



Extra! May/June 2006

Fair Use It or Lose It
Copyright owners' threats erode free expression

By Marjorie Heins

Tom Forsythe is an artist with a mission. In 1997, he created “Food Chain Barbie,” photographs depicting the iconic doll interacting with various kitchen appliances. The results—“Malted Barbie” and “Barbie Enchiladas,” among others—were intended, Forsythe said, “to critique the objectification of women associated with Barbie.”

Barbie’s manufacturer, Mattel, sued Forsythe for copyright and trademark infringement. Eventually, a federal court ruled for the artist, finding that “Food Chain Barbie” was protected as a “fair use” under both copyright and trademark law. The court explained that there are great public benefits to allowing critique of cultural icons. Letting Forsythe use Barbie’s image encourages “the very creativity” that is at the heart of copyright law.

This was a success story for free expression, but it cost four years of bruising litigation. Most people threatened with suit cannot afford the risk, the cost and the stress. (Forsythe was helped by pro bono counsel recruited by the ACLU.) Often, they cave in to “cease-and-desist” letters or legal threats, even though they might have a legitimate fair use defense.

Fair use is an essential part of intellectual property (IP) law, which includes the law of copyright and trademark. It allows anyone to copy part—sometimes all—of a work without permission, for purposes such as commentary, criticism, news reporting and education. The copyright law lists four factors to be considered in evaluating a fair use claim: the purpose and character of the use; the nature of the copyrighted work; the amount and importance of what was copied; and the effect on the market for the copyrighted work. There are also fair use and First Amendment defenses in trademark law.

Collage, appropriation art, musical mash-ups and Web-based morphing—all integral to creativity today—depend on the fair use and free expression safeguards in IP law. Without them, owners could exercise absolute control over even a short quotation from a work they own—or a parody like “Food Chain Barbie.” They could use this power to silence discourse, frustrate artistic creation, and censor commentary they didn’t like, by refusing to grant permission for quotes or reproductions.

How much of this is actually happening? What do artists, bloggers and other contributors to culture know about fair use? How do they respond to threats from IP owners? These are some of the questions the Free Expression Policy Project, based at NYU Law School’s Brennan Center, sought to answer in 2004 when we began research for *Will Fair Use Survive?*, a report published late last year. The report summarized phone interviews, focus group discussions, a survey that drew almost 300 responses and an analysis of 320 letters from IP owners that can be found on the website ChillingEffects.org.

At the start of our research, we identified several factors that seemed to threaten fair use. The first is the practice of sending cease-and-desist letters, alleging copyright and trademark infringement and threatening dire punishments, to everyone from artists and social critics to commercial competitors. The practice isn't new, but the volume of cease-and-desist letters has increased with the coming of the Internet, where copying is more visible and reaches larger audiences than ever before. The letters, needless to say, don't mention the possibility of fair use or other free expression defenses.

Even more troublesome are "take-down" notices sent by copyright owners to Internet service providers, which pressure them to censor their own subscribers. Under the 1998 Digital Millennium Copyright Act (DMCA), ISPs have a "safe harbor" from copyright liability if they "expeditiously" remove any material that a copyright owner tells them is infringing. No legal judgment of infringement is necessary.

Although the DMCA allows a subscriber to send a counter-notice contesting the accusation, the requirements of the counter-notice are technical, and not every Web speaker is a "subscriber" who can make use of the procedure. Those contributing to newsgroups, for example, may not even know their material has been removed in response to a take-down letter.

Another impediment to fair use is the "clearance culture." Many publishers expect their authors to get permission for all quotes and illustrations. Music companies, after the early days of hip-hop, established a practice of requiring permission for even the smallest sample. The free borrowing that was critical to rap music, just as it was to blues and jazz, was seen as a threat to the clearance culture.

Another aspect of the clearance culture are "errors and omissions" insurance policies that filmmakers need for commercial distribution. The policies require applicants to report whether they've received permission for every snippet of film, music or text that they've used, in addition to shots of products or even distinctive buildings. The application form makes no mention of fair use. Because independent filmmakers generally can't afford the permission fees, lots of great footage ends up on the cutting-room floor.

Our phone interviews, survey answers and focus groups yielded scores of stories reflecting confusion about fair use, pressures from industry gatekeepers not even to assert it, and chilling effects from cease-and-desist and take-down letters. Not everybody was intimidated, of course, and the stories of resistance are at least as instructive as those of acquiescence.

Among the people we interviewed, for example, were the creator of a parody New York Times corrections page, an editor at the Cape Cod Voice and a small entrepreneur using the term "Pet Friendly Travel" for her company. They received cease-and-desist letters from (respectively) the New York Times itself, the Village Voice and a company selling "pet friendly" chew toys. None of them acquiesced.

The people who answered our online survey ranged from an artist who made "Homeland Security" blankets to a fan fiction website owner who posted a story called "Gaelic Dreams" and received a cease-and-desist letter from the "Gaelic Dreams" import company. Dozens of historians expressed frustration with a clearance culture that allows the heirs of now-deceased artists and writers to control scholarly critique by denying permission to reprint artworks or text unless they vet the content beforehand.

Appropriation art is an obviously critical area for fair use. One participant in a focus group held at the College Art Association, painter **Joy Garnett**, draws inspiration from documentary photos. Unbeknownst to Garnett, one of the images she used, for a painting titled Molotov included in a 2004 show, was from a book published 30 years earlier by the photographer Susan Meiselas. Meiselas' attorney wrote a cease-and-desist letter demanding that Garnett sign over all rights to the painting.

Garnett's reaction was: "How could I ask her permission? Implicit in that would be that for every moment of my creative process, I would have to be concerned with finding the authors of these photographs, contacting them for permission and dealing with their attitudes about permission."

Concerned about a possible DMCA take-down letter, Garnett did remove the image from her website. But by the time she did, her online discussion group took her image and transformed it, much as she had transformed Meiselas' photograph. "Everyone started making digital collage based on the Molotov image. For the next five months, this image went global."

Many other stories emerged from our research. For example:

- Chick Publications sent a take-down notice asserting that a parody of its fundamentalist religious cartoons, "Cthulhu Chick Track," infringed its copyright. After notification from the ISP, the proprietor of the parody site deleted the artwork. A reader responded with surprise: "I thought that 'fair use' laws allowed the modification of copyrighted material for parody purposes."
- Bank of America sent a cease-and-desist letter to a small entrepreneur who makes ceramic piggy banks under the domain name www.piggybankofamerica.com. The piggy bank maker at first "panicked and felt helpless," but eventually found her way to Stanford's Cyberlaw Clinic. A law student wrote a well-researched reply, and Bank of America backed off.
- MasterCard sent a cease and desist letter to Attrition.org, which was spoofing its "Priceless" advertising campaign. Attrition replied that its parodies were fair use, then added a new one to the site: "Thumbing our nose at your pompous bullshit: PRICELESS. There are some things only hubris can buy. For everything else, there's Attrition."

Artists, scholars and others who contribute to culture are often confused about fair use. There is a serious need for community support and pro bono legal help. A substantial number (more than 20 percent) of cease-and-desist and take-down letters on the Chilling Effects site stated weak IP claims or involved speech with a strong free expression or fair use defense. The disconnect between the law and the claims made in many cease-and-desist or take-down letters is striking.

In part because fair use is risky, unpredictable and under pressure from the clearance culture, "copyleft" activists have looked for other ways of countering overzealous copyright control. One innovative alternative is Creative Commons, which provides sample licenses that copyright owners can use to allow copying of their works. Millions of Creative Commons licenses have been adopted, but they depend, of course, on the willingness of the owner. Fair use works on the opposite principle—that it should not cost money or require permission to make reasonable use of words and images that are part of our culture. Fair use is irreplaceable precisely because it doesn't depend on payment, procedures or permission. It needs to be defended, promoted and, most of all, used.

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