

TWO RELATIONSHIPS

TO A CULTURAL PUBLIC DOMAIN

By **Negativland**¹

INTRODUCTION

It's been ten years since Negativland was sued by Island Records for the copyright infringement, trademark infringement, defamation of character and consumer fraud contained in our 1991 "U2" single. In the big wide world of idea ownership, a lot has changed since then - the Internet and its worldwide empowerment of individuals through personalized interconnection, the effects of globalization and how it bypasses both the ideologies of local governments and the rule of their national laws, and the Digital Millennium Copyright Act with which intellectual property owners are attempting to survive all these rugs being pulled out from under them. There is a contemporary realization that, on one hand, the fate of all content is now in the hands of its receiving audience more than ever before, and on the other hand, that worldwide commerce is scrambling to forge all kinds of new laws and regulations to maintain their traditional control over the fate of "their" content.

Over the last 10 years, Negativland has continued to be associated with these issues, sometimes because we volunteer ideas on these subjects, sometimes because we continue to make art that ends up evoking them. Other than the two lawsuits against us in the wake of the "U2" single, we've never been sued again. There have been other threats, scares and skirmishes against us over the years, at various times from the RIAA, PepsiCo, Beck, Geffen Records, Philip Glass, Fat Boy Slim, and even attorneys for ax murderer David Brom. But, surprisingly, we've actually been left alone throughout the 90's as we continued to release work that appropriated from privately owned mass media (often times in much more glaring ways than anything we were ever sued over). Perhaps it's because we've been flying under the radar as "alternative" music, or perhaps that highly publicized suit, which we publically defended as "anti-art" because we couldn't afford to defend it in court as Fair Use, caused others to think twice before suing us again. Or perhaps, at least these days, it's because, in the wake of Napster, DSL lines and MP3s, the music industry now has much bigger things to worry about than a bunch of fringe audio artists chopping up and re-using bits of their privately owned intellectual property.

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Whatever the reasons, Negativland has remained appropriatively unrepentant and continues to work in the same ways we always have. And, in the wake of those lawsuits, we expanded our own self run record label, Seeland Records, to help out other artists who also "infringe" in order to collage. Most notably in the compilation *DECONSTRUCTING BECK*, and our recent re-release of John Oswald's historic *PLUNDERPHONICS* project, both of which, unlike our own work, are each made up entirely of other peoples music.

We've continued to work this way because we like the sound of it. We like the results, we get inspired by what we find out there, it's simply FUN to do, and we sense we are not alone in these perceptions. In continuing to pursue collage and found sound as elements in our music, we have continued to set our work out as public examples of how appropriation from our media surroundings is neither culturally harmful nor dangerous to anyone else's business, but hopefully does represent some interesting art perspectives which are well worth having around.

At this late date in the proliferation of collage, we no longer see this "appropriation" approach as particularly daring, edgy or transgressive, as it once truly was. The "aesthetic" of collage (though not always the actual thing) has by now been very mainstreamed. We see it in mass media everywhere we look. We see it in the many web based CD stores that now have a "Plunderphonics" category, in the frequent appropriation based film and music festivals around the world, and in the way our own phrase "culture jamming" has entered into routine anti-corporate and anti-advertising activist lingo. We see it in the way it has become a common subject matter in courses in film schools, law schools, art schools and music schools. At some level, even though it's all STILL tacitly illegal, this way of working is now really nothing unusual at all. And observing this now generally culture-wide acceptance of collage's appropriation methodologies, one would think that sympathetic laws of allowance would also emerge to keep it legal. But that has not happened yet. What's wrong with this picture?

PART ONE: FREE EXCHANGE IN THE DIGITAL DOMAIN

TWO POSITIONS

Any argument over what should or should not be considered a public domain for cultural works stems from one of two positions.

Position One: Everything created by humans is “work” that is done in order to gain income and which cannot continue to be done without that income. Therefore, all pieces of cultural “work” need to be compensated, usually on a per-unit basis, if we expect such work to continue. And therefore, becoming a “user” of such work without compensating the creator for that work is a theft of the creator’s rightful and necessary compensation. This position- the ethical and economic standard within our usual practice of cultural creation- stems directly from our evolution through a pre-digital, hard copy based world in which the supply of anything made was necessarily physical and so also supply-limited in nature. The physical supply of any thing made was controlled by the maker of that thing and the units or copies of it were doled out by the maker exclusively. That condition quite naturally evoked and supported the above ethic in a material world which provided virtually no other options in it.

Position Two: Digital technologies of reproduction have dragged the above ethic into a virtually new world of production realities in which there is still the creation of individual “works,” but once a digital copy of that work is released, it’s up for grabs. Anyone on the receiving end of it is capable of making their own indistinguishable copies ad infinitum and distributing them ad infinitum as well. And they can do this as individuals at home, at little cost, and using consumer technology available to anyone. In other words, we have begun to allow the receiving end of cultural output to put themselves in charge of the reproduction and distribution of that work- above and beyond what the original producer accomplishes in that realm. As music makers, for instance, we are no longer in charge of our own music once it actually leaves our hands in digitized forms. We cannot control what further duplication and distribution of it is done by those who receive it. This unexpected and perplexing reality has begun to encourage a different ethic and economic standard for digitized cultural work which is somewhat oblivious to those that have always ruled in Position One. This new ethic is nothing new at all, actually, emerging as it does from a very old ethic. An ethic that every effort of private capitalism over the last century has sought to deflect, delay, and smother: the concept of public domain.

THE DEATH OF FOLK ART AND THE BIRTH OF THE INTERNET

It is primarily computers and the Internet that have prompted Position Two, and out of them come a renewed interest in the free and open exchange of cultural works. This new digitally driven ethic of free exchange emerged so easily because the *ideal* of an unhindered, wide open, and free cultural exchange has always held a deep philosophical appeal for the receiving end of culture, and the receiving end has now suddenly been given

an effective technological tool to actually make this happen. To that was added the lack of any need to pay for anything in this new domain, which does nothing to limit its popular appeal either. But deep within these unfamiliar realizations about how reality is working now is the remaining conundrum of how to pay for cultural production. This is the one nagging residue of practicality from Position One which Position Two does not yet have a good answer for. But interestingly enough for our limited human brains, on the Internet we don't really appear to have a viable choice! All digitized media, particularly on the Internet, has actually turned the world of traditional copyright controls upside down, putting the general public in a distribution driver's seat that simply did not exist before. And, in doing so, digitally reproduced media has opened up the public's imagination to what THEY would like to do with whatever forms of culture come their way. The audience can now bypass the creator's control over sales and distribution. Once again in the history of human technology, new technology has thrown us and our society's prior "values" for a loop.

In much earlier times, prior to the corporately driven modern era of hands-off, privately owned and copyrighted cultural material, the natural human approach to their own culture was to participate in it by not only absorbing it as an individual, but also by remaking it, adding to it, removing from it, recombining it with other elements, reshaping it to their own tastes, and then redistributing the adjusted results ourselves. The whole history of human culture virtually consisted of altering, reusing, and copying from the universal public domain in various re-imagined ways until copyright came along.

Copyright has made true folk music, for instance, illegal and impossible. It is extinct as a process. What's left are professional "singer/songwriters," each one "original," each one intending to remain legal by being lyrically and melodically distinguished from all the others, and all having little to do with any kind of true, evolving "folk" process at all. Any kind of modern folk music (as opposed to that which has already reached the legally defined public domain) became impossible when it became possible to sue it out of existence. Along with this general direction in the modern parameters of creativity, came complete twists in human perception itself, such as the very concept of copying (which is how this species actually got to where we are) becoming a term of disrepute, something to be avoided, an UNcreative act! So now all music, which is always chock full of copying regardless of any laws, continues under self-delusional standards of "originality" based on carefully delineated degrees of copycat provability.

Acknowledging the strengths and realities of human nature (monkey see, monkey do) has now become a disrespected practice in our commercialized culture. Nothing is allowed to incrementally evolve through various individuals. Each individual must make a

legally defined leap from another's (phony) "originality" to their own (phony) "originality." We wonder if the whole history of human culture would agree with copyright lawyers and content owners that this is a good thing for the evolution of human culture?

As for the Internet, digital distribution does not remove the right to sue copying or "unauthorized" reuses of existing work, but it does remove a great deal of practicality in actually enforcing such legal mandates. These are "crimes" committed by countless individual citizens inside countless homes, and tracking any of this criminal multiplicity is so difficult it just becomes expensively pointless. Now we are discovering just how difficult it is becoming for copyright's relatively short lived repression of the public's urge for a public domain culture to continue. The success of Napster showed that the public's desire to engage in cultural reprocessing and/or redistribution for themselves had not become extinct. It seems the general public will always take control of revising the destiny of cultural products which enter their sphere of possession if given the opportunity. With digital technology, they suddenly can and so they do. But this new opportunity has also evoked a newly awakened awareness of the economics of modern culture and the all-encompassing colonization of the arts by commercial interests which have come to characterize our popular culture as a whole. These commercial interests have actually come to rule what's "important" and what's not in cultural material. Among other things, when private cultural income threatens to go out the window, some very different sorts of standards for popular "worth" may start to emerge.

SCREAMS OF INDIGNATION

The music industry, in which virtually all mainstream music is, at the moment, owned and controlled by five trans-national corporate entities, now screams that free digital exchange will kill music if left to its own home reproduction devices. Well, it could possibly kill THEIR kind of expense laden music, but their self-absorbed assumption that they ARE all the music that counts is one of the reasons it's so appealing to subvert their economic grip on music by reproducing it and passing it on for free. But such an emotion, regardless of how justifiable it may be if focused, is vague at best and merely a general feeling about what ALL music is "worth" in this commercially compromised culture. This newly empowered free exchange attitude does not apply much of any distinguishment between musical examples. So this "subversion" extends equally to the small independent varieties of music too, and thus we have a potential support problem for ALL music, whether it's made in a corporate music factory at great expense or for very little in a home studio. What may shake out of this situation, however, is that if payment for any and all music significantly diminishes, all the other-than-profit motivated home studios can hang on

and keep producing music a lot longer than the big, extravagant, corporate music factories will ever care to. Music will not disappear under present conditions any more than it did throughout most of human history when no one was being paid to make it. However, it may change in nature, and it may not be much of a living if it never escapes an Internet format.

The Net, however, opens up self production as a finally significant alternative to the notorious corporate label slavery which has ruled modern music production because it potentially provides, at very low cost, what has always been missing before - self distribution that can actually get beyond one's own neighborhood. A single master is now all that's needed to be a potential world wide distributor. When manufacturing multiple hard goods is no longer the only way to distribute music, literally anyone can play. It is still a question as to how crucial exactly how much income from such activities is going to be, but so far, the Net's unique ability to encourage the self control and self ownership of one's own musical career by utterly bypassing the former only game in town - corporate labels' usurpation of control and ownership rights - is not to be dismissed just because the resulting living may be smaller.

This may be the main future of music on the Net, as yet still filled with corporate hand wringing over economic collapse. The Net motto for the future may well be "Get small or get off." The Net may end up being characterized as a people's medium, primarily designed by and for individuals rather than yet another comfortable bed for the mass culture of corporate marketing which has so far successfully taken over all other available mass mediums. Such a medium, geared to the interconnection of individuals, may also become inevitably divorced from the copyright constraints which will go on ruling the material world. The Net may become a simultaneously operating alternative in which everything that remains within it is functionally in the public domain and open to anyone's reuse. This is not to assume there will be no ways for creators to garner individual incomes in a digitized public domain, but they will probably be unusual in the history of making livings, perhaps including voluntary payment, and are mostly yet to be invented.

For the time being, there are still persistent and expensive efforts on the part of corporate producers of cultural content to somehow maintain the Position One economic standard for digitized media (per-unit payment) within the new Position Two functioning reality (free exchange by default). With sparkling dollar signs in their eyes, the music factories dream of charging for those millions of "unauthorized" downloads which are now happening, when of course, any charges for them will instantly dry them up to an unknown degree. At any rate, practically none of these efforts at placing a toll on what everyone knows is an infinite and virtually expense free supply in the digital domain has ever worked

well, and none of them have worked at all for long. And there is not much hope that they ever will because no matter how many very smart encrypters and digital security specialists the private producers employ, the world is always much bigger and there will always be someone else out there who is just as clever and who is, by nature, opposed to a privately controlled culture of limited supply. All private exclusivity codes will be cracked by the vast and alternatively motivated population at large, given enough time. Why are they doing this? The Position Two ethic. How will we pay for cultural production? Nobody knows. Can we pound a square peg into a round hole? Probably not.

THE CONSUMER AS CRIMINAL

Meanwhile, all this has landed us in an era in which the traditional business of culture is in the impossible position of seeing its customer base as criminally dangerous to their business. This paranoia stems from the essence of capitalist logic - charging is good, free is bad. And not just bad, but impossible! But in the realm of the Internet, cultural materials - text, images, and audio - are all constantly moved around by an on-line audience operating under the assumption that free is good and charging is bad. On-line users express this notion there because, for the first time in in their lives, they actually can. And they see how the Internet can apparently go on and on this way, that western civilization is perhaps not so threatened by it, and most significantly, that not one off-line business concern, individual or company, has yet gone out of business because of ANYTHING that's happening on-line. The Internet was never designed as a commercially structured medium for selling. It was designed as a medium for a free, open, and decentralized exchange of information. This tenacious, foundational nature of the technology and software is proving extremely difficult to convert into various forms of toll taking. Only cultural content as apparently irresistible and indispensable as porn has succeeded in making non-physical content pay there. There are few if any other economic success stories on the Net which are not offering off-line material goods as the lure.

So far, all forms of paid advertising (a major way that cultural content has always supported itself) have proved themselves to be largely ineffectual on the Net. Few people click through those banners. It's just a whole different kind of place, suggesting an attitude among its users who change their usual media expectations upon entering. It's a world wide place that somehow suggests personal direction and individualized participation more than any other medium that has ever been available to us. What we seek on the Net seems to be something more individually specific to us, as individuals. The medium, itself, seems to prefer unmodulated individual expression and priorities. Homogenized, generic, conglomerated corporate intrusions into this arena always appear antagonistic, disruptive,

and annoying. Logos, branding, and selling itself - all the things we now accept as characterizing our corporate culture in the off-line material world - do not yet get the same free and willing pass inside Internet culture. There also appears to still be some kind of choice there, an inherent flexibility to make of it what we will, a choice which no longer strikes us as possible in the commercially locked up brick and mortar world.

It's often surprising how oblivious the mentality of corporate commerce is with regard to how self-damning their own unconsidered nature appears to be when it reaches the Net. They are looking at the Net as a new and lucrative nut to be cracked, but they are basically proceeding to do this in the same old ways they tackled every other new medium that ever appeared. They either ignore the basic design of Net technology which is so persistently opposed to that form and function, or they are hard at work with their well-greased pals in Congress to legally change the basic design into something they can work with. Failure after failure has not made a dent in their assumptions that this, too, can and will be turned into another medium for commercial placement and selling products. The RIAA's attack on Napster (and by default, their attack on 25 million music fans who used Napster) was a public relations disaster for the music industry, a disaster that the industry still seems to fail to grasp. They are still looking at the Internet as the biggest mall of all. The vast majority of users, however, seem hardly interested in more malls at all. This may be because, for the majority of users, the Internet still represents a very new expression of public domain ethics and possible procedures, a place where cost and content are not necessarily bound together. It's a way of thinking which has been denied to us in all other forms of mass media, all of which succumbed to commercial domination and sponsored purposes long ago.

ART OVER PROFIT?

Life is often engaged in a series of overlapping contradictions fighting for survival and predominance. Music on the Net has just become a new example of this evolutionary principle in action. Music might even evolve (or devolve if you prefer) into a dual life, one being its present status as private property, copyrighted and supply-controlled in the material world, and the other being a non-proprietary "vapor service" as long as it remains digitized within the confines of the Internet. From the "art over profit" perspective that is ours, this perfectly possible legal distinction would pull the rug out from under many of the significant dangers to the Internet as we know it from corporate capitalism's compulsion to change it all to suit their own purposes.

Many assume that such a dual-tracked distribution of cultural material (all copyrighted in the material world and all subject to Fair Use on the net) is not a plausible

option. They assume this would be a form of “competition” the material world could not economically sustain, that no one is going to pay for something here that they can get free over there. But actually, if experience is a somewhat more reliable teacher than theory, we might notice that this is exactly what is happening now. One can download practically any music for free somewhere on the Net, yet CD sales, for year after year while this has been possible, continue to remain the same or even increase! There are many factors at work in this paradox which may actually be more than a temporary pause while download quality catches up to CD quality. The Net approaches being a functioning public domain for whatever enters it. It is accessible worldwide. The amount of material found there is inestimable, as is the total population of users who access it. The numbers involved in both amounts of content and amount of access distinguish the Internet as an unprecedented phenomenon with which we have no previous familiarity.

The key to the paradox may be found in this unprecedented scale. Most music buyers will very likely always find a certain preference for hassle free, glitch free (in other words, computer free), audio perfection, along with the relevant packaging which CDs or their hard copy successor will always provide. But everyone’s CD budget is forever limited to what is most important to them. They purchase music they are SURE they like, sure they want to add to a physically permanent collection. Computer housed music, on the other hand, has all the aura and charm of disposable music, a way to sample unknown things with no obligation to buy, a way to try out or collect a whole lot of stuff one would never ordinarily buy in any case, and a place where a great deal of unknown music is easily checked out and deleted without losing any investment at all. Every free download whim definitely does NOT represent a “lost” sale, and in fact, the literally unconsumable plethora of available free music on the Net can and does create sales.

Free digitized music still appears to be excellent advertising. Whatever amount of the salable variety of music is supplanted by free downloads, they also produce enough sales for “permanent” music which is first discovered through all this disposable digital sampling, that it balances out to keep CD sales no less than they were before the Internet came along. The amount of free music downloading going on (perhaps now in the billions) really scares the recording industry, but they seem to forget the scales of practicality involved. They only need sell a tiny fraction of that amount to become sinfully rich anyway. So far, this digital public domain for all music exists in tandem with record stores selling the same stuff, and surprisingly, the relationship may not be any more destructive than it is helpful to sales. Live and learn.

But such a dualistic reality appears relatively unthinkable to commercial interests who remain deep in the habit of assuming that exclusive and protected ownership is the

only guarantee of private profit. The Net has been no significant part of that habit yet, but business interests seem incapable of noticing the Net's more innovative suggestion that this assumption may not, in fact, be true at all. Especially in terms of how this new medium interacts with and informs the whole world of copyrighted experiences that they do profit from.

PARADOXES OF PRACTICALITY

What may be even more difficult for commerce to swallow is the very possible ultimate realization that any alternative to the whole Net remaining a public domain by default may be bound to fail anyway. All it takes to subvert copyright constraints there is for one individual to purchase access to a work on or off the Net, and from that point on it is potentially up for grabs on the Net for nothing. The basic functionality of this medium was beautifully designed to promote and facilitate copying and spreading, and unless its basic nature is significantly altered (efforts are underway as we write), it will always be prone to do this well. As paranoia grows among the corporate owners of culture and content, the net becomes all the more curiously fascinating to its vast majority of commercially unaffiliated users precisely because it just sits there, a profound enigma in the midst of a society so otherwise firmly entrenched in capitalist formulas for success. How can this commercially unworkable anomaly be accommodated? The psychic and societal shifts these paradoxes of practicality may eventually produce among us reaches far beyond the arts to question the value of intellectual property ownership itself, which has suddenly been turned into a revitalized question for so many since the Internet appeared.

All other previous mass mediums have been one way in nature and designed for sponge-like spectatorship almost exclusively. Mass mediums value their audiences first and foremost as target consumers representing demographic statistics with which they can sell advertising. The Internet, however, still appears to be the only medium for the masses, a medium for active, individual exchange and interchange, without a center of control or executive offices making decisions about its future, where personal contribution rather than anonymous absorption is what is suggested by the technology. The difference consists of who and what is really in charge, and who and what it's really for.

The Internet is currently the biggest and most widely perceived symbol of a reawakening passion for vaguely realized concepts of a public domain culture. But long before, and still continuing outside the Internet, this philosophical ideal concerning our cultural surroundings has also been evident throughout the modern arts.

PART TWO: STICKY FINGERED HISTORY

GRIST FOR THE MILL

Beginning with the Industrial Revolution and extending all the way up through the entire 20th Century to this point in late, high capitalism, there has been an intertwined relationship between the co-option of our mental and physical environment by private commercial interests on the one hand, and on the other hand, a simultaneous awareness of this unilateral encroachment on everyone's personal and public spaces within the evolution of art.

This awareness was not always displayed by art that was trying to point this out in particular, but much art has taken it into account, nevertheless. Some art is concerned with the social consequences of what is happening around it, other art is not, but it all tends to pass on whatever it is seeing, no matter how unconsciously assimilated or openly displayed these perceptions may be. There is a certain perceptual stance most artists have always taken in relation to their work and their environment, and that perception sees everything out there as grist for their mill. Whether they are painting a tree in a landscape or sampling music, for artists it's just what's out there, and it's all equally usable if it "works" to make the art they want to make. It matters not who "owns" the music they sample any more than it matters who "owns" the tree they paint. Ownership has never had anything to do with creativity.

This ancient and universal artist's view of art's potential subject matter proceeded just fine for quite a while. For centuries there were no lawsuits against landscape painters by land owners, and neither did they demand a cut of the painting's price (presently, however, Disneyland claims copyright on any photos you take inside their imagineered landscapes). Throughout the 20th Century, America was surprised by many unforeseen new technologies which, as usual, began to produce new forms of thinking and new forms of creative activity. For instance, one technology - the ability to capture and reproduce sound electrically - began to allow those involved in creating music to think differently about what music might consist of. Electrical transcription meant that music no longer needed to be live to be heard. Music as an artifact frozen in time and space was almost immediately seen by composers as having recombinable possibilities. Pre-recorded sounds and music began appearing in musique concrete performances by the second decade of the last century. At the same time that electrical invention was spreading, so was the brand

new techniques of visual collage (recombining disparate elements or imagery into a single new composition, also the founding attitude of surrealism in general.)

Collage first appeared in the brand new reproduction technology of the late 1800's called photography (another form of freezing time into material form which makes it capable of post-creation manipulation), and quickly spread to painting. Lawsuits against early photography were unknown. There were also no lawsuits against the early painters who embraced collage around the turn of the 20th Century. They began to attach actual material found in the world around them to their canvases, sometimes including commercially produced products like candy wrappers or fragments of advertising. Still no offense taken. Musical collage, for the most part, remained in the realm of classical music up until mid century. However, all through the endless, live-only centuries of music creation, many composers had routinely included pre-existing music within new work which might range from including familiar folk melodies to borrowing fragments from their classical predecessors or contemporary colleagues. When recorded music came along, it was no great leap for some composers to add that into their compositional concepts. Music was proceeding exactly as it always had and as it wanted to then, with hardly a hassle from those early commercial copyright laws starting to congeal over in the shadows.

In the fine art realms of creation, there was a clear understanding that copying and appropriation was not only a tradition in art, but also seemed to be growing in relevance as the modern perceptual world around the artists of the last century fragmented into all sorts of reproduction possibilities that electric imagery and sound began to shower civilization with. We'll skip World War One and Dada's found objects (though their effect on creating an artistic view of the world as both absurdly surreal and entirely available to become art via appropriation was profound), but hot on those heels came Surrealism's concept of detournment which consisted of cleverly changing the nature of existing material to make it say or show things it never originally intended to say or show, often in the form of ironic juxtaposition. The earliest form of culture jamming. But still no lawsuits, still all relatively uncontested as long as it was fine art.

You have to get all the way up to the middle of the 20th Century, when the "crassness" of Pop Art emerged so rudely (in response to American culture's already commercially saturated consciousness, particularly the unavoidable barrage of advertising iconography filling society's public view with its "taste") before we see the beginning of lawsuits based on the "infringement" of the private copyrights of such subjects. Even then, such artistically constricting absurdities against art's freedom of expression were still generally seen as just that, and while the N.Y. Times sued Robert Rauschenberg for an

unauthorized silk-screen of one of their news photos, Campbell's Soup saw Warhol's paintings of their cans as great free advertising, which it was!

JUMPING MUSIC

About this same time in the late 50's, collage and the use of "found" subject matter jumped over to pop music (having been apparent in classical music for some time already), notably in the form of Buchanan and Goodman's "novelty" edits consisting of fragments of then current rock & roll hits with connecting narration which became "completed" by clips of familiar song lyrics. This was the beginning of mass appeal collage music in the pop realm, and they were immediately threatened legally by the owners of the music they reused. It was also the beginning of music owners deciding to take this artistic appropriation business as some kind of serious economic threat and increasingly criminalizing it as commercial "theft."

But collage and the artistic attitude behind it continued to grow and spread and eventually infiltrated all forms of creativity during the last century. In fact, collage is now often considered the single most influential and, indeed, the defining aesthetic of the entire 20th Century. And it shows no signs of diminishing in the next one. Turn on the news, it's solid collage. Watch a commercial or a music video, it's solid collage. Go to a live baseball game, with its mix of the game itself and improvisationally dropped in found audio and video clips used to wind up the audience- that is collage as well. Every computer user in the world knows and understands the term "cut and paste." The applications and attractions of collage are now universally appreciated. But as the "style" eventually began to spread far and wide beyond the realm of fine art, then the process started to get sued.

By the time collage cropped up in popular music, that kind of music was no less technically an art form than any other, but you'd never know it by its owners and operators. By mid 20th Century, music of the popular variety had been thoroughly colonized by marketers of recordings as a mass commodity. Whatever artistic qualities of popular music may have been touted in the PR of those producing it, behind the scenes it was definitely a commodity game. Profit and loss, not artistic integrity, was determining success or failure. Popular recorded music became all about money, where it remains focused to this day. Thus art, which is not defined as a business, became a business in the form of popular music. And music, which is not defined as a competition, became a competition in the hands of record labels.

This anti-art trend never materialized in painting or other fine arts as it certainly has in music (although it still occasionally happens in other arts too), because the scope of intellectual activity in the fine arts is much smarter about art and what makes it tick. They better understand that all art is about “theft,” and that art has always proceeded by copying from whatever appeals to it, including other art. Add to that the fact that fine art generally ends up as a singular, unique object (the “original” is all there is), while music ends up as an endlessly mass produced object which can be sold over and over again over time. Music, once something which could only be heard live and in person, became a mass commodity, frozen and available in any time or space - a mass marketable product regardless of how much art it might happen to contain.

Add to this the fact that pop music marketing was not run by the likes of artistically enlightened museum or gallery directors, but by dollar hungry entertainment moguls, their accountants, and their lawyers, all of whom, by mid century, were already actually being leaned on or infiltrated by organized crime. So you have the *industry* of pop music becoming, amid all the art within it, a crass and opportunistic nest of thieves and scoundrels in which any artistic priorities, if understood in the first place, were quickly readjusted or cast aside in favor of the bottom line on a regular basis. In pop music, with the aid of modern copyright law, any kind of perceived copying became just another way to collect money and crush possible competition, even though no other art form in human history is more thoroughly based on copying the precedents of others than music is.

IN CREPT COLLAGE

Into this peculiar, highly competitive, proprietary obsessed “art” of popular music, eventually crept the well respected, classically founded motivations and techniques of collage. Who knew? Cutting and editing analog tape of musical and non-musical material into new recordings was occurring throughout the 1960's and 70's, but it was in the 1980's that all hell broke loose. The music electronics industry began marketing various digital sampling devices and computer controlled music sequencing software intended to allow musicians to easily play back the sounds of “public domain” flutes and cellos and saxophones. What the inventors of samplers never guessed would occur was that this new device also easily allowed musicians to capture and then play back bits of ANY pre-recorded music or found sounds and add it to their own music. Collage in the form of sampling other work to make a new one began to be routinely suppressed. Pop samplers, initially emerging in rap or hip hop genres where they began freely plucking the grooves they wanted from the grooves of other popular music, found themselves in court. By the late 80's, lawsuits and threats of lawsuits proliferated as this particular capturing technology

spread far and wide throughout music of all kinds. Collage and its use of "unauthorized" sound became a criminal activity. Collage music became criminal music. Copyright law became the art police. Presently, we have a somewhat more settled situation in which sample clearance fees, rather than lawsuits, rule the economies of collage in music, but to this day music owners continue to make every effort to stamp out unauthorized collage in music.

As artistically stupid as this is on the face of it, it has become possible because we have established inflexible copyright mandates across all the arts which allow any and all art to be "protected" as private, untouchable property, unavailable for any purpose other than it's original purpose, including any reuse in new art by others. For artists, copyright means that other art is emphatically not allowed to be seen as part of their landscape, not a part of their usable environment, not something that influences their creative minds. Art, in particular, has been divorced from all that to become completely unavailable to any succeeding art's use without payment and permission. One can buy it and absorb it as a consumer, but one can't do anything further with it. This withdrawal of all art from any further creative recycling goes directly against the above stated universal and historical artists prerogative to see the entire world around them as grist for their mill. If they do collage and see other art products as part of the "public domain" they draw from, copyright tells them they can't.

HOW IT BEGAN AND WHAT IT BECAME

When copyright was originally instituted, it certainly began to put boundaries on the public domain which extended everywhere at the time, but there were some very good and valid reasons to do so.

A total free-for-all public domain inevitably results in the counterfeiting of entire existing works of all kinds. Once rampant, THIS form of covert income siphoning IS theft, and it has been severely limited by being made prosecutable under copyright law, as it should be. A creator should be able to reap whatever rewards accrue from whatever it is they do. Counterfeiting removes this ability. Counterfeiting is an unarguable misuse of the concept of public domain. Good law so far, and if this was the only aspect of cultural reuse in a public domain that copyright law prohibited, we would have no complaint against it at all. Unfortunately, it now goes against so much more that has happened to appear within its reach since it was conceived that the very thing it originally proclaimed to protect - the encouragement and promotion of the useful arts and sciences - is now often its target for hindering and prohibiting. We've been hearing for years that irony is dead in America, but that will certainly not be possible until copyright law is revised.

Something has happened in human creativity which copyright law was never written to accommodate - the fragmentary reuse of other's art to make new art - and the opportunistic minds behind pop music, in particular, were able to use copyright law to act like this proven creative form (fragmentary and transformational appropriation within new works) was no different than counterfeiting entire works. Copyright law did not distinguish such a difference and neither did they. Sampling source owners called these collaged uses piracy and sued to crush the practice because:

- (1) they did not and do not understand how art works
- (2) they claimed such reuses were in competition with their source works
- (3) they were not getting paid for it.

After a while, it somehow wore into their brains that modern musicians were not going to let go of collage as a technique and that sampling was only spreading more profusely into all varieties of new music. So the best way to handle it from a business perspective was to ignore reasons (1) and (2) and concentrate on (3) - getting paid for it. That's where we stand today and here's what's still wrong with it.

Just because a recognized art form like music becomes manifested as a commercial mass commodity, it is still an ART FORM which necessarily depends on free expression. If, as in the case of music collage, this aspect of free expression is hindered or censored by both prior tolls and required permission in order to practice the art form, then you have paid expression if one can afford it, no expression if one can't, and criminal expression if one can't afford it but does it anyway. Free expression demands free access to the elements of its expression, even when those elements happen to be owned by someone else. *Especially* when they are owned by someone else. This is the free pass all art has always been given to speak its mind, and commercial interests of any kind do not negate this creative imperative. If you want this kind of art to occur at all, it goes with the territory. We don't expect a writer to get permission and make a payment in order to use any particularly words or letters. We don't require payment and permission for a painter to represent the billboard that is sitting in the middle of their landscape view. Yet we are doing exactly this in the case of music collage (even as we continue NOT to do it in other, less commercially oriented collage arts!). Pre-existing private properties, even pre-existing art, can and do form the "alphabet" that any form of collage might use. The current copyright restrictions on using this alphabet constitutes a prior restraint that amounts to censorship of the creative practice itself, and this is true whether or not the practice itself happens to be housed in a new commercial product.

Collage, recontextualizing familiar and recognizable elements from our common experience as it does, is often a statement involved with social awareness or social commentary. It is often expressing forms of satire, direct reference, or criticism. It is not always polite. As such, it often represents a potent form of creative free speech requiring just as much protection as any other form of free speech. The entire range of practice called collage must be considered in this way in order to protect this potential in all its forms and possibilities. It's no good to trivialize these concerns by noting how hip hop musicians simply use a sample of another's music just because they like the riff. It's truly irrelevant! Allowing source owners control over that practice through payment and permission requirements also prevents another collagist from using a clip of music or some damning dialog in a critical or unflattering context which the clip's owner doesn't happen to appreciate and thus refuses to allow. Fair Use may be available to parody for this reason, but it's NOT available at all to satire which can be equally unflattering to source owners. And by the way, do YOU know which is which?

PAY TO PLAY

The dangers to collage from payment and permission requirements also include the aspect of affordability. Once collage had made its presence sufficiently felt in modern music and was obviously not going away because of litigation, the music industry settled down to pursue charging everyone to do it. They all set up brand new suites in their office buildings devoted to this inter-corporate trade in music samples. Usage fees were set to what competing music corporations could pay, although sometimes they trade samples for samples too. Purchasing a single sample can run anywhere from hundreds to many thousands of dollars each, depending on what the owner arbitrarily thinks the potential sales traffic will bear. If these commercial rules of legitimacy are followed, collage becomes confined to realms in which there is a wealthy label supporting the musician's desires. For the most part, a mutually lucrative trade among relatively rich and already successful music purveyors. Any independent, grass roots efforts at collage are left out of this expensive loop of sampling "legitimacy."

From personal experience as collage music makers who have no affiliation with major labels, we in Negativland can assure you that we simply could not be making the style of collage music we do at all if we agreed to pay for every clip and sample we use. The cumulative price of working in the particularly densely sampled way that we do is totally prohibitive to grass roots, independent, barely surviving artists like us. Just one of our CDs may use a hundred or more different samples, generally recorded fragments off

of radio, movies, TV, or other records. The haphazard nature of found sound collecting from mass media often does not happen to include the owner's name and address, so we sometimes have a very practical difficulty in even knowing who actually owns the bits we recorded, perhaps recorded years before we actually get around to using them. If we do know or can find out these hundreds of separate owners, we certainly don't appreciate their simply ignoring usage requests from the likes of us. As we have heard from many other independents who try, no response is a usual response. If they do ever get back to you, the whole process can take years. Thus, they have already successfully abrogated any release schedule you may be financially counting on, which becomes crucial when you are releasing only one record at a time as a small independent label. And then, of course, even if we could afford to pay for all these multiple samples from all these multiple owners, and all that could be worked out on schedule, these usages must also hang on their multiple permissions granted. This is their chance to prevent this kind of work from appearing at all if they don't happen to like the content or attitude of it. This is the final and ultimate dead end wall which copyright forces collage up against, especially in cases like ours where we are often not about being flattering or ideologically supportive to the sources in our work. Which brings us to Fair Use.

A DISTINCT LACK OF UNDERSTANDING

Copyright law's allowance for Fair Use, requiring neither payment nor permission for the partial reuse of another's work, is already established within present copyright law to allow for the free expression of news, comment, criticism, parody, and a few other things. It is the only legal acknowledgment we have that copyright controls can, indeed, equal censorship of free speech and free expression if permitted total and unrestricted reign over all possible reuses. The problem with fair use as it stands is in its interpretation with regard to *art reuses* when that art is immersed (if not sinking) in a sea of commercial interests, as modern music is.

Fair Use, as a legal concept, preceded the modern technologies that produced the new and unexpected art of collage. The aging guidelines for determining Fair Use do not yet accommodate, or even acknowledge, the modern tendency to actually create new work out of old. This leap of understanding has yet to appear in any of our commercially biased law making as a culture, a culture already drenched in the practice of legal and illegal collage from top to bottom. Commerce goes on seeing the stylistic epoch of collage, now a century old, only as an opportunistic way to acquire some unearned and unexpected income via copyright law. As artists, we see the indistinguishing over reach of copyright's control over almost all creative reuse as a selective prohibition on modern art's evolution.

From an artistic point of view, it is delusional to try to paint all these new forms of fragmentary reuse and sampling as economically motivated “theft”, “piracy”, or “bootlegging”. We reserve these terms for the unauthorized taking of whole works and reselling them for one’s own profit. Artists who routinely appropriate, on the other hand, are not attempting to profit from the marketability of their sources at all. They are using elements, fragments, or pieces of someone else’s created artifact in the creation of a new one for *artistic reasons*. These reused elements may remain identifiable, or they may be transformed to varying degrees as they are incorporated into the new work, where they may join many other fragments, all in a new context and forming a new “whole”. This becomes a new “original,” neither reminiscent of nor competitive with any of the “originals” it may draw from.

DEFINING ART AND BUSINESS

Because art is not defined as a business, yet some of it like music must compete for economic survival in the marketplace of commercial business, we think certain legal priorities in the idea of copyright should be revised to uphold certain modern artistic imperatives in commercial contexts. Specifically, we propose a revision of the Fair Use guidelines to apply to a great deal more artistic activities than they now do. This revision should throw the benefit of the doubt to reuses within collage contexts, and place the burden of proof for showing economically motivated infringement on the owner/litigator. When a copyright owner wished to contend an unauthorized reuse of their property, they would have to show essentially that the usage does not result in anything new beyond the original work appropriated. In other words, that the usage accomplishes nothing more than counterfeiting their property. However, if the new work is judged to significantly fragment, transform, rearrange, or recompose the appropriated material within a new work, and particularly does not use the entire work appropriated from, then it should be automatically seen as a valid fair use - an original attempt at new creative work, whether or not the result is successful or pleasing to the original source creators or owners. This level of free reuse in the creation of new work would cause no great or destructive economic hardship to source owners because none of them are making much of a living by just sitting back and collecting fees for rare or occasional reuses of their work in collages anyway, and if they say they are, perhaps they should be encouraged to do something new once in a while themselves! Such an expansion of Fair Use would let all possible music collage works through the copyright gate but still prohibit wholesale counterfeiting. Unlikely? So is the present commercial suppression of collage through payment and permission requirements!

In the meantime, if paying for samples is impossible and/or permission is not forthcoming, it is implied that artists should actually strive to fit within the narrowly specified Fair Use guidelines as they already exist whenever attempting to use unauthorized appropriated elements in new work. But when you become aware of the tiny sliver of specific artistic activity to which Fair Use now applies, it doesn't take an artist to see that there is much more to be done with all the media influences which surround us. These ideas range far, wide, and weird, hardly ever following the strictly defined "rules" of pure parody or commentary which the tiny tunnel of Fair Use guidelines now provide for. The usual Fair Use interpretation that only non-profit works need apply is the worst of all its myriad of misperceptions. Again, just as the supporting reasoning for copyright law states, are we out to support, dare we say even ENCOURAGE collage in this world or aren't we? Would we really prefer it to just go away? If we want collage to flourish without bias or censorship, especially at the grass roots level, it must be able to support itself in the very same way all its sources do - by selling ITSELF. Otherwise, it withers in poverty, not to mention lawsuits.

All claims that collage is simply reselling its sources are patently absurd. Anyone familiar with any actual examples of collage understands that an internal familiarity present within it in no way duplicates or competes with the appeal of the individual sources joined there. It is this selection and joining which creates an entirely *new* effect, a new whole that is more than the sum of its parts, and an effect that is thereafter original to the collage alone. But if there is no practical economic theft involved, if a collage and its sources are not possibly in direct economic competition with each other, exactly what IS the fundamental objection to fragmentary free appropriation in the creation of new work?

Please consider the ungenerous and uncreative logic we are overlaying our copyrighted culture with. In this age of reproduction, so typified by recorded music everywhere and battles for the consumer consciousness of our population through the mass saturation of our environment with logos, brands, messages, ideas, and imagery, artists will naturally continue to be interested in sampling material from this modern environment of both reproduced art and psychological influence mongering. Appropriating from all these publicly available influences we swim in as a society is desirable precisely because of how these elements express and symbolize something potently recognizable about the culture from which both we, as artists, and this new environment of reproduced culture, springs. The private owners/public spreaders of such art, artifacts, icons, messages, and ideas are seldom happy to see their properties in unauthorized contexts which may be antithetical to the way they wish to spin them. But their knee-jerk use of copyright restrictions to prevent any kind of this work they don't like now amounts to the corporate censorship of this kind of art within our culture.

Unlike the basic thrust of all the rest of U.S. law, copyright law actually assumes that all “unauthorized” uses are illegal until proven innocent. Since any contested reuse always requires a legal defense, such a legal expense, even when Fair Use DOES apply, remains beyond the financial grasp of most accused “infringers”. This financial intimidation, especially on the part of large, corporate source owners, results in the vast majority of art appropriators caving in and settling out of court, their work being consigned to oblivion, and the corporate cultural “owner” having it all their own way, including their legal expenses paid under a claim of “damages.” There are no “damages” from collage!

FAIR USE FOR COLLAGE

A question to consider is this: should those who might be borrowed from have an absolute right to prevent all such free reuses of their properties, even when the reuse is obviously part of a new and unique work? Do we want to actually put all forms of unauthorized reuse under the heading of “theft,” implicating a socially valuable art form such as collage with criminal intent - a form which may be making controversial social or cultural points and cannot operate true to its vision when, regardless of whether or not it can afford the price of authorization, *prior permission is required*?

We’d like to see copyright law acknowledge the logical and inalienable right of artists, not publishers or manufacturers, to determine what new art will consist of. The current corporate control over our cultural output has an ominous feel to it because it has given culture over to fewer and fewer corporate committees of taste-molders and marketers who are driven only by an overriding need to maintain an ever rising bottom line for their shareholders. Is the admittedly pivotal role which society places on commerce really so unassailably useful when it reaches to inhibit and channel the very direction of an art form like collage, allowing it to evolve this way, but not that way? Is the role of Federal Law to serve the demands of private income, or to promote the public good through free cultural expression? Both?

Then the crux of the collage debate we hope to raise is this - why can’t we do both? Why can't we maintain all reasonable forms of fair and just compensation for artists which directly result from the work they themselves do, while at the same time not inhibiting, preventing, or criminalizing other perfectly healthy and valuable forms of music/art such as collage which arise out of new, enabling technology and increase our total wealth of creativity as a culture? We believe the promotion of artistic freedom should, for the first time, find a balanced representation with the purely commercial and proprietary obsessions which now dominate the purposes of our copyright laws. The minor and

isolated conflicts of commercial interests this may entail just do not measure up to the conflict with public interest which doing nothing about it maintains.

TWO RELATIONSHIPS TO A CULTURAL PUBLIC DOMAIN

In the isolated medium of the Internet, and in the suggestion of Fair Use for collage, we are being guided by new technologies to reacquaint our brains with cultural leanings toward a rejuvenated public domain, right here in the 21st Century. And since we are actually FORCED to accommodate these two persistent references to the boundaries of public domain in our midst (collage and the Internet), we may begin to seriously consider what value or lack thereof a larger public domain may actually entail in practice. Not having a choice sometimes finds unnoticed values which an easy and habitual dismissal never considered. The billions in private income reserved for private interests under copyright controls, or the withholding and denying of all reuses of culture in lieu of payment and permission, may not be the best ends in sight for mass enlightenment. If that be a goal, the "value" of totally private intellectual property may not actually outweigh the cultural value of enlarging ALL our brains in a more intellectually unconstricted environment, not to mention the enlargement of our enthusiasm for, and participation in, our own culture which might result from a wider concept of public domain.

Both the status of music on the Internet and the status of collage in music are primary examples of how the ever latent urge to perceive, use, and reuse the world around us as a PUBLIC domain, rather than a private one, has never been entirely suppressed by our equally hallowed concepts of private property and the rights of its owners. For most of human history, cultural creation was always intended to be a shared phenomenon, an activity attached to spiritual sustenance and spiritual confirmation between the maker and their community. Only recent human history has found it advisable to withhold virtually all such creative activity until it can be paid for. That old selflessness that infuses the human urge to make art may no longer be so practical in a world in which making art has become more and more expensive, and so much of the potential subject matter for art's ancient habit of free appropriation has been legally declared off-limits. But suddenly, the Internet offers an isolated "look and feel" that rekindles the rather ancient and generous purpose behind all cultural experience: a glimpse of no fences, possibly existing for the sake of mutual connectedness and community relevance, possibly existing for its own sake and no other.