



## Remix rights and negotiations over the use of copy-protected works<sup>☆</sup>



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### ABSTRACT

This paper examines an environment where original content can be remixed by follow-on creators. The modelling innovation is to assume that original content creators and remixers can negotiate over the ‘amount’ of original content that is used by the follow-on creator in the shadow of various rights regimes. The following results are demonstrated. First, traditional copyright protection where the original content creators can block any use of their content provides more incentives for content creators and also more remixing than no copyright protection. This is because that regime incentivises original content creators to consider the value of remixing and permit it in negotiations. Second, fair use can improve on traditional copyright protection in some instances by mitigating potential hold-up of follow-on creators by original content providers. Finally, remix rights can significantly avoid the need for any negotiations over use by granting those rights to follow-on innovators in return for a set compensation regime. However, while these rights are sometimes optimal when the returns to remixing are relatively low, standard copyright protection can afford more opportunities to engage in remixing when remixing returns are relatively high.

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### 1. Introduction

Remixing is a term used to describe taking content (sound, music, photos and words) and altering them in some manner to create new content. While the notion of derivative works has existed in copyright law for some time, digital technology has allowed a wider range of content types to be combined to produce remixed creative works and for that work to reach a wider audience. For example, users now attract millions of views on YouTube with their own video representations of popular songs (e.g., the Harlem Shake phenomenon) or re-working of television shows and movies (e.g., the synchronisation of video of George W. Bush and Tony Blair to the duet, *Endless Love*). For the purposes of this paper, *remixing* occurs whenever someone takes copy-protected content and repurposes it in some manner. Thus, while it does not include direct copying, parts, or maybe all, of the copy-protected material are used in the derivative work.

Legal and economic scholars have been challenged in considering how such remixing should be treated. In law, there is a position that it may fall under ‘fair use.’<sup>1</sup> Fair use is an exemption to copyright protection, that exists in some jurisdictions, related to works that use copy-protected materials for reviews, discussion and parody. This may, in

some circumstances, encompass remixed content. However, it should be noted that a fair use exemption does not exist everywhere; including, notably, Europe and Australia. Moreover, while fair use can potentially be readily applied to non-commercial remixing and use of copy-protected material, when it is uploaded or distributed using commercial platforms (such as YouTube or SoundCloud), the precise nature of the content becomes ambiguous.

In this paper, we explore remix rights in the context of considering the optimality of copyright law from a property rights perspective. That is, the law sets default rights on various parties. Usually, in fact, no copy-protected material can be used in any form by others unless express permission is given by the copyright owner. Thus, potential user/creators need to obtain permission to use such materials. As Lessig (2008) notes, this has occurred on open platforms such as YouTube where amateurs, for instance, uploaded videos with songs playing in the background only to be cited with takedown notices because appropriate permissions had not been sought. These takedown notices invariably occurred after remix effort had been expended. In other cases cited by Lessig, users who sought permissions found transaction costs prohibitive. Google and other platforms have since opted for solutions that encourage remixed content and lower transaction costs for obtaining permissions.

Lessig (2008) argues that these measures still stifle creativity. He claimed that technology has made copying so easy that it is hard to base the structure of the law on the presumption that copying can be prevented. He argues that remix rights should be applicable where the user has a demonstrably amateur characteristic. For instance, a song in the background of a family video is not copy-protected but if it is

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<sup>1</sup> For a review see Katz (2013).

uploaded to YouTube and publicly available it becomes so. Indeed, in Canada, new provisions on user-generated content reflect this. These provisions allow remixing so long as the purpose is non-commercial in nature and does not have a substantial adverse effect on the copyright holder. However, *it should be noted that remixing involves activities that may not satisfy these criteria*. This has prompted some to propose alternative means of compensating creators while allowing pervasive copying. For instance, the European-based Right2Remix.org argues that remix rights should be granted by default as they are a form of creative expression with lump-sum compensation being paid to the copyright owners for any losses incurred as a result of this.

In economics, Boldrin and Levine (2010) argue for a permissive regime that essentially removes copy protection, claiming that incentives for creators will be adequate in their absence. Lessig also argues that the regulation of small-scale technical copyright infringement does not outweigh the legal and transactional costs involved. This is a pervasive theme. When economists looked at the desirability of a fair use exemption, they emphasised the transaction costs involved in securing permissions for derivative works (Landes and Posner, 1989), in particular, when those works involve combinations of work by diverse copyright holders (Depoorter and Parisi, 2002). However, to date, economists have not considered copyright protection from a perspective where the costs of transacting come from potential hold-up—either by content creators (when copyright protection is strong) or users who remix (when copyright protection is weak).<sup>2</sup> That is the contribution of this paper.

This paper examines the impact of remixing and the various rights regimes that have been proposed. As a benchmark, we consider how different regimes impact the overall quality of creative works generated—both original content and remixing—and also on whether a regime can leave incentives to create original content no lower than what would arise if remixing were technically infeasible.

The modelling innovation is to move beyond the simple view of copyright protection as protecting the original content creator from competition from copies (see Novos and Waldman, 1984; Johnson, 1985; Landes and Posner, 1989, for classic treatments). Instead, as with the incomplete contracts literature in the theory of the firm (Hart, 1995) and also its application to law (Pitchford and Snyder, 2003), I consider, carefully, how different rights regimes specifying residual control and return rights impact on negotiations between original content creators and users who remix for public consumption. In effect, I bring the cumulative innovation framework beyond patent matters (Green and Scotchmer, 1995) to copyright matters. This not only allows us to examine remix rights and their impact but also to consider more carefully the impact of traditional copyright protection as it currently exists on the amount of remixing that occurs. As a consequence, it explicitly considers hold-up as a transaction cost in the copyright area.<sup>3</sup>

The outline of the paper is as follows. In Section 2, I introduce a baseline model involving the interactions between an initial content creator and a follow-on remixer of that content. These agents undertake non-contractible investments in the quality of their (potentially) published works and then negotiate in the shadow of copyright regimes that might exist. In order to focus on the interesting case, the model makes the assumption that, in the absence of permission, remixing harms the copyright owner, although, in reality, it is possible that, in some instances, the owner may receive benefits from remixing. Section 3 considers the outcomes when there are traditional rights regimes of either no copyright protection or traditional copyright protection. In the former, follow-on remixers have a right to remix and publish their

work while in the latter, initial content creators have a right to block the publication of remixed work. In each case, the rights determine the bargaining position of each agent in negotiations over whether remixed work is actually published or not. The significant result is that traditional copyright protection enhances the incentives of initial content creators to invest in their content—something that is intuitive—but also the actual amount of remixing that occurs and is published—a result that is counterintuitive at first glance. That latter result comes from the incentives of initial content creators in the absence of copyright protections to lower their own quality enough to discourage remixing from taking place and cannibalising their own returns. Under copyright protection, there is no such restraint and so socially superior outcomes—in terms of the welfare of initial content providers and follow-on remixers—arise.

Section 4 looks at ‘fair use’ exemptions. While in many legal studies these have been envisaged as allowing copy-protected work to be used for specific purposes (e.g., parody), here I consider fair use as a safe harbour based on the ‘quantity’ of a copy-protected work that is used. For example, artists may be able to lift samples of music and incorporate them without permission or payment but not entire pieces of content. Here, it is found that fair use only binds when some remixing will be desired in equilibrium and will often involve additional payments to copyright owners. This reinforces the finding that no copyright protection is sub-optimal but also the notion that if the share of original content returns is heavily dependent on a lack of sampling, then it is socially optimal not to have a fair use exemption. This mirrors, in part, the notion that fair use should be accompanied by non-commercial follow-on use.

Section 5 then considers remix rights as outlined by some advocacy groups. Such rights change the defaults of blocking by copyright holders to allow remixers to engage in such activities but also being under an obligation to compensate copyright holders for potential losses. It is demonstrated that such a regime can encourage second-best investments in remixed content without reducing initial content investment beyond that would arise if remixing was blocked. Moreover, remix rights avoid the need for negotiations between the original content provider and the remixer prior to remixing and, perhaps, altogether. In other words, remix rights can minimize transaction costs. That said, because traditional copyright protection can lead to actual remixing, it is not always the case that remix rights generate a higher level of remixed content being created and published. Overall, from a welfare perspective, it is not possible to clearly rank remix rights over traditional copyright protection. In an extension, a remix regime similar to that currently provided by YouTube is examined, which has some superior elements but also some mitigating effects compared with other copyright regimes considered.

## 2. Baseline model

We model a content creator, *A*, and a user/remixer, *B*. There are two time periods (Fig. 1). In period 1, a copyright regime is established which is known to all. Also in that period, *A* creates content by expending effort (or other resources) of measure, *x*. The cost of *x* is  $C(x)$ , which is increasing and convex. In period 2, *B* takes *A*'s content and chooses whether to remix it. As a simple measure, suppose that *s* is the share of *A*'s content that *B* uses in remixing (*s* could stand for ‘sample’). In addition, *B* expends their own effort, *y*, in taking *s* and transforming it into their own content. Again, the cost of *y* is  $C(y)$ , which is increasing and convex. Once *B* has made their choice, *A* and *B*

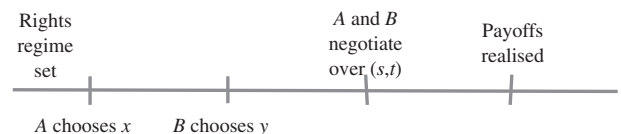


Fig. 1. Timeline.

<sup>2</sup> Halonen-Akatwijuka and Regner (2009) consider the optimal ownership of copyright itself between music artists and publishers/distributors. However, they do not examine the optimal copyright law as is done here.

<sup>3</sup> A related paper by Miceli and Adelstein (2006) looks at fair use exemptions as involving a minimum standard of copying by horizontally differentiated competitors to the copyright holder. It derives a socially optimal fair use standard under those assumptions but does not consider the underlying bargaining game as I do here.

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