THE ART OF DEFIANCE : COPYRIGHT AND THE CREATIVE COMMONS

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"CAUGHT, NOW IN COURT ' CAUSE I STOLE A BEAT / THIS IS A SAMPLING SPORT / MAIL FROM THE COURTS AND JAIL / CLAIMS I STOLE THE BEATS THAT I RAIL ... I FOUND THIS MINERAL THAT I CALL A BEAT / I PAID ZERO."

Chuck D, "*Caught, Can I Get A Witness?*"

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Fall CCTP 505

THE ART OF DEFIANCE : COPYRIGHT AND THE CREATIVE COMMONS

In the early 1900s, a controversial, young artist named Marcel Duchamp took a cheap postcard reproduction of Leonardo Da Vinci's *Mona Lisa*, drew a moustache on her famous grin and proceeded to sign it as his original piece. A few decades later, a brilliant musician named Ray Charles faced criticism - and soaring record sales - when he dared to merge sacred gospel songs with lyrical innuendo. Shortly thereafter, drawing inspiration from America's evolving identity as a country of mass-consumption, Andy Warhol painted a Campbell soup can with vitriolic verisimilitude. And at the close of the twentieth century, Grandmaster Flash and Sugarhill Gang, the pioneers of rap and hip-hop, appropriated existing songs to augment their rhymes, thereby producing the prevailing musical genre of the proceeding century.

As Lawrence Lessig asserts, "[c]reators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. That building is always and everywhere at least partially done without permission and without compensating the original creator."[1] As presumed public domain, the brushstrokes, grace notes and *ideas* authored by our collective creative ancestors have always been an indispensable element of human creation. However, throughout history, artists have proven their resilience when faced with restrictive milieus (be they technological, social or political in nature) that would threaten the creative commons (hereby defined as the collection of images and information once ensured as residing in the public domain from which bloom the fruits of creative introspection and action). Now, in this litigious era of fiercely defended (and dubiously defined) 'property,' artists and the very freedom to create is under attack once more. This time, however, the threat comes from an enemy wielding an instrument that purports to cripple creativity altogether. The weapons of choice are copyright and intellectual property. The "enemies" are, ironically, fellow artists in the contentious industries of culture. The damsel in distress is the

doctrine of "fair use" and the survival of the creative commons. And finally, the hope for defense is the essence of innovation and social critique (in particular, the power of parody) that has driven the defiant nature of artistic expression from the dawn of man's self-awareness.

Given the advent of ever-increasing legal restrictions (the Copyright Extension Act (1998), the Bridgeport Music Inc. vs. Dimension Films ruling (2002) and the Digital Millennium Copyright Act (1998) are primary examples), it would seem that budding film-makers, musicians and visual artists have little choice but to concede an emerging defeat. However, with an increasing number of exhibitions such as "*Illegal Art,*"[2] publications such as Stay Free Magazine,[3] a surge of underground (primarily urban) musical productions and precedent court rulings on the protection of parody as fair use (for example, 1994's Campbell v. Acuff-Rose Music, Inc.),[4] there is a strong indication that a movement of defiance has emerged and is growing in mainstream acceptance. As in the case of Duchamp and Dadaism, Ray Charles and soul, Warhol and Pop Art as well as Grandmaster Flash and hip-hop, creative movements are borne from social critique and the infusion of culture with industry. History has proven that cultures of permission[5] and restriction breed counter-cultures of deviant innovation, and it is here that our hope for the survival of the creative commons resides.

My analysis of how the creative commons is affected by the voracious expansion of copyright will focus on how artists have reclaimed their agency despite the tightening of legal constraint. I am also seeking to underscore the non-linear development of *consumed* cultural *products*. Particularly evident in the realm of artistic expression, objects that have traversed from production through distribution are salvaged from the assumed terminus of consumption through the doctrine of fair (re) use and the practice of appropriation. This reclamation of culture is most clearly illustrated in the use of "sampling" in hip-hop music - the paragon praxis of musical defiance that is currently under siege.

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[1] Lawrence Lessig, *Free Culture* (New York: Penguin Press, 2004) p.29
[2] See: http://www.illegal-art.org
[3] See: http://www.stayfreemagazine.org
[4] See: http://supct.law.cornell.edu/supct/html/92-1292.ZS.html

DEFYING PRODUCTION

When Marcel Duchamp inverted a white industrial urinal, signed his name on its ceramic rim and called it "*Fountain*," who would have known that this act of artistic disobedience would be reincarnated in the guise of Puff Daddy and the Notorious B.I.G.? Much in the way that Duchamp pioneered the appropriation of "found objects" for artistic use, the progenitors of rap and hip-hop appropriated the artifacts of musical industry (beats, chords, "found noise") and signed their "names" with rhymes of social critique. As Kembrew McLeod describes in an interview with rappers Chuck D and Hank Shocklee, "[w]hen Public Enemy released *It Takes a Nation of Millions to Hold Us Back*, in 1988, it was as if the album had landed from another planet. Nothing sounded like it at the time. *It Takes a Nation* came frontloaded with sirens, squeals, and squawks that augmented the chaotic, collaged backing tracks over which P.E. front man Chuck D laid his politically and poetically radical rhymes. He rapped about white supremacy, capitalism, the music industry, black nationalism, and… digital sampling." [6]

The early development of hip-hop can be viewed as the ideal use of the creative commons as unfettered public domain. Early "sampling" of commercially distributed music (which was in turn reproduced and redistributed as a new musical entity) illustrates a kind of artistic utopia where innovation was nurtured and inspired. With the fusion of spoken word and reclaimed sound, a powerful new genre of music was created, and as Lawrence Lessig asserts, "we've come to exaggerate the new and forget that a great deal in the "creative" is actually old. The new builds on the old, and hence depends, to a degree, on access to the old."[7]

Until it became clear that hip-hop was commercially viable, artists freely recycled horn hits, guitar riffs and the occasional melody from oft-forgotten tunes and sound tracks without worry about

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[5] Lessig, *Free Culture*, p. 192
[6] Kembrew McLeod, *How Copyright Changed Hip Hop* (Stayfree Magazine, No.20)
[7] Lawrence Lessig, *The Future of Ideas* (New York: Vintage Books, 2002) p.105

"clearing" copyright before production.

However, as Chuck D describes, " [c]orporations [eventually] found that hip-hop music was viable. It sold albums, which was the bread and butter of corporations. Since the corporations owned all the sounds, their lawyers began to search out people who illegally infringed upon their records." [8]According to the Bridgeport Music Inc. vs. Dimension Films ruling of 2002, "a musician who copies any part -- even as little as two seconds -- of an existing recording without permission of the person who owns the copyright to the recording is in violation of the law."[9] This sudden assertion of intellectual property by large music companies drastically changed first the legality of sampling and therefore the sound of hip-hop forever. By forcing licensing mandates on all elements of a studio-produced sound, artists are now forced to seek out other means of supporting rhyme with sound. If not, they face ever-increasing licensing fees which have virtually sequestered the employment of "sampling" to the few musicians fortunate enough to have these fees covered by, ironically, the very corporations that impose them.[10]

As crippling as this development may appear, "…not all constraints are corrupting of something called "creativity." Certain constraints obviously enable creativity."[11] In having to forego sampling, artists have returned to composing original works, fusing elements of soul, jazz and even punk rock to produce new sounds. Still, many producers (or "MCs") consider sampling to be fundamental elements of their craft: "Sampling is so important. It's the foundation of rap and hip-hop," **The Roots'** co-manager **Shawn Gee** says."[12] One area that sampling can (and has) survived is in the realm of parody, given its legal precedent.

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[8] McLeod: http://www.stayfreemagazine.org/archives/20/public_enemy.html
[9] David Rim, *Hip Hop Dead?* (Copyfutures, The Future of Copyright: http://lsolum.typepad.com/copyfutures/2004/10/hip_hop_dead.html)
[10] Foxxylady, *Can Hip Hop Live Without Sampling?* (Sixshot.com: http://www.sixshot.com/articles/4259/)
[11] Lessig, *Ideas,* p.104
[12] Foxxylady: http://www.sixshot.com/articles/4259/

DEFYING DISTRIBUTION

In 1994, Acuff-Rose Music, Inc, publishers of the popular song *Oh, Pretty Woman,* filed suit against rapper group 2 Live Crew for their song *Pretty Woman*, which, while borrowing heavily from the Orbison-penned tune, was defended as a parody and therefore protected under fair use. The significance of Campbell v. Acuff-Rose Music, Inc. (1994) lies in its clear protection of creative works that obviously cannot, by their very nature, obtain clearance from the original author but must rely on reproducing significant elements of the piece to substantiate the parody. These critical forms of critique are weighed according to (1) the purpose and character of use of the original copyrighted work, (2) the nature of the copyrighted work, (3) the amount and substantiality of the copying in relation to the copyrighted work as a whole and (4) the effect upon the potential market or value of the copyrighted work.[13] At the core of these criteria is the *transformative* value of the new work. Accordingly, in the case of *Pretty Woman,* the Court ruled that a "parody, like other comment or criticism may claim a fair use under [Section] 107 [of the Copyright Act].[14]

In 2003, working under a heavy dose of (primarily corporate) parody, an international group of activist-artists converged to form the now infamous exhibition, "*Illegal Art*."[15] Presenting a diverse array of media (from cloth to CD) and subject matters (from Cinderella to cunnilingus), what bound each art (and artist) was a world of controversy and fundamental illegality. Having produced the work in the years following the Sonny Bono Copyright Extension Act of 1998 (which extended copyright terms for an additional twenty years),[16] use of popular cartoon characters (Mickey Mouse, for example, was particularly pervasive) rendered many of the pieces in violation of copyright. Examples include artists Michael Hernandez De Luna (pursued by the FBI for mailing envelopes bearing "fruit-flavored" anthrax stamps and commemorative Monica Lewinski stamps), Thomas Forsythe (who

[13] Lloyd. L Rich, *Parody: Fair Use or Copyright Infringement?* (Public Law: http://www.publaw.com/parody.html)
[14] Rich, http://www.publaw.com/parody.html
[15] Danit Lidor, *Artists Just Wanna Be Free* (Wired Magazine: http://www.wired.com/news/culture/0,1284,59501,00.html)
[16] See: http://www.copyright.gov/legislation/s505.pdf

faced legal censure from Mattel for "*Food Chain Barbie,"* his images of Barbie in a blender) and Diana Thornecroft (whose drawings of bound and bleeding Disney and Sesame Street characters are literally banned from Canada).[17]

Arguably, "*Illegal Art's*" greatest act of defiance was in the distribution through a CD of musical pieces that, according to its liner notes, "would never have existed if the artists had adhered to copyright law."[18] Citing folk music's tradition of borrowing and modifying a communal melody, the artists contributed works that were entirely sampled from sources as diverse as James Brown to the Beastie Boys. In asserting the need for recorded music to return to the public domain, it is even more impressive that such works are now distributed online, thereby giving it a far more global reach. While the website does state its acceptance of risk (and that the songs are not likely to be available for too much longer), its defiance of "Sonny Bono" is a perfect example of art exerting defiance.

While each work was, at one point, defended on the grounds of fair use, the organizers of the exhibition risked great legal action against them due to prior actions against the exhibiting artists from the entities that their work "attacked." Not surprisingly, controversy bred publicity, and perhaps it is a hopeful indicator that none of the organizers (nor the exhibiting artists) faced further legal action despite wide press coverage and exhibition prominence (shows in the San Francisco Museum of Modern Art are not insignificant feats). It would be too idealistic to assume that corporate legal departments were swayed into self-reflection by a piece depicting their company logo as an oil spill (a more likely scenario is that litigation would have brought unwanted press); however, what *is* promising is that as artists reclaim their agency and work in active defiance of legal restriction, mass distribution of their work (i.e., exhibition in prominent gallery space, wide press coverage and use of online resources) can render their message mainstream.

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[17] Lidor, http://www.wired.com/news/culture/0,1284,59501,00.html

Defying Consumption

One of the most stunning pieces in the *"Illegal Art"* show was a series of quilted panels created by artist Ai Kijima. As stated in his artist bio "[q]uilting is a traditional craft that depends on the appropriation of previously-owned and recycled materials. The abundance of commercially-printed fabrics featuring corporate characters add a both a new dimension and an unfamiliar set of concerns to the crafter's process."[19] What Kijima refers to are the discarded, forgotten though often cherished *Metallica* T-shirts and *Harry Potter* bed sheets that, when appropriated into his art, take on a striking new meaning in vibrant fields of color, shape and form that are entirely composed of industrial materials. While exemplifying a synthesis of classical compositions with industry reminiscent of Andy Warhol, Kijima himself is also an example of active consumption. By this I mean a critical reflection over the (fair and unfair) use of the products offered for consumption coupled with a pro-active attempt to recreate its meaning (either through art or advocacy).

Lessig supports this concept best in his discussion of the Japanese art of *doujinshi*. While easily dismissible as fanatic and derivative, *doujinshi* is a well-respected art form that allows fans of popular *manga* (print and animated cartoons) to appropriate with near-perfect verisimilitude the styles, characters and diegesis of a given series into independent works that are then published without compensation to the original creators.[20] Though it presents an interesting discussion into the global variety of cultural and legal norms surrounding copyright, it also offers a literal illustration of active consumption. Fans are not passively absorbing the comics; rather, they engage the authors by engaging the characters, challenging the progenitors to remain vigilant in maintaining the quality of their work (lest a fan best them in both script and art). Through the practice of *doujinshi,* fans actively recreate meaning from consumed media- much like the unfettered rappers of old.[21]

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[18] See: http://www.illegal-art.org
[19] See: http://www.illegal-art.org
[20] Lessig, *Free Culture*, p.25
[21] See: http://www.witch-hunter.net/passion/doujinshi.php

As David Bollier states, "[o]wners of intellectual property want their Barbie dolls, cartoon characters, corporate logos, and software programs to be *ubiquitous* in the culture, but never to be *freely usable* by the culture. They want to sanction only a controlled, consuming relationship with the products introduced into commerce, not an open, interactive one of the sort we associate with a democratic culture."[22] In other words, what is desired of us is complacency (if not, complicity) in the erosion of the creative commons. Interestingly, it is an oft-stated irony that while Disney owes its portfolio (and billions) to the appropriation of scores of children's tales and narratives in the public domain, the company is also the fiercest defender of copyright and intellectual property (indeed, one of the chief beneficiaries of the Copyright Extension Act is the beloved *Mickey Mouse*, who remains protected from the public domain for another twenty years).[23]

However, the question is not what to do with a hidden Mickey *now*, but what do expect when his twenty years expire. One can easily argue that copyright will be extended (and expanded) further; if so, where will the artists be? Will they be locked out of the creative commons altogether? Persistent advocacy of fair use amongst policy makers and use of the democratic process aside, an equally important strategy would be to continue to defy (however, with the legal backing from supportive litigators). While art and music in *expression* can offer a defiance of the commons/ copyright binary, in *practice*, it would be foolish not to acknowledge the restrictions poised on musicians by copyright clearance or on media artists by the protection of corporate brands as property; in essence, that the binary does, indeed exist. Rather, it is an offered hope that in the battle for the commons, copyright is viewed as a challenge, not a decree for defeat - a challenge that will breed what artists will never be without: creativity.

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[22] David Bollier, *Silent Theft* (New York: Routledge, 2003) p.121
[23] Lessig, *Free Culture*, p.24-25

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