

REMIX

Making Art and Commerce Thrive
in the Hybrid Economy

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INTRODUCTION

In early February 2007, Stephanie Lenz's eighteen-month-old son, Holden, started dancing. Pushing a walker across her kitchen floor, Holden started moving to the distinctive beat of a song by Prince (that's the current name of the artist formerly known as Prince), "Let's Go Crazy." Holden had heard the song a couple of weeks before while the family watched the Super Bowl. The beat had obviously stuck. So when he heard the song again, he did what any sensible eighteen-month-old would do—he accepted Prince's invitation and went "crazy" to the beat, in the clumsy but insanely cute way that any precocious eighteen-month-old would.

Holden's mom, understandably, thought the scene hilarious. She grabbed her camcorder and captured the dance digitally. For twenty-nine seconds, she had the priceless image of Holden dancing, with the barely discernible Prince playing on a radio somewhere in the background.

Lenz wanted her parents to see the film. But it's a bit hard to e-mail a 20-megabyte video file to anyone, including your relatives. So she did what any sensible citizen of the twenty-first cen-

tury would do: she uploaded the file to YouTube and e-mailed her relatives the link. They watched the video scores of times, no doubt sharing the link with friends and colleagues at work. It was a perfect YouTube moment: a community of laughs around a homemade video, readily shared with anyone who wanted to watch.

Sometime over the next four months, however, someone not a friend of Stephanie Lenz also watched Holden dance. That someone worked for Universal Music Group. Universal either owns or administers some of the copyrights of Prince. And Universal has a long history of aggressively defending the copyrights of its authors. In 1976, it was one of the lead plaintiffs suing Sony for the “pirate technology” now known as the VCR. In 2000, it was one of about ten companies suing Eric Corely and his magazine, *2600*, for publishing a link to a site that contained code that could enable someone to play a DVD on Linux. And now, in 2007, Universal would continue its crusade against copyright piracy by threatening Stephanie Lenz. It fired off a letter to YouTube demanding that it remove the unauthorized performance of Prince’s music. YouTube, to avoid liability itself, complied.

This sort of thing happens all the time today. Companies like YouTube are deluged with demands to remove material from their systems. No doubt a significant portion of those demands are fair and justified. If you’re Viacom, funding a new television series with high-priced ads, it is perfectly understandable that when a perfect copy of the latest episode is made available on YouTube, you would be keen to have it taken down. Copyright law gives Viacom that power by giving it a quick and inexpensive way to get the YouTubes of the world to help it protect its rights.

The Prince song on Lenz’s video, however, was something completely different. First, the quality of the recording was terrible. No

one would download Lenz’s video to avoid paying Prince for his music. Likewise, neither Prince nor Universal was in the business of selling the right to video-cam your baby dancing to their music. There is no market in licensing music to amateur video. Thus, there was no plausible way in which Prince or Universal was being harmed by Stephanie Lenz’s sharing this video of her kid dancing with her family, friends, and whoever else saw it. Some parents might well be terrified by how deeply commercial culture had penetrated the brain of their eighteen-month-old. Stephanie Lenz just thought it cute.

Not cute, however, from Lenz’s perspective at least, was the notice she received from YouTube that it was removing her video. What had she done wrong? Lenz wondered. What possible rule—assuming, as she did, that the rules regulating culture and her (what we call “copyright”) were sensible rules—could her maternal gloating have broken? She pressed that question through a number of channels until it found its way to the Electronic Frontier Foundation (on whose board I sat until the beginning of 2008).

The EFF handles lots of cases like this. The lawyers thought this case would quickly go away. They filed a counternotice, asserting that no rights of Universal or Prince were violated, and that Stephanie Lenz certainly had the right to show her baby dancing. The response was routine. No one expected anything more would come of it.

But something did. The lawyers at Universal were not going to back down. There was a principle at stake here. Ms. Lenz was not permitted to share this bit of captured culture. They would insist—indeed, would threaten her with this claim directly—that sharing this home movie was willful copyright infringement. Under the

laws of the United States, Ms. Lenz was risking a \$150,000 fine for sharing her home movie.

We'll have plenty of time to consider the particulars of a copyright claim like this in the pages that follow. For now, put those particulars aside. Instead, I want you to imagine the conference room at Universal where the decision was made to threaten Stephanie Lenz with a federal lawsuit. Picture the meeting: four, maybe more, participants. Most of them lawyers, billing hundreds of dollars an hour. All of them wearing thousand-dollar suits, sitting around looking serious, drinking coffee brewed by an assistant, reading a memo drafted by a first-year associate about the various rights that had been violated by the pirate, Stephanie Lenz. After thirty minutes, maybe an hour, the executives come to their solemn decision. A meeting that cost Universal \$10,000? \$50,000? (when you count the value of the lawyers' time, and the time to prepare the legal materials); a meeting resolved to invoke the laws of Congress against a mother merely giddy with love for her eighteen-month-old.

Picture all that, and then ask yourself: How is it that sensible people, people no doubt educated at some of the best universities and law schools in the country, would come to think it a sane use of corporate resources to threaten the mother of a dancing eighteen-month-old? What is it that allows these lawyers and executives to take a case like this seriously, to believe there's some important social or corporate reason to deploy the federal scheme of regulation called copyright to stop the spread of these images and music? "Let's Go Crazy"? Indeed! What has brought the American legal system to the point that such behavior by a leading corporation is considered anything but "crazy"? Or to put it the other

way around, who have we become that such behavior seems sane to anyone?

Near the center of London, in a courtyard named Mason's Yard, there is a modern-looking cement building called White Cube. In a previous life, it was an electricity substation. Today it is an art gallery.

In late August 2007, I entered the gallery and walked to the basement. A large black curtain separated the stairs from an exhibit. When I passed through the curtain, I saw on one wall of the huge black room twenty-five plasma displays, one set next to the other, in portrait orientation. Each display was a window into a studio. In each studio was a fan of John Lennon. Twenty-five fans—three women, twenty-two men, fifteen wearing T-shirts (both men and women), one wearing a tie (man). All twenty-five were singing the vocal track, from the first song to the last, without pause, from John Lennon's first solo album, *John Lennon/Plastic Ono Band* (1970). The exhibit looped the video again and again, for eight hours a day, six days a week, throughout the summer of 2007.

These fans were ordinary Brits. Very ordinary. None were beautiful. None were very young. They had no makeup. They were twenty-five Lennon fanatics, selected from over six hundred who had applied to sing this tribute to their favorite artist.

London was not the only city with an exhibit like this. Three related installations had been made in three different countries. In Jamaica, *Legend (A Portrait of Bob Marley)* featured thirty fans singing Marley's *Legend* album. In Berlin, *King (A Portrait of Michael Jackson)* had sixteen fans singing the whole of *Thriller*. And in Italy,

thirty fans of Madonna gathered for *Queen (A Portrait of Madonna)*, a tribute to the queen of pop. *Working Class Hero (A Portrait of John Lennon)* was just the latest in the series. The young South African artist who had created it, Candice Breitz, was considering making more.

I'm not one to be moved by John Lennon's solo work. Yet as I sat in that pitch-black room, watching these fans sing his music, I was overwhelmed with emotion. Like a mother holding her baby for the first time, or a boy reaching out to take his father's hand, or a daughter turning to kiss her father as her wedding begins, each of these fans conveyed an extraordinary and contagious emotion. They were not fantastic singers. Often someone would miss the timing or forget the words. But you could see that this music and its creator were among the most important things in these people's lives. Who knows why? Who knows what their particular associations were? But it was clear that this album was just about the most important creative work these fans knew. Their performance was a celebration of this part of their lives. That was its point: not so much about Lennon, but about the people whose lives Lennon had touched.

Throughout her career Breitz has focused upon the relationship between mainstream culture—from blockbuster movies to pop music—and the audience who experiences it. As she explained to me,

the idea is to shift the focus away from those people who are usually perceived as creators so as to give some space, some room, to those people who absorb cultural products—whether it's music or movies or whatever the case may be. And to think a little bit about what happens once music or a movie has been distributed: how it may get absorbed into the lives into the very being of the people who listen to it or watch it.¹

Each of us connects differently. The connection runs deep in some; it skips across the surface in others. Sometimes it catches us and pulls us along. Sometimes it changes us completely. Again, Breitz:

Even the most broadly distributed, most market-inflected music comes to have a very specific and local meaning for people according to where it is that they're hearing it or at what moment in their life they're hearing it. What goes hand in hand with the moment of reception is a dimension of personal translation.

This "reception," she continued, "involves . . . interpretation or translation." That act "is creative." Active. Engaged. Yet, it's easy for us to miss the active in the mere watching. It's rude to turn around and watch people watch a movie. It's a crime to try to film them singing in the shower. We live in a world infused with commercial culture, yet we rarely see how it touches us, and how we process it as it touches us.

As Breitz explained this to me, I wondered about its source in her. Where did it come from? I asked her. In part, it was African.

In African and other oral cultures, this is how culture has traditionally functioned. In the absence of written culture, stories and histories were shared communally between performers and their audiences, giving rise to version after version, each new version surpassing the last as it incorporated the contributions and feedback of the audience, each new version layered with new details and twists as it was inflected through the collective. This was never thought of as copying or stealing or intellectual-property theft but accepted as the natural way in which culture evolves and

develops and moves forward. As each new layer of interpretation was painted onto the story or the song, it was enriched rather than depleted by those layers.

But this reality is not unique to oral cultures. In Breitz's view, it is "how the artistic process works" generally.

This process of making meaning may be more blatant in the practice of certain artists than it is in the practice of others. Artists who work with found footage, for example, blatantly reflect on the absorptive logic of the creative process. But I would argue that every work of art comes into being through a similar process, no matter how subtly. No artist works in a vacuum. Every artist reflects—consciously or not—on what has come before and what is happening parallel to his or her practice.

This understanding of culture, and the artist's relationship to culture, led directly to the particular work I was watching at White Cube. As she described to me,

these works are based on a pretty simple premise: there are enough images and representations of superstars and celebrities in the world. Rather than creating more images of people who are already overrepresented, rather than literally making another image of a Madonna or a John Lennon, I wanted to reflect on the other side of the equation, on what goes into the making of celebrity.

I realized I needed to turn the camera 180 degrees, away from those who are usually in the public eye—those who already have

a strong voice and presence on the screen or stage—towards those on the other side of the screen or stage, the audience members who attend concerts, watch movies, and buy CDs.

Towards those who are usually—incorrectly, in my opinion—conceived of as mere absorbers of culture rather than being recognized as having the potential to reflect culture creatively.

Prior to *Working Class Hero*, the similar installations had all been well received. After seeing *Legend*, for example, Bob Marley's widow, Rita, decided to incorporate permanently a copy in the inventory of the Bob Marley Museum in Kingston, where she had arranged an opening showing at the museum, inviting all thirty performers and their families from across Jamaica to come to the museum to celebrate its celebration of her husband.

But with the portrait of Lennon, the reception wasn't quite so warm. At White Cube's request, Breitz had set out to secure permission from the copyright holders of *John Lennon/Plastic Ono Band* prior to the first installations of the work at nonprofit museums in Newcastle and Vienna. Breitz wrote Yoko Ono to secure that permission. After a couple of months, she received a response from one of Ms. Ono's lawyers. "We are not able to grant the use of Mr. Lennon's image for your project," the e-mail informed. But Breitz didn't want permission to use Lennon's image. She wanted permission to engage with twenty-five fans singing his music. When Breitz responded with that correction, the lawyer informed her that he had not in fact personally reviewed her proposal. He was simply relaying the fact that Ms. Ono was not willing to grant the rights requested. A major international curator who knew Yoko and was a supporter of Breitz's work intervened on Breitz's behalf,

suggesting that, as he understood the situation, Breitz could in fact have paid for the relevant copyrights and gone ahead with the project, but that out of respect, she was seeking Ono's permission and understanding. Ms. Ono wanted to hear more, but she disagreed with the curator about her freedom to make a cover without permission. "Permission," Ono insisted, "was vital, legally."

The curator described the proposal again. Ono asked to see it in writing. After reviewing it, her lawyers informed Breitz that she could use *John Lennon/Plastic Ono Band* in her project, but:

Please note, clearance for the use of the actual musical compositions must be secured from the relevant publishers.²

Relieved (however naively), Breitz then asked White Cube's lawyers to start the process of securing "clearance" from the copyright holders for the compositions. Three months later, the lawyers representing Sony (holder of the rights to ten of the eleven songs on the album) quoted a standard fee of approximately \$45,000 for one month's exhibition. Sony knew this was too much but wanted to set a baseline for the negotiations that would follow. They requested that the artist let them know the largest sum that she could afford. They wanted to see the project's budget.

Time, however, was running short. The exhibit was scheduled to open in Newcastle in a matter of weeks. After being pressed, the lawyers agreed to permit the work to be shown at this nonprofit institution without an agreement. They did the same for a nonprofit venue in Vienna three months later, but mentioned that Ms. Ono's lawyers wanted a formal agreement before any further exhibitions could go ahead.

A year after the request was originally made, it had still not been resolved. At the time of this writing, more than two years after the initial response, and after literally hundreds of hours of the lawyers', the museum executives', and Breitz's time, the rights holders have still not come to a final agreement. No one seems to have noticed that the value of the time spent dickering over these rights far exceeded any possible licensing fee. Economics didn't matter. A principle was at stake. As Ms. Ono had put it, "permission was vital, legally" before the love of twenty-five fans for the work of John Lennon could be explored publicly by another artist.

Gregg Gillis is a twenty-five-year-old biomedical engineer from Pittsburgh. He is also one of the hottest new artists in an emerging genre of music called "mash-up" or "remix." Girl Talk is the name of his one-man (and one-machine) band. That band has now produced three CDs. The best known, *Night Ripper*, was named one of the year's best by *Rolling Stone* and *Pitchfork*. In March 2007, his local congressman, Democrat Michael Doyle, took to the floor of the House to praise this "local guy made good" and his new form of art.

"New" because Girl Talk is essentially a mix of many samples drawn from many other artists. *Night Ripper*, for example, remixes between 200 and 250 samples from 167 artists. "In one example," Doyle explained on the floor of the House, "[Girl Talk] blended Elton John, Notorious B.I.G., and Destiny's Child all in the span of 30 seconds." Doyle was proud of this hometown wonder. He invited his colleagues to "take a step back" to look at this new form of art. "Maybe mash-ups," Doyle speculated, "are a transformative new art

that expands the consumer's experience and doesn't compete with what an artist has made available on iTunes or at the CD store."

Doyle's comments helped fuel a flurry of media attention to Girl Talk. That, in turn, helped fuel some real anxiety among Girl Talk's distributors. For the defining feature of this mash-up genre is that the samples are remixed without any permission from the original artists. And if you ask any lawyer representing any label in America, he or she would quickly Ono-ize: "Permission is vital, legally." Thus, as Gillis practices it, Girl Talk is a crime. Apple pulled *Night Ripper* from the iTunes Music Store. eMusic had done the same a few weeks before. Indeed, one CD factory had refused even to press the CD.

Gillis had begun with music at the age of fifteen. Listening to electronic experimental music on a local radio station, he "discovered this world of people that could press buttons and make noise on pedals and perform it live." "It kind of blew my mind," he told me. At the age of sixteen he "formed a noise band—noise meaning very avant-garde music" for the time.³

Over the years, "avant-garde" moved from analog to digital—aka computers. Girl Talk the band was born in late 2000 on a Toshiba originally purchased for college. Gillis loaded the machine with audio tracks and loops. Then, using a program called Audio-Mulch, he would order and remix the tracks to prepare for a performance. I've seen Girl Talk perform live; his shows are as brilliant as his recorded remixes.

It wasn't long into the life of Girl Talk, however, that the shadow of Law Talk began to grow. Gillis recognized that his form of creativity didn't yet have the blessing of the law. Yet he told me, "I was never that fearful...I guess I was a little naive, but at the same time, it was just the world I existed in where you see these things

every day. [And you] know you're going to be selling such a small number of albums that no one will probably ever take notice of it." There were of course famous cases where people did "take notice." Negativland, a band we'll see more of later in this book, had had a famous run-in with U2 and Casey Kasem after it remixed a recording of Kasem introducing the band on *American Top 40*. Gillis knew about this run-in. But as he explained to me in a way that reminded me of the days when I too thought the law was simply justice written nicely,

I feel the same exact way now that I felt then. I think, just morally, that the music wasn't really hurting anyone. And there's no way anyone was buying my CD instead of someone else's [that I had sampled]. And...it clearly wasn't affecting the market. This wasn't something like a bootlegging case. I felt like if someone really had a problem with this then we could stop doing it. But I didn't see why anyone should.

Why anyone "should" was a question I couldn't answer. That someone would was a prediction too obvious to make. The "problem" would be raised not directly, but indirectly; not by filing a lawsuit against Girl Talk, but by calling up iTunes or another distributor and asking questions that made the distributor stop its distribution, and thus forcing this artist, and this art form, into obscurity. The "problem" of Girl Talk would be solved by making sure that any success of Girl Talk was limited. Keep it in Pittsburgh, and dampen the demand wherever you can, and maybe the "problem" would go away.

Gillis agrees the problem is going away. But for a very different reason. For the thing that Gillis does well, Gillis explained to me,

everyone will soon do. Everyone, at least, who is passionate about music. Or, at least, everyone passionate about music and under the age of thirty.

We're living in this remix culture. This appropriation time where any grade-school kid has a copy of Photoshop and can download a picture of George Bush and manipulate his face how they want and send it to their friends. And that's just what they do. Well, more and more people have noticed a huge increase in the amount of people who just do remixes of songs. Every single Top 40 hit that comes on the radio, so many young kids are just grabbing it and doing a remix of it. The software is going to become more and more easy to use. It's going to become more like Photoshop when it's on every computer. Every single P. Diddy song that comes out, there's going to be ten-year-old kids doing remixes and then putting them on the Internet.

"But why is this good?" I asked Gillis.

It's good because it is, in essence, just free culture. Ideas impact data, manipulated and treated and passed along. I think it's just great on a creative level that everyone is so involved with the music that they like.... You don't have to be a traditional musician. You get a lot of raw ideas and stuff from people outside of the box who haven't taken guitar lessons their whole life. I just think it's great for music.

And, Gillis believes, it is also great for the record industry as well: "From a financial perspective, this is how the music industry

can thrive in the future... this interactivity with the albums. Treat it more like a game and less like a product."

Gillis's point in the end, however, was not about reasons. It was about a practice. Or about the practice of this generation. "People are going to be forced—lawyers and... older politicians—to face this reality: that everyone is making this music and that most music is derived from previous ideas. And that almost all pop music is made from other people's source material. And that it's not a bad thing. It doesn't mean you can't make original content."

All it means—today, at least—is that you can't make this content legally. "Permission is vital, legally," even if today it is impossible to obtain.

Silvia0 is a successful Colombian artist. For a time she was a songwriter and recording star, making CDs to be sold in the normal channels of Colombian pop music. In the late 1990s, she suffered a tragic personal loss, and took some time away from performing. When she returned to creating music, a close friend and developer for Adobe convinced her to try something different.

I saw her describe the experience outside a beautiful museum near Bogotá, at the launch of Creative Commons Colombia. (We'll see more of Creative Commons later. Suffice it to say for now that the nonprofit provides free copyright licenses to enable artists to mark their creative work with the freedoms they want it to carry. These licenses are then translated, or "ported," into jurisdictions around the world. When that porting is complete, the country "launches," making the new localized licenses available.) About a hundred people, mainly artists and twentysomethings, were gathered in an

amphitheater next to the museum. SilviaO spoke in Spanish. A translator sitting next to me carried her words into English.

She told a story of donating an a cappella track titled “Nada Nada” (“Nothing Nothing”) to a site Creative Commons runs called ccMixer. ccMixer was intended as a kind of Friendster for music. People were asked to upload tracks. As those tracks got remixed, the new tracks would keep a reference to the old. So you could see, for example, that a certain track was made by remixing two other tracks. And you could see that four other people had remixed that track.

SilviaO’s track was a beautiful rendition of a song sung in Spanish, described on the ccMixer site as the story of “a girl not changing her ideas, dreams or way of life after engaging in a relationship.” A few days after the track was uploaded, however, a famous mixer citizen, fourstones, remixed it—cutting up the Spanish into totally incomprehensible (but beautiful) gibberish, and retitling the mix “Treatment for Mutilation.”

As she stood before those who had come to celebrate Creative Commons Colombia and described this “mutilation,” I, the chairman of Creative Commons, began to sweat. I was certain she was about to attack remix creativity. A remixer had totally destroyed the meaning of her contribution. I was certain this was to become a condemnation of the freedom that I had thought we were all there to celebrate.

To my extraordinary surprise and obvious relief, however, SilviaO had no condemnation to share. She instead described how the experience had totally changed how she thought about creating music. Sure, the words were no longer meaningful. But the sound had taken on new meaning. As she told me later, “the song

became more jazzy, and it opened the gate to understanding that maybe it was going to be more to treat my voice as an instrument and something completely independent from lyrics than I was used to before.”⁴

Inspired by that remix, she wrote another track to be layered onto the first. Since then, she has added song after song to the ccMixer collection. Unlike Breitz’s work or Girl Talk, all these remixes were legal. If “permission is vital, legally,” then with this work, permission had already been given. The Creative Commons licenses had shifted the copyright baseline through the voluntary acts of copyright holders.

And for SilviaO, the act of creating had changed. Before, she sat in a studio, crafting work that would be broadcast, one to many. Now she was in a conversation with other artists, providing content they would add to, and adding content back. “I’m more talking with the musicians right now,” she told me, “because I’m releasing my work and I know for sure, for many of them, they don’t understand not even the words I am saying. [But] my voice is just another instrument, so all the options that they are playing with are completely their own. So there is more freedom.... My voice,” she explained, “was just a little bit—it was just a little part of the huge process that is happening now with this kind of creation. I was a little bit more free, because I didn’t know how they were reacting.

“I became,” she whispered, “a little bit more courageous.”

If I asked you to shut your eyes and think about “the copyright wars,” your mind would not likely run to artists or creators like these.

Peer-to-peer file sharing is the enemy in the “copyright wars.” Kids “stealing” stuff with a computer is the target. The war is not about new forms of creativity, not about artists making new art. Congress has not been pushed to criminalize Girl Talk.

But every war has its collateral damage. These creators are just one type of collateral damage from this war. The extreme of regulation that copyright law has become makes it difficult, and sometimes impossible, for a wide range of creativity that any free society—if it thought about it for just a second—would allow to exist, legally. In a state of war, however, we can’t be lax. We can’t forgive infractions that might at a different time not even be noticed. Think “eighty-year-old grandma being manhandled by TSA agents,” and you’re in the frame for this war as well.

Collateral damage is the focus of this book. I want to put a spotlight on the stuff no one wants to kill—the most interesting, the very best of what these new technologies make possible. If the war simply ended tomorrow, what forms of creativity could we expect? What good could we realize, and encourage, and learn from?

I then want to spotlight the damage we’re not thinking enough about—the harm to a generation from rendering criminal what comes naturally to them. What does it do to them? What do they then do to us?

I answer these questions by drawing a map of the change in what we could call cultures of creativity. That map begins at the turn of the last century. It is painted with fears from then about what our culture was becoming. Most of those fears proved correct. But they help us understand why much of what we seem to fear today is nothing to fear at all. We’re seeing a return of something

we were before. We should celebrate that return, and the prosperity it promises. We should use it as a reason to reform the rules that render criminal most of what your kids do with their computers. Most of all, we should learn something from it—about us, and about the nature of creativity.