

MEDIA EDUCATION FOUNDATION

60 Masonic St. Northampton, MA 01060 | TEL 800.897.0089 | info@mediaed.org | www.mediaed.org

Freedom of Expression

Resistance & Repression in the Age of Intellectual Property

Transcript

INTRODUCTION

[VOICE OVER]: A major battle began today over Copyright.

JOHN SORENSEN: Corporations truly will control our collective memories.

[CLIP, Newscast] Newscaster: I think it's great.

KEBREW MCLEOD: What right do you have to silence me?

KEN DOLL TOY: Wanna go shopping?

SUT JHALLY: They don't have the right to stop you using their materials.

[CLIP, "Gimme the Mermaid"]: You can never use it for anything without my permission!

MARJORIE HEINS: Censorship is bad for democracy.

[CLIP, newscast] Newscaster: Publishers say "Jib-jab" is violating copyright laws.

DAVID BOLLIER: We need to start to assert ourselves as citizens and assert ourselves as creators.

INGA CHERNYAK: You have those rights.

JAMES BOYLE: What's the big deal?

CARRIE MCLAREN: Copyright expansion is un-American.

[CLIP, Newscast] Newscaster: Here in New York tomorrow a federal judge will be asked to decide a legal battle between the Fox News cable channel and a liberal comedian.

[Clip, CNN Newscast] Reporter: The book is called Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right.

DAVID BOLLIER: Well, Al Franken had the brilliant idea of making fun of *Fox News* and other right-wing figures by naming his book “Fair and Balanced.” Astonishingly, *Fox* sued him for violating its trademark because the *Fox Television News* likes to advertise itself as “fair and balanced” and that’s apparently a trademark term.

[CLIP, Fox Newscast] Al Franken: It’s a case of either you defend yourself or you let things like “fair and balanced” slip into the public domain like “elevator” and “cellophane” and so on.

MARJORIE HEINS: This is an example of really outrageous conduct by, in this case, a trademark owner. Clearly no one was going to confuse his use of “fair and balanced” with *Fox*’s. He was clearly making a commentary on it; it has the highest level of first amendment protection.

DAVID BOLLIER: The Judge in that case laughed it out of court saying that this was an utterly frivolous and ridiculous lawsuit. But what if you hadn’t been Al Franken with Dutton Penguin behind you to sue and Floyd Abrams as your attorney? Chances are you might not have even have gotten that far and you would have had to change the title of your book.

CARRIE MCCLAREN: And that’s really more commonly what you see: people just can’t afford it. Actually, what we’ve seen over the years and what’s becoming even more common are people who just don’t make things or do things because they’re afraid of some kind of action.

SUT JHALLY: This is not some abstract, legal stuff that’s going on. The reason people should care about this is that they live now in a digital world—they live in a world that is in fact made up of copyright images—and that their own rights to free expression are going to be restricted unless those freedoms are defended in some way.

CHAPTER 1: FREE SPEECH IN THE AGE OF COPYRIGHT

NARRATOR: Copyright law, which protects works of music, film, books and other creations, has grown in importance in recent years. Although many of us are

familiar with the copyright battles involving YouTube, Google, and music downloading, a more fundamental issue is more often overlooked in these debates. Increasingly, copyright and other intellectual property laws are being used as a tool of censorship and as a way of restricting the public's access to vital information.

JAMES BOYLE: Copyright law used to be something that was not of interest to most people; it applied to large distributors of copyrighted content: you have a printing press, you have a broadcasting network, you care about copyright. I'm a consumer, I just care about, 'do you send me the stuff?' That has obviously changed in lots of ways. Now copyright law applies directly to all of us. We're all copying; we're all distributing all the time.

SUT JHALLY: I believe in copyright. I believe that when you create a work that it belongs to you and someone shouldn't be able to just come along and rip it off and use it for their own purposes. However, I do believe that if I make a statement or if I create something that someone else should be able to take my creation and be able to use it in their own creation. If they want to critique me they've got to be able to quote me.

MARJORIE HEINS: They have the power to decide whether or not you can quote. They have the power of censorship. Copyright system basically gives a very powerful censorship authority to private companies and individuals.

SIVA VAIDHYANATHAN: Much of what we think about as free speech in American emanates from a very 18th century notion of it. It's about being able to say what you want in a newspaper or stand on a soapbox in a public park. But now we live in a multimedia world. That means it's real easy to stand up for free speech if it's about a newspaper editorial. It's really hard to stand up for free speech if you're making a video documentary, for instance.

JOHN SORENSEN: Individual copyright holders like Warner Brothers, like Disney, are shaping the images that you see and thus your understanding of your history, your culture, yourselves.

SUT JHALLY: Anyone who is interested in democracy should always worry about those institutions that have risen up that are now preventing precisely the kinds of freedoms, the expression of the freedoms, that the first amendment talks about.

INGA CHERNYAK: If we want to make the claim that we live in a democratic society, what that rests on is people having access to information, people having access to media and culture and being able to make informed decisions.

LAWRENCE LESSIG: So I think we need copyright, absolutely. It's an essential part of creativity, it's essential to make sure that people can profit from their creative work. But we need a different structure of copyright so that the natural instincts about how you use creative work don't also constitute piracy.

CHAPTER 2: FENCING THE CULTURAL COMMONS

DAVID BOLLIER: Copyright law is a bargain between the public and creators, and creators get a monopoly right in their work by which they make money. But the public gets some things in return.

WENDY SELTZER: Initially, copyright lasted for 14 years, renewable once, and it was a protection for books, charts, and maps, a limited right to publish and sell. And the notion really was that after the author or artist had a reasonable period of time in which to profit from the creation, it would enter the public domain and anybody could copy it and distribute it because that's how culture gets built.

KEMBREW MCLEOD: The reason why the public domain's important is because it creates this pool of cultural resources like Shakespeare where you can revise and adapt the stories that Shakespeare or whoever wrote and you don't have to ask permission or have to pay anything; you just do it.

JOHN SORENSEN: And that is really our collective cultural record that we depend on telling stories about ourselves and our culture and our history.

DAVID BOLLIER: And if you have to pay for every little dollop of previous creativity, chances are you won't be able to create much because it will be owned and expensive, so the public domain is very important for anybody who wants to create.

SIVA VAIDHYANATHAN: The commons is a word that we use to describe any goods or set of goods that we all have access to. So you can think of a public park as a commons, you can think of a natural forest as a commons. These are rich resources set aside for public use. The cultural commons is the set of all of the signs and words and songs and poems that make us part of the culture. Membership in a culture is a direct result of familiarity with the cultural commons.

NARRATOR: At the insistence of the movie, music, TV and book industries, the US congress and other international governments have repeatedly extended the length of time a work can remain under copyright. These copyright extensions ensure that work that would have entered the public domain remain under private ownership. The latest extension was enacted by the "Sonny Bono Copyright

Term Extension Act” of 1998, named after the late congressman who rocketed to fame as the lesser half of the 1960s pop group *Sunny and Cher*.

[VOICE OVER]: In 1998, Congress passed the “Sonny Bono Copyright Term Extension Act,” which was the 11th time in 40 years Congress had extended the term of existing copyrights.

DAVID BOLLIER: So the works that were going to enter the public domain suddenly would be locked up for another 20 years.

KEMREW MCLEOD: And at the beginning the United States’ history, the longest a copyright could last was 28 years. And in the 20th century that just kept getting extended and extended and extended

DAVID BOLLIER: And they did this largely because Mickey Mouse was about to enter the public domain in 2003. One of the ironies of Disney lobbying heavily for extending the copyright and making sure that nothing goes into the public domain is the fact that as a company it was basically founded on using public domain materials like Snow White, like Cinderella, the Jungle Book—an infinite number of books and stories that it reused and recreated to make its animated films.

SIVA VAIDHYANATHAN: There was almost no public discussion about how much harm this would do to our cultural commons and to our sense of cultural identity.

LAWRENCE LESSIG: When this law passed I read in the New York Times a story of this father and web developer named Eric Eldritch who had intended to make the works of Robert Frost that would pass into the public domain available on the internet. I contacted him and I said, ‘it’s a dangerous thing to ignore this law, you could lose your house if you ignore this law, maybe the better thing to do is to think about how we might challenge the law.’ And the basis of the challenge was the very simple text of the constitution. The critical feature of that constitutional grant is that the purpose of the grant is to promote progress and the grant is restricted because it can only be for limited times. Congress’s view about limited times is much like my child’s view of the command that you can only have one cookie. I say to my child, ‘you can have one cookie,’ and he takes a cookie and then another cookie and then another cookie and you say, ‘I told you you could have one,’ and he says, ‘I did take one, three times.’ Well, that’s congresses conception of limited times.

KEMBREW MCLEOD: So the Supreme Court ended up saying that it actually wasn’t unconstitutional because there actually was a point in which the copyright term would end, even though Congress keeps extending the term of the copyright and it has over the course of the 20th century; there’s still an end point.

CARRIE MCLAREN: The most disturbing thing to me about the “Sonny Bono Act” is that for every Disney film out there or for every hugely popular, valuable work there are tens to hundreds of thousands of films that are obscure, that are deteriorating, that will not be preserved because there’s just no way economically that anyone is able to do it.

LAWRENCE LESSIG: My favorite brief was filed by copyright owners who own the rights to Laurel and Hardy and they said, ‘every time these copyrights are extended we make millions of dollars so we love it. But if you don’t strike this law down a whole generation of American film will literally disappear.’ And the argument was nobody can restore these films while they’re under copyright ‘cause it’s impossible to know who the copyright owners are; you can’t find them, you can’t ask for permission. So it’s only when they pass through the public domain that people will actually restore them. Well by the time these copyrights expire, and they won’t begin to expire until 2019, all of these films from the 30s and the 40s will literally be dust because they were produced on nitrate based stock, which after a period of time just turns to dust.

[CLIP, “King Kong (1933)”] *Voice 1 (male): We’re millionaires, boys! I’ll share it with all of you. Why, in a few months it’ll be up in lights on Broadway: Kong, the Ape Wonder of the World!”*

JAMES BOYLE: And what we do is we lock up the tiny percentage of the stuff that’s still being commercially produced; we say, ‘ok we wanna protect you ‘cause you’re still being commercially produced fifty, sixty, seventy years after production,’ but by doing that we also lock up all the other stuff, which is massively inefficient and has real harm to cultural production.

SIVA VAIDHYANATHAN: This leads us to an important conflict or question about copyright law. Can we maintain a rich cultural commons and therefore an effective sense of cultural cohesion if we are stopping up the public domains and stopping new material from entering the public domain?

NARRATOR: The folk music tradition is a great example of how previous works of art, music and culture can inform new, vibrant creations. The public domain is important for folk musicians who borrow and rework old bits of melodies and lyrics. This tradition, however, is fast becoming extinct.

SIVA VAIDHYANATHAN: Pete Seger and Woody Guthrie both freely acknowledged that much of their music was built on other people’s works or fragments or notes or bits of lyrics and then they would make minor changes. Woody Guthrie built on everything he heard and he was explicit about it. He knew he was taking from the blues masters of the previous generation, he knew he

was taking from what was then called hillbilly music. He knew he was building on cowboy poetry. He understood that it was about revising and building and forging a tapestry. He spelled out that people should be allowed to freely take from this work. Now, his estate hasn't necessarily agreed with his own position and we're in this perverse situation where the guardians of Woody Guthrie's contribution don't value the same things that Woody Guthrie did.

DAVID BOLLIER: Well, *This Land Is Your Land*, which derived from other folk songs, was later parodied online by a website called "Jib Jab" and it was a hilarious spoof involving Senator Kennedy and President Bush. Well, the publisher that owns the rights to that song decided it didn't want to have an unauthorized parody out there without making any money off of it and tried to stop the parody.

[CLIP, Newscast] *Newscaster: It may be your land but lawyers from the company that publishes the song say the political hymn belongs to them.*

KEBREW MCLEOD: And Jib Jab got a bunch of lawyers who basically worked for free on their behalf and these lawyers discovered that the song *The Land Is Your Land* had been improperly re-registered in the early 70s and actually it's in the public domain.

SIVA VAIDHYANATHAN: We've basically made the point very clear that *This Land Is Your Land* is in the public domain and is built on public domain works and now this song is our song.

CHAPTER 3: THE RISE OF THE CLEARANCE CULTURE

NARRATOR: Today, more people than ever before have access to multi-media technologies that allow them to tell stories and to document their cultural history and their everyday life. At the same time, the expectation that documentary filmmakers should get permission for every fragmentary use of a copyrighted work is increasing. The cost of licensing those works is also rising. This chilly legal atmosphere has given rise to what is referred to as the "clearance culture."

JAMES BOYLE: The "clearance culture" is basically the assumption that the copyright law holder's monopoly is absolute, that I can control every aspect of use in any form of any way of representing any aspect of a copyrighted work and that in order for you to portray that work you need to get clearance from me, the copyright holder.

PAT AUFDERHEIDE: The cost of that is multiple. One of the costs is that filmmakers face very high prices for documentary works.

LAWRENCE LESSIG: In a world where you've gotta clear every single bit of artwork anywhere in your shot, where you can't include clips from other shows without getting permission, those people can't create their art or their expression under the existing rules.

SIVA VAIDHYANATHAN: It makes it much harder to make a democracy work, a democratic republic work, because basic information, basic habits of commentary, are priced out of the reach of many Americans.

NARRATOR: No one would argue that filmmakers shouldn't compensate creators for significant re-uses of their work within another work. But in today's "clearance culture," the costs that documentarians are expected to pay are forcing them to make unnecessary and damaging changes to their films.

CARRIE MCLAREN: So what happens is documentary filmmakers, because they have to clear so much and because the clearances are so expensive, documentary filmmakers end up having to shift reality a little bit.

MARJORIE HEINS: It betrays the documentary process and it's totally unnecessary, but they think it's necessary or the insurer or the distributor tells them it's necessary.

LAWRENCE LESSIG: Especially in the context of documentary filmmaking I think that there should be a very strong presumption that says that the reuse for the purpose of documentary films is presumptively valid unless you can show that there's a clear intent to exploit the underlying market, meaning to substitute your documentary film for the work that you're using.

JOHN SORENSEN: To a certain extent I think it's totally fair that a private corporate entity should be rewarded economically for preserving something and making it accessible. That's a service that they're providing to all of us. But on the other hand when they restrict access, they're restricting access to what really is a part of our common cultural heritage and in that sense, from an intellectual sense, from a historical sense, a sense of creativity, they are restricting access to what could safely be called the common good.

KEBREW MCLEOD: There are just tons of examples of this clearance culture run amuck and one example, a vivid one, is the song *Happy Birthday To You*, which can cost enormous sums of money if you want to include it in a documentary, because *Happy Birthday To You* is still under copyright.

[VOICE OVER]: In *Hoop Dreams* there was a scene with a birthday party and they had *Happy Birthday* playing. You have to license *Happy Birthday* and those costs can be \$10,000 or \$20,000 for a few bars of *Happy Birthday*.

JAMES BOYLE: Amy Sewell’s great documentary *Mad Hot Ballroom*, which deals with inner city kids doing ballroom dancing, had a couple of famous examples that are used. One was a phone that played a copyrighted ring tone, the theme of *Rocky*, and \$10,000 was demanded to clear the rights.

CARRIE MCLAREN: When a ring tone playing the *Rocky* song rings is it in any way going to harm their *Rocky* franchise commercially? No. Is it in any way taking away from their motivation to actually create a *Rocky*? No. It’s extortion at some level.

CHAPTER 4: SUPRESSING FREEDOM OF INFORMATION

SIVA VAIDHYANATHAN: There has been for at least 20 years, maybe 30 years now, a pervasive notion in this country—and it’s soon spreading throughout the world—that everything private is better than everything public, that anything public is done inefficiently, is done corruptly, and that anything done privately is going to be done well.

[VOICE OVER]: There’s a vast trend, that I call the “enclosure of the commons.” to put property rights around something, claim it for oneself, and sell it. So we have the human genome being sold, we have fresh water supplies in Canada being taken to equatorial countries.

MARJORIE HEINS: And a world that’s so heavily privatized and corporatized presents a number of threats not only to the expression of culture but to the way in which we function as a society.

[CLIP, Newscast] Reporter: Electronic voting. Millions of Americans in more than 30 states will cast their votes this November on new machines that are meant to work like ATMs.

NARRATOR: The latest public trust to follow in the footsteps of privatization is voting. The most basic instrument of our democracy has now been called into question with the proliferation of electronic voting machines, which are manufactured and monitored by private companies.

[CLIP, “The Daily Show”] Jon Stewart: The touch screen machines, those are obviously the most controversial; they leave no paper ballot; how do those work?

Guest: Well, it's quite simple. First the voter touches the name of his or her preferred candidate in any given race. Key pressure differentials in the touch screen unit then transmit a digital representation of the voter's choice here to the computer where "things" happen.

Jon Stewart: And when you say "things," what kind of "things"?

Guest: Oh, nobody knows, these machines are built by private companies, which count our votes by using secret proprietary software and we don't have a right to know what goes on inside those.

[VOICE OVER]: Diebold was a manufacturer of some of these systems and several thousand emails were leaked to activists.

WENDY SELTZER: And those were emails about Diebold engineers talking about the security or insecurity of electronic voting machines.

NELSON PAVLOSKY: And we found that troublesome because we feel that people have a right to know how their votes are counted. These are machines for a public election and they're paid for through tax dollars and they're these black boxes; you're not allowed to know how they work.

[CLIP, Newscast] Newscaster: ...a flaw Diebold knew about three years ago according to this internal email: 'Our smart card format has absolutely no security...they could stand at the ballot station and quietly burn new cards all day.'

Mark Radke (Diebold spokes person): I will say that we are extremely confident in the security of our system and I will just leave it at that.

NELSON PAVLOSKY: So we posted the Diebold memos on our website and Diebold then sent legal threats to Swarthmore College and Swarthmore College shut down our website.

DAVID BOLLIER: Diebold claimed that the emails were copyrighted and could not be released and essentially it was trying to use copyright law, especially under this draconian law called The Digital Millennium Copyright Act, to prevent any public discussion about the reliability of the electronic voting systems.

NARRATOR: Nelson Pavlosky and his fellow student activists felt compelled to fight back. They challenged this attack from Diebold on First Amendment grounds and, along with other activists groups, joined a lawsuit against Diebold that literally made the company pay for the abuse of copyright law.

SIVA VAIDHYANATHAN: That meant a lot of lawyers helped them out and a lot of activists helped them out to make a stand. And ultimately when they got to court the court looked at this and said, ‘we are actually talking about something central to the operation of democracy. We’re talking about a company, Diebold, that we have entrusted with the most basic operations, yet they’re being secretive and abusing copyright to make sure that no one criticizes them publicly.’

WENDY SELTZER: And so about a year later the judge ruled in our favor and Diebold paid our damages and attorneys fees.

NELSON PAVLOSKY: And we had a very strong case because basically what we were saying was that Diebold didn’t have copyright control over this work because our use was Fair Use.

CHAPTER 5: FAIR USE AND FREE SPEECH

NARRATOR: One of the most important safeguards against the overzealous behavior of copyright holders is a legal doctrine known in the United States as Fair Use. Fair Use protects the unlicensed reproduction of media for the purposes of criticism, news reporting, teaching, scholarship, research and other similar uses.

PAT AUFDERHEIDE: The reason why copyright gives owners rights to materials is because it’s regarded as a very successful way of encouraging producers to make things because it gives them a reward. But copyright law also recognizes that unless people can quote from their own culture, they can’t make art, they can’t make new work of any kind. Because people draw on their culture to make work...so there are provisions for quoting material without permission or payment, which is Fair Use.

NELSON PAVLOSKY: Copyright is control over ideas and speech and the First Amendment is supposed to guarantee you freedom of speech, so in order to make the First Amendment and copyright work together you need to have these exceptions of copyright law called Fair Use.

DAVID SANJEK: What Fair Use allows you to do is take an element of something that preexists, incorporate it in a work that you’re completing, be it critical or creative, and make reference to something someone else has done.

SIVA VAIDHYANATHAN: In a production, such as this one, this documentary that you’re watching, a producer could take small segments of copyrighted works like pieces of Star Wars or photographs of famous people and use elements of

them in a larger work. To do that without clearing it, without getting permission from the copyright holder, relies on some faith in Fair Use.

[CLIP, Newscast] Newscaster: For the second time in two years, X-rated rappers 2 Live Crew won a major Supreme Court decision, this time affirming the Crew's right to parody Roy Orbison's classic "Oh Pretty Woman."

NARRATOR: One significant test of Fair Use that dealt with the issue of parody was the infamous 1994 Supreme Court decision involving the rap group *2 Live Crew*, who parodied the 1960s pop hit, "Oh Pretty Woman," by Roy Orbison.

JAMES BOYLE: The case involved *2 Live Crew* taking a Roy Orbison song, "Pretty Woman," and turning it into something rather different that dealt with a big, hairy woman and her colleague who were going to let "me and the boys jump in."

DAVID SANJEK: Here, part of the joke or the seriousness of the parody was taking that kind of romanticized view of a woman that was part of the Orbison song and turning it on its head.

JAMES BOYLE: It took almost all of the melody, certainly the characteristic hook, the bass line, and it was a commercial production.

KEMBREW MCLEOD: And even though it was a commercial product, even though that album by *2 Live Crew* sold millions of copies, the Supreme Court said that the fact that it's a parody outweighs that.

INGA CHERNYAK: That was great because it established that a parody does not necessarily have to be funny, because the song is not a very funny song, and it established that parody is worthy of protection.

MARJORIE HEINS: So it was a very important and positive development for free expression and Fair Use.

NARRATOR: A good example of a work that has taken advantage of the Fair Use doctrine is Robert Greenwald's video documentary *Out Foxed*. The evidence this documentary used to support its claim consisted of dozens of clips that quote from *Fox News*. Greenwald used these clips in an attempt to illustrate that *Fox* was neither fair nor balanced, as its trademark slogan asserts.

SIVA VAIDHYANATHAN: They were never going to give permission and Greenwald knew it so instead he archived all of these thousands of hours of footage and just decided, 'I'm going with it; they can sue me if they want.'

MARJORIE HEINS: And of course he never could have made the film if he'd had to get permission, because either it would have been denied or the costs would have been astronomical, probably both.

SIVA VAIDHYANATHAN: But *Fox News* chickened out; they weren't even willing to mess with it. And that documentary, which has ramifications in our media space in a lot of different ways, was a great example of standing up for Fair Use.

SUT JHALLY: My own understanding of Fair Use actually stems directly from experience. In 1991 I made a video tape called *Dreamworlds*, which looked at images of women on MTV and its connections to sexual violence and I did this just as a professor and when I finished the tape I thought, well, if it's useful to me to use in my own classes, it might be useful to some other people as well and so I did a very small mailing to other Communications departments and to some Women's Studies departments. And then, low and behold, one day I got a letter from the legal department of *MTV Networks* telling me that I was using their copyrighted images and that I had to cease and desist and also recall all the tapes that I'd sent out. Now, when I responded to MTV, I pointed out that Fair Use and the 1976 Copyright Act on Fair Use in fact allows exactly for the kind of use that I was making of those images. As a result of the controversy with MTV, that led to the setting up of the Media Education Foundation. And I can say that the Media Education Foundation uses Fair Use, not in an aggressive way—I think we use Fair Use in exactly the way it was meant to be used. Every one of our videos, and we've now done 50 of them or so, uses media images without permission and I think that is not pushing the margins, that is not taking a risk. What we are doing is operating within the law.

[VOICE OVER] The Media Education Foundation has been one of those groups trying to say, 'We have rights too,' and I think only by exercising those rights through one's own creativity and free speech is one going to be able to protect it.

JAMES BOYLE: So I do think Fair Use has a vital role to play, but not everything should be a Fair Use. For example, there's a case involving a documentary film in which they took every little famous clip of Elvis appearing on the Ed Sullivan show or any show that he appeared on and the hooks from his most famous songs and strung them together in hours and hours of video tapes and DVDs saying, 'this is the true Elvis and the most comprehensive Elvis.'

[VOICE OVER]: You can't just cut together a whole bunch of shots of Elvis singing and say, 'you'll really love these pictures of Elvis singing, they're very entertaining,' and call it Fair Use.

JAMES BOYLE: Now, this is just a way of getting stuff without paying for it. So there's a claim where the copyright holders could very legitimately and absolutely

rightly say, you're just ripping us off and claiming Fair Use as a shield. And when they did say that, the courts said, 'you're absolutely right, it isn't a Fair Use'—and in my view it shouldn't have been.

JAMES BOYLE: A lot of us, when we think of edgy cultural productions and subversive this and illegal that and it all sounds so wonderfully black-clad and pirate-y and edgy, we forget the same things can be done to our own artwork. And when we think about that, a slightly queasy feeling descends and we're maybe not quite as sure.

PAT AURDERHEIDE: You might make a point with that material that the filmmaker would be outraged by. You might be a very conservative person who is taking the work of a very liberal filmmaker and showing how stupid liberals are.

JAMES BOYLE: When we think about Fair Use we have to be careful because we are talking about taking something where someone was making an argument, making a statement, and allowing people to change that without permission. I believe we need to do that, we need to have parody and we need to have comedy and we need to have criticism, but it would be facile and stupid to say that there's no threat on the other side. There is a threat on the other side.

KEMBREW MCLEOD: And so it's clear that Fair Use is really important to allowing a democracy to function in an information age, but Fair Use has its limitations. Fair Use is ambiguously written, for instance: it's really hard for just an everyday artist or even his or her lawyer to confidently say when something is Fair Use and when something isn't.

JOHN SORENSEN: Most documentary filmmakers, I think it's fair to say, are very cautious about invoking Fair Use and most act as if Fair Use does not exist.

SIVA VAIDHYANATHAN: And sometimes a publisher, a producer, a distributor, a theater will tell you, 'sorry, I'm not even going to play with your stuff, I'm not going to even consider your stuff if you're going to talk about Fair Use. I need you to clear everything,' and clearance can be either too expensive or just completely impossible.

NARRATOR: In response to these chilling effects, documentary filmmakers gathered together and defined for their own community what the standards of Fair Use should be. They crafted a Best Practices Statement, which is encouraging more documentary filmmakers to recognize that Fair Use exists not just in theory but also in the real world.

[CLIP, Press Conference] Voice 1: We can really take a stronger stand and defend our rights as filmmakers.

Voice 2: Who owns our history?

Voice 3: This is Fair Use

CHAPTER 6: FIGHTING BACK

NARRATOR: In response to the increasing influence of intellectual property laws, a significant movement that resists the assaults on free expression is growing. This movement is diverse and decentralized. Carrie McLaren and her organization, *Stay Free!*, for example, mounted the traveling Illegal Art Exhibit, which is also online. It features works of art that have provoked law suits, threats of law suits or which are vulnerable to legal action. The genius of the show is that, because it is an educational project, the Illegal Art Exhibit is protected by Fair Use.

MARJORIES HEINS: She is a young activist and high school teacher in Brooklyn who had the brilliant idea of pulling together dozens and dozens of works from all media: cartoons that use Mickey mouse, the famous parody of the Starbucks logo that says “consumer whore,” which was the subject of a law suit...

CARRIE MCLAREN: The purpose of it, and the reason we started it, was really to try to give a human face to the copyright debate and to illustrate how the expansion of copyright law is really affecting artists who work in different media.

[CLIP, “Gimme The Mermaid”] Barbie: You wanna test me? You wanna test me in the courts? If we did not buy ownership we bought exclusivity, if you wanna try and check me out, you go ahead and try and do something with it and I’m gonna sue your ass. You can never use it without our permission!

DAVID BOLLIER: She was mounting this exhibit to make a point that our ability to talk about our own culture, our ability to create new works, is severely curtailed by the laws that are on the books.

CARRIE MCLAREN: Several of the artists in the show have run into legal problems, lawsuits or threats, and several haven’t. And part of the reason we wanted to do that is to show how much grey area is involved because when you’re making any kind of work that involves appropriation you never really know what is going to happen so there is a lot of self-censorship involved.

NARRATOR: The Illegal Art Exhibit demonstrates that Fair Use is a valuable tool for fostering free speech and artistic expression. And it encourages other to assert their Fair Use rights and fight back against overreaching copyright claims.

DAVID BOLLIER: The Illegal Art Exhibit was an attempt to show the importance of Fair Use by just asserting ‘we’re gonna to this, you can sue us if you want.’

CARRIE MCLAREN: One of the funny things about doing the Illegal Art Exhibit is that in some cases we have more leeway to show artists’ work than they do themselves because we have a pretty solid Fair Use defense because we’re doing the show for the purposes of criticism and for the purposes of education, where an artist is doing something to create.

NARRATOR: Another tactic used by artists and activists is sometimes called ‘culture jamming,’ which aims to interrupt the traditional relationship between product and consumer. Tactics include modifying billboards, generating mock advertisements and orchestrating media pranks. ‘Culture jammers’ attempt to intercept the monologue that is our culture industry and turn it into a dialogue.

DAVID SANJEK: Some of the involved tactics, which are legally borderline, where people deface billboards not just to put mustaches on people but to counter the images...

NARRATOR: *Negativland* is an experimental sound-collage group credited with coining the term ‘culture jamming.’ In 1991, Island Records sued *Negativland* when they parodied the music of *U2* by mixing it with the outtake of a well-known radio DJ in an infamous example of sonic subversion.

CARRIE MCLAREN: *Negativland* is an audio collective based in California. Over ten years ago now they put out a record called *U2* and it had a picture of a U2 spy plane on it and it basically looked like a *U2* record and it also included music in which they’d heavily sampled *U2* as well as Casey Kasem.

[CLIP, Mark Hosler of *Negativland*] Mark Hosler: In case you’re wondering why we even did it at all its because we got this incredible tape of Casey Kasem doing these outtakes and we loved it so much and he was talking about the group U2 and screwing up and swearing and all that.

[CLIP, “America’s Top Ten”] Casey Kasem: No body cares; these guys are fun England and who gives a shit? It’s a waste of names that don’t mean diddly shit.

[CLIP, Mark Hosler of *Negativland*] Mark Hosler: Unfortunately, we chalked up and spit out the wrong person and they stepped on us and that was *Island Records* and the group *U2*. About 10 days after the single came out, a 180-page lawsuit landed on our doorstep and on the doorsteps of *SST Records*.

CARRIE MCLAREN: They really ended up using it and incorporating it into their artwork and making the whole lawsuit part of their artwork. They started collecting memos; they started talking about it publicly.

[CLIP, Mark Hosler of *Negativland*] Mark Hosler: So we make stuff by taking bits of the environment around us, which happens to be a media environment, and we chop it up, scramble it up, and spit it back out again and make new things out of it. Some of what we do is just serious and some of it's just fun and even if you don't like the music we do, we're addressing some issues that are kind of important to anyone interested in art and music and creativity and our culture and how it's evolving, because it's evolving in some ways that are very very sad and very very oppressive because the corporations are controlling and owning everything in a way that takes something like our little joke, the single U2, and smashes it utterly.

NARRATOR: Another group of 'culture jamming' crusaders who use thought-provoking pranks to challenge captains of industry is *Artmark*, more commonly known as *The Yes Men*. Some of their targets have included the World Trade Organization, Beck, Mattel Toys and George W. Bush. Their aim is to provoke debate by inserting themselves in the mainstream channel of consumer culture, often with very funny results.

[CLIP, CNN Newscast] Newscaster: BLO stands for the Barbie Liberation Organization. Artmark affected its first high profile act of worker-based sabotage in 1993 when it channeled \$8,000 to a group that switched the voice boxes of 300 G.I. Joe and Barbie dolls.

DAVID BOLLIER: One of the more hilarious spoofs that *Artmart* did was to change the voice boxes in these dolls of G.I. Joe and Barbie so that Barbie would say, 'No escape for the guilty, vengeance is mine!' And G.I. Joe would say 'I love school, don't you? Let's sing with the band tonight.'

CARRIE MCLAREN: And then they documented what happened. They took the dolls and they switched them and then they dropped them back in the stores and managed to get news coverage

DAVID BOLLIER: And they've produced a number of pranks and spoofs over the years that again show the absurdity of the ultra-propertization of culture and the dispossession that occurs to all of us when we can't even own and talk about our own culture. So some of their pranks are educational as well as extremely funny.

KEMBREW MCLEOD: Pranks are a way of reaching wider audiences and dealing with serious issues but in a fun way, in a way that you know that TV, news or newspapers will pick up on it.

[CLIP, CBS Newscast] Newscaster 1: Ever get the feeling that corporate America has too much influence on your life? A Communications instructor at Iowa thinks so.

Newscaster 2: And he's out to give AT&T a taste of it's own medicine by taking legal action.

KEBREW MCLEOD: So I had the idea to basically dare the US government into letting me trademark "freedom of expression" because I thought, what could be a greater commentary on the state of culture than if someone can control a phrase like "freedom of expression?" And sure enough, in 1998, the US government gave me the trademark for "freedom of expression" and Carrie McLaren asked to include the trademark certificate in her show, the Illegal Art show, and around the time of its Chicago debut, AT&T used "freedom of expression" as part of an ad campaign.

[CLIP, Newscast] Newscaster: McLeod says he's taking legal action against the telecommunications giant in the same way that large corporations like AT&T use laws against smaller companies and individuals.

KEMBREW MCLEOD: And so I hired a lawyer and sent them a cease and desist letter and said, 'this letter is a demand that you cease all further uses of "freedom of expression" because I own it'...so that became part of the Illegal Art show as well, the lawsuit, or the fake lawsuit and the whole performance of me being outraged about someone using "freedom of expression."

[CLIP, CBS Newscast] Kembrew McLeod: I can just see the headline 'AT&T stops using "freedom of expression;" victory for free speech.'

Newscaster: Now we were unable to get comment from AT&T's corporate office.

KEMBREW MCLEOD: Pranks are just one way in which you can try and engage with the world and enter into debates; it's a more entertaining way. You can also try and change the law and lobby congress. You can start your own organization and try and protect Free Speech in today's information age. There are lots of different ways in which you can deal with and try and change the world.

LAWRENCE LESSIG: I'm on the board of Public Knowledge, which is a Washington-based lobbying organization. It tries to get the message of the public domain into the hands of policy makers so they at least hear it. I also chair the Creative Commons Project and what Creative Commons does is give free licenses to people, copyright licenses, so that they can signal the freedom that they want their work to carry.

[CLIP, Creative Commons Project] Voiceover: How? Our CC brand marks works that are governed by Creative Commons Licenses, a set of standardized copyright licenses available free of charge on our website. We wrote these licenses so that lawyers and courts could read them, then we translated them into a language you can read.

LAWRENCE LESSIG: And what that does is make it much more transparent out there on the web that there are people that don't buy into either extreme of the current debate, either the extreme of all rights reserved or no rights respected, but instead believe that some of their rights they're happy to give away to the public while others they want to keep.

CARRIE MCLAREN: There are a lot of organizations that are doing great work and they always need volunteers. You can get on the Internet and find lots of groups, the EFF, Downhill Battle, whoever they are, and they always want volunteers, they always want donations. Just contact them and say, 'what can I do to help?' I mean there are tons of people. Or start your own group.

NARRATOR: Someone who took the advise of "starting your own group" seriously is Nelson Pavlosky. He felt so strongly about these issues that he co-founded a student organization named Freeculture.org.

NELSON PAVLOSKY: So we started this organization, Freeculture.org, to start up groups at other campuses around the United States and around the world to work on these issues of intellectual property and freedom of speech.

SIVA VAIDHYANATHAN: Now he started a student movement called the Free Culture Movement, or Freeculture.org, and it was named after Lawrence Lessig's brilliant book Free Culture, which came out in 2004. So Nelson was able to build on the work of Lessig and others to spark what has now become a global student movement.

NELSON PAVLOSKY: You really want people to get involved in things rather than having this passive consumer broadcast culture.

INGA CHERNYAK: We are about **a.** informing people of their rights and informing people about the limitations of copyright and **b.** encouraging people to exploit those limitations and really take advantage of the rights that they have with regard to media and culture and participate in it as fully as they can.

LAWRENCE LESSIG: The Free Culture Movement increasingly forces the other side to say why their restrictions on freedom make sense.

INGA CHERNYAK: So what I think is really important, why young people need to know about this, is that if there's a right that you have that you never knew you had, you aren't going to complain when that right is taken away from you.

SUT JHALLY: If corporations take the rights away from video artists today they'll be taking away the rights from you tomorrow

JAMES BOYLE: I personally am not a copyright basher; I view myself as a copyright defender. I think it's a great system so long as it stays within its bounds.

LAWRENCE LESSIG: As a generation grows up using digital technology, the natural way they express themselves will be through these technologies. They won't just sit down at a typewriter and write out an essay. They will increasingly find that their way of expressing themselves is about taking creative work and doing stuff with it. This is how people think; it's how kids think. And unless it's legal to think in this way, we're going to produce either a whole bunch of misfits who believe that they are just not made for this society or we're going to produce a kind of disrespect for the law that will corrode the way in which this law actually can function in our society.

[END]