

A Response to Professor Menell: A Remix Compulsory License Is Not Justified

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INTRODUCTION

At the recent Columbia Law School Kernochan Center Symposium *Creation Is Not Its Own Reward: Making Copyright Work for Authors and Performers*, a diverse group of creators, academics, lobbyists and practicing attorneys presented their views on how copyright law succeeds or fails in providing the creators of copyrighted works with appropriate rights and protections in the ever-changing digital copyright ecosystem. Speakers disagreed not only on whether or not the copyright system was working in favor of or against the interests of creators, but also on fundamental copyright principles. This is not surprising; while most academics and practitioners seem to accept, to one extent or another, that creators are not treated well in the digital age, there is no consensus on the 200-year-old constitutional threshold question: should copyright be viewed as a property interest or an economic theory? If a property interest, then copyright might actually work better for authors and performers in the future. But if an economic theory, the chance for authors and performers to thrive and prosper in the digital era decreases dramatically.

As part of this debate, Jay Rosenthal, one of the authors of this Article, proposed that the basic problem for creators in the digital age is that in the United States, the majority view regarding the fundamental philosophical basis of copyright is grounded in an economic theory-based approach rather than a property interest-

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based approach. Mr. Rosenthal argued that the latter should be the proper constitutional view of copyright. And until a more property interest-based approach is systemically adopted and incorporated into U.S. copyright doctrine, creators will continue to have their works exploited at well below market rates, used without permission when permission should be required and pirated almost at will. This inevitably results in the constant devaluation of the creator's property interest, and represents the greatest threat to the professional class of authors in the United States.

Mr. Rosenthal suggests that a strong property interest approach is warranted, and the proper methodology to use when developing and administering copyright law is to start from the basic foundational premise that all intangible copyrighted works should be legally characterized as property, with very little variance from the way the law treats real property. But as with real property, exceptions and waivers of copyright (such as a limited term, fair use and compulsory licenses) are appropriate at times and should be considered on a case-by-case basis.

This approach to copyright—one could call it a unified theory of copyright—is best constructed by Harvard Law Professor Robert Merges in his book *Justifying Intellectual Property*.¹ Professor Merges argues that strong IP protection, including the initial treatment of copyright as a strong property interest, is still the best policy in the digital age, despite the ease with which the Internet allows tech companies and the public to ignore IP rights.² He concludes that strong IP protection encourages and facilitates openness without mandating a single approach, and allows collective works to develop without undermining the ideal conditions for individual creativity.³ Professor Merges states in his book:

[T]he traditional virtues of individual property ownership—autonomy, decentralization, flexibility—are in no way obsolete in the digital era; they are indeed just as prominent as ever. Even though we are surrounded by dynamic new technologies for creating and disseminating original works, individual control over individual assets, in the form of IP rights, still makes sense, and for the same reasons as always. IP rights reward and recognize individual achievement, and bring with them greater scope for individual autonomy. They permit individual decisions about how creative works may be used, and by whom. IP rights provide a fair and legitimate institutional setting for creativity in the digital era.⁴

Professor Merges does not believe that the copyright property interest is inviolate. Exemptions and waivers of copyright are appropriate and should be considered. He calls these secondary issues “midlevel principles.”⁵ These midlevel principles could include fair use, copyright term, the primacy of the public domain and arguably even piracy. So the proper analytical approach to copyright is to start by recognizing a strong property interest, then proceed to analyze, debate and perhaps even apply the “midlevel principles” in a way that respects the property interest of

1. ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

2. *See id.* at 4–5.

3. *See id.* at 227–28.

4. *Id.* at 238.

5. *See id.* at 139.

the creator while simultaneously taking into consideration the interests of the users and the general public.⁶ The goal with this type of approach is to ensure that any limitation on the copyright property interest of the creator is properly justified.⁷ In some instances, applying a copyright exception or waiver is justified—in others it is not. For example, certain compulsory licenses might be more justified than others.⁸

This perspective is in contrast to the economic theory approach, which would start from an equibalance of interests between the copyright owner and user.⁹ When starting from equibalance, for example, much greater weight would be given to factors such as efficiency and certainty, when trying to determine the justification for the existence, continuation or expansion of a compulsory license.

In this short Article, we will try to provide an example of how this property interest approach might be applied when addressing one of the more controversial recent copyright reform proposals—the creation of a compulsory license for remixes, mash-ups and digital sampling.

Professor Peter Menell, in his recent law review article on copyright reform, offers up a comprehensive approach to copyright reform with many suggestions and ideas, including an expansion of the scope of the music compulsory license to include music used in remixes, mash-ups and digital sampling.¹⁰ Professor Menell is a well-respected academic and some of the proposals in his article have great merit. However, we believe this compulsory license proposal simply is not justified and would do great damage to the value of the creator's property, especially when analyzed in the context of the Merges approach.

In his article, Professor Menell contends that a compulsory license for these types of works “offers an attractive solution for all parties. . . . [I]t could offer a sweet spot in which copyright owners, remix artists and fans could participate in a market-based system for more fairly allocating value among creators.”¹¹ While Professor Menell's proposal is well intentioned and thoughtful, his conclusion is deeply flawed, because as we view the property interest of the original artist in relation to the interest of the appropriating artist, there is simply no legal, economic or creative justification for creating such a compulsory license.

Applying the Merges approach, we start with the premise that all performers and writers of pre-existing music enjoy a strong property interest. This universe of performers and writers ostensibly includes major artists and writers, as well as up and coming artists and writers. The next step in the analysis is to determine whether the creation of a compulsory license is justified, and this would be done by addressing some of the perceived “midlevel principles” that may negatively impact

6. See *id.* at 139–41.

7. *Id.* at 4–9.

8. See *id.* at 228–29.

9. See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

10. Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235 (2014).

11. *Id.* at 355–56.

the property interest of the creator, but would at the same time help the appropriating user of the work. There are three distinct identifiable “principles” or issues that could stand out as the most important to address when determining whether there is justification for adopting this type of a compulsory license:

1. A compulsory license, on its face, eliminates a creator’s right of approval—the right to say “no.” This is one of the most important property rights a creator retains, and a high standard should be applied to justify such a property right deprivation.
2. Compulsory licenses undervalue creators’ works because compulsory license rates are almost invariably below free market rates.
3. Compulsory licenses should only be used in the event there is a market failure, and in this instance, there is actually a fully functioning market for digital samples and similar forms of free market derivative work licensing. In this context one would also consider the efficiency gained and the certainty of the user of the copyrighted work.

I. THE RIGHT TO SAY NO

As a preliminary matter, Professor Menell, in an article he wrote in 2007, argues that copyright is not a property interest. In his article, *Intellectual Property and the Property Rights Movement*, he attempts to provide some form of legal rationale and reasoning for this controversial position.¹² While he acknowledges that music creators’ exclusive rights are important, he does not grant creators of intangible property right interests the same type of deference he would give to owners of real property.¹³ And he supports this conclusion by arguing, as a matter of public policy, that it would not be in the best interest of authors, users or the public to do so. The benefits to society—including to users of copyrights—would be so negatively impacted that there is no rational reason for such treatment. He also claims that the efficiencies gained by sometimes depriving the creators of their right to say “no” overrides any downside to the creators.¹⁴ This does not mean he believes creators have no rights—rather, it is a matter of degree. Professor Menell simply believes there is little damage in curtailing a creator’s right to say “no.”

Of primary importance to Professor Menell’s view is that depriving the creator’s right to say “no” by use of a compulsory license might ensure a desirable level of market efficiency and certainty in the price. On this point, we believe there is another valid perspective—although we recognize that Professor Menell’s point has been adopted by the majority of tech industry and consumer stakeholders, as well as many academics over the last twenty years. We argue, however, to the contrary, that denying a copyright owner the right to say “no” breeds inefficiency, is damaging to the economy as a whole and is contrary to achieving “progress” as a constitutional matter. While a compulsory license is efficient for some parties, it is not for the rights holder, resulting in an overall loss of efficiency.

12. Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, 36–42.

13. *Id.* at 39.

14. *Id.*

Voluntary transactions with well-defined property rights are a precondition for effectively functioning markets, because in voluntary transactions, *both* parties expect to be made better. A very important recent legal/economic study turns the Menell concern on its head. This study posits that a system that does not require consent can lead to market failure because of the externalities it generates.¹⁵ The authors of the study apply the Pareto efficiency test, which stands for the proposition that a transaction is efficient if one party is made better off without making another party worse off.¹⁶ In contrast, a compulsory license would mandate parasitic transfers, meaning the unauthorized remixer is made better off while the original creator is worse off.¹⁷ These types of parasitic transfers decrease society's overall wealth, and the law should try to minimize the total harm caused by such transactions.

Professor Merges addresses this issue by explaining that a compulsory license benefits the "amateur" creator at the expense of the "professional."¹⁸ It allows amateur works to flourish because giving lower-profile creators free reign to use established works as the building blocks for their own works gives them a big advantage when it comes to public recognition and acceptance of their works.¹⁹ But this advantage is at the expense of established creators, to whom approval rights are extremely important and whose property is consistently undervalued in the process.²⁰ For those creators on the cusp of "professional" status, a compulsory license could prevent them from reaching that elite status because of the loss of revenue compared to the current, permission-based system.²¹

Furthermore, the substantial costs it would require to develop and administer a compulsory license would constitute an unjustifiable and inefficient use of government and private market resources. For example, the § 115 compulsory license requires costly Copyright Royalty Board proceedings to determine rates, costly rulemaking procedures (the most recent rules regarding § 115 Statements of Account were released after many years of deliberation), costly enforcement and costly compliance requirements.²² There is no justification for even considering subjecting performers and writers to a similar situation for remixes in an attempt to

15. Robert Ashcroft & George Barker, *Is Copyright Law Fit for Purpose in the Internet Era?*, IE-FORUM.NL (Sept. 2014), <http://perma.cc/SQQ7-ZBMB>; see also Susan Butler, *The Value of No*, MUSIC CONFIDENTIAL, Sept. 2014.

16. Ashcroft & Barker, *supra* note 15, at 5.

17. *Id.*

18. MERGES, *supra* note 1, at 248.

19. *See id.*

20. *See id.* at 225, 248; *see also id.* at 56–58.

21. *See id.* at 248.

22. *See* 17 U.S.C. § 115 (2012); Dina LaPolt, *Re: Music Licensing Study: Notice and Request for Public Comment*, in U.S. COPYRIGHT OFFICE, MUSIC LICENSING STUDY: COMMENTS IN RESPONSE TO THE MARCH 17, 2014 NOTICE OF INQUIRY DUE ON MAY 23, 2014 (2014), *available at* <http://perma.cc/3P4Q-5HHN>; see also Jay Rosenthal & Christos P. Badavas, *Comments of the National Music Publishers' Association, Inc. and the Harry Fox Agency, Inc. in Response to March 17, 2014 Notice of Inquiry*, in U.S. COPYRIGHT OFFICE, MUSIC LICENSING STUDY: COMMENTS IN RESPONSE TO THE MARCH 17, 2014 NOTICE OF INQUIRY DUE ON MAY 23, 2014 (2014), *available at* <http://perma.cc/2WUY-VSMS>.

solve a problem that arguably does not exist.

II. DEVALUATION OF THE COPYRIGHT

Professor Menell proposes a compulsory royalty rate of 18.2 cents per reproduction for a song five minutes long or less, or twice the current statutory mechanical license rate.²³ This rate, or any other rate that the government would impose, would significantly decrease the value of the original property used in the derivative works. Furthermore, it would be incredibly hard—if not impossible—for the government to set a rate reflecting the fair market value of the works, considering the varied types of uses such a license would encompass. Furthermore, the government arguably does not have a sophisticated understanding of the music business and would have great difficulty trying to determine a fair market rate.

It is fair to conclude that creators would lose significant value through such a compulsory system. A clear example of how compulsory licenses historically undervalue creators' works is the § 115 compulsory mechanical license. The license rate started in 1909 at two cents per reproduction for a song five minutes long or less.²⁴ This is the equivalent of more than 50 cents today; however, the current statutory rate is a meager 9.1 cents.²⁵ Arguably, songwriters and music publishers would have been able to obtain much more favorable rates through free market negotiations.²⁶

In addition to the negative impact a compulsory remix license would have on the value of creators' works, this proposed compulsory license regime would neutralize the creators' exclusive right to prepare derivative works, one of the most fundamental rights granted to authors under the Copyright Act.²⁷

There are also constitutional concerns. A new compulsory license would render this aspect of the exclusive right entirely obsolete. Turning this pre-existing exclusive right into a nonexclusive right might raise constitutional objections because Congress has interpreted these exclusive rights to include control over derivatives. It is unclear whether Congress has the constitutional authority to abridge this right.

The implementation of a compulsory license for remixes might also arguably violate the Takings Clause of the Fifth Amendment because it would so dramatically devalue the original artists' property interest that the entire

23. Menell, *supra* note 10, at 356.

24. See *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet*, 113th Cong. 21 (2014) (statement of David M. Israelite, President & Chief Executive Officer, National Music Publishers' Association), available at <http://perma.cc/46XY-XTX7>.

25. See *id.*

26. See Rosenthal & Badavas, *supra* note 22; see also Jay Rosenthal & Christos P. Badavas, *Additional Comments of the National Music Publishers' Association, Inc. and the Harry Fox Agency, Inc. in Response to July 23, 2014 Second Notice of Inquiry*, in U.S. COPYRIGHT OFFICE, MUSIC LICENSING STUDY: COMMENTS IN RESPONSE TO THE JULY 23, 2014 REQUEST FOR ADDITIONAL COMMENTS DUE ON SEPT. 12, 2014 (2014), available at <http://perma.cc/4QBW-NKRN>.

27. 17 U.S.C. § 106(2) (2012).

compulsory provisions and process might be ruled an unconstitutional regulatory taking.²⁸ For other compulsory licenses, the rate-setter uses comparable metrics to set rates such as the value of licenses in the marketplace. There is already a marketplace for licensing derivative works, but license rates are so diverse, and in some instances the value of the license so great, that a metric-based approach would be unworkable and certainly unfair. Do we start with a superstar who can commend huge fees for derivatives, or do we start with the amateur creator who will give his music away for free for anyone to alter? Because a compulsory license rate would have to ignore huge-dollar deals to set a one-size-fits-all amount, these high-value uses would only be able to recognize a fraction of their true value.

III. THERE IS NO MARKETPLACE FAILURE NECESSITATING A COMPULSORY LICENSE

The general rule is that compulsory licensing is only used when compelled by a marketplace failure. However, there is no evidence the marketplace for licensing remixes, mash-ups and sampling is failing. In fact, current music industry practice shows that this marketplace is already functioning, and for those newer art forms—like mash-ups—the market must be given sufficient time to fully develop, and this development is already underway.

Many rights holders voluntarily enter into agreements for their works to be sampled or used in remixes when approached.²⁹ Furthermore, other solutions already exist, such as free market remix or a Creative Commons type collective, where creators *voluntarily* release music under licenses that allow others to remix their works. There have also been several well-documented instances of collaborations between original artists and appropriating artists to create derivative works.³⁰ Copyright law should promote these productive free market mutual

28. See Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327 (2014) (conducting an analysis of whether a compulsory license created by § 114 might rise to the level of a constitutional taking).

29. See Dina LaPolt & Steven Tyler, *Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*, in U.S. PATENT & TRADEMARK OFFICE, GREEN PAPER PUBLIC COMMENTS: POST-MEETING COMMENTS (2014), available at <http://perma.cc/9WBW-HAUW>; see also *Comments of National Music Publishers' Association, Nashville Songwriters Association International, SESAC, Inc., Church Music Publishers Association*, in U.S. PATENT & TRADEMARK OFFICE, GREEN PAPER PUBLIC COMMENTS: PRE-MEETING COMMENTS (2013), available at <http://perma.cc/9D22-87Z7>; see also Victoria Sheckler, *Reply Comments of ASCAP, BMI, NMPA, CMPA, NSAI, RIAA, and SESAC*, in U.S. PATENT & TRADEMARK OFFICE, GREEN PAPER PUBLIC COMMENTS: POST-MEETING COMMENTS (2014), available at <http://perma.cc/78J5-BZZN>. Hip-hop music has utilized a thriving market for remixes and sampling since the very beginning of the genre, with the exception of a handful of works that were released before seeking permission from rights holders was commonplace. Dina LaPolt, a co-author of this Article, participated in countless sample clearance negotiations when she represented the estate of Tupac Shakur and helped release his many posthumous albums. Sampling is still extremely prevalent in hip-hop music and is one the genre's defining hallmarks.

30. One famous example saw legendary hip-hop group Run-D.M.C. collaborating with Aerosmith on a version of the latter's hit song "Walk This Way" for a genre-bending smash hit that broke down the barriers between rock music and hip-hop in 1986. See LaPolt & Tyler, *supra* note 29, at 6.

collaborations as a matter of public policy.

There is currently no shortage of remixes or works that can be remixed. A good amount of content is available for free, and no particular work is necessary for a remixer to practice his or her craft (or hobby). On the other hand, a creator who is forced to make his or her works available loses the essential right to say “no,” which denies the market a chance to ever develop. Balancing these concerns, it is clear that we cannot bastardize creators’ original works to facilitate remixers’ access to any and all materials. The original artists’ interests are simply greater than the appropriating artists’ interests.

Because there is no compulsory remix license, the licensing transactions for these types of uses are worked out in the free marketplace. In some instances, a derivative work is authorized, but in others not. In the electronic music space, for example, one of the main musical genre utilizing remixes, the standard business model usually contemplates these works as works made for hire for the original artists. A remixer is paid a flat fee, usually does not receive royalties and most certainly does not receive a copyright percentage in the remixed work. Essentially, industry custom does not deem these remixes to be “derivative works” in the first place.³¹ In other instances, they do—but in both it is determined by free market exigencies, not compulsory license mandates.

Similarly, a compulsory license determining remixes are per se fair use would most assuredly stifle marketplace growth, as much or more than any compulsory system providing for a below fair market rate. The best approach, in this instance, would be to deny adoption of any fair use defense for mash-ups. This will give markets a reasonable opportunity to form. If markets do take shape, creators are suitably paid for the use of their works, while granting fair use from the start denies the market a chance to develop rates that would properly compensate a professional class of creators. As stated succinctly by Professor Merges:

An across-the-board declaration that remixing is fair use will shut down a nascent market, eliminate a potential revenue source for original creators, and therefore marginally reduce the scope of autonomy for creators of works in digital form.³²

It would not be appropriate for a court to make a determination that remixes are per se fair use in the first place. The fourth factor of fair use, which has always been one of the most important to the courts, is “the effect of the use upon the potential market for or value of the copyrighted work.”³³ In other words, this factor asks whether a use ignores an existing market to the detriment of the copyright owner. In the case of a compulsory license for remixes, there *is* an existing market, and fair

31. This is illustrated by the recently announced *5 Years of mau5* compilation featuring remixes of songs originally released by electronic artist deadmau5 that he commissioned himself. Ryan Middleton, *Deadmau5 Releases ‘5 Years Of Mau5’ EP Featuring Eric Prydz, Dillon Francis & Others* [REVIEW], MUSIC TIMES (Nov. 25, 2014, 9:31 AM), <http://perma.cc/7LVE-GXWB>. The album is a career retrospective with remixes by many of the current hottest electronic artists, including Dillon Francis, Eric Prydz and Botnek. *Id.*

32. MERGES, *supra* note 1, at 254.

33. See 17 U.S.C. § 107(4) (2012); see, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

use is just trying to weave around it. And while the question of whether this type of use is transformative is beyond the scope of this Article, the authors strongly believe that the uses of sound recordings and musical compositions in this context are derivative in nature, not transformative, thus requiring licenses.

IV. CONCLUSION

Applying the approach adopted by Professor Merges, we conclude there is no persuasive legal or economic justification to take the drastic step of implementing a compulsory license for remixes, mash-ups and sampling.

The proper approach is to maintain the current free market system currently in place, while promoting the development of a market for the new uses that are the focus of Professor Menell's proposal. Compulsory licensing should only be used in light of a marketplace failure, and Professor Menell has not made the case that the marketplace has failed or that there is any justification for this new compulsory license.

A functioning marketplace for digital samples already exists, and a vibrant marketplace for "mash-ups" may be just on the horizon. By maintaining a creator's right to say "no" to derivative uses of their works, music creators' essential property rights will be enhanced. Remixers and other appropriating artists can today take advantage of pre-existing business models and solutions, such as licensing through a creative commons-style service and the wealth of works whose owners voluntarily license them for derivative works, or they could simply enter into a license with the creator.

For Professor Menell to support a remix compulsory license, he must minimize almost all arguments in favor of providing a viable property interest to authors. In other words, the only way he can justify a compulsory license is to ignore or diminish the property rights and importance of music creators to the point where the user of a work and the public are considered much more important. This conclusion is much harder to reach if one starts with the premise that original artists own a strong property interest in their works. It can only be reached if the property interest is minimized, ignored or part of an economic theory that provides an equal balance between copyright owners and users. Significantly, a number of major artists like Steven Tyler, Don Henley and Dr. Dre have already publicly opposed such a compulsory license, and this most assuredly will continue.³⁴

The argument that a strong need for this compulsory license even exists is also highly questionable. Professor Menell provides no empirical evidence that there is any real demand by professional artists for such a right. Rather, it seems Professor Menell is responding to some sort of perceived need by amateurs—not so much for the amateurs to create "quality" new works of art, but rather a need for these amateurs to simply be entertained. There is nothing in the Copyright Law or in any

34. Ed Christman, *Proposal for Compulsory Remix License Has Foes in Steven Tyler and Attorney Dina LaPolt*, BILLBOARD (Feb. 10, 2014), available at <http://perma.cc/CD76-FJ6T>; see LaPolt & Tyler, *supra* note 29.

understanding of the word “Progress” in the Constitution³⁵ which compels an original artist to provide his property at bargain basement prices—or for free—for the mere entertainment of users. As a society, we do not subsidize leisure activity. If someone wants to have fun by creating “mash-ups,” then let that person find a vendor who will provide them with all the digital files he or she needs either for free—like in a creative commons system—or for a fee.

Simply put, there is no persuasive justification for relieving a phantom demand for compulsory remix/mash-up licensing by further eroding the creators’ property rights. It is our hope that we can put this issue aside so stakeholders can move on to real and more important issues facing the music industry.

35. U.S. CONST. art. I, § 8, cl. 8.