REMIX CULTURES AND THE IMAGINING OF ALTERNATIVE INTELLECTUAL PROPERTY POLICIES

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In theory, legal taxonomies acknowledge how creative, productive, and beneficial remixing practices can be. This does not reflect the realities of how such law is enforced, however. This paper is concerned with how creative practitioners and users deal with this problem. I argue that it is in the lived praxis of remixing communities that 'para-legal' contexts which challenge traditional intellectual property policies are established.

In this era of easily copyable and flawlessly reproducible digital information, a never-ending profusion of news items, online postings, and academic writing focuses on the complications and quandaries that arise whenever remixing activities interface with the legal apparatuses currently in place to safeguard the materials to be remixed. These accounts, whether they cover legal complaints, artistic practices, or tech news, may touch on everything from audio mashups, fan fiction and machinima to web-apps combining the functionality of multiple online services, modded video game consoles and hacked games, art projects drawing on scientific data visualization methods, and business ventures that remix traditional production processes. True to the beautifully open-ended idea of recombinant creativity, there is no limit to the possibilities of what can be remixed, and of the forms that remixes may take. However, the consequences of all these remixing practices tend to be much less broadly envisioned. In more or less detail and with ranging measures of precision, discussions of remixing practices invariably invoke various aspects of intellectual property (IP) law, most commonly the spectre of copyright infringement. Often, this is done to the effect of stating that the remixes in question either 'have been,' 'should be,' or 'could easily be' prosecuted for IP violations.

The haziness and inaccuracies of such discussions, which may condemn legitimate users as thieves, or, conversely, praise thieves as open access advocates, often reflect the fact that most national and international IP regimes currently have no truly fair methods for sanctioning certain types of remixes while properly classifying others as wrongful. In theory, legal systems acknowledge how creative, productive, and beneficial remixing practices can be – after all, most IP law is explicitly understood to encourage learning and the arts. But this does not at all reflect the realities of how such laws are enforced. This paper is concerned with how practitioners and users deal with this problem.

In many creative remix practices, we can observe a general unwillingness to acknowledge the relevance of IP law for interpreting certain creative activities and expressions. Consequently, I argue, such practices often seek to establish extra-juridical or 'para-legal' contexts which challenge traditional IP policies by creating alternatives that foreground the common and the collective rather than the concept of property. It is in the lived praxis of these alternatives that some of the most elaborate critiques of the shortcomings of existing IP law may be found.

In part because of dated Copyright Acts featuring vague and unrefined 'fair use' and 'fair dealing' doctrines, remixing is often improperly linked with property violations. As a result, there is much confusion

concerning what does or should constitute a permissible remixing practice. This is certainly complicated by the fact that today, virtually all digital activities heavily rely on a core feature of remixing, namely the copying and reusing of bits of information. Add to this the effortlessness with which everyday users have adopted all manners of cut-and-paste techniques, and it comes as little surprise that in the popular imagination expressed in news media and online, there often remains little difference between relatively distinct practices. Take, for example, the reshuffling of digital code practiced by sampling artist Gregg Gillis (aka Girl Talk), legendary for cramming 322 individual, copyrighted samples into 14 radio-length mashups on his 2008 album Feed the Animals without securing licenses, and the reshuffling of digital code practiced by hacker George Hotz (aka geohot), who opened up Sony's PS3 gaming console to home-brew software in 2010. A variety of perspectives on this comparison are conceivable: 1) Both practitioners could be criticized for interfering with the integrity of IP-protected, authored content. 2) Hotz's hacking and Gillis's sampling might be seen as unrelated, the former willfully damaging the value of IP, the latter constituting a creative compositional act. 3) The same distinction could hold if we were to switch the roles of geohot and Girl Talk in this last argument. 4) Finally, the activities of both practitioners could be justified by arguing that their recodings are conducted in the spirit of openness and sharing, and for public benefit rather than for commercial purposes (the expressions of both remixers encourage active, creative use of otherwise restricted cultural commodities).

While none of these perspectives have been legally tested (Girl Talk has yet to be sued for copyright infringement; geohot has settled with Sony out of court), there is some validity to all the opinions they express. Indeed, both geohot and Girl Talk have been typecast as both copyright villains and fair use activists. More and more, legal systems are pushed to acknowledge such uncertainty and their inability to adequately respond to it. Meanwhile, creative communities around the globe move on to explore their own solutions to the problem of how go regulate which remixes are permissible and which aren't. Much can be learned from the ways in which remix practitioners and activists are beginning to respond to the inadequacies of current IP law. Rather than seeking to frame creative practices of remixing in existing IP regimes, I propose we must acknowledge that the communities forming around such unfairly marginalized activities already produce principles and ethical codes of collaborative, appropriation-based creativity and sharing.

Beyond gaining due legitimacy, these activities and the ethics they produce have also yet to be recognized as a valuable component of cultural policy reform initiatives. In the complexities which arise when current IP discourse collides with new creative practices fundamentally based on the appropriation and reuse of IP-protected materials, we can find long lists of the ambivalences and confusion around the legality of remixing culture. Part of the intrinsic value of appropriation-based creative practices conducted in the spirit of open access and the circulation of cultural expressions and knowledge, I believe, is that they produce this confusion and thus demonstrate the inability of traditional IP law to deal with it. One tactic of creative communities, in other words, is to show how tragically out of step current IP law is with the tendencies, desires, and, quite simply, realities of present-day remix culture.

Discussions of remixing culture frequently foreground the potential legal repercussions remixing can entail. Yet, notwithstanding threats of litigation or fines, remixing is ubiquitous to a degree that might be astonishing if it weren't for the fact that digital media environments are inherently designed to facilitate the copying, sharing and reusing practices on which remixes rely. In light of this, national and international IP regimes have generally proven unable to properly address questions of the permissibility of remixing. A growing body of scholarships is highly critical of the direction IP law is taking, and challenges the rationale that IP laws stimulate and incentivizes cultural creativity, showing, instead, that they limit it. Similar arguments have been made in more mainstream venues, such as in Brett Gaylor's 2008 open

source documentary RIP! A Remix Manifesto. Such critiques, and the creative practices of appropriation and remixing they commend, indicate that regimes of IP law are facing crises of legitimacy and relevance. Official responses to these crises are in short supply, and often inadequate. To give one example, last June the Canadian Parliament tabled an amendment (Bill C-32) to its Copyright Act that would adopt a number of positive changes to its fair dealing provision, while at the same time including new provisions that would criminalize the circumvention of digital rights management (DRM) software – a move that essentially reverses the proposed expansion of permissible copying and remixing.

Developments of this kind have long driven creative practitioners and their advocates both into the underground and to activist fronts. Groups such as the Canadian Appropriation Art Coalition work to raise awareness concerning the impracticality of current IP laws, and highlight recommendations of changes to existing laws based on the experiments of artists and activists. But the fact remains that to creative practitioners and everyday users, to the remixers of the world, lobbying for meaningful legal reform has proven tedious and ineffective. Often, establishing more radical, independent alternatives which operate in the shadow of existing IP regimes appears as the more practical direction to take. Common to most such alternatives – whether they take the shape of individual artists' projects or organized groups – is the assumption that the remixes in question must be permissible as a matter of principle, i.e., that alternative models for fairly regulating copying and circulation of protected cultural matter must be pursued primarily because existing fair use and fair dealing exemptions fail to do so.

While efforts of practitioners and activists to establish fair copying and remixing cultures 'outside' of IP law have drawn the attention of academic communities, comprehensive investigations of alternative systems governing creative exchange and remixes have not been conducted. Studies on the successes of developments such as Creative Commons can be bracketed here, considering that this movement has been criticized of simply promoting a continuation of copyright by other means; see, e.g., Berry and Moss 2005. In this sense, the Creative Commons licensing system's resistance to the limitations imposed by conventional IP law on remix culture may be described as a defeatist approach which advances by layering an already restrictive system with further rules.

In comparison, much of the resistance emerging in creative communities of mashup artists, fan fiction writers, coders, or machinima artists operates, rather, through what we might call 'para-legal' sites and channels that allow for the more immediate, vernacular negotiation of moral codes and new ethics of the permissibility of copying and remixing practices (see Zeilinger, forthcoming).

An example of this approach is the practice of media artist and activist Kenneth Goldsmith, founder of Ubuweb (www.ubu.com), perhaps the most popular free digital repository of experimental art. Goldsmith tends to ignore the possibility that some of his reusing practices are illegal, and generally insists that his 'dealings' are always 'fair' even when they don't conform to the rules outlined in copyright laws, i.e., that there is no reason why his activities of making copyrighted works freely available should be considered as infringement. If contacted by content owners, Goldsmith proceeds by entering into personal correspondences with them, during which, by arguing that he broadens their audiences and does not interfere with their commercial interests, he is usually able to win them over to the ethics of his activities (Goldsmith, forthcoming).

Many communities of remixing practitioners follow similar tactics of 'copy first, ask later,' but often add into the mix what amounts to complex, if informal, codes of conduct governing matters of the access to and reuse of remixed works. The vibrant chipmusic community, for example, many of whose members repurpose obsolete but patented video game hardware to synthesize and sample recognizable sounds,

generally follows a series of informally agreed-upon rules established on popular online fora. Transgression of these rules and misappropriation of material produced by members of the community are dealt with in the online exchange of comments and opinions, involving creators, offenders and audiences. Conventional IP law is hardly ever invoked, and these informal negotiations are surprisingly effective in establishing a fair system of access and exchange among creators (Zeilinger, op. cit.). Similar practices have emerged in communities of machinima artists (Horwatt 2010), or also in the exploding mashup scene (McGranaham 2010). Rather than choosing the path of litigation, members of these communities frequently prefer to discuss their concerns with offenders, or denounce or ridicule breaches of the various codes of conduct to which they subscribe. For example, when punk pioneer Malcom McLaren sought to co-opt the burgeoning chipmusic scene as 'his' discovery, members of the chipmusic community voiced their grievances in a widely publicized open letter that helped to solidify the community's sense of identity and the artform as such (gwEm 2004). Creative communities also tend to foreground links to ideals of collaboration, sharing and exchange as known from open source programming culture, hacking culture, and the now defunct 'demoscene' of the 1970s and 1980, which, too, functioned according to unwritten codes of conduct that in turn strongly influenced open source programming.

As noted, remix practitioners often display unwillingness to acknowledge the relevance of IP law for their activities as a matter of principle. A good example for this unwillingness is Richard Stallman's work, where it is linked to the issue of genetics and bio-engineering. As Stallman, well known as the founder of the GNU project and the Free Software Foundation, notes, admitting broad applicability of IP law can substantially complicate any resistance to misconceptualizations of copying processes. To make his point Stallman cites the appropriation of traditional knowledge and its 'remixing' as patentable procedures or medical agents. While such activities must be condemned for effectively shifting collective cultural practices and knowledge from the public domain into the domain of IP law, it should, argues Stallman, never be defined as theft or piracy: "The 'biopiracy' concept presupposes that natural plant and animal varieties, and human genes, have an owner as a matter of natural right. Once that assumption is granted, it is hard to question the idea that an artificial variety, gene, or drug is property of the biotech company by natural right" (Stallman 2005: 170).

In the same vein, many creative practitioners are concerned that there lies danger in allowing their remixing practices to be co-opted by conventional property-based IP discourse, because once that happens, all their actions will have to accept as a relevant context the restrictions and limitations imposed by existing copyright regimes. It is easy to see, then, why creative practitioners and everyday users who seek to acknowledge copying, sharing, remixing as a quasi-universal human tendency (discussed, for example, in Boon 2010) are often unwilling to adopt rules which supplement, rather than supersede IP law. Instead of simply shifting the enclosures which IP law represents, qualitatively different approaches are needed.

With the exception of fan fiction communities, comprehensive studies on viable alternatives in creative communities are few and far between. Some work has been done on the contemporary mashup scene, on relevant aspects of chipmusic communities, as well as on machinima communities. But these examples of critical inquiries have not begun to adequately address larger questions of how the different practices they consider fit into a broad discourse regarding the general permissibility of remixing in our contemporary cultural landscapes. Some foreground discussion of remix aesthetics over legal and sociopolitical aspects, some interpret resistance to limiting legal systems as a negation of copyright, and some simply test how existing remix forms would fare in hypothetical confrontation with current IP laws. I contend that more useful perspectives can be found by considering the critical commentary of

remix practitioners itself, and to treat their practices, tactics and techniques as a performance of new remix theories.

Many contemporary remix communities are well organized and have established extensive platforms where works, ideas, and methodologies are shared, discussed and exchanged. It is to these platforms of creative production, collaboration and exchange that we have to look in order to understand what remixing means today, which ethics and moral values are attached to it, and how remixing is already systematically validated and legitimized outside the law. Here, the reproductive qualities of digital media – i.e., their inherent copyability, the fundamentals of remixing – are properly explored as a democratization of culture, rather than as an economic threat to fenced-off property systems. This insistence on the inherent positive value of copying and sharing always resists the enclosure of creativity by IP policies that are based on profit-driven models of private property, and it is here that we can find discursive frameworks which can provide real alternatives to conventional IP and copyright law.

However, remix communities appear hesitant to conceptualize and provide such frameworks. It may be up to researchers and activists to demonstrate that cultural practices which insist on the merits of sharing and copying should be framed in a new positive rhetoric, for example of civil liberties, human rights, or moral economy. Only then will it be possible to conceptualize creative resistance to existing IP law not as indirectly confirming the validity of profit-oriented IP regimes (i.e., theft as a challenge to property), but to link such resistance to fundamental rights which property-based legal regimes can't easily acknowledge, including the freedom of expression, the freedom of access to information, or the freedom to receive and impart information and ideas (as outlined, e.g., in the Universal Declaration of Human Rights). As such, the actual practices of and discussions among present-day remixers suggest that a moral economy or a human rights framework may be most suitable for negotiating how to balance new digital-environment abilities to copy, collaborate and share with universal desires for rights to creatively participate in cultural life, for open access to informational goods, and for rights to cross-cultural exchange and cultural diversity. Taking existing remixing practices seriously, in other words, will inevitably push existing national and transnational doctrines of fair use and fair dealing to their limits, and will demonstrate the urgent need for policies that honor inherent values of sharing and collaboration over the monetary worth of culture-as-property.

It appears that revised and updated permutations of existing IP law can only recast, rather than remove, the restrictions which property-based legal discourse imposes on universal creative drives. Thus we must insist that emergent forms of digital cultural appropriation are not merely seen to create new forms of legal offence and injury, but rather new, experimental ethics of digital practice and new forms of respectful dialogue. My focus in this short paper has been on how crucial it is to accept domains of collaborative creativity and cultural exchange as evolving extra-juridical systems that are based upon norms, mores and conventions operating outside the logic of intellectual property. Rather than exploring how to 'fairly' embed remixing communities in existing IP schemes, we need to show how creative practitioners are able – and have always been able – to withstand assimilation by expansive ideologies pushing property-based legal regimes and to forge alternative practices in their shadow. We may be a far way off from proposing coherent alternatives to existing, flawed intellectual property regimes. For now, it is a good start to acknowledge that already existing sites of resistant, fluid remixing practices represent the true laboratories of legal reform.

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