



OWNING CULTURE

authorship, ownership,
& intellectual property law

Kembrew McLeod



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Authorship, Ownership,
and Intellectual Property Law



PETER LANG

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Advance Praise for **OWNING CULTURE**

"Kembrew McLeod's lively and accessible book makes a persuasive case for the centrality of intellectual property law in shaping popular cultural practices. Rich in contemporary and historical examples that range from hip-hop sampling practices to appropriations of indigenous knowledge, *Owning Culture* will serve as a great introductory text for students in communication, anthropology, and cultural studies."

*Rosemary Coombe, Canada Research Chair in Law,
Communication, and Cultural Studies, York University;
author of The Cultural Life of Intellectual Properties:
Authorship, Appropriation, and the Law*

"This is the most accessible, entertaining, and compelling book on intellectual property law I have encountered. Kembrew McLeod uses an array of fascinating cases to show how intellectual property law impacts our culture. The results are a sobering demonstration of corporate power and the triumph of property rights over other freedoms."

*Professor Justin Lewis, Department of Journalism,
Media and Cultural Studies, Cardiff University, United Kingdom;
author of Constructing Public Opinion*

OWNING CULTURE



Toby Miller
General Editor

Vol. 1



PETER LANG

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Acknowledgments

First, I want to thank Sophy Craze and Toby Miller for caring about this project and giving me the opportunity to bring it to fruition. Sophy was one of the only editors who had a full understanding of what I was trying to convey in this book, and her support and guidance was essential.

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The idea for the epilogue of this book came from a particularly memorable camping trip with Susan Ericsson, Eric Morgan and Lisa Rudnick, all of whom have heard more than their fair share of talk about intellectual property law. Furthermore, Lisa Rudnick's input when I wrote the first draft of this book was crucial in helping to develop some of the key ideas contained here, more so than she probably realizes.

Thanks to Negativland for getting sued in 1991 and sparking my interest in the topic of intellectual property, and special thanks to Mark Hosler for taking my phone calls about this suit over the course of the 1990s. Also, I appreciate Steve Jones's willingness to look over parts of this manuscript and give his feedback.

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Collectively, all of you turn on my heart light, especially when I'm caught between the moon and New York City. You are the wind beneath my wings; you're the meaning in my life (you're the inspiration) and nothing compares to you.

In all sincerity, thank you.

Preface

Because I'm writing a book about intellectual property law, there is some relevant information I should divulge before I begin in earnest. I trademarked the phrase "freedom of expression." No, I'm not joking and, yes, I have proof. In my possession I have trademark number 2,127,381 and a certificate from the U.S. government that reads, "The application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Commissioner of Patents and Trademarks, and that the Applicant is entitled to registration of the Mark . . . Freedom of Expression."

Does this mean I can sue anyone in the United States for using the term without my permission? No, not really. My self-produced publication, *Freedom of Expression*®, was registered only under Class 16 of the international schedule of classes of goods and services, which covers, generally, "printed matter" and the like. But even though I can't prevent someone from using the term in *all* situations, I can still sue for the unauthorized use of "freedom of expression" in *some* contexts.

I first started thinking about issues surrounding intellectual property law, culture and power nearly 10 years ago, when I was an undergraduate working under Professor Bruce Busching. In his office one day, discussing a presentation about intellectual property law I was to do as a teaching assistant for his class in advanced critical social theory, we joked about trademarking "freedom of expression" and, after some thought, I decided to try it. It took me a while to trademark the phrase because, unlike corporations that have the deep pockets to shell out the money for the numerous trademarks they register, I simply did not have the \$245 it would cost to immediately register it.

Three years later I underwent the process of registering the mark, starting with searching a database to make sure no one else had beaten

me to the proverbial punch, after which I carefully filled out the application form and dropped a check in an envelope. Because that fee was nonrefundable, it was an unnerving process because the U.S. Patent and Trademark Office (PTO) might, as one person told me, “laugh my application out of the office.” I had an uneasy feeling that someone in the government would see that my application was nothing more than a satirical joke, a comment on what I have labeled “the private ownership of culture.” This phrase refers to the increasing expansion of what intellectual property law can protect, including human genes, scents, the term “white meat” and particular shades of green. (When the Starbucks Coffee chain moved into Amherst, Massachusetts, where I worked on my doctorate, an independently owned coffee shop received a letter threatening legal action for daring to serve coffee in plain green cups—apparently, Starbucks trademarked that shade of green in conjunction with food and drink service items.)

Despite the eyebrow-raising examples mentioned above, I thought that the PTO would draw the line with my idea. In fact, my application did hit a snag early on when the PTO sent a letter informing me that aspects of it were “not acceptable.” Fortunately, it wasn’t that the PTO found the idea of someone owning “freedom of expression” morally, socially and politically unsettling; I had simply filled out the application incorrectly. Because, in part, “the mark is not typed entirely in capital letters,” as a PTO lawyer wrote, I had to amend my application, after which I waited approximately six months to receive in the mail a certificate designating me as the owner of freedom of expression®.

I felt like a proud father and wanted to share the news with the rest of the world. To do so, I came up with the idea of executing a media prank in which I would threaten to sue someone who used freedom of expression® without my permission. Regardless of how one feels about the ethics of manipulating the media, I have found media pranks to be an effective, interesting and unconventional way of engaging in cultural criticism beyond the limited scope of academia. Employing the services of my old high school prankster friend Brendan Love, who posed as the publisher of a fictional punk rock magazine also titled *Freedom of Expression*, I started to lay the groundwork for my plan. To add legitimacy to this potential news story, I hired Attorney at Law Joan R. Golowich (who did not know this was a joke) to send a letter ordering Brendan to cease and desist his use of the phrase.

Before I had my first meeting with Ms. Golowich, my boss at Amherst College Library, Margaret Groesbeck, declared, in the same words some-

one else used a few years earlier, that this lawyer would “laugh me out of her office.” Thankfully, I learned that intellectual property law is entirely humorless, and after informing Ms. Golowich of my intention to sue someone for using freedom of expression® without permission and after she examined my documents, she confidently told me that we had a case and that she would draft a letter to Mr. Love immediately. Here are some unintentionally hilarious excerpts from my lawyer’s letter:

We represent Kembrew McLeod of Sunderland, Massachusetts, the owner of the federally registered trademark, FREEDOM OF EXPRESSION . . . Your company has been using the mark Freedom of Expression . . . Such use creates a likelihood of confusion in the market and also creates a substantial risk of harm to the reputation and goodwill of our client. This letter, therefore, constitutes formal notice of your infringement of our client’s trademark rights and a demand that you refrain from all further use of Freedom of Expression.

I made copies of the letter and my trademark certificate and sent them, along with a press release, to local media. The point of this particular media prank was to “play it straight” and never let on to a reporter my intention to engage in social commentary—I would let the news story itself be the social commentary. That is, rather than someone reading a quote from me stating “I’m concerned with the way intellectual property law facilitates the appropriation of significant aspects of our culture by corporations . . . blah blah blah,” I wanted to orchestrate the story in a way that newspaper readers would come to that conclusion on their own. I did my best to sound serious when a woman with a wonderfully rhyming name that reminded me of a certain suicide ritual, Mary Carey, interviewed me on behalf of the regional paper, the *Daily Hampshire Gazette*.

The story, which fittingly appeared in the Fourth of July weekend edition on the local section’s front page, was cleverly titled “Freedom, an expression of speech.”¹ Carey did a good job of writing a balanced, “objective” story by interviewing both Brendan and myself, but it was nonetheless slanted in the direction of highlighting the absurdity of someone being able to own freedom of expression®. The article closed with the following poker-faced quote from myself: “I didn’t go to the trouble, the expense and the time of trademarking Freedom of Expression just to have someone else come along and think they can use it whenever they want.”²

Unfortunately, the *Daily Hampshire Gazette* refused to give me permission to reprint the article in this book. After I filled out the paper’s copyright notice form, informing them that the article was a prank, the paper returned my request to reprint it with a handwritten note that stated

simply, "Permission *denied*. [signed] Jim Hardy, Editor 3/18/99."³ (The *Gazette* did not want me to reprint it, obviously, because the paper had no desire to be embarrassed by having it used in an unfavorable context.) I was especially struck by the fact the editor emphasized his disapproval by underlining "denied," and I wondered if he was at all aware of the irony that he was using copyright law to attempt to prevent the reprinting of an article that was itself *about intellectual property law being employed to restrict freedom of expression!*

Even if I did reprint the article in full, it ought to fall within the domain of "fair use" as outlined the 1976 U.S. copyright statute. "Fair use" evolved from court decisions that recognized the fact that absolute control of copyrighted works would circumscribe creativity and, perhaps more importantly, limit commerce.⁴ The "fair use" statute recognizes that, in certain contexts, aspects of copyrighted works can be legally reproduced, and it allows for the appropriation of copyrighted works for use in, for instance, "criticism, comment, news reporting, teaching . . . scholarship, or research," according to the 1976 U.S. copyright statute.⁵ Fair use may apply to a variety of other situations not listed above, and in determining whether a work is fair use, the U.S. Congress outlined the following four factors:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- (2) The nature of the copyrighted work
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- (4) The effect of the use upon the potential market for or value of the copyrighted work⁶

Nevertheless, the *Daily Hampshire Gazette* could still bring a copyright infringement lawsuit against Peter Lang Publishing and myself, and the paper could get an injunction to keep the book from being distributed until a ruling. Although it is true that such a reprint might be considered "fair use" in a court of law, it is possible that it wouldn't; this uncertainty is fueled by the inconsistency and contradictions surrounding intellectual property case law. Even the 1994 2 Live Crew Supreme Court ruling (*Campbell v. Acuff-Rose Music, Inc.*)—which expanded the criteria for judging "fair use"—was ambiguous, particularly (but not only) because it referred to "fair use" only within the context of parody.⁷

In the end, there is no certainty that a court would rule that the reprinting of the *Daily Hampshire Gazette* article was “fair use,” and if a court did, the newspaper could still engage in a long, costly appeals process. Because of this very real scenario, my publisher won’t allow me to reprint it in the first place, the result of what the Supreme Court has called a “chilling effect.” In “‘The Sound of Silence’: Academic Freedom and Copyright,” Whitely discusses the ways in which copyright works to restrict what can be reprinted in academic books and journals, to make it more difficult to engage with certain cultural texts in order to critique or discuss them.⁸ (I use “cultural text” as a broad term that refers to songs, television shows, motion pictures, web sites and a variety of other forms of cultural expression.)

Responding to Whitely’s essay, Timothy Taylor supported her assertions, giving personal examples of the way in which copyright law, to a certain extent, shaped and limited the content of his book, *Global Pop* (examples that, after speaking to numerous colleagues, he said were fairly commonplace).⁹ Taylor stated,

My editor at Routledge tended to be extremely cautious about such matters; if we had a refusal from anyone, no matter how unconsidered, he wouldn’t allow anything to be reprinted save the usual four or five lines of lyrics. I don’t think this is an unusual practice on his part, but simply cautious; no editor wants to be the person of whom an example is made in a lawsuit. And this, of course, is the way the “industry” operates: they can’t go after everyone, but they can go after someone in enforcing their extremely narrow (and, to them, profitable) notion of what “fair use” means.¹⁰

In 1991, Sut Jhally, professor of communication at the University of Massachusetts, Amherst, received a letter from MTV’s lawyers for his use of the trademarked MTV logo and copyrighted broadcasts in his *Dreamworlds* video, which critiqued the sexist images contained in many of the videos MTV aired. In a letter to Jhally and to the university, MTV threatened legal action if Jhally did not cease his distribution of the *Dreamworlds* video. This is a clear example of how intellectual property law is used ideologically, because it is obvious that this educational video, which featured a sober British voice lecturing over the video images, without music, did not threaten MTV’s market.

In other words, no one was going to purchase a copy of *Dreamworlds* in place of watching the network’s programming; quite simply, MTV did not like the opinion that Jhally was espousing. Despite the fact that Jhally’s appropriations of the music network’s intellectual property fit the very definition of “fair use,” as well as the fact that University of Massachusetts

lawyers acknowledged this, the lawyers advised Jhally to not make a public issue of MTV's actions.

When Jhally insisted on continuing his distribution of *Dreamworlds*, the university lawyers backed away and told him he was on his own because—like most organizations or businesses—they did not want to deal with a potentially costly lawsuit. In response, Jhally set up the Media Education Foundation (MEF) to distribute the video and to take the brunt of any lawsuit, then proceeded to play a game of legal chicken with MTV, sending out press releases to major news outlets, many of which picked up the story.¹¹

MTV officials never publicly responded to Jhally's critique in *Dreamworlds*, nor did it pursue further legal action, presumably because they knew the video genuinely did constitute "fair use" and because they had suffered the public embarrassment of Jhally calling their legal bluff. Since 1991, MEF has employed the most liberal notions of "fair use," producing numerous videos that use privately owned media texts to engage in cultural criticism.

Returning to the issue of academic book publishing, there are numerous other examples of authors engaging in criticisms of media texts who are being denied copyright permission to reprint the very thing they are critiquing. Em Griffin, in his introductory book for communication undergraduates, reprinted an analysis of a Diet Coke television commercial that a former student gave, and then wrote:

Although Marty's reading of the Diet Coke commercial may not appear particularly radical, it includes a significant—if implicit—social critique. Highlighting our culture's obsession with thinness, he suggests that the ad plays to viewer anxiety over excess pounds through association with the rotund pachyderm. In fact, Marty's claim that the ad targeted weight-conscious viewers was sufficiently subversive to incur the disapproval of Coca-Cola. The company expressed its displeasure with his analysis by denying me permission to run photos from the ad in this book.¹²

Em Griffin told me that, like most book deals, his contract with McGraw-Hill required him to secure permission to reprint copyrighted materials. Because Coca-Cola was "so adamant that under no circumstances would they let this be used in connection with Marty's critique," Griffin said, "I didn't pursue the issue when they said [his critique] would have to be dropped before they gave permission. . . . Put another way, I was scared off."¹³

When Sut Jhally was finalizing a contract with Routledge for a book that would be much like *Dreamworlds* but critiqued sexist images in media texts more broadly, he hit a major snag when he insisted on using

numerous advertisements and images without asking permission, claiming "fair use." The Routledge editor checked with the legal department of Thompson International, the parent company, but the lawyers refused to allow these unauthorized reprintings despite the fact that it was exactly this type of appropriation for which the "fair use" statute was written. Many businesses, institutions and universities are reluctant to sanction critiques and other intellectual endeavors that fit the definition of fair use because of the extremely high expense of litigating an intellectual property case.

Therefore, letters from corporate lawyers act as *de facto* cease-and-desist court orders, and the proliferation of these letters gives way to self-censorship. In this environment, the obvious question to ask is how in the world are people supposed to critique the ubiquitous, privately owned texts that help shape our consciousness without being able to reproduce them? ("Okay, close your eyes and imagine a scantily clad woman and a Diet Dr. Pepper bottle, now. . . .") People still do engage in such activities within more independent organizations like Jhally's Media Education Foundation. Businesses that must make more conservative interpretations of "fair use" as a protection from costly litigation, however, are far more constrained.

Notes

- 1 Carey, M. (1998, July 4–5). Freedom, an expression of speech. *Daily Hampshire Gazette*, p. 9.
- 2 Ibid., p. 9.
- 3 Jim Hardy, personal communication, March 18, 1999.
- 4 Buskirk, M. (1992). Commodification as censor: copyrights and fair use. *October*, 60, pp. 82–109.
- 5 Ibid., p. 91.
- 6 Elias, S. (1996). *Patent, copyright & trademark: A desk reference to intellectual property law*. Berkeley: Nolo Press, p. 169.
- 7 (1994). *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (U.S.S.C.).
- 8 Whitely, S. (1997). “The sound of silence”: Academic freedom and copyright. *Popular Music*, 16, 2, pp. 220–222.
- 9 Taylor, T. D. (1998). “Fair use isn’t fair”: A response to Sheila Whitely. *Popular Music*, 17, 1, pp. 129–132.
- 10 Ibid., pp. 129–130.
- 11 Sut Jhally, personal communication, July 29, 1999.
- 12 Griffin, E. (1997). *A first look at communication*. New York: McGraw-Hill, p. 17.
- 13 Em Griffin, personal communication, September 7, 1999.

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