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**“It’s...well, see, it’s like Sir Isaac Newton once said,
‘If I have been able to see further, it was only
because I stood on the shoulders of giants.’”**

—Intellectual property attorney Hal Stakke
quoting Sir Isaac Newton

GRIST for the MILL

Beginning with the Industrial Revolution, and extending all the way through the twentieth century to today’s late high-capitalism, the increasing co-option of our mental and physical environment by private commercial interests has intertwined with an evolving awareness in art of this ever-growing, unilateral encroachment on everyone’s personal and public space. There is a certain perceptual stance most artists have always taken in relation to their work and their environment—a perception that sees everything out there as possible grist for their mill. Some art is concerned with the social consequences of what is happening around it, other art is not, but all art tends to be affected by what it looks at whether this influence is unconsciously assimilated or openly displayed. Whether an artist paints a tree in a landscape or samples someone else’s music, they just use what’s out there; and everything is equally usable if it “works” to make the art they want to make. It matters not who “owns” the music they sample any more than it matters who “owns” the tree they paint. Ownership has never had anything to do with creativity.

This ancient, universal artist’s view of art’s potential subject matter proceeded just fine for quite a while. For centuries

there were no lawsuits against landscape painters by landowners, nor did they demand a cut of the painting's price. (In contrast, though it's never been tested in court, Disneyland presently claims copyright on any photos taken inside their imagineered landscapes.) Throughout the twentieth century, the world was surprised by many unforeseen new technologies, which began to produce new forms of thinking and new forms of creative activity. For instance, one of these new technologies—the ability to capture and reproduce sound electrically—began to allow those involved in creating music to think differently about what music might consist of. Electrical transcription meant that music no longer needed to be performed live to be heard. Music as an artifact frozen in time and space was almost immediately seen by composers as suggesting new and inspiring possibilities for recombination. Prerecorded sounds and music began appearing in *musique concrete* performances by the second decade of the last century. At the same time that electrical invention was spreading, so were brand new techniques of visual collage, like recombining disparate elements and imagery into a single new composition: the founding attitude of surrealism in general.

Collage first appeared in a brand new reproduction technology developed in the late 1800s called photography. Photography provided a way to freeze light/time into material form, which made it possible to manipulate the image post-creation. Photos could be cut up and recombined or manipulated in the darkroom to make joke or “impossible” photo imagery. Lots of fun. Lawsuits against early photographers were unknown, nor were there lawsuits against turn-of-the-century painters who embraced collage and the reuse of found material. They began to attach materials and objects from the world around them to their canvases, including commercially produced products like candy wrappers or fragments of advertising. Still, no offense was taken. Musical collage, for the most part, remained in the realm of classical music up until mid-century. However, even before then, during the centuries when only live music was possible, many composers routinely included pre-existing musical “quotes” within new work, ranging from familiar folk melodies to fragments borrowed from their classical predecessors or contemporary colleagues. When recorded music came along, it was no great leap for some

composers to add such material into their compositional concepts. Music proceeded exactly as it always had and as it wanted to, with hardly a hassle from the early commercial copyright laws that were starting to congeal in the shadows.

In the realm of fine art, the use of copying and appropriation was not only a tradition but also seemed to grow in emotional relevance as the perceptual world around artists became fragmented by the new possibilities for reproduction introduced by electric imagery and sound. We'll skip World War I and Dada's found objects, though both profoundly affected an artistic view of the world as both absurdly surreal and entirely available for art via appropriation. With surrealism came the concept of **detournement**, which consisted of cleverly changing the nature of existing material to make it say or show things it never originally intended to say or show, often in the form of ironic juxtaposition and derailment of meaning; the earliest form of culture jamming. And still, there were no lawsuits. So long as it was fine art, these methods remained relatively uncontested.

In the middle of the twentieth century, the "crassness" of Pop Art emerged in rude response to American society's already commercially saturated consciousness, particularly the unavoidable barrage of advertising iconography that increasingly filled public views with its insistent "taste." With the "copying" in Pop Art, we saw the beginning of lawsuits based on the infringement of the private copyrights of commercial subjects that became the unwilling content of new works. Even then, such constraints on artistic freedom were still generally seen as absurd. While the New York Times sued Robert Rauschenberg for an unauthorized silk-screen of one of their news photos, Campbell's Soup saw Andy Warhol's paintings of their soup cans as great free advertising. Which it was.

Jumping Music

In the late '50s, collage and the use of "found" subject matter (apparent in classical music for some time already) jumped over to pop music. This happened most notably in the form of Buchanan and Goodman's "novelty" edits, which consisted of fragments of then-current rock & roll hits,

that were connected by narration and completed by clips of familiar rock & roll song lyrics. This was the beginning of collage music with mass appeal in the pop realm, and Buchanan and Goodman were legally threatened by the owners of the music they incorporated. Music owners began to take the artistic appropriation gambit as some kind of serious economic threat, increasingly criminalizing it as commercial "theft."

But collage and the artistic attitude behind it continued to grow and spread during the last century, eventually infiltrating all forms of creativity. In fact, collage and appropriation may now be considered the single most influential and most defining aesthetic for the entire twentieth century. And it shows no signs of diminishing in the twenty-first. Turn on the news: it's solid collage. Watch a commercial or a music video: it's solid collage. Go to a live baseball game and see the mix of replays and found audio and video clips from popular culture that are shown on big screens to wind up the audience: that's collage as well. The home computer is the ultimate collage and appropriation box, and every computer user in the world knows and understands the term "cut and paste." But amazingly, just as this cut-and-paste style of thinking began to spread far and wide beyond the realm of fine art (even becoming part of the public's new attitude toward an increasingly complex mass of information that they must navigate), this process also began to get sued in the art of music.

Once music became a lucrative product embedded in physical form, such music was technically no less an art form than any other, but you'd never know it by its new owners and distributors. By mid-twentieth century, music of the popular variety had been thoroughly harnessed by marketers of recordings as a mass commodity. Though labels and producers touted the artistic qualities of popular music in their PR, behind the scenes it was definitely a commodity game. Profit and loss, not artistic integrity, determined its success or failure, and popular recorded music became all about money, where it remains focused to this day. Thus art, which had never been defined as a business, became a business in the form of popular music; and the creation of mass-produced music became a competition in the hands of record labels.

This kind of corporate-think trend never materialized in painting or other fine arts in the way it certainly has in

music (although it still occasionally happens in other arts too), because the fine arts world is much smarter about art and what makes it tick. Culturally, they see that it's not a competition but a continuous, all-inclusive accumulation forever. They better understand that all art is steeped in "theft," and that art has always proceeded by copying from whatever appeals to it, including other art. Add to that the fact that fine art generally ends up as a singular, unique object (the "original" is all there is), while music ends up as endlessly mass-producible objects containing content that can be sold again and again over time. Music, which was once something that could only be heard live and in person, became a repeating reproduction—a mass marketable commodity, regardless of how much art it might happen to contain—forever in competition with all other such music "products."

Music stands apart from the other arts for other reasons as well. Major and minor music label marketing, for example, is not run by artistically enlightened museum or gallery director types but by dollar hungry entertainment moguls, their accountants, and their lawyers. Crime moved in. By mid-century (and continuing to this day), many of these music labels were illegally cornering distribution with payoffs and thug tactics, co-opting airplay with payola, concocting rip-off artist contracts, cooking the books for embezzlement, and were even leaned on or infiltrated by organized crime. (This is well documented in Fredric Dannen's book, "Hit Men," and things haven't changed since that book was published.) So you have the *industry* of pop music becoming a crass and opportunistic nest of thieves and scoundrels, in which any artistic priorities—if understood in the first place—were quickly readjusted or cast aside on a regular basis in favor of the bottom line. In pop music, with the aid of modern copyright law, any kind of perceived copying became just another way to collect money and crush possible competition, even though music, possibly more than any other art form in human history, is thoroughly based on copying the precedents of others.

In Crept Collage

Into this peculiar, highly competitive, proprietary-obsessed “art” of popular music, eventually crept the well-respected, classically founded motivations and techniques of collage. Who knew? Cutting and editing analog tape recordings of musical and non-musical material into new compositions was occurring throughout the 1950s, '60s, and '70s; but it wasn't until the 1980s that all hell broke loose. The music electronics industry began marketing various digital sampling devices and computer controlled music sequencing software intended to allow musicians to easily play back the sounds of “public domain” flutes, cellos, and saxophones. The inventors of these “samplers” never guessed that this new device would also easily allow musicians to capture and play back bits of *any* pre-recorded music or found sound and then add it into their own music. Collage (in the form of sampling others work to make new work) began to be routinely suppressed. Pop samplers, initially emerging in rap and hip-hop, began to freely pluck the grooves they wanted from the grooves of other popular music and soon found themselves in court. By the late '80s and early '90s, lawsuits and threats of lawsuits proliferated as this particular capturing technology spread far and wide throughout music of all kinds. Musical collage and its use of “unauthorized” sound became a criminal activity. Collage music became criminal music, and the natural evolution of rap and hip-hop was stopped dead in its freethinking tracks. Copyright law became the art police.

Presently, we have a somewhat more settled situation in which sample clearance fees, rather than lawsuits, rule the economies of collage in popular music. But music owners continue to make great efforts to stamp out unauthorized collage in music, even going so far as to intimidate and threaten, via the RIAA, any CD pressing plants that manufacture any sort of “unauthorized” sampling or found sound music. The RIAA acknowledges the existence and idea of fair use only in its literature's footnotes,* and seems to hope this concept won't spread.

As artistically stupid as this looks on the surface (trying to control what art wants to do whether that art happens

* For more on Negativland's own involvement in how this small concession to fair use came about, go to www.negativland.com/riaa/index.html.

to be a “product” or not), this kind of control has become possible because of established, inflexible copyright mandates across all the arts, which allow any and all creations to be “protected” as private, untouchable property, unavailable for any purpose other than its original purpose—including any reuse in new art by others. For artists, copyright means that other art is emphatically not allowed to be seen as part of their landscape, not allowed to be part of their usable environment, and not allowed to be something that influences their creative minds. Art has become completely unavailable to any succeeding artist’s use without payment and permission. One can buy it and absorb it as a consumer, but one can’t do anything further with it. This withdrawal of all copyrighted art from any further creative recycling goes directly against the universal and historical prerogative of artists to see the entire world around them as grist for their mill. If they see other art products as part of the public environment they materially draw from, copyright tells them they cannot.

Is Making Art Supposed to Be This Difficult?

Something has happened in human creativity which the authors of copyright law never foresaw and thus never accommodated: the fragmentary reuse of other’s art to make new art. The opportunistic minds behind pop music, in particular, used copyright law to argue that this proven creative form (fragmentary and transformational appropriation within new works) was no different than counterfeiting entire works. Copyright law did not distinguish such a difference and neither did they. Sampled source owners called these collaged uses “piracy” and “theft” and sued to crush the practice because they did not and do not understand how modern art functions; they claimed that such reuses were in economic competition with their source works, and they were not getting paid for the reuse.

After a while, it somehow wore into their brains that modern musicians were not going to let go of collage as a technique and that sampling was only spreading more profusely into all varieties of new music. So the best way to

handle it from a business perspective was to ignore this blow to proprietary ownership and concentrate on getting paid for the reuse. That's where we stand today, and here's what's still wrong with it—

Even when a recognized art form like music manifests as a commercial mass commodity, it is still an **art form** and necessarily depends on free expression. Free expression demands free access to the elements of its expression, even when those elements happen to be owned by someone else. **Especially** when they are owned by someone else. This is the free pass all art has always been given to speak its mind, and commercial interests of any kind do not negate this creative imperative. If we want this kind of art to occur at all, then such freedom comes with the territory. We don't expect a writer to get permission and make a payment for using particular words. We don't require a painter to get permission and make a payment to represent a billboard that sits in the middle of her landscape view. Yet we do exactly this in the case of music collage, which suggests that such payments and permissions are pure economic opportunism based on this particular medium's existence as mass-produced objects. How does the material form of music change the desirable principle that anything is grist for artistic mills? The simple fact that an art form happens to be **worth** more in its potential income generation does not negate the principles of free expression that form the creative foundation of all art and its reason for being. Pre-existing private properties, even pre-existing art, can and do form the "alphabet" that any form of modern collage might use. The current copyright restrictions on using this alphabet constitute a prior restraint that amounts to both inhibiting the process and censoring the creative practice itself. This intimidation of art should not be happening just because the practice of collage happens to be housed in a commercial product.

More Attitude

Collage, which places familiar and recognizable elements from our common experience into a new context, often makes a social commentary or a statement about social awareness. It often expresses forms of satire, direct reference, and criticism. It

is not always polite. As such, it often represents a potent form of creative free speech that requires just as much protection as any other form of free speech; the entire range of practices we call “collage” must be considered in this way in order to protect its potential in every possible manifestation. To trivialize these concerns by pointing out how rap musicians simply use a sample of another’s music just because they like the riff is to miss the point, even irrelevant. Allowing source owners to have control over this practice can also prevent another collagist from using a clip of music or disreputable dialogue in a critical or unflattering context if the owner refuses to give permission even after being offered payment for it. Fair use may be available to parody for this reason (as defined in the Supreme Court 2 Live Crew case), but it’s **not** available at all to satire. And, by the way, do you know which is which?

“Fair use” claims for cases of sampling/collage in our courts are now a morass of tortured and irrelevant nitpicking guided by a technologically outdated law that is wholly inappropriate for acknowledging or accommodating the practice of collage. The creative process has lost all benefit of the doubt, and commerce decides what can and cannot be art on whims of selective prosecution. These being the rather insane laws of modern art that we are stuck with, we are proud to sanely make criminal music for all to hear and judge for themselves.

Pay to Play The dangers to collage caused by payment and permission requirements also include the aspect of affordability. Once collage had made its presence sufficiently felt in modern music, proving that it would obviously not be driven away by litigation, the music industry settled down to pursue charging everyone to do it. They all set up brand new suites in their office buildings devoted to this inter-corporate trade in music samples, and sample usage clearance fees were adjusted to what competing music corporations could pay. Purchasing a single sample can run anywhere from hundreds to many thousands of dollars, depending on what the owner arbitrarily decides the potential market will bear. If these commercial rules of legitimacy

are followed, collage becomes confined to realms in which there is a wealthy label supporting the musician's desires and a mutually lucrative trade among relatively rich and already successful music purveyors. Any independent, grass roots efforts at collage are left out of this expensive loop of sampling "legitimacy."

From our personal experience as collage music makers who have no affiliation with the major labels, we in Negativland can assure you that we simply could not be making the style of collage music we do at all if we agreed to pay for every clip and sample we use. While we agree with the philosophical and ethical idea of listing on our CDs as many of our found sound sources as can be known, the cumulative price of **paying** for the use of these samples (working in the particularly densely sampled way that we do) is totally prohibitive to grass roots, independent, barely surviving practitioners like us. Just one of our CDs may use a hundred or more different samples and fragments recorded off of radio, movies, TV, or records. The haphazard nature of found sound collecting from mass media often doesn't happen to include the owner's name and address, so we sometimes have a very practical difficulty in even knowing who actually owns the bits we recorded—some of which we don't get around to using until years later. Even knowing or finding the owners doesn't guarantee permission since the owners often ignore the artist's request. (We have heard from many other independents who seek permission that no response is a usual response.) If they ever **do** get back to you, the whole process can take years. Thus, this process can abrogate any release schedule you may be financially counting on, and this becomes crucial when you are releasing only one record at a time as a small independent label. And then, of course, even if we could afford to pay for all these multiple samples from all these multiple owners, and all that could be worked out on schedule, these usages still depend on the multiple permissions being granted. This is where source owners can prevent this kind of work from appearing at all if they don't happen to like the content or attitude of it.

Which brings us to fair use.