Beyond Copyright Consciousness

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Bad Subjects, Issue #52, November 2000

A Child Embraces Technology in the Sixties

The first cheap Norelco Cassette Recorders hit the US market when I was thirteen. Though it suddenly became much easier to tape songs off the radio, I lagged behind the tech curve, stuck in 3-inch open-reel land. It took time to save up the money to buy a little Sony battery-powered cassette recorder, but finally I ditched my reel-to-reel tapes. And then the format battles escalated. Record companies had gotten in the habit of releasing key albums in expensive 7-inch reel-to-reel versions, highly valued by audiophiles for their sound. But then, as the youth music market exploded, they came out with a wealth of read-only technology: little MGM "Playtapes," bastard cassettes with four songs; 4-track cartridges destined for sad obsolescence; and those beloved relics of the 1970s that still litter thrift stores, 8-track tapes. All of these machines would sooner eat a tape than record onto one. Wanting large music libraries and mostly unable to afford them, we kids recorded as many albums and radio shows on cassette as we could. And then I began to lose interest in rock and roll, at least until the onset of punk; not because free music was less alluring than expensive music, but because pop music entered into an overproduced and boring phase.

Not being a disenfranchised musician or songwriter, I never thought about intellectual property issues when I was young. Access to music was all I wanted. Much later, I began to collect historical film, partly out of fascination, partly because few others were doing so, and started Prelinger Archives in 1985. Needing to support the breadth and speed of my collecting habit, I went into the business of selling stock footage, which means charging commercial users for access to film clips or segments so that they could use them in their productions. Though we owned some of our material outright, much of it was public domain and not subject to copyright. Even before I knew of the Internet, the copyright status of the works in our collection, and the state of copyright law in general, was thus intimately associated with my 'own archives' ability to survive financially.
Now, in our business-crazed culture, "IP" is practically the hottest topic in
town. Whether it's the Napster trial or the latest corporate acquisition, control
over content is generating highly publicized battles. We used to just go ahead
and copy; now we talk about copyright, our freedom to violate it, and the
latest tools that enable us to do so. (Or perhaps the entertainment industry just
thinks we do, and that's why they're scared.)

Anachronistic But Hard As Nails

Copyright may be under siege by new access technologies, but it is far from
dead. Quite the opposite. The "copyright-based industries" -- publishing,
entertainment and software -- contribute hundreds of billions of dollars to the
US economy. Intellectual property is our second most valuable export, and
more and more of us labor to create, manage, distribute, sell and shrink-wrap
what passes for "content" these days. Though I'd like to imagine differently,
I find it inconceivable that the large corporations that control intellectual
property rights will stand by as the fences separating their holdings from the
public domain melt down.

Like organic creatures, copyrights used to age and wither away. In fact,
Congress's original intent in drafting copyright law was to grant exclusive
rights for limited terms, linked to the life spans of authors, in order that they
could enjoy the fruits of their labor while alive. Until 1978, copyrights
generally lasted 28 years and could, if formalities were strictly followed, be
renewed for another 28. Publication without proper copyright notice threw a
work into the public domain. This is why so many older US works are out of
copyright, unlike works that originate in most other countries. After 1978,
the US "harmonized" its copyright laws with those of most other countries,
extending the term of copyright for new works created by individuals to the
span of their lives plus 50 years, and new works created by corporations to
75 years. In 1993, renewals for older works became automatic. The tragic
death of John Lennon at age 40 was cited in congressional testimony, as paid
lobbyists warned that his young son Sean might outlive the terms of his
father's copyrights, and see John's works exploited without proper
compensation. In 1998, the largely undebated Sonny Bono Copyright Term
Extension Act further "harmonized" our copyright laws with our European
trade partners, extending terms to life plus 70 and 95 years respectively.
These laws have collectively kept hundreds of thousands of US works out of
the public domain, and restored copyrights to perhaps millions of foreign
works. Such lengthy timespans lock works up for an inordinately long time,
but then corporations often live longer than people do.

Corporate copyright holders have also pushed to limit the definition of "fair
use" and, now, under the Digital Millennium Copyright Act of 2000
(DMCA), to prevent just about all unpaid copying, performance, distribution
and collecting of digitally based works. If today there are not thousands of
people serving federal prison sentences for felony violations of copyright
law, it's not because the laws aren't on the books -- they're just too difficult to
enforce.
Not Dead Yet

Today's received ideas about intellectual property can be distilled into two major threads: technology killed copyright, and copyright is anachronistic in networked culture. Both of these notions are simplistic and ahistorical, and I'll try to argue that they're shortsighted. What we really ought to be talking about is access to works. Access is related to copyright, but is really more fundamental to our freedom to think and experience. I'd like to propose an expanded access scheme and offer an example of small steps that are being taken in that direction.

Trying to debunk the idea that technology killed copyright is a tiring chore. Yes, the proliferation of new tech tools makes it harder to control the unauthorized duplication of copyrighted works, and such tools are certainly sustaining another thrilling chapter in the arms race between geeks and suits. But people are still lining up at Blockbuster after work, waiting in line to pay money to rent major studio releases on video tape. HBO, which relies on a regular flow of monthly subscriber payments, is more profitable then ever. Yes, millions of people are using Napster to collect semi-degraded music files, but they still have to pay their AOL bills, and $263/year times tens of millions adds up to enough to buy Time Warner, who boasts of being the "world's largest copyright proprietor." Recent widely reported studies indicate that Napster actually drives increased CD sales.

Many estimable individuals have lined up behind the notion that we live in a post-copyright age. They try to convince us of the total irrelevance of copyright, as "information wants to be free." Others posit that the disintermediating characteristics of the Internet will empower individual authors and artists by permitting them to sell their work directly to their audiences. People like John Perry Barlow and Esther Dyson imagine an era where creators are compensated in a royalty-free realm, where reputation, expertise, consulting chops and sales of collateral products almost magically generate income. This isn't completely off the mark, because this works for some people, notably the proponents of those ideas themselves. Like so many economic schemes today, it presumes a winner-take-all model. But how many writers can give away their texts and survive on honoraria from guest slots on CNN? And, ultimately, who cares enough about most creative people to help provide them with a living? As long as IP is bought and sold as a commodity, market rules will apply.

I'm actually most comfortable with the ideas of those who support formative chaos, those who rhetorically call for total and complete disobedience of copyright law, rather than cloaking their efforts under a veil of disingenuous responsibility. In many ways copyright law has outlived its social and economic function. It's a fact that the most lucrative copyrights are controlled by monopolistic corporations, but it's also true that copyright can permit comparatively powerless individual authors and artists to exercise a tiny measure of economic clout. But if we're to transform authoritarian copyright laws into social practices that protect creators and benefit society in general, a
period of flux and experimentation will be essential.

Authorship Requires Access

This brings us to the issue of access to works. Today's reader is also a writer; today's listener a sampler; today's spectator an editor or director. Many of us are no longer content with simply reading, listening or viewing works -- we want to appropriate material from other works and make something that is more than the sum of its parts. This is a pretty obvious point, and it's also obvious that unyielding copyright law limits freedom of expression for all of us. What's less obvious is that there are also other ways of limiting our ability to quote, cutup and recontextualize.

In order to be an active reader/listener/spectator, we need access to materials. Yet aside from current pop culture stuff widely available in American superstores, such access is currently quite difficult. One reason for Napster's popularity, and the rush to embrace other peer-to-peer technologies, may be the sheer diversity of music and sound that has become available. Much of this audio was hitherto inaccessible, locked in record company vaults, private collections, archives and radio station libraries. In this sense the body of Napster material functions as a virtual archive that's totally available to all.

Quite the opposite is true in other media. Our history and culture are increasingly becoming private property rather than public resource. For instance, consider still photography. Hundreds of millions of historical still images are now controlled by two large corporations, Getty Images and Corbis, who are actively competing for top market rank. (I should disclose that two subsidiaries of Getty Images do an excellent job of representing my own collection for stock footage sales.) Unfortunately, these collections are generally inaccessible without payment of substantial research and licensing fees. In other media, textual material, music and works of art are now owned or controlled by a dwindling number of rightsholders. It is now highly probable that most access to cultural and historical materials will follow the paradigm of "billable events," with few exceptions or discounts for nonprofit or public users. E-commerce, of course, makes it much easier for rights holders to charge for the experience of listening to or eyeballing content.

The function of not-for-profit entities like libraries, museums and archives is also changing. They no longer exist simply to offer reference or read-only access to their holdings. With the proliferation of authoring tools in all media and the vast increase in all modes of cultural production, many access requests now anticipate the reproduction of materials for reuse and public
distribution, and this trend is running headlong into the limitations of copyright law. Although the Internet is dramatically increasing the population of creators and publishers, there is less preexisting content available for reuse.

The access problem exists for both copyrighted and non-copyrighted works. Many public domain works exist only in libraries, archives, or private collections, and their custodians charge for access. Though fees may pay for storage, preservation, cataloging, and the production of viewing copies, it ultimately defies common sense for public domain works not to be freely available to the public. If we act to lessen or to end copyright's authoritarian control over access to culture, we must make sure that other controls don't take its place.

Toward an "Intellectual Property Preserve"

To think about strengthening public access to cultural resources is to consider basic questions of property and its privatization. As in so many other situations, it's worth looking to history and landscape for precedents and a possible solution. In the late 19th and early 20th centuries, private corporations exerted unprecedented pressures on the "public domain" -- American land and natural resources. They owned or controlled key tracts of productive land, often as a result of government give aways or favoritism. The aggressive pursuit of extractive interests such as mining, logging and agriculture threatened to exhaust public lands and encroach upon naturally or culturally significant sites. In response to this threat, the conservationist movement lobbied to organize a system of national forests, parks and monuments. By preserving a limited public sphere not subject to the exercise of private property rights, the benefits of some wilderness and cultural sites were preserved for all.

Substituting culture for nature gives us the idea of an intellectual property preserve that houses words, pictures, sounds, moving images and digital information, and protects them as public property. How might such a "national park for intellectual property" work? First, the preserve would be a repository for intellectual property rights that had been donated by rights holders. These rights would include copyrights, or in the case of public domain materials, the right to reproduce and disseminate the materials. The activities of the preserve would be closely coordinated with existing institutions, who would often still hold physical materials.

The preserve would contain textual material, still and moving images, works of art, sounds and digital information of all kinds. These assets would be acquired in two ways. First, the preserve would purchase certain key resources to build up a core collection of content. This activity would necessarily be supported by private funding. Second, after developing a curatorial plan, the preserve would solicit donations of content. These
donations might not necessarily include the physical materials representing the content, but would definitely include copyrights or rights to reproduce.

Why would copyright owners (or owners of public domain materials) ever cede their properties to the preserve? First, and perhaps most important, tax incentives. Amend the tax code to allow substantial deductions or tax credits for donating valuable copyrights or materials. Second, following the precedent of public land acquisitions, key donors might be compensated with private funding. Third, promote public recognition that an act of donation is a prestigious deed benefitting the national cultural heritage.

There is nothing particularly radical about the practice of a preserve. It's an attempt to work within the system, a gentle expropriation, a creation of incentives for property holders to do the right thing. Ultimately, though, its goals are to rebalance private vs. common property for mass benefit. The preserve aims to make a significant portion of our intellectual and cultural property available to one and all -- both individuals and corporations -- for nothing more than the physical costs of duplication and transmission. Its concept supports freedom of inquiry and freedom of expression by preserving the right to quote, to duplicate, to appropriate preexisting material.

I've been thinking about this idea for several years, and have recently discovered that a Boston writer and publisher, Eric Eldred, also has a similar idea for a "copyright conservancy," where copyright holders would donate works to benefit the public.

An Attempt to Build the Preserve

At the Internet Archive, a nonprofit headquartered in San Francisco, a small group of engineers backed by a philanthropist are trying to create a new paradigm for access to archival material, in this case historical film from my own archives. By doing this, we're making a concrete move toward building an IP preserve. What we've done is to select a body of 1001 key archival films, both films that we've found to be most in demand and unknown films that we think people will like to see and work with. Next, we've undertaken the expensive process of transferring the films to videotape and then digitizing them so that they can be stored and served online.

There's lots of film and video on the Internet right now, but most of it is of relatively poor quality. There are two reasons for this. First, of course, most people don't have sufficient bandwidth to view huge movie files. Second, rights holders want to stream their images rather than provide downloadable files which can be viewed repeatedly, reused or distributed with little control. Since we're not worried about either of these considerations, we are offering fairly high-resolution video files (MPEG2). These files are too big to stream, and must be downloaded by the user.

What this means is that visitors to our site will get movies for keeps. They can look at them, send them to other people, archive them to disk, dump them to tape, re-edit them, and even incorporate them into low-end
productions. We don't think this will put an end to commercial stock footage licensing from our collection, which generates income to keep the archives going, because high-end users will ultimately demand the best quality images available, and there are certain compromises inherent in video compression.

We hope to see our footage show up in independent productions, in cafes, on public access TV, in classrooms (shown both by teachers and students), as home entertainment, ambient imagery, on other people's web sites, and in places we can't yet imagine. Very few people have ever had significant access to primary moving image historical material, so it has had little chance to seep back into, and influence, the culture. There is much talk of media literacy, but access to the archival material that might make exercises in literacy dig deeper has always been difficult. Here is an initial step toward making it easier.

Concurrently, we also hope that users will take our video and recompress it further, so that it will be easier to distribute. This is already happening in the world, with a hacker-developed technology based on MPEG4, which may well evolve into the video equivalent of MP3.

I'm hoping that this project will encourage other companies and institutions to give up total exclusivity to their material and make it available, at least for viewing access.

Despite being the object of much attention right now, the struggle for control over content probably isn't very meaningful to mass audiences. Neither is the issue of access. On the other hand, people want to learn, play, and be entertained, and they tend to find ways around control mechanisms that limit the free and inexpensive exercise of these activities. While grassroots opposition to the DMCA, for instance, was limited to fairly sophisticated groups, tens of millions voted with their mice and downloaded Napster before it could be declared illegal, rendering any possible crackdown effectively impotent. And while it may require the support and expertise of elite elements to organize something like an intellectual property preserve, and though the activities and even the existence of such a preserve may be invisible to most people, a preserve could mount a fundamental challenge to our definitions of public and private property. In so doing, it would be a greater force for change than any possible reform of copyright law.

Rick Prelinger has collected historical film since 1982, and is currently working with the Internet Archive to build a prototype IP preserve. Thanks to Megan Shaw Prelinger for timely and thoughtful assistance.

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