Intellectual Property: The Attack on Public Access to Culture

by Howard Besser

Under the guise of a response to the digital age, the corporate "content industry" has targeted our basic right to free speech, including satire and social commentary. The insidious vehicle: copyright law. In 1996 in *Wired*, law professor Pam Samuelson assailed the "copyright grab" by publishers, motion picture studios, music distributors, among others. Since that time, the industry has become more aggressive about strengthening protection for copyright holders and weakening public rights.

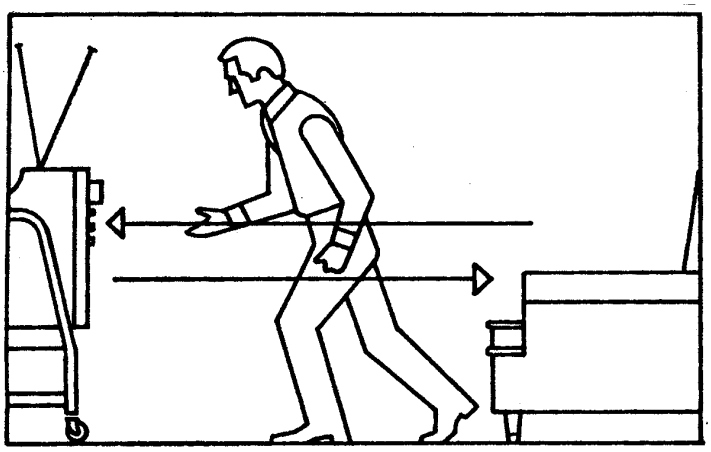
Many holders of copyright view it as an "economic right." US copyright law, however, was actually established to promote the "public good" by encouraging the production and distribution of content. Article 1, Section 8 of the US Constitution states:

> The Congress shall have power …to provide for the … general welfare of the United States *To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;* [emphasis added]

The rationale behind copyright is that granting creators temporary monopoly rights over their creations will encourage them to create more. The real goal is to ensure that new knowledge will be developed and circulated.

Underpinning much of the recent rhetoric by the "content industry" is a view of copyright as an unlimited economic right. This logic is misguided. The economic rights granted by copyright are merely a byproduct of attempts to fulfill the societal need to increase creativity. Though it granted Congress the power to give creators monopoly control over their creations, the Constitution was careful to insert the phrase "for limited times."

Prior to the digital age a delicate balance had emerged between copyright holders and the general public. Copyright holders had certain exclusive rights over their material, but those rights were tempered by access rights held by the public. The three most important public rights were the public domain, fair use and first sale.



Jess Rowland

Copyright has always been a temporary monopoly. When a copyright expires, the work enters the public domain, a diverse unregulated public space. Anyone can draw on material in the public domain for any purpose whatsoever. Unlike material under copyright, no one can charge for using the public domain or prevent the use of such work. A rich public domain has allowed creativity to flourish. Because *Romeo and Juliet* is in the public domain, we have a wide variety of creative interpretations—from a version set in contemporary Mexico to *West Side Story*—all without having to get permission from a copyright holder. The public domain is a critical public space, an essential part of both education and creativity.

Fair Use, a common practice codified into law in the 1976 Copyright Act, limits a copyright holder's monopoly over the use of his/her work by permitting copying under a limited set of circumstances for uses such as education, private study and satire. The fair use doctrine assumes circumstances that constitute a compelling enough social good that even if a copyright holder wants to prevent them, the law will not support it. Fair use allows students to photocopy copyrighted articles for personal use, teachers to read excerpts from copyrighted works in class, reviewers to quote from copyrighted works in their published reviews, and satirists to incorporate portions of copyrighted works.

It also permits repurposing and recontextualization for parody or social comment. Re-using something for a purpose other than its original intention is a fundamental part of creativity. Kids play-act in clothes made for grown-ups, they use tin cans for telephones, and they create collages from magazine photos and articles. Creative adults constantly repurpose content in a wide variety of social commentary situations (from rap music sampling, to collage illustrations, to postmodern art). The elimination of fair use would not only hurt education and social welfare, but could stifle the very creativity and content production that copyright was intended to foster.

The First Sale doctrine limits a rights holder's control over a copy of a work

to the first time that copy is sold. According to first sale, anyone who purchases a work can then do what they want with that copy—resell, lend, share, or destroy it—without ever consulting the rights holder. Among other social benefits, this doctrine has permitted libraries, used bookstores, and used record stores to operate without having to consult with a rights holder each time they lend or sell a work.

Attempts to eliminate the first sale doctrine in the digital age raise even more critical issues. A key aspect of first sale has prevented the rights holder of intellectual property from completely controlling access to it and how it is used. Though an off-line publisher, newspaper or Hollywood studio might limit the audience for an initial set of sales, someone buying the work could turn around and sell it to anyone else. In proposed digital age legislation, however, the purchaser of a work could not legally sell it or give it away without permission. In a world without first sale:

- publishers could refuse to distribute to unfriendly critics
- organizations could prevent gadflies or consumer groups from viewing documents that might be used to paint them in unflattering terms
- authors could prevent known satirists from getting copies of their works
- libraries would not be able to lend works

The proposed elimination of fair use and first sale for digital material will gut much of copyright's ability to promote the public interest, turning it into a vehicle that guarantees economic rights to copyright holders.

Taken together, public domain and fair use have allowed satire and social commentary to flourish. Without them, copyright holders could not only charge for the reuse of material, but could also limit creative use not to the holder's liking. A recent example of this occurred in Spring, 2001. The estate of Margaret Mitchell was able to temporarily block the publication of a satire of the sexism and racism in *Gone with the Wind* by claiming that the satire (*The Wind Done Gone*) infringed on their copyrighted story and characters. A higher court eventually allowed book's publication, but as the content industry becomes more successful at changing the laws, look for more suits like this one.

Primitivo Morales

How the Digital Age is Different

The content industry fears that fair use and first sale in the digital age will cause them to lose significant control over their copyrighted content, threatening their profits. Because a digital work is so easy to copy, many rights holders fear that fair use provides a loophole for those who wish to redistribute a work. They also fear that first sale will permit their first buyer to redistribute a work for free, ruining the rights holder's market and destroying authorship incentives. The content industry is pressing for legislation which would virtually eliminate fair use and first sale in the digital world.

There are at least two key problems with the content industry's position: (1) in the past they have raised the specter of massive financial loss due to copying, yet history has proven their fears groundless; and (2) even if the content industry faces loss of control in the digital age, their proposed legal changes will result in an immense loss for the public, and tip the delicate balance of copyright law firmly to the side of the industry.

When home video recorders were introduced in the U.S. in 1975, the content industry feared massive copyright infringement. In 1976 key members of the content industry (Walt Disney Productions and Universal City Studios) filed suit requesting an injunction against the manufacture and marketing of Betamax videorecorders. They contended that these machines would cause them significant financial harm in that individuals could use them for copying protected intellectual property. A landmark 1984 U.S. Supreme Court decision (*Sony Corporation of America et al. v. Universal City Studios, Inc. et al.*) recognized home videorecording as a fair use, and allowed Sony to continue marketing the machines.

In the course of litigation, representatives of the content industry strongly supported the Universal/Disney position. Jack Valenti, president of the Motion Picture Association of America, called the Betamax a "parasitical" device. He claimed that VCRs posed significant threats to the film industry's markets:

- because cable television subscribers could record off the air and lend recordings to friends, very few people would subscribe, and cable TV would dry up
- because people could tape off the air then fast-forward through commercials, TV advertising revenues would tumble

- if people could tape movies off the air and watch them at home for free, they would stop going to movie theaters, and the studios would face financial hardship

None of these dire predictions have come true: the cable television industry is financially healthy, television advertising revenues haven't tumbled, and movie theaters still attract a healthy business. Ironically, the studios that tried to prevent the use of home video recorders now make almost half their income from rentals and sales to the home video market.

In the past four years, legislators re-shaping intellectual property law have heard vociferous testimony from the content industry about looming tremendous losses unless copyright laws are tightened. Most of the proposed legislation has responded directly to these fears in ways that will effectively eliminate fair use and first sale in the digital age. Public interest coalitions (including libraries, educational institutions and consumer groups) have countered that new legislation should preserve the kind of balance between rights holders and the public interest that existed with analog material.

What Has Copyright Become?

The framers of the US Constitution envisioned intellectual property law as guaranteeing a set of temporary monopoly rights to individuals — "authors and inventors"—to encourage the production of new works. Economic changes have created the current situation in which creators have not had the resources or means to disseminate their creations. Today most creators have little choice but to sell their copyright to corporations who then disseminate these works. For the most part, copyrights are not held by individuals, but by corporate entities. The content industry would argue that strengthening their position allows them to provide greater incentives to individual creators, but many creators challenge that notion (National Writers Union president Jonathan Tasini just won a suit against the *New York Times* on behalf of freelance writers.) Strength-ening copyright laws bolsters the position of the content industry by giving it an untempered monopoly over content, at the expense of the public good. It does little to encourage the creation of new content.

Proposed legislation to turn copyright laws into economic guarantees for the holders is but the most recent attempt by the content industry to tilt the balance in their favor. If content providers have their way, intellectual property use will move away from domains that have at least some provision for public good and social benefit (e.g. as fair use and first sale)—into arenas where only economic relationships apply.

Limited Time

The "limited time" duration of copyright guaranteed that works would enter the public domain relatively quickly. This provision was instrumental in ensuring that the law promoted the creation of new works, rather than the extraction of profits from content. The duration of a copyright guarantee has increased over time. A 1709 British law set copyright for 14 years. Prior to 1976, copyright was granted for 28 years and renewable for another 28 years. The 1976 Copyright Act increased the term to 75 years, and the 1998 Sonny Bono Term Extension Act increased it still further—to 95 years for corporations and 70 years after death for individuals.

Intense lobbying and public relations efforts by the content industry reveals a desire to see the public domain completely eliminated. In fact, provisions within the 1998 Digital Millenium Copyright Act took works that had fallen into the public domain and put them back under copyright. The two companion 1998 copyright acts placed a wide variety of materials that should be entering the public domain back under copyright control for at least another 20 years (which gives the content industry ample time to extend copyright again). Songs like Irving Berlin's *Blue Skies*, Harry Woods' *When the Red, Red Robin Comes Bob, Bob Bobbin' Along*, and Hammerstein and Kern's *Ol' Man River* and *Showboat* should all enter the public domain next year, as should stories by Virginia Woolf, F. Scott Fitzgerald, Ben Hecht, Rudyard Kipling, P. G. Wodehouse, and Zane Grey. All of the above have been placed under copyright control for at least another 20 years.

OUT OF SEASON TO TASTE

Those little scooters are everywhere
like anti-SUVs

or computers (just add legs and hair)
or upbeat franchisees

Hooters opens up the street
Have faith, it closes too

Sidewalk scooters too will pass,
all at once, as if on cue

Only the computers keep coming on
When fingers grow from them, we're done

by klipschutz

Some content industry promoters defend their encroachments on the public domain by claiming that the new economic models of the digital age will eliminate the need for a public domain. They contend that maintaining copyright in perpetuity allows them to create "micro-payment" delivery systems, thus allowing anyone to access older content for just a few pennies per use. However, copyright is as much about control as it is about access. Under the system being proposed rights holders will be able to prevent uses not in their own interest. Following their logic would turn the public domain into a controlled pseudo-public space where information is clearly a commodity to be bought and sold.

This lengthening of copyright duration flies in the face of the Constitution, which, as noted, granted Congress the right to institute copyright protections for *limited times*. A robust public domain of copyright-free material allows creators to draw on and incorporate history into new works. It is absurd to think of 75 or 95 years as a "limited time," and even more absurd to rationalize that exclusive rights lasting beyond one's lifetime would provide incentives to a creator to create more works.

In a 1998 editorial, the *New York Times* (itself a major content-holder that benefits from strong copyright legislation) sharply criticized the extensions of copyright duration that have since become law.

> "Supporters of this bill, mainly the film industry, music publishers and heirs who already enjoy copyright revenues, argue that extending copyright will improve the balance of trade, compensate for lengthening life spans and make American protections consonant with European practice. But no matter how the supporters of this bill frame their arguments, they have only one thing in mind: continuing to profit from copyright by changing the agreement under which it was obtained.
>
> There is no justification for extending the copyright term. Senator Orin Hatch argues that the purpose of copyright is "spurring creativity and protecting authors." That is correct, and the current limits do just that. The proposed extension edges toward perpetual patrimony for the descendants, blood or corporate, of creative artists. That is decidedly not the purpose of copyright.
>
> Copyright protects an author by granting him the right to profit from his own work. But copyright also protects the public interest by insuring that one day the right to use any work will return to the public. When Senator Hatch laments that George Gershwin's "Rhapsody in Blue" will soon "fall into the public domain," he makes the public domain sound like a dark abyss where songs go, never to be heard again. In fact, when a work enters the public domain it means the public can afford to use it freely, to give it new currency.
>
> . . . [T]he works in the public domain, which means nearly every work of any kind produced before the early 1920's, are an essential part of every artist's sustenance, of every person's sustenance. So far Congress has heard no representatives of the public domain. It has apparently forgotten that its own members are meant to be those representatives."
>
> (*NY Times*, Feb. 21, 1998 editorial)

Lengthening of copyright duration is particularly onerous in view of other attempts to assert copyright over material either already in the public domain or about to enter it. Corbis Corporation (a digital image stockhouse wholely owned by Bill Gates) contends that when it digitizes an image of an art work or photograph, the digitization creates a new copyright, to persist for the duration of copyright protection beginning with the date of digitization. If this contention is upheld by the courts, the digital version of works already in

the public domain will remain under copyright protection for an additional 95 years.

Recently defeated legislation would apply copyright to an entire database, and start the copyright duration clock ticking every time a new item is added to the database. This would allow a database provider a perpetual copyright merely by adding something new to the database every 90 years! This legislation died in Congress, but will be reintroduced with strong backing from the content industry.

The content industry was one of the leading supporters of Clinton's first campaign for the presidency. Clinton appointed former copyright industry lobbyist Bruce Lehman as Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, where he managed efforts to overhaul the nation's intellectual property laws. Lehman was the driving force behind the administration's green paper and white paper recommendations on major changes to those laws.

Hugh D'Andrade

As copyright legislation advanced through Congress, content industry lobbyists aggressively courted congresspeople. The Association of American Publishers (AAP) hired former congresswoman Pat Shroeder to head their organization. In the 1996 election, the content industry donated over $11 million to congressional campaigns, split fairly evenly between Democrats and Republicans. In the early part of the 1998 campaign (as copyright legislation was under debate in Congress), Hollywood- connected donors gave more than $1.3 million to congressional campaigns. The content industry also waged a strong public relations campaign, claiming the economy would suffer irreparable harm if copyright controls were not tightened. After the Digital Millenium Copyright Act and the Sonny Bono Term Extension Act finally passed into law, a wire service story revealed Disney's aggressive lobbying (particularly as to portions which extended copyright protection for an additional 20 years). Hardly surprising, as Disney's copyright over characters such as Mickey Mouse, Goofy, and Donald Duck was due to expire. Equally unsurprising, a week after the Digital Millenium Copyright Act became law, Bruce Lehman resigned his Administration post, having accomplished most of his goals on behalf of the content industry.

Licensing

For the past decade, most publishers have refused to sell material in digital form to libraries. Instead, they require libraries to license this material. Licenses are contractual arrangements, and publishers claim that rights such as fair use do not apply to these arrangements. This has put publishers on a collision course with librarians. AAP president Pat Shroeder regards librarians as the enemy. According to a Feb. 7, 2001 article in the *Washington Post*, she complained, "Publishers want to charge people to read material; librarians want to give it away."

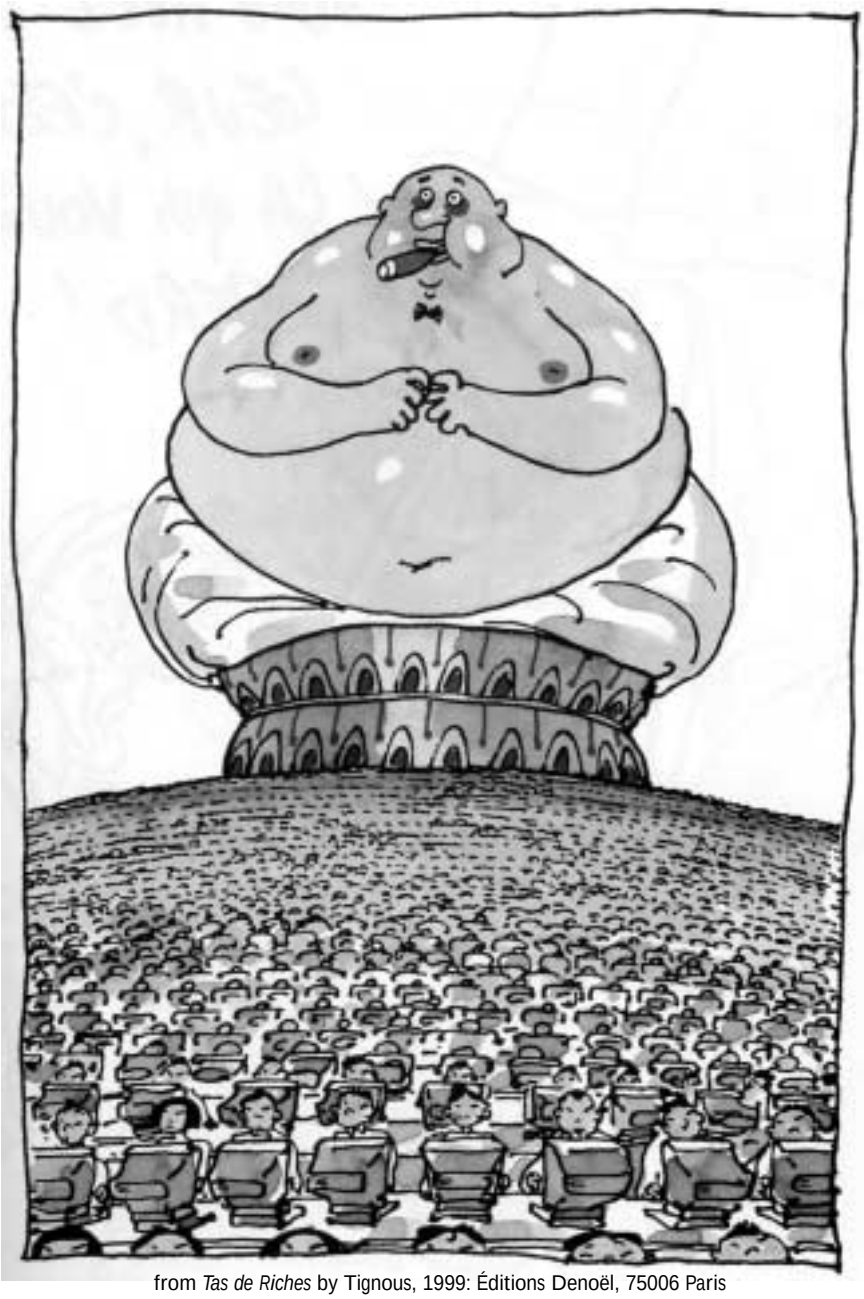
Under licensing schemes, material is leased rather than bought outright. This raises a myriad of concerns for libraries. Licenses are for a fixed period of time at the end of which license fees may be raised drastically. If the market isn't large enough, the material may be withdrawn from the market. The licensor may eliminate particular items for economic reasons or because they are controversial, making it difficult for a library to build collections or maintain a historical record.

Site licenses of digital works of art to educational institutions can cause particular problems for teachers and students who build curricular or creative materials that incorporate these works. They are hesitant to spend the time to create new materials incorporating licensed digital images absent some assurance that the campus license (and each individual image that was originally part of it) will contin-

ue in perpetuity, and that they can take their creations with them when they leave the campus. Sabbaticals at another campus, faculty or students taking positions elsewhere, or even showing a portfolio to a potential employer would all be prohibited by most licensing agreements.

Licensing material in digital form can also raise privacy concerns. A trend in university licensing of digital material is for members of the institution to access such material directly from a central site maintained by the publisher, rather than from a local site mounted by the university. This type of architecture requires that each individual be identified to the publisher as a valid member of the licensed university community. Such an approach carries the potential for dangerous violations of the privacy that university researchers have come to expect. Libraries carefully guard circulation information, and many purposely destroy all but aggregate statistics to avoid having to respond to law enforcement agencies seeking an individual's reading habits. It is extremely unlikely that publishers will provide this kind of privacy protection. Many websites monitor the browsing at their site, tracking who is looking at what, how often and for how long. A whole industry has emerged that purchases this kind of personal marketing information from site managers and resells it. In lean financial times, even licensors who are committed to privacy concerns may find the temptation of payment for this kind of information difficult to resist.

Another key concern for libraries is the way in which licensing digital information will affect interlibrary loans (ILL). Due to consolidation in the publication industry, academic journal subscription costs have skyrocketed. The only way libraries have been able to respond is by developing cooperative purchasing agreements with other nearby libraries. But most licensing agreements for journals in electronic form prohibit ILL or any other form of access outside the immediate user community. Licensing has the potential of not only destroying libraries' recent response to the rising cost, but may also destroy their historic cooperative lending practices. Traditionally, even the poorest library could employ ILL to borrow materials it could not afford to purchase. This practice is likely to be prohibited by digital age licensing agreements.



from *Tas de Riches* by Tignous, 1999: Éditions Denoël, 75006 Paris

Free Speech Suppressed with Intellectual Property Law

The increasing use of licensing schemes to avoid domains (like fair use) where the public good must be taken into consideration is part of a larger trend whereby commercial transactions establish precedence over public rights.

Libel laws have been used recently to try to suppress criticisms traditionally protected by free speech. These lawsuits, filed by corporate entities against individuals, have laid the burden of proof upon the defendants, forcing them to prove all their criticisms were true. In 1998, Oprah Winfrey successfully (and at great cost) defended herself against a $12 million lawsuit filed by the cattle industry under a recent food disparagement law. According to a *New York Times* wire service article, "critics say that [the recent food disparagement laws] are a serious infringement on free-speech protections and are driven by business interests intent on silencing journalists and others who question the safety of the

American food supply." In a similar case in Britain, McDonalds sued activists from London Greenpeace over a leaflet urging consumers to boycott McDonalds for a host of reasons ranging from health to working conditions to the effects of cattle raising practices on tropical rainforests. In this long-running "McLibel" case, the defendants were forced to prove each of the accusations in their leaflet.

Many groups use the threat of intellectual property infringement litigation to avoid criticism or suppress works. Limitations to the fair use defense against copyright infringement can result in the elimination of parody and satire, the curtailment of free speech, and the suppression of creativity. Below are a few recent cases (many more are available in the online longer version of this article at (http://www.gseis.ucla.edu/~howard/Copyright).

- In 2000, Mattel sued artist Tom Forsythe claiming that his satiric photographs of Barbie dolls violated their copyright and trademarks. Forsythe had sold postcards of his photographs with the dolls posed performing household chores and in sexual positions, obviously commenting on the role of Barbie in perpetuating gender stereotypes. In February, 2001 a federal Appeals Court ruled that Forsythe had not violated Mattel's copyright or trademark.
- In the late 1960s, satirical cartoonist Dan O'Neill created a mouse which he used as a minor character in an underground comic book that satirized corporate America. Walt Disney Productions sued O'Neill and his publisher for copyright infringement. In a series of cases and appeals that nearly ruined O'Neill financially, the courts ruled that publication of a comic including the mouse was a violation of Disney's copyright (*Walt Disney Productions vs The Air Pirates*). The rulings in this case raise disturbing issues about copyright infringement being used to inhibit an artist from engaging in satire or parody of a cultural icon.
- In 1998, a French AIDS awareness advertising campaign withdrew two ads under threat of suit by Walt Disney Inc. One featured Snow White in suspenders and fishnet stockings and the other featured Cinderella in a seductive pose (Disney Pressure Halts French AIDS Ad Campaign). Disney contended that these ads constituted copyright infringement. The mere threat of litigation caused the AIDS awareness group to pull their ads. This incident is noteworthy both because it did not require actual litigation (a mere threat assured compliance) and because Snow White and Cinderella are not Disney creations, but are folklore characters going back hundreds of years.
- In 1991 Negativland released a single parodying disk jockey Casey Kasem and U-2's song "I Still Haven't Found What I'm Looking For." Almost immediately U2's distributor (Island Records) and publisher (Warner/Chappell) went to court charging copyright infringement. After only two weeks, all recordings were pulled from the shelves, and the recording has never made it back into music stores. Several years of litigation almost bankrupted Negativland's members. But the band, which had a history of cultural satire, continued to adamantly defend the social importance of artistic appropriation such as sampling.

  "Throughout our various mass media, we now find many artists who work by 'selecting' existing cultural material to collage with, to create with, and to comment upon… The psychology of art has always favored fragmentary 'theft' in a way that does not engender a 'loss' to the owner. Call this 'being influenced' if you want to sound legitimate." (Negativland, page 154)
- In fall, 1996, webmasters of fan sites for *Star Trek* began receiving letters from a Viacom/Paramount attorney charging copyright and trademark infringement. The letters demanded that all such material be removed immediately, including photographs, sound files, excerpts from books, and even "artistic renditions of *Star Trek* characters or other properties." A few months later it was revealed that Viacom/Paramount was planning its own *Star Trek* website, and had used the threat of litigation to remove competition. This litigation threat had an additional chilling effect on free speech: a request by the Star Trek Usenet Discussion group (rec.arts.sf.starwars) to create a new subgroup dedicated to fan fiction was vetoed because Paramount's litigation had claimed that fictional accounts using *Star Trek* characters or settings were violations of their intellectual property (see articles by Granick, Ward).
- In 1996, the American Society of Composers, Authors and Publishers (ASCAP) told the Girl Scouts that scout camps must start paying a licensing fee to sing any of the four million copyrighted songs it controlled, such as "Happy Birthday." Many camps went songless for months, until media attention generated outrage sufficient to forced ASCAP to back down. But in doing so, ASCAP still insisted that it might prosecute camps for playing background music without a license (as opposed to singing around a

IN CASE OF FIRE RUSH HEADLONG TO YOUR OWN DESTRUCTION

Jess Rowland

campfire). Though most citizens would bristle at ASCAP's attempts to charge the Girl Scouts, as a copyright holder the law is on its side. The Girl Scouts' only defense would be fair use (but only as long as fair use remains a defense).

These cases all occurred under previous versions of copyright law. More recent legislation which would further limit or eliminate fair use carries with it greater danger. The discourse over copyright legislation is dominated by discussion of "economic harm" to the content industry if action is not taken. The harm to the public good from further limitations on fair use is treated merely as a minor side-effect.

Conclusion

Together, the concepts of public domain, fair use and first sale form an Information Commons—a diverse public space for free speech and creativity. In recent years we have seen a powerful assault on this Commons—from bullying threats of litigation, to court cases, to harsh legislation. The content industry is not only trying to reshape copyright from a public good into an unlimited economic right, but is even trying to expand its control into new arenas in order to suppress criticism.

The content industry has complained vociferously about potential economic harm, yet its assertions seem to be specious: The Netherlands has a much more liberal policy than fair use, allowing individuals unlimited reproduction of copyrighted material for their own private use; and the content industry still operates profitably within the Netherlands. As the effects from the Betamax court case show, technological changes initially perceived as economically threatening can lead to the discovery of new economic models involving income streams that exceed the ones previously "threatened". And as the software industry has shown, lowering prices not only provides a great deterrence to copyright infringement, but can open up new markets of potential customers.

There has always been a distinct set of differences between information and commodities. (For example, if I sell or give someone a toy, I no longer have it; but if I sell or give them information I still retain it.) The law has recognized this difference by treating intellectual property differently than tangible property. As the law has eliminated various public good aspects of intellectual property, we have seen a rapid increase in the commodification of information. Intellectual property becomes more bland as it increasingly falls under corporate control. Individuals find it more difficult to become creators. Diverse voices are more and more marginalized. As Negativland wrote in the Epilogue to their book, "We are suggesting that our modern surrender of the age-old concept of shared culture to the exclusive interests of private owners has relegated our population to spectator status and transformed our culture into an economic commodity." (Negativland, p 190) We need to stop the fencing off of our Information Commons and seize it back as a public space.

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