

FAIR USE

Negativland

[<http://negativland.com>]



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?

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.

In the early years of this century, Cubists began to attach found materials such as product packaging and photographs to their paintings. This now seems an obvious and perfectly natural desire to embody or transform existing things into their own work as a form of dialogue with their material environment. And that "material" environment began to grow in strange new ways. Appropriation in the arts has now spanned the entire Century, crossing mediumistic boundaries, and constantly expanding in emotional relevance from beginning to end regardless of the rise and fall of "style fronts". It flowered through collage, Dada's found objects and concept of "détournement", and peaked in the visual arts at mid-century with Pop Art's appropriation of mass culture icons and mass media imagery. Now, at the end of this century, it is in music where we find appropriation raging anew as a major creative method and legal controversy.

We think it's about time that the obvious esthetic validity of appropriation begins to be raised in opposition to the assumed preeminence of copyright laws prohibiting the free reuse of cultural material. Has it occurred to anyone that the private ownership of mass culture is a bit of a contradiction in terms?

Artists have always perceived the environment around them as both inspiration to act and as raw material to mold and remold. However, this particular century has presented us with a new kind of influence in the human environment. We are now all immersed in an ever-growing media environment -- an environment just as real and just as affecting as the natural one from which it somehow sprang. Today we are surrounded by canned ideas, images, music, and text. My television set recently told me that 70 to 80 percent of our population now gets most of their information about the world from their television sets. Most of our opinions are no longer born out of our own experience. They are received opinions. Large increments of our daily sensory input are not focused on the physical reality

around us, but on the media that saturates it. As artists, we find this new electrified environment irresistibly worthy of comment, criticism, and manipulation.

The act of appropriating from this media assault represents a kind of liberation from our status as helpless sponges which is so desired by the advertisers who pay for it all. It is a much needed form of self-defense against the one-way, corporate-consolidated media barrage. Appropriation sees media, itself, as a telling source and subject, to be captured, rearranged, even manipulated, and injected back into the barrage by those who are subjected to it. Appropriators claim the right to create with mirrors.

Our corporate culture, on the other hand, is determined to reach the end of this century while maintaining its economically dependent view that there is something wrong with all this. However, both perceptually and philosophically, it remains an uncomfortable wrenching of common sense to deny that when something hits the airwaves it is literally in the public domain. The fact that the owners of culture and its material distribution can claim this isn't true is a tribute to their ability to restructure common sense for maximum profit.

Our cultural evolution is no longer allowed to unfold in the way that pre-copyright culture always did. True folk music, for example, is no longer possible. The original folk process of incorporating previous melodies and lyrics into constantly evolving songs is impossible when melodies and lyrics are privately owned. We now exist in a society so choked and inhibited by cultural property and copyright protections that the very idea of mass culture is now primarily propelled by economic gain and the rewards of ownership. To be sure, when these laws came about there were bootlegging abuses to be dealt with, but the self-serving laws that resulted have criminalized the whole idea of making one thing out of another.

Our dense, international web of copyright restrictions was initiated and lobbied through the Congresses of the world, not by anyone who makes art, but by the parasitic middle men of culture -- the corporate publishing and management entities who saw an opportunity to enhance their own and their clients' income by exploiting a wonderfully human activity that was proceeding naturally around them as it always had -- the reuse of culture. These cultural representers -- the lawyers behind the administrators, behind the agents, behind the artists -- have succeeded in mining every possible peripheral vein of monetary potential in their art properties. All this is lobbied

into law under the guise of upholding the interests of artists in the marketplace, and Congress, with no exposure to an alternative point of view, always accommodates them.

That being the case, there are two types of appropriation taking place today: legal and illegal. So, you may ask, if this type of work must be done, why can't everyone just follow the rules and do it the legal way? Negativland remains on the shady side of existing law because to follow it would put us out of business. Here is a personal example of how copyright law actually serves to prevent a wholly appropriate creative process which inevitably emerged out of our reproducing technologies.

In order to appropriate or sample even a few seconds of almost anything out there, you are supposed to do two things: get permission and pay clearance fees. The permission aspect becomes an unavoidable roadblock to anyone who may intend to use the material in a context unflattering to the performer or work involved. This may happen to be exactly what we want to do. Dead end. Imagine how much critical satire would get made if you were required to get prior permission from the subject of your satire? The payment aspect is an even greater obstacle to use. Negativland is a small group of people dedicated to maintaining our critical stance by staying out of the corporate mainstream. We create and manufacture our own work, on our own label, on our own meager incomes and borrowed money. Our work is typically packed with found elements, brief fragments recorded from all media. This goes way beyond one or two, or ten or twenty elements. We can use a hundred different elements on a single record. Each of these audio fragments has a different owner and each of these owners must be located. This is usually impossible because the fragmentary nature of our long-ago random capture from radio or TV does not include the owner's name and address. If findable, each one of these owners, assuming they each agree with our usage, must be paid a fee which can range from hundreds to thousands of dollars each. Clearance fees are set, of course, for the lucrative inter-corporate trade. Even if we were somehow able to afford that, there are the endless frustrations involved in just trying to get lethargic and unmotivated bureaucracies to get back to you. Thus, both our budget and our release schedule would be completely out of our own hands. Releases can be delayed literally for years. As tiny independents, depending on only one release at a time, we can't proceed under those conditions. In effect, any attempt to be legal would shut us down.

So OK, we're just small potato heads, working in a way that wasn't

foreseen by the law, and it's just too problematical, so why not just work some other way? We are working this way because it's just plain interesting, and emulating the various well-worn status quos isn't. How many artistic prerogatives should we be willing to give up in order to maintain our owner-regulated culture? The directions art wants to take may sometimes be dangerous, the risk of democracy, but they certainly should not be dictated by what business wants to allow. Look it up in the dictionary -- art is not defined as a business! Is it a healthy state of affairs when business attorneys get to lock in the boundaries of experimentation for artists, or is this a recipe for cultural stagnation?

Negativland proposes some possible revisions in our copyright laws which would, very briefly, clear all restrictions from any practice of fragmentary appropriation. In general, we support the broad intent of copyright law. But we would have the protections and payments to artists and their administrators restricted to the straight-across usage of entire works by others, or for any form of usage at all by commercial advertisers. Beyond that, creators would be free to incorporate fragments from the creations of others into their own work. As for matters of degree, a "fragment" might be defined as "less than the whole", to give the broadest benefit of the doubt to unpredictability. However, a simple compilation of nearly whole works, if contested by the owner, would not pass a crucial test for valid free appropriation. Namely: whether or not the material used is superseded by the new nature of the usage, itself -- is the whole more than the sum of its parts? When faced with actual examples, this is usually not difficult to evaluate.

Today, this kind of encouragement for our natural urge to remix culture appears only vaguely within the copyright act under the "Fair Use" doctrine. The Fair Use statutes are intended to allow for free appropriation in certain cases of parody or commentary. Currently these provisions are conservatively interpreted and withheld from many "infringers". A huge improvement would occur if the Fair Use section of existing law was expanded or liberalized to allow any partial usage for any reason. (Again, "the whole is greater than the sum of its parts" test.) If this occurred, the rest of copyright law might stay pretty much as it is (if that's what we want) and continue to apply in all cases of "whole" theft for commercial gain (bootlegging entire works). The beauty of the Fair Use Doctrine is that it is the only nod to the possible need for artistic freedom and free speech in the entire copyright law, and it is already capable of overriding the other restrictions. Court cases of appropriation which focus on Fair Use and its

need to be updated could begin to open up this cultural quagmire through legal precedent.

Until some such adjustments occur, modern societies will continue to find the corporate stranglehold on cultural "properties" in a stubborn battle with the common sense and natural inclinations of their user populations.