

Illegal Art: Considering Our Culture Of Copying

The past fifteen years have seen the rapid growth of the mainstream internet – an unprecedented tool for interacting with the world. This technology is simply the world’s most efficient copying machine, surpassing former copying technology such as papyrus scrolls, vinyl records, and plastic compact discs. It has radically changed the way we communicate, access information, and contribute material to the social and cultural spheres.

In particular, the coupling of affordable internet-capable devices with software that allows (practically, if not legally) the easy digital reproduction and modification of media has created a culture where the production, publication and distribution of artistic works have never been easier.

There is now a proliferation of remix and “mashup” culture. Many of these new works are parodies or satires, but this form of creativity is not protected by New Zealand Copyright Law. Consequently, they are illegal creative works.

In 2008 New Zealand’s Ministry of Economic Development conducted an inquiry to determine the need for parody and satire exceptions to New Zealand Copyright Law. A public discussion document was ear-marked for release in December 2008, but a change of government stopped the review due to it “not being considered a priority”¹ and to date there has been no further activity.

The impetus for the review was noted as:

Developments in digital content distribution and the need to ensure clarity to copyright users, rights-holders and internet service providers as to what constitutes copyright infringing material... the Copyright Act 1994 is currently silent on the issue of parody and satire.²

PARODY & SATIRE: ILLEGAL ART

Despite the silence in New Zealand’s Copyright Act on the issue of parody and satire, New Zealand artists who are still producing these kinds of artworks remain at risk of prosecution. Two examples of potentially infringing New Zealand works are the *Telecon* parody and *Should-A.com*.

The Telecon Parody

In March 2006 audio was leaked of Telecom CEO Theresa Gattung stating that the telecommunications company had used “confusion as its chief marketing tool”.³ An anonymously

authored parody video soon appeared online that remixed a Telecom advert featuring children voicing glowing remarks about the company. In the remix the children's comments had been substituted with statements of disgust ultimately announcing that they, as customers, were "leaving" Telecom. The remix concluded by erasing part of the letter 'm' in the trademarked Telecom logo, leaving only 'Telecon'.

The parody was initially shared by email before being uploaded to YouTube. Telecom appealed to YouTube to remove the video, asserting their copyright.⁴ While initially successful, the company soon became a victim of "The Streisand Effect"⁵ – a phenomenon in which the attempt to remove information has the unintended consequence of causing greater intrigue, more publicity, and a wider audience than would have likely occurred if no removal had been attempted in the first place. Following the widespread distribution of *Telecon* on the current affairs programme *Campbell Live*, the telecommunications company ceased enforcing their copyright and copies of the video remain accessible on YouTube.⁶

While Telecom eventually refrained from enforcing their copyright, their legal right to seek prosecution of those they believe to have uploaded, downloaded, or created the parody remains to this day.

New Zealand artists creating copyright infringing parodies or satires must remain anonymous to avoid potential prosecution. Any legal attempt to make such a work in New Zealand currently requires the permission of the copyright holder. In cases of a critical or negative parody it is not difficult to imagine a company's response to such a request.

Should-A.com

Dylan Reeve's *Should-A.com* launched in July 2009 as a comment on an impending public referendum and its particular choice of question. The site explained its purpose as follows:

The referendum in itself is fine, it is part of the democratic process in New Zealand. However the wording they chose makes a mockery of the process. New Zealanders are asked to vote on the question: "Should a smack as part of good parental correction be a criminal offense in New Zealand?"

That the smack was deemed "good parental correction" and not "bad parental correction" or a less biased term was a point of focus in public debate, making it fit for parody.

The *Should-A.com* website allowed members of the public to remix their own questions into a digital poster that mimicked the official referendum branding. The Electoral Enrolment Centre owned the original poster images and within days they ordered the removal of thousands of public submissions from *Should-A.com*⁷. However, as with *Telecon*, the complaint was dropped following media attention.

If Reeve had instead criticised the referendum's wording by quoting it without using the graphic branding he would have avoided any potential copyright infringement. However, his appropriation of the official referendum graphics made for a more successful and effective artwork that empowered the public to comment on the referendum in a clear and easy to understand manner.

Textual quotation, remix, and critique are protected forms of artistic expression, in part due to copyright law's response to long established text-based copying technology such as the printing press. Home computers have allowed unprecedented access to video and audio production, but the law hasn't kept up with the public's desire to comment using current technology.

READ/WRITE AND READ ONLY CULTURE

In his 2008 book *Remix*, Harvard Law Professor Lawrence Lessig details two types of engagement with creative works: Read/Write Culture (RW) and Read Only Culture (RO). RW allows a user to both read a work and make changes to it whereas RO restricts a user's engagement with the work to the act of solely reading.

RO is inherently tied to present day copyright law, which protects analog reproduction technologies and their "natural" limitations that inhibit the sharing of works. Lessig states:

There's a part of culture that we simply consume. We listen to music. We watch a movie. We read a book. With each, we're not expected to do much more than simply consume. We might hum along with the music. We might re-enact a dance from a movie. Or we might quote a passage from the book in a letter to a friend. But in the main, this kind of culture is experienced through the act of consumption. There's a beginning, a middle, and an end to that consumption. Once we've finished it, we put the work away.⁸

On the other hand, RW culture allows people to engage with creative works as active audience members, creating their own transformative works. As Lessig further states:

Remix is an essential act of RW creativity. It is the expression of a freedom to take "the songs of the day or the old songs" and create with them. In Sousa's time,⁹ the creativity was performance. The selection and arrangement expressed the creative ability of the singers. In our time, the creativity reaches far beyond performance alone. But in both contexts, the critical point to recognize is that the RW creativity does not compete with or weaken the market for the creative work that gets remixed. These markets are complementary, not competitive.¹⁰

One of the more widespread viral memes of our time, the *Hitler Rage Videos*, illustrates a difference between RO and RW Culture. As the relevant Wikipedia entry states, the videos feature "a scene of Adolf Hitler ranting in German, from the 2004 movie *Downfall*. The original English subtitles have been removed and mock subtitles added to give the appearance that Hitler is ranting about a number of modern topics."¹¹

Under RO an audience member may passively view the video clip, whereas under RW a user might engage with the work by downloading the video, editing it, and subsequently sharing their critical response to the film online.

Hitler Rage Videos have risen to become a globally recognised placeholder for comedic critical comments. "Hitler" has become a puppet for the expression of outrage at a plethora of issues from sport to politics, the New Zealand Earthquake Commission's response following the Christchurch Earthquakes,¹² and even self-referencing on the issue of the removal of *Hitler Rage Videos* from YouTube due to copyright infringement allegations.¹³

The tension between RO Culture and RW Culture lies in the competing interests in cultural works. Copyright holders may wish to charge for the remix of their work, or to prevent what they perceive as derogatory remix affecting the integrity of their work. The public may desire remix as a form of communication, viewing limitations on it as a restriction on their free speech.

New Zealand's copying laws are inherited from over a century of copying technology that favoured RO Culture, but the relatively recent development of technologies that enable remix has revitalised the public's interest in RW culture. The law's failure to protect RW culture has unfortunately fostered a disrespect for copyright itself, and the increasing irrelevance of copyright to popular culture has carved out a category of illegal art.

COPYRIGHT: A BRIEF HISTORY

Copyright is a legal concept that was originally designed to encourage public learning and to support the further writing and production of “useful books”. The English Statute of Anne in 1709 gave publishers a fourteen year monopoly on the reproduction of their texts. The central concept of the law was that, by limiting the public’s former right to copy, publishers would be allowed to recoup the costs of their copying machines in order to provide more books to the public, *quid pro quo*.¹⁴

New Zealand Copyright Law was inherited from its mother country and subsequently shaped by both national debate and international treaties, notably the Berne Convention.¹⁵ Although the duration of copyright began at 14 years, in New Zealand it now stretches 50 years beyond the end of the year the author dies for literary, dramatic, musical or artistic works.¹⁶ The scope has also expanded; now covering the works of visual artists, musicians, designers, and film makers. From once regulating an industrial manufacturing process, copyright now regulates what the public do in the privacy of their homes.

A popular misunderstanding of copyright, one advocated by RO industry groups, is to view copyright as a property right – as if it were a physical object – and then to derive rewards and punishments according to who should and should not have it. Terms like “Intellectual Property” have given the wrong impression of what copyright is, and heavy-handed anti-piracy campaigns seek to reinforce this misunderstanding.

In order to encourage free speech, critical thinking and analysis, a number of legitimate public uses of copyrighted material do not require permission under copyright law. In New Zealand and other commonwealth countries, including the UK, Australia and Canada, the term for these public uses is Fair Dealing. In the United States it’s known as Fair Use.

Entire professions such as journalism are built upon the right to quote and copy from multiple sources for the purposes of critical analysis, without being excessively inhibited by the rights of copyright holders. In the U.S. alone, the economic value added by industries dependent on Fair Use has been measured at \$2.2 trillion dollars annually, or one sixth of the U.S. economy – 70% greater than the value added by copyright industries.¹⁷

New Zealand’s *Fair Dealing* covers the “reasonable” use of a work for the purposes of criticism, review and news reporting; research or private study; educational uses; and copying by libraries and archives. However, there is no exception for works of parody, satire, remix, or caricature despite public support for parody protection having been measured at 87%.¹⁸

INTERNATIONAL PRECEDENTS

Australia implemented an exception to copyright for the purpose of parody or satire as part of its 2006 Copyright Amendment Act. A number of EU countries including France, Belgium, the Netherlands, Poland and Spain also have parody exceptions to their copyright laws. In the Scandinavian countries transformative or derivative works are generally permitted without the copyright holder’s consent.

Germany allows the creation of transformative or derivative works under a Free Use mandate (without requiring a copyright holder’s permission) provided the work meets certain conditions, for example, being distinct from the original. However, musical works that feature recognisable sampled melodies are not covered by this exception.

The United States’ *Fair Use* provision is generally interpreted to allow parody, satire, and remix due to its grounding in the constitutional right to Freedom of Speech. This broad interpretation can

present problems as the question of whether a creative work is, or isn't, exercising the principle-based value of Free Speech is a matter of opinion and susceptible to multiple interpretations constrained only by case law.

The United Kingdom does not currently have a parody or satire exception to its copyright law, although it has taken some steps towards implementing one. In 2005 it commissioned a report to establish whether its copyright system was "fit for purpose in an era of globalisation, digitisation and an increasing economic specialisation". The resulting report recommended a copyright exception for parody, caricature and pastiche. Following this, the U.K. government reached the first stage of a two-part public consultation before halting the process.¹⁹ However, upon the recommendation of the May 2011 Hargreaves Report the government has committed to revisiting the introduction of a parody exception.²⁰ Incidentally, like New Zealand,²¹ it is illegal in the U.K. to use Parliamentary footage for the purposes of satire.²²

Canadian copyright law doesn't include a parody or satire exception, however a Copyright Bill (C-32) is currently being debated as part of a broader copyright reform that proposes to legally protect non-commercial remixes. As Alaister Moughan of New Zealand law firm Izard Weston states:

This reform is something which really needs to be considered in New Zealand. It represents positive copyright regulation that recognises that in the digital world, determining what is and what is not 'copyright piracy' is difficult. Such reform has the potential to help to distinguish between economically harmful and beneficial remixing.

It also creates room for an important trade-off between the interests of the consuming public and those of copyright owners. In trying to protect themselves with greater enforcement powers, the music and film industries are interfering in the use of their products by their customer base. If copyright authors are going to get extensive enforcement powers to combat file sharing, it should be acknowledged that the scope of what is being looked at in terms of copyright infringement is greatly increased.²³

Given that New Zealand's copyright law has recently shifted in support of copyright enforcement for rights holders, rebalancing this shift by protecting transformative and derivative artistic practices such as remix, "mashup", satire, parody, pastiche and caricature would be timely.

INCREASED ENFORCEMENT IN NEW ZEALAND

Over the past fifteen years New Zealand copyright law has seen significant changes in favour of copyright holders and against public rights. In 1995 the public could sample 5% of text for educational reasons but by the year 2000 this was reduced to 3%, and now with digital technology and Digital Restrictions Management (DRM) this right can be effectively removed.

In 2008 it became possible in New Zealand to order the removal of content on websites by allegation-alone under Section 92C of the Copyright Act. Unlike equivalent laws such as the U.S. DMCA,²⁴ s92C provides no redress for the falsely accused as it lacks a counter-notice procedure. Such laws are prone to abuse, as demonstrated by the Church of Scientology's removal of 4,000 protest videos from YouTube through alleged infringement.²⁵

New Zealand has recently been one of several international countries to pursue the introduction of new copyright laws that target illegal file sharing online: the *Copyright (Infringing File Sharing) Act*.²⁶ Having come into force on 1 September 2011, the Act provides a framework for rights holders to make accusations of copyright infringement against internet account holders and ultimately win the right to take them to the Copyright Tribunal, who can stipulate fines of up to \$15,000.

As defined in the law itself:

file sharing is where

(a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and
(b) uploading and downloading may, but need not, occur at the same time
infringement means an incidence of file sharing that involves the infringement of copyright in a work by a user.²⁷

In light of the proliferation of RW Culture, and the lack of protection for derivative and transformative creative practices in New Zealand, the broad target of “Infringing File Sharing” may see punishments levelled at artists creating and sharing such works, and fans who are downloading them.

THE FUTURE OF NEW ZEALAND COPYRIGHT

New Zealand has scheduled a public copyright review for 2013, however this will be constrained by obligations under international trade negotiations and agreements. Of particular note are the Anti-Counterfeiting Trade Agreement (ACTA)²⁸, signed by New Zealand in October 2011, and the Trans-Pacific Partnership Agreement (TPPA), currently under negotiation.²⁹ Unlike conventional agreements, both of negotiations have uncharacteristically taken place behind closed doors despite public criticism³⁰ and petitions calling for the release of the negotiating texts.³¹ However, leaked documents indicate that the negotiations include proposals for extending the term of copyright and greater state enforcement of copyright law.

A key concern in New Zealand criticisms of the negotiations relates to the U.S. interest in influencing New Zealand copyright law. Documents released by Wikileaks in 2011 have demonstrated these interests during the writing of the *Copyright (Infringing File Sharing) Act*, including the offer to draft the copyright law³² and a U.S. government plan to allocate \$500,000 to a locally-based copyright enforcement project.³³ As stated in the cable “The project’s performance will be judged by specific milestones, including increases in the number of enforcement operations and seizures, with percentages or numerical targets re-set annually.”

With this demonstration of a well-resourced foreign interest in New Zealand copyright enforcement, it is imperative that our citizens are afforded the same legal protections as citizens of the U.S and numerous other international countries.

CONCLUSION

Modern copyright law does not simply give rights to artists and copyright holders, but aims to provide a balance between artistic and public rights – a balance between what is good for copyright holders and what is good for culture and the economy as a whole. Increased enforcement of outdated copyright law has the potential to harm the progress of the arts.

Artists are not simply copyright holders, but they are also members of the public. As such they also benefit from the public aspect of copyright law. Despite the slow adjustment of copyright law artists continue to use creative processes to produce commentary that is, incidentally, illegal.

By not addressing the realities of our culture of copying by legally protecting the work of artists engaged in RW culture, New Zealand is rendering important artistic works illegal, and putting the artists who make them at risk.

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