CHAPTER 10 / DARREN WERSHLER

Cultural Ownership, Copyright, and Intellectual Property

What does it mean to own culture? Whose rights should prevail—those of the creators, or those of the public? Should culture be owned at all?

KEY CONCEPTS

1. The laws that govern copyright and intellectual property can evolve over time in response to changes in culture and technology, as well as lobbying from industries and artists.
2. The *commons* consists of those things and places that are owned collectively by a society, not by any single individual, organization, or corporation.
3. New tools for using copyright to ensure the circulation of cultural objects, such as Creative Commons licences, have recently arisen in opposition to traditional uses of copyright laws to restrict the uses of cultural objects.

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Introduction: Who Is "Girl Talk," and Why Hasn't He Been Sued?

In November 2010, audio artist Gregg Gillis, also known as Girl Talk, released his fifth album, *All Day*. The album, which is available as a free download from the website of the Illegal Art label, is constructed entirely from brief samples of 373 different songs. The Illegal Art website lists all the tracks and thanks the artists by name (Illegal Art 2010), but neither Girl Talk nor his label bothered to obtain official permission from the sampled artists or labels

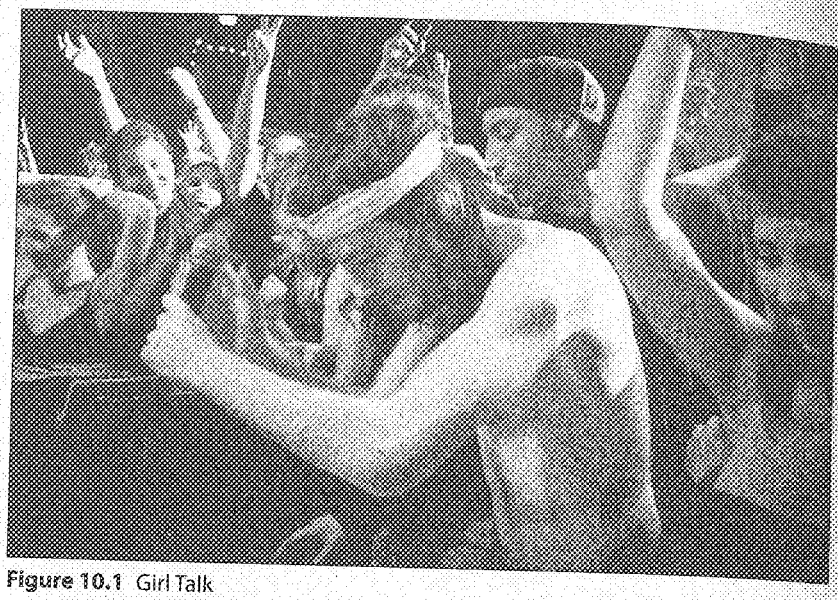

Figure 10.1 Girl Talk

Gregg Gillis's music raises questions about artistic ownership that will likely become more common in the years to come as the mashup form gains popularity.

SOURCE: © mekuria getinet (www.mekuriageti.net).

before making use of their work on *All Day*. The result is that opinions about both the legality and aesthetic merits of Girl Talk's music are sharply divided.

The most common name for the sort of music that Girl Talk produces is the *mashup*, although these tracks are sometimes referred to as *bastard pop* or *bootlegs*,[1] especially in England, where they began attracting popular attention late in 2000 (McGranahan 2010, 11). Typically, a mashup consists of the vocal track from one pop song matched to the instrumental tracks from another. Girl Talk's tracks are a series of short samples with matched beats, strung together one after the other with a slight overlap (oddly similar to the middle-of-the-road *Hooked on Classics* disco albums of the early 1980s). Terms like "bootleg" and "bastard" were deliberately chosen for the same reason that Girl Talk's label calls itself Illegal Art: to evoke the clandestine, the subversive, and the illicit. Pop music has always used such connotations to sell itself, but is it literally true that Girl Talk's music is somehow illegal?

A Case of Copyright Infringement?

Some legal scholars believe that under current Canadian (Reynolds 2009, 667) and US (Herreman 2009) copyright laws, the creation of mashups in

general—and Girl Talk's kind of mashups in particular—probably constitutes copyright infringement. One of the conditions for copyright infringement to occur when making any new work (there are several) is that a sampler has to incorporate a "substantial" part of someone else's work in its creation. In both Canada and the United States, "substantial" means any amount that enables the average person to recognize the source of a sample, so a "substantial" amount can be quite small (Herreman 2009; Reynolds 2009, 649). In an interview in the *Village Voice*, Gillis says, "I like to use [the bands I sample] in a way that everything is recognizable. That's a part of the fun where you recognize the sample and you hear how it can be manipulated" (Village Voice Contributor 2008). By this standard alone, then, it's certainly possible to make an argument that Girl Talk's music infringes on the copyrights of others.

KEY CONCEPT

The laws that govern copyright and intellectual property can evolve over time in response to changes in culture and technology, as well as lobbying from industries and artists.

The question, though, is what would happen if a copyright infringement case against Gillis ever made it to court. Copyright law is interpreted by *case law*—that is, the terms of what does or doesn't constitute infringement or legitimate use of someone else's creations change constantly, as lawsuits are lost, won, overturned by higher courts, and argued yet again. Are cultural norms changing to the extent that Gillis might actually *win* a copyright infringement lawsuit brought against him?

Lawrence Lessig, a noted American lawyer, author, and a figurehead of the *Free Culture* movement—which takes its name from one of his books (2004)—interviews Gillis in a book called *Remix* (2008). He concludes that even though music like Girl Talk's very likely constitutes infringement right now, the compositional practices of the current generation of musicians will eventually require changes to copyright law. He writes, "For the thing that Gillis does well, Gillis explained to me, everyone will soon do. Everyone, at least, who is passionate about music. Or, at least, everyone passionate about music and under the age of 30" (Lessig 2008, 13–14). As if to underline Lessig's contention, a recent study by the Rockwool Foundation Research Unit in Denmark found that 70 percent of its respondents considered unauthorized downloading for personal use to be a socially acceptable act (Golijan 2011). Meanwhile, the acclaim that Gillis is receiving continues to grow. His *Feed the Animals* was one of *Time* magazine's top 10 albums of 2008 (Tyrangiel 2008) and 24th on *Rolling Stone*'s top 50 of the same year (dsussman 2008). In Pittsburgh, Girl Talk's hometown, city council declared December 7, 2010 to be "Gregg Gillis Day" (Manganaro 2010).

Unauthorized downloading for personal use is becoming a socially acceptable act.

The fact that Girl Talk's music generates so much controversy and uncertainty is a strong indicator that something interesting is taking place with

regard to both the creative and consumptive practices common to contemporary culture. In his book *Copyrights and Copywrongs*, Siva Vaidhyanathan (2001) has noted how the advent of hip hop culture and the sudden proliferation of sampling in the late 1980s "revealed gaping flaws in the premises of how copyright law gets applied to music and shown the law to be inadequate for emerging communication technologies, techniques, and aesthetics" (133). In other words, the questions that sampling raises are not just limited to music, but in a digital milieu, are relevant for the entire cultural sphere.

Lev Manovich (2001) argues that if we were to look for a figure to represent the overall logic of digital culture, the DJ—not the writer or visual artist—would be the best choice. The DJ makes new tracks through the selection and combination of pre-existent elements—what we commonly describe as "cut-and-paste," a process we do dozens of times a day on our own computers. Manovich (2001, 135) points out that selection is not an end in and of itself: the DJ innovates, creates, and circulates elements of culture, which might otherwise have been forgotten, for appreciative new audiences.

KEY CONCEPT

The *commons* consists of those things and places that are owned collectively by a society, not by any single individual, organization, or corporation.

The issue that we now have to face is that there is a direct conflict between our current major mode of cultural composition, which is based on a sampling or collage aesthetic, and the last several centuries of copyright law, which has inexorably extended the duration of copyright and expanded the range of materials that fall under it. The way forward is to remember that cultural values and laws can and do change. But practices alone are not enough. We need to give some thought to how our society might produce a culture we can all live with, which means thinking about not just private possessions, but what we hold in common as a society.

For centuries, the very idea of culture has been based on the process of re-conceptualizing that which came before. At the same time, individual creators hope to live off their creations, and industry hopes to profit from the objects to which it holds rights (or at the very least, to recuperate expenses). Creators and producers need some protection for their works so that they can make a living. Without viable and healthy industries that produce and circulate cultural products of all sorts, culture will suffer. Take, for example, the textbook you are holding, and ask yourself why the publisher might want to retain copyright on its materials for as long as possible.

This chapter asks you to consider what conditions best negotiate the sometimes-competing interests of the public, who deserve the right of fair use and a healthy public domain, and creators, who deserve to be rewarded for their creations. What follows is a discussion of the key ideas that inform

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The Changing Commons

The *commons* is "a resource to which anyone within the relevant community has a right without obtaining the permission of anyone else" (Lessig 2001, 19). It is not private, but public property. Most public squares, parks, and streets are part of the commons, which is why citizens have the right to assemble, speak, and debate in them. The *public domain* (see below) is also a part of the commons, as are ideas and theories. What is and is not part of the commons at a given time and place is subject to change.

The questions that every society has to ask itself, writes Lawrence Lessig (2001, 19–21), are *which* resources should be held in common, and *how* should we relate to those resources? Today, though, argues Jeremy Rifkin (2000), among others, public space is being enclosed by spaces that *look* like the commons (such as shopping malls and gated communities) but end up repackaging cultural activities as commodities for sale. He argues that these new spaces have rules and regulations that actually change how they operate. Cultural activities in such places are not an end in themselves, but a means toward commodifying all of lived experience (154–55).

how the law has historically overseen the distribution of rights in terms of cultural ownership, and how the notion of cultural ownership has changed. What does it mean to own culture, and whose interests are at stake?

What Is Intellectual Property?

One of the most common definitions of **intellectual property** is that it is "non-physical property that is the product of original thought." The most familiar aspects of its domain include the laws that define copyrights and moral rights, patents and trademarks, and trade secrets. The major characteristic of intellectual property law is that it doesn't protect ideas themselves, because no one owns ideas. Instead, it protects the fixed physical forms that those ideas take by limiting who has the right to produce and control them (Moore 2011).

intellectual property Non-physical property that is the product of original thought.

The term "intellectual property" is relatively new; it appears in US legal records only twice before 1900. Since then, it has become increasingly common (Lessig 2001, 293–94). In the 18th century, notes William Fisher (2003), "lawyers and politicians were more likely to refer to patents and copyrights as 'monopolies' than they were to refer to them as forms of 'property'" (20).

In other words, in its conception, intellectual property was different in an important respect from possessions or other types of physical property. Like other forms of monopoly, patents and copyrights were seen as potentially subject to abuse, so were granted by the state to people only as a short-term, temporary measure when it was in the public interest to do so. The purpose of the short-term monopoly on intellectual property that is granted to creators is to provide them with just enough funds to be able to create *more* work for the benefit of the whole society, not to reward them for that work in perpetuity, which would likely result in the end of their innovations. As Wendy J. Gordon (1992) observes, a long series of legal precedents recognizes that "the law must grant something less than a right to all the benefits one's work generates" (158) in order to keep intellectual property laws from stifling creativity instead of encouraging it.

The increasing use of the term "intellectual property" is problematic because we tend to pay attention only to the "property" part, and forget that it was designed to serve the public interest. Unlike other forms of property, it's a given that intellectual property will, at some point, pass out of its creators' hands and into the hands of the public. Gordon reminds us that this isn't simply a matter of lazy people appropriating the work of the industrious and innovative:

> After all, the potential free riders—the users, copyists, and adapters—are not mere parasites. Many are creators themselves. They may reach markets different than those reached by the original creators, or they may bring new perspective, reduced cost, special expertise, deeper insights, or innovative technology to the exploitation and adaptation of established works. (1992, 157)

We should therefore strive to balance the rights that we assign to individual creators against the need to create the best possible environment for both vigorous economic development, and individuals and cultures to express themselves (Gordon 1992, 158)—but we don't. The easiest way to see how intellectual property has become more and more like other kinds of property in the eyes of both the courts and the public is to look at the history of its most familiar form: copyright. Over the course of its existence, copyright terms have become longer and longer, and more and more rights have been assigned to creators.

Over the course of copyright's existence, more and more rights have been assigned to creators.

A Condensed History of Copyright in North America

Although the suffix "-right" in the word "copyright" makes many people think of "human rights," those inalienable rights to which every person is entitled simply by virtue of being human, copyright law was designed according to

different principles. In both the Canadian (Murray and Trosow 2007, 11) and US legal traditions, copyright is a set of artificial rights created by the state and granted to the creator—actually, more of a privilege or a deal than a right (Vaidhyanathan 2001, 20–21). Copyright law is national, not global, which means that although many countries have treaties and other arrangements with one another to protect the works of their own citizens as these works circulate around the world, copyright law varies in significant respects from country to country.

Most legal scholars point to Britain's *Statute of Anne*, passed in 1710, as the common origin of Canadian and US copyright law. The primary purpose of the *Statute of Anne*, however, was not to enshrine the rights of authors, but to attempt to regulate the use of a new form of media technology that threatened to change the traditional balance of power: movable lead type and the printing press. The duration of protection that authors received for works they published after the *Statute of Anne* was 14 years, with an option to renew for another 14-year term. This is where the notion that it's actually a good idea to grant limited copyright terms comes from—the belief that a culture is richer if its writers and artists are continually producing new work, disseminating new ideas, and creating new commodities to sell.

The *Statute of Anne* marks the first time that the notion of a **public domain** is officially codified into law (Vaidhyanathan 2001, 40). The public domain is the body of works that are outside copyright, either because they have not been turned into fixed forms and copyrighted, because they already have passed out of copyright, or because they are things that cannot be copyrighted, such as ideas, facts, methods, and systems. The public domain also includes the uses for creative works that are not covered by copyright (Litman 1990, 974). What *can* be copyrighted is the fixed form or *work* (for example, a novel, a song, a sculpture, a video) that someone creates from a particular idea, *not* the idea itself. This means that there will always be aspects of any particular work that cannot and should not be controlled.

public domain
The body of works that are outside of copyright, or were never subject to it.

The United States Congress passed its first *Copyright Act* in 1790. Like the *Statute of Anne*, it also had a term of 14 years, renewable for another 14. The duration of the copyright term remained short to ensure that works flowed back into the public domain quickly, where other creators could make use of them, driving the development of a new culture for a new country. Since the establishment of this law, Congress has extended the duration of US copyright many times, with increasing frequency. In 1831, the initial term increased to 28 years, renewable for another 14, for a maximum of 42 years. In 1909, the renewal term was increased to 28 years, for a maximum of 56 years. In the latter half of the 20th century, Congress again extended the term of US copyright many times, to its current length: the

life of the author plus 70 years for individual people, and 95 years for corporate authors. Because of this expansion, copyrighted materials take longer and longer to re-enter the public domain, and the amount of material currently under copyright keeps expanding. As Lawrence Lessig (2004) notes, "now that copyrights can be just about a century long, the inability to know what is protected and what is not protected becomes a huge and obvious burden on the creative process" (252).

The history of copyright in Canada is very different. Canadian Parliament was nominally given control over copyright by the *British North America Act* of 1867, but copyright in Canada was governed by the British *Imperial Copyright Act* of 1842 until 1911. This was due, in large part, to political and economic tensions between Britain and the United States. Although the United States is now the chief global advocate of expanding intellectual property rights, "[u]ntil approximately the middle of the nineteenth century, more Americans had an interest in 'pirating' copyrighted or patented materials produced by foreigners than [they] had an interest in protecting copyrights or patents against 'piracy' by foreigners" (Fisher 2003, 11). After the United States seceded from the British Empire, its printers and publishers routinely produced cheap bootleg copies of European books, many of which found their way into Canada. Like the *Statute of Anne*, the *Imperial Copyright Act*, which made it illegal to import reprints into Britain and its colonies, and added a 35 percent duty to US publications, was conceived of by the British as a means to protect both the economic interests of British publishers and to ward off seditious American ideas from the minds of Canadian citizens.

In the latter half of the 19th century, the Canadian government tried several times to pass its own copyright legislation, but because any such law required British approval, and Britain was more concerned with protecting its own interests than those of its colonies, the legislation was not approved. The Canadian *Copyright Act*, finally passed into law in 1924, remained largely unchanged until 1988. However, the duration of copyright under the *Copyright Act* has also been extended to its current length—the life of the author plus 50 years after his or her death.

New Canadian Copyright Laws

As of this writing,[2] there have been several failed attempts by different governments to change Canadian copyright law to implement some of the provisions of the World Intellectual Property Organization (WIPO) treaties that Canada signed in 1992. The United States implemented these treaties as its *Digital Millennium Copyright Act* (DMCA) in 1998. Copyright law needs to adapt

to the changes in the creative environment that have accompanied the widening popularity of the Internet, but attempts to modernize the law in both Canada and the United States have created considerable controversy, especially around the issue of technical protection measures (TPMs), or digital locks. Under the DMCA and the last proposed set of changes to Canadian copyright, even if a person has the legal right to use the content protected by a digital lock, breaking that lock is deemed an infringement of the law.

Critics of TPMs have voiced several concerns. Engineers and academics need to take apart objects in order to study them. Some critics worry that the prohibition on breaking TPMs would prevent such everyday activities from occurring. Others are concerned about companies gathering up large swaths of public domain material and then rendering them less useful to the public by placing them on digital storage media and then making them uncopyable. What will happen in Canada on this issue remains to be seen.

Other proposed changes to Canadian copyright, if they pass into law, will provide explicit protection for some of the uses of copyrighted material in Canada that are currently allowable under US copyright law, such as parody and satire, and provisions for educational use. Again, there is some contention regarding what these exemptions will mean, in practice, for authors, publishers, and the public.

Even without such changes, Canadian copyright law differs from US copyright law in several significant ways other than its duration. One is the inclusion in Canadian law of provisions to protect the **moral rights** of the author. Moral rights include the right to be associated with a work as its author; the right to remain anonymous or use a pseudonym; the right to prevent changes to a work if it has been altered in a way that negatively affects the author's reputation; and the right to prevent a work from being associated with a product, service, cause, or institution. Many European countries also have moral rights as part of their copyright laws. To many creators, the concept of moral rights sounds like a very good idea; the only problem is that many publishers include a clause in their contracts demanding that creators must waive those rights before publication.

moral rights
A series of rights accorded to an author relating to his or her association with a work, or the integrity of the work.

Another important difference between Canadian and US copyright laws is the manner in which each country describes the limits to copyright. The US principle is called *fair use*, and the Canadian principle is called *fair dealing*. Fair use, which became part of US copyright law in 1976, allows anyone to quote a limited amount from a copyrighted object for purposes such as news reporting, academic research or teaching, criticism, commentary, or parody. As Murray and Trosow (2007) note, the "such as" means that these

HISTORICAL HIGHLIGHT

Michael Snow and Moral Rights

In 1979, the Toronto Eaton Centre commissioned the internationally acclaimed Canadian artist, Michael Snow, to build a sculpture for the mall's atrium. Snow's work, *Flight Stop*, consists of a flock of 60 life-size Canada Geese suspended from the rafters. In 1982, as part of its Christmas decorations, the centre hung red ribbons around the geese's necks and used the image in its advertising campaign without asking the artist's permission. Snow asked the centre to remove the ribbons, but was ignored, so he invoked his moral rights, and the court ruled in his favour.

In his article on the *Snow v. The Eaton Centre* case, David Vaver (1983) notes that until this point, very few Canadian creators had ever used moral rights as an occasion to launch litigation (90). The irony is that in some respects, the notion of moral rights was more powerful as a *threat* than it was after it had been used successfully. Once it became obvious that artists could and would invoke their moral rights in court, and could actually win such cases, it became common practice in contracts with artists to include a clause asking them to waive their moral rights as part of the deal, and this very specifically Canadian bit of copyright law began to fade into the background.

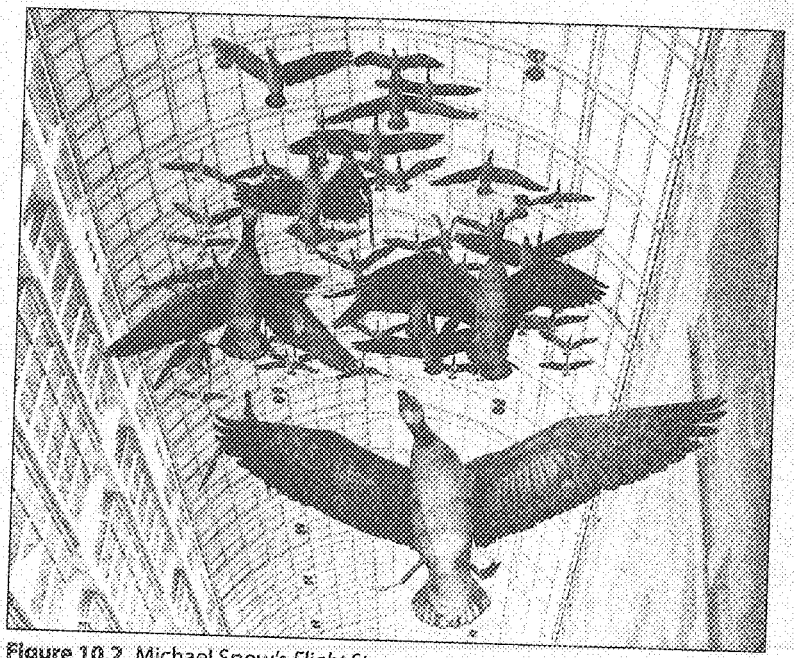

Figure 10.2 Michael Snow's *Flight Stop*

are illustrations of some of the uses that might be fair; US copyright law is thus more open-ended than Canadian copyright law, and eventually allowed parody as a fair use because of this openness (75). The notion of how much of any given copyrighted object may be quoted is deliberately fuzzy; in some cases, it might include the whole object, but it is usually limited to a small fraction, such as a few lines of a poem or a few pages of a novel. When doubt arises about whether someone has quoted more than what is fair, copyright holders may launch a court case for copyright infringement.

As mentioned earlier in this chapter, copyright law is interpreted by case law—that is, what counts as fair use at a given time and place is decided in court. On the one hand, this means that copyright law can be adapted to suit the mores and needs of the time, but it also means that it is subject to abuse by wealthy copyright holders. Sending creators a *cease and desist* letter threatening to drag them through the courts if they don't stop quoting from your copyrighted object (no matter how large or small the amount quoted) can be enough to intimidate most people, because copyright cases can take years and cost hundreds of thousands of dollars to defend. This is called the **chilling effect**, and it is a major strategy for the legal divisions of many corporations and the estates of many prominent authors and artists. For example, Paul Zukofsky (2009), the son of American poet Louis Zukofsky, maintains this notice on his website:

chilling effect
A legal strategy used by copyright holders, in which the threat of long, costly legal action tends to dissuade others from using a work.

> Despite what you may have been told, you may not use LZ's words as you see fit, as if you owned them, while you hide behind the rubric of "fair use." "Fair use" is a very-broadly defined doctrine, of which I take a very narrow interpretation, and I expect my views to be respected. We can therefore either more or less amicably work out the fees that I demand; you can remove all quotation; or we can turn the matter over to lawyers, this last solution being the worst of the three, but one which I will use if I need to enforce my rights.
>
> In general, as a matter of principle, and for your own well-being, I urge you to not work on Louis Zukofsky, and prefer that you do not. Working on LZ will be far more trouble than it is worth. You will be far more appreciated working on some author whose copyright holder(s) will actually cherish you, and/or your work. I do not, and no one should work under those conditions. However, if you have no choice in the matter, here are the procedures that I insist upon, and what you must do if you wish to spare yourself as much grief as possible.

Faced with such a notice, many authors will justifiably focus their attention elsewhere, but what this means is that it is possible to shape public discourse and criticism by aggression. The Electronic Frontier Foundation,

in conjunction with school of law clinics at Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University, have banded together to create an advocacy site called Chilling Effects (www.chillingeffects.org) to advise creators of their rights and to track abuses. However, many publishers err on the side of caution, requiring authors and artists to seek—and pay for—permission to quote even the tiniest section of a copyrighted work. While this requirement provides some assurances about the legality of the new work and puts money in the pockets of other artists, it too is a kind of chilling effect, suggesting there are some subjects that you simply cannot afford to write about.

As unpredictable as the US notion of fair use might seem to be in practice, Canadian fair dealing is an older but weaker principle. The 1921 Canadian *Copyright Act* had a fair dealing provision, but didn't actually define the term, leaving Canadians to sort out the issue as best they could in case law. Fair dealing permits the quotation of "a substantial part" of a copyrighted object, but only for the purpose of news reporting, private study, review, research, or criticism. If someone is quoting less than a substantial part of a copyrighted text, the copyright holder has no say in the matter—but the definition of "substantial" is open to interpretation. Once an act of quotation has been deemed to fall under one of these categories, the question of its fairness arises, with respect to both which section has been copied and how much of it has been quoted. Of course, many of the acts that Canadians do now, such as recording TV shows on a PVR, do not fit into any of these categories, which is one of the reasons that the law needs updating. Nor does Canadian copyright law make explicit provisions for teaching and parody. Various attempts to revise Canadian copyright law have included some provision for educational use and for parody and satire, but the mixed reactions from various segments of the public make it unclear whether they will ever make it into law, or how much of such provisions will change before it is passed.

Many parts of copyright law are deliberately ambiguous, and necessarily so. Copyright law was formulated on the premise that eventually, all ideas should find their way into the hands of the public, so it's actually not in anyone's best interest to define copyright law too precisely. What Vaidhyanathan (2001) calls a *thin, leaky* copyright system "allows people to comment on copyrighted works, make copies for teaching and research, and record their programs for later viewing." A *thick* copyright system that accounts for every possible use of a copyrighted object could all too easily become a tool of censorship (184).

As important as copyright is, it is not the only form of cultural ownership in contemporary culture.

Other Forms of Cultural Ownership

Other cultural objects require other sorts of protection. Whereas copyright protects the fixed forms of expression that ideas take, *patents* protect inventions, a category that can include not only machines, but also processes, art, manufactured articles, and "compositions of matter," which are substances that consist of more than two other substances that have unique properties when combined. Patents have a duration of 20 years, and allow the patent holders exclusive rights over the patented object as long as they disclose its workings.

Sometimes, an individual or a company will deliberately *not* take out a patent to prevent competitors from learning how a product works. *Trade secrets* are information that bestows some economic advantage on a product's owners, and are, well, secret. Such information is generally protected through contracts or non-disclosure agreements. These agreements do not have a fixed expiry date, but the moment that competitors find out a trade secret without violating such an agreement, they can make use of it.

Trademarks are designed to protect the signs and symbols that companies use to identify themselves and their products from others that have the potential to confuse consumers. Trademarks confer on their holders the right to exclusive use of that mark. They can be established through common use or through an official registration process, which provides a stronger degree of protection. Trademarks last for renewable 15-year terms. Because they can be lost if the owner not only fails to renew them, but fails to defend them, they require special vigilance.

Scholarship and academic work operate according to a different system altogether. For example, students own copyright in their work, but teachers and professors sometimes do not: depending on their collective agreements, the institution may in fact own the work that its instructors produce. But it is important to remember, as Murray and Trosow argue, that the academy and the marketplace function according to entirely different economies with different logics. While the marketplace uses copyright to ensure that people have *permission* before quoting a substantial part of an object, an educational institution requires something significantly different: *attribution*. "Copyright infringement is use without permission ... and it's a matter of law, whereas plagiarism is use without attribution, and it's a matter of community or professional practice" (Murray and Trosow 2007, 193). The academy, in fact, *rewards* scholars for providing citations; these indicate

The circulation of knowledge is what makes it valuable, and the creation and maintenance of culture require this interchange.

that you have done your research, and have contributed to a conversation that started before you arrived and will continue long after you've moved on to other concerns. In such an environment, the circulation of knowledge is what makes it valuable and useful to others, not hoarding it. It's important to remember that the creation and maintenance of culture require this interchange, and that the role of copyright in it is actually *not* the first priority; producing the conditions under which all people are able to express themselves fully, fearlessly, and productively is.

Indigenous Models of Cultural Ownership

In terms of getting our priorities straight, what if we have to re-examine the very principles upon which copyright is founded? Rosemary Coombe (1998, 209) has argued convincingly that the categories of property that we use unquestioningly all the time—intellectual property, cultural property, and real property—divide peoples and things according to the same logic that historically was responsible for disenfranchising Native peoples in North America. To insist on applying that logic to their ongoing cultural production, then, is a continuation of colonialism. The *traditional knowledge* built up by various groups of First Peoples has no single author, is not always fixed into specific forms (in the manner that an idea may become a photograph, a song, or a poem), and is often very old. Therefore, copyright systems often treat aspects of it, such as traditional tribal designs and motifs, as though they were in the public domain (Murray and Trosow 2007, 187).

So what does it mean when traditional Haida designs can be purchased as automobile decals and anyone can get a Maori tattoo? The answer is complex because, as Coombe explains, when First Peoples lay claim over images, themes, and symbols, they do not do so as either the conventional notion of the "author," insisting on fees and royalties for the circulation of their creative works. Nor do they fall back on an equally stereotypical and essentialist version of themselves as timeless, changeless cultures with claims to special authenticity. Like the rest of us, they are "living, changing, creative peoples engaged in very concrete contemporary political struggles" (Coombe 1998, 228).

Many First Peoples' approaches to copyright are similar to the concept of moral rights. Instead of focusing on protecting the reputation of an individual author as a creative originator, though, they protect the honour of the clan, culture, or nation whose materials the individual transmits. Whether or not the individual is allowed to improvise on or reinterpret the material that is being transmitted depends on the particular tradition (Murray and Trosow 2007, 189).

Increasingly, First Peoples are using the instruments of intellectual property in ways that are effective, and even subversive. For example, the tiny HaidaBucks Café in the village of Masset, in Haida Gwaii (formerly the Queen Charlotte Islands), successfully fended off a trademark infringement lawsuit from the Starbucks corporation (Baldwin 2003). In Haida slang, a "buck" is a young man; the HaidaBucks Café is owned and operated by four young Haida Gwaii men. Visit their website, and you can read all about it, beginning with the joke that "If you're as dull-witted as Starbucks® thinks you are, you may not realize you've reached this site by mistake" (Baldwin 2003).

Figure 10.3 HaidaBucks
View inside the HaidaBucks Café in Masset, British Columbia.

SOURCE: Lane Baldwin. Reprinted by permission.

Public Licensing: The Creative Commons

So if you were concerned about the shrinking public domain and the lengthening terms of copyright, what could you do about it without infringing on the copyrights of others? What if you could use your copyright to encourage sharing and circulation rather than restrict it?

In 2001, a group of cyber-law and copyright experts, including Stanford law professor and author Lawrence Lessig, founded Creative Commons. This group is dedicated to expanding the range of creative work available for others to build upon and share. Its goal is not simply to increase the amount of primary content that is available online, but also to make accessing it easier and cheaper. Drawing inspiration in part from the licensing systems developed by the GNU/Linux Free Software and Open Source communities, Creative Commons has developed a set of tools that help people who have produced creative works (such as websites, scholarship, music, film, photography, literature, and courseware) to make their creations free for certain uses, or to dedicate them entirely to the public domain.

KEY CONCEPT
New tools for using copyright to ensure the circulation of cultural objects, such as Creative Commons licences, have recently arisen in opposition to traditional uses of copyright laws to restrict the uses of cultural objects.

There are a variety of different Creative Commons licences, each specific to the country in which a person takes it out. Each licence allows the creator to retain copyright, and to announce that other people's fair use, first sale, and free expression rights are not affected by the licence. Each

requires licensees to obtain the creator's permission to perform any of the activities that the creator restricts, to keep the creator's copyright notice intact on all copies of the work, not to alter the terms of the licence, and so on. The licences apply worldwide, last for the duration of the work's copyright, and are irrevocable.

The less familiar, and most interesting, aspect of the Creative Commons licence is what it allows people to do with the creator's work: to copy, distribute, perform, or shift media in a variety of ways that the creator can specify from a set of mix-and-match distribution conditions. For example, you might decide that you want to let others copy, distribute, display, and perform your work, and to create derivative works (such as translations or mashups) based upon it, but for non-commercial purposes only. The most interesting of the terms that you can attach to your copyright is the "Share Alike" term, which allows others to distribute derivative works only under a licence identical to the licence that governs your work. The Creative Commons website helps creators design a licence, then presents three different versions: one in everyday prose, one in legal language, and one designed to be read by search engines, which means that the licensed work can be located using Google, Yahoo!, or Flickr. There are now millions of Creative Commons licences in use, on websites, books, music, photographs, and many other objects.

Digital Dilemmas

Faced with the dizzying rate of information exchange on the Internet, many of the people who create things for a living are asking the following question: how many copies of their work will be sold if it's possible to circulate, cheaply and easily, digital copies of that work? The worst-case scenario is that the answer might be one copy—and that everyone else will simply make copies of that first, lonely, legitimately purchased digital file.

Digital objects are different from non-digital ones, because it is possible to make an infinite number of identical digital copies with little to no effort.

In *Being Digital* (1995), Nicholas Negroponte notes that the best way to measure the consequences of digitization for society is to think about the difference between things that are made out of *atoms* and things that are made out of *bits* (the basic unit of digital information) (11). In the physical world of atoms, where making an exact copy of an object is expensive and time-consuming, our economy and culture are driven by the notion of scarcity. When dealing with atoms, sharing something means that you have to give up part of it, so people are more reluctant to share. Digital objects are different, because it is possible to make an infinite number of identical copies of them with little to no effort: click "copy," then "paste," and repeat, or program your computer to do the work for you. Moreover, the advent of

peer-to-peer technologies, beginning with Napster and continuing through BitTorrent, the most popular peer-to-peer protocol in use today, has meant that it is also possible to distribute all those copies with little to no effort.

Peer-to-Peer Systems

Peer-to-peer (P2P) is a network in which each computer that is connected has more or less the same processing power and privileges for the purpose of sharing files as any other. Its opposite is a form of architecture called *client–server*, where large, powerful computers called servers manage resources such as network traffic, file management, and storage and printers for a series of smaller, much less powerful computers or terminals called clients. In the early days of its existence, the Internet functioned as a network of peers, but it has gradually become more client–server focused owing to massive increases in traffic, the introduction of gated systems, and so on.

Today's peer-to-peer applications, such as BitTorrent, basically ignore the powerful, server-based centres of the Internet in favour of establishing small, unstable networks of connected users with minimal resources, in order to accomplish specific short-lived tasks, such as sharing copies of TV programs. P2P doesn't care who you are or which computer you are using. All it cares about is that you want a file, and someone else has it, or vice versa. It's quick and dirty. And it works very, very well: ipoque's annual Internet studies from 2006 to 2009 consistently show that peer-to-peer technologies generate the majority of Internet traffic in many parts of the globe—more than the Web, email, and streaming media (Schulze and Mochalski 2009)! This is partly because more people know how to use the software, and partly because the sizes of the files that are being traded have increased drastically, from single songs to entire full-length movies.

Life After Napster

This situation is a direct result of a near-complete failure over the last decade to deal with the consequences of P2P on any level: technological, legal, governmental, fiscal, or moral. Back in 2001, legal scholar and Free Software Foundation counsel Eben Moglen argued that after the lawsuit that shut down **Napster**, the record companies had an opportunity to retain the 60-million-plus people in the original Napster user base. If they had opted to let people continue downloading music in exchange for a fee collected from their monthly Internet service charge, that money could have been used to establish a pool of funds to pay artists proportionally for the amount that their work had been downloaded. This model is called *voluntary collective licensing*, and it is the mechanism that allows radio stations to function:

Napster
Founded in 1999, this peer-to-peer file-sharing service made MP3 files available outside of copyright protection, and helped usher in a major shakeup of the music industry.

in exchange for being able to broadcast music, the stations pay a fee to organizations that redistribute the fees to the artists and songwriters. Radio makes its money by selling advertisements, not by charging its listeners directly (Electronic Frontier Foundation 2008).

But instead of investigating the possibilities of collective licensing, the labels bet that they could establish their own proprietary networks, and that people would use them. (They didn't, at least until the iTunes music store and Amazon.com MP3 sales began to gain popularity at the end of the first decade of the 21st century. By February 2010, the iTunes Music Store had sold 10 billion songs in less than seven years [Zibreg 2010].) By forcing Napster to shut down and providing no credible alternative, the labels effectively educated Napster's users that there were other places online to get free music. Furthermore, the labels created a situation in which litigation against those people was self-defeating: "Suddenly, instead of a problem posed by one commercial entity that can be closed down or acquired, the industry will be facing the same technical threat, with no one to sue but its own customers. No business can survive by suing or harassing its own market" (Moglen 2001).

"No business can survive by suing or harassing its own market."
—Eben Moglen

Many Internet service providers (ISPs) have responded to the increase in P2P traffic by throttling bandwidth—that is, imposing speed limits on how fast certain kinds of data will transfer (for example, your ISP might choose to slow down the movement of BitTorrent data packets). Of course, this presumes that the people using the software are infringing on the copyrights of others without actually verifying that this is the case, and it limits the potential of P2P software for legitimate applications, such as the distribution of software upgrades. But at the present moment, we are deadlocked between the desire of people to obtain increasing amounts and kinds of cultural materials online, and no clear path to the creation of a consensus model that can equitably compensate creators for the unchecked copying of their works.

Owning Living Things: Biotechnologies

The state of being impoverished, according to Alexander Galloway and Eugene Thacker (2007), traditionally refers to people who have nothing but their bodies to sell. Until recently, this notion usually meant that the poorest people in a given society survived by selling the power of their physical labour. In contemporary society, selling one's body can be more literal, involving the sale of blood, sperm, or ova, or acting as a surrogate mother. However, these authors argue that to survive today, the poor "are expected to give up not just their body's labour power but also their body's *information*

in everything from biometric examinations at work, to the culling of consumer buying habits, to prospecting inside ethnic groups for disease-resistant genes. The biomass, not social relations, is today's site of exploitation" (Galloway and Thacker 2007, 135; emphasis in original).

Legal cases from over the last few decades in the United States suggest that under some circumstances, we do not even have ownership rights to the very cells that we are made of. One of the most famous of these cases involved a surveyor named John Moore, who discovered in 1976 that he had a form of cancer called hairy-cell leukemia. Dr. David Golde, a cancer researcher at UCLA, treated Moore by removing his spleen. Over the next seven years, Golde flew Moore to Los Angeles from his Seattle home to take follow-up cell samples from Moore's bone marrow, semen, and blood. In 1983, several weeks before giving Moore a consent form asking him to agree to voluntarily grant all rights to any potential product developed from his cells to the University of California, Golde filed a patent on a *cell line* ("self-perpetuating clones of the original cells") he had developed from Moore's cells—a patent whose market value at the time was expected to reach $3 billion (Skloot 2006).

Moore sued the following year, and the case went all the way to the Supreme Court of California, where it was finally settled in 1990. The court ruled that although an adult has the right to decide whether to submit to medical treatment, and although doctors have the responsibility to reveal any personal interest in their own research, patients do not own the cells removed from their bodies during a medical procedure. Moore therefore had no rights to Golde's patent, which actually required Golde to physically alter Moore's cells so that they could survive outside his body, a process that was therefore deemed an invention (Evans 2006).

Although both Moore and Golde are now deceased, the repercussions of the *Moore* case are still being felt. One of the arguments against assigning patients the rights to cells removed from their bodies is that doing so would slow down the speed of medical research by creating situations in which patients would demand money from their doctors. Others (including a dissenting judge on the California Supreme Court) argue that "the ruling didn't prevent commercialization; it just took patients out of the equation and emboldened scientists to commodify tissues in increasing numbers" (Skloot 2006). Some hospitals now have specific clauses in the papers that patients sign to ensure that the rights to their cells are waived, but the debate continues, and other lawsuits have been fought over similar issues.

The implications of patenting cells and genes extend far beyond the human body. Jeremy Rifkin (2000) notes that because of the US Patent and

Trademark Office's 1987 decision that genes, chromosomes, cells, and tissues can be patented, some biotechnology critics predict that within 25 years, "much of the genetic commons—the legacy of millions of years of biological evolution—will have been isolated, identified, and enclosed in the form of intellectual property, controlled, for the most part, by a handful of giant transnational life-science companies" (65–66). When farmers pay for genetically modified seeds from such companies, they aren't really "buying" them; they're leasing a single season's use of them, and the harvest belongs to the patent holder. This means that the centuries-old tradition of farmers reserving part of their harvest for later use or emergency food is potentially a crime. Monsanto, a prominent life-science company, has sued hundreds of farmers for patent infringement (Rifkin 2000, 67). The growing dependency of farmers all over the world on a few large seed suppliers, the dwindling of farmers' emergency seed reserves, and the decrease in varieties of seeds being planted are all factors that worry the critics of seed patenting, because of these patents' potentially destabilizing effect on world food reserves.

Conclusion

The examples of how the expansion of intellectual property law is changing our relationship to our bodies, our food supply, and to nature itself point directly to the issue of why these ideas matter. Who controls information, and how, are questions that have life-and-death consequences. And there are no easy answers about how to arrive at an equitable notion of the limits of intellectual property. Some thinkers, such as Marcus Boon (2010), argue that critiquing intellectual property law because it has become more like material property law is beside the point. For Boon, the problem is property itself, and the systems and structures that govern it. He writes that "'fair use' and 'the public domain' are crippled concepts unless they include, for example, the right to cross national borders (fair use of land), or access to food, hospitals, medicine, and education (all of which have been, to different degrees, part of public domains at some time or other)." From such a perspective, one possible answer to the problem of scarcity in general "is simply to *make more copies* and distribute them freely" (Boon 2010, 246; emphasis in original).

Boon argues that copying is, and has always been, a *practice* rather than a right. Practices are rooted in value and competence rather than ownership. In fact, practices *own us*, reshaping us and inserting us into a community of other practitioners (Boon uses the examples of musicians, yogis, warriors, and lovers) who may well have stolen their knowledge in the first place in order to teach it to others (Boon 2010, 247). Copying as practice can even

function within a capitalist economy, as examples demonstrate—ranging from 20th century art (Marcel Duchamp, Andy Warhol, Jeff Koons, Richard Prince) to companies whose business now largely comes from open-source software sales (Red Hat, IBM).

The questions that surround cultural ownership and intellectual property are far more complex than they first appear. Public licensing schemes such as Creative Commons are not a perfect solution to the controversies regarding how we handle intellectual property today, and, as Boon (2010) points out, they do little to address real, lived inequalities unless the entire system in which they are embedded changes. However, they are one positive step in a long journey toward creating a world where it is possible to respect the creative output of others and to have a wide range of materials to work with in the creation of new kinds of cultural objects. An open approach to content, and its result—a rich body of circulating text and images—is crucial to the ongoing viability of culture itself.

Notes

1. This usage is rare now because of the confusion with pre-digital unauthorized recordings of rock musicians (often live, usually made by fans), which are also called bootlegs.
2. For updated information on Canadian copyright legislation, please visit this book's website at www.emp.ca/intersections.

Discussion Questions

1. To what extent do your own uses of digital cultural objects (ebooks, music recordings, movies, TV shows) conform to or depart from the existing copyright laws of your country? Explain.
2. Divide the class into two groups. Everyone in one group will write a paragraph that explains why creators should receive maximal protection under copyright law; everyone in the other group will write a paragraph explaining why copyright law should favour the rights of users. Share, discuss, and debate your results.
3. After performing activity 2 above, reflect on how easy it is to favour one side over the other. Try to describe a compromise that recognizes the needs of both positions.

SUGGESTED RESOURCES

Books

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Murray, Laura J., and Samuel E. Trosow. 2007. *Canadian Copyright: A Citizen's Guide*. Toronto: Between the Lines.

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Websites

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Creative Commons. http://creativecommons.org.
Electronic Frontier Foundation. https://www.eff.org.
Michael Geist's Blog. http://www.michaelgeist.ca.

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