Remix Culture Gone Too Far?
"Blurred Lines" Between Inspiration & Copyright Law

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Thesis: The ubiquitous access to the Internet and online distribution of content has made it easier than ever to create new kinds of art and music. The use of these music samples and publically accessible imagery has opened up many artists to copyright infringement. Copyright law must evolve to reflect changing technology and the prevailing needs of remix culture.

Introduction

"There is no such thing as a new idea. We simply take a lot of old ideas and put them into a sort of mental kaleidoscope."

(Mark Twain)

From the dawn of time, human beings used works from other artists, writers, inventors, and philosophers to inspire the creation of their original masterpieces. Leonardo Da Vinci drew inspiration from classical painters like Andrea del Verrocchio. Ludwig van Beethoven admired Mozart and Bach for creating some of the most beautiful compositions of our time. These creators often borrowed elements from past creations and built something new.

I doubt the Framers' inclusion of the Copyright clause in the constitution could've foreseen the numerous complications the digital age would cause while enforcing copyright law. The law has evolved through the enactments of the Copyright Act of 1909 and the Copyright Act of 1976, but more revisions are becoming a necessity. Today, remixing and mashing together digital content is a common practice: whether it's creating a YouTube video collage of one's favorite singers to sharing and manipulating images on social media. The use of samples and parts of photographs are being used to create compelling new art. What happens when not only drum beats and melodies can be copyrighted, but the inspiration behind the creation of these pieces? Can the "feel" of a song or painting infringe on the original work of an artist?

This research paper will explore the legal case against Clifford "T.I." Harris, Pharrell Williams, and Robin Thicke's song, "Blurred Lines," and how the ruling benefits corporations controlling the digital content but leave independent artists behind. In effect, setting a dangerous

precedent for U.S. copyright law. The current copyright leaves room for legal uncertainty, which can stunt the development of creating new artwork. Analysis of other infringement and fair use cases under copyright law, including the Shepard Fairey's graphic design vs. the Associated Press's original photo, will be assessed. Several case examples will be used to demonstrate how copyright law, and the information policies surrounding the topic, needs an upgrade for the new digital age.

"Blurred Lines" Case Study

On March 26, 2013, recording artists Robin Thicke, Pharrell Williams and Clifford "T.I." Harris released their hit song, "Blurred Lines." The song's percussions and groove were inspired by Marvin Gaye's 1977 hit song "Got to Give It Up." It became a hit and peaked at number one on the music charts that same year. Shortly after, Marvin Gaye's heirs and Bridgeport Music, Inc. sued the artists for copyright infringement. Gaye's family accused the authors of the song of stealing the "feel" and "sound" of "Got to Give It Up." Bridgeport Music, Inc, stated that Thicke, Williams, and Harris took samplings from Funkadelic's song, "Sexy Ways."

The Gaye estate seemed to have a case. In an interview to Radio.com, Robin Thicke admitted he wanted to create a song that "embodied the fun vibe of his favorite song of all time, Marvin Gaye's "Got to Give It Up."1 Using this evidence, the Gaye's family pressed on with the lawsuit.

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[1] Ed Christman, "'Blurred Lines' Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous," Billboard, March 13, 2015, accessed April 30, 2018, https://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and.

"Up until now, the music industry thought you couldn't copyright a vibe, feeling or a genre," says a music publishing executive. "Infringement has to be based on some element that is copyrightable."[2]

The Gayes' case against the songwriters was unprecedented. The artist didn't use any of the lyrics or sound samples from "Got to Give It Up." However, the vibe of the song had a 70s feel with an upbeat tempo like Gaye's song. The same could be said about the song, "Sexy Ways." Billboards.com stated that most infringement cases are usually settled out of court; however, the authors of the song felt the need to protect their reputations. Also, they were adamant about the fact that they didn't take any original samples or lyrics from the original song.

According to one anonymous music executive from Billboard.com, Pharrell was an accomplished songwriter. He didn't want his reputation tarnished from accusations of copyright infringement.[3] Pharrell countersued and pressed for a declaratory judgment that "Blurred Lines" didn't infringe on Gaye's song. Pharrell's efforts proved to be futile. After a seven-day trial, the California jury found "Blurred Lines" infringed on Gaye's song. Thicke and Pharrell were held liable, but not T.I., since the latter claimed to be the creators of the song. Marvin Gaye's heirs were awarded $5.3 million in damages and 50 percent (about $2 million) of the royalties from the song. Both parties were not satisfied with the verdict and filed an appeal. [4]

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[2] Andrew K. Gonsalves, "Legal View: Clearing Up Robin Thicke's Blurred Lines," LegalNews.com, October 22, 2013, accessed April 30, 2018, http://www.legalnews.com/detroit/1381801.

[3] "'Blurred Lines' Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous."

[4] Meredith M. Wilkes et al., "Blurred Lines Between Inspiration and Infringement: Ninth Circuit Holds "Blurred Lines" Infringes Copyright," Lexology, March 26, 2018, accessed April 30, 2018, https://www.lexology.com/library/detail.aspx?g=807a1317-e275-4925-a3cd-e563d15597b4.

Then on March 21, 2018, almost five years after the first lawsuit, the U.S Court of Appeals for the Ninth Circuit upheld the jury's verdict that Pharrell and Thicke infringed on Gaye's song. The court based its evidence on the elements of copyright infringement claim:

(i) Ownership of a copyright in the work

(ii) Copying of protectable elements of that work, which may be shown by direct evidence of copying or access and substantial similarity[4]

Gaye's heirs owned the rights to the song "Got to Give It Up," and there were 'elements' of the original song present in "Blurred Lines," such as an overall 70s vibe. But the vibe isn't a copyrightable thing. Copyright law doesn't protect "feel" and "sound" of a song. Judge Nguyen from the case warned other judges allowed Gaye's heirs to "accomplish what no one has before: copyright a musical style," establishing "a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere." [4] The majority of the judges believed the advice was speculative, and it doesn't give license to copyright musical style or groove, but only time will tell from future hearings. The warning was clear. Artists should be careful in making sure their song doesn't sound similar to another artists' work. Over 200 artists and composer spoke out against the original 2015 verdict and filed an *amicus brief* [5] to overturn the decision.

> "The verdict, in this case, threatens to punish songwriters for creating new music that is *inspired* by prior works," states the artists' brief authored by Ed McPherson. "All music shares inspiration from prior musical works, especially within a particular musical genre.[6]

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[5] An amicus brief is a legal document filed in an appellate court case by outside parties. The briefs provide additional information or arguments for the court to consider for a case.

[6] Eriq Gardner, ""Blurred Lines" Appeal Gets Support From More Than 200 Musicians," The Hollywood Reporter, August 30, 2016, accessed April 30, 2018, https://www.hollywoodreporter.com/thr-esq/blurred-lines-appeal-gets-support-924213.

After the verdict, we are left to wonder where is the line between inspiration and unlawful infringement? Copyright law doesn't provide clear guidelines. The songs in question did not have similar melodies or lyrics, which are materials protected by copyright law.

Pharrell and Thicke's legal team also pointed out that "Gaye himself was heavily influenced by Frank Sinatra, Smokey Robinson, Nat "King" Cole, James Brown and others." [6] Many musicians are often influenced by each other. Are these musicians also infringing on these artists' work by having the same "feel" of another artists' work to some of their songs? Good ideas are recycled, and creating a song inspired by someone else's work can often lead people to discover older music they've never heard before. These infringement cases are often costly. A small artist couldn't afford the legal costs of a trial and may decide not to release a new song because of this new copyright precedent; thus, stifling creativity.

The Rise of the Musicologist

Marvin Gaye's heirs couldn't have won the case without hiring a few forensic musicologists. The rise of musicologist services is the direct result of high-profile cases like "Blurred Lines" and Led Zeppelin's "Stairway to Heaven," which were won thanks to a musicologist.[7]

Musicology involves comparing two pieces of music and find the similarities between them. A musicologist is hired during a copyright lawsuit for both parties. Every aspect of the

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[7] Andy Hermann, "Music Copyright After 'Blurred Lines': Forensic Musicologists Speak," Rolling Stone, April 04, 2018, accessed May 01, 2018, https://www.rollingstone.com/music/features/music-copyright-after-blurred-lines-experts-speak-out-w518206.

song is examined: lyrics, melodies, rhythms, instruments used, chord progressions, and harmonic elements. If a sample is unclear, the musicologist performs a spectrogram analysis. The analysis looks at the song's waveform for "digital fingerprints" that can reveal a sample's presence.[7] The musicologist position requires years of music theory training. The services of Judith Finell, a musicologist in the "Blurred Lines" case, persuaded the jury to rule in favor of Gayes' heirs by pointing out secondary similarities between the two tracks as "'look and feel and cowbells,' as one legal observer puts it rather than their lyrics, melody and other elements more commonly considered protectable under copyright law."[7]

The musicologist's expertise could've complicated matters. The ruling has blurred what constitutes copyright infringement. What is protectable under copyright law? Artists are understandably weary and find it hard to navigate the new copyright terrain. In an interview with Rolling Stone magazine, Harvey Mason Jr., a veteran songwriter, and producer have worked with many artists including Michael Jackson and Britney Spears. He's stated that he's often had to change his music because it "felt" like something else.[8] Record companies have the capital to hire musicologists and entertainment lawyers. The same can't often be said for other artists who may roll the dice and hope they aren't sued.

According to Rolling Stone magazine, many of their insiders are seeing infringement cases being settled more quickly because of the "Blurred Lines" verdict. Even if the merits are "marginal."[8] Again, we can see this case is setting a harmful precedent. Many artists would instead settle with large music labels even if there weren't technically an infringement case.

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[8] Hermann, "Music Copyright After 'Blurred Lines': Forensic Musicologists Speak," Rolling Stone.

Current Copy Right Law in Remix Culture

Digital sampling was a common practice during the rise of hip-hop culture in the 1980s. Rappers from Grandmaster Flash and B.I.G often used sound clips from prior artists in their raps. Unsurprisingly, copyright law and hip-hop culture have bumped heads on numerous occasions. One famous case between Grand Upright Music, Ltd. v. Warner Brothers Records, Inc. set the stage for future copyright law. Rapper Biz Markie claimed that he shouldn't be liable for copyright infringement because everyone was sampling music without permission in the industry. The Southern District of New York rejected the argument (3).[9] He was then found guilty of infringement. It's a cautionary tale for artists. When in doubt, always receive permission from the creator. Often, these licenses are expensive, and the amateur artist couldn't afford to pay for them. For example, DJs would see the majority of their money earned going toward licensing fees rather than profit if they sold an album.

The issue of digital sampling didn't stop there. In the case between Bridgeport Music, Inc. v. Dimension Films, the judge sided in favor of Bridgeport.[9] The *bright-line rule*[10] was created. It states that it is illegal to sample another artist's work without obtaining a license digitally.[10] Several journals analyzed for this article discussed mashup style of music in great length. Mashup artists are distinctly different from hip-hop artists in that they don't add new vocals to the sampled beats. These artists often use music from several artists and combine them to create a new piece of music. The most common type of mashup is the "A vs. B" form where the vocal track from one song is layered over the musical composition of another.[10] Other

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[9] Emily Harper, "Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm," *Hofstra Law Review*, 4th ser., 39, no. 2 (2010), accessed May 1, 2018, http://scholarlycommons.law.hofstra.edu/hlr/vol39/iss2/4

[10] Harper, "Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm, 5.

mashup artists create collages of beats and songs to make something entirely new. Often these artists aren't sued for copyright. These works can often be created for "such purposes include, but are not limited to, tribute, homage, criticism, education, curiosity, and popular demand."[8] Since these works are often not being sold for profit, and in homage to the original, they could fall under fair use in copyright law. There are two most common defenses for mashup artists to protect themselves from litigation and limit copyright holders' exclusive rights: *de minimis defense* and the *fair use defense*.[11]

De Minimis

In the de minimis defense, the question in an infringement case is whether the defendant copied the plaintiff's work and if this copying was substantial. A case against Newton v. Diamond proved there was a situation where unlicensed sampling a song was acceptable. The Beastie Boys used an unauthorized three-note sequence from a song which was not the "heart" of the original song (104).[12] This only applies to musical composition (musical notes, sounds, and beats) copyright and not samples of sound recordings. The Beastie Boys had a license to sample the sound recording from the music producer, but not the musical composition (notes). In other words, the band won the case because they used the minimal amount of content. So, they weren't truly infringing on the original. It's what makes the "Blurred Lines" case so unique. None of the original music was sampled or composition taken from Marvin Gaye's song. Nonetheless, the jury ruled in favor of Bridgeport Music, Inc. based on the verdict that the song has a similar "groove" of the song "Got to Give It Up."

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[11] Satia Famili, "Mashed Up In Between," Berkeley Journal of Entertainment and Sports Law 5, no. 1 (May 17, 2016), http://scholarship.law.berkeley.edu/bjesl/vol5/iss1/5.
[12] Ibid., 104.

Fair Use and Shepard Fairey

The second defense against copyright infringement is the fair use doctrine. The Copyright Act of 1976 modified the law and placed limitations on the copyright holder's exclusive rights. It was pretty clear that granting copyright holder unlimited restrictions on their content limited the promotion of learning, "which is the constitutional purpose of copyright" (105).[13] To determine what constitutes fair use, Copyright Act states that the courts should consider the following factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
2. The Nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work (17).[13]

The Supreme Court especially weighs the first and last factors more heavily to determine if a work is fair use. Regarding mashup artists, or any amateur using social media platforms, the re-use of copyright work is protected under fair use. The works aren't used for commercial reasons and should have no adverse effect on the original artist having the ability to make money off of the original artwork. According to Harper from the Hofstra Law Review, some artists like David Bowie and Nine Inch Nails had supported the idea of other artists using their work to create new music (8).[14]

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[13] Ibid., 105.
[14] Harper, "Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm," 8.

In the cast of Shepard Fairey v. The Associated Press[15], we see an artist taking the original photograph from the news source without permission. The associated press's photographer, Mannie Garcia, took a photo of then President Barack Obama at an event for the National Press Club in Washington. Fairey saw this image and thought it was fair use to use it for a digital art poster. Under fair use, Fairey didn't profit off of the work. However, he may have been guilty of the third factor. Typically, it depends on how much the work has been "transformed" to determine if one is in violation of the third factor. His digital art of the photograph had a striking resemblance to the photograph. Also, the fourth factor "the effect of the use upon the potential market"[16] made it difficult for the A.P. to profit off of the campaign posters created from the photograph. Fair use isn't straight-forward. An independent artist didn't profit off of the work, and yet he was found guilty of infringing on the work. This case left a few experts confused about what is protected under fair use then. Is it only after a fair use work makes money, even if the creator hasn't made a profit off of it, and then it isn't fair use anymore? There is the potential that the artist can profit from the exposure indirectly, even if it isn't from the copyrighted work. Maybe this is how factor two is breached. The "nature of work," means were your intentions immoral, and the infringer was attempting to profit off of the work? Either way, copyright law should be revised in this section to clarify. Fair use is a powerful defense, except the only way to use it is if one is sued. Attorney, Jim Jesse, states that "the ultimate test of fair use…is whether the copyright's goal of promot[ing] the Progress of

[15] Randy Kennedy, "Shepard Fairey and The A.P. Settle Legal Dispute," The New York Times, January 12, 2011, accessed May 01, 2018, https://www.nytimes.com/2011/01/13/arts/design/13fairey.html.

[16] Famili, "Mashed Up In Between," 105.

Science and useful Arts' would be better served by allowing the use than by preventing it" (11).[17]

Parody and Derivative Work

There are two more points to talk about concerning copyright law: what constitutes parody and derivative work. Copyright holders have the right to create derivative works; that is altering the content of the original and making it into another body of work.[18] Fair use limits this a bit by stating that as long as the non-copyrighter holder isn't profiting off of it or doesn't harm the copyright holder's ability to make money as specified in the fourth doctrine, "the effect of the use upon potential markets" (105).[19] Most artists think if they modify a song enough, then it is fair use. This is simply not true according to Jesse. One must always acquire permission to use any part of a recording or composition of work if used for profit. Again, this leaves many small and amateur artists behind. There are licensing costs and hiring a lawyer or musicologist to think about to determine if a work is fair use and without a doubt not infringing on another copyright owner's work. It's common for infringement cases to be settled out of court. It's another option for cash-strapped independent artists.

The defining case on parody is Campbell v. Acuff-Rose Music, Inc. The band 2 Live Crew applied the music of "Oh, Pretty Woman" to their lyrics.[20] The band argued that the song was a parody since it criticized the concepts and ideas expressed in the original song. Campbell

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[17] Jim Jesse, "Great Artists Steal? Understanding Digital Music Sampling and Its Legal Status. Volume 19," *Copyright & New Media Law*.

[18] Ibid.

[19] Famili, "Mashed Up In Between," 105.

[20] Jim Jesse, "Great Artists Steal? Understanding Digital Music Sampling and Its Legal Status. Volume 19."

had asked the record label for permission but used the song anyway giving credit to the composer, Rob Orbison, and the record label. The case made it to the Supreme Court, and the court ruled in favor of 2 Live Crew. The work was said to be an infringing derivative of the original but was defensible as fair use because it constituted a parody. "By definition, one cannot parody a work without actually using the work." [21] Famous parody artist Weird Al get permission before he uses a song. Some of his works range from Michael Jackson's "I'm Bad" which turned into "I'm Fat" and Coolio's "Gangsta's Paradise" to "Amish Paradise." [22] Jesse advises all artists to do the same. Again, the average YouTuber or Facebook user would use fair use to protect themselves from litigation.

Orphan Works

The author of a work doesn't need to file for copyright protection thanks to the Copyright Act of 1976. It has caused a significant amount of issues for the U.S. copyright office. Such amendments like the Sonny Bono Copyright Term Extension Act of 1998, extended the duration of copyright protection. It has resulted in the inability to locate some copyright owners. There haven't been any new amendments to orphan works as of 2018. One prominent case against the Google Books Project didn't resolve the issue (13-17).[23] Google argued there use of the books from other publishers was fair use in that it wasn't used for profit and educational purposes. Users would be permitted only to see snippets of the digitally copied books, whereas the public

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[21] Ibid.
[22] Ibid.
[23] United States, Library of Congress, United States Copyright, *A Report of the Register of Copyrights*, by Maria A. Pallante, 2015, 13-17, accessed May 1, 2018, https://www.copyright.gov/orphan/reports/orphan-works2015.pdf.

would have access and the ability to download books currently available to the public domain. The publishers feared that it would harm the sales of their books. Publishers settled with Google and had the power to choose which books Google can digitize. Orphan works still lack protection. The Senate came close to passing a bill in 2008 called the Shawn Bentley Orphan Works Act of 2008. It would let the infringers use the work in good faith, but when the owner of the copyright was found, then the violator would have to pay for the license (12).[24] This was a step in the right direction, but like most copyright law, there haven't been any concrete amendments to the Act to clarify what constitutes as fair use and what infringes on the ideas of the copyright holder.

Third Party Copyright Solutions

Current copyright law doesn't mix well with current remix culture. Larry Lessig along with Hal Abelson and Eric Eldred created Creative Commons, a nonprofit organization aimed to promote the sharing and creation of works. A Creative Commons license allows authors to distribute their work with limited rights, "'some rights reserved' in contrast to the 'all rights reserved' nature of the copyright system (112).[25] The license is for non-commercial use like other fair use perimeters and requires permission after the fact if the work is used for more commercial purposes. The license had the internet in mind. This content can be reused and remix at will without worrying about expensive litigation. However, artists need to sign up for this to make it worthwhile. The reality is that many large music and publishing industries control the majority of the copyrighted material.

[24] Ibid., 12.
[25] Famili, "Mashed Up In Between," 112.

Flickr and YouTube are two web-based companies taking advantage of Creative Commons to manipulate digital content easily.[26] These licenses are used by public and private organizations like museums and private individuals.

YouTube used Content ID for copyright holders. It scans all uploaded video and audio for a copyright match. The owners of the copyright can have the video muted, taken down, or profit from the views by running ads against it.[27] They can also track viewership. It looks like a win for both content creators and copyright holders. There are now over 5,000 copyright partners in the YouTube network. These range from music publishers to movie studios. Amateur content creators can create remixes without worrying about possible litigation. The Digital Millennium Copyright Act (DMCA) sometimes mistakenly flags, blocks or removes many of the videos for infringing on copyrighter's content. Some kinks are being worked out with the system, but Google has praised the Content ID system for its innovation. Google would like to use the system for the whole web, but the cost to run the system just for Google can cost up to $60 million.[28] Government involvement is vital to implementing this across the web. It could resolve many costly settlements and lawsuits between small and amateur artists and the large corporations.

Another solution proposed by Harper is the U.S. government legalizing amateur remix culture. Adopt a licensing system where the artists can use the copyrighted work as much as they want, but when the begin profiting from the work, then they must pay into the licensing system

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[26]Laura Gordon-Murnane. 2015. "Copyright Tools for a Digitized, Collaborative Culture." Online Searcher 39, no. 6: 28-52. Library & Information Science Source.

[27] Ibid.
[28] Ibid.

for the work (37).[29] This is very similar to the Creative Commons idea. Except the idea would be to enroll all of the copyrighted work into one system. One thing to consider, Congress would need to determine how each shareholder would receive royalties and a percentage of the revenue. Legislators seem to assume that the majority of individuals create to make money, but the widespread use of remix culture on digital platforms like YouTube, Instagram, Facebook, etc. appears to state that this is a digital cultural phenomenon. It shouldn't punish the end-user for a common practice of sharing and remixing content.

Conclusion

Copyright Law has come a long way from offering absolute rights over an author's content. This issue is a bit contentious among content holders and creators alike. Some artists and large corporations would agree that we need stricter laws to protect the unlicensed sharing of content running rampant across the web. However, sharing of ideas and works instills creativity and foster innovation, which is precisely what copyright law intended to do before it becomes jumbled under ambiguous precedents. Copyright law is need of a remix that fits the needs of the digital revolution. The answer isn't necessarily more copyright law. The idea that a "feeling" or a "genre" can be copyrighted, even if not specifically stated but shown by the ruling of a trial like "Blurred Lines," sets a dangerous precedent. It decimates the desire to create art, which is what copyright law was intended to do, "ensure the progress of science and the arts by creating incentives" for the authors, musicians, and artists to create original work (112).[30] The same can be said for Fairey's digital interpretation of former President Barack Obama's portrait.

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[29] Harper, "Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm, 37.
[30] Famili, "Mashed Up In Between," 112.

Legalizing remix culture is a step in the right direction. Creative Commons and Content ID is a great third-party invention for establishing information policy and protecting content creators and copyrights holders' interests, but government intervention is needed to create a workable licensing system that can incorporate all of U.S. copyrighted material. The unlicensed sharing of information is here to stay. It's up to Congress to protect progress and innovation, and not stifle it with too much regulation.

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