# Commodification of Culture Harms Creators

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information commons links | public domain links | general copyright links

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Creators draw upon a wealth of pre-existing material in developing new works. Access to and availability of our rich cultural heritage is critical to the creative process. Yet at the end of the 20th century we began to see access to that culture being walled off. In a veritable assault on access to our common heritage, various segments of the content industry have used the courts, the legislative process, technological developments, and downright bullying as part of a broad attempt to turn our cultural heritage into a common commodity (one that is owned, leased, and controlled). If this trajectory continues into the 21st century, this commodification of our cultural heritage will have serious implications for artists, writers, and other creators.

In this paper, the author first discusses the importance of prior works to the creation of new works, and shows why broad and free access to a "commons" of cultural information is critical to the creative process. He then discusses how the various pieces of this commons are rapidly being whittled away by the content industry. Finally, he points to the overlapping interests of creators and users of information, and illustrates that they have more in common with each other than with the content industry.

## The Importance of Pre-existing Works to the Creation of New Works

Historically, a rich set of public content has inspired creativity, both because content was easily accessible, and because people clearly had the right to copy, reinterpret, and riff off of pre-existing content.

Fairy tales and ballads have been reinterpreted in new and creative ways that are too numerous to count. And there have likely been tens of thousands of interpretations of the dramatic works of just one man (Shakespeare). Works like *West Side Story* and Disney's *Sleeping Beauty* and *Hunchback of Notre Dame* have relied on pre-existing works that are in the public domain -- freely accessible for copying and reintrepretation without having to ask anyone's permission.

At its root, visual art is about representation, which is a form of copying. From the earliest surviving human paintings that sought to copy the outside environment onto cave walls, art has involved copying either scenes from the real world or copying the works of other artists. We teach art to our children by having them copy master artworks. Art schools for adults teach techniques by having students copy pre-existing works. Even

some art works commonly regarded as masterpieces are essentially copies of pre-existing works.

For 1,000 years art was dominated by religious scenes. A huge number of artworks feature Jesus, Madonna, Buddah, or Gnisha, many of these copying the exact same scene.

In the 20th century we saw a shift in art from taking whole pre-existing works and representing them within the subsequent artist's vision, to taking parts of pre-existing works and recontextualizing these. From the collage art of the 1900s, to the dadaists of the 1910s, to the pop art of the 1960s, to postmodern art of the post-1970s, 20th century art has been dominated by the act of taking pre-existing pieces and recontextualizing these. As we enter the 21st century, we can expect an even greater use of pre-existing pieces by creators, as multimedia and hypermedia developers contend that the concept of "repurposing" is critical to their work.

Many believe that, due to the rise of commercial media in the 20th century, art responded by recontextualizing commercial images. This kind of art is a form of commentary on those images, and essentially a form of free speech. Artists known as "culture-jammers" complain about being bombarded by billboards, advertisements, and media images from the corporate sector. They insist that incorporating pieces from these media images into their social commentary art works is the only way that other voices can be heard amidst a sea of corporate-controlled images that engulf our lives (Lasn).

Rap music makes a similar claim. Emerging from a community that has traditionally been powerless, rap musicians use the process of sampling to recontextualize the dominant society's music and "take back the power".

Historically, the key social mechanism that permitted this widespread prolifieration of reinterpreting and recontextualizing pre-existing works, was the reigning social attitude that one could freely do this. Though individuals or organizations could own a physical work of art, throughout most of history there was no concept of intellectual property -- owning a monopoly on the copying and reinterpretation of a work. Copying was considered an homage, a form of flattery. Though the emergence of a mechanical process for making precise copies (photography) did challenge the access control asserted by the owners of physical works of art (Benjamin 1978), it was not until 100 years later that serious attempts to limit the rights to copy pre-existing works began to arise.

The legal mechanisms that permitted access, reinterpretation, and recontextualization of pre-existing works were enshrined in a series of principles: a robust public domain, time limits for any copyright monopoly, fair use, and first sale. In the 1990s, all these legal principles came under an unrelenting attack. All these principles have already been severely curtailed, and all are in danger of being completely eliminated.

If changes continue on the same trajectory, we can imagine a future where creators will no longer be able to make free use of pre-existing material. A future where critics cannot use media works to comment on or criticize those very works. A future where the heirs of

today's prolific playright forbid restaging of interpretations (like turning *Romeo and Juliet* into *West Side Story*). A world where anyone sampling music or even singing ballads must first obtain permission from a copyright holder. A world where oly a priveleged few can write stories about coyrighted planets or races. A world where children must obtain permission for each image they cut out to make a collage. Unfortunately, that future is with us now, with threatened litigation over works like *The Wind Done Gone* and *Pretty Woman*, as well as attempts to prevent fans from writing stories about Vulcans or Klingons, and girl scouts from singing songs like *Happy Birthday*.

Let us now turn to these copyright legal concepts and principles, to understand what purpose they have served and how they are changing.

## Copyright concepts

Though many copyright holders view copyright as an "economic right" that protects their ability to make money off content, US copyright law 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 goal of copyright is to "provide for the general welfare" and "promote the progress of science and useful arts" by encouraging further creation. The rationale behind copyright is that granting creators temporary monopoly rights over their creations will encourage them to create more. The real goal of copyright is to ensure that new knowledge will be developed and circulated through society.

Underpinning much of the recent rhetoric by the "content industry" is a view of copyright as an unlimited economic right. This logic is misguided since the economic rights granted by copyright are just 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 set controls on that monopoly by stating that it could only endure for "limited times". After these time limits expire, a work enters the *public domain* where anyone can use it for any purpose they see fit.

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

**Fair Use** (a common practice which was codified into law in Section 107 of the 1976 Copyright Law) 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 that these types of uses constitute a compelling enough social good that even if a copyright holder wanted to prevent such uses of their material, the law would not support them. It is *fair use* that 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 into their satires.

The ***First Sale*** doctrine limits a rightsholder's control over a copy of a work to the very first time that copy is sold. According to *first sale,* anyone who purchases a work can then do what they want with that copy, even if the rightsholder opposes that use. *First sale* allows the purchaser of a work to resell it, lend it, share it, or destroy it -- without ever consulting the rightsholder. Among other social benefits, the *first sale* doctrine has permitted libraries, used bookstores, and used record stores to operate without having to consult with a rightsholder each time they lend or sell a work.

## An Information Commons

Taken together, a robust *public domain,* time limits for any copyright monopoly, and the concepts of *fair use* and *first sale* create a rich public arena. It is this arena that creators draw upon for raw materials for new creations. It is this arena that we use to teach our children about our cultural heritage (and, to a large degree, it <u>is</u> our cultural heritage). And this arena is a center for our public discourse, for clashing views on culture, and for free speech challenges to dominant cultural forms. We call this arena an ***information commons***. A number of previous authors (see Besser Information Commons) have made the case for an *information commons* in the telecommunications arena (Benkler 1998, Lessig 1999a), as an area for ideas to flourish (Lessig 1999b), or have made legal arguments in its favor (Benkler 1999). These other others have emphasized the social role of a commons in maintaining free speech. In this paper, the author will discuss an *information commons* primarily from the standpoint of its relationship to creation of new works, as well as from its social function.

In his seminal work from the early 1990s, Lee Felsenstein made the case for the Internet becoming the ***Commons*** of the future (Felsenstein, 1993). A Commons is a space that no one owns, and no one controls. For the ancient Greeks, this space was known as the *Agora*. In the Middle Ages it was known as the *Commons*. In the 20th century it was parks, streets, town squares, and coffeehouses. It is a space where free speech, public discourse, and creativity flourishes. And though buying, selling, and advertising can take place in a Commons, Felsenstein contends that it really is much more than that:

> What goes on in these marketplaces is more than commerce. People hang out there, display their identities (usually as members of groups), gather groups of friends, banter and gossip within and among the groups,

> overhear others' conversations, and inject themselves temporarily into those conversations. In short, they get to know who the other people are who share their society, and keep up with their daily doings. (Felsenstein 1993)

An *information commons* is critical to society as we know it. Creators draw on it for new works. Scholars use it for new discoveries. Teachers teach with it, young people learn from it. It is a place where we are exposed to diversity in terms of culture, people, and ideas. It is a key part of public discourse.

Our information commons includes the works of Shakespeare, the fables of Aesop and Grimm, the speeches of Jefferson, untold number of hundred-year-old ballads, and characters like Aladdin, Snow White, Sleeping Beauty, Rip van Winkle. Our information commons is the essence of our cultural heritage.

But few 20th century works are part of our information commons, and it appears increasingly likely that few of these ever will be. Where characters like Mickey Mouse and Barbie were fundamental parts of our cultural upbringing, aggressive enforcement of intellectual property laws prevent us from using representations of these characters in new works or social commentaries. Towards the end of the 20th century, we saw our information commons begin to rapidly erode through increasing terms for copyright monopolies, diminishment of a public domain, and severe limitations on both f*air use* and *first sale*.

## The Erosion of the Information Commons

In previous centuries, the erosion of the Commons was accompanied by serious attempt s by small (often already powerful) groups to grab power. At the dawn of the industrial revolution, England adopted the "Enclosures Act" which deeded the village common grazing lands to whomever could build a fence around them. The wealthy few who could afford the cost of fencing prospered, and many of them leveraged this prosperity to dominate the emerging industrial market. At the same time, according to Felsenstein, those who could not afford to pay for fencing off common land became indentured servants to those who could, and many experienced homelessness and starvation.

In recent years we have begun to experience the erosion of various aspects of our contemporary commons. With the privatization of broadcast frequencies and massive consolidation within the industry, we have seen the further concentration of media in the hands of a very few, and the marginalization of diverse or challenging voices through attempts to severely limit low-power radio and community radio stations. With the commercialization of the Internet we have seen the promised commons where "anyone can have a voice or be an information provider" decay into a situation where everyone can be a passive consumer (Besser 1995). And in physical space, we have seen our city center commons being replaced by shopping malls which on the surface look similar, but are really privatized spaces devoid of free speech or open discourse (and habitually ban individuals who wear clothing that mall proprietors associate with colors used by gangs).

In all these cases, we have seen a commons replaced by a pseudo-commons -- something that retains the myth of free access, diversity, and free speech, while eliminating the very heart of this.

Our information commons are also being eroded, and replaced with a pseudo-commons that retains the myths of an open society, free access, diversity, and free speech; a society where anyone can be an information producer, a creator of culture. Just as the coming industrial revolution provided an excuse for the wealthy to enclose the commons grazing land, the current information age is providing an excuse for the content industry (publishers, motion picture studios, music distributors, etc.) to fence off access to our information commons.

The coming of the digital age threatened to upset the delicate balance between rightsholders and users in copyright law (National Academy 2000). In response to that threat, the content industry has engaged in a veritable assault on long-standing public interest practices. In what law professor Pam Samuelson has termed the "Copyright Grab" (Samuelson), the content industry is exploiting concerns over digitization and attempting to reshape the law by strengthening protection for copyrightsholders and weakening public rights to access and use material. To do this they have employed a variety of techniques: shaping new legislation, aggressively pursuing lawsuits, employing technological schemes (such as copy protection) that prevent fair use access, and shifting to licensing and other forms of contract law that let them skirt fair use rights.

Recent attempts to overhaul the copyright law have been prompted by strong lobbying efforts from the "content industry". The content industry was one of the leading supporters of Clinton's first campaign for the presidency, and after taking office Clinton appointed former copyright industry lobbyist Bruce Lehman as Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. Lehman was given the task of managing efforts to overhaul the nation's intellectual property laws, and he was the driving force behind the Administration's green paper and white paper recommendations on major changes to intellectual property laws (Samuelson).

As copyright legislation was passing through Congress, content industry lobbyists aggressively courted Congresspeople. The Association of American Publisers hired former Congresswoman Pat Shroeder to head their organization and act as chief spokesperson. In the 1996 election, the content industry had already donated over $11 million to congressional campaigns, split fairly evenly between Democrats and Republicans (Makinson). In the early part of the 1998 campaign (while copyright legislation was being debated in Congress), Hollywood connected donors gave more than $1.3 million to congressional campaigns (Mother Jones 400). The content industry also waged a strong public relations campaign, claiming that the American 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 through Congress, an Associated Press story revealed that Disney had lobbied hard for the new law (particularly portions which extended copyright protection for an additional 20 years) because Disney's copyright over characters such as Mickey Mouse, Goofy, and

Donald Duck were due to expire soon (Salant). Not surprisingly, a week after the Digital Millenium Copyright Act was signed into law, Bruce Lehman resigned his Administration post, having accomplished most of what he set out to do on behalf of the content industry.

This 1998 legislation both took works that had already entered the public domain and put them back under copyright monopoly control, as well as extended (for at least 20 more years) the copyright on a large number of works that were about to pass into the public domain in the next few years. Affected works include: Virginia Woolf's *Jacob's Room*, Buster Keaton's *Sherlock Jr*. F. Scott Fitzgerald's *Hot and Cold Blood* and *Invasion of the Sanctuary* , Ben Hecht's Fingers at the Window, Rudyard Kipling's *Independence* and *London Stone*, half a dozen works by P.G. Wodehouse, etc. Works that we're scheduled to enter the public domain quite soon but must now wait at least 20 more years include: Irving Berlin's ***Blue Skies*** (2002), Harry Woods' ***When the Red, Red Robin Comes Bob, Bob Bobbin' Along*** (2002), Oscar Hammerstein II and Jerome Kern's ***Ol' Man River*** and ***Showboat*** (2003), and Mickey Mouse (2004).

The "limited time" duration of copyright was instrumental in ensuring that the law promoted the creation of new works, rather than solely the extraction of profits from content. The duration of a copyright guarantee has increased over time (see chart A). A 1709 British law set copyright for 14 years. The first US law (adopted in 1790) allowed rightsholders to renew for an additional 14 years. In 1909, 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 Millenium Copyright Act increased the term still further -- to 95 years for corporations and 70 years after death for individuals.

| **Year** | **Copyright Duration** |
|---|---|
| 1709 (British) | 14 years |
| 1790 (US) | 14 years + 14 year renewal |
| 1909 (US) | 28 years + 28 year renewal |
| 1976 (US) | 75 years (corporate)<br><br>life + 50 years (individual) |
| 1998 (US) | 95 years (corporate) |

| | |
|---|---|
| | life + 70 years (individual) |

Chart A: Copyright Duration

This lengthening of copyright duration flies in the face of the Constitutional limitation on copyright which granted Congress the right to institute copyright protections, but only for *limited times*, and as such is being challenged in the courts by a group of law professors (citation). The Constitutionally mandated goal of copyright is to encourage the production of new works, both by guaranteeing creators some exclusivity for a limited time, and by making sure that there is a robust public domain of copyright-free material that creators can draw on and incorporate into new works. It is absurd to think that 75 or 95 years is a "limited time", and even more absurd to rationalize that exclusive rights lasting beyond one's lifetime would provide incentives that would encourage a creator to create more works.

In a February 1998 editorial, the *New York Times* (itself a major content-holder that benefits from strong copyright legislation) strongly criticized proposed extensions of copyright duration.

> ...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 Orrin 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 pubic 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, February 21, 1998 editorial)

Lengthening of copyright duration is particularly onerous in the context 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 they digitize an image of an art work or photograph, their digitization creates a new copyright which will persist for the duration of copyright protection beginning with the date of digitization. If their contention that digitization is a substantial creative act is upheld by the courts, it will mean that the digital version of works already in the public domain will remain under copyright protection for an additional 95 years. A similar rationale may be followed in pending database treaty legislation, which is likely to extend effective monopoly control for an additional 95 years to a compiler every time they add a new work to their compilation.

## Control of Downstream Use (Licensing & other mechanisms)

The *first sale* doctrine has played a critical in creative criticism and other forms of free speech, and Content Industry attempts to eliminate *first sale* could create a very different world than the one we're used to living in. A key aspect of *first sale* has prevented the rightsholder of intellectual property from completely controlling who has access to it and how it is used. Though a publisher, newspaper, or Hollywood studio in the analog world might limit the audience for an initial set of sales, someone buying the work could turn around and sell it to anyone else. But in proposed digital age legislation, the purchaser of a work could not legally sell it or give it away without permission from the rightsholder. 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
- used bookstore and used recording stores couldn't operate without obtaining rightsholder permission before each purchase

The Content Industry is serious about controlling all downstream use of a work. According to Peter Chernin, President of News Corp (owner of Fox, Harper-Collins, and other content industry companies), his organization is advocating legislation that "guarantees publishers' control of not only the integrity of an original work, but of the extent and duration of users' access to that work, the availability of data about the work

and restrictions on forwarding the work to others" (quoted in Publishers Weekly, May 2001)

Until such legislation passes, content industry strategy has been focused on making users "license" content instead of "buy" it. For the past decade, most publishers have applied this strategy in the library world, refusing to sell them material in digital form. 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.

Under licensing schemes, material is leased rather than bought outright. This raises a myriad of concerns for libraries. Licenses are only for a limited number of years, and at the end of that period license fees may be raised drastically or, if the market isn't large enough, the material may be eliminated altogether. The licensor may eliminate particular items for economic reasons or because they are controversial, making it very difficult for a library to build collections or to maintain a historical record of the resources they have made available. In a recent example, in the wake of the Tasini case (see below), the New York Times threatened to eliminate freelance articles from the databases they sell, rendering these incomplete records of that newspaper's publication.

Site licenses of digital works of art can cause particular problems for faculty and students who build curricular or creative materials that incorporate these works. Faculty and students are hesitant to spend the extensive time needed to create new digital materials incorporating licensed digital images unless they can be sure that the campus license (and each individual image that was originally part of it) will continue in perpetuity, and that they can take their creations with them when they leave the campus. Faculty 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. This is a central problem to any type of licensing agreement; if a licensor did in fact choose to offer guarantees of continuity, that licensor would run the risk of a university deciding to cancel their license payments yet still maintain the continuity of access.

Licensing material in digital form can also raise privacy concerns. A recent trend in university licensing of digital material is for members of the university community to access that 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. This 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. Today a large number of websites monitor the browsing that goes on 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 difficult 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, scholarly journal subscription costs have skyrocketed in recent years (Guernsey, Case, McCabe, Wyly). The only way that libraries have been able to respond to this 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 crisis of the rising cost of serials, but it may also destroy their historic cooperative lending practices. Libraries, which have traditionally cooperated to guarantee that users of even the poorest library could employ ILL to borrow materials that their library could not afford to purchase, are likely to find themselves prohibited by licensing agreements from engaging in ILL.

The vast expansion of the duration of the copyright monopoly, coupled with 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. This would continue a trend to increasingly favoring rightsholders over consumers and the public good.

## Intellectual Property Law Used to Suppress Creativity and Free Speech

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 recent trend where commercial transactions take precedent over what used to be regarded as public rights or part of the public good.

In recent years, libel laws have been used to try to suppress criticisms that have been traditionally protected by free speech. These lawsuits, filed by corporate entities against individuals who have criticized them, have laid the burden of proof upon the defendants, forcing them to prove that all their criticisms were true. In 1998 Oprah Winfrey won an expensive court battle defending herself against a $12 million lawsuit. The lawsuit, filed by the cattle industry under a recent food disparagement law, challenged statements Oprah made on her television talk show about the health of eating beef. According to the New York Times, "critics say that they [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"(Verhovek). In a similar case in Britain, McDonalds sued activists from London Greenpeace who had created 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 they had made in their leaflet (Vidal).

Many groups within our society use the threat of intellectual property infringement litigation to avoid criticism or suppress works that they disapprove of. As many of the

cases listed below show, limitations to the *fair use* defense against copyright infringement can result in the elimination of parody and satire, the curtailment of free speech, or the suppression of creativity, particularly in the form of new artistic styles:

- In Spring 2001, the estate of Margaret Mitchell succeeded in halting publication of Alice Randall's novel that satirized the racism and sexism in *Gone with the Wind*. Mitchell's estate claimed that *The Wind Done Gone* infringed on their copyrighted story and characters. Though an appeals court overruled the lower court and permitted publication, in the future we are likely to see an increase in the use of copyright law as prior restraint against critical works (Strothman).
- 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" (Levitt). A few months later it was revealed that Viacom/Paramount was preparing to make their own Star Trek website public, and used the threat of intellectual property litigation to remove any competition or confusion ahead of time (Granick, Ward). 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 (Granick) because Paramount's litigation had claimed that fictional accounts using Star Trek characters or settings were violations of their intellectual property (Ward).
- In 1999 eToys, a toy distributor, sued the artist group eToy accusing them of trademark infringement, trademark dilution and unfair competition for using the internet domain name etoy.com for their satiric website. Even though the artists had used the etoy name before the toy distributor even existed, a Los Angeles Superior Court judge granted a preliminary injunction against the artists, and under threats of $10,000/day fines, the artists stopped using the domain name (Mirapaul 1999). Only after an extensive protest campaign by artists and free speech advocates (as well as some guerilla direct-action tactics) did the toy company drop their lawsuit (Mirapaul 2000).
- In the late 1980s artist Jeff Koons created a wooden sculpture of a couple holding a large number of puppies in their arms. Photographer Art Rogers, who had taken a photograph of a couple holding puppies in their arms and was marketing it as a postcard, sued Koons for copyright infringement. Koons claimed that his work was parody and that most art was derivative in similar ways. The courts ruled against Koons (reaching as high as a June 1992 decision of the US District Court of Appeals), and ordered him to pay a large financial settlement to Rogers.
- 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 a detestable 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 raises 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 ad 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, and the mere threat of litigation caused the AIDS awareness group to pull their ads. This incident is interesting both because it did not require actual litigation (the mere threat of litigation assured compliance) and because the characters Snow White and Cinderella were not created by Disney, and were folklore characters for hundreds of years before the Disney company was even formed.
- In 1990 the estate of Roy Orbison sued the rap group *2 Live Crew* for copyright infringement because they used "sampling" of Orbison's original song in their parody of "Pretty Woman". Though the Federal District Court supported 2 Live Crew's claim that parody was a fair use, in 1992 the Court of Appeals for the Sixth Circuit reversed the decision, contending that fair use did not come into play because the parody song had commercial character. This was a disturbing decision that would severely limit most rap group "sampling" and any kind of parody that might be sold for a profit. Luckily, in 1994 the Supreme Court overruled the appeals court and held that their parody was fair use (Luther R. Campbell et al. vs Acuff-Rose Music, Inc.).
- In 1991 the band *Negativland* released a single parodying radio disk jockey Casey Kasem and the group ***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 2 weeks, all recordings were pulled from the shelves, and the recording has never made it back into music stores. The several years of ensuing litigation almost bankrupted Negativland 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 the 1990s the Church of Scientology won significant monetary damages in a series of lawsuits against a number of former church members who had posted criticisms of the Church to newsgroups or on their websites. The Church's Religious Technology Center monitors the Internet to find postings that include portions of the church's writings, then files suits against the posters and Internet Service Providers (ISPs) claiming that posting writings of the church constitutes copyright infringement. Threatened litigation against ISP Netcom led Netcom to adopt a new policy forbidding any posting of copyrighted material anywhere on their site, and allowing them to act quickly to remove any material when copyright challenges arise. The results of such a policy means that any

rightsholder can get the ISP to remove material that they don't like, even if the poster of the material believes that posting constitutes fair use (Espe).

- In 1996 the American Society of Composers, Authors and Publishers (ASCAP) told the Girl Scouts of the USA that scout camps must start paying a licensing fee to sing any of the 4 million copyrighted songs that ASCAP controlled (Walker and Fagan). This included girl scout staples such as "Happy Birthday". Many camps went songless for months, until newspaper and talk show attention generated enough outrage that ASCAP was forced to say that they had no intention of prosecuting girl scout camps for violations of singing songs around the campfire. But in backing down, ASCAP still insisted that they still might prosecute camps for playing background music without a license. Though most citizens would bristle at ASCAP's attempts to charge the girl scouts, as a copyright holder the law is on their side, and the girl scouts' only defense would be *fair use* (but only as long as *fair use* remains a defense).

The cases listed above all transpired under previous versions of copyright law. Current legislation which would further limit or eliminate fair use carries with it the danger of limiting free speech, curtailing satire and parody, and suppressing new art forms to an even greater degree than existed when the above battles took place. The discourse over copyright legislation is dominated by discussion of "economic harm" that will come to the content industry if action is not taken. The harm to the public good that will come from further limitations on fair use is treated merely as a minor side-effect. As Negativland wrote in a 1993 issue of Billboard:

> The prevailing assumption — that our culture, and all its cultural artifacts, should be privately controlled and locked away from any and all further creative uses by the audience they are directed at — is both undesirable and unworkable. Uninvited appropriation is inevitable when a population bombarded with electronic media meets the hardware that encourages people to capture those media. However, laws devised to protect the "ownership" of transmittable information have, for example, resulted in a music industry in which the very idea of a collage is a dangerous one, and artists inspired by "direct reference" forms of creation do not have the "right" to decide what their own art will consist of. Has it occurred to anyone that the private ownership of mass culture is a bit of a contradiction in terms? (Negativland, p 154)

## Creators and Users: Common Interests

The content industry perpetuates the myth that they speak for the creators. At conferences and in debates, these consolidator representatives repeatedly claim that they are advocating strong copyright monopoly control in order to protect authors, recording artists, and filmmakers. But they seldom make this claim when members of the creative communities they claim to represent are present. Courtney Love echoes the sentiments of even successful music performers when she contends that musicians play the role of sharecroppers to the recording industry's plantation owners (Love 2000). And the New

York Times decision to pull freelance authors' articles from their database after losing a Supreme Court case (Tasini vs NY Times) shows that the content industry does not have authors' interest in mind, and is only interested in maximizing their own profits.

The content industry is also no friend of libraries. Association of American Publishers (AAP) spokeswoman Judith Platt has been quoted criticizing librarians for wanting to share content, and calling them radicals "like the Ruby Ridge or Waco types" (ZDNet News, July 12, 2001). AAP President/Director Pat Schroeder's reaction to librarians was featured in a Washington Post article (Feb 7, 2001): " Publishers and librarians are squaring off for a battle royal over the way electronic books and journals are lent out from libraries and over what constitutes fair use of written material… Grossly oversimplified: Publishers want to charge people to read material; librarians want to give it away. … 'We,' says Schroeder, 'have a very serious issue with librarians.'"

While the interests of the content industry are very different than that of creators or of librarians or of users, the latter groups have much in common. Creators, librarians, and users all make good use of content created by others. They all want the widest possible distribution of content. They benefit from moves away from perpetual "locking up" of content. And they all have interest in works persisting over long periods of time. In this sense they are major allies who could benefit from working together in an alliance to promote the proliferation of content.

An example of such an alliance developed in the struggle over the Tasini vs. NY Times court case. This case came about when freelance authors sued the newspaper because it sold the content from back issues to database vendors (such as Nexis) without getting permission from the freelancers. In June 2001 the Supreme Court ruled that publishers had violated the freelancers' copyright and suggested remedies like negotiating blanket agreements with author groups like the National Writers Union (which had brought the suit). Instead, the newspaper decided to pull all freelancer articles from their database vendors, affecting the historical record of the "newspaper of record. During the court proceedings, most of the library community aligned itself with the writers, echoing their sentiment that they should be justly compensated, and that the increasing control asserted by consolidators needed to be tempered. And since the court decision, both writers and librarians have vociferously denounced the Times decision to pull articles as being a costly power-play, bad public policy, destructive of the historical record, and resembling the schoolyard bully who won't let anyone else play with the ball if he can't have his way" (Besser 2001). The network of mutual support between librarians and creators to oppose content industry power-grabs can serve as a model for future struggles.

## Conclusion

Having a robust information commons to draw upon is critical for creativity and for the creation of new and works. The key copyright concepts that have nurtured that information commons (a rich *public domain*, *fair use*, and *first sale*)are deeply intertwined with a value system that emphasizes access to information over privatization

of information. These concepts promote democratic values such as political critique and satire, equal access to information for education, and the diversity of creativity that comes from letting less powerful societal voices develop new art forms that comment upon older ones.

In recent years we have seen a veritable assault on the *public domain, fair use* and *first sale* — 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 they are even trying to expand their rights into new arenas where these can be used to suppress criticism.

The content industry has complained vociferously about potential economic harm, yet their assertions run counter to a variety of examples which raise questions as to whether they will be harmed economically: 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.

In the wake of the content industry assault, a number of groups are struggling to maintain an information commons (Besser Commons). These include the Center for the Public Domain (http://www.centerforthepublicdomain.org/) and the Knowledge Conservancy (http://yen.ecom.cmu.edu/kc/). Additional groups, such as the Digital Future Coalition (http://www.dfc.org/) are deeply involved in the pragmatic struggles to maintain access to content.

If these groups are not successful, we will continue on the same trajectory. Accompanying our shrinking information commons will be increased control over social/political commentary and satire, as well as rightsholders' increased control over the creation of new derivative works and recombinant works. We will continue to see the criminalization of acts that might possibly impede digital commerce . The result will be the creation of fewer and fewer derivative works like *West Side Story, The Wind Done Gone,* and rap music, and far less experimentation and exploration. Fewer challenging voices will be heard, and public discourse will be curtailed. A likely companion to the tight control over pre-existing content is the 1984-ish vision of controlling access to our common history.

But the most devastating impact from these recent changes is the likely transformation of information into a consumer product. 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; even when granting a copyright monopoly, the law has mandated *fair use* and

*first sale* as limits to that monopoly. As the law is changing to eliminate the public good aspects of intellectual property, we are seeing a rapid increase in the commodification of information. The area of authorship and creativity will increasingly resemble the world of consumer products — intellectual property will become more bland and corporate controlled. Most individuals will find it more and more difficult to become a creator, and will settle for being merely a consumer. And diverse voices will be 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)

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