PLEASE, STEAL MY ART: DOES INTELLECTUAL PROPERTY LAW HINDER CREATIVITY? OR, CAN WE STOP TALKING ABOUT INTELLECTUAL PROPERTY LAW AND TALK ABOUT CREATIVE PRACTICE RIGHTS?

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I. INTRODUCTION

“He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”

Thomas Jefferson¹

In the performing arts, there is a saying: “Mediocre artists borrow; Great artists steal.” This bold statement does not mean the best artists steal. It is not a comment about product, but a comment about process. Artists steal ideas, stories, and even components, both large and small. This article is about the necessity of maintaining an artist's ability to steal and the clear and present danger of losing that freedom. The notion that freedom is a valuable part of creativity and innovation is deeply rooted in ideas about intellectual property and aesthetic evolution. If an artist steals an idea, finds an innovative solution to a problem or devises a new way of seeing an old thing, in the process of implementing that idea or shaping that thing into something new, the new work has the potential of bettering and improving upon the original. When it becomes something new, the original is transformed. And, along a long lineage of influences and ideas, humans better themselves through these innovations. We need these chains of influence—the evolution of ideas and new configurations—in service of a larger need: the progress, if possible, of our species.

II. THE CONSTITUTIONAL BASIS FOR COPYRIGHTS AND THEIR INCARNATION AS PROPERTY RIGHTS

The idea of creative freedom is not unheard of. As a matter of fact, this idea manifests itself in intellectual property laws. For instance, copyright, despite extension after extension, has a termination date.² This notion was codified within the Constitution of the United States in order to secure to authors exclusive rights for a limited time.³ The authors of the Constitution ranked the importance of this idea in the same section and alongside the right to declare war,

³ U.S. CONST. art. I, § 8, cl. 8.
to coin money, and to collect taxes.4 Therefore, because of this “limited time” phrase, drug companies lose their patents after a time period and (eventually) authors lose their copyright. It is easy to see that it is for the public good that ideas and things eventually move into a public domain—owned by the culture and not an individual or corporation.

However, in today’s cultural conversations and court decisions about copyright and ownership, producing artists ought to be concerned that they have pushed too far to the side of production at the expense of process. Artists argue about property rights, not creative rights. If the purpose of copyright is to make incentives for people to create or innovate, then copyright by its very nature should only last while the creators exist; that is, while they are still alive. However, today a person can own his or her works not only while he or she is alive, but for a full seventy years after death.5 For corporate authors, copyright has extended from fourteen to ninety-five years.6 As the entertaining YouTube video Copyright: Forever Less One Day points out, George Lucas has control over his Star Wars properties until the year 2072.7 Thus, clearly copyright is no longer about private incentive but rather corporate ownership and profiteering.

Many understand that corporate health is important to the nation's economy, and for many a significant part of their retirement benefits are bound up in these corporations’ success or failure. These men and women need them to prosper so that they may as well. But in copyright’s massive shift away from functioning to serve the public good and towards private and corporate ownership and profiteering, whatever Americans may be gaining in control they may be losing in inventiveness and innovation. In the trajectories of the rise and fall of nations, one can see a move away from creative vibrancy (as we see in China and India, nations with a fairly loose sense of copyright) to stagnancy and ossification (as we see in Japan and some Euro-zone nations). Those who create lose their ability to use the tools and components of that very act of creation.

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4 See id.
6 See id. § 302(c); but see LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 292 (2004) (proposing a shorter term).
III. Transforming the Old into the New

Artists steal and, in the process, tend to make something entirely new. How many symphonies have been inspired by paintings, or folk dances, or even earlier pieces of music? How many films and plays tell an old story in a new way? Shakespeare, arguably the greatest writer in the English language, seemingly stole plots and ideas as a daily practice. The films 10 Things I Hate About You (1999) and O (2001) are Shakespeare's The Taming of the Shrew and Othello, respectively. Of course, West Side Story would not exist without Romeo and Juliet. Beyond Shakespeare, the 1995 hit film Clueless, with Alicia Silverstone, introduced an entire new generation to Jane Austen by updating her story Emma. Because the originals are in the public domain, artists of today are free to use them. For instance, nobody had to pay for the rights to Beowulf for the 2007 film.

Many artists create great work out of pre-existing ideas and works, recycling them over and over. That idea, in itself, is an important part of the creative process. We are unable to imagine somebody reworking the plot to Gone With the Wind or Citizen Kane today without some threat of legal action. So, borrowing from Shakespeare is creative but drawing from Margaret Mitchell (apparently one of the most protected estates outside of Disney, Michael Jackson, and The Beatles), is infringement.

Not only may ideas and plots be stolen, but also parts or small components. What new text is written without using the same words that previous authors used over and over, innumerable times, often using full phrases from originals? No musician creates music from notes never before played. In music there is the phenomenon that has become known as the “pop-punk chord progression.” In musical terms an example would be, for a song in the key of C major, the progression of: C-G-Am-F. You can hear this chord progression in a host of pop songs by Lady Gaga, The Beatles, Green Day, The Offspring, Journey, the Rolling Stones, and dozens of other modern artists. Or, rearrange those same chords to Am-F-C-G/B and one finds the “sensitive female chord progression” seen in Lilith Fair music festival performers. Pop comedy group The Axis of Awesome demonstrate this phenomenon most exactly in their performance “4 Chords,” in which they jump through thirty-six songs, using just these four chords, in six and one

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half minutes. Artists throughout the ages use the same media and materials over and over—not just ideas but also bits, pieces, and parts. Thus, the value placed upon a piece is determined by how original the particular arrangement of the piece seems to be and not the components themselves. Embedded in this acceptance is the acknowledgement that nothing is completely original. As Shakespeare said, “[i]f there be nothing new, but that which is [h]ath been before,” from Sonnet 59 which he took from The Bible:

“What has been will be again,
what has been done will be done again;
there is nothing new under the sun.”

This stealing is sometimes called “permissible borrowing.” The question often then becomes, “where is the line between permissible and non-permissible” or “do you have permission?” It is this question that sends the courts into a maelstrom of conflicting or confusing decisions and opinions.

IV. FAIR USE AND ITS ROLE IN “PERMISSIBLE BORROWING”

The more appropriate legal definition of “stealing” or “permissible borrowing” is called fair use—one of the most abused, confused and misunderstood aspects of intellectual property law. According to the U.S. Copyright Office, four major factors contribute to fair use. The first is “the purpose and character of the use,” which includes whether the use of the material is for financial gain. Non-profit companies tend to fare better on this point. The second is “the nature of the copyrighted work,” for example, whether the original has high value as a property, such as the music of The Beatles or Michael Jackson. The third is “the amount and substantiality of the portion used in

11 Ecclesiastes 1:9.
13 Id.
14 Id.
relation to the copyrighted work as a whole.”15 The word often associated with fair use here is “transformative;” if the new use transforms the old work into something entirely new, it is fair use. The final factor is “the effect of the use upon the potential market for or value of the copyrighted work.”16

These points operate on some assumed yet unstated notion of originality. But if nothing under the sun is truly new or original, what is deemed original concerns not only the components of the work but also the arrangements of those components into a particular pattern that is determined to be new, original, unique, or transformative. As always, the question ultimately becomes, who gets to decide? And, thus, the problem that arises is that nobody can agree on any single decision or definition of “transformative” or “effect” on “potential market” in some of the grayer areas.

V. THE LEGAL COSTS ON CREATIVE ARTS ORGANIZATIONS

Determining the transformative potential of a new work is where arts organizations hit a snag in production. If a copyright owner with sizable resources, such as a corporation, threatens action against a smaller producing arts individual or organization and quibbles that part of the work is infringement of rights and not fair use, the individual or small arts organization will always fold. In the United States, most performing arts organizations or artists do not have the resources to enter into a lengthy legal battle.17 Without the charity of pro-bono-willing attorneys sitting on non-profit boards of directors, legal bills can quickly jump into the hundreds of thousands of dollars, which is more than the operating budget of many of these arts organizations. So, even though the organization may be able to easily make the case of fair use, they cannot afford to. What’s worse is that many of these arts organizations would rather self-censor than risk the ire of the copyright holders. This chilling self-censorship is actually spelled out on the U.S. Copyright Office website, which makes the following suggestion to artists:

The safest course is always to get permission from the copyright owner before using copyrighted material . . . . When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the

15 Id.
16 Id.
17 European arts organizations through helpful state funding and assistance, generally tend to fair better in these cases.
doctrine of fair use would clearly apply to the situation. The Copyright Office can neither determine if a certain use may be considered fair nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.  

In short, artists have been warned; it may as well say “enter at your own peril” like some silly old action-adventure film. Fair use is decided on a case-by-case basis and the courts do not agree. The result then becomes the case that legitimate new works of art may be hindered or even disappear entirely before they ever enter the public consciousness.

VI. FOUR EXAMPLES OF LEGAL COSTS AND THEIR DETRIMENTAL EFFECT ON CREATIVE ARTS ORGANIZATIONS

Let us examine four examples where ownership and property rights hindered production. When one thinks of copyright infringement battles, one tends to think of digital media (recorded music, films, and digital images). Lawrence Lessig (the 2011 Roy L. Furman Professor of Law at Harvard Law School) has eloquently and precisely detailed how copyright hinders creativity in the world of digital media. Lessig urges a move away from “fair use” to “free use,” particularly regarding the non-profit sector, where most performing and visual artists live. He sees the problem as such: “[W]e are less and less a free culture, more and more a permission culture.” He understands that innovation and creation trapped in bickering over permissions are a threat to change and progress.

However, this article looks at examples from the performing arts because: (1) that is the author’s professional expertise, and (2) the copyright issues have not received the same attention as those of the massively funded campaigns from the Recording Industry Association of America (RIAA) or the Motion Picture Association of America (MPAA). All four examples arise from live theatre, but there are many other of these types of cases in the other performing arts.

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19 See LESSIG, supra note 6.
20 See id. at 294-96.
21 Id. at 8.
A. The Wooster Group’s L.S.D. (... Just the High Points…)

The first case occurred in the early 1980s when an experimental performance group called The Wooster Group (film actor Willem Dafoe is a founding and current member) decided to include a short, sketch version of The Crucible by Arthur Miller in its production called L.S.D. (...Just the High Points...). Critic and theorist David Savran, in conversation with The Wooster Group in his book Breaking the Rules: The Wooster Group, presents at least one side of the discussion. In brief, The Wooster Group collectively constructed its performances, and it seemed fascinated with the comparison of Dr. Timothy Leary’s experiments with psychedelic drugs in the 1960s and the Salem witch hunt resistance lead by John Proctor, the lead character in Miller’s play. The Wooster Group always treats documents, fictional and historical, as texts of particular periods in American history and examines them for issues of truth, value, and importance.

The problem came when Arthur Miller was invited to watch The Wooster Group’s twenty-five minute version of his nearly three-hour play. Miller’s lawyer immediately served a cease-and-desist order in reaction. Miller seemed more concerned with his image (or “brand” in today’s parlance) than with the fact that The Wooster Group had used his original to create a wholly new and fascinating work of art. In its upending of Miller’s play, The Wooster Group discovered tantalizing issues hidden under the surface—how can a white man in the twentieth century accurately portray a black slave in the seventeenth century? The slave woman Tituba in Miller’s version was a marginal character, while in The Wooster Group production she became a central focus. Thus, the play is expanded from not only an examination of the motives behind the witch trials, but also the power constructs of class, race, and gender of the time periods, both the seventeenth century, the play's setting, and the twentieth century. The Wooster Group could not afford to fight Miller and his publishers in court and agreed to remove that section from the performance. Because of Miller’s reaction, The Wooster Group’s artistic insights into the works, the periods, and the cultures were never to be seen by the Manhattan theatre-going public.

The Wooster Group’s study of The Crucible, though not a complete and outright lampoon, clearly is a transformative use of the original similar to many parodies. Miller’s fear that he may have been the butt of some joke should not be cause to close the show—based on

24 Id. at 187-95.
that logic, we would not have Saturday Night Live or Mickey Mouse. Saturday Night Live is well known for its spoofs of other films, television, and celebrities. In fact, one of the most protected properties in the world and the icon of The Walt Disney Company, Mickey Mouse, was himself created in as an act of satire of an old Buster Keaton film, Steamboat Bill, Jr.\textsuperscript{25}

B. Akalaitis’ Endgame

Another theatrical production in the early 1980s suffered a similar conflict, but with a slightly better outcome. Experimental director Joanne Akalaitis (formerly of the Mabou Mines, known for producing composer Philip Glass) was directing a production of Samuel Beckett’s Endgame for the American Repertory Theatre (ART) in Cambridge, Massachusetts. Beckett’s famous tragicomedy only requires one rather stark and non-descript room:

\textit{Bare interior.}

\textit{Grey light.}

\textit{Left and right back, high up, two small windows, curtains drawn.}

\textit{Front right, a door. Hanging near door, its face to wall, a picture.}

\textit{Front left, touching each other, covered with an old sheet, two ashbins . . . .}\textsuperscript{26}

\textit{With such a basic setting, most theatre directors would feel free to adjust or add freely.} But the rule is that once you purchase the rights to produce a play you must produce the play as defined by the dialogue, which must never be altered, and the stage directions, which tend to be more fluid. Akalaitis took artistic liberty with the play directions and decided to set it in a post-nuclear-holocaust subway station.\textsuperscript{27} Many directors have altered settings in theatrical productions with little fanfare. But Beckett and his lawyers threatened

\textsuperscript{25} Keep in mind, many of Disney’s greatest films would not exist without the free use of the Grimm Brothers [\textit{Snow White} ("Sneewittchen"), Cinderella ("Aschenputtel"), Sleeping Beauty ("Dornröschen"), The Princess and the Frog ("Der Froschkönig"), Tangled ("Rapunzel") and Hans Christian Anderson (The Little Mermaid) and the forthcoming Frozen, based on The Snow Queen).

\textsuperscript{26} \textsc{Samuel Beckett, Endgame} (1957), \textit{reprinted in Endgame & Act Without Words I} 7 (2009) (format and italicization maintained from original).

to close the production because of the changes in locale, saying that this was not the original intention of the playwright. After several meetings and a mounting legal bill (which many organizations smaller than ART could not afford), Beckett agreed to allow the production to proceed but that he would denounce it publicly and every printed program would carry the denunciation.

Both the Miller and the Beckett case call into question who owns what part of the property. The words are clearly the playwright’s, but how those words are performed or staged leads into grayer territory. Often on films, authors sign away all of their ownership rights to a studio and thus give the studio free reign to alter the text however they please. In live theatre the playwright may still revoke production rights if displeased with the artistic choices a production company makes. But is it not the act of interpretation in a way the significance here, transformative use, thus creating a new work of art out of an old?

C. Lavery’s Frozen

In a more recent case, British playwright Bryony Lavery created a Broadway hit in 1998 with her Tony Award nominated play, Frozen; that is, until it all fell down around her. The play follows a psychiatrist in her work with a serial killer and the mother of one of his victims. As many playwrights do, Lavery worked from and was inspired by many different source texts, including a 1997 New Yorker article from Malcolm Gladwell and New York psychiatrist Dorothy Lewis’s 1998 book, Guilty by Reason of Insanity. Indeed, Lavery used some of Gladwell’s exact words.

Gladwell documents the process of his reaction to the play’s plagiarism point-by-point in his book What the Dog Saw. Gladwell met with Lavery and began to come to an understanding of what occurred. Lavery said she thought of these pieces as “news” and therefore they were free to use in her play; her fair use was an attempt to be as true to the source materials in order “to be accurate.” When Lewis saw the play, she immediately recognized her own life being

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31 Id. at 238.
portrayed on stage. Gladwell was notified 675 of his words had been picked out and used in Lavery’s play.32 A clear case of plagiarism—
theft!

But the position he ultimately took is that Lavery used his words and parts of Dorothy Lewis’ life and made them into something extraordinary and new. They were old words in the service of something entirely new. They had become art.

The damage had been done to Lavery’s career. Though she continues to write and produce in her native England, her next plays have largely been ignored in this country, though Frozen has had some continued life despite the controversy.

D. Fuller’s As I Lay Dying

Some of these new works even have to hide at the margins, self-conscious about their very right to exist. Two years ago, poet and playwright Janice Moore Fuller began a stage adaptation of William Faulkner’s American classic, As I Lay Dying. Fuller is a Faulkner scholar and decided to adapt Faulkner’s work to live theatre, a task some would consider a Herculean feat considering Faulkner’s beautifully rambling and complex writing style. Fuller simultaneously started the process of seeking permission for theatrical rights to adapt the work and discovered a problem—the executor of the Faulkner estate was unwilling to respond after years of repeated requests to allow or deny the use. The literary rights are held by Random House, so she could apply to publish the adaptation. But the attorney who was the executor held the performance rights. There was a film adaptation announced for the story with actor James Franco behind the project. The film seems to be caught in “development hell,” and may never see the light of day. It remains unclear whether the performance rights have been secured.

Fuller has since continued to send letters and requests to the attorney but has received no response. One can only assume that since she is asking for the performance rights for theatrical production the attorney does not feel it worthwhile to even answer, maybe because it would not be a significant source of income if produced by regional arts organizations or colleges/universities instead of a film company. Though she collects copies of all of these attempts in case the attorney decides to come forth at some point, she worries that her adaptation will gather dust instead of doing the task she hoped for—connecting new audiences to the brilliance of Faulkner. Theatre companies, being

32 Id. at 243.
local entities, still draw in thousands of audience members—a worthwhile enough constituency with whom to share Faulkner's stories, images, and language.

In the fall of 2011, Fuller’s adaptation saw the light of day in a college production. Some regional theatres, particularly those interested in Southern authors and playwrights, continue to discover the adaptation and show significant interest in producing the play. But these companies are going to be unwilling to risk a lawsuit when the question of theatrical rights still hangs in the air.

In all four cases, intellectual property became—and in some cases remains—a hindrance for something new and original from entering the world. Even though none of these cases ended up actually reaching a court for a decision, they still affected the world of production and illustrate the battle for control and ownership over creativity and innovation. Gladwell is an exception here, and only after a conscious moment of reflection. In their book, Reclaiming Fair Use: How to Put Balance Back In Copyright, Patricia Aufderheide and Peter Jaszi call ours a culture of fear and doubt. That is, artists fear punishment if they make something new out of something old and doubt their rights and therefore tend not to be as freely creative as they might otherwise be.

**VII. IS THERE A LINE BETWEEN STEALING, PERMISSIVE BORROWING AND CREATIVE RIGHTS?**

Entering into such discussions about where the line is between creative rights and intellectual property rights assumes that there should be a line—a way of defining clearly, in legal terms, which is which. Yet as Americans continue to struggle with this issue in court, it seems increasingly clear that the attempt to find and define that line is ever elusive. Lessig argues for a drastic (to some) reconsideration of copyright law and ideas of ownership and permission. In service to the greater good, free use should be the norm. At the front of one’s mind should be not “where is the line,” but maybe “when do property and ownership inhibit process, and thus new product?” As Gladwell came to recognize, “I could also simply acknowledge that I had a good, long ride with that line—and let it go.” But how many copyright holders out there are as brave and progressive as Gladwell? And how many corporate owners are willing to be that open with how

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33 PATRICIA AUFTERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 1-15 (2011).
34 See LESSIG, supra note 6, at 8-9.
35 In a brave act of free use, I've decided not to cite the source.
their properties are used? Americans shake their fingers in shame at China for its unwillingness to clamp down on copyright violations. What Americans citizens see as loss of profits in a massive sales market, the Chinese seem to see as freedom of creativity. Chinese authors have taken rigidly protected properties like the Harry Potter, Jurassic Park, and the Lord of the Rings books and (hilariously) smashed them together. Just consider the titles: Harry Potter and the Golden Armor (Harry rides a Tyrannosaurus Rex), Harry Potter and the Leopard Walk-Up-To Dragon (Gandalf from The Lord of the Rings trilogy assists the Hogwarts students to fight off foes), Harry Potter and the Chinese Overseas Students at the Hogwarts School of Witchcraft and Wizardry (adding Chinese students for local flavor), and Rich Dad, Poor Dad and Harry Potter (Richard Shaw’s classic 1969 novel and Harry Potter together, for some unclear reason). Obviously, none of these are sanctioned or approved sequels to the Harry Potter franchise. The author of the series, J.K. Rowling, has made plenty of money and will continue to for a very long time. The Chinese works are clearly transformative, yet they made profits and infringe on a highly protected property. Based on the four points of fair use described above, Rowling would clearly win a suit and therefore these sequels only exist in underground Chinese markets. But what true fan of the series (those who have probably bought the toys, the DVDs, the books, and probably some costumes) would not want to read them?

In this swing toward hyper-protective ownership, the world is out of balance. A world where the copyright industry’s primary job seems to have become, in some sense, the industry itself merely attempting to remain relevant and at play, and paid not for just what it is producing but primarily what it has produced. And the trend continues onward as illustrated by the stretch of Disney’s ownership of Mickey Mouse from his parodic appearance in 1928 indefinitely into the future. At this point, we begin eating our own, shooting down new ideas and new art before it can get off the ground. Gladwell says, “The ethics of plagiarism have turned into the narcissism of small differences: because journalism cannot own up to its heavily derivative nature, it must enforce originality on the level of the sentence.” Replacing “plagiarism” with “infringement,” and “journalism” with “the creative arts,” the sentence paints a strong picture of the current state of

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37 GLADWELL, supra note 30, at 241.
intellectual property law. It is more interested in control than creation, though artists know it is creation that is always the source of success and a brighter future.

We need to have these discussions; they are vital as we move into grayer areas of new media, where YouTube and Vimeo videos recycle culture and arts over and over again. Is the government really going to shut down a group of teenagers who record and electronically share their dancing and lip-syncing to a Beyoncé song for the whole world to see? That may sound ridiculous but some current proposals would do just that.

VIII. CONCLUSION

In a battle of ownership, creators and artists will nearly always lose because they lack the financial and legal resources to fight back. Therefore, *pro bono* work from the legal profession becomes an invaluable and important resource for any arts organization. A non-profit organization without a lawyer on the board of directors is a disaster in the waiting.

As an artist and scholar, I have created numerous works that live under copyright. I understand that many people must survive from the royalties generated by those copyrights. Intellectual property rights exist to generate financial incentives for people to create, adapt, and innovate. However, as a director and creator of live performances, my performance work does not operate under copyright. My designs, my direction, my insights and interpretations, all of these I willingly share with my audiences. My books, after a time, become outdated on the surface; but some of the ideas may still resound with audiences: maybe I have solved a problem, built a better mousetrap, or offered a new insight. If you, in a new way, incorporate my creation into your own work and make something even better, then we all win.

So, please, feel free to steal my art. Just steal it well.