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FORUM

Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist- Academic¹

Kembrew McLeod

Using as its departure point the controversy surrounding the release and dissemination of Danger Mouse's Grey Album, this article discusses the recent brand of activism that has emerged as a reaction to the expanding influence of intellectual property law. The limited edition Grey Album, in which Danger Mouse mixed the instrumentation from the Beatles' White Album with vocals from rapper Jay-Z's Black Album, came to the attention of EMI/Capitol, the owner of the Beatles' sound recordings, in early 2004. Danger Mouse received a cease and desist letter from this copyright holder immediately after it was released, but it wasn't until the company began sending cease and desist letters to fans who were trading and distributing the album on the Internet that EMI/Capitol was positioned at the receiving end of a large, organized online protest. The Grey Album itself is also a useful object of study because it highlights the ways in which copyright law has not caught up with the century-old cultural practice that is collage. Placing this album in a historical context—from musique concrète to post-millennial mashups—helps to highlight the ways notions of the authorship and ownership have changed over the years, with regard to intellectual property.

Introduction

In early 2004, underground hip-hop artist Danger Mouse produced a pop-music Frankenstein he named the *Grey Album*. This mad musical scientist spent more than 100 hours chopping up instrumental fragments from the Beatles' *White Album*, adorning them with vocals from Jay-Z's recently released *Black Album*. Conceptually, it was a great idea, but it's also a pretty compelling record, or at least an interesting

listen. “Every single kick, snare, and chord is taken from the original Beatles recording,” Danger Mouse wrote on his website. He pressed a limited edition of 3,000 copies, but it spread like digital wildfire on file-sharing networks, and it received coverage and praise from the *New Yorker*, the *New York Times*, and *Rolling Stone*. As corporate goliaths tend to do, EMI soon began sending out cease-and-desist letters.

In response, the music activists at downhillbattle.org coordinated a major online protest—dubbed “Grey Tuesday”—where at least 170 websites risked a lawsuit by hosting the album. It was kind of a virtual sit-in. I was one of many who received a cease-and-desist letter from EMI after I posted the album on my website, Kembrew.com, and, along with a few others, I refused to back down from this intimidation. One website operator replied to EMI’s legal threats by quoting the entirety of the Beatles’ “Piggies,” which goes, in part: “Have you seen the bigger piggies in their starched white shirts” and “In their eyes there’s something lacking, what they need’s a damn good whacking.” He or she ended their email with “We do not negotiate with pigopolists.” I simply ignored the letter and kept the album on my website.

Under the current copyright system, owners insist that it’s illegal to sample without permission, even if one offers to pay royalties. However, it’s perfectly okay for musicians to record their own versions of a song by registering the cover and paying the appropriate licensing fee. (You can record a Beatles song without asking, even if you butcher the cover, but the Beatles almost never allow sampled reinterpretations of their work.) This “compulsory right” to remake others’ music has been in place since the Copyright Act of 1909. It is in this way—and many other ways—that copyright still has not caught up with a collage method that is a century old. The *Grey Album* was yet another example of a creative work that literally had no place in this world; it was stillborn, legally, even if it is very much alive, creatively.

I risked a lawsuit because I felt a responsibility to show that fair use exists in practice, not just in theory. For me, it would have been ethically wrong to act as a detached academic while others took the fall, because if anyone could make a fair use case, it’s me. As a professor who regularly teaches undergraduate and graduate courses on copyright, popular music, and pop culture, I think it is important to make certain copyrighted materials available without worrying about getting sued. It was in the spirit of promoting conversation and debate about an illegal artwork (and a broken copyright regime) that I engaged in this act of copyright civil disobedience.

Anyway, it did not cause EMI economic harm, and Jay-Z tacitly allowed this to happen by releasing a *cappella* versions of his record. There’s no way any Beatles fan would choose to download the Danger Mouse remix in lieu of purchasing a Beatles record, and the same is true of Jay-Z’s fan base. In fact, this controversy likely sold a few CDs for both plundered artists. The *Grey Album* was banned because it does not fit in to an outdated copyright regime, which is why it was of interest to many journalists, law professors, media scholars, music fans, and others. I never did hear from EMI again and nor did the other online activists who heard from the Beatles’

record company; and, by the end of the day, the album had been downloaded more than 1 million times, which would have made it a platinum record in an alternate universe.

Backspin, Background

One can understand the *Grey Album* as an exemplar of how popular culture and popular music have been fully transformed by the modernist collage aesthetic, particularly the strategies of *musique concrète*. Engineer and radio announcer Pierre Schaeffer, who coined that phrase, began experimenting with recorded noises captured on magnetic tape shortly after World War II. He had no conceptual pretenses and wasn't necessarily a devotee of experimentalist John Cage; rather, he refined this sound-collage technique quite simply because of the pleasure it gave him (Russcol). Many musicians and composers during the mid-1950s were attracted to *musique concrète* once tape-recording technology became widely available, and it soon turned into a fully fledged avant-garde movement.

John Cage, who had previously incorporated turntables and radios into his compositions, was compelled to experiment with tape. This resulted in a composition he crafted for magnetic tape called *Imaginary Landscape No. 5*, which called for the use of any 42 records to be "treated as sound sources, rather than being what they were" (Revill 43). Other Cage works that arranged captured sound fragments included *Williams Mix* and *Fontana Mix*, both of which used everyday sounds such as street noise, coughing, swallowing, cigarette smoking, and other ephemera (Kun; Ewen). Experimental composer Karlheinz Stockhausen, while a student in Paris, was introduced to *musique concrète* during his studies with Schaeffer; Stockhausen claimed this had a great impact upon his later work as he went on to greater fame within the European art music world (Witherden; Ewen). A composer who predicted in 1917 some of the strategies employed by *musique concrète* producers was Edgard Varèse, who in 1954 was finally able to use a tape recorder to create his electronic collage masterwork *Deserts* (Russcol).

In 1961, James Tenney, a young American musician and composer, created a piece titled *Collage #1 (Blue Suede)*. This interesting work was audacious by today's legal standards because he cut up and reassembled portions of Elvis Presley recordings, including the King's rendition of Carl Perkins's rockabilly classic "Blue Suede Shoes." Tenney slowed it down, chopped it up, and manipulated its tempo (Polansky). Also, during the late 1950s and early 1960s, Beat novelist William Burroughs and collaborator Brion Gysin created their own "cutups" with tape (Lydenberg). The earliest example of "sampling" on the *Billboard* charts was Buchanan and Goodman's 1956 hit "The Flying Saucer." Bill Buchanan and Dickie Goodman composed this funny "break-in" record on a reel-to-reel magnetic tape recorder, creating a skit about an alien invasion—as told through then-current rock and roll hits. Imitating the radio broadcasts of *War of the Worlds*, the songs break in to the radio announcer's comments, creating a jarring, goofy collage of sound.

“Radio Announcer: The flying saucer has landed again. Washington: The Secretary of Defense has just said....” Then Fats Domino breaks in, singing “Ain’t that a shame.” Elvis appears, as do many others, and the record sold more than a million copies, inspiring a host of imitators. A few song publishers sued Goodman, which prompted these jokers to release the totally unauthorized “Buchanan & Goodman on Trial.” The delirious 1956 single swiped the *Dragnet* theme, among many other songs, and Little Richard “played” their defense attorney—who argued in front of a jury of Martians. Four labels (Imperial, Aristocrat, Modern, and Chess) and two performers (Fats Domino and Smiley Lewis) filed for an injunction to prevent the sale of all Buchanan and Goodman recordings.

They also asked for US\$130,000 in damages, but Judge Henry Clay Greenberg sided with Buchanan and Goodman, denying the injunction because he believed that the single was clearly a parody and not a violation of anyone’s copyright. The judge stated “he had created a new work,” rather than simply copying someone else’s music (Prato; Miller). Speaking of “pop meets experimental collage,” perhaps the most widely heard example of *musique concrète* was the Beatles’ “Revolution #9,” the song on *The White Album* that many people wish had been left off the record. In fact, Stockhausen was one of the icons featured on the Beatles’ *Sgt. Pepper* album cover. Yoko Ono introduced John Lennon to magnetic tape sound collage, and their collaborative piece used dozens of unauthorized fragments from radio, television, and other sources (Korn). Among others, Ono had previously performed with Ornette Coleman and John Cage and had deep ties with the Fluxus movement (Pouncey).

The basic rhythm for “Revolution #9” was built from the sound of twenty tape loops pillaged from the archives of EMI, the Beatles’ record label. “We were cutting up classical music and making different size loops, and then I got an engineer tape on which some test engineer was saying, ‘Number nine,’” John Lennon recalled (qtd. in Miles 484). While the Beatles obviously had the implicit approval to chop up EMI’s material, it is highly unlikely that the Beatles paid any “sampling” royalties or got permission from the original performers. It was ironic, though not surprising, that when Danger Mouse cut up the Beatles for his *Grey Album* he received a cease-and-desist letter from EMI.

Mash It Up

In 2001, a new kind of pop music genre emerged, making possible the *Grey Album*. Some people called these songs “mashups.” The first mashup classic that got major media attention was Freelance Hellraiser’s “A Stroke of Genie-us,” a shotgun wedding in which pop diva Christina Aguilera sings atop the music of New York garage band the Strokes. Even Aguilera, trying to gather as much street credibility as possible, endorsed the illicit recording. One of the finest mashup masterpieces is Soulwax’s “Smells Like Teen Booty,” a smirky track that hammers Nirvana’s “Smells Like Teen Spirit” in to “Bootilicious,” by Destiny’s Child. Everything is business as

usual when Nirvana kicks off with that familiar riff, until you hear the voices of Destiny's Child coo "Kelly, can you handle this? Michelle, can you handle this? Beyoncé, can you handle this? ... Wooooooooooo!" It is a marriage made in hell, and it sounds heavenly.

The mashup phenomenon could not have happened without the simple programs that allow amateur bedroom composers to juxtapose two or more songs in interesting ways. "Today, algorithms have been written that will do things like time-stretch it perfectly for you," said Scanner, who both has been sampled and samples in his own work. He told me:

So, you can take a Christina Aguilera track with a Nirvana track and pitch it so it fits perfectly. You can take two beats that would never, ever match and throw them in a piece of software and time match them, so they fit like a perfect puzzle.

Mashups also couldn't have happened without the digital distribution power of the Internet. File-trading networks such as Kaazaa, Limewire, or the first Napster make it possible for mashups to circulate; also, the billions of available MP3s provide the grist for creation.

"There's a phenomenal availability of material," said Ian, a member of the London-based Eclectic Method. Performing live in clubs behind a bank of computers and mixing equipment, the three members of Eclectic Method draw from a hard drive full of sampled audio and video loops. Using the VJam software developed by Coldcut—the godfathers of the British cut-and-paste aesthetic—Eclectic Method make mixes live on the spot. For instance, they might drop the rhymes of hardcore rapper DMX on top of a groove from a 1960s easy-listening LP, all while chopping up one of his videos. Ian said that, without file-trading networks

what we do would be absolutely impossible, because it would cost too much. You can't buy all of these tunes you're going to DJ, and you can't buy all of these videos. They're transmitted on TV, someone encodes them, they go out on KaaZaa, and it's rich pickings.

The Internet is the Wild West of today, sort of like hip hop in the late 1980s before laws and bureaucracies limited its creative potential. I hope this will not happen to the Internet, but history shows that the creative door eventually slams shut (though alternatives always pop up, like a crazy sociological version of that whack-a-mole carnival game). Long after Grandmaster Flash used his bass line for "White Lines," Liquid Liquid bassist Richard McGuire still keeps track of sampling's evolution. "You can't keep creativity down. There will always be new ways, combinations of things that come out," he said, speaking about mashups. "It can sometimes be miraculous how they fit, and it knocks me out. This is the same kind of thrilling thing. Every time there's new stuff like that, it's so simple. It's like, 'Why didn't I think of that?'"

In many ways, mashups unknowingly follow the deconstructionist method, whereby a text is pried open, disassembled, and drained of the meanings intended by the author. Deconstruction cannot really be understood in the abstract because it is

first and foremost an *activity*. “Deconstruction is not a form of textual vandalism designed to prove that meaning is impossible,” writes literary critic Barbara Johnson (xiv). “In fact, the word ‘deconstruction’ is closely related not to the word ‘destruction’ but to the word ‘analysis.’” The origin of the word “analysis” means “to undo,” which is pretty much a synonym for “to de-construct.” The deconstructionist is a revolutionary reader, one who targets society’s old, taken-for-granted meanings—waging a civil war of words that pits differing philosophies against each other until ink is spilled.

“The deconstructive double agent feigns alliance and conducts clandestine operations behind the enemy’s line,” writes communication theorist Briankle Chang. “The feigned alliance enables him to move freely across the war zone,” Chang writes. “Freely crossing the war zone, the deconstructive mole traverses the lines separating the self from the other, friend from foe; he becomes a wartime nomad” (137). With mashups, one of the underlying motivations of bedroom computer composers is to undermine, disrupt, and displace the arbitrary hierarchies of taste that rule pop music. Those hierarchies are often gendered, with the “raw,” “real” rock representing the masculine and the “soft,” “plastic” pop representing the feminine. “To deconstruct the opposition,” Jacques Derrida argues, “is to overturn the hierarchy of a given moment” (Derrida 41).

By blurring high and low pop culture (Nirvana representing the high and Destiny’s Child, the low), these mashups demolish the elitist pop-cultural hierarchy that rock critics and music collecting snobs perpetuate. With mashups, Nirvana and Destiny’s Child can sit comfortably at the same cafeteria table, perhaps showing holier-than-thou arbiters of cool that legitimate pleasures can be found in both varieties of popular music. “I think mixing Busta Rhymes with a House tune will make people dance,” said Jonny, of Eclectic Method. “But mixing Britney Spears with NWA [Niggas Wit Attitude] will make people dance *and* laugh” (personal interview, Sept. 14, 2003, London).

One hilariously compelling mashup out there crosses Eminem’s “Without Me” with “Come On Eileen” by Dexy’s Midnight Runners, which aurally emasculates the posturing white rapper by placing him atop a goofy one-hit wonder of the 1980s. Another great one is his “The Real Slim Shady” set to a ragtime instrumental. When you take the bad-boy rhymes of Eminem and force him to rap over “Come On Eileen” by Dexy’s Midnight Runners, you’ve engaged in an act of violence and trickery. The humorless white rapper takes himself far too seriously, which at times reduces his image to self-parody. This is ironic because, at the same time that Eminem makes fun of “boy bands” and other targets in his videos, Eminem doesn’t like it when others satirize him. I can guarantee you that Marshall Mathers is not too happy about having to rap on top of the “gay”—to him—sounding Dexy’s Midnight Runners, but there’s nothing he can do about it. His powerlessness illustrates how he, as an author, has little control over how his music is received and understood—that he literally does not have the final word, as Roland Barthes would say—no matter how hard he tries.

Much like this Eminem/Dexy's Midnight Runners mash-up, Derrida's book *Glas* samples the "masculine" discourse of philosophy and juxtaposes it against the "feminine" style of literature to create a new kind of writing. Derrida conceived of deconstruction, in part, as a way of reading and writing differently, in the same way that thousands of sonic deconstructionists have found novel ways of *hearing* differently. Making a mashup requires you to listen carefully and in a new way, looking for the perfect song that will hilariously undermine the authority of another. This is pretty new; I am sure my Dad did not use these listening techniques when grooving to his favorite rock and roll tunes in the 1950s and 1960s. Even "passive" listening in the age of sampling can be very active, especially when a familiar song fragment sends us rummaging through our memory banks for a match.

The origins of the mashup can be heard in the medleys found on disco 12" singles, in which a mixer would seamlessly segue from one song to the other. Sometimes these were unlikely medleys, like Donna Summer's eighteen-minute dance masterpiece that effortlessly fused her versions of "Heaven Knows," "One of a Kind," and "MacArthur Park." (The latter song, by Jimmy Webb, contains the famously bizarre lyrics "Someone left the cake out in the rain/ And I don't know how to take it because it took so long to bake it/ and I'll never get that recipe again, Oh no!") As far back as the 1910s, record companies were making megamixes—of opera. Because the 78-r.p.m. disc could only hold a few minutes per side, Wayne Koestenbaum notes that tempos had to be quickened and episodes trimmed, even for arias. In a 1911 catalog, the Victor Company boasted about a *Carmen* medley: "An amazing number of the most popular bits of Bizet's masterpiece have been crowded into this attractively arranged potpourri" (Koestenbaum 66). Even closer to the potpourri spirit of mashups, the postmodern disco duo the Pet Shop Boys masterfully blended the high-minded "Where the Streets Have No Name" by U2 with the 1960s schlock of "Can't Take My Eyes Off You," made popular by Engelbert Humperdinck and others.

In the case of the Pet Shop Boys, the group rerecorded these songs themselves, whereas 12" megamixes are usually drawn from the original recordings. But in both instances, they were medleys—rather than laying vocals from one song atop a different song's instrumental. The earliest example I have found of pop music surgical grafting is Alan Copeland's "Mission: Impossible Theme/Norwegian Wood," from 1968. Copeland started out in the late-1940s as a member of the vocal group the Modernaires, became an arranger for Ella Fitzgerald, Frank Sinatra, and others, then did work as a TV-theme composer. Just what gave him the idea to plop the vocal melody of the Beatles' "Norwegian Wood" (originally in a 3/4 waltz time signature) on top of the *Mission: Impossible* theme song (in jazzy 5/4 time) is a complete mystery. But, somehow, it works. Even more remarkably, it won a Grammy for "Best Contemporary Pop Performance by a Chorus," though Copeland's song didn't have enough cultural impact to start a new trend in the late 1960s (Chusid). This was the real space-age bachelor-pad music.

Mashups are also an extension of the experimental spirit of hip hop, before it was coopted and lost that loving feeling. "My audience was the most progressive of all,"

Afrika Bambaataa said about hip hop in the 1970s, “because they knew I was playing all types of weird records for them. I even played commercials that I taped off the television shows, from *Andy Griffith* to the *Pink Panther*, and people looked at me like I was crazy” (Fricke and Ahearn 49). Mashups allow people to participate in—to make and remake—the pop culture that surrounds them, just as Bambaataa did. Despite my appreciation of them, I do not mean to idealize mashups because, as a form of creativity, they are quite limited and limiting. First, because they depend on the recognizability of the original, mashups are circumscribed to a relatively narrow repertoire of Top 40 pop songs. Also, mashups pretty much demonstrate that Theodor Adorno, the notoriously cranky Frankfurt School critic of pop culture, was right about one key point.

In arguing for the superiority of European art music, Adorno claimed that pop songs were simplistic and merely made from easily interchangeable, modular components. Yes, Adorno was a snob; but after hearing a half dozen mashups, it is hard to deny that he is right about that particular point. If pop songs weren’t simple and formulaic, it would be much harder for mashup bedroom auteurs to do their job. From this point of view, it would be quite easy to see mashups as yet another sign of the end of the world, proof that our culture has withered and run out of ideas. There would be cause for alarm if mashups were the *only* form of creativity that uses the collage method, but they are not. (Also, to address Adorno’s criticisms of pop music, there are many times when “formula” and “repetition” can create great music. James Brown’s 1960s and 1970s music contain just the kind of simple, repetitive elements that might have driven Adorno crazy, had he lived long enough to hear Brown’s funky drummer.)

It is fitting that the granddaddy of modern mashups involves a song by Public Enemy. I asked Chuck D how he felt about amateurs reworking his songs without his permission (something that turned out to be a lengthy setup for such a short answer).

Me: As you probably know, some music fans are now sampling and mashing together two or more songs and trading the results online. Um, there’s one track by Evolution Control Committee that uses a Herb Alpert instrumental as the backing track for your “By the Time I Get to Arizona.” It sorta sounds like you’re rapping over an easy-listening Herb Alpert and Tijuana Brass song, and you might say it undermines the original political thrust of your song. How do you feel about other people reworking your music without permission?

Chuck: I think my feelings are obvious. I think it’s great.

Instead of attacking these bastard pop confections—fruitlessly trying to track down the anonymous infringers—some record companies are appropriating the appropriations. Increasingly frequent in Europe is what Freelance Hellraiser calls a “Lawyer’s Mix,” where two songs are fused together by a cover band. He bitterly writes on his website that this is done “without giving credit to the people who came up with the original idea.” In Freelance Hellraiser’s case, the Aguilera/Strokes mashup was released two years later as a legitimate single, and someone other than

Freelance Hellraiser got paid. It is an interesting thing for him to complain about—the idea that someone is ripping off his own rip-offs. But he does raise an interesting point. In collage, the author is somewhat absent from the new work of art and is a kind of meta-author or even a curator. What sort of protections should he or she have, if any?

Because “Stroke of Genie-us” was enormously popular in trading circles, a record company only had to sit back and see how the Internet audience reacted. In almost no time, mashup makers ended up becoming active participants in what is essentially an ongoing focus group. This way, labels can license the two songs from the original copyright holders and release a “new” single, but only after it has proved itself to be an illicit hit on the Internet. This calculating practice gave the Sugarbabes a number one U.K. hit, singing Adina Howard’s “Freak Like Me” over an instrumental by 1980s electro-pop artist Gary Numan. “It’s been an enormously successful way of refueling people’s interest in pop music,” Scanner told me, “but they’re also selling them the same product again. You end up buying a record you’ve already got, but twice.”

Eclectic Method has been pulled into the world of commerce by working for the European program *MTV Mash*, which is kind of a sanctioned version of their multimedia club gigs.

MTV is approaching record labels, which are shocked that they want to give them some money. “Okay, you want to give us some money for doing this dodgy bootlegging stuff.” And they’re like, “No, this is mashing, this is compound culture, this is clash, this is everything but something illegal that people do in their bedrooms.” (personal interview, Sept. 14, 2003, London)

Much as with hip-hop sampling, the high cost of licensing limits the range of choices and the number of samples they can use on *MTV Mash*. “In our live show,” Jonny told me, “we’ll cycle through seven artists in thirty seconds sometimes, and that costs too much money to do for real.” By “for real,” Jonny means “legitimately,” and the Eclectic Method website is filled with illegitimate video mashups that you can download for free. “I think the day our downloads go down is the day you’ve seen that we’ve had to compromise our commercial work.” These reports from the frontlines of art and commerce highlight how the law yet again is struggling to catch up with contemporary creative practices, something that inevitably results in cease-and-desist letters.

Negativland, Copyright Activism, and Pranks

After receiving a threatening letter from EMI on that cold “Grey Tuesday,” I asked myself—to quote the Talking Heads—“How did I get here?” In one word: Negativland. This group of audio pranksters emerged in the early 1980s on the West Coast, a collective whose sound-collage endeavors initially came to the attention of the fringes of rock audiences (primarily through their association with the punk-rock-oriented, independent label SST). Not “popular” by any definition, they usually

sell between 10,000 and 15,000 records per release (Negativland). The bulk of the group's collages are drawn from media sources, primarily radio and television, and are constructed using a variety of methods that include tape splicing and sampling from radio and television broadcasts.

For instance, the song "Christianity Is Stupid," from their 1987 record *Escape From Noise*, features a radio preacher sarcastically shouting in a sermon "Christianity is stupid ... Communism is good," removed from its original context, placed in one of the group's collages, and replayed over and over again. Despite the fact that sound collage has a long history, some members of Negativland had little knowledge of the tradition established by avant-garde composers such as Cage, Tenney, and Schaeffer. Mark Hosler, the group's informal spokesperson, told me they were not emulating a particular aesthetic style; instead, many of the members were simply teenagers who were reacting to a media-soaked environment. Their most notorious record, which ended up getting them sued in 1991, was their "U2" single, which sampled from the mega-group's "I Still Haven't Found What I'm Looking For."

The record was released with little fanfare on SST Records, a small independent punk-rock label. But within a few days of its release—these companies are very good at monitoring their copyrights—Island Records and U2's song publisher, Warner-Chappel, served Negativland and SST with a lawsuit (Harrington). Recognizing that they were small fish compared to this oceanic multinational corporation, Negativland sent out a press release that stated: "Preferring retreat to total annihilation, Negativland and SST had no choice but to comply completely with these demands" (Negativland 72). Even though Negativland had a strong fair-use argument, primarily based on parody, they did not have the resources to fight a prolonged court battle. And because of pressure from their record company, they agreed to a very unfavorable settlement.

Negativland introduced two of the major influences on my life: media pranks and copyright law. The *U2 v. Negativland* lawsuit turned on a light bulb in my head that has not gone off for years, which began with an undergrad term paper, then became a grad school essay, a dissertation, a book, and so on. The absurd plight of Negativland also prompted me successfully to register with the U.S. Patent and Trademark Office (PTO) the phrase "freedom of expression®," my own ironic commentary on the lengths to which culture has become privatized. Finally, in early 1998, I was granted ownership of the phrase—the same year, by the way, that Fox News was awarded "Fair and Balanced®," which the company later used to sue satirist Al Franken and his publisher when he used the phrase in the title of his book without Fox's permission.

When I received the certificate from the PTO, I felt like a proud father whose baby was delivered by the United States Postal Service, rather than by a stork. As someone in his early stages of copyright activism, I wanted to light a cigar and announce my new offspring to the entire world, and I knew just the way to do it—with a media prank. Taking a cue from Negativland, early in my life I learned how easy it was to manipulate the media into telling my strange little stories. I orchestrated a scenario in

which I threatened to sue someone for using “freedom of expression[®]” without my permission, something I documented in my first book, *Owning Culture: Authorship, Ownership and Intellectual Property*.

After that book came out in 2001, the publisher of a very smart magazine of cultural criticism, *Stay Free!*, contacted me. Carrie McLaren was putting together an art show named “Illegal Art: Freedom of Expression in the Corporate Age” (being the good egg that I am, I did not ask her to pay royalties for using my trademark). She wanted to include my framed freedom of expression[®] government certificate in an exhibit that featured art and ideas that pushed the envelope of intellectual property law. I was flattered to discover that among the many great artists included in the show, Negativland was involved. Later that year, my framed trademark certificate adorned the walls of the San Francisco Museum of Modern Art Artist’s Gallery. However, the strangest moment came when a group of German artists and academics flew me to Berlin to lecture about copyright, art, and my freedom of expression[®] prank for a festival.

They called it “Kunst und Verbrechen,” which translates to “Art Without Crime,” a phrase French philosopher Gilles Deleuze apparently once used. This combination arts festival and academic conference kicked off with a videotape of a sniper who assassinated a cake—a kind of Euro-Twinkie—followed by a funeral service. After that was a radical anti-establishment Ska band from the Balkans (whose lyrics, I was told, are almost entirely comprised of “swear words”). The next day, the organizers screened a film depicting a series of male erections, which was followed by a discussion by the director. Then came a performance in a full-sized wrestling ring wherein a Mexican wrestler, Carlos Amoraes, did battle with himself. Then, along with other German-speaking scholars from around Europe, I was the lone academic who gave a lecture in English about copyright and censorship. I’ve never felt so out of place, and yet so at home.

Also that year, there was an AT&T ad in the *Daily Iowan* that used the slogan “Freedom of Expression”—again, without my permission—to lure college students into signing up for their long distance plan. My class told me I should sue AT&T. We all laughed, and I said, “Sure.” I forgot about it for a couple of months, but soon the media prankster gears began turning in my head. I realized that the synergy of the art show, the publicity it was generating, and my own freedom of expression[®] project was too perfect not to exploit. I hired a lawyer in Iowa City, gave him my government documents and a copy of the ad, and he drafted a cease-and-desist letter addressed to AT&T (just as the company would have done to me if I had stepped on their trademarked toes).

Conspiring with the Chicago organizers of the Illegal Art show—the good folks at *In These Times* magazine—I used the show’s opening as a press conference to announce publicly my scheme. The *New York Times* broke the story and others picked it up, including the U.S. government’s overseas broadcasting arm, *Voice of America* (which allowed me to air my critiques of intellectual property law all the way to Afghanistan). AT&T never did respond to my lawyer’s cease-and-desist letter and

obviously did not worry about it, a luxury I did not have when EMI Records sent me a cease-and-desist after I posted the *Grey Album* on my website. This underlines the power that intellectual-property-owning bullies have. Even though I never did stop AT&T from using freedom of expression[®] without my permission, my little media prank was a success for me. I found a way to broadcast to millions a critique of intellectual property law that would not normally get national or international attention. After all, people like me, like us, do not typically get a voice in the loud, overcrowded mediascape.

The Weird World of Copyright Activism

As we have seen in recent years, intellectual property owners are succeeding in pushing for a radical rethink and revision of intellectual property law. In early 2003, the U.S. Supreme Court upheld the Copyright Term Extension Act (which I shall refer to as the Bono Act, named after the late Sonny Bono), which lengthened the copyright term to “the life of the author plus 70 years.” The Bono Act was passed by Congress after intense lobbying from companies like Disney (the copyright for *Steamboat Willie*, the first cartoon appearance of Mickey Mouse, was due to expire in 2004). It also extended copyright protection for valuable songs like “Happy Birthday to You” and “This Land Is Your Land.” These two songs ironically emerged from a folk tradition that emphasized the borrowing of lyrics and melodies, and which saw culture as a common resource to be shared, not privately owned. Both songs were built on preexisting melodies that date back to the nineteenth century (McLeod; Barkley).

The first copyright law Congress passed created a copyright term of fourteen years, following the directive written in the U. S. Constitution, which states “Congress shall have the power ... to promote the progress of the useful arts and sciences by securing for *limited times* to authors and inventors the exclusive rights to their respective writings and discoveries” (emphasis added). The purpose of copyright law, according to the framers of the Constitution, was to create incentives for artists, writers, and scientists to contribute to the collective good of American culture. In exchange they received a limited monopoly right that would eventually pass into the public domain and enrich the culture, making their work available for all to benefit from and use.

But over the course of the twentieth century, the definition of “limited times” has expanded beyond a century. If the original purpose of copyright law was to provide incentives for new creations, how is this helped by extending the length of protection for Disney’s *Steamboat Willie* or Time-Warner’s “Happy Birthday to You”? Although Woody Guthrie’s estate is probably doing great things with the income generated by “This Land Is Your Land” and his other compositions, how does retaining the private ownership of those folk songs serve the public good or promote creativity? To quote a far more esteemed legal authority than myself, in his dissenting opinion Supreme Court Justice Breyer argued that the Bono Act will have damaging consequences for culture. He writes:

This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

Reacting to these events, in 2003, Illegal Art—a record label run by the pseudonymously named Philo Farnsworth, who in real life is also a professor—fought back. The label began work on its latest project, a compilation CD named *Sonny Bono Is Dead*. In its press release soliciting the input of artists, Farnsworth wrote: “We encourage artists to liberally sample from works that would have fallen into the Public Domain by the year 2004 had the Sonny Bono Act failed,” adding, slyly, “Artists are also encouraged to create new works by sampling Sonny Bono’s output.” The Illegal Art label was also responsible for curating and releasing the CD *Deconstructing Beck*, a compilation CD featuring compositions constructed entirely from audio fragments from songs by Beck, an artist who also samples.

This is but one of many examples of intellectual property activism, a broad-based movement that confronts the way these laws have increasingly been used to inhibit certain forms of creativity that are perceived as threats to content owners. As we exit the analog world, copyright and trademark owners have repeatedly invoked the specter of digital distribution as a new technology that will surely destroy existing culture industries. And Congress is listening carefully to these industries. In response to the heavy-handed tactics of the Recording Industry Association of America and the Motion Picture Association of America, a broad coalition of activists and academics—librarians, hackers, professors, scientists, information technology specialists, and many, many others—has responded with varying tactics.

Stanford University Law Professor Lawrence Lessig took the battle over the Bono Act all the way to the Supreme Court (and unfortunately lost). He has survived to fight many more battles, helping to found organizations such as the Creative Commons, an organization devoted to carving out less restrictive alternatives to copyright law. The Electronic Frontier Foundation, which has consistently fought to maintain freedoms in the digital world, has taken many battles to court (and won, in many cases). The American Library Association has aggressively organized to chip away at some of the more extreme measures in the 1998 Digital Millennium Copyright Act. New York University Professor Siva Vaidhyanathan—author of the books *Copyrights and Copywrongs* and *The Anarchist in the Library*—has been an extremely compelling lecturer and organizer within academic circles.

And using strategies of irony and humor, I occasionally put on the clown costume and make people laugh, though I also try to counterbalance that with a sustained and sober critique of the current intellectual property regime. I am able to parlay the

cultural capital of being a professor in to other more respectable modes of engagement, such as writing op-ed pieces for the *New York Times*. As a professor at the University of Iowa, this is a door that can open for me, but it is an option that “the dude who trademarked freedom of expression®” probably could not exercise. This cultural capital was also quite valuable when I received the letter from EMI when I hosted the *Grey Album* on my personal website.

My status as a professor whose primary subject of investigation is the cultural impact of intellectual property law helped reassure me when I grew anxious about the possibility of being sued. It also improved the chances that I would prevail if I invoked a fair-use defense; nevertheless, it still meant I could be sued—something that is a long, painful, and expensive process. Fortunately, that never happened. As our culture increasingly becomes fenced off, it becomes all the more important for those of us in the university setting to protect fair use rights and guard against further privatizations that stifle creativity and the free exchange of ideas that are essential to maintaining a functioning democracy.

Note

- [1] Some of this essay was drawn and transformed from parts of my forthcoming book *Freedom of Expression®: Overzealous Copyright Bozos and Other Enemies of Creativity*, Doubleday.

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