

A COLLAGE OF RELEVANT IDEAS [collected by David Morneau]

U.S. Code: Title 17, Chapter 1

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- 1) to reproduce the copyrighted work in copies or phonorecords;
- 2) to prepare derivative works based upon the copyrighted work;
- 3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- 6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

As Duchamp pointed out many decades ago, the act of selection can be a form of inspiration as original and significant as any other. Throughout our various mass mediums, we now find many artists who work by "selecting" existing cultural material to collage with, to create with, and to comment with. In general, this continues to be a direction that both "serious" and "popular" arts like. But is it theft? Do artists, for profit or not, have the right to freely "sample" from an already "created" electronic environment that surrounds them for use in their own work?¹

All popular music (and all folk music, by definition), essentially, if not legally, exists in a public domain. Listening to pop music isn't a matter of choice. Asked for or not, we're bombarded by it. In its most insidious state, filtered to an incessant bass-line, it seeps through apartment walls and out of the heads of walk people. Although people in general are making more noise than ever before, fewer people are making more of the total noise; specifically, in music, those with megawatt PA's, triple platinum sales, and heavy rotation. Difficult to ignore, pointlessly redundant to imitate, how does one not become a passive recipient?²

Meanwhile, in the early '70s in Jamaica, King Tubby and Lee "Scratch" Perry, great visionaries, were deconstructing recorded music. Using astonishingly primitive predigital hardware, they created what they called *versions*. The recombinant nature of their means of production quickly spread to DJs in New York and London.

Our culture no longer bothers to use words like *appropriation* or *borrowing* to describe those very activities. Today's audience isn't listening at all - it's participating. Indeed, audience is as antique a term as record, the one archaically passive, the other archaically physical. The record, not the remix, is the anomaly today. The remix is the very nature of the digital.

Today, an endless, recombinant, and fundamentally social process generates countless hours of creative product (another antique term?). To say that this poses a threat to the record industry is simply comic. The record industry, though it may not know it yet, has gone the way of the record. Instead, the recombinant (the bootleg, the remix, the mash-up) has become the characteristic pivot at the turn of our two centuries.³

The psychology of art has always favored fragmentary "theft" in a way which does not engender a loss to the owner. In fact, most artists speak freely about the amount of stuff they have stolen at one time or another. In the realm of ideas, techniques, styles, etc. most artists know that stealing (or call it 'being influenced' if you want to sound legitimate) is not only OK, but desirable and even crucial to creative evolution. This proven route to progress has prevailed among artists since art began and will not be denied. To creators, it is simply obvious in their own experience.

Now some will say there is a big difference between stealing ideas, techniques, and styles which are not easily copyrighted, and stealing actual material, which is easily copyrighted. However, aside from the copyright deterrence factor which now prevails throughout our law-bound art industries, we can find nothing intrinsically wrong with an artist deciding to incorporate existing art "samples" into their own work. The fact that we have economically motivated laws against it does not necessarily make it an undesirable artistic move. In fact, this kind of theft has a well-respected tradition in the arts extending back to the Industrial Revolution.⁴

The precarious commodity in music today is no longer the tune. A fan can recognize a hit from a ten millisecond burst, faster than a Fairlight can whistle Dixie. Notes with their rhythm and pitch values are trivial components in the corporate harmonization of cacophony. Few pop musicians can read music with any facility. The Art of Noise, a studio based, mass market targeted recording firm, strings atonal arrays of timbres on the line of an ubiquitous beat. The Emulator fills the bill. Singers with original material aren't studying Bruce Springsteen's melodic contours, they're trying to sound just like him. And sonic impersonation is quite legal. While performing rights organizations continue to farm for proceeds for tunesters and poeticians, those who are shaping the way the buck says the music should be, rhythmatis, timbralists and mixologists under various monikers, have rarely been given compositional credit.

At what some would like to consider the opposite end of the field, among academics and the salaried technicians of the orchestral swarms, an orderly display of fermatas and hemidemisemiquavers on a page is still often thought indispensable to a definition of music, even though some earnest composers rarely if ever peck these things out anymore. Of course, if appearances are necessary, a computer program and printer can do it for them

Professional developers of the musical landscape know and lobby for the loopholes in copyright. On the other hand, many artistic endeavours would benefit creatively from a state of music without fences, but where, as in scholarship, acknowledgement is insisted upon.⁵

One way I've begun to think about this is to question whether within our culture, writing is allowed. Now when you say the word writing, for those of us over the age of 15, our conception of writing is writing with text, and in fact our tradition protects the right to write with text and to draw upon other people's writings with text quite substantially. People can review my book and quote my words in reviewing my book, criticize me, do whatever they want, and that's protected by a tradition of fair use that has taken hundreds of years to develop but is now pretty strong.

But if you think about the ways kids under 15 using digital technology think about writing--you know, writing with text is just one way to write, and not even the most interesting way to write. The more interesting ways are increasingly to use images and sound and video to express ideas. Well, all of those ways of writing under the law as it's understood right now are basically illegal unless you secure permission from the author up front. So the same act of creativity in some sense, you know, taking, creating, mixing out of what other people do, is legal in the text world and illegal in the digital media world. And the struggle is to get people to recognize that there's no good reason for the rules to be so radically different between the two contexts, and that we ought to be encouraging a wider range of creativity using digital media—both because there are many people who would be extraordinarily talented in exploiting those types of creativity, and also because it would really spur growth in collective literacy about how media itself functions and how it has its effect.⁶

<http://www.bannedmusic.org/>
<http://www.downhillbattle.org/>
<http://www.lessig.org/>
<http://www.mashculture.nl/english/>
<http://negativland.com/>
<http://www.peoplelikeus.org/>
<http://www.plunderphonics.com/>

This document can also be found online at <http://5of4.com/lifedance/download.html>

¹ Negativland *Fair Use* (<http://negativland.com/fairuse.html>)

² John Oswald "Plunderphonics, or Audio Piracy as a Compositional Prerogative"- as presented by John Oswald to the Wired Society Electro-Acoustic Conference in Toronto in 1985. (<http://www.plunderphonics.com/>)

³ William Gibson, *God's Little Toys: Confessions of a cut & paste artist*. *Wired* (13.07, July 2005)

⁴ Negativland

⁵ Oswald

⁶ Richard Koman *Remixing Culture: An Interview with Lawrence Lessig* 02/24/2005 (<http://www.oreillynet.com/pub/a/policy/2005/02/24/lessig.html>)