

Inke Arns

## Use = Sue

### On the Freedom of Art in the Age of ‘Intellectual Property’

*You can't use it without my permission ...  
I'm gonna sue your ass!*

(Negativland & Tim Maloney, *Gimme the Mermaid*,  
music video, 4:45 min., 2000)

The words above are yelled by Disney's Little Mermaid in the furious voice of a copyright lawyer in the music video *Gimme the Mermaid*<sup>1</sup> by the band Negativland and the Disney animated filmmaker Tim Maloney. Made for Black Flag's song *Gimme Gimme Gimme*, this video shot in the early 1980s aesthetic is deliberately sited – as a quasi-political aesthetic statement that also diametrically opposes the prevailing Zeitgeist – at the start of the exhibition *Anna Kournikova Deleted By Memeright Trusted System – Art in the Age of Intellectual Property*.

#### 1970s/1990s: Plunderphonics

Negativland is a Californian ‘plunderphonics’ band that was founded in the late 1970s and works with collage and sampling techniques. In 1991 it released the non-commercial single *U2*, which included samples from the U2 song *I Still Haven't Found What I'm Looking For*, and led to copyright litigation by the Island Records label on behalf of the rock band U2. Although Negativland tried to describe their usage of the samples as ‘fair use’, they were obliged to recall and destroy the entire pressing. The costs of the trial brought the band to the brink of financial ruin.

‘Plunderphonics’, a term coined by the Canadian musician Jon Oswald at a Toronto conference in 1985, is used to describe music consisting exclusively of samples of other music.<sup>2</sup> For Oswald, ‘plunderphonics’ are conceptual pieces of music made up exclusively – in contrast to current sampling methods – of samples of a single artist, for instance material (typically vocals or rhythms) by James Brown. Oswald's non-commercial album *Plunderphonics* of 1989 contained twenty-five tracks ‘compressed’ in this way, each one consisting of material by a different artist. Among other songs, Michael Jackson's *Bad* had been broken down into the smallest musical units and re-assembled under the title *Dab*. Oswald minutely listed every sample on the cover of his album. The cover of *Dab* was a ‘revealing’ montage of the cover of Michael Jackson's album *Bad*. After the Canadian Recording Industry Association threatened Jon Oswald with uncompromising litigation (and, as a consequence, financial problems) for copyright infringement, he was forced to destroy all the records not yet in circulation.<sup>3</sup>

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<sup>1</sup> Music video for the song of the same title, published on the Negativland CD *Fair Use: The Story of the Letter U and the Numeral 2*, 2000.

<sup>2</sup> Jon Oswald, ‘Plunderphonics, or Audio Piracy as a Compositional Prerogative’ in *Wired Society Electro-Acoustic Conference* (Toronto, 1985), <http://www.plunderphonics.com/xhtml/xplunder.html>.

<sup>3</sup> The court proceedings against Negativland were accompanied in 1993 by the appearance of the *CVS Bulletin* (‘Copyright Violation Squad Bulletin’), a kind of manifesto of Plunderphonics. See <http://cvs.detritus.net/>.

## 1960s: Cut-Up

The 'Cut-Up' technique served as important inspiration to Oswald's concept of plunderphonics. Brion Gysin and William Burroughs, whose book *Naked Lunch* had just appeared, invented Cut-Up in the Beat Hotel in Paris on 1 October 1959. The technique involves randomly cutting up found written and audio material then re-assembling it according to chance.<sup>4</sup> Some of the resultant sentences contain amusing nonsense, while others appear to have an encrypted meaning. Gysin and Burroughs also used tape recorders, and dragged the recording tape across the recording heads manually, with the result that entirely different sounds and words were suddenly to be heard. 'It was as if a virus was driving the word material from one mutation to the next',<sup>5</sup> and Burroughs found it appropriate to use in his first text collages a report on the state of virus research.

## 1950s/1980s: Détournement, Plagiarism

A further historical strand – that of Situationist *détournement* (reversal, turning) and Neoist plagiarism – stretches back to the French poet Comte de Lautréamont (Isidore Ducasse, 1846–70). In his *Poésies* (1870), he wrote: 'Plagiarism is necessary. It is implied in the idea of progress. It clasps the author's sentence tight, uses his expressions, eliminates a false idea, replaces it with the right idea.'<sup>6</sup> Florian Cramer points out that Lautréamont's concept of plagiarism became the Situationist *détournement* in the 1950s and then, thirty years later, was retranslated into 'plagiarism' by the alternative anti-copyright cultures.<sup>7</sup> The 'Festivals of Plagiarism' staged in 1988 and the subsequent year defined plagiarism as the 'conscious manipulation of pre-existing elements in the creation of "aesthetic" works. Plagiarism is inherent in all "artistic" activity, since both pictorial and literary "arts" function with an inherited language (...) Plagiarism enriches human language.'<sup>8</sup> The analogue media such as photocopiers, printed T-shirts, VHS and audio cassettes used at the Festivals of Plagiarism (which for their own part plagiarised the Fluxus festivals and the Neoist Apartment festivals) resemble those of Mail Art, which worked with collages and photocopies. This movement, in which amateur artists interested in Dada and Fluxus were networked, emerged from Ray Johnson's New York Correspondence School in the 1960s. While Mail Art, and in particular Neoism, sought to undermine the concept of originality by the act of deliberate repetition, it was astonishingly the case that 'none of the participants reflected upon the unlimited capability to copy and plagiarise digital information.'<sup>9</sup>

## A Broad Culture of Appropriation

The late 1980s were possibly too early still for such a step to be taken. The examples described above (which were, admittedly, obscure to the larger public) represent a broad culture of appropriation in the twentieth century that using images, texts, recordings and other

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<sup>4</sup> As purely poetical methods of generating unusual images, 'cut-up' and 'fold-in' had numerous forerunners among the Dadaists and Surrealists, among the Lettrists and Concrete poets of the 1950s, in the 'cross-column readings' that became fashionable as a parlour game in England around 1770, as well as in the 'ars combinatoria' of the European Mannerists, who used combination tables to generate generated so-called opposition metaphors in the sixteenth and seventeenth centuries.

<sup>5</sup> Carl Weissner, 'Das Burroughs-Experiment' in *Burroughs, eine Bild-Biographie* (Berlin, Dirk Niehsen Verlag, 1994), p. 62.

<sup>6</sup> 'Le plagiat est nécessaire. Le progrès l'implique. Il serre de près la phrase d'un auteur, se sert de ses expressions, efface une idée fausse, la remplace par l'idée juste.' (Isidore Ducasse, *Poésies*, 1870, available at <http://www.gutenberg.org/etext/16989>).

<sup>7</sup> On this, see the panel held on 'Art as Anticopyright Activism', *Wizards of OS 3*, Berlin, 2004, [http://www.wizards-of-os.org/archiv/wos\\_3/programm/panels/freier\\_content/art\\_as\\_anticopyright\\_activism.html](http://www.wizards-of-os.org/archiv/wos_3/programm/panels/freier_content/art_as_anticopyright_activism.html).

<sup>8</sup> 'Plagiarism', Festival of Plagiarism, London, January–February 1988.

<sup>9</sup> Florian Cramer, *Anti-Copyright in künstlerischen Subkulturen*, lecture held on 22 September 2000, [http://plaintext.cc:70/all/anticopyright\\_in\\_kuenstlerischen\\_subkulturen/anticopyright\\_in\\_kuenstlerischen\\_subkulturen.html](http://plaintext.cc:70/all/anticopyright_in_kuenstlerischen_subkulturen/anticopyright_in_kuenstlerischen_subkulturen.html).

fragments of culture speaks about precisely the same culture – almost in the sense of a ‘close reading’. The most prominent representative of this culture of appropriation is Pop Art, which was founded in the late-1950s by Richard Hamilton in Great Britain and by Andy Warhol, among others, in the USA. This artistic movement, which counts as a precursor of the postmodern, deployed and appropriated images of the Western world of consumerism and merchandise. In the Soviet Union, the 1970s saw the analogous development of so-called Sots Art that made use of the visual arsenal offered by the world of Communist merchandise and propaganda. The protagonists of the US-American ‘Appropriation Art’ of the 1970s and ’80s produced deliberate and strategically considered copies of works by other artists (for instance, Sherrie Levine’s *After Walker Evans*, 1971) in order to undermine concepts like originality and authenticity. ‘Found footage’, for its part, describes works of film that incorporate and manipulate existing film material (examples include work by Martin Arnold, Douglas Gordon, Oliver Pietsch). Radical concepts of appropriation are formulated in the early stories of Jorge Luis Borges as well as in the poststructuralist theory of intertextuality, published in 1966, of the literary theorist Julia Kristeva: ‘Any text is constructed as a mosaic of quotations; any text is the absorption and transformation of another.’<sup>10</sup> Both explicit intertextuality (that is, chosen as conscious strategy) and implicit intertextuality subvert the nineteenth-century Romantic concept of the artist-genius autonomously creating from within, and replace this notion with a more contemporary concept for which the reception (and processing of the existing) is more important than the production of what is genuinely new.

### **Intellectual Property as the ‘Oil of the Twenty-First Century’**

In a post-industrial society production is no longer confined to material goods (such as steel and coal) but increasingly extends to immaterial goods. However, a significant difference exists between the two: immaterial goods like knowledge and information can be reproduced without impairment, which is not the case with material goods. But in order to be able to function within a value chain, the distribution of these immaterial goods must be restricted – namely with the aid of patent, copyright and trademark law. All these instruments are forms of ‘intellectual property’. Mark Getty, the founder of Getty Images, which as the world’s leading provider of stock images (alongside Corbis) owns over seventy million digitised images, therefore aptly described ‘intellectual property’ as the ‘oil of the twenty-first century’.

As a ‘hotly contested factor in our economy as a whole’,<sup>11</sup> copyright law is in the process of becoming the market-regulating instrument of post-industrial society. The consequences of this development are considerable: ‘The expansion of copyright law is leading to an unparalleled concentration of resources in the hands of globally active quasi-monopolists in the media and IT markets.’<sup>12</sup> The philosopher Eberhard Ortland therefore compares the question of future access to ‘intellectual property’ with the issue of access to water, a resource necessary to life. ‘The question of who controls access to the immaterial goods and data streams – and to which conditions access in a particular case is linked – will become one of the central questions of power in the twenty-first century. It is not just a matter of vast sums of money; elementary civil liberties are also at stake – such as the right to inform oneself without hindrance in the framework of the knowledge available, and the right to communicate this information to others.’<sup>13</sup> An outlook on the unparalleled privatisation of intellectual property

<sup>10</sup> Julia Kristeva, ‘Word, dialogue and novel’ in *The Kristeva Reader*, ed. Toril Moi (Oxford University Press, 1986), p. 37.

<sup>11</sup> Reto M. Hilty, ‘Sündenbock Urheberrecht?’ in *Geistiges Eigentum und Gemeinfreiheit*, eds. Ansgar Ohly und Diethelm Klippel (Tübingen, Mohr Siebeck, 2007), pp. 107–44; here p. 111.

<sup>12</sup> Eberhard Ortland, ‘Die Schlüsselrolle der Kunst für das Urheberrecht’ in *Urheberrecht im Alltag. Kopieren, bearbeiten, selber machen / iRights.info*, eds. V. Djordjevic et al. (Bonn, Bundeszentrale für politische Bildung, 2008), pp. 311–15; here p. 311.

<sup>13</sup> *Ibid.*, p. 312.

is given in the exhibition *Anna Kournikova Deleted By Memeright Trusted System* by Kembrew McLeod's project *Freedom of Expression*<sup>14</sup>, for which the American university professor trademarked<sup>14</sup> the term 'freedom of expression', and threatened with legal action anybody who used his trademark without the express authority of the owner. Already in 1997, the Spanish artist Daniel García Andújar collected for his project *Language (Property)*<sup>15</sup> vast numbers of sentences that are now registered trademarks and therefore the property of their (corporate) owner. Examples include 'Where do you want to go today?'<sup>TM</sup> (Microsoft) or 'What you never thought possible'<sup>TM</sup> (Motorola). The overriding motto of Andújar's work was consistent: 'Remember, language is not free'<sup>TM</sup>.

### **Asymmetrical Expansion of Copyright to the Advantage of Exploiters**

'The past ten years have witnessed a progressive expansion of copyright – but by no means in the interest of creative activity, and even less so with reference to the common good.'<sup>16</sup> The lawyer Reto Hilty, director of the Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht, talks of a 'dangerous fiction to which we succumb almost passionately – but without reflecting – namely the notion that copyright protects the author.'<sup>17</sup> It is necessary to distinguish between three agents whose interests copyright law must take into consideration: authors (creators), consumers, and the 'copyright industries' (Hilty), in other words: the exploiters. Hilty points out that the last-named group is 'incredibly skilled at being perceived under the title of "author"' by using the generic term 'owner of the rights' that conceals however the fact that author and exploiter 'by no means pursue the same interests'.<sup>18</sup> That the exploiters desire to extend the copyright protection is understandable. 'The usual formula "more protection = more creativity" is highly acceptable, being terribly easy to understand.'<sup>19</sup> However, it is for the most part the case that nobody notices that the hands of precisely the authors – the actual creative forces – are being bound at the same time. Not just since the beginning of the twenty-first century has creativity often been – as described above – 're-creativity' from authors reliant upon open access to knowledge and cultural artefacts. This aspect is confirmed by Hilty: 'As we know, nobody is in a position to create something new without taking recourse to the pre-existing. And in consequence we should not be allowed to advance copyright to the point that the production of new works is hindered by, of all things, copyright law. But we are well on the way ... to doing precisely that.'<sup>20</sup>

### **'Digital Dilemma': Tension Between Participation and Exploitation**

The above situation is exacerbated by the so-called digital dilemma. At the very moment when digitalisation and the possibility of worldwide access to knowledge could exercise a positive influence on the availability of content, considerable constraints are being placed – paradoxically – upon access, with the result that digitalisation is leading to a regular scarcity. The reason for this development is to be found in the sharp reaction of the rights industry to the ability of digital works to be copied and distributed with no impairment of quality. Since 1990, the exploiters have been pressing for the introduction of technical protection measures (Digital Rights Management, DRM). However, not only do these technical barriers prevent the mass copying of digital data in, for instance, Internet exchange forums, they also make it impossible to carry out actions that are guaranteed by existing copyright law, for instance, the

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<sup>14</sup> Words can be trademarked but not copyrighted.

<sup>15</sup> Shown by HMKV as part of the 2006 exhibition *The Wonderful World of irrational.org*.

<sup>16</sup> Hilty 2007, p. 144.

<sup>17</sup> Ibid., p. 113.

<sup>18</sup> Ibid., p. 114.

<sup>19</sup> Ibid., p. 137. The same assertion was made in the open letter addressed to Federal Chancellor Merkel by the Federal Association of the German Music Industry on 'Intellectual Property Day' (printed in *Frankfurter Allgemeine Zeitung*, 25 April 2008).

<sup>20</sup> Hilty 2007, pp. 118–19.

right to make a copy for private use.<sup>21</sup> In 1996 the World Intellectual Property Organisation (WIPO) passed two agreements relating to the internet that place under penalty any ‘cracking’ of this protection.<sup>22</sup> Furthermore, the right to re-sell digital works was abolished.<sup>23</sup> Now that DRM has proved not to function, however, the rights industry (in particular, the International Federation of the Performing Industry IFPI) is currently targeting the infrastructure level of the Internet Service Providers (ISPs) with demands for internet filtering and barring those who repeatedly infringe copyright from using the internet. By means of the multilateral Anti Counterfeiting Trade Agreement (ACTA), the US-American, European, and Japanese rights industries are at present trying to enforce these and other measures worldwide in the course of clandestine negotiations that bypass the national parliaments and the appropriate UNO agencies, the WIPO and the World Trade Organisation (WTO). Any discussion in the framework of these bodies would entail publicity – something that would not be beneficial to the cause of the exploiters.

Let us return, however, to the paradoxical situation presented by the ‘digital dilemma’ that Hilty, too, describes as highly problematic: ‘The greater the number of works available online, the wider the theoretical range of possibilities of usage; yet in practical terms this usage is proving to be increasingly difficult the less traditional – that is, physical – copies of works are being produced.’<sup>24</sup> For if works can only be used online, users are at the mercy of the conditions drawn up by the owners of the rights, and as mentioned above the rights are generally owned not by the authors but by the exploiting parties who favour the expansion of copyrights, digital rights management (DRM) and controlled access to the internet – a de facto ban on copying (and more besides). The copyright law currently in force, which has yet to be adequately adjusted to the digital age, therefore affects ‘access to knowledge on the net in a much more far-reaching and fundamental manner,’ according to Jeanette Hofmann, ‘than is the case in the analogue world.’<sup>25</sup> Hofmann describes the digital dilemma as follows: ‘In the much-quoted information society the possession of and the access rights to knowledge of all kinds are developing equally into a pre-defined breaking point for democracy as well as into a growth-intensive value-added chain. In the relation of tension between claims to democratic participation and economic exploitation interests lies (...) the core of the digital dilemma. The manner in which exclusive exploitation rights and public entitlement to usage of knowledge, or knowledge wares, are brought into balance in the future is a political matter likely to become of the central distributive questions in the new economy.’<sup>26</sup>

### **On the Future of Art in the Age of ‘Intellectual Property’**

‘Copyright law pursues the goal of safeguarding the generation of knowledge by furnishing the producers with control over the usage and distribution of their works. At the same time, however, it follows the intention of safeguarding public access to this knowledge – not just because the generation of knowledge is recognised to be a process involving a division of labour, but obviously also

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<sup>21</sup> [www.privatkopie.net](http://www.privatkopie.net)

<sup>22</sup> The agreements were implemented in the Digital Millennium Copyright Act (DMCA) in the USA in 1998, and in the EU Directive on Copyright in the Information Society in 2001.

<sup>23</sup> Unlike digital data, material sound carriers like records, CDs or DVDs may be re-sold, for instance in second-hand shops.

<sup>24</sup> Hilty 2007, p. 110.

<sup>25</sup> Jeanette Hofmann, ‘Das “Digitale Dilemma” und der Schutz des Geistigen Eigentums’, contribution to conference *Wem gehört das Wissen?*, Heinrich-Böll-Stiftung, Berlin, October 2000, <http://www.wissensgesellschaft.org/themen/publicdomain/dilemma.html>.

<sup>26</sup> Hofmann 2000.

because all those who generate or distribute knowledge by necessity themselves take recourse to existing stocks of knowledge.’<sup>27</sup>

The expansion of copyright that at present amounts to a de facto expansion of exploiters’ rights is bringing about an ‘increase in the opportunities to deliberately or negligently violate third-party copyrights as well as an increase in the risk of being falsely accused of violating third-party copyrights (...) particularly in those cases in which collage or sampling techniques are deployed, or in conceptual art.’<sup>28</sup> That is why the ranks of critics of the expansion of intellectual property rights are swelling – particularly in areas where ‘intellectual property’ in its present form ‘turns against freedom in art (and science) and threatens to obstruct the production of new works.’<sup>29</sup>

In view of these developments, the exhibition *Anna Kournikova Deleted By Memeright Trusted System – Art in the Age of Intellectual Property* mounted on the 2,200 square metres of floor space in the PHOENIX Halle on the former site of Phoenix-West steelworks in Dortmund inquires into the implications for art and music that appropriates, samples and cites existing material in an era of copyright (or intellectual property) law increasingly favouring exclusive exploitation rights as opposed to public entitlement to usage. In contrast to the assertion of the copyrights industry that the expansion of copyright (for whom?) signifies more creativity, the exhibition posits the thesis that creativity is, and continues to be, possible only if artists are in a position to create new work with recourse to existing material. Appropriating art that speaks about culture by referring to cultural artefacts and deploying found aesthetic material will only be able to continue to come into being if in the future too it is assured that sufficient allowance is made for the democratic rights of participation (of consumers, but of originators, too!) alongside the justified economic interests of the originators and exploiters.

If the development of copyright and other intellectual property rights continues along the present lines, it will become questionable whether sufficient consideration is given to general participation. Tightened up in the interest of the exploiting parties, copyright law would turn against the freedom of art and degenerate into an effective instrument for suppressing innovation. It would become increasingly difficult to talk about culture by using images, logos or sound fragments of precisely that culture. A foretaste of such a development is already given by the vast reduction in the usage of sampling in hip hop since the legal departments of major labels have started to aggressively pursue the unlicensed usage of samples by musicians signed to other labels. In this sense, it would be possible to ask in regard to the works featured in this exhibition: What would happen to, for instance, Fred Fröhlich’s digital animation *Volume 1* that, made up of over ten thousand ‘stock photographs’, represents a heightened form of ‘plunderphonics’ or found footage? This work speaks, just as does Der Plan’s karaoke music video *Hohe Kante* (2004), explicitly and critically about our times – using images of our times’ everyday culture.

### **Happy Birthday To You**

The fictitious newspaper announcement of the death in 2067 of the ex-professional tennis player and model Anna Kournikova referred to in the exhibition title *Anna Kournikova Deleted By Memeright Trusted System* describes not only a distant future but to some degree the reality of the present day. The unpleasantly formulated notice briefly reports that Kournikova, who copyrighted her appearance, or her ‘trademark’, against illegal lookalikes,

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<sup>27</sup> Hofmann 2000.

<sup>28</sup> Ortland 2008, p. 312.

<sup>29</sup> Ortland 2008, p. 314.

was identified as an illicit copy of her own self while on a non-registered trip in the Asian-Pacific region, and was deleted by the high-power laser beam of a satellite operated by the Memeright Trusted System.

However, a similar scenario might play at your next birthday party if such a system were to be installed. Did you know that the song *Happy Birthday To You*<sup>30</sup> is owned by Time Warner, the world's largest company in the field of entertainment? Every time you sing the song without the owner's permission you are guilty of copyright infringement. To this extent, the equation of 'use' and 'sue' is more than just a play on words. Bear that in mind next time you throw a party, and obediently pay your licence fees. The alternative? Don't sing the song.

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<sup>30</sup> The melody was published under the title *Good Morning to All* in 1893 by the schoolteachers Mildred and Patty Hill in their book *Song Stories for the Kindergarten*. Children then started to sing the song with their own lyrics at birthday parties. In the exhibition, see *Illegal Art*, CD; see also Kembrew McLeod, 'Copyright and the Folk Music Tradition' in id., *Owning Culture. Authorship, Ownership & Intellectual Property Law* (New York, Peter Lang, 2001), pp. 39–69.