

Steal This Look

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This story follows the life of a particular photographic image: its initial fame, followed by relative obscurity in the pages of an out-of-print book. It tells how, decades later, the image was cropped and placed without attribution and surreptitiously on the Internet where I happened to find it while doing image research; how I eventually transformed the fragment into a painting that was shown in an exhibition in New York's Chelsea district; how that painting was reproduced on the exhibition's announcement card and gallery website, and emailed with the press release; how, soon after, I was sued for copyright infringement by the photographer who shot the original image; how, in solidarity, a global community of digital artists "pirated" images of my painting and made remixes of it; and how the image thus became more widely distributed than ever, as a direct result of the wrong-headed, short-sighted attempt to have it removed.

There are several subplots here. One has to do with the function of images in the media -- as rogue entities that (like information) want to be free and resist the controls that people and cultures impose upon them. The other subplot has to do with the principle of fair use and how it has been encumbered by recent extremist steps to regulate creative property. This story demonstrates how the threat to fair use has grown in the atmosphere of ambiguity and intimidation engendered by such regulation.

Copy 'n' Paste

Somewhere between the writing of *Steal This Book*, Abbie Hoffman's incendiary Yippy classic, and *Free Culture*, Lawrence Lessig's passionate argument for a more balanced approach to the regulation of creative property, the world became both more interconnected and more regulated. With unprecedented ease, ordinary people have been technologically enabled to communicate, while at the same time the technology of surveillance, regulation, and control has grown ever more sophisticated in stopping them. Somewhere between 1971 and 2004, the concept of "stealing" changed forever. "Copy and paste" has become the format, the exact instructional basis, for a broad range of computer processing and activity, from the mundane to the highly specialized. In terms of copyright law, everyone has become a thief.

Since the birth of the Internet, activists have significantly expanded their strategies by taking them online, while artists share information and ideas at new levels of exchange. Hacktivism, sampling, shredding, remixing, etc. have evolved into viable forms of creativity, and their support bases become vital subcultures that continue to develop through networked discussion, information aggregation, and file sharing in a global ecology of culture.

Meanwhile, the uncompromising code of machines has begun to supplant and subsume old modes of human behavior and law in the name of protecting creative property and the rights of artists. But what is really being protected here? Surely the rights of artists have never been more devalued, while the checks and balances of human judgment and common sense are being gradually cut out of the loop of control. Control by corporations; control by the few.

I never would have thought that "regulation versus fair use" would become my battle, but this issue, while it may seem specialized, affects us all. Obviously, there are appropriate uses for copyright; artists, musicians, and writers should have legal recourse to protect themselves from outright theft. And although the piracy hysteria seems like something that chiefly surrounds consumers of culture -- music downloaders, software pirates -- and not so much the producers of culture, that is simply not the case. Though it may have had its roots in software theft, this war -- like any other -- has spread to every avenue of social behavior and cultural production, inflaming attitudes and disputes in seemingly unlikely areas of creativity.

History Painting

I make paintings based on journalistic photographs and footage sampled from the news. I look for images that depict moments of political crisis, social unrest-images from the "media narrative" in which we find ourselves immersed. Part of my justification for remaking media images as paintings has to do with the fact that paintings may tell us something different than media images, and

"Until we understand the nature of institutional violence and how it manipulates values and mores to maintain the power of the few, we will forever be imprisoned in the caves of ignorance."

-- Abbie Hoffman, *Steal This Book* (1971) [1]

"Never in our history have fewer had a legal right to control more of the development of our culture than now."

-- Lawrence Lessig, *Free Culture* (2004) [2]

so may engage mass media and photojournalism in a kind of critique.

There is a long tradition of painting that functions along these lines, commenting on society and culture, politics and war, and there is much contemporary painting that samples or appropriates images from the public domain. There are a number of painters for whom sampling photographs and news images is part of a routine process, Leon Golub and Gerhard Richter, to name but two. As far as I know, neither of these gentlemen has ever been sued for copyright infringement. It is not just that their re-purposing of images is transformative and clearly falls under the privilege of fair use; their oeuvres belong to a relatively "pre-digital" era when attitudes surrounding creative property issues were less inflammatory. No one, apparently, has been so brazen or confused as to accuse Golub or Richter of piracy. The critical dimension of their work is understood, and though they clearly build upon pre-existing cultural artifacts, their work has never been seen as "derivative" in the legalistic sense.

Am I a Pirate?

In January 2004, I mounted an exhibition in a New York gallery that was comprised of eleven paintings based on news images. It was called "*Riot*" and presented the figure in moments of extreme emotion or physical distress. [3] The varied subjects included WTO protestors, skinheads, religious fanatics, and punk rockers. The source images were sampled from various mainstream and indie news websites, ripped from their contexts, retaining only their raw emotive qualities and a general, disquieting sense of their possible origin. The conceptual basis for these works rested on the malleability of images in the media, and indeed of photographs in general.

The painting reproduced for the exhibition announcement depicts a longhaired youth in a beret throwing a Molotov cocktail. It measures 70 x 60 inches, the figure blown up to larger than life-size, twisting off the canvas as he pulls his arm back to throw the flaming bottle. Typical of the paintings in the exhibition, Molotov shows a figure at a moment of truth but without the explicit details surrounding his action.

Halfway through the exhibition, I received an e-mail from an acquaintance. He had received my announcement card and recognized the Molotov figure from what he characterized as a well-known photograph by a famous photojournalist; being a permissions-oriented photographer himself, he wanted to know if I had obtained permission to use it. I scoffed, thinking he was mistaken, not to mention out of line. He then sent me the link to the online photo agency where I could view the image.

The photograph was indeed the source for Molotov. The jpeg I had grabbed from some anarchist website a year earlier represented a fragment of its central figure. In the original, the figure stands in a landscape containing sandbags, a tank and other figures; in his "cropped" hand he brandishes a rifle. I soon discovered that this image was part of a well-known photo essay shot in a war-ravaged state in the 1970s. The series was published in 1981 as a book of 71 images -- a form intended to straddle reportage and art. That book, a classic of sorts, has long been out of print.

A week after my show closed, the power of copyright was eerily invoked in the form of a legal letter. The famous photojournalist -- whom I shall refer to as "W." -- had hired a lawyer to threaten me with an injunction: I was being charged with copyright infringement regarding the painting Molotov. In a tone that assumed moral high ground, the letter asserted that I was "simply sailing under the flag of 'piracy,' taking verbatim, protected artistic expression" -- in other words, Molotov was a derivative work based on the pre-existing photograph copyrighted by W.

Note that "derivative" is a legal term, an "old" term that was chosen long ago for use in the Copyright Act. It denotes something that has been recast or revised from the original; for instance, if you wrote a book and someone wanted to adapt it, you have certain rights over the adaptation, up to a point, since you are the copyright holder. Under US copyright law, the creator of an original retains rights to reproduction, modification, distribution, and display of all derivative works. But copyright holders are apt to abuse this term; it is not supposed to be wielded to prevent others from exercising their rights and privileges as they exist under fair use.

The letter included a form for me to sign that would legally bind me to certain conditions consistent with copyright owners' rights over derivative works. For instance, I would have to request permission in writing from W. for any future reproduction or exhibition of the painting. In the meantime, W.'s lawyer began to dispatch a barrage of e-mails and threatening phone calls to my gallery and myself, demanding that the image as well as any references to it be removed from our respective websites. The whole thing seemed exaggerated and absurd, approaching the Kafkaesque.

A friend gave me the name of a lawyer whom I consulted immediately. He is a well-known champion of fair use rights for artists here in New York. As we analyzed my work vis-à-vis the original, it seemed that, while I had certainly utilized a fragment of a key figure from a pre-existing photograph, I had not necessarily created a derivative work, as I shall demonstrate briefly here. I had ample reason to refuse to sign the demeaning and potentially ensnaring form.

Fair & Square

Copyright owners' rights are limited by a principle known as "fair use." Under the Copyright Act, fair use extends to purposes such as "criticism, comment, news reporting, teaching, scholarship, and research." [4] This means simply that the author of a new work does not have to ask permission from the author of a pre-existing work in

order to sample or build upon it for certain purposes. Here then are my main arguments, along with the four cardinal points that are argued non-exclusively in fair use cases:

- 1) *The purpose and character of use (whether the work is commercial or educational -- commercial use does not automatically signal infringement). Molotov is part of a body of work that critiques photojournalism, mass media, and contemporary society; its purpose is "educational," its commercial value as a unique work of art notwithstanding.*
- 2) *The nature of the copyrighted work (whether it is creative or informational). The original belongs to a genre of photography that happens to function as both: it is an expressive (creative) work, as well as a piece of war reportage (informational).*
- 3) *The amount of the portion used in relation to the copyrighted work as a whole. I used a small portion of the original and transformed it significantly in a number of ways: I painted the portion as a monumental portrait, whereas the original was a landscape composed of a number of other elements and figures; also the context, meaning, and intent behind the new work is utterly different from that of the original.*
- 4) *The effect on the potential market or value of the copyrighted work (this is often considered the most important factor). The existence or sale of the painting Molotov does not remotely infringe upon the market value of the original photograph.*

There was also the fact that I did not knowingly attempt to "infringe."

Of particular interest to me was my lawyer's elaboration on "facts" with regard to copyright, and how this relates to cardinal point 2, the nature of the copyrighted work: copyright protection does not extend to facts, ideas, or concepts; copyright extends to the "expression" of ideas, but not to the ideas themselves. Photojournalism, then, is distinct from other forms of photography in that it attempts to record facts, which cannot be copyrighted and remain in the public domain. Not to mention that by taking photographs of factual events, W. is equally operating under the privilege of fair use as a reporter. War photographers do not obtain releases from their subjects. If the figures and events portrayed by W. are not staged actors, if indeed they are real people engaged in historic acts, then they do not consist solely of unique elements of artistic expression; their factual elements cannot be made the exclusive property of one author.

Joywar

When I was first threatened with this lawsuit, I posted a short letter to an online discussion list hosted by the new media arts organization Rhizome.org, of which I am a member. The letter outlined my basic situation, leaving out names and particulars. The idea was to open my case to discussion. It seemed timely; recent energized discussions on Rhizome had focused on the issues surrounding The Grey Album. I wanted to know what people thought and to what extent I could expect grassroots support should I need it.

As it turned out, people were surprised and outraged that I was being sued, especially since it was over a painting. It is one thing to copy something photographically or digitally and to start splitting hairs as to whether the new work is substantially transformative; it is quite another thing to mistake old-fashioned painterly quotation for digital sampling. Gradually, something began to dawn on me: this whole case was not about the painting itself. It was really only about the presence of reproductions on the Web. Low-resolution jpegs of paintings bear more of a resemblance to photographs than they do to the paintings themselves. Seen in the flesh, Molotov was clearly something quite different from its source image; but the thumbnails on the Web -- flattened, simplified, and reduced in size -- constitute a partial return to the photographic medium, and bear a closer resemblance to the figure in the original photograph -- too close for comfort, apparently.

W.'s lawyer must have reasoned that the best way to get me to remove the images of Molotov from the Web was to convince me that the painting itself was derivative and that I was guilty of piracy. If I fell for it and signed the form, I would have no recourse but to cede control of all reproductions to W.

After an exchange of letters, it became clear that my explanations and arguments were not satisfactory to W., whose lawyer came back with a more aggressive tack, this time demanding a licensing fee. I decided that it was best to remove the images of Molotov from my website to pre-empt any threats directed toward my Web hosting service, which would have been a conventional next move on the other party's part. I announced my decision in a post to Rhizome. I could not have predicted what happened next: several list members grabbed the jpeg to mirror it on their own sites in a gesture of solidarity; images of Molotov would still be out there and accessible, circulating on the Internet, while I could avoid the prospect of being threatened with a court order.



Fig. 1: invert pirate x 2. Courtesy of Mark River (MTAA)

The artist Mark River of the collaborative net art duo MTAA (M.River & T.Whid Art Associates) posted a Photoshopped version of Molotov to the list, and the idea of making protest art-remixes of Molotov caught on like wildfire. His collaborator, Tim Whidden, declared "Joywar" and before I knew it, a virtual sit-in was taking place on my behalf. [5] "Joywar" hilariously references "Toywar," the 1999 battle between Zurich-based net.art collective etoy.com and eToys, the online toy vendor. For those not familiar with the case, the retailer, worried that potential customers might mistakenly end up at the art site, issued a court order to close down etoy.com; in response, etoy supporters engaged in various forms of virtual activism, bombarded eToys.com and overwhelmed its servers. Due to the "Toywar" and the help of almost a dozen lawyers enlisted by etoy, the toy corporation lost five billion dollars worth of equity in less than 3 months, its stock was devalued to \$1 per share, and etoy.com was able to keep its name.

So for a short while, "Joywar" was the new "Toywar." Friends and strangers, net artists, designers, and bloggers (including members of etoy.com) began circulating copies of Molotov, remixing it, and posting it on their sites -- people created interactive art, digital collage, ASCII, Flash animations, you name it. [6] Blogs and BBSs posted links to the agitprop and to our discussions on Rhizome, enjoining readers to appropriate Molotov and make mash-ups of it. In the space of a few weeks, "Joywar" had spread via RSS feeds and news aggregators like a virus, to circulate freely and perhaps indefinitely.

Meanwhile, as if to confirm my suspicions about the real motive behind the case, the threat of an injunction was dropped as soon as my gallery and I removed the thumbnails of Molotov from our websites. I received a terse email from W.'s council thanking me, but requesting the URL of the website where I had found the fragment of the original photograph. [7] That was at the beginning of March and I have heard nothing since.

It's Your Revolution

The figure of the angry, handsome youth throwing a flaming Pepsi bottle is the perfect emblem for struggle; in this case, the struggle for artistic expression in an atmosphere of increasingly oppressive regulation. [8] Without him, "Joywar" might never have taken place, or at least it wouldn't have had the same panache. Of course, I wasn't being sued by Pepsi, nor was this an issue of corporate censorship. Even the accusation of copyright infringement was spurious. This case should never have been; it slowly revealed itself as little more than the product of an over-sensitive, controlling photographer and the manipulations of a bombastic lawyer. Whatever the true scenario, my free speech had indeed been threatened, the principle of fair use trashed, and it cost me money just to ascertain my rights and hold my ground.

As Abbie Hoffman might have insisted, the real heroes of this story are the pirates, since the best way to fight oppression is to invent ingenious ways to circumvent it -- to hack it. Remixing Molotov was a collective demonstration of just such a hack. It is in this spirit that I offer this story: be creative as you can be, protect yourself, employ evasive measures if you must, and don't back down. If you recognize the case against you as unfair, as spurious, if it makes you mad and you feel the urge to take up a virtual Pepsi bottle, fill it with metaphorical petrol, light it on fire and throw it at something -- go for it. Remember what Abbie said: "We cannot survive without learning to fight." So go ahead -- and don't even think about asking for permission -- just steal this look: <http://www.twhid.com/misc/joy/molotov/>; or <http://www.rssgallery.com/book.htm>; or <http://www.anatomyofhope.net/joy/>; or <http://navasse.net/joywar/>; or <http://art-design.smsu.edu/cooley/molotov/>; or <http://www.voyd.com/joywar/joywar.jpg>; or <http://sasnak.org/archives/000092.html>... [9]

Notes:

[1] Abbie Hoffman, *Steal This Book* (Pirate Editions Inc., 1971; Four Walls Eight Windows, 2002), ISBN: 156858217X
Bootleg copy stolen from the Library of Congress in 1971: http://www.mindmined.com/public_library/nonfiction/abbie_hoffman_steal_this_book.html

[2] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press: 2004), ISBN 1594200068

Free downloads: <http://www.free-culture.cc/freecontent/>

[3] Astrachan Gunst & Thomas, P.C., *Fundamentals of Copyright Law*, Baltimore, Maryland:
http://www.aggt.com/resources/funda_ip.html

[4] Paintings from the *Riot* series: http://www.firstpulseprojects.net/riot_2003/Index.html

[5] *Joywar: The Molotov Years*, *Net Art News*, March 8, 2004: <http://rhizome.org/netartnews/story.rhiz?timestamp=20040308>

[6] Joywar solidarity page hosted by artist/composer Michael Szpakowski:

<http://www.somedancersandmusicians.com/solidarityold.html>

[7] I was never able to find that URL again.

[8] *It's your revolution*, Flash animation by Pau Waelder: <http://www.sicplacitum.com/arte/molotov.htm>

[9] More examples of Molotov, remixed:

Mirror image:

<http://www.twhid.com/misc/joy/molotov/>

Collage:

<http://www.rssgallery.com/book.htm>

<http://navasse.net/joywar/>

<http://www.voyd.com/joywar/joywar.jpg>

<http://www.electrichands.com/shanghai-pepsi.jpg>

<http://sasnak.org/archives/000092.html>

ASCII:

<http://www.anatomyofhope.net/joy/>

<http://www.voyd.com/joywar/ascii.htm>

Interactive + animation:

<http://art-design.smsu.edu/cooley/molotov/>

<http://www.gloriousninth.com/piratesofpenzance.html>

http://www.somedancersandmusicians.com/Some_QuickTime_Movies/art.mov

<http://544x378.free.fr/%28WebTV%29/html/molotov.html>

<http://www.anti-chambre.net/joywar/>

<http://www.ysagoon.com/diz/web/molotov/>

Thanks to everyone; I wish I could include all the remixes here.

Fig.2: JOYWAR! NOW. Courtesy of Ryan Griffis.

