If You’re Asking, It’s Not Fair Dealing: Animating Canadian Copyright Issues in a “Read-Write” Classroom

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Instructors and students in the humanities and fine arts are currently confronted by a peculiar paradox: we have access to a bewildering and ever-expanding range of on- and off-line digital tools to assist in the realization of our creative ideas, but this is often overshadowed by a pervasive and well-founded culture of fear with respect to copyright. In my own field – communication studies – this experience manifests as an uncertainty shared by instructors, teaching/research assistants, and students on at least three fronts: the existing media we quote or incorporate into exercises and assignments; our creative and personal work; and the distribution and protection of the work we produce. These concerns are quite aside from a familiar, long-standing anxiety over what media (and how much of it) we can actually show in the classroom as part of our teaching about media.

Outside the academy, the ongoing “computerization of culture” (Manovich 2001) has much to do with the creation of a general sense of uncertainty and anxiety about dealing with media. The seemingly inexorable consolidation of media ownership across the developed world, the increasing prevalence of digital locks (digital rights management) and traffic shaping, plus the aggressive prosecution and/or persecution of alleged copyright infringers by corporate lawyers are all challenging the few things we thought we understood about how digital networks functioned.

Inside the academy, we can add additional factors to this list. Some have to do with the shifting divisions between fields of study, such as the emergence of the digital humanities, and the reification of “interdisciplinarity” (successor to the previous decade’s vacuous yet magic keyword: “excellence”), and the relative novelty of research/creation grants. Others have to do with the technologization of faculty.

There is now a latent expectation that new faculty members will arrive with sufficiently developed technical skills to be able to create course blogs, research websites, or online archives, or that they will develop many of these skills as part and parcel of their research programs, regardless of their area of intellectual specialization. The consolidation and expansion of undergraduate communication studies programs with substantial production-oriented courses in their curricula and the emergence of graduate programs offering practice-based alternatives to theses and dissertations increase such demands, and present unforeseen scenarios. We also have to face new questions about the archivability and sustainability of digital research. Many of us make unhesitating promises to granting agencies that an integral outcome of our research projects and funded conferences will be a website or a DVD (or both), as well as articles or books.

With this complex of factors in mind, I would like to reflect on the opportunities and fears associated with the problems of media making as a pedagogical activity involving faculty and students in the humanities. Given the present volume’s focus on “dynamic” fair dealing, I locate this discussion within a web of shifting and emerging tensions. Not the least of these is the burden of copyright per se, and the very few exceptions that Canadian educators “enjoy” under the tentative provisions of fair dealing (and its more expansive American cousin, fair use). In addition, we must take into account the conservative and self-protective undercurrents of educational administrations; the political and creative necessity of constantly testing the boundaries of what is “allowed” (i.e., according to university regulations, or in law, or via rumour and anecdote); and the willingness of students to engage in critical – even transgressive – media practices, tied to the formal imperative that they engage in productions worthy of inclusion in their portfolios and resumes.

Context: A Production House Built on Fair Use

From 1997 to 2002, while studying for my PhD in communication at the University of Massachusetts–Amherst, I also worked for the Media Education Foundation (www.mediaed.org) as a graphic designer and video producer. The MEF is a non-profit video production company dedicated to creating and distributing classroom documentaries on media.
issues. Over the past eighteen years, the MEF has worked with many leading figures in the arena of media and cultural criticism, including Noam Chomsky, Susan Douglas, Stuart Hall, bell hooks, Jean Kilbourne, Naomi Klein, Robert W. McChesney, Edward Said, and Janet Wasko. Many of MEF’s most successful videos address problematic representations of race, ethnicity, gender, and sexuality in TV shows, advertising, videogames, news, and cinema.

This experience was also my first formal encounter with making media under the terms of fair use. Indeed, the very existence of the MEF, which was founded in 1991 by Sut Jhally, a professor of communication at the University of Massachusetts–Amherst, is entirely predicated on fair use as a legally defensible (as opposed to a legally protected) position. As Jhally (n.d.) has recalled, the whole enterprise started quite by accident. In the 1980s, he began collecting recorded excerpts of various media, especially music videos, with a view to playing them in his large lecture courses for the purposes of analysis and critique. He then cut together multiple examples to make a short classroom video on the problematic portrayal of women in music videos, which he repeatedly edited and tested out in the classroom. The result was a controversial piece called Dreamworlds (Jhally 1991), which he then started duplicating in VHS format to distribute to other scholars and teachers.

In what has since become a rather predictable scenario, Jhally received a cease-and-desist letter from MTV’s lawyers claiming copyright infringement and demanding that he retrieve and destroy all copies of the tape. These kinds of letters have become ubiquitous, and are often spurious at best, as the evidence accumulated by the Chilling Effects Clearinghouse (www.chillingeffects.org) makes clear. Jhally refused to comply, citing fair use, and MTV ultimately backed off. By mutual agreement with his university, Jhally went on to establish the MEF as an entirely separate entity. With a catalogue currently running to over seventy video titles, the MEF has continued to critique the media by quoting liberally from its output, all under the auspices of fair use. Although my chief responsibility at the MEF was to design their annual catalogue, flyers, videoboxes, and interstitials, I did produce and co-direct Behind the Screens: Hollywood Goes Hypercommercial (Soar 2000), a video about product placement, merchandising, and tie-ins in the movies (see www.brandhype.org). It is comprised solely of footage taken from the movies, interspersed with talking heads, and we did not seek permission for a single movie excerpt. (As many of us now know, if you’re asking, it’s not fair use.)

It is worth reminding ourselves that, in the pre-DVD, pre-TiVo, pre-World Wide Web milieu of the mid-1980s to mid-1990s, teachers were routinely obliged to record whatever media they wanted for purposes of study and critique via their own VHS machines as it was aired. Failing that, it was necessary to badger colleagues in the hopes that someone else happened to record it, or to attempt to purchase tapes after the fact, directly from the broadcasters. Although the technologies have changed, the culture of fear that we live with today was clearly very active twenty years ago. Indeed, it seems many people have always shied away from recording television shows or ads, let alone playing them back in the classroom. And not much seems to have changed in academic publishing, to take another, related example: we’re still chasing up permissions for media images to support our scholarly articles because the journal or press concerned isn’t sure enough about its rights, or, more bluntly, is frightened of being sued. Important exceptions remain, which, given their image-heavy critiques, would simply not have been feasible without fair use. Key examples in the realm of visual culture include Goffman (1979), Williamson (1978), and Gross et al. (2003).

Copyright as Cause Célèbre

Timeshift to October 2008, when copyright, intellectual property (IP), fair use, and fair dealing have become the wildly improbable causes célèbre of artists, musicians, academics, and librarians. I am attending the premiere of *Rip!: A Remix Manifesto* (Gaylor, 2008), an award-winning, feature-length documentary directed by Montreal-based filmmaker Brett Gaylor. *Rip!* (working title, The Basement Tapes) has been screened at multiple festivals, in theatres, and on television stations across the world. It is now available for viewing in HD, for free, on the National Film Board’s website. The film, produced by EyeSteelFilm and the NFB, offers a highly polemical view of contemporary copyright law in the United States and Canada, including interviews with activists such as sound artist Mark Hosler of Negativland, Standford law professor Lawrence Lessig, and musician and former Brazilian Minister of Culture Gilberto Gil. In the film, Gaylor deploys a faux-naïve, first-person narrative to explore questions about the limits of copyright as it relates to music sampling, focusing on his “favourite artist” Girl Talk. Appropriately enough, Girl Talk, aka minor mash-up star and likable exhibitionist Gregg Gillis, has a well-deserved reputation for creating
eminently danceable tunes on his laptop, by recycling some of the catchiest and kitschiest pop hooks of the past twenty years. While some of this work has been released through a record label called (wait for it) Illegal Art, Gillis is best known on the club circuit for his wild live shows. Strapping on his laptop like an electric guitar, or diving headlong into the crowd, Gillis brings fresh meaning to the notion of nerd chic.

Although I have a vested interest in copyright issues, my main reason for attending the premiere was to see the final cut of a film that includes sections of an animation made by my first-year students. I had not even heard of Girl Talk when, a year earlier, I had invited Gaylor to talk about his Open Source Cinema Project (OSCP) with the students in my Intermedia I course. For my regular unit on copyright, I would usually begin with a guest lecture by my colleague Nancy Marrelli, Concordia University archivist emerita, on the history of copyright law in Canada. After that I’d move on to an extended discussion of alternatives, chiefly the Creative Commons (CC), and illuminate these ideas with contemporary “real-world” examples, such as the case brought by the Associated Press against graphic designer and provocateur Shepard Fairey, creator of an iconic Obama poster called “HOPE,” for which Fairey used an AP photograph as source material, without permission.

Case Study: Girl Talk Rotoscoped!

After much discussion, planning, and patient bureaucratic shepherding by the faculty, the fall of 2007 saw the launch of a new undergraduate curriculum in my department. An entirely new feature of this curriculum was the introduction of the department’s fourth production stream, called Intermedia, which I had a significant role in developing. Its three new courses (introduction, intermediate, and advanced) were conceived as a complement to long-established offerings in film, video, and sound. The goal was never simply to provide “digital media” courses, or to teach Web design, or “computers.” Rather, we sought to open up a critical and creative space in which students and faculty could together explore many of the hybrid and liminal media practices that have come to the fore in recent years.

The first-year course, which I have taught twice a year over the past six years, has necessarily been a work in progress. In 2008–09, we routinely addressed a variety of issues and ideas relating to residual and “new” media, including basic critical/creative explorations of photography and sequential storytelling, graphic design and editorial illustration, interactivity, database narratives, usability, and copyright. Given the size of the class (60–65 students, on average) and a strategic need to have the students develop their collaborative production skills, most exercises and assignments at this point were conducted in pairs or small teams. I had always wanted to adapt a filmmaking exercise I encountered several years earlier to the digital realm, and finally hit on the notion of using Adobe’s Flash—which we already had in the lab—to animate over a previously shot and edited video.

Year on year, Flash is hands down the most desired, yet enigmatic, software application for my first-year students. It is a ubiquitous program for creating interactive, primarily Web-based, media. For those who’ve ever tried using it, however, it’s notoriously difficult to learn, partly because of a slew of maddeningly counter-intuitive features and functions. Making good-looking work can also be tricky, as the students often discover. Substantially interactive works require that they learn how to program inside the application, using a native coding environment called ActionScript, which has itself gone through at least three major transformations. Using Flash for animation work meant that the students would become familiar with the application’s interface and some of its quirks (e.g., work files being distinct from published files; incompatibilities between versions) while avoiding ActionScript. It would also be an opportunity to develop non-trivial work with immediate, gratifying results, while more or less subverting the program’s chief function. All we needed were source videos over which we could animate.

The approach I conceived was this: the short video would be divided up between all the students, with each one animating just a few seconds. The animation technique we deployed, called “roto-scoping,” involved digitally drawing over the video frame by frame, and in this case removing the video entirely once the animation process was complete. Traditional rotoscoping can be seen in the fluid movements of Snow White in Walt Disney’s Snow White and the Seven Dwarves (1937); more recently, digital rotoscoping has been used to create entire movies, such as Waking Life (2001) and A Scanner Darkly (2006).

Rip! A Remix Manifesto began life as an attempt to create a collaborative documentary on music sampling using Web-based social networking tools. At Gaylor’s appropriately named Open Source Cinema Project website, visitors were invited to help write the script, shoot or download appropriate footage, then edit and upload the results. After he’d presented the OSCP to my class, I asked Gaylor if he might have
some appropriate footage for my students to rotoscope. Gaylord offered me a three-minute video of Girl Talk in concert. It was a superbly shot and assembled montage of various live performances edited to a single pre-recorded mash-up, including his sublime track “Bounce That!” which samples everything from Stevie Wonder to The Breeders. Gaylord had his own motives: what would an animated remix of a video of a remix artist’s performance look like, and how might it contribute to the argument he was developing for his documentary? Once we’d figured out the logistics, my students – all sixty-four of them (ably supported by two teaching assistants, senior intermedia students Daniel Laurin and Kennetha Story) – began rotoscoping individual sections of approximately two to three seconds each (at 12 frames per second, this amounted to around 30–40 separate digital drawings per student). The process took four weeks, and each time the class met, we would review the progress made.

Since our students generally don’t have fine arts backgrounds, the quality of their individual contributions was highly variable, as were the techniques (line, colour, movement) they deployed. That said, the rough-and-ready feel of mash-ups in general, and the driving beats of the track itself, ensured that the piece hung together. Once Rip!: A Remix Manifesto was finished, we posted the completed animation on the OSCP website. Another copy (dubbed Girl Talk – Bounce That – Best Fan Video Ever) found its way onto YouTube. What happened next took us all by surprise: our work was soon picked up by Pitchfork, the highly influential online music magazine – as one student Facebooked excitedly, “We’ve been Pitchforked!” – and multiple blogs (e.g., Drawn, Gawker), and the number of hits on OSCP and YouTube began climbing rapidly. As of July 2012, the copy posted on YouTube in late 2007 had been viewed nearly two million times.

Why so much attention, so much Internet traffic? One could fairly claim that, out of context, the animation simply became just another trivial meme – a pleasurable, if inane, diversion akin to viral videos of celebrities behaving badly, babies biting their brothers, performing cats, and disoriented, post-dentist kids. Certainly, some of the thousand or so comments it has so far received on YouTube suggest as much, for example, “cool ass video,” “love this!” Others simply reference the artist or the sampling, for example, “What song does the first beat come from?” or “I think the 1.38 sample is ‘Ma Cherie Amour’ by Stevie Wonder.” A few acknowledge the context in which the video was produced, as described in the associated information panel on YouTube and in the titles and credits before and after the animation: “yeh that was good made me think a lot about copyright and how it controls us girl talk is a hero of copyright breaking”; “Love this! I’m totally going to use it for a video dance bday party I have coming up. Love the idea of open source cinema ... That is the way things should be. I’m tired the big record companies trying to lock down youtube. [sic]”

We also know that mash-ups can be anything but inane: The Lord of the Rings (2001) reimagined as a parable about capitalist hegemony; Buffy from Buffy the Vampire Slayer (1997–2003) confronting the creepy Edward Cullen of Twilight (2008) when he enters “her” bedroom uninvited; Mel Gibson “arguing” with Christian Bale in a mutual display of extreme machismo. Subtitle mash-ups of Der Untergang (aka Downfall) (2004), the German drama that follows the last days of Hitler’s reign, run the full gamut, from uncannily incisive to irredeemably inane.

Reflections

Viral success aside, the degree to which this animation has contributed to ongoing debates about copyright, if at all, remains to be seen. That the piece was ultimately featured in Rip! as an example of public, grassroots participation in remix culture was certainly validating for the students, the teaching assistants, and for me. Girl Talk has been described more than once as “a lawsuit waiting to happen,” which makes one wonder if the same can be said about derivative works (like ours) drawing on his sample-based music, or even the documentary itself. I imagine this issue was not front-of-mind when my university’s house organ, Now (formerly Concordia Journal), covered the story favourably (Herland 2008), and the university’s PR people posted yet another copy of the animation on their YouTube Channel (almost 6,000 views) – without permission.

It’s also worth pausing to think about the nature of our classroom remixes. The favourite examples cited in works by (predominantly male) authors such as Cory Doctorow, Michael Geist, Lawrence Lessig, or Kembrew McLeod often refer to a single medium: audio tracks sampled and remixed; video footage appropriated and recut. With our projects, the derivation is an entirely new interpretive “layer” of visuals; in three out of four projects, the original source video has been completely removed (the exception, RoboProfessor, was specifically performed and shot with a view to being animated over by us). The legality of this kind of creative work is precisely what was being fought over
in the United States, between Shepard Fairey’s Obama poster and the Associated Press.

I do not want to suggest that my experience with this assignment is typical or, indeed, particularly illuminating in terms of a broader debate about the (over)reach of contemporary copyright law. That said, it has been highly instructive for me and my students, since the animation assignment – which I’ve now used three more times since Girl Talk Rotoscoped: Steamboat Mickey (winter 2008, with sound design by Owen Chapman); RoboProfessor (fall 2008, featuring a performance by Kemrew McLeod, in service of Copyright Criminals, the 2009 documentary he made with Benjamin Franzen); and The Poem of the Transparent Girl, (winter 2009, using a performance shot in Brazil by the OSCP) – offers direct, creative engagement with a pressing issue that is already having profound consequences for them as a generation “criminalized” for its “Read-Write” activities. Lessig (2008) defines a Read/Write culture as one in which “ordinary citizens … add to the culture they read by creating and re-creating the culture around them”; in contrast, a Read/Only culture is “less practiced in performance, or amateur creativity, and more comfortable … with simple consumption” (28). Criminalization occurs regardless of whether or not users acknowledge it or identify with this characterization. Even being asked simply to make an informed, collective decision about which CC licence to choose for a class project, for example, a self-produced e-zine on Montreal culture, can lead to a more engaged discussion about copyright than might otherwise be possible.

In broader terms, online engagement and activism around copyright issues are vital to the development of enlightened policy initiatives, especially amid the current flood of rather regressive proposals. The Conservative governments’ Bill C-32, and other, more recent initiatives, have been criticized (Doctorow 2010, Geist 2010b) as a problematic retreat of the US Digital Millennium Copyright Act (DMCA), specifically around the issue of digital locks. It made for especially surprising reading as it followed in the wake of an unprecedented period of public consultation (http://ic.gc.ca/eic/site/008.nsf/eng/home), which was overwhelmingly in favour of regulations that did not merely appear to mimic the provisions of the DMCA. Meanwhile, the minister responsible for the Bill, James Moore, recently argued that people who oppose his proposal are “radical extremists” (Singleton 2010) who simply don’t want any copyright at all. Proof, indeed, that we need more, not less, public involvement in these debates.

In Closing

Classroom media productions serve to augment or problematize the key theories and concepts set out in the curriculum. This is less a matter of supplementing intellectual explorations by “making stuff”; rather, the two activities can be made to work iteratively and symbiotically. Further, having the whole class work together on one production assignment can reap many benefits. Students are inevitably inspired by what some of their peers produce from week to week with exactly the same tools and parameters, and the collaboration also becomes more than the sum of its parts.

The dynamism of fair dealing, if not its very existence, depends on a willingness to occupy the notional space it offers, and to continually test its boundaries; to challenge the culture of fear and the associated chilling effect on creativity; and, to recognize that the classroom is as good a place as any to do so. The history of the Media Education Foundation reminds us that many of these issues are not new; further, while the university administration protected itself by requiring that the MEF become an independent entity, the MEF has yet to be sued for copyright infringement.