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## Now We All Live in Negativland: The Normalization of Copyright Tomfoolery

In many ways both legally and culturally 1991 was a different world. Most obviously and essentially, it was before the rise of the World Wide Web and its transformative revolution in how information, creative expression and commercial products are distributed, experienced and sold. This was an economic world then, before the rise of Napster and file sharing with its, to say the least, shattering effects on the business model for the content industry. It was a legal environment before the 1998 expansions of copyright in the Sonny Bono Copyright Extension Term Act and the Digital Millennium Copyright Act, which brought copyright into the on-rushing digital world, but in a way designed to benefit commerce at the expense of fair use. However, by then there were a steadily growing number of artists and musicians who were creating new works based on appropriated sounds and images. Not surprisingly this got a number of them sued for copyright infringement. In the fall of 1991 sound art pranksters Negativland were sued by U2's record and publishing companies over the uncleared samples and allegedly deceptive packaging of Negativland's single called, provocatively, *U2*. Re-examining, from the viewpoint of our current digital impasse, these entertaining but dishearteningly complicated legal wranglings allows for a critique of the content industries legal response to the digital culture,

a study of the origins of the counter-response by the advocates of free culture and fair use, and a reinforcement of the virtue of a purposefully imprecise copyright law.

It might be tempting for some to look at this pre-Information Superhighway era with a glint of nostalgia, almost as a simpler fin de siècle time where copyright infringement was easy to enforce, record labels were free to charge whatever they wanted for their product, and they didn't need to sue grandmothers and teenagers for illegal downloading. Copyright law mainly had the regulatory role of promoting a free economy by preventing content providers from ripping off each other's protected materials. It essentially required the economic and technological base of the entertainment industry to create a copy that was exact enough to infringe and that was distributable on a mass scale. Consumers could only consume.

To be sure there had been some earlier disruptions in this one way, top down commercial model of distributing culture. While these new technologies afforded the public some ability to control how and when they experienced pre-packaged culture, through time shifting or creating a mix-tape for a friend for example, the imperfect nature of analogue reproducibility limited the extent of the impact of the use. The content industry was either forced to accept and eventually reap huge profits from them, *i.e.* home videotape recorders, or while widely complaining about the effects – the British Phonographic Industry's easily ridiculed "Home Taping is Killing Music" ad campaign – rather easily absorbing the minor market effects. It took digital technologies, with their stunning ease of

perfect reproduction, alteration, and immediate and widespread dissemination, to truly upset the balance between content provider and consumer. This has had the by now well documented<sup>1, 2</sup> contradictory effect of turning the wider public into felonious pirates plundering the wealth of the unsuspecting entertainment industry and into activated and creative producers of a new digital folk culture. It has also brought copyright out of the purely economic sphere into our day-to-day lives regulating how we interact and experience the world around us.

Over the last century artists have played the role of the canary in the coalmine on this issue both in conceptually locating the human impulse to manipulate the increasingly mediated cultural environment and through the development of the actual methods of doing so. For the former the obvious touchstone is Marcel Duchamp's concept of the readymade. Duchamp asserted that the true artistic act was not the previously conceived of final artwork such as a painting or a sculpture, but the mental decision of calling something "art". The artist makes an artwork from appropriating images, objects and ideas from the world around them and it's the conceptual gesture of doing so that transforms them from the prosaic and the natural into the aesthetic. As Duchamp showed, it didn't matter if the original object was a urinal, a bottle rack, or the Mona Lisa suggestively detoured with an added moustache. Everything is fodder: high art, popular culture and the utilitarian.

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<sup>1</sup> Lessig, Lawrence. Free Culture: The Nature and Future of Creativity. New York: Penguin Books, 2003.

<sup>2</sup> Vaidhyanathan, Siva. Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity. New York: New York University Press, 2001.

In 1972 artist, musician and provocateur Genesis P-Orridge took Duchamp's concept of the readymade into the realm of the copyright with his performance and related book entitled *Copyright Breeches*. Besides creating a punningly humorous pair of oversized trousers emblazoned with dozens of copyright symbols, instead of merely declaring already existing objects art as per Duchamp, P-Orridge asserted his copyright over them in a declaratory act of peremptory claiming<sup>3</sup>. While it was obviously farcical for P-Orridge to claim copyright over things which he has no proper and legal ownership, his piece criticizes the acquisitive nature of the artists and the way the business world exploits the creative works of others. Astutely, P-Orridge highlights how the concept of what has become to be known as intellectual property undergirds and conjoins both worlds. Further, whether purposefully or not, it augurs the clashes to come between free expression and copyright control.

Until the ease of digital technologies it required the skill and drive of the artist to create a work that would irritate a copyright holder enough to claim infringement. One couldn't just cut and paste an image of Mickey Mouse to raise the legal wrath of Disney, but you had to be a talented enough cartoonist to draw and publish a satirical and patently offensive underground comic involving trademarked and copyright protected cartoon characters as the Air Pirates did in 1971<sup>4</sup>. Or you had to have the ability to paint like Roy Lichtenstein who subtly

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<sup>3</sup> Ford, Simon. Wreckers of Civilisation: The Story of Coum Transmissions and Throbbing Gristle. London: Black Dog, 1999.

<sup>4</sup> Levin, Bob. The Pirates and the Mouse: Disney's War Against the Counterculture. Seattle: Fantagraphics Books, 2003.

repurposed copyrighted images from trashy pulp comic books into intentionally vague but incredibly valuable pop art objects<sup>5</sup>.

Similarly, new recording technologies like videotape recorders and samplers were originally expensive enough and required enough training to limit the possibility of copyright infringement by the wider public. But with each new technology artists were immediately devising new methods of capturing the world around them, subverting and transforming the images and sounds they appropriated in manners that could not avoid infringing copyrights. According to the apocryphal origin myth of video art, in the fall of 1965 Nam June Paik purchased one of the first home video recorders – the Sony TCV-2100. Right away Paik set about recording televised images of politicians, popular figures and rock stars off the air that he manipulated and distorted<sup>6</sup>. He did this as a comment on the media landscape with its emerging cult of the celebrity and as raw material for creating his cathode tube paintings where the TV screen became a new electronic canvas.

In the music world, the release of digital samplers in the late 1980s transformed the ease with which artists and musicians could use previously recorded sound as a raw element for new compositions. DJs in the hip hop world used the new technology to dramatically expand on the previously

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<sup>5</sup> Go to the Lichtenstein Foundation's homepage at <http://www.lichtensteinfoundation.org/grrr.htm>. Lichtenstein's painting of a menacing dog used here to humorously dissuade copyright thieves was almost directly copied from a comic book panel; compare the images at the bottom of <http://davidbarsalou.homestead.com/LICHTENSTEINPROJECT.html>. See Alex Beam's article on Lichtenstein and copyright in the Boston Globe for more on the Foundation site's use of the dog painting.

<sup>6</sup> *E.g.* see Paik's Lindsay Tape, 1967, McLuhan Caged, 1967, Nixon Tape, 1967(?), Variations of Johnny Carson vs. Charlotte Moorman, 1966, Variations on George Ball on Meet the Press, 1967, and Beatles Electronique, 1966.

turntable-based musical form into the creatively dense soundscapes such as Public Enemy's *It Takes a Nation of Millions to Hold us Back*<sup>7</sup>. In an example presaging the troubles of Negativland, in 1989 composer John Oswald was forced to destroy the copies of his *Plunderphonics* CD. The CD, which featured a cheeky collage of Michael Jackson's head on the nude body of a woman which certainly played a part in the actions against Oswald, was a cut-up clashing jumble of samples from musicians such as Dolly Parton, Metallica, the Beatles, James Brown and Michael Jackson. Oswald's composition is clearly an act of musical critique and commentary in the way it collapsed previously held critical notions on the differences in musical genres and styles. Oswald, who distributed the CD for free, was threatened by the Canadian Recording Industry Association to turn over the existing copies and master tapes or face criminal proceedings. Lacking the financial means to battle the CRIA in court, Oswald complied<sup>8</sup>. In a manner which builds on P-Orridge's concept of the interwoven nature of art and commerce in relation to copyright, after the *Plunderphonics* debacle Oswald was hired twice by the music industry to create remix CDs: one celebrating the 40<sup>th</sup> anniversary of Elektra records (label to Metallica, one of the artists on *Plunderphonics*) and a double disc re-imagining of the Grateful Dead's psychedelic freak out jam "Dark Star"<sup>9</sup>. This suggests that the underlying issue is

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<sup>7</sup> The legal ramifications of this technology in the rap world were somewhat settled in by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* However legally protected sampling might have been, the actual cost of clearing samples became too prohibitive and rap music in the mid 1990s changed compositionally to a less sample heavy music form.

<sup>8</sup> Negativland. *Fair Use: The Story of the Letter U and the Numeral 2*. Concord: Seeland, 1995, 213-220.

<sup>9</sup> The *Plunderphonics* CD is available in its entirety as a free download from Oswald's website at <http://www.plunderphonics.com/xhtml/xnotes.html>.

not the act of manipulation of the copyright protected work that disturbs the content industry, but doing it without their permission.

Negativland used a similar technology to create the two songs on their *U2* single. They sampled U2's hit song "I Still Haven't Found What I'm Looking For" and mixed it with clandestine outtakes of a furious Casey Kasem swearing during an un-aired dedication to the very same U2 song. Packaged in a cover emblazoned with the letter U and number 2 and an image of the spy plane, Negativland released the single as a conceptual goof on the music industry, the nature of appropriation (does the band U2 own the phrase U2 with its Cold War connotations?) and the not so deeply veiled insincerity of an industry predicated on the commoditization of emotional connections.

Within weeks of the single's release, on storied underground record label SST, lawyers representing U2's label and publishing company – but not the band themselves – filed a lawsuit requesting an ex parte temporary restraining order to halt Negativland's "exploitation"<sup>10</sup> of their record. The lawsuit alleges that the single constitutes "nothing less than consumer fraud" due to the cover's oversized U and 2 "which is so deceptive as to create the false impression that the recording of is a genuine U2 record". The lawyers accuse Negativland of violating §43(a) of the Lanham Trademark Act and of "attempt[ing] to usurp the anticipated profits and goodwill to which plaintiffs are entitled from the exploitation of recordings and musical compositions by U2"<sup>11</sup>. Once again, the

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<sup>10</sup> Negativland, 5.

<sup>11</sup> Negativland, 6.

lawyers were protecting the profits of the label and publishing company, not the musicians in U2.

The second part of the complaint focused on Negativland's unauthorized use of the song "I Still Haven't Found What I'm Looking For." The lawyers called it a "blatant case of copyright infringement" under §101 of the Copyright Act justifying the request for the restraining order and compensation<sup>12</sup>. The judge agreed with the request and issued the temporary restraining order to SST and Negativland on September 5<sup>th</sup> with a hearing set for the 15<sup>th</sup> of October.

Reading the lawsuit now – from a non-legal standpoint it must be emphasized – reveals the absurdity of presenting the U2 trademark as one easily damaged. In fact, in the narrative that the lawyers furnish to establish Island and Warner-Chappell's as legal exclusive rights holders to sell and publish U2's music constantly mentions the overwhelming success of U2. They state that for 11 years Island records has been "manufacturing, marketing, promoting, advertising and selling millions of records by the enormously popular recording group known as 'U2'"<sup>13</sup>. They go on to recall that U2's *The Joshua Tree* album, which included the song that Negativland sampled, sold over 5 million copies alone in the United States and that album was made even more important by its winning a Grammy<sup>14</sup>. The lawyers relayed an account where one of the world's most popular bands and brands, that has sold millions and millions of records, can be usurped by a band who has pressed ten thousand copies of an album that if not stopped would "flood the shelves of record stores with the infringing

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<sup>12</sup> Negativland, 14.

<sup>13</sup> Negativland, 8.

<sup>14</sup> Negativland, 11.



recording [...] creating massive confusion among the record buying public”<sup>15</sup>.

“Thus, some unwitting consumers, upon purchasing and listening to the ‘U2 Negativland’ recording, might well conclude that U2 has made a poor quality and offensive recording, thus further unlawfully tarnishing the band’s reputation and image, and the enormously valuable “U2” name and mark”<sup>16</sup>.

Clearly, this is a hyperbolic legal form of writing designed to make an overwhelmingly convincing point in court. The point of bringing this up is not to suggest that there is some cut off point of damages under which pirates and bootleggers can operate outside of the law or that the plaintiffs were outside of their right as copyright holders. Instead it is to highlight that the lawyers, who were not required to prove damages or that any unwitting customers actually purchased the Negativland record thinking it was the new U2 record to request compensation, developed a legal case that might prevail in court but in the public arena ended up making U2 the heavy and Negativland the aggrieved party. This tin ear for judging the public opinion would return in their policy of litigation that the recording industry levied on individuals accused of illegal downloading a decade later<sup>17</sup>.

Similarly to the Oswald case, SST settled with Island and Warner-Chappell stating at the time that the \$90,000 of losses and fines incurred by settling out of court would be significantly less than the expected \$250,000 in legal fees that a defense would cost, regardless of whether they were successful

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<sup>15</sup> Negativland, 16.

<sup>16</sup> Negativland, 15.

<sup>17</sup> This is not meant to libel lawyers, but instead the labels and publishers for an overreliance on utilizing legal means to defend entrenched outmoded positions.

or not<sup>18</sup>. The label agreed to hand over all copies of the recording and refrain from in any way infringing on U2's trademark or copyright. The settlement effectively gave Island Records the rights to Negativland's recording.

Instead of what should have been the end of a rather unfortunate audio prank became even more tortuous as Negative decided to continue fighting for their cause in the public arena. First, they parted ways with their label as SST was insisting the band was responsible for all of the damages. They kept their case on the media radar via attempts to convince Island founder Chris Blackwell to release the record as a b-side to a U2 record since "interest in the single is higher than ever"<sup>19</sup>, entreaties to Casey Kasem, and ambushing U2's the Edge in an interview where they hit him up for a loan to pay off their legal fees and release a new record<sup>20</sup>.

In August of 1992 they released a magazine which compiled all the documents of the case – the original lawsuit, settlement, press clippings, letters and faxes between the parties, and the interview with the Edge – and a CD of an audio collage mixing together purposefully infringed copyright protected material and a treatise on fair use. SST immediately sued them for copyright infringement based on unauthorized publication of internal SST documents. The band and SST eventually settled out of court by allowing the label to release an essentially unauthorized live recording of Negativland and any parodies of Negativland if it

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<sup>18</sup> Negativland, 46

<sup>19</sup> Jolson-Colburn, Jeffrey. "Negativland, U2 scrap takes bizarre twists: [DU PAGE SPORTS FINAL, NED Edition]." *Chicago Tribune*. 30 Jan. 1992,

<sup>20</sup> Hosler, Mark, Don Joyce and R.U. Sirius. "U2's the Edge Meets Negativland." *Mondo 2000*. June 1992. Accessed 3 Dec. 2008 at <http://www.well.com/gopher/Publications/MONDO/u2negat.txt>.

so desired. Through a combination of relentlessly irritating Island records, appealing to U2's better artistic impulses, and garnering the Irish band bad press over the suit<sup>21</sup> Negativland had by the summer of 1994 convinced Island and U2 to return the offending recordings back to Negativland. While insisting that any contract indemnify U2 and Island from any legal actions that Kasem might take, according to U2's manager Paul McGuinness the main condition for the return was "that you [Negativland] stop writing us"<sup>22</sup>.

In 1995, Negativland released an expanding book version of the magazine that had earlier got them into legal trouble with SST. The book, *Fair Use: The Story of the Letter U and the Numeral 2* includes paper records that document the events after the earlier magazine and an appendix with essays on fair use, artistic appropriation, and the Supreme Court ruling on the 2 Live Crew Case. The book, with its in-depth paper trail of records from all sides, allows for a fascinating study of the legal and economic issues that result from copyright suits. Further, read from the vantage of the digital now, the book is a legal and cultural time capsule of a transitional era where just emerging technologies, which as the Negativland case shows were already roiling the legal waters, were on the cusp of completely transforming the relationship between producer and consumer.

Negativland and the book have played no small role in that transformation given their role in the free culture and fair use advocate groups that have arisen

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<sup>21</sup> "More recently, there have been some questionable moves on the band's part that have only fueled charges of high-handedness"; Darling, Cary. "ANALYSIS U2 still flying high with album, tour: [MORNING Edition]." *Orange County Register* [Santa Ana, Calif.] 5 Apr. 1992, H.08. ProQuest Central. 3 Dec. 2008 <http://www.proquest.com/>.

<sup>22</sup> Negativland, 178.

to counter what they see as the overreaching power grab by the content industry. Through the course of the book it is interesting to see Negativland adopting the tenets and cause of fair use whereas their original response was one of the freedom of artistic appropriation and first rights amendments. At some point after the lawsuits they became acquainted with Lawrence Lessig and the legal decision on the 2 Live Crew case<sup>23</sup>; both of which seems to have catalyzed their thinking on fair use and copyright. Without overplaying them or the books importance, it should be noted that their advocacy for fair use and their legal problems brought the issue to the underground independent culture, many of whom later became strong proponents of the freedom of artistic expression. An example of this would be someone like Carrie McLaren who at the time of the 1991 U2 Negativland lawsuit was a college radio music director and in 2002 curated the *Illegal Art* exhibit which featured work by Negativland and other artists stretching the boundaries of copyright<sup>24</sup>. Negativland have continued their crusade against corporate control of expression; in 2003 they developed the sampling license for Creative Commons<sup>25</sup> and just this fall Negativland member Mark Hosler lobbied members of Congress for copyright law revisions for the Digital Freedom Campaign<sup>26</sup>.

In addition the book offers an opportunity to study a pre-Internet case of copyright infringement for the purposes of charting the origins and

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<sup>23</sup> The letter from SST's lawyer settling their lawsuits includes an oddly friendly note of cold comfort that if the 2 Live Crew case had been decided earlier, Negativland would likely never been sued. Negativland, 167.

<sup>24</sup> <http://www.illegal-art.org/>.

<sup>25</sup> <http://creativecommons.org/press-releases/entry/3707>.

<sup>26</sup> <http://www.digitalfreedom.org/>.

transformations of the current legal response by the music industry to the overwhelming flood of peer-to-peer copyright violations. One point that becomes quickly obvious regards whose benefits the lawsuits are designed to protect. As discussed earlier the lawsuit against Negativland was filed by U2's record label and publishing company. Obviously, it is the norm in the industry for musicians to assign their label and publishing company the right of representation in legal matters, but seeing the business relationship laid out so starkly as it is in the lawsuit is revelatory. According to Eric Levine of Island Records: "record companies' primary assets are rights - copyrights, exclusive rights for recording services, names, trademarks etc"<sup>27</sup>. So it's not the actual songs or musicians that the music industry are selling, but the right to access and use them.

In both the Negativland case and the current lawsuits the goal of the content industry is to use its legal power to tamp down on behavior that it deems economically threatening. The content industry has the financial advantage of being able to pay for lawyers that Negativland didn't and most defendants still don't. Since the vast majority of these cases are settled out of court<sup>28</sup>, this has the incredibly dangerous effect of limiting the discourse of copyright to one that favors corporate interests, as most cases do not reach the level of adjudication that might rule on issues such as fair use. This has the effect of criminalizing

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<sup>27</sup> Harrington, Richard. "On the Beat; U2's Double Trouble; FINAL Edition]." The Washington Post (pre-1997 Fulltext) [Washington, D.C.] 18 Dec. 1991, b07.

<sup>28</sup> The RIAA has even set up a website, P2P Lawsuits, where you can pay for your out of court settlement by credit card! [https://www.p2plawsuits.com/P2P\\_00\\_Home.aspx](https://www.p2plawsuits.com/P2P_00_Home.aspx).

behavior that has not been proven so in court; it diminishes the presumption of innocence that the legal system is predicated on<sup>29</sup>.

The entertainment industry's campaign, while in no means effective<sup>30</sup>, certainly shocks those on the receiving end of a lawsuit. When asked in 1995 if the lawsuit has forced Negativland to consider legal issues in a way that might limit their creativity, Hosler responds "Yeah, to some degree we probably will. It's just hellish to get sued"<sup>31</sup>. In 2008, the mother of a college student who was sued for copyright infringement and was chastened by the \$220,000 court ruling against Jamie Thomas said "I'm just so scared. I think we're just probably going to settle. I don't even want to go to court"<sup>32</sup>. Stephanie Lenz, whose case is discussed below, states:

"[When recording home videos] I'm constantly thinking about what's going on in the background, what's on the TV, what's on the CD player, the characters on my kid's clothes, the characters on the toys they are playing with. I'm cognizant of what's going on at every step, instead of focusing on my kids, which is where my attention should be"<sup>33</sup>.

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<sup>29</sup> Obviously, the courts system would not be able to handle the sheer number of cases that get settled out of court. Nor would it necessarily be desirable for judges to always rule on these issues of art and culture pointing to the importance of changes in legislation as argued for in Lawrence Lessig's book Remix: Making Art and Commerce Thrive in the Hybrid Economy. For an example, see Judge Posner's concept of the burlesque in his ruling the case Ty, inc. v. Publications Int'l, Ltd. He rules that burlesque is not covered by fair use since it negatively effects the demand of the original, but which he supports by stunningly arguing that Young Frankenstein reduces the demand of the original movie (which was of course an adaptation of the book).

<sup>30</sup> Tens of billions of illegal downloads per year in spite of the RIAA's 30,000 lawsuits against individuals in the 5 years from 2003-2008; Kravets, David. "File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation." Wired. 4 Sept. 2008. Accessed on 3 Dec. 2008 at <<http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html>>.

<sup>31</sup> Deuce of Clubs. "Suits, Lawsuits, and Art: Negativland Takes On the Man." Planet Magazine. 4 July 1995. Accessed on 3 Dec. 2008 at <<http://deuceofclubs.com/write/negativl.htm>>.

<sup>32</sup> Kaplan. "Music Industry Zealous in Tracking Tune Thieves: Illegal downloads and file-sharing of music have launched tens of thousands of lawsuits." St. Petersburg Times, 20 Jul. 2008, B.1. ProQuest. 10 Dec. 2008 <http://www.proquest.com/>.

<sup>33</sup> Avila, Jim, Chris Francescani and Mary Harris. "The Home Video Prince Doesn't Want You to See: Pa. Mom Fights Back With Lawsuit Against Music Company." ABC News. 26 Oct. 2007.

One important lesson from the Negativland case is that while they were crushed into complying with the original lawsuit's demands, in the end they essentially won. Through pleading their case in the media and doggedly pursuing U2 and Island Records Negativland got their supposedly illicit recordings returned to them. The results of that return contradict the lawsuit's hysterical claims that allowing Negativland's recording to be distributed would cause irreparable harm to U2's image and record sale; clearly no such thing has happened. Negativland re-released the recordings in an expanded form in 2001 and has had absolutely no effect on U2's market share or trademark.

While this example does not necessarily pertain to the lawsuits against peer-to-peer file sharing, it is directly germane to the industry's response of re-used and re-mixed copyright protected content that shows up, among other places, on YouTube. Yes, such behavior is unauthorized, but not only is there no proof of actual economic harm, but in this era of splintering audiences the content industry should instead take advantage of this new form of marketing. In the case of the Stephanie Lenz video where her infant son dances to "Let's Go Crazy", Prince<sup>34</sup> and Universal instead of issuing a take down notice to YouTube could have leveraged the video and its audience by placing an ad for a new Prince album or a link to a site with a discounted mp3 of the now 24 year old

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<sup>34</sup> Apparently Universal was acting on the expressed wishes of Prince who personally "scours the internet" searching out copyright violations of his songs; see Avila, et al. Of course Prince is notoriously eccentric, but he has been cognizant of the power of the Internet to directly connect him to fans outside of the influence of corporate media, so it's rather surprising he would be so over protective in this case.

song<sup>35</sup>. Lenz, who is being represented by the Electronic Freedom Frontier, may not win her countersuit against Universal, but her case has resulted in a potentially significant ruling dictating that copyright holders must take into account issues of fair use and market impact before issuing take down notices<sup>36</sup>.

That the economic and legal power resides with the content industry, but the social and moral power is with the public is just one of the ironies that the Negativland case unveils. Another is the fact that, as mentioned, the recordings were eventually returned to Negativland implying a fluid subjective nature to ascribing copyright infringement. These recordings are now available for free from Negativland's website with a reproduction of the original cover<sup>37</sup> or for sale in the expanded form from iTunes, where they are encrypted by Apple's FairPlay DRM which restricts their use and raise the possibility of breaking §1201 of the copyright law if someone were to crack their digital protection.

As an example of the appropriator becoming the appropriated, Negativland themselves were sampled in 1991 on Marky Mark and the Funky Bunch's *Music for the People*, the album that made Mark Wahlberg a star<sup>38</sup>

In a manner reminiscent of P-Orridge's blurring of art and commerce, at the time of the lawsuit Negativland and U2 were engaged in similar critiques of mass media and used similar technologies to appropriate copyright protected materials. In describing the concept behind the *U2* single Negativland member

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<sup>35</sup> See Brian Stelter' "Some Media Companies Choose to Profit From Pirated YouTube Clips" in the August 15 2008 The New York Times for examples of content providers benefiting from the ad revenues of YouTube videos which include copyright protected material.

<sup>36</sup> Egelko, Bob. "Woman Can Sue Over YouTube Clip De-Posting." The San Francisco Chronicle. 21 Aug. 2008.

<sup>37</sup> <http://www.negativland.com/index.php?opt=mailorder&item=65&type=1>.

<sup>38</sup> Negativland, 268.



Don Joyce says "we did it for laughs and because tricksters and jesters are the last hope against corporate music bureaucracies, which have all but killed grassroots inspiration"<sup>39</sup>. Using similar rhetoric Bono describes the inspiration behind their Zoo TV tour: "The media has rock and roll by the balls," Bono says, almost snarling. "They draw cartoons, and it's indelible ink. It's an attempt to reduce you, your humanity, your sense of humor. The only way to deal with it is to create a cartoon even bigger"<sup>40</sup>.

A concert by U2 on that tour opened up with a video mash-up by the Emergency Broadcast Network – a slightly more mainstream and explicitly political version of the media cut-up style of *Negativland* – that edited President Bush's declaration of war against Iraq into the lyrics of Queen's "We Will Rock You"<sup>41</sup>. The stage was covered in video monitors and screens that displayed a mix of TV images taken from live satellite feeds. When confronted about this appropriation of copyright protected images the Edge replied, "I don't think there *is* a problem. I mean, in theory I don't have a problem with sampling. I suppose when a sample becomes just part of another work then it's no problem"<sup>42</sup>. In a further example blurring the two groups as appropriators the cover for U2's single "One" was based on David Wojnarowicz's photo *Falling Buffalo*, itself an image appropriated from a museum diorama<sup>43</sup>. Perhaps U2 had the power and

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<sup>39</sup> Lozaw, Tristram. "U2's record firm sues over satirical single: [01 Edition]." Boston Herald [Boston, Mass.] 13 Dec 1991, S29.

<sup>40</sup> Fricke, David. "Oakland Show / U2 Tour Swings Back Into Bay Area: [SUNDAY Edition]." San Francisco Chronicle. 1 Nov. 1992, 4.

<sup>41</sup> <http://www.youtube.com/watch?v=PUDR9RckfEU>

<sup>42</sup> *Negativland*, 83.

<sup>43</sup> Cameron, Dan and Dennis Szakacs. David Wojnarowicz. Accessed on 12 Dec. 2008 at <http://www.queer-arts.org/archive/9902/wojnarowicz/wojnarowicz2.html>.

finances to pay for these acts of appropriation, but expression should not be limited to those that can afford it.

Copyright law by design, and thankfully so, is a contradictory balance between competing interests. "To promote the progress of Science and the Useful Arts" for the good of the public, certain rights of control are granted to individuals over their works. Except that their rights of reproduction, display, performance, etc. are limited by time and fair use. Copyright protects "original works of authorship" except that "there is no such thing as a wholly original thought or invention"<sup>44</sup>. Therefore, the ironies and contradictions over copyright in the Negativland lawsuit, while at times maddening, are not examples of copyright law failing in some way, but of it acting as it was designed to by creating a legal and intellectual venue where concepts of creativity, expression, profit and control can be democratically tugged to and fro.

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<sup>44</sup> Leval, Pierre N. "Toward a Fair Use Standard. " *Harvard Law Review* 103.5 (1990): 1105. Accessed on 6 Dec. 2008 at <http://docs.law.gwu.edu/facweb/claw/LevalFrUStd.htm>.

APPENDIX 1: Additional Note

In a 1993 interview from *Paperback Jukebox* reprinted in the *Fair Use*<sup>45</sup> book Mark Hosler of *Negativland* makes a prediction about the future of the music industry that is so accurate that an extended excerpt is worth quoting.

“Paperback Jukebox: Don’t they [the content industry] have a tighter grip on it now than they ever have?”

Mark Hosler: Yes, they do. But look at something like the Internet. Do you know what I’m talking about – these electronic bulletin boards?

PJ: Sure.

MH: Our magazine [the one SST sued them over] is up on the Internet now. Theoretically it’s available to millions of people. Now of course there aren’t that many people interested in this story, but to anyone who wants it, it’s there. Someone just put it up there. What is SST going to do to stop that? Nothing. There’s nothing they can do. In fact on the Internet there’s a digitized version of our “U2” single. The fidelity’s not that good, but that will change as computers get faster and faster. What is Island Records going to do to stop that? Eventually you’ll be able to put CD-quality sounds up on the Internet and people will be able to download it anytime they want. It doesn’t matter how hard you try to own it, control it or legislate it, the technology has gotten away from them. Of course I’m being optimistic, but I think that the laws are going to be come outmoded. Corporations can control things, but they can’t control them absolutely 100% in every single possible conceivable way. [...] And I think the next decade is going to be very interesting, because I think the new technology could be the undoing of all these powerful forces.

PJ: How so?

MH: Let’s skip ahead 50 years from now. I think we’re gonna look back at the last half of this century and see that there was this temporary, artificial boom period where a small number of people got to make huge profits from the sale and control of information and intellectual property. But at the end of the 20<sup>th</sup> century everything changed. As everything became digitized it became harder and harder to make the same amount of money they used to make. It’s like the playing field got leveled out by the technology.”

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<sup>45</sup> *Negativland*, 142.

## Bibliography

- Anderson, Nate. "RIAA Defendant Enlists Harvard Law Prof, Students." Ars Technica. 29 Oct. 2008. Accessed on 3 Dec. 2008 at <http://arstechnica.com/news.ars/post/20081029-riaa-defendant-enlists-harvard-law-prof-students.html>.
- Avila, Jim, Chris Francescani and Mary Harris. "The Home Video Prince Doesn't Want You to See: Pa. Mom Fights Back With Lawsuit Against Music Company." ABC News. 26 Oct. 2007. Accessed on 3 Dec. 2008 at <<http://abcnews.go.com/TheLaw/Story?id=3777651&page=1>>.
- Beam, Alex. "Lichtenstein: Creator or Copycat?" Boston Globe. 18 Oct. 2006. Accessed on 3 Dec. 2008 at <[http://www.boston.com/news/globe/living/articles/2006/10/18/lichtenstein\\_creator\\_or\\_copycat/](http://www.boston.com/news/globe/living/articles/2006/10/18/lichtenstein_creator_or_copycat/)>.
- Cameron, Dan and Dennis Szakacs. David Wojnarowicz. Accessed on 12 Dec. 2008 at <http://www.queer-arts.org/archive/9902/wojnarowicz/wojnarowicz2.html>.
- Cohn, David. "Positive About Negativand iPod." Wired. 28 Feb. 2005. Accessed on 3 Dec. 2008 at <<http://www.wired.com/culture/lifestyle/news/2005/02/66725>>.
- Darling, Cary. "ANALYSIS U2 still flying high with album, tour: [MORNING Edition]." Orange County Register [Santa Ana, Calif.] 5 Apr. 1992, H.08. ProQuest Central. 3 Dec. 2008 <http://www.proquest.com/>.
- Deuce of Clubs. "Suits, Lawsuits, and Art: Negativland Takes On the Man." Planet Magazine. 4 July 1995. Accessed on 3 Dec. 2008 at <<http://deuceofclubs.com/write/negativl.htm>>.
- Egelko, Bob. "Woman Can Sue Over YouTube Clip De-Posting." The San Francisco Chronicle. 21 Aug. 2008. Accessed on 12 Dec. 2008 at <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/20/MNU412FKRL.DTL>>.
- Electronic Frontier Foundation. "Lenz v. Universal." Electronic Frontier Foundation. 2008. Accessed on 3 Dec. 2008 at <<http://www.eff.org/cases/lenz-v-universal>>.
- Fisher, Marc. "Download Uproar: Record Industry Goes After Personal Use". The Washington Post. 30 Dec. 2007. Accessed on 3 Dec. 2008 at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html>.
- Ford, Simon. Wreckers of Civilisation: The Story of Coum Transmissions and Throbbing Gristle. London: Black Dog, 1999.

Fricke, David. "Oakland Show / U2 Tour Swings Back Into Bay Area: [SUNDAY Edition]." San Francisco Chronicle (pre-1997 Fulltext) [San Francisco, Calif.] 1 Nov. 1992, 4. ProQuest National Newspapers Premier. ProQuest. 3 Dec. 2008 <http://www.proquest.com/>.

Green, Heather. "Does She Look Like a Music Pirate?" Business Week. 24 Apr. 2008. Accessed on 10 Dec. 2008 at [http://www.businessweek.com/magazine/content/08\\_18/b4082042959954.htm..](http://www.businessweek.com/magazine/content/08_18/b4082042959954.htm..)

Harrington, Richard. "On the Beat; U2's Double Trouble; FINAL Edition]." The Washington Post (pre-1997 Fulltext) [Washington, D.C.] 18 Dec. 1991, b07. ProQuest National Newspapers Premier. 3 Dec. 2008 <http://www.proquest.com/>

Hosler, Mark, Don Joyce and R.U. Sirius. "U2's the Edge Meets Negativland." Mondo 2000. June 1992. Accessed 3 Dec. 2008 at <http://www.well.com/gopher/Publications/MONDO/u2negat.txt>.

Howell, Peter. "Samplers mine cutting Edge: [AM Edition]." Toronto Star [Toronto, Ont.] 5 Nov 1992, E10. ProQuest Central. 3 Dec. 2008 <http://www.proquest.com/>.

Jolson-Colburn, Jeffrey. "Negativland, U2 scrap takes bizarre twists: [DU PAGE SPORTS FINAL, NED Edition]." Chicago Tribune (pre-1997 Fulltext) [Chicago, Ill.] 30 Jan. 1992, 7. Chicago Tribune. ProQuest. 3 Dec. 2008 <http://www.proquest.com/>.

Kaplan, Thomas. "Music Industry Zealous in Tracking Tune Thieves: Illegal downloads and file-sharing of music have launched tens of thousands of lawsuits." St. Petersburg Times [St. Petersburg, Fla.] 20 Jul. 2008, B.1. ProQuest National Newspapers Premier. ProQuest. 10 Dec. 2008 <<http://www.proquest.com/>>

Kelly, Kevin. "Idea Lab: Becoming Screen Literate". The New York Times. 21 Nov 2008. Accessed 29 Nov 2008 at <http://www.nytimes.com/2008/11/23/magazine/23wwln-future-t.html?pagewanted=1&ref=magazine>.

Kravets, David. "File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation." Wired. 4 Sept. 2008. Accessed on 3 Dec. 2008 at <<http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html>>.

Lessig, Lawrence. Free Culture: The Nature and Future of Creativity. New York: Penguin Books, 2003.

Leval, Pierre N. "Toward a Fair Use Standard." Harvard Law Review 103.5 (1990): 1105. Accessed on 6 Dec. 2008 at <http://docs.law.gwu.edu/facweb/claw/LevalFrUStd.htm>.

Levin, Bob. The Pirates and the Mouse: Disney's War Against the Counterculture. Seattle: Fantagraphics Books, 2003.

Levine, Robert. "Steal This Hook. D.J. Skirts Copyright Law." The New York Times. 6 Aug. 2008. Accessed on 3 Dec. 2008 at <http://www.nytimes.com/2008/08/07/arts/music/07girl.html?pagewanted=1&ei=5124&en=d1338d482f96926d&ex=1375848000&partner=permalink&expprod=permalink>.

Lozaw, Tristram. "U2's record firm sues over satirical single: [01 Edition]." Boston Herald [Boston, Mass.] 13 Dec 1991, S29. ProQuest Central. ProQuest. 3 Dec. 2008 <http://www.proquest.com/>

"Minn. Woman to Pay for Illegal Downloads." NPR. 5 Oct. 2007. Accessed on 3 Dec. at < <http://www.npr.org/templates/story/story.php?storyId=15037223>>.

Negativland. Fair Use: The Story of the Letter U and the Numeral 2. Concord: Seeland, 1995.

P2P Lawsuits. Accessed on 10 Dec. 2008 at [https://www.p2plawsuits.com/P2P\\_00\\_Home.aspx](https://www.p2plawsuits.com/P2P_00_Home.aspx).

Russell, Deborah. "No Positives for Negativland in 'U2' Settlement." Billboard 7 Dec. 1991: 49. Research Library. ProQuest. 3 Dec. 2008 <http://www.proquest.com/>

Stelter, Brian. "Some Media Companies Choose to Profit From Pirated YouTube Clips." The New York Times. 15 Aug. 2008. Accessed on 3 Dec. 2008 at <<http://www.nytimes.com/2008/08/16/technology/16tube.html>>.

Stewart, Ken. "McGuinness speaks out." Billboard. 8 May 1993: 40. Research Library. ProQuest. 6 Dec. 2008 <http://www.proquest.com/>.

Ty, Inc. v. Publications International Ltd. No. 01-3304. US Appeals Court Seventh Ct. 2002. Accessed on 3 Dec. 2008 at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=7th&navby=docket&no=013304>.

"U2's Label Stops Sales of Parody:[ FINAL Edition]." San Francisco Chronicle (pre-1997 Fulltext) [San Francisco, Calif.] 23 Sep. 1991, E4. ProQuest National Newspapers Premier. ProQuest. 3 Dec. 2008 <http://www.proquest.com/>

Vaidhyanathan, Siva. Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity. New York: New York University Press, 2001.

Van Buskirk, Eliot. "Negativland Q&A: In the Future, Nothing Will Remain Intact." Wired. 9 Oct. 2007. Accessed on 3 Dec. 2008 at <<http://blog.wired.com/music/2007/10/negativland-qa-.html>>.

Walker, Rob. "Mash-Up Model." The New York Times. 20 July 2008. Accessed on 3 Dec 2008 at [http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?\\_r=1&partner=rssnyt&emc=rss](http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?_r=1&partner=rssnyt&emc=rss).

"Woman Struggling with Music Downloading Lawsuit." USA Today. 1 Feb. 2005. Accessed on 3 Dec. 2008 at [http://www.usatoday.com/tech/news/2005-02-01-riaa-forges-ahead\\_x.htm](http://www.usatoday.com/tech/news/2005-02-01-riaa-forges-ahead_x.htm).

Zimmermann, Patricia R. "just say no: NEGATIVLAND'S NO BUSINESS." Afterimage 34.1/2 (2006): 14-17. Research Library. ProQuest. 29 Nov. 2008 <<http://www.proquest.com/>>