


CHANGING COPYRIGHT

Essay by Negativland

In an attempt to suggest a culturally sane solution to the continuing legal confrontations between owners of copyrighted cultural material and others who collage such material into new creations, we advocate a broadening of the copyright concept of Fair Use. We want the Fair Use statutes within copyright law to allow for a much broader variety of free, creative reuses of existing work whenever they are used in the creation of new work. The world wide corporate assumption of private cultural ownership is now fencing off such timely artistic directions by using copyright law to assert that virtually any form of reuse without payment or permission is theft. From their economic point of view, cultural owners now use copyright law as a convenient shield from "direct reference" criticism, and a legal justification for total spin control and informational monopolization in the marketplace.

However, from an artistic point of view, it is ponderously delusional to try to paint all these new forms of fragmentary sampling as economically motivated "theft", "piracy", or "bootlegging". We reserve these terms for the unauthorized taking of whole works and reselling them for one's own profit. Artists who routinely appropriate, on the other hand, are not attempting to profit from the marketability of their subjects at all. They are using elements, fragments, or pieces of someone else's created artifact in the creation of a new one for artistic reasons. These elements may remain identifiable, or they may be transformed to varying degrees as they are incorporated into the new creation, where there may be many other fragments all in a new context, forming a new "whole". This becomes a new "original", neither reminiscent of nor competitive with any of the many "originals" it may draw from. This is also a brief description of collage techniques which have developed throughout this century, and which are universally celebrated as artistically valid, socially aware, and conceptually stimulating to all, it seems, except perhaps those who are "borrowed" from.


No one much cared about the centuries old tradition of appropriation in classical music as long as it could



only be heard when it was played live in front of your ears. But now all music exists as a mass produced, saleable object, electronically frozen for all time, and seen by its owners to be in continuous, simultaneous economic competition with all other music. The previously interesting idea that someone's music might freely include some appropriated music of another has now been made into a criminal activity. This example is typical of how copyright laws now actually serve to inhibit or prevent the creative process, itself, from proceeding in certain interesting ways, both traditional and new.

This has become a pressing problem for creativity now because the creative technique of appropriation has jumped from the mediums in which it first appeared (principally in the visual fine arts of painting, printmaking, and sculpture) to popular, electronic mass distributed mediums such as photography, recorded music, and multimedia. The appearance of appropriation techniques in these more recent mass mediums have occasioned a huge increase in owner litigations of such appropriation based works because the commercial entrepreneurs who now own and operate mass culture are apparently intent on obliterating all distinctions between the needs of art and the needs of commerce. These owners of mass produced cultural material claim that similarly mass produced works of appropriation are a new and devastating threat to their total control over the exclusive profits which their properties might produce in the same mass marketplace. They claim that, art or not, an unauthorized appropriation of any kind can not be allowed to directly compete in the appropriated material's avenue of commerce, as if they were equal in content, and equal in intent. The degree to which the unique nature and needs of art practice do not play any part in this thinking is more than slightly insane.


Consider the starkly stupid proposition that collage has now become illegal in music unless the artist can afford to pay for each and every fragment he or she might want to use, as well as gain permission from each and every owner. Consider how this puts a stop to all independent, non-corporate forms of collage in music, and how those corporately funded collage works which can afford the tolls had better be flattering to the owner in their usage. Where does such a routine



thwarting of common free expression lead to? Society does not thrive on commerce alone, and an enlightened one would have long ago established the legal primacy of artistic intent and authority to be at least equal to that of private commercial activities when these two social forces come to blows within our free market system. One feeds the mouth, but the other feeds the spirit, and either one without the other can only be seen as a form of societal decline. And if you don't think the overwhelming colonization and monopolization of creative formats by economic interests has had a debilitating effect on the very practice of creativity, you have already succumbed to that homogenized haze of inconsequence which commercial media surrounds us with day in and day out.

Because art is not defined as a business, yet must compete for economic survival in the business marketplace, we think certain legal priorities in the idea of copyright should be turned upside down. Specifically, a revision of the Fair Use statutes should throw the benefit of the doubt to artistic reuse and place the burden of proof on the owner/litigator. When a copyright owner wished to contend an unauthorized reuse of their property, they would have to show essentially that the usage does not result in anything new beyond the original work appropriated. However, if the new work is judged to significantly fragment, transform, rearrange, or recompose the appropriated material, and particularly does not use the entire work appropriated from, then it should be seen as a valid fair use - an original attempt at new art whether or not the result is successful and pleasing to the original artist, the owners of his or her work, or the court.


This would fully protect the owner's undisputed right not to be bootlegged, and it's NOT difficult to determine! Think of any past or present examples of unauthorized bootlegging, and any past or present examples of artistic appropriation, and you will find it is always perfectly obvious which is which. The difference between any kind of fragmentary transformation of existing work, and the unmanipulated presentation of whole works by others, which is required for successful bootlegging, would be as clear to courts and juries as it is to us. But this is precisely the crucial distinction in methodology which present law

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seems unwilling to acknowledge, thus throwing all kinds of valuable creative techniques and motivations into the same criminal hopper with economically motivated ripoffs. Both our courts and our corporations are now in the untenable position of assuming that once a work becomes a saleable object, that becomes its only significant roll in society, and that roll is the only one the law should be concerned with.

We acknowledge there are some complex difficulties in delineating exactly how fragmentary appropriation and esthetic motivation might be defined and allowed within revised Fair Use statutes. But awkward as that process may seem, we think that effort is possible. We presently see neither wisdom nor integrity in a set of laws that, except for very narrowly interpreted "fair use" allowances, simply ignores the validity, even the very existence of various established and valued art practices based on "direct referencing", (Surrealism for example) which have evolved through art formats of all kinds since the turn of this Century, yet do not necessarily fit within the Fair Use guidelines. Now it is implied that artists should actually strive to fit within the narrowly specified "Fair Use" government guidelines whenever attempting to use appropriated elements in new work. But when you become aware of the tiny sliver of specific artistic activity which Fair Use now allows, it doesn't take an artist to see that there is much more to be done with all the media influences which surround us. These ideas range far, wide, and weird, not always following the strictly defined "rules" of parody or carefully controlled commentary which the tiny tunnel of Fair Use statutes now provide for.

Please consider the ungenerous and uncreative logic we are overlaying our culture with. Artists will always be interested in sampling from existing cultural icons and artifacts precisely because of how they express and symbolize something potently recognizable about the culture from which both they and this new work spring. The owners of such artifacts and icons are seldom happy to see their properties in unauthorized contexts which may be antithetical to the way they are spinning them. Their kneejerk use of copyright restrictions to crush this kind of work now amounts to corporate censorship of unwanted independent work. Unlike the basic thrust of all the rest of U.S. law, copyright law actually assumes that all unauthorized



uses are illegal until proven innocent, and any contested "fair use" always requires a legal defense, which remains beyond the financial grasp of most accused "infringers". This financial intimidation results in the vast majority of art appropriators caving in and settling out of court, their work being consigned to oblivion, and the "owners" having it all their way, including their expenses paid under the guise of "damages".

The question we want you to consider is this: Should those who might be borrowed from have an absolute right to prevent any such future reuses of their properties, even when the reuse is obviously part of a new and unique work? Do we want to actually put all forms of free reuse under the heading of "theft" and criminalize a valuable art form such as collage? - A form which may involve controversial social/cultural references and cannot operate true to its vision when permission is required. Present copyright prohibitions appear unable to appreciate the flow of the art forest because they are forever fixated on the money trees. One might say that Soviet Communism finally fell because it insisted on ignoring the human nature of its own citizens. Here in the land of the free, as well as everywhere else, it is basic to human nature to copy for our own creative purposes - in fact, it's how we got to this level of civilization. This ageless aspect of human creativity is nothing but desirable and need not be criminalized when the motive is to create new work.

The law must acknowledge the logical and inalienable right of artists, not publishers and manufacturers, to determine what new art will consist of. The current corporate control over our technologically based culture has an ominous feel to it because these private owners of our common cultural life have succeeded in removing the concept of culture from a pluralistic dispersment of esthetic ideas, born and realized by individual creative impulses, and given it over to fewer and fewer corporate committees of molders and marketers who are driven only by an over riding need to maintain an ever rising bottom line for their shareholders in the culture market. Is the admittedly pivotal role which society places on commerce really so unassailably useful when it begins to inhibit and channel the very direction of an "independent" art form, "allowing" it to evolve this way, but not that way? Is the

role of Federal Law to serve the demands of private income, or to promote the public good through free cultural expression? Both?

Then the crux of the debate we hope to raise is how are we going to maintain reasonable forms of fair compensation for artists and their whole parasitic entourage of associated agents without inhibiting, stifling, or criminalizing perfectly healthy and valuable forms of independent music/art practice which arise out of new, enabling technology? We believe the promotion of artistic freedom should, for the first time, find a balanced representation with the purely commercial guidelines which now dominate copyright law.

Finally, this shift in the mental paradigm which now deifies all-encompassing private ownership must be forged and supported in all the little areas which now attend it. For instance, contract clauses between music labels and their artists which assert the label's exclusive right to market the artists' work could conceivably be renegotiated by fair use supporters to include the possibility of a subsequent fair use of the artist's work by anyone else. The clear and crucial distinction between bootlegging and fair uses, and the change in attitude towards the artistic legitimacy of Fair Use, should be reflected in the very legal documents of private enterprise which occasion all these lawsuits in the first place. Contracted artists who support Fair Use could begin demanding such clause adjustments in their contracts now, and in fact, this would be an interesting means for the traditionally "helpless" artist to actually begin affecting this artistically desirable change in our present legal system, as they are apparently the only people involved who are capable of putting art before profit, and no one else involved appears willing to push this convention challenging juggernaut into reality.

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