REMIX

Also by Lawrence Lessig

Code and Other Laws of Cyberspace

The Future of Ideas

Free Culture

Code: Version 2.0

REMIX

Making Art and Commerce Thrive
in the Hybrid Economy

LAWRENCE LESSIG

BLOOMSBURY

To two teachers,
L. Ray Patterson and Jack Valenti

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PREFACE

In early 2007, I was at dinner with some friends in Berlin. We were talking about global warming. After an increasingly intense exchange about the threats from climate change, one overeager American at the table blurted, "We need to wage a war on carbon. Governments need to mobilize. Get our troops on the march!" Then he fell back into his chair, proud of his bold resolve, sipping a bit too much of the wildly too-expensive red wine.

It was obvious that my friend was speaking metaphorically. Carbon is not an "enemy." Not even an American marine could fight it. Yet, as I looked around the table, a kind of reticence seemed to float above our German companions. "What does that look mean?" I asked one of my friends. After a short pause, he almost whispered, "Germans don't like war."

The response sparked a rare moment of recognition (in me). Of course, no one was talking about using guns to fight carbon. Or even carbon polluters. Yet, for obvious reasons, the associations with war in Germany are strongly negative. The whole country, but especially Berlin, is draped in constant reminders of the costs of that country's twentieth-century double blunder.

But in America, associations with war are not necessarily

negative. I don't mean that we are a war-loving people; I mean that our history has allowed us to like the idea of waging war. Not out of choice, but as a remedy to a great wrong. War is a sacrifice that we have made, and in one recent case at least, a sacrifice to a very good end. We thus romanticize that sacrifice.

That romance in turn allows the metaphor to spread into other social or political conflicts. We wage war on drugs, on poverty, on terrorism, on racism. There is a war on government waste, a war on crime, a war on spam, a war on guns, and a war on cancer. As Professors George Lakoff and Mark Johnson describe, each of these "wars" produces a "network of entailments." Those entailments then frame and drive social policy. As they put it, in discussing President Carter's "moral equivalent of war" speech:

> There was an "enemy," a "threat to national security," which required "setting targets," "reorganizing priorities," "establishing a new chain of command," "plotting new strategy," "gathering intelligence," "marshaling forces," "imposing sanctions," "calling for sacrifices," and on and on. The WAR metaphor highlighted certain realities and hid others. The metaphor was not merely a way of viewing reality; it constituted a license for policy change and political and economic action. The very acceptance of the metaphor provided grounds for certain interferences: there was an external, foreign, hostile enemy (pictured by cartoonist in Arab headdress); energy needed to be given top priorities; the populace would have to make sacrifices; if we didn't meet the threat we would not survive.[1]

A fight for survival has obvious implications. Such fights get waged without limit. It is cowardly to question the cause. Dissent is

an aid to the enemy—treason, or close enough. Victory is the only result one may contemplate, at least out loud. Compromise is always defeat.

These entailments make obvious sense during conflicts such as World War II, when there really was a fight for survival; my spark of Lakoffian recognition, however, was to see just how dangerous these entailments are when the war metaphor gets applied in contexts in which, in fact, survival is not at stake.

Think, for example, about the "war on drugs." Fighting debilitating chemical addiction is no doubt an important social objective. I have seen fi rsthand the absolute destruction it causes. But the "war on drugs" metaphor prevents us from recognizing that there may be other, more important objectives that the war is threatening. Think about the astonishingly long prison terms facing even small-time dealers— the Supreme Court, for example, has upheld a life sentence without the possibility of parole for the possession of 672 grams of cocaine.[2] Think about ghettos burdened by the drug trade. Think about governments in Latin America that have no effectively independent judiciary or even army because the wealth produced by prohibition enables the drug lords to capture their control. And then think about the fact that this war has had essentially no effect on terminating the supply of drugs. One doesn't notice these inconvenient truths in the middle of a war. To see them, you need a truce. You need to step back from the war to ask, How much is it really costing? Are the results really worth the price?

The inspiration for this book is the copyright wars, by which right-thinking sorts mean not the "war" on copyright "waged" by "pirates"

but the "war" on "piracy," which "threatens" the "survival" of certain important American industries.

This war too has an important objective. Copyright is, in my view at least, critically important to a healthy culture. Properly balanced, it is essential to inspiring certain forms of creativity. Without it, we would have a much poorer culture. With it, at least properly balanced, we create the incentives to produce great new works that otherwise would not be produced.

But, like all metaphoric wars, the copyright wars are not actual conflicts of survival. Or at least, they are not conflicts for survival of a people or a society, even if they are wars of survival for certain businesses or, more accurately, business models. Thus we must keep in mind the other values or objectives that might also be affected by this war. We must make sure this war doesn't cost more than it is worth. We must be sure it is winnable, or winnable at a price we're willing to pay.

I believe we should not be waging this war. I believe so not because I think copyright is unimportant. Instead, I believe in peace because the costs of this war wildly exceed any benefit, at least when you consider changes to the current regime of copyright that could end this war while promising artists and authors the protection that any copyright system is intended to provide.

In the past, I've tried to advance this view for peace by focusing on the costs of this war to innovation, to creativity, and, ultimately, to freedom. My aim in *The Future of Ideas* was to defend industries that never get born for fear of the insane liability that the current regime of copyright imposes. My subject in *Free Culture* was the forms of creative expression and freedom that get trampled by the extremism of defending a regime of copyright built for a radically different technological age.

But I finished *Free Culture* just as my first child was born. And in the four years since, my focus, or fears, about this war have changed. I don't doubt the concerns I had about innovation, creativity, and freedom. But they don't keep me awake anymore. Now I worry about the effect this war is having upon our kids. What is this war doing to them? What is it making them? How is it changing how they think about normal, right-thinking behavior? What does it mean to a society when a whole generation is raised as criminals?

This is not a new question. Indeed, it was the question that the former, now late, head of the Motion Picture Association of America, Jack Valenti, asked again and again as he fought what he called a "terrorist war" against "piracy."[3] It was the question he asked a Harvard audience the first time he and I debated the issue. In his brilliant and engaging opening, Valenti described another talk he had just given at Stanford, at which 90 percent of the students confessed to illegally downloading music from Napster. He asked a student to defend this "stealing." The student's response was simple: Yes, this might be stealing, but everyone does it. How could it be wrong? Valenti then asked his Stanford hosts: What are you teaching these kids? "What kind of moral platform will sustain this young man in his later life?"

This wasn't the question that interested me in that debate. I blathered on about the framers of our Constitution, about incentives, and about limiting monopolies. But Valenti's question is precisely the question that interests me now: "What kind of moral platform will sustain this young man in his later life?" For me, "this young man" represents my two young sons. For you, it may be your daughter, or your nephew. But for all of us, whether we have kids or not, Valenti's question is exactly the question that should

concern us most. In a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?

Valenti asked this question to motivate Congress—and anyone else who would listen—to wage an ever more effective war against "piracy." I ask this question to motivate anyone who will listen (and Congress is certainly not in that category) to think about a different question: What should we do if this war against "piracy" as we currently conceive of it cannot be won? What should we do if we know that the future will be one where our kids, and their kids, will use a digital network to access whatever content they want whenever they want it? What should we do if we know that the future is one where perfect control over the distribution of "copies" simply will not exist?

In that world, should we continue our ritual sacrifice of some kid caught downloading content? Should we continue the expulsions from universities? The threat of multimillion-dollar civil judgments? Should we increase the vigor with which we wage war against these "terrorists"? Should we sacrifice ten or a hundred to a federal prison (for their actions under current law are felonies), so that others learn to stop what today they do with ever-increasing frequency?

In my view, the solution to an unwinnable war is not to wage war more vigorously. At least when the war is not about survival, the solution to an unwinnable war is to sue for peace, and then to find ways to achieve without war the ends that the war sought. Criminalizing an entire generation is too high a price to pay for almost any end. It is certainly too high a price to pay for a copyright system crafted more than a generation ago.

This war is especially pointless because there are peaceful means to attain all of its objectives—or at least, all of the legitimate objectives. Artists and authors need incentives to create. We can craft a system that does exactly that without criminalizing our kids. The last decade is filled with extraordinarily good work by some of the very best scholars in America, mapping and sketching alternatives to the existing system. These alternatives would achieve the same ends that copyright seeks, without making felons of those who naturally do what new technologies encourage them to do.

It is time we take seriously these alternatives. It is time we stop wasting the resources of our federal courts, our police, and our universities to punish behavior that we need not punish. It is time we stop developing tools that do nothing more than break the extraordinary connectivity and efficiency of this network. It is time we call a truce, and figure a better way. And a better way means redefining the system of law we call copyright so that ordinary, normal behavior is not called criminal.

Many will read this declaration and wonder just why I should be allowed to teach law at a great American university. Do we respond to high levels of rape by decriminalizing rape? Would tax evasion best be solved by eliminating taxes? Should the fact of speeding mean we should repeal the speed limit? Or put generally: Does the fact of crime justify the repeal of criminal law?

Of course not. Rape is wrong and should be punished severely whether or not people continue to rape. Tax evasion is evil and should be punished much more severely than it is, whether or not most people cheat. And speeding kills and should be regulated much more effectively than it is now, even if most of us regularly speed. Nothing I'm saying about the copyright war in particular generalizes automatically to every other area of regulation. I am

talking specifically about one unwinnable war, and about alternatives to that war that have the consequence of decriminalizing our kids, and decriminalizing many of us too.

But I confess that I do believe that this way of thinking about the copyright wars should affect how we think about other kinds of regulation. Tax evasion is wrong. But one way to avoid that wrong would be a simpler, fairer tax system. Speeding is wrong. But one way to avoid that wrong is to avoid fifty-five-mile-per-hour speed limits on straight, rural, four-lane public highways. We should always be thinking about how to moderate regulation in light of the likelihood that the target of regulation will comply. It does no one any good to regulate in ways that we know people will not obey.

We need, in other words, more humility about regulation. The twentieth century changed us in many obvious ways. But the one way we're likely not to notice is the presumption the twentieth century gave us that government regulation is plausibly successful. For most of the history of modern government, the struggle was not about what was good or bad; the struggle was about whether it was possible to imagine government effecting any good through regulation. Fears of inevitable corruption, in part at least, drove our framers to limit the size of the federal government—not idealism about libertarianism. Recognizing the uselessness of certain sorts of rules led governments to avoid regulation in obvious areas, or to deregulate when they saw their regulation failing. These are the historical expressions of regulatory humility, a habit of mind for most of human history.

We've forgotten these limits of humility. Wherever there is a wrong, the first instinct of our government is to send in the legal equivalent of the marines. We pass a law to ban a behavior, but we rarely work through just how that law will change behavior. Nor do we assess how corrosive it is if, the law notwithstanding,

the behavior remains the same, though now with the label "criminal." If something is wrong, it gets a law, without us even working through alternatives to exploding regulation.

If you're skeptical, think about a simple example. Around the time the Supreme Court heard arguments in the well-known peer-to-peer file-sharing case *MGM v. Grokster*,[4] my local public-radio station aired a story about the case. The story happened to run on a day when the radio station was also running its own fund-raising drive. Just after the story about *Grokster* ended, the show shifted to its call for public support. "More than 90 percent of people who listen to public radio don't contribute to its support," the announcer said. "That's why we need you to contribute now."

I had worked on a brief in the *Grokster* case, in which we addressed the content industry's claim that 91 percent of the content shared on peer-to-peer file-sharing networks was in violation of copyright law. We had responded by reminding the Court that in the earlier Sony Betamax case, in which the VCR was the target, the content industry had also estimated that 91 percent of VCR usage was in violation of copyright laws. The industry was nothing if not consistent.

But the contrast between the complaint in the Supreme Court and the complaint of the announcer on public radio startled me. Here were two examples of free riding: people downloading Britney Spears's music without paying her and people listening to "All Things Considered" without paying NPR. With one, we criminalize the free riding. With the other, we don't. Why? Do you think it would be appropriate to arrest people who listen to NPR without paying? I certainly don't. And as you may wonder, do I think Britney Spears should be paid through voluntary pledges on a 1-800 number? No, again, I don't.

My point in retelling this story is to get you to see something that is otherwise too often obscure: there are many different ways in which we tax to raise the revenues needed for public goods (as the economist would call copyrighted works). We select among these different ways the one that is best. The critical point I want this book to make is that one factor we should consider when deciding that is whether the way we select makes our kids criminals. That's not the only factor. But it is one that has plainly been missing from Congress's consideration about how best to deal with the impact of digital technologies upon traditional copyright industries.

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