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Intellectual Property Law, Freedom of Expression, and the Web

Kembrew McLeod
University of Iowa

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Kembrew McLeod



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Intellectual property law is a key variable that helps drive the so-called "new economy." Without the legal and economic protection that intellectual property law provides, companies would not have had the confidence to adopt a new business model in which intangible, easily reproducible goods and services have become among the most important things that are sold. Strong intellectual property protection is extremely important for companies operating within this new economic landscape, and they do not take kindly to others who - without authorization - use companies' trademarked, copyrighted and patented goods (in the case of celebrities, their images are protected by right of publicity law).

The issues surrounding both the Internet and intellectual property law are numerous and extremely complicated. In this essay, I will focus only on the use of intellectual property law by corporations to restrict freedom of expression.

Trademark law is increasingly being deployed to police how corporate logos are being used on the Web. This is significant because trademark law has no formally written "fair use" provision that is analogous to copyright law. Corporations and the courts don't view the corporate trademarks that litter our cultural landscape as culturally rich signifiers that can be used to help make sense of the world. Instead, they are viewed as private property first and foremost, and any attempts to use these trademarks in ways that property owners don't approve can result in costly lawsuits.

In order for people to comment on, critique, or fawn over the subject of a site, Web authors reproduce trademarked and copyrighted images. Although there are numerous websites that haven't had legal problems, those sites that go beyond simply promoting a television show, movie or fictional character and which are critical of their subjects often raise the ire of a corporate trademark owner. Copyright law is also being used in much the same way and, despite the "fair use" provision in the law, companies have been successful in shutting down types of expression they do not approve of because the cost of litigating a copyright infringement lawsuit is extremely high. In other words, when faced with the possibility of a lawsuit, potential infringers often choose not to risk a costly legal battle and, instead, decide not to engage in an activity that would bring the wrath of a corporation with a well-financed legal department.

The Internet is commercially-mediated terrain. As more and more of our interactions are mediated electronically and cultural texts are routinely distributed online, we are increasingly exposed to the policing powers of intellectual property owners. That is, when we create new cultural texts (and engage in everyday interpersonal discussions), we often reference existing cultural texts to convey certain meanings. In doing so, we cannot help but use privately owned signifiers when engaging in cultural production--signifiers that are copyrighted and trademarked by very protective corporate entities who care little for protecting freedom of expression.

My use of the phrase "freedom of expression" has a double meaning, because I successfully trademarked the phrase. After developing an academic interest in intellectual property law, I grew increasingly concerned with the way in which copyright, trademark and patent laws were being used to gobble up things that had previously been assumed to be in the public domain. Pharmaceutical companies, for instance, have patented human genes associated with diseases and common phrases like "home style" have been trademarked by the food company Mrs. Smith's, which threatened to sue Mrs. Bacon (the owner of a small St. Petersburg, Fla. bakery) for her unauthorized use of the phrase. <1>

As a kind of socially conscious prank, I applied with the U.S. patent and trademark office to register "freedom of expression" as a trademark, and in 1998 I received a certificate that stated that I was the proud owner of the mark. It was registered only under Class 16 of the international schedule of classes of goods and services, which covers, generally, "printed matter" and the like. But even though I can't prevent someone from using the term in *all* situations, I can still sue for the unauthorized use of "freedom of expression" in *some* contexts - an irony that amuses (and scares) me to no end.

Regardless of how one feels about the ethics of manipulating the media, I have found media pranks to be an effective, interesting, and unconventional ways of engaging in cultural criticism beyond the limited scope of academia. Employing the services of my old high school prankster friend Brendan Love, who posed as the publisher of a fictional punk rock magazine also titled **Freedom of Expression**, I started to lay the groundwork for my plan. To add legitimacy to this potential news story, I hired Attorney at Law Joan R. Golowich (who did not know this was a joke) to send a letter ordering Brendan to cease and desist his use of the phrase. Before I had my first meeting with Ms. Golowich, my boss at Amherst College Library, Margaret Groesbeck, declared, in the same words someone else used a few years earlier, that this lawyer would "laugh me out of her office." Thankfully, I learned that intellectual property law is entirely humorless, and after informing Ms. Golowich of my intention to sue someone for using freedom of expression® without permission and after she examined my documents, she confidently told me that we had a case and that she would draft a letter to Mr. Love immediately.

I made copies of the letter and my trademark certificate and sent them, along with a press release, to local media. The point of this particular media prank was to "play it straight" and never let on to a reporter my intention to engage in social commentary -- I would let the news story itself do the talking. That is, rather than someone reading a quote from me stating "I'm concerned with the way intellectual property law facilitates the appropriation of significant aspects of our culture by corporations... blah blah blah," I wanted to orchestrate the story in a way that newspaper readers would come to that conclusion on their own. I did my best to sound serious when a woman with a wonderfully rhyming name, Mary Carey, interviewed me on behalf of the **Daily Hampshire Gazette**.

The story, which fittingly appeared in the Fourth of July weekend edition on the local section's front page, was cleverly titled "Freedom, an Expression of Speech." Carey did a good job of writing a balanced, "objective" story by interviewing both Brendan and myself, but it was nonetheless slanted in the direction of highlighting the absurdity of someone being able to own freedom of expression®. The article closed with the following poker-faced quote from myself, "I didn't go to the trouble, the expense, and the time of trademarking Freedom of Expression just to have someone else come along and think they can use it whenever they want." Unfortunately, the **Daily Hampshire Gazette** refused to give me permission to reprint the article.

Distinctions Between Intellectual Property Laws

Copyright, trademark, and patent law protect different types of cultural expression or information. They have emerged out of distinct histories, but people tend to use them interchangeably. For instance, in different parts of the **Daily Hampshire Gazette** article, the reporter referred to freedom of expression® as both a trademarked and a patented good. For her, the newspaper readers, and some readers of this book, these two terms might mean the same thing, but they are certainly not. So to alleviate any confusion, I will provide a very brief overview of patent, copyright and trademark law in the U.S., as well as the body of law that protects celebrity images - the right of publicity.

Copyright Law. Copyright applies to all types of original expression, including art, sculpture, literature, music, songs, choreography, crafts, poetry, flow charts, software, photography, movies, CD-ROMs, video games, videos and graphic designs. Copyright only applies to literal expression, and not the underlying concepts and ideas of that expression (that is, you cannot copyright an idea). The difference between an idea and the protected expression of that idea highlights the way Enlightenment and Romantic concepts of originality and authorship are deeply embedded in contemporary copyright law, a subject I will return to later.

There is a strong connection between the rise of capitalism, the invention of the printing press, and the commodification of literary and artistic domains, and copyright law was the first piece of legislation to arise from the collision of the above-mentioned concepts. In 1710, Britain passed the Statute of Anne, which was akin to modern copyright law, and in 1790 the U.S. Congress passed a similar law long before most major European countries. This is not surprising considering the fact that an early draft of the Declaration of Independence sought to protect life, liberty and "property" rather than "the pursuit of happiness," as in the well-known phrase contained in the final draft.

Copyright owners are extremely powerful and have at times flexed significant lobbying muscle. For instance, until 1998 the period of copyright protection lasted for the life of the author plus 50 years unless the creator was a business in which case the period of protection lasted for 75 years. But many of the Walt Disney's most lucrative character copyrights were due to lapse near the turn of the century, with (horror of horrors!) Mickey Mouse passing into the public domain in 2004, and Pluto, Goofy and Donald Duck following suit in 2009. Disney, along with the Motion Picture Association of America (MPAA), heavily lobbied Congress to pass legislation to extend copyright coverage for an extra 20

years, which Congress did. <8>

Trademark Law. As a form of intellectual property law, trademark law developed from a body of common law that was concerned with protecting commercial marks from being misused and misrepresented by competing companies. <9> Trademark law is also a federal statute and it grew out of nineteenth century court decisions surrounding "unfair competition" business practices. Trademark law is concerned with how businesses may "identify their products or services in the marketplace to prevent consumer confusion, and protect the means they've chosen to identify their products or services against use by competitors." <10>

Among the things that can be trademarked are distinctive words, phrases, logos and graphic symbols used to identify a product or service. Examples include MacDonald's golden arches, Prince's gender-bending squiggle symbol, or Kraft Real Cheese. Trademark law is not simply limited to protecting symbols, logos, words or names; it also covers shapes, sounds, smells, numbers and letters. (In 1997, hip-hop star Warren G sued country star Garth Brooks for the unauthorized use of the lower case letter "g," which he had trademarked.) <11>

Patent Law. Patent law protects from unauthorized commercial use certain types of inventions registered through the PTO, which grants three types of patents. The first, utility patents, are granted to useful inventions that fit into at least one of the following categories: "a process, a machine, a manufacture, a composition of matter or an improvement of an existing idea that falls into one of these categories." <12> The second, design patents, "must be innovative, nonfunctional and part of a functional manufactured article"; a bottle or flashlight design that doesn't improve functionality would qualify. <13> A plant patent, the third type, "may be issued for any asexually or sexually reproducible plants (such as flowers) that are both novel and nonobvious." <14> This last type of patent covers living matter and is relatively recent, the product of a 1980 Supreme Court decision that ruled that an applicant could patent a genetically engineered bacterium. <15> This type of patent expanded, by the mid-1990s, to include human genes, cell lines, proteins, genetically engineered tissue, and organisms. <16>

Right of Publicity Law. The oddball in this list, right of publicity law, evolved from legal principles different from copyright, trademark and patent law. Nevertheless, right of publicity, which protects celebrity images from being appropriated in a commercial context without permission, functions in much the same way these other intellectual property laws do. Like trademark law, it does not have a "fair use" component written into law, thus making it easier for celebrities to regulate the contexts in which their images appear. Right of publicity law descends from right of privacy law, and it came into existence to meet a particular social and economic need that developed over the twentieth century. Raymond Williams has argued that the logic of capitalism necessarily requires previously untouched areas of cultural activity to be brought into this web of commodity relations. The transformation of right to privacy, a nonproprietary law, into right of publicity, a proprietary law, is an example. <17>

The trademarking of important cultural texts is very significant because, unlike copyright law, it has no formally written "fair use" statute. To briefly explain, "fair use" evolved from court decisions that recognized the fact that absolute control of copyrighted works would circumscribe creativity and, perhaps more importantly for elite lawmakers, limit commerce. <18> The "fair use" statute recognizes that, in certain contexts, aspects of copyrighted works can be legally reproduced, and it allows for the appropriation of copyrighted works for use in, for instance, "criticism, comment, news reporting, teaching... scholarship, or research," according to the 1976 US copyright statute. <19> Fair use may apply to a variety of other situations not listed above, and in determining whether a work is fair use, the U.S. Congress outlined the following four factors:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- (2) The nature of the copyrighted work
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- (4) The effect of the use upon the potential market for or value of the copyrighted work <20>

The "fair use" statute was written in order to, in part, protect freedom of expression, but because trademark law has no formally written "fair use" provision that acknowledges privately owned images as culturally rich signifiers, it opens citizens up to a newly emergent form of censorship. I will illustrate this with an example. As much as some televangelists may have desired it, Jesus Christ cannot be trademarked. Without any intellectual property protection for Jesus' image, churches cannot suppress the presentation of artist Andres Serrano's *Piss Christ* -- the controversial photograph of a crucifix submerged in a glass of urine -- in the same way that Disney can legally enjoin an offensive

work of art that appropriates its trademarked characters. Just as it is impossible for Christian churches to trademark the image of Jesus Christ, it is unthinkable that the Bible could be copyrighted. However, the Church of Scientology - a religion that emerged in the age of intellectual property law - copyrighted its religious writings, and it has filed numerous copyright infringement lawsuits throughout the past few decades to maintain control over the context in which those writings are presented. <21>

Intellectual Property Law and the Internet

In recent years, the Internet has been a place where Scientology dissidents have organized and traded information, and many of the online critiques that have used Scientology's copyrighted and trademarked images have prompted intellectual property lawsuits. <22> For instance, in 1996 a judge ruled in favor of the Church of Scientology when a critic of the Church published copyrighted Scientology writings on the Internet as part of an ongoing discussion among church dissidents. Giving an example of a person who wants to engage in a critique of Christian religious beliefs needing Bible text to work from, one defendant's lawyer unsuccessfully argued that the use of the copyrighted documents were necessary to engage with and debate the Church of Scientology's ideas. <23>

The Church of Scientology has won numerous copyright cases against those who have critiqued the Church, and its court battles pertaining to the Internet helped set the first precedents concerning copyright and cyberspace. <24> The Internet is an increasingly significant venue where individuals can also use celebrity images to help make meanings and build communities among people with common interests. It is also a site where celebrities have intervened to shut down uses of their image they do not approve.

Celebrities are not the only ones who have intervened to shut down web sites; corporations that produce various cultural texts (television shows, motion pictures, etc.) have forced fan web sites to remove copyrighted and trademarked materials. The Fox network has vehemently protected its intellectual properties, and was one of the first television networks to pursue legal threats and actions against infringers in the early days of the Internet. Early on, they sent cease and desist letters to *Simpsons* sites and, notably, sites devoted to the *X-Files*. This angered many fans who felt that the success of the fledgling show (created by Chris Carter) was due in part to the early support and buzz created by the Internet. <25>

Many times corporations that want to eliminate unauthorized uses of their intellectual properties want to control the context in which their copyrights and trademarks are exhibited, particularly when shown in an unfavorable context. In other instances, companies are driven by a simple desire to protect their own investments. A college student, Gil Trevizo, launched a web site devoted to another Chris Carter-created show, *Millennium*, before Fox itself had launched its official site, which cost \$100,000 to create and which the network planned to debut on the Web the night the show premiered. The studio balked and sent Trevizo a letter from the legal department threatening a lawsuit unless all copyrighted and trademarked materials were removed from the site.

The student, forced to comply with Fox's demands, stated, "They don't understand an active medium where you have to interact with people as a community, rather than purely as customers." <26> This prompted an e-mail "flame war" against the studio, with one perceptive fan, Lori Bloomer, arguing, "If you look at the official sites, they tell you exactly what they want you to know." <27> She continued, "It is becoming clear that this is not just a matter of either copyright or trademark ... but that Fox execs want complete and total control over how every facet of their company is portrayed on the Internet." <28> With the numerous site closings, some site operators satirized Fox's actions by playing on instantly recognizable lines from the *X-Files*: "They're shutting us down, Scully" and "Free speech is out there." <29>

Jill Alofs - the founder of Total Clearance, a firm that specializes in multimedia and Web site clearances - stated:

An individual fan may create a site and not think that they are doing anything bad, but that is not necessarily the case in the eyes of all entertainment companies.... The entertainment companies want to have a sense of control over their properties, and often these Web sites do not fit in with the marketing and imaging that companies want to present. <30>

Of course, fan sites are not the only worry of corporations; even more troublesome is the targeting by IP-owning corporations of sites that criticize them. Increasingly, companies are using trademark law to silence criticism because of the law's lack of a formally defined "fair use" provision. For instance, a former employee of Kmart, Jim Yagmin, began a "Kmart sucks" site in 1995, where the teenager painted an unflattering portrait of his former employer. <31> Yagmin then received a threatening letter from Kmart's lawyers ordering him to: "(1) Remove the icon `K' and any appearances of `K' with the likeness of

that used by Kmart, including the red Kmart and the blue and gray Kmart sucks. (2) Remove the name Kmart from the 'title' of any page. (3) At the bottom of 'The Eternal Fear' page remove the lines 'Go steal something from Kmart today, and tell em Punk God sent ya'." <32 >

Kmart spokeswoman Mary Lorencz stated: "We monitor the use of our trademark everywhere, including cyberspace.... We've spent a great deal of time and money creating a positive image for it, and it's obviously important to us." <33 >
Despite the fact that Yagmin replaced the Ks with Xs, the modification was not enough for his nervous Internet service provider, which told him the site would have to be removed completely.

In another example of the way in which intellectual property law is used ideologically, Zack Exley, a University of Massachusetts-Amherst graduate student, registered the unclaimed domain names "gwbush.com," "gwbush.org," and "gbush.org." In 1999, he set up a satirical web site, a sort of "parallel universe" Bush campaign site. The same year the Bush campaign sent Exley a letter threatening to sue him if he continued to use their copyrighted and trademarked images on his site. He promptly removed the images, though the content of the site still remained critical of the Bush campaign. Exley's actions pushed the campaign to buy 260 other domain names, including the hilariously paranoid registering of such addresses as "bushsucks.com," "bushsux.com" and "bushblows.com." <34 > (If you type in the domain names bushblows.com, bushsucks.com or bushbites.com, it sends you directly to the official Bush-Cheney web site. In fact, many derogatory adjectival combinations will send you to the campaign's website - try it, it's a great party trick.)

At the time, Bush could do nothing about Exley's registering of these domain names, but since then it has become easier for famous people to secure control of a domain name that mirrors their own name. In 2000, pop singer Madonna won a case in front of the United Nations-affiliated World Intellectual Property Organization, in which she sued a porn site operator to transfer the domain name to the singer. WIPO's fast-track arbitration system has allowed corporations, music groups and celebrities to gain control of domain names that they argue were registered in bad faith. WIPO has ruled in favor of, for instance, Julia Roberts and Jethro Tull (which, of course, is not a person, but a band name). <35 > Among other eyebrow-raising decisions, the panel also ordered the domain name Corinthians.com, a site devoted to the Bible, to be transferred to a Brazilian soccer team of the same name. <36 >

By 1999, trademark law had expanded to protect this previously untouched aspect of the Internet. <37 > Numerous courts have found in favor of trademark-owning companies in "cyber-squatting cases." "Cyber-squatters" are those who have registered domain names that echo the trademarks owned by a company, such as the name "DonaldFuck.com." Sally M. Abel, International Trademark Association board of directors member, stated: "Courts as a whole are bending over backward to respect trademark rights.... [The courts] appear to have accepted that this is a commercial medium." <38 > That is, because the Internet is a site of commercial activity, the conception of trademarks purely as property should win out over the idea that they are important texts that can be used to engage in discourse about contemporary life.

At the end of 1999, trademark-owning corporations won a major lobbying victory when the U.S. Congress passed the Anti-Cyber Squatting Consumer Protection Act, which ensures penalties of up to \$100,000 for people who use trademarked names in their domain names (such as "CokeSucks.com," etc.). <39 > In the wake of the passage of this bill, companies have been particularly aggressive in pursuing legal action against those who incorporate their trademarks into domain names.

In 2000, a judge from the Southern District of New York ruled in favor of Mattel, Inc. in a case involving a porn site that had registered the name "Barbiesplaypen.com." The judge initiated a cease-and-desist order, prompting the site to shut down. At the time of the ruling, a Mattel spokesperson stated that the company would defend its brand names even when there have been no customer complaints, and in this case the company stated that it wouldn't risk having people think that Mattel was involved in a pornographic site. The Houston-based lawyer Robert Lytle, a legal expert on cyber-squatting, stated, "The case strengthens the ability of the mark owner to protect its mark from tarnishment from uses on the Web." <40 > Similarly, Ford Motors filed a lawsuit against 95 companies and individuals who violated this law. The 1999 Anti-Cyber Squatting Act gives trademark owners the sweeping legal power to transfer the domain names that contain their trademarked name, in virtually any context. <41 >

The Privatization of Culture

These recent examples of the privatization of culture are merely an extension of a trend that has been taking place during the last thirty years, and which has been accelerating. Herbert Schiller asserts that, by the late-twentieth century, most symbolic production and human activity had become immersed in

commodity relations. <42> "In the 1990s," Schiller writes, "the production, processing, and dissemination of information have become remarkably concentrated operations, mostly privately administered." <43> In addition, there has been a growth of corporate power primarily resulting from government deregulation, privatization of once public functions, and the commercialization of activities that previously were not a part of the economic sphere. <44> Schiller argues that a "total corporate information-cultural environment" is spreading throughout the globe, including not just movies and television shows, but banking and other economic and financial networks. <45> To this extent, by the mid-1990s, intellectual property accounted for over 20% of world trade, roughly \$240 billion U.S. dollars. <46>

R.V. Bettig wrote *Copyrighting Culture* as an attempt to extend the line of thinking that runs through the political economy of communication literature to the area of intellectual property. Although Bettig discusses the ideological functions of media ownership to a certain extent, *Copyrighting Culture* is first and foremost an examination of the appropriation and commodification of information and culture. Intellectual property is significant to his analysis of media ownership, especially because companies that control the copyrights of cultural "software" (back catalogs of music, films, television shows, etc. -- for instance, Disney) are considered by many investment firms to be extremely lucrative, perhaps the most profitable companies in the communications market. Furthermore, ownership of intellectual property significantly enhances a company's ability to maneuver in the corporate landscape of culture industries. For instance, Hollywood was able to muscle its way into the cable television industry because of its massive holdings of cultural software. <47>

Schiller, for his part, focuses on the intensifying push toward the privatization of as many forms of social activity as possible, which were brought under corporate control during the latter part of the twentieth century. <48> Sites where culture is produced (public schools) or made available (public libraries, museums, theaters, etc.) have been brought under the direct influence of private corporations that, in turn, influence the form culture takes.

[B]y the close of the twentieth century, in highly developed market economies at least, most symbolic production and human creativity have been captured by and subjected to market relations. Private ownership of the cultural means of production and the sale of the outputs for profit have been the customary characteristics. The exceptions - publicly supported libraries, museums, music - are few, and they are rapidly disappearing. The last fifty years have seen an acceleration in the decline of nonmarket-controlled creative work and symbolic output. At the same time, there has been a huge growth in commercial production. <49>

New technologies have facilitated both the growth of culture industries and the explosion of information-producing sectors. Both of these areas have been marked by the consolidation of ownership through mergers and acquisitions.

An example of this is the 1989 merger of Time and Warner Brothers to create Time-Warner, the subsequent merger of Time-Warner with Turner Broadcasting in 1996, and America Online's acquisition of the Time-Warner empire. <50> As the result of this consolidation of media corporations, the dominance of a few firms works to ensure that a more limited range of expression is communicated. These factors, Schiller maintains, contribute to the homogenization of culture, shaped to meet the interests of the corporate parents that own the sites where culture is produced and the venues where cultural texts are distributed. <51>

Public information has been extensively privatized in the postwar period. This is characterized by the privatization of governmental information that once was made available largely for free to the public, the close relationship between universities and big business (especially in the sciences), and the commercialization of information in the library field. For instance, before World War II, there were no large companies organizing, managing and distributing information, and information-gathering centered around universities, government agencies, and public libraries. Government materials were not considered lucrative and therefore were not copyrighted. But during the 1950s and 1960s computers facilitated the emergence of information industries, and recent decades have seen the widespread privatization of national and governmental information contained in databases managed by private companies. <52>

With the government increasingly contracting out information to private firms, the primary channels that citizens used to gain access to this information have been restricted in many ways. For instance, while Supreme Court, Federal Court and lower court records are still available for free, companies such as Westlaw control the intellectual property rights to such information as it exists in a more accessible form, and charge heavily for access to it. Records of scientific data and medical studies that had previously resided in the public domain are very often held by private companies that have a financial stake in restricting the flow of that information. Even if that information is readily available, there is no guarantee it will be organized in a way that benefits the welfare of the public. <53>

Corporations have been extremely resourceful in securing new areas of culture to inhabit and own, and the National Information Infrastructure (NII, or as then-Vice President Al Gore called it, the "Information Superhighway") is a good example. <54> Private corporations led the charge to build the NII, and have - with the Reagan, Bush and Clinton administrations' encouragement -- invested billions of dollars in telecommunications in the 1980s and 1990s. <55> Those who put up the capital for this new "highway" will get to decide where it's built, who will be admitted, and what information can flow through it.

Adding to the unabated privatization of public-owned information resources was the selling off of sections of the radio spectrum to facilitate the increased activity of communication industries. When those sections of the radio spectrum were in government hands, at least there was the *possibility* that they might be used in the public interest. But now that these sections are in the hands of private companies (AT&T and Sprint secured significant portions for themselves), there are no such guarantees. Ultimately, a privately owned information system will contain the key feature of the private industries that came before it: inequality in the distribution of resources. <56>

Unfortunately, intellectual property law, particularly trademark law, only conceives of these culturally loaded signifiers as *private property* and the courts characterize the use of such trademarks as trespassing. At the same time that companies have been able to invoke trademark law to gain control of existing, registered domain names, the number of remaining domain names are being gobbled up, not so much by "cyber-squatters" but by the corporations that can purchase thousands of domain names at a rate that can't even come close to being matched by private citizens. This, combined with the fact that corporations actively use intellectual property law to suppress expressions of dissent, points to a future of higher fences between the information haves and have-nots. Constraints are placed upon the use of these privately-owned images by intellectual property laws, which essentially function as the traffic laws that are used to police the exchange of cultural expression on the privatized information superhighways of modern communicative practice.

