



Art At Risk: copyright, fair dealings and art in a digital age

*Part one: Teacher's Resource
Susan Ballard and Pamela McKinlay
revised June 2011*

Art at Risk was a collaborative research project undertaken by Dr. Susan Ballard and Pam McKinlay at the Dunedin School of Art, Otago Polytechnic from 2009-2010. It was funded by AKO Aotearoa Southern Regional Hub, the Dunedin School of Art and the Otago Polytechnic Research Committee.

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ART AT RISK: Copyright, Fair Dealings and Art in a Digital Age.

A research project by Pam McKinlay and Susan Ballard, Dunedin
School of Art at Otago Polytechnic.



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POLYTECHNIC
Te Kura Matatini ki Otago



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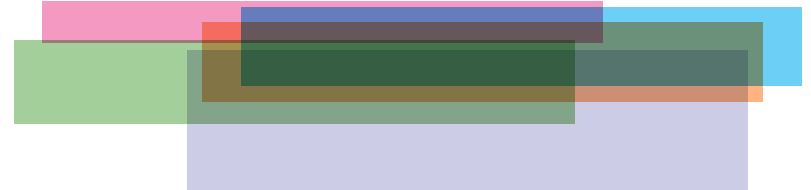
Documentation of issues arising from 14 student projects in Aotearoa NZ

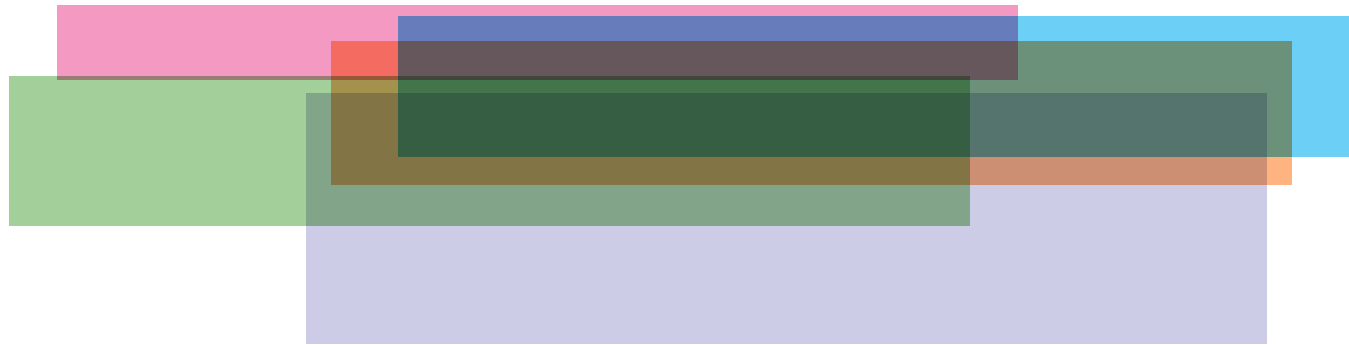
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Casebook: a source of legal reference cases that support the case studies.

Each section of this publication is available individually as a .pdf download from our website hub:

<http://www.otagopolytechnic.ac.nz/schools-departments/art/research-search/academic-projects/art-at-risk.html>





introduction

introduction to the resource

This project investigated the digital image, and the associated delivery of copyright information in the tertiary classroom. **Art at risk** provides a set of research resources and practical information for teachers working with digital images. **Part One: Teacher's Resource** includes a set of posters that guide students through the decisions that need to be made when using digital images, and a set of case studies that include a record of real classroom situations and the decisions that were made regarding the risk of copyright infringement, understandings of appropriate ethical behaviors, and our critical and social contexts in New Zealand Aotearoa. **Part Two: Background Research** documents, analyses, evaluates, considers and recommends methods for engaging with digital images whilst paying careful attention to the movements towards open source and creative commons approaches to digital media. Part Two includes extensive bibliographic data and a glossary for teachers keen to extend their knowledge of the complex frameworks of copyright.

Because of the complex nature of research into copyright, and the risks of confusing legal fact with opinion, this project is divided into two parts. PART ONE contains the teacher's resource and PART TWO the background: extended research, bibliographies and a glossary of terms to help teachers unpack the complex occurrences in the case studies.

The information contained in this project is not legal advice. It is a collection of resources relevant to the use of images in a digital context. In addition, as we have noted over the term of this project, terms and conditions of use for images on sites changes rapidly often with little or no notice as does the law itself, so students and teachers need to remain vigilant.

what is COPYRIGHT ?

Copyright is a set of rights granted by default to an author of an original work. Copyright does not protect facts, ideas, information, styles or techniques used in creating an artistic work – copyright protects the “expression” or the work itself. In return for receiving copyright protection over their works authors, under the same law, grant exceptions to their work for the public good. These are called “Permitted Acts” and cover fair dealings, educational exemptions and library uses.

All material in this resource employs the following basic rules of copyright. Some works have layers of copyright. In music this might include the tune, lyrics, and recording. All content has copyright unless it states otherwise. In some cases where the original is not recognised as a work of art under the law a representation such as a photograph will be. The copyright in an underlying representation of a work is not always the same as the original. (An old sculpture may be in the public domain, and a new photo has new copyright).

In addition we recommend that students and teachers take a multitude of questions into consideration when considering whether a digital image can be used.

- Who made it?
- Is it in copyright?
- How can it be used?
- When was it made?
- What is your source?
- What is your purpose?
- Who is going to see it?
- Where did you ‘find’ it?
- What is your intended use?
- How do you want to use it?
- Does this fall under fair dealings?
- What is the market for your work?
- What do you want to use? Sound? Picture? Video clip?
- What are the requirements and responsibilities of use listed in the terms and conditions?

Art At Risk: copyright, fair dealings and art in a digital age

The use of digital images by artists is now widespread. In art schools students engage with cultures of remix and appropriation on a daily basis. We need to prepare our students for critical and informed engagements with these media, and as teachers we need the tools to be able to navigate the metadata and data fields efficiently and with knowledge of the legal and technical specificities relevant to the digital image. **art at risk** provides these tools. Definitions of copyright, fair use and fair dealing along with details of the relevant NZ copyright legislation can be found in the **glossary**. Background on the specific issues regarding artworks can be found in the **publication or exhibition** section.

Copyright myths abound. Some of the more common include:

- ‘if it’s on the internet it’s in the public domain’
- ‘if it doesn’t have a copyright notice it’s not copyrighted’
- ‘my use isn’t hurting anybody - in fact it’s free advertising’,
- ‘copyright violation isn’t a crime’
- ‘linking is okay because then I’m not saving the file to my harddrive’
- ‘it was fair use’.¹

From Flickr to Facebook to YouTube students engage both still and moving digital images and negotiate different permissions and database resources every day. A recent study by technology giant CISCO predicted that by 2013 video will make up 90% of online communication.² An understanding of the role of the digital image in the teaching of art is essential to the development of informed and engaged learners who use images not simply because they are there, but because they know and understand the implications of the use of images in a digital age. In this project we have developed guidelines as to how to approach the use of digital images– and answer some of the questions that students ask everyday:

- What can you download from YouTube?
- Is everything on Flickr available to use?
- Can I cut this image up and call it my own?
- What happens if I upload my project to Facebook?

Being able to confidently answer these questions will raise the level of critical debate surrounding classroom engagement with the digital image and allow for deeper research in the use of digital images in tertiary environments.

can I use that? is a set of posters and handouts that introduce issues in copyright, privacy and fair dealings.

The Beginners Online Guide to Copyright is a classroom primer.

Digital Image Rights is a guide to good practice in evaluating the digital image, it highlights layers of copyright and asks the questions: where did you get it? What are you going to use it for? Who is going to see it?

Can I Use That? is a flow diagram that traces the digital image from source to distribution via copyright pathways.

What’s Fair? People Watching People is a poster that outlines the relationships between public and private space including information on what surveillance is, who does it, why and what happens in public space. It also looks at privacy and the boundaries of privacy including trespass, interception and the digital contexts that these relate to.

Digital Sources for all Media introduces how to read licence statements, and how to make decisions about where to get images and what to use. We also list locations and sources for free media.

Privacy and the Digital Image introduces privacy in digital contexts including definitions of privacy and ethical boundaries.

All posters can be printed for classroom use.

The core of **art at risk** is a set of **case studies** drawn from a pool of current art students and recent graduates from art schools in Aotearoa New Zealand. Questions of copyright and remix arose during the development of these art projects either at their gestation or as processes *en route* to final student artworks. It is the teaching recommendations and responses to the processes of exploration and experimentation where students push at the boundaries of the complex legal nexus of copyright and privacy that are documented here.

The fourteen studies introduce the kinds of ideas and projects that students think of, including a sampling of teacher responses. Each case study is formatted to examine the Artistic, Legal and Ethical implications of the project; including a risk management strategy for the project and links to relevant cases in New

Zealand and international law. In addition each case study includes a small selection of relevant artists works and practices that have been publicly exhibited or acknowledged. The case studies focus on student artworks **proposed or created in a classroom situation only**. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and information for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context. A *Casebook* lists the cases and legal thinking we make reference to in the case studies.

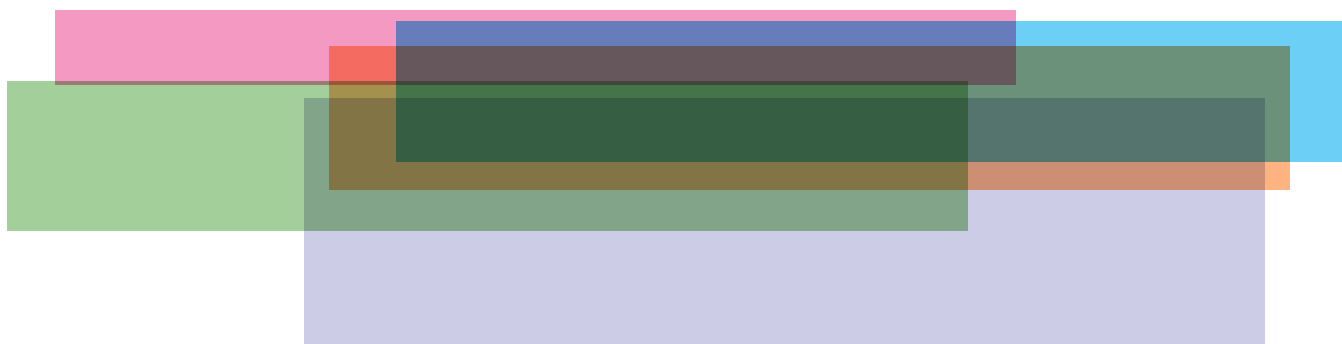
Our analysis provides considered and critical information for teachers and students wondering about **how digital images can be used, in **what** circumstances there might be restrictions, **why** these restrictions are there, **when** to rethink projects or apply for clearance, and **how** to negotiate appropriate use and permissions.**

This project hopes that in following these models for how to approach digital images in the classroom, teachers and students will become critically aware, digitally literate, and informed leaders in the ethical and legal use of images.

1. Brad Templeton, "10 Big Myths about copyright explained" (October 2008), <http://www.templetons.com/brad/copymyths.html>

Brad Templeton was the first owner of a ".com" company (in the world) and is a member of the EFF; See: Committee on Intellectual Property Rights and the Emerging Information Infrastructure, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academy Press: Washington DC, 2000), 124-127.

2. Jon Stokes, "Cisco report: the exaflood will be televised," *Arstechnica, Business* (10 June 2009), <http://arstechnica.com/business/news/2009/06/cisco-report-the-exaflood-will-be-televised.ars>



can I use that?

beginners

Online Guide to Copyright, Art Law and Fair Dealing

*A filtered selection of online material to begin
your investigations into copyright and fair dealing ...*

CREATIVE DIRECTIONS

http://www.tki.org.nz/r/media_studies/creative-directions/index_e.php

Creative Directions is an intellectual property (IP) resource for media studies teachers developed by the Ministry of Education and the Intellectual Property Office of New Zealand (IPONZ).

ART LAW: IMAGE RIGHTS

http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm

A concise primer to the Art Law Rights in images by Harvard Law School with plenty of links to illustrative cases.

THE COPYRIGHT WEBSITE

<http://www.benedict.com/Default.aspx>

This is a great website for real world, examples and practical copyright information. It provides general copyright information for educators, students, re-mixers, mash-uppers and confused citizens.



TEACHING COPYRIGHT

<http://www.teachingcopyright.org/curriculum/hs>

EFF's Teaching Copyright curriculum was created to help teachers present the laws surrounding digital rights in a balanced way by getting students to think about Copyright rather than intimidating them.



AN ALTERNATIVE PRIMER ON NATIONAL AND INTERNATIONAL COPYRIGHT LAW

<http://www.copysouth.org/portal/copyright-primer>

What are the basic nuts and bolts (and traps and dead ends) of copyright law? Who owns copyright? What rights do users have? Do international copyright conventions work in the interest of the peoples of the world, and, if not, why not? The intended audience: librarians, musicians, downloaders and book readers, information activists, students, and others who want to know how the copyright system actually works in practice. You will NOT find this primer on the list of texts recommended by the World Intellectual Property Organisation (WIPO) but it is written by lawyer, Alan Story. Published by the CopySouth Research Group.



digital image rights can I use this image?

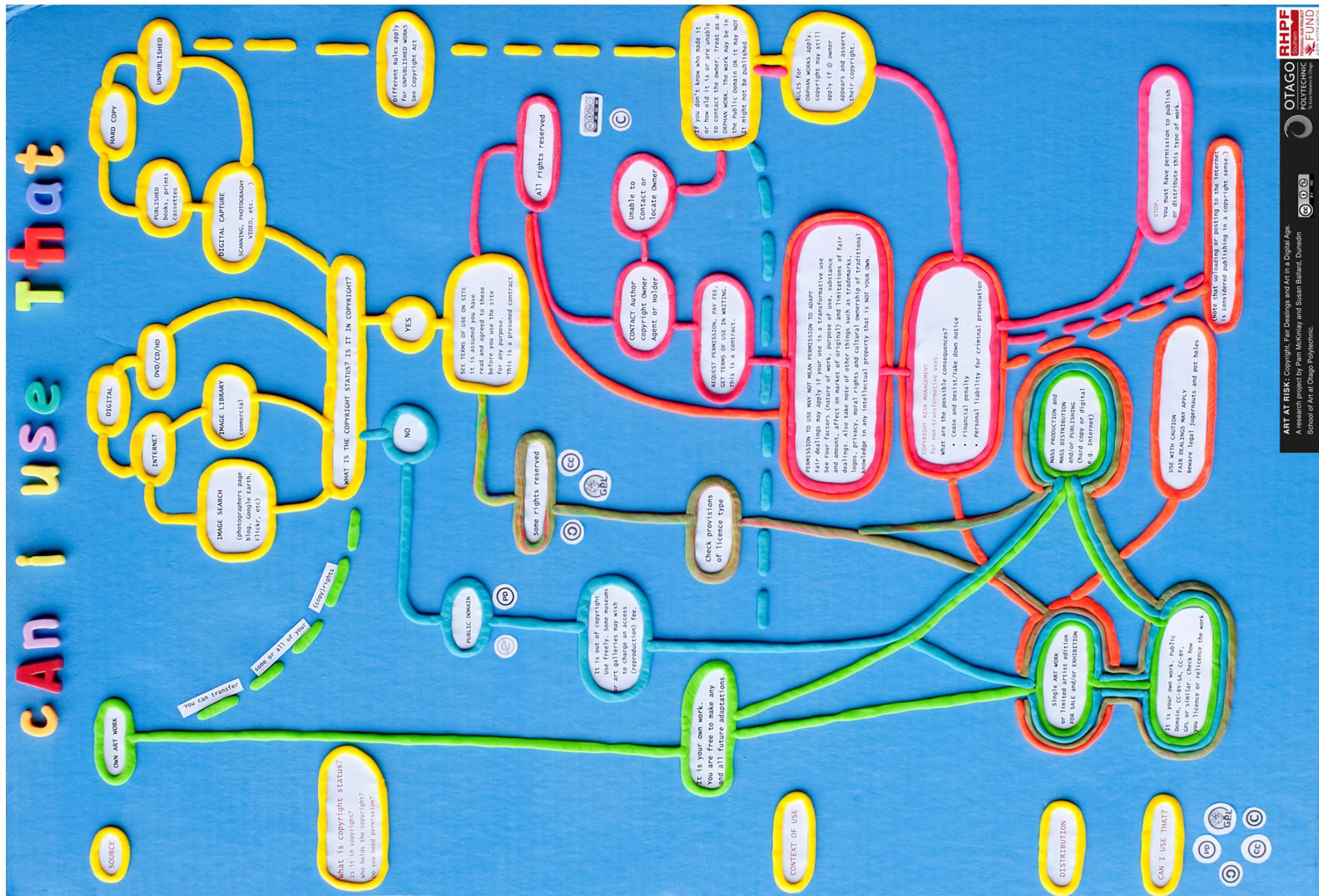
There are different rules for different countries and different formats
There are different rules for published and digital content
There are different rules if you have entered into a licensing agreement

ASK...

- Who made it?
- Is it in copyright?
- How can it be used?
- When was it made?
- What is your source?
- What is your purpose?
- Who is going to see it?
- Where did you 'find' it?
- What is your intended use?
- How do you want to use it?
- Does this fall under fair dealings?
- What is the market for your work?
- What do you want to use? Sound? Picture? Video clip?
- What are the requirements and responsibilities of use listed in the terms and conditions?

*All content has © unless it states otherwise.
The © in an underlying representation of a
work is not always the same as the original.
Some works have layers of copyright.*

Try The Digital Image Rights Computer (DIRC)
which guides users through digital image rights.
It includes a summary of when an image may be used
with permission, without permission, and under fair use.
The Digital Image Rights Computer (DIRC) is
hosted by the Visual Resources Association of America.
http://www.vrweb.org/resources/tp/dir/page_33.html



What consents are necessary for filming or making any art in public spaces?

What's Fair? People Watching People



SURVEILLANCE

From the French for "watching over", surveillance "is the monitoring of the behaviour, activities, or other changing information, usually of people and often in a surreptitious manner." Wikipedia (6 July 2010). The work of French theorist Michel Foucault influences the way we approach the problem of people watching people. Thinking about surveillance and privacy in art practices involves a set of questions around how we behave in public space and how data is collected. We include some examples of artists who are resisting and subverting these tools.

TYPES OF SURVEILLANCE

Covert surveillance
Covert human observation: infiltration / informants
Direct observations: watching / following / listening
Concealed devices: electronic "bugs" and software
Computer: data / hacking / cookies / robot takeover / trojans
Telephone + communications
Remote/ removed/ automated monitoring (recorded or in real time)
Postal
Overt
Human observations from the public or operatives in public spaces
CCTV and other recordings
TV / photo / video / audio
Biometric fingerprinting, retina, DNA

USES OF SURVEILLANCE

Broadcast News
Entertainment
Interactive play
As a deterrent to criminal and anti-social behaviour
Police use surveillance to follow or trace people
Surveillance stops traffic congestion and speed
We get a better idea of the urban environment through Google Earth aerial mapping and Street View
Government / Armed forces use it for military intelligence and espionage. For example at Tangimoana, Waihopai (NZ) is part of the "Echelon" Project - a global intelligence gathering programme
Businesses monitor the behaviour of staff and customers
Businesses monitor customers choices
Data collection

WHY SURVEILLANCE?

Deterrent to criminal and anti-social behaviour (future tense)
Ability to respond to incidents (present tense)
Visual and Biometric evidence (past tense)

SURVEILLANCE IN PRIVATE SPACES

Home security for private property and inhabitants takes two roles:
• SECURITY – the protection from trespass or access and entry of unwanted persons
• MONITORING – the actions of baby, children, teenagers and/or elderly

SURVEILLANCE IN PUBLIC SPACES WHO DOES IT?

Businesses
Banks
Shops
Galleries
Schools
Hospitals
Civic security – CCTV inside and outside buildings
Surveyors + city planners
Private investigators
Thieves / blackmailers / voyeurs / stalkers

Do we have public space personas?

ARTISTS

INSTITUTE FOR APPLIED AUTONOMY "Routes of Least Surveillance" (2001). The IAA invented a programme called isee where visitors could map their journey around New York to avoid CCTV cameras.

KEN GOLDBERG "Demonstrate" (2004). Goldberg installed robotic web-cameras over UC Berkeley's plaza, the camera and its controls were accessible to anyone on the internet.

DENIS BEAUBOIS "ATM Family Portraits" (1996). Beaubois invited his family to pose in front of an ATM machine and then asked the bank for the photograph.

JEROME SCEMLA "Citizen Cam" (2009). A movie about a fictional tv-channel in Reykjavik which broadcasts sequences taken from surveillance cameras throughout the city.

SURVEILLANCE CAMERA PLAYERS "Waiting for Godot" (1996). Surveillance camera players staged performances via subway CCTV that they recorded and redistributed.

JULIA SCHER "Welcome to Securityland" (1995). Scher places art galleries under surveillance.

SOPHIE CALLE "La Filature - The Shadow" (1981). Calle asked her mother to pay a private detective to track her every move.

GUY BEN-NER "Stealing Beauty" (2007). Ben-Ner filmed a family sitcom in IKEA stores.

How has our idea of public space changed over the centuries?

Is it ok to listen in to a celebrity's cell phone conversation in a coffee shop?

WHAT AND WHERE ARE THE BOUNDARIES OF PUBLIC AND PRIVATE SPACE?

Public Space has historical associations with the Agora in Greece and the Forum in Rome and therefore an association with "free speech" for citizens. A public space refers to an area or place that is open and accessible to everyone. We expect that public spaces have a collective ownership and set of behaviours.

In Nineteenth Century France there was the persona of the flâneur described by Charles Baudelaire as "a person who walks the city in order to experience it." Street (documentary) photography is an outshoot of this philosophy of detached observation.

IS PRIVACY A LEGAL RIGHT?

This doesn't just effect celebrities chased by the paparazzi. Rights of privacy include protections against:
• intrusion
• embarrassment
• being shown in a false light
• appropriation

SOME WORDS ASSOCIATED WITH PRIVACY:

privacy / identity / autonomy / anonymity / confidentiality / intimacy / candid / unguarded / paranoia / defamation

There are two overarching LIMITATIONS to the use of any material from public space:

1. the MEDICAL imperative – medical information is private at all times in all spaces
2. the ETHICAL imperative – stay away from the vulnerable and the young

INTERSECTIONS BETWEEN PUBLIC AND PRIVATE SPACE

- interpersonal communications
- entering private property
- photography
- communications to the public

BREACH OF PRIVACY:

The NZ Broadcasting Standards Authority says "that the person [must] be identifiable beyond their intimate friends or family before it will find that the privacy standard has been breached."

Is it ok to photograph strangers on the street?

Have inhibitions increased or decreased?

TRESPASS

Public and Private space are "property" issues so there are social and legal limitations to what we can do.

There are two types of trespass
• against chattels
• against property

Trespass against property includes infringements such as nuisance and interference. These are decided by a "restitution" test which assesses the seriousness of the infringing action.

Trespass against chattels includes electronic trespass. Historically electronic trespass related to spam. Under trespass law the requirement for trespass against chattels is for some physical contact to the chattel. Electronic signals qualify as "contact" especially if the action was intentional.

Factors important in trespass
• Intent
• Negligence
• Misrepresentation

ELECTRONIC TRESPASS

These days electronic media mean that public and private spaces overlap each other in spaces we can't even see like the wireless network. What are the legalities of accessing 'open' wireless networks? Wi-Fi services advise customers to treat all transmissions as if they were a public broadcast. They advise customers to take responsibility for encryption security. We might intercept wireless:

- accidentally and incidentally (hot spots)
- purposefully (trolling/scanning for Wi-Fi)

This means that use of your neighbour's Wi-Fi qualifies as trespass to their chattels, or as Ned Snow puts it: "Failure to protect property does not imply consent to use property."

WORDS USED TO DESCRIBE INTERCEPTION:

Unauthorised access / exploration / exploitation / attack / intrusion / invasion / theft

INTERCEPTION OF COMMUNICATION

Eavesdropping requires the consent of one or more parties to be recorded. You can only capture people's communications if they are within normal range of hearing and only if speech is unprotected in public spaces.

Cell phones can be intercepted remotely and even turned on remotely and used to record face to face conversations. However, electronic interception and Privacy Acts place limits on the collection and use of data. The Privacy Act NZ and PATRIOT Act in United States lift restrictions on government interception of private communication in transit and subsequent storage and outline the limits around these exceptions.

Communications containing written text, including txtng and email, have "authors" and depending on the length and quality of communication may qualify for Copyright, therefore forwarding or using without permission is an infringement, especially if doing so contravenes privacy rights.

"When you go out in public you give up some of your rights of privacy. This can be a wonderful thing for an artist, but not so much if you are on the other side of the lens."
(Elsa Lankford, 2007)

PRIVACY and the DIGITAL IMAGE

Privacy protects individual rights and information. Any use of the following could lead to infringement of a person's rights to privacy:

- *Disclosure of private correspondence or personal finances (income, tax returns, etc)*
- *Disclosing sexual relationships*
- *Making public others' family disagreements or details of someone's home life*
- *Recording (from a public space) using high tech equipment which enables sight and sound beyond the normal range, ie. shot-gun microphone or cameras with telephoto or zoom lenses. (This does include the paparazzi)*
- *Taking photographs on private property (trespass may also apply)*

intrusion

Intrusion is an activity which occurs in a private place or where there is an expectation of privacy, hence, hidden cameras and microphones cannot be used in situations where there is an expectation of privacy (for example a public telephone booth). The activity must also be considered "highly offensive" to the average person. Expectations of privacy extend to certain elements of accident scenes such as when the accident victim is discussing their condition with the medical personnel at the scene but if the accident has occurred in a public place there are still no general expectations of privacy.

media

The NZ Broadcasting Standards Authority says "that a person [must] be identifiable beyond their intimate friends or family before it will find that the privacy standard has been breached." For example, you may not like me telling my friend that your grandmother was a pirate with sexual health problems. If I did this, your grandmother is within her rights to sue me. Privacy Law also applies to individuals and to the media. When covering news events, the media must be careful not to disclose embarrassing private facts or place people in a false light. Privacy law also covers the area of misappropriation, which protects a person's right to control public uses of his or her name, image and likeness.

facebook

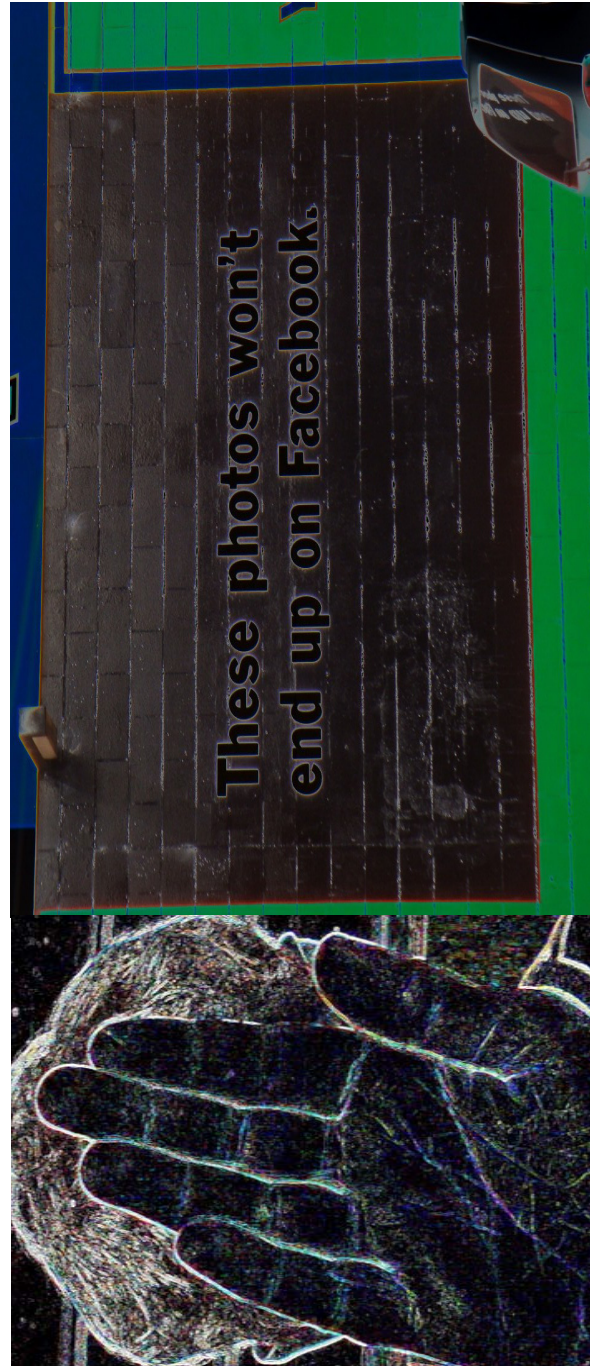
Facebook operates a buy out privacy policy, which means that by default Facebook privacy settings are open and NOT private at all. As these settings change daily, our advice is to be very careful about what information is uploaded to Facebook and to treat ALL information you upload as public.

facts

You may disclose 'facts' in the public sphere which are legally obtainable, e.g. within the phone book or an electoral roll.

workplaces

Non-public areas of the workplace are "private". Some private spaces such as supermarkets are considered to be a public environment.



DIGITAL Sources for all MEDIA

1-

Learn how to read copyright statements and terms of use agreements

Net Know-How is a good place to start: <http://www.netknowhow.ca/nkhcring.html>

all rights reserved

The general rule for all images found online is learn the conditions under which the original photograph or image was licensed and follow the provisions or terms of use associated with it. For example, was the image from a commercial image library or a professional photographer's site? "Free" in "Royalty Free" is not so, often it means you have to pay a one-off fee.

public domain

In theory Public Domain images are those which can be adapted, translated and derived from. Art works and other public domain objects or material often reside in cultural heritage institutions which often have a reproduction by fee policy. Sometimes this will be a payment to cover the costs of the reproduction. In some instances the fee may be waived if permission is requested and subsequently granted.

creative commons

Creative Commons licences offer an open and viable alternative to all rights reserved copyright options. In addition the flexibility and range of potential licences offered by Creative Commons allows for future engagements with digital media forms we cannot even anticipate. The Creative Commons collection of videos and comics offer simple introduction to licences.

2-

find your image

Many images are available via photo-management sites. Flickr for example, automatically gives its community CC options for assigning to their images when they are uploaded. Remember a "public" photo, in Flickr, is not the same as an image in the Public Domain. This has to do with privacy settings and Flickr protocols; who the photographer allows to either share or view their photo. As a sign of courtesy you can use the Flickr comments field to tell the photographer how you have used their image. There are sites that allow use for educational and non-commercial uses in their Terms and Conditions, plus specialised sites that deal with specialist areas in art history.

sources of "free" images

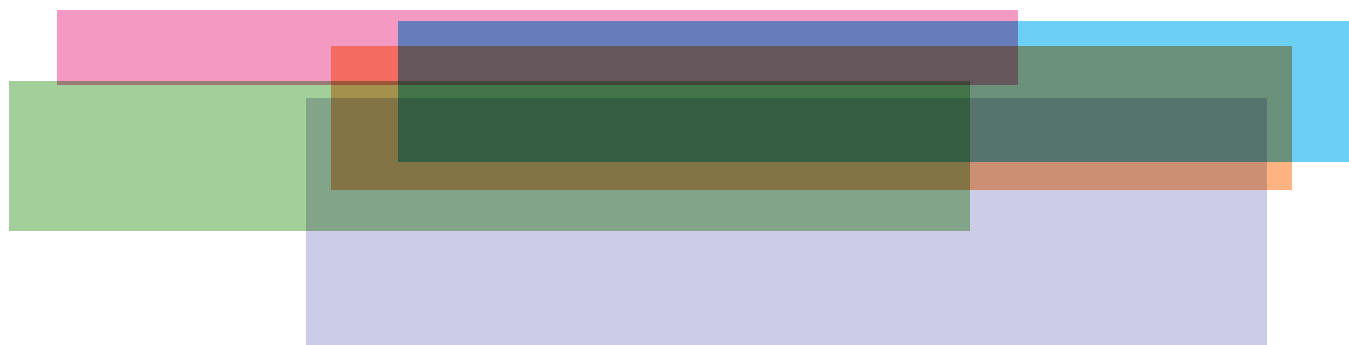
- Flickr Commons – <http://www.flickr.com/commons> (check the licence of the contributing group or individuals)
- Creative Commons have a page of search services – <http://search.creativecommons.org>
- Wikimedia Commons – <http://commons.wikimedia.org>
- Morguefile – <http://www.morguefile.com>
- Wikipedia Public Domain Images – http://en.wikipedia.org/wiki/Wikipedia:Public_domain_image_resources
- Pics4learning – <http://pics.tech4learning.com>
- Web Museum – <http://sunsite.nus.sg/wm>
- Electronic Frontier Foundation "Public Domain Frequently Asked Questions" – <http://www.teachingcopyright.org/handout/public-domain-faq> This page also has links to sources for image libraries and other public domain materials such as Library of Congress.
- Tana Leaver "Sources of Legally Reusable Media" – <http://tamaleaver.pbworks.com/Sources+of+Legally+Reusable+Media> Includes links to a lot of sound material.
- Bigfoto – <http://www.bigfoto.com/>

3-

create a customised image search

follow these four easy steps for creating your own advanced search of Google for free media

1. *Click on the "Advanced Search" next to or below the Google Search Box.*
2. *The box you are most interested in is the "Usage Rights" one. Choose one of the "free to use" options. For more assistance, double click on "Usage rights". This will take you to a help page.*
3. *Fill in other boxes with the information regarding the images/content you are searching for.*
4. *Click on the "Usage Rights" one. Choose one of the "free to use" options. For more assistance, double click on "Usage rights". This will take you to a help page.*



case studies

case studies

The case studies document student artworks proposed or created in classroom situations. Our analysis provides considered and critical information for teachers and students wondering about *how* digital images can be used, in *what* circumstances there might be restrictions, *why* these restrictions are there, *when* to rethink projects or apply for clearance, and *how* to move around and negotiate appropriate use and permissions.

We locate the case studies in the broader contexts of IP law, in particular Copyright, in New Zealand. For each of our examples we ask does Fair Dealings apply? The discussions and analysis, that follow each case outline, highlight possible ramifications if the work were to leave the teaching “bubble.” Some case studies include Teacher Responses, and all include a suggested approach to copyright risk management.

In order to fully understand the complex issues contained in the case studies we recommend teachers familiarise themselves with the background material contained in **Part Two: Background Research.**

art at risk is not designed to police or condone the types of works and activities that students engage in. Instead it is a study of the types of decisions that are made in the creation of digital images, it might be worth thinking of the case studies as a series of vignettes. We conducted interviews with students and recent graduates. As themes began to emerge from the scenarios we decided on which of the more common examples would be useful to explore in detail. In addition these snapshots of student learning allowed us to see the journey from idea to experiment to discussion to change in direction.

gathering case studies

See

Appendix iiiia. Introduction sheet for Interviews

Appendix iiib. Ethics consent forms Part 1 and Part 2

Appendix iiic. Media Release Forms.

We worked with the Otago Polytechnic Ethics Committee on the best way to approach student confidentiality and anonymity within this project. The project was supported by this committee in order to make sure clear ethical guidelines were used by the researchers as well as by the students as they engaged with decisions about copyright and IP legislation.

the case study analysis follows the following format

Source and Use – where did the image come from and how was it used?

Legal and Ethical Nodes – Were there any legal or ethical issues arising from either the source or proposed use?

Art Node – Are there any art precedents for these works – what is the art context?

First Steps – where to start looking to find further information.

NZ Law – what does our law say as the default position on copyright and other things? What sections of the law might apply here?

Relevant cases – Are there any similar uses which resulted in a copyright infringement case being taken which could indicate how the law might be interpreted?

Copyright risk management and recommendations – things that should be taken into account to assess whether one can use an image that is still within the copyright period under Fair Dealings or other permitted acts, or whether use is ethical or legal in a privacy sense.

Outcome – Where known did these discussions influence the direction, execution of ideas or approach of the students’ future works?

Related Questions – issues or questions that might arise from asking or answering any of the above points but not directly relating to the specific scenario.

Teachers Respond – Some of the case studies also include an indicative random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of ‘it’s OK’ to ‘STOP’).

It is often the situation that conflicting positions regarding copyright are equally valid, the data in the **casebook** offers real examples from law with which to analyze the examples given here. The case studies also contain numerous references to content in **Part Two: Background Research.** These are indicated with bold font: **see.**

These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



Student A "294"

Case Study A

Source: Google Earth

Use: Landscape photography

PROJECT

The student proposed a limited edition (~20 copies) artist's book featuring photographs of virtual terrain and also some urban scenes. It will contain an essay, photos, credits of photo sources for each page and it is not for sale. Photographs were captured as screen grabs from *Google Earth* or *Streetview* and manipulated in *Photoshop*. Student A was also interested in capturing digital glitches (where the digital/machine reading of the digital image translates to something not quite right to a human eye reading) and also glitches relating to capture transition (where images were captured while loading was in-progress).¹

legal node

What copyright exists in Google Earth and Google Streetview?

Do students need permission to capture photos from Google Earth? This is after all information of and about public space, which is part of the rationale behind the Google Earth project.

How would students go about obtaining permission if need be?

Are these images photos of landscape (as if they had been there in person) or are they select copies of landscape images (except that they do not actually exist as an extant unit anywhere else except the unique screen grab made by the “photographer”)?

Is the use of Google Earth a tool which you as the creator or viewer are driving?

Are there any responsibilities regarding attribution?

Would a black and white thumbnail reference of the source plus ISO mapping reference suffice for attribution purposes?

Is manipulation of the image allowed? Are these a transformative use?

Are the glitches a transformative use?

What about trademarks captured in Street View?

ethical node

Are there any public space/private space issues regarding people incidentally photographed by Google Earth?

At what point does naming and mapping come to be seen as ownership?

Student A's project raises issues of discovery and mapping in the Google Earth project where notions of enclosing the commons are looked at from behind virtual copyright fences in much the same way as previous waves of colonisation and/or empire building viewed “terra incognita”. Where then is the frontier, when we can take a trip to GoogleMars?

art node

In this case study the art node looks at the use of satellite photography and street photography, as well as the use of JPEG compression.

Michael Wolf (2009)

“Street photography is a dying art compared with the 1940s and 50s when you couldn't move in Paris, New York and London for snappers taking brilliantly spontaneous shots of everyday life. Michael Wolf has created . . . intimate, candid pictures of strangers in Paris . . . The catch is that he was nowhere near it when he took them.”² Michael Wolf is a Google Earth street photographer.

Glue Society (2007)

The Glue Society created scenes from the Bible as if from a “God's-eye” viewpoint using satellite imagery.³

Übermorgen (2010)

In their comment on the environmental disaster that was the 2010 BP oil slick, Übermorgen created “the world's largest digital oil painting”, using manipulated aerial images of the oil spill.⁴ This work was about “disconnection of form and color and about contemporary and futuristic imaging procedures”, namely compressor and consumer video editing-software. By looping the frames, the images became liquid, deformed and transformed. “These visualisations represent the “Verkuenstlichung” of nature and the “Vernatuerlichung” of art”, says Übermorgen, “Unedited oil-paintings of the event can be found via search-engines, on boston.com or on the NASA Earth Observatory website.”⁵

Thomas Ruff (2009)

The JPEG project manipulated images found on the internet emphasizing the digital origins and constituent make-up of the image.⁶

Walker Evans (1940s)

Walker Evans was interested in anonymous street portraiture for much of his professional life. He was a kind of visual flaneur. He recognized that the images he captured with his camera could reveal the values of a society by reflecting back the day to day occurrences as he captured them.⁷

Risk Management

FIRST STEPS

Visit the Google Earth site and read; the “Permissions” pages, “Licensing agreements” and “Legal notices”.⁸

RELEVANT CASES

So far there are no relevant cases but Google has changed its privacy statement on its website in the last six months, possibly to reflect shifts in public opinion and increasing sensitivity. For example in parts of Europe and England people formed human barriers to prevent a Google Streetview car entering their towns and villages. Also Google Streetview in France now has to inform the public when a car is going to be in their area (so they can take evasive action if they don't wish to be included “incidentally” in a street view).⁹

NZ LAW

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)

NZ Copyright Act S. 98 Moral Rights (alteration and adaptation)

NZ Copyright Act S. 226G CMI

NZ Contract law

COPYRIGHT RISK MANAGEMENT

Although GoogleEarth is free to photograph any of our public spaces, we may not be entirely free to use that information as we might wish. So step one is to **Print out** and read the Google Terms of Use. We note that some of these changed at some point during the study, which is why we advise students to refer to a hard copy. Attribute as required according to the Legal Notices. Basically these say you can use it providing you don't step over the restriction boundaries and also comply with the Legal Notices. These set out the restrictions according to the nations and industries involved. Some of these relate to military and intelligence sensitivities and others are market concerns mostly concerning commercial distribution of competing materials such as maps. Please read all!

Ask permission if you are wanting to make changes to the way Copyright Management

Information (CMI), is displayed, for example cropping out the Google logo. **See words** for more about CMI. In any case all images will have multiple and indelible Google watermarks in them in the final image.

Note that there are also alternatives such as NASA and other public domain satellite imaging sources. If using these as a source students should once again check for restrictions, such as “commercial use” in their project. Currently, every image created from Google Earth using satellite data provided by Google Earth is a copyrighted map. Any derivative from Google Earth is made from copyrighted data which may not be used except under the licenses Google provides. Google allows non-commercial personal use of the images as long as copyrights and attributions are preserved. By contrast, images created with NASA's globe software World Wind use the Blue Marble, Landsat or USGS layer, each of which is a terrain layer in the public domain. Works created by an agency of the United States government are public domain at the moment of creation. This means that those images can be freely modified and redistributed.¹⁰

Privacy issues have mostly been dealt with at Google by fuzzing out people's faces and the introduction of new notification measures. In the same vein television news items also blur out vehicle registration plates. Google also extends modesty treatment to random sculptures.¹¹

The student project is a transformative use. It may fall within fair dealing as both a work of scholarship and as non-commercial. Sources should be satisfactorily attributed. **See words.**¹²

Please check the CMI of individual tagged photos. Some photos in Google Maps may be copyrighted to other sources (not only Google) or may have been geo-tagged and uploaded from other sites such as Panoramio. Panoramio Blog is a mash-up of Google Maps and geopositioned photos. Virtual visitors to famous locales in street view can browse from user photos taken in the vicinity where users have offered geo-tagged high quality images for selection and inclusion in Google Street view project. User photos appear as thumbnails in Streetview and link directly to an author's Panoramio page where attribution and licensing info should be available.¹³

SEE ALSO

Virtual travel, Google virtual flights, **see Case Study F.**

Google Streetview performances or interventions, **see Art Node in Case Study M.**

RELATED QUESTIONS

Is recording a virtual fly-over a form of cropping?

OUTCOME

The student disregarded our advice and went ahead with the manipulated images.

1. Note over the course of this project GoogleEarth software has been updated. One of the modifications appears to have smoothed over loading glitches, so these are now a product of an older version of the software, possibly never to be repeated again.
2. Jonathan Jones, "Paris a City of Pixels", *The Guardian*, (2 Nov 2009) <http://www.guardian.co.uk/artanddesign/2009/nov/02/paris-photography-google-street-view>
3. Patrick Burgoyne, "The Bible According to Google Earth," *Creative Review Blog*, (7 December 2007), <http://www.creativereview.co.uk/cr-blog/2007/december/the-bible-according-to-google-earth> (accessed 12 July 2010)
4. UBERMORGEN, "Deep Horizon", (May 2010), <http://UBERMORGEN.COM/DEEPHORIZON> (accessed 12 June 2010)
5. UBERMORGEN, "Deep Horizon, Digital Oil Painting Statement", (May 2010), <http://ubermorgen.com/DEEPHORIZON/statement.html> (accessed 12 June 2010)
6. Guy Lane, "Interview with Thomas Ruff," *FOTO 08*, (24 Oct. 2009). <http://www.foto8.com/new/online/blog/1014-thomas-ruff-interview> (accessed 12 June 2010)
7. Sarah Jones, "On August Sander, Thomas Ruff and Walker Evans", *Tate Etc*, (Issue 13, Summer 2008), <http://www.tate.org.uk/tateetc/issue13/shocking.htm> (accessed 12 July 2010).
8. Google, "Terms of Service", (16 April 2007), <http://www.google.com/accounts/TOS>, (accessed 12 June 2010).
9. Digital Trends, "Village Residents Physically Block Google Street View Camera", *Digital Trends, International*, (6 April 2009), <http://www.digitaltrends.com/international/village-residents-physically-block-google-street-view-camera/> (accessed 12 June 2010).
10. "Google Earth", *Wikipedia*, http://en.wikipedia.org/wiki/Google_Earth (accessed 12 July 2010)
11. Google Maps, "Privacy", <http://webcache.googleusercontent.com/search?q=cache:Ep6bPiNAeHUJ:maps.google.com/help/maps/streetview/privacy.html+GOOGLE+street+view+privacy+faces&cd=9&hl=en&ct=clnk&gl=nz> (note this page is now only available cached); also, Gigazine, "Google Streetview respects privacy of a statue," (20 May 2009), http://en.gigazine.net/index.php?/news/comments/20090520_googlesv_privacy/ (accessed 12 July 2010).
12. Satisfactory attribution in an artwork includes author, title, date, medium, and in this case also provenance.
13. Eduardo Manchon, "Explore more with user photos in Street View", *Panoramio Blog*, (Feb 26 2009), <http://www.panoramio.com/blog/explore-more-with-user-photos-in-street-view/> (accessed 12 June 2010)

These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



Student B – Composite image of Venice Canal

Case Study B

Source: Thumbnails of iconic landmarks

Use: Composite Image

PROJECT

Student B captured 1000s of thumbnail images of famous landmarks off the Internet. Every day bus loads of visitors arrive and disgorge their cargo in front of the next “must see” view on their grand tour itinerary. The tourists disembark, stretch, look and point an image-catching device at the view, before being herded off to the next spot– this results in millions of people recording and often sharing millions of the exactly the same view if not the same image online. The images used in this project were examples of such mass photography.

These kinds of photographic views have become stale and jaded. One “snap” appears little different to the next. An important aspect of the project was the “sameness” of the images– the images chosen were from the same view point and all look alike. Using only low res thumbnails Student B created a composite image of superimposed layers. By stripping back the opacity (to create various degrees of transparency) and superimposing 100s of manipulated images, these were then enlarged and the student produced a composite pixelated image made from all the thumbnails– a kind of digital cubism in effect.

legal node

Does the source of the images matter?

Has this process produced a transformative image? **See Words.**

Does using only low resolution thumbnails make any difference? **See Words.**

What do we need to know about different Creative Commons licences? **See Copyright Alternatives and Creative Commons.**

In Flickr what is the difference between a public and private photo?

ethical node

Photos with people in them are considered personal mementos rather than straight 'objective' views. Can we borrow a photo of a stranger and use it in our work? Even though these photographs are often taken in a public space, issues of privacy may arise if privacy rights are infringed when they are recontextualised. **See Privacy and the Digital Image;** and **Case Studies L, M and N** for more about privacy issues.

art node

In this case study the art node looks at artists creating composite images.

Nancy Burson (1980s)

Burson's pioneering work produced a series of computer-generated composite portraits before morphing software was more easily available. She used a program which created an average of several images by mapping facial coordinates and then finding their mean.¹

Idris Khan (2004)

"Working with appropriated imagery, Idris Khan's photos are all-encompassing composites, consolidating iconic cultural symbols of similar type into single 'super-images' ... Exposed in translucent layers the images are anchored by the compositions' continuous shapes as they descend into fractured and gestural blurs merely suggestive of the originals. Through this process of layering, Khan creates a poetic malleability from the fixed codes of history".²

Jason Salavon (2009)

Using software he created, Jason Salavon makes composite images generated from and reconfiguring multiple existing images to present new perspectives on the familiar. In one series Salavon's works "average" a number of different portraits by Rembrandt, Velazquez and van Dyck. These are mashed up into composite images in which the subjects appear effaced and ethereal.³

Marika Dermineur & Stéphane Degoutin (2008)

The Googlehouse is an online process that builds a house with images of domestic rooms (living room, tv room...) picked up on the Internet using an image search engine".⁴

Neil Kandalgaonkar (2005)

The Brevity program (2005) on Flickr gives you an image which is a compilation of fifty photos tagged with one or two descriptors from 50 different Flickr users. The project was inspired by Jason Salavon.⁵

Risk Management

FIRST STEPS

Check the Flickr Terms of Use at <http://nz.docs.yahoo.com/info/terms/>

Research the different forms of Creative Commons licensing at <http://creativecommons.org/about/licenses/>

RELEVANT CASES

Leslie Kelly vs Arriba Soft (2002 and 2003).

This was a case where thumbnail images appearing in a search engine were not found to be reducing the market for the original. **See Casebook.**

Jeff Koons vs Blanch (2005).

A successful case of transformative use was won by “Koons [who] drew on part of a photograph taken by Andrea Blanch titled *Silk Sandals* and used it in his painting Niagara, which also includes three other pairs of women’s legs dangling surreally over a landscape of pies and cakes.” **See Casebook.**

Robert Rauschenberg vs Turner (1991).

Rauschenberg included a page torn from an old issue of Time magazine in a collage. “The photographer who originally took the picture in the ad successfully sued Raushenberg for unauthorized use of the photograph.” **See Casebook.**

Damien Hirst vs Cartain (2008).

The image of Damien Hirst’s diamond encrusted skull was parodied and later used as a poster and t-shirt art by a 16 year old school boy. Hirst sued him.⁶

Virgin Mobile (2007).

Virgin Mobile ran a series of billboard commercials which used photos from Flickr paired with catchy slogans. One of these ads “Dump Your Pen Pal” was based on a photo obtained from Flickr. Initially filed as a copyright case against Creative Commons, this suit was dropped and it was eventually settled as a Privacy Infringement case against Virgin Mobile – the girl featured in the advertisement was under age and no consent had been obtained to use her image.⁷

Lane Hartwell, vs Richter Scales (2007).

A clip, by a cappella group Richter Scales, mixed original imagery with photos found

online. This was all set to a soundtrack of Billy Joel’s “We Didn’t Start the Fire.” Lane Hartwell, a freelance photographer, objected to the use of one of his images being used in the video. **See Casebook.**

NZ LAW

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)

NZ Copyright Act S. 98 Moral Rights (alteration and adaptation)

NZ Contract law – terms of use for individual photos

COPYRIGHT RISK MANAGEMENT

Does size really matter? No, copying will not be exempted on diminished size alone.⁸

Is the final work a transformative use? These images are based on snap shots that everybody takes yet what has been created is an image that no one will ever take. The student’s final image is a new art work.

Does the source matter? Freely available does not always mean free to use.⁹ Students should avoid stock photos and avoid photos with people in them.

When using Google image search or any other image search engine, the student can limit or filter the search results to return a set of images that they could possibly use with greater freedom, such as Creative Commons or Public Domain images – **See Words and Digital Sources for all Media.** If the photos are licensed in a way that allows for derivative use or remix, the student should follow the provisions set out by the sources in their terms and conditions. The student needs to consider attribution and re-licensing under similar terms. Students in New Zealand Aotearoa are advised to use a CC-NZ ported licence. **See Copyright Alternatives and Creative Commons** for more information about licence types.

Finally a photo tagged “public,” in Flickr, does not mean it is a Public Domain image. This has to do with privacy settings and Flickr protocols, that is, who the photographer allows to either share or view their photo. As a sign of courtesy students can use the Flickr comments field to tell the photographer, who allowed them to use their image, how they have built on it and acknowledge their input into the project.

SEE ALSO

Photosynth is an example of seamless photo merging applications online.¹⁰

Panoramio is a site where users can upload geotagged photographs to Google Maps. Virtual visitors in Street view can then browse from user photos taken in the vicinity. Students should note the Terms of Use for each individual photo.¹¹

RELATED QUESTIONS

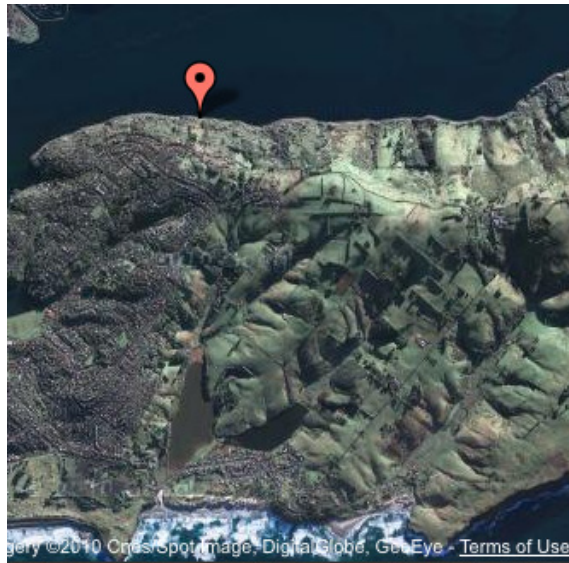
It is also comparatively easy for sites to EXCLUDE their images from image-search results and to protect them from “unauthorised” downloading. Image uploaders can avail themselves of such tools as robot.txt, watermarking, and transparent gif overlays among others.¹² Do image uploaders also have digital responsibilities in the virtual world to protect their IP by such means, as do real property owners in the real world?

OUTCOME

The student made careful decisions about which images to use and produced a series of compelling composite images.

1. Grey Online, “Seeing and Believing: The Art of Nancy Burson: Early Photographs and Composites, Grey Art,” *Grey Online*, New York University, (April 2002) <http://www.nyu.edu/greyart/exhibits/burson/images/index.html> (access 12 July 2010).
2. Saatchi Gallery, “Selected Works by Idris Khan,” *Saatchi Gallery*, http://www.saatchi-gallery.co.uk/artists/idris_khan.htm (accessed 12 July 2010).
3. Museum of Contemporary Art Chicago, “Portrait of the Artist: Jason Salavon,” *New City Art*, <http://art.newcity.com/2010/03/29/portrait-of-the-artist-jason-salavon/> (accessed 12 June 2010).
4. Marika Dermineur and Stéphane Degoutin, “Googlehouse,” <http://googlehouse.net/> (accessed 12 July 2010).
5. Neil Kandalgaonkar, “50 People see . . .” *Flickr*, <http://www.flickr.com/photos/brevity/sets/164195/> (accessed 12 June 2010)
6. Arifa Akbar, “Hirst demands share of artist’s 65 pound copies,” *The Independent*, <http://www.independent.co.uk/arts-entertainment/art/news/hirst-demands-share-of-artists-16365-copies-1054424.html>, (accessed 12 June 2010) *The Independent* reports Damien Hirst sued T-shirt boy; Jack of Kent, “Damien Hirst, Conceptual Art and the Law”, Sept 2009, <http://jackofkent.blogspot.com/2009/09/damian-hirst-conceptual-art-and-law.html> (accessed 12 June 2010). Jack of Kent reports the retaliation action where T-shirt boy struck back with a conceptual art (attack) work.
7. Pinsent Masons Law, “Lawsuit over Virgin Mobile’s use of Flickr girl blames Creative Commons,” (25 Sept 2009), *Outlaw News*, <http://www.out-law.com/page-8494>
8. Susan M. Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property* (The University of Chicago Press: Chicago and London, 2006), 93.
9. JISC Digital Media, “Still Images: Frequently Asked Questions about Copyright”, (2006-2009). <http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/>, (accessed on 16 June 2009), See question 7 about the use of Google Images.
10. Microsoft., “Photosynth”, <http://photosynth.net/default.aspx>
11. Eduardo Manchon, “Explore more with user photos in Street View,” *Panoramio Blog* (Feb 26 2009), <http://www.panoramio.com/blog/explore-more-with-user-photos-in-street-view/> (accessed 12 June 2010) Panoramio Blog - a mash-up of Google Maps and geopositioned photos. User photos appear as thumbnails in streetview and link directly to an author’s Panoramio page where attribution and licensing info should be available.
12. William F. Patry, *Moral Panics and Copyright Wars* (Oxford University Press, 2009), 186. Patry writes of a publishing case in “which falsely asserting that free-riders are engaged in unauthorized conduct Mr Curley (of ACAP) was well aware there exists, and since 1994, a simple and effective computer protocol . . . that ACAP’s members can use to either prevent search engines from crawling their site, or to control which parts should not be searchable or remain visible during search results. . . . This protocol is called a “robots.txt” extension.”

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Student C – ScreenGrab from Website

Case Study C

Source: Google Maps

Use: Creating a Web Page using Google API

PROJECT

In order to create a new kind of map of the local environment, Student C used a Google Maps API to embed film footage taken at various locations around city. An API is an application programming interface – the behind the scenes software that makes Google Maps interact with other software programmes. The Google API is a free mapping application provided by Google. It is mostly used for entrepreneurial purposes, such as real estate and visitor information.

legal node

The idea came from a similar artist's site which had also used Google's API to embed soundscapes at various locations around another city. Visually there was some similarity between the soundscape site and Student C's site and there was a question about how much of this was based on the Google API?

Is there copyright in HTML?

Is the new work original?

ethical (social) node

Attendees of the Glastonbury music festival were invited to geotag themselves and fellow spectators in the audience and tag or link to social networking sites such as Facebook.

Where are the limits of privacy in public space?

art node

In this case study the art node looks at artists works that use the google API as well as other works that imitate other websites.

Andrea Polli (2010).

Soundseeker.org is an interactive website of New York city. A wide range of contributors record found sounds from around the city and upload them to the site with tags to their exact locations. The intention is that the soundscape created is a new way to navigate the map of the city.

Yes Men (2008).

"Armed with nothing but thrift-store suits, the Yes Men lie their way into business conferences and parody their corporate targets . . . basically doing everything that they can to wake up their audiences to the danger of letting greed run our world."¹ In this example they created a parody web site targeting BP.

Eric Fischer (2010).

The Geotaggers' World Atlas is a series of maps formed from Geotags sent to Flickr where they are ordered by the number of pictures taken in the central cluster of each one . The photo locations come from the public Flickr and Picasa search APIs.²

"Nagasaki Archive" (2010).

An archive that maps information about Nagasaki and nuclear weapons. "Nagasaki Archive" is an attempt to reorganize all of this information on a digital virtual globe (Google Earth). With topographic data, the user can enhance the experience of what it was like when the A-bomb struck Nagasaki, in detail.³

Hidenori Watanabe Laboratory (2008-2010).

The Tuvalu Visualization Project is an art project visualizing information of Tuvalu on Google Earth. This project has been executed as a joint research of NPO Tuvalu Overview and Hidenori Watanabe Laboratory at Tokyo Metropolitan University.⁴

Risk Management

FIRST STEPS

Read the terms of use for the API. It is assumed you have read and agreed to the Terms of use of the Google Maps API before you download, install or use any online software or use any site.

Basically they say you can use it providing you don't step over the restriction boundaries and comply with the Legal Notices (there are separate pages for these). These set out the restrictions according to the nations and industries involved. Some of these relate to military and intelligence sensitivities and others are market concerns mostly concerning commercial distribution of competing materials such as commercial atlases and maps.⁵

RELEVANT CASES

Yes Men (2008)

The Yes Men made a parody of the official BP website. The Yes Men site was called “beyond petroleum”. The other site of course was BP (British Petroleum). They were in correspondence with the legal department at BP for some time before the Yes Men website disappeared.⁶

Flickr API (2008)

In a Goliath vs David(s) case, Heineken threatened photographers for sulling its name when they sought compensation after Heineken had used their photographs commercially via the Flickr API.⁷

NZ LAW

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)
NZ Contract law

COPYRIGHT RISK MANAGEMENT

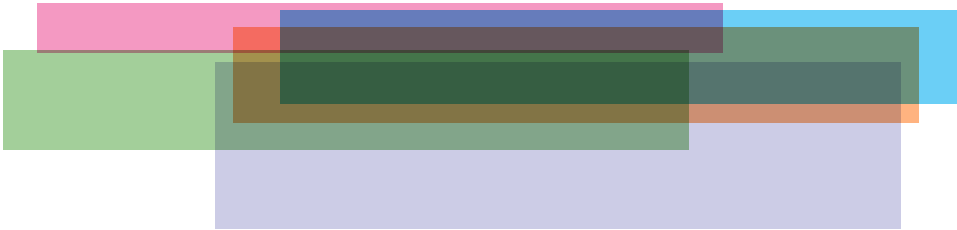
Student C can happily use the API in their web page. “The Google Earth API is a free service, available for any web site that is free to consumers.”⁸

The HTML which supports any website does attract copyright so students should ensure they do not copy “elements” (or supporting HTML) from other web sites. There are generic command sets that are not considered design elements so students need to make

a careful assessment over the use of code (as a language) and code as a creative element. A comparison with multiple other sites using the Google API found that most of the look is dictated by the Google API.

OUTCOME

The student made a website which was well received by the city council and which a number of tourists used as an alternative way of navigating the city.



1. Yes Men, "The Yes Men Fix the World Story," (2009), <http://theyesmenfixtheworld.com/story.htm> (accessed 12 June 2009).
2. Eric Fischer, "The Geotaggers' World Atlas," *Flickr*, (19 May and 28 May 2010), <http://www.flickr.com/photos/walkingsf/sets/72157623971287575/> (accessed 12 July 2010).
3. Nagasaki Archive Committee, "Nagasaki Archive", http://en_nagasaki.mapping.jp/
4. NPO Tuvalu Overview and Hidenori Watanave Laboratory, "The Tuvalu Visualization Project," <http://tv.mapping.jp/> (accessed 10 October 2010).
5. Google, "Terms of Service," (April 16 2007), <http://www.google.com/accounts/TOS>, (accessed 12 June 2010).
6. Andrew O Baoill, "Yes Men bow to BP complaints – in their own way", (March 10 2008), *Funferal*, <http://funferal.org/blog/2008/03/10/yes-men-bow-to-bp-complaints-in-their-own-way/> (accessed 12 July 2010). Here is part of the story behind the BP website infringement notice. You need to read the legal correspondence for the rest of the story which is contained in an email from BP. See Andy Bichlbaum, "Use of a website... infringing copyright on the trademarks of BP," *The Yes Men* (10 March 2008), <http://theyesmen.org/agribusiness/beyondpetrol/> (accessed 12 July 2010).
7. Olivier Laurent, "Row brews on Heineken rights graph", *British Journal of Photography* (Vol. 26, (11), 2008, 6.
8. Google Code, "Google Earth API," (2010) <http://code.google.com/apis/earth/> (accessed 12 June 2010).

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Marcantonio Raimondi, after Raffello Sanzio, **Das Urteil des Paris**, um 1515/16, Kupferstich
24 January 2006 Staatsgalerie Stuttgart (A 85.1) http://en.wikipedia.org/wiki/File:Urteil_des_Paris.jpg The official position taken by the Wikimedia Foundation is that "faithful reproductions of two-dimensional public domain works of art are public domain, and that claims to the contrary represent an assault on the very concept of a public domain".
http://en.wikipedia.org/wiki/File:Queen_Anne.jpg

Case Study D

Source: Google Images

Use: Photographs containing people as basis of drawing

PROJECT

Student D used images found via a Google search engine as source material for model poses and inspiration for composition in their digital drawings made using Illustrator.

legal node

When is drawing from source material not ok?

Was the resulting drawing a transformative use?

Is any format or medium shifting allowed under the law?

Copying from reproductions (plaster casts and prints) has been one of the corner stones of how art has been taught from the earliest of times. It is the basis of how art is made. Over the centuries medium shifting between the different arts has been common.

Looking back over the history of copyright law a pattern emerges whereby the modes of (mass) distribution have historically gained greater copyright before unique works. For example, etching received copyright protection in 1734. Commonly known as Hogarth's law, this Act came about following the unauthorised wholesale copying of *A Harlot's Progress* originally painted by Hogarth c1771 and for which he had assigned exclusive rights to particular printers for reproduction by engraving. Painting finally received copyright protection in 1862.¹ In the twentyfirst century the most rapacious protectors of copyright are those that have arrived latest in the piece and are involved in mass media distribution (for example movie producers). **See Introduction to the History of Copyright** for further discussion about the history of copyright.

ethical node

The law says it does not want to get into discussions of art criticism. However this is contradictory in cases dealing with art works, where visual literacy is vital in the viewing of art and non-art works. As we see in **Words** the law shies away from defining art and wishes only to deal with what it calls matters of "originality". The 'objective' test for transformative works in a court of law is in fact a subjective one whereby an 'ordinary' observer is asked to see how similar or different the new work and the original/s are. So, the test for a transformative use, is by no means objective but relies instead on subjective means and often by a non-literate audience (as in art or visual literacy). It might be a fairer test if the art object was "tested" against a system of art norms rather than a group of randomly assembled viewers.

It is important to remember that despite the differing perspectives between art and law on this issue, artists are still bound by law and in this case such copies could be seen as committing a criminal offence.

art node

Drawing after the "masters" was a traditional "academy" way of learning to draw. Indeed there were major heated arguments about the merits of drawing from the masters versus drawing from life. It was thought that if one copied from the masters one would be copying the most perfect proportions and it was felt this was in the best interests of creating an ideal beauty. Renaissance artists Raphael, Titian, Annibale Carracci and other "masters" all drew from Greek originals, Roman copies and other models of antiquity. In addition they also copied the admired works of other less ancient predecessors. Carracci paintings are sometimes noted for their cut and paste approach to composition. Titian's allusion to the original models of 'antiquity' was not lost on his audience of the day and continues to fascinate art historians today. As Roger Fry has said, "each generation ... has to remake it's Old Masters. If we did not continually go on revaluing and remaking them, they would be not merely old but dead."²

Raphael Judgement of Paris (pre 1516)

A classic example of medium shifting over the ages is Raphael's *Judgement of Paris*. It survives today only as a "copy", in a print made by Marcantonio Raimondi (c1516). Re-incarnated in *Judgement of Paris*, a painting by Anton Raphael Mengs (c1757), Raphael's *Judgement* is later recontextualised in Manet's *Les Dejeuner Sur L'Herbe* (1873) and later still in Picasso's *Les Dejeuners* (1961).³

Walter Sickert (1930)

In his later years Sickert frequently made use of photographs and newspaper reproductions as the basis for his paintings. Richard Shone writes that, "occasionally [Sickert] blatantly acknowledged the source of his image on his canvas for example his portrait of King George V with his racing manager at Aintree." Shone says that Sickert's work was in fact "prophetic of much photo-based painting of later decades" such as Warhol, Bacon, Kitaj and Richard Hamilton.⁴

Vincent Van Gogh (1890s)

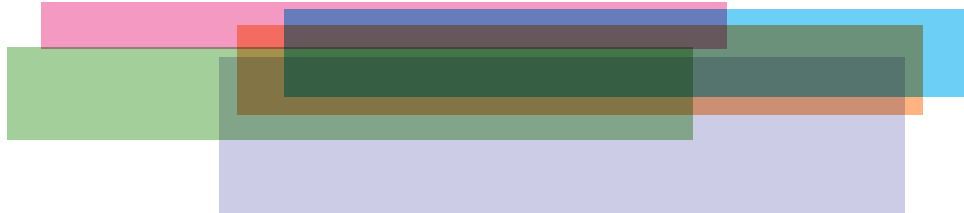
Van Gogh used etchings when models were unavailable during a period of convalescence. "I shall not lose sight of the figure, even though I have no models at the moment", he wrote to his brother.⁵ Van Gogh also made copies after etchings of Millet, Rembrandt, Daumier and others. He thought of his paintings as translations. His subsequent move towards greater linearism and arbitrary colour palette are sometimes attributed to this practice.

Star Wars Uncut (2010)

"Hundreds of Internet users remade *Star Wars: A New Hope* into a fan film last year, 15 seconds at a time. This month they all played a part in Emmy history. The finished product, *Star Wars Uncut*, won an Emmy last week in a relatively new category, interactive

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media, heaping new attention onto a project that its producers call a “user-directed broadcast.”⁶



Risk Management

FIRST STEPS

The question is raised, if the source materials are digital should they be treated any differently to non-digital sources such as sculptures, casts and photographic reproductions? The simple answer is no.

In very general terms one can only “shift” from a 3D source to 2D as long as the work copied falls within S73 of the NZ Copyright Act. For example, someone can draw a building or sculpture normally in a public place or a sculpture on permanent display in a gallery. However if the work is exhibited for a limited time and/or access, this copying is not covered by S73. Despite the history of this practice in art, under the law one cannot translate an image from 2D to 2D, or 2D to 3D, or 3D to 3D if the image/ artwork is still under copyright. **See Words:** Format Shifting.

Read “Derivative Works And Copyright: Painting from Another’s Photograph”, by Mary Ann Fergus for a indicative legal opinion on this issue.⁷

RELEVANT CASES 2D-2D

Shepard Fairey vs Garcia (2008).

Fairey reworked one of Mannie Garcia’s photographs of Presidential nominee Obama, in the *Hope* poster used in the lead up to the 2009 election, in the United States.⁸ **See Casebook.**

Comedy III Productions Inc. V Saderup (2001).

Gary Saderup created t-shirts featuring his own drawings of *The Three Stooges*. The court found that it was infringing because he used the likenesses of dead celebrities without the consent of the heirs or owners of the image and obtaining “likeness rights.”⁹ In this case the court used the example of Andy Warhol’s *Marilyn Monroe* (1962) as “an example of celebrity likeness that was creative enough to be transformative”, but they disallowed Saderup’s use. **See Casebook.**

Burrow-Giles vs Sarony (1884).

A historical case which involved a photographer, a celebrity (Oscar Wilde) and a 19th century system of mass production and distribution (printing). **See Casebook.**

RELEVANT CASES 3D to 2D

John Radford vs Hallensteins (2004-5)

John Radford's sculpture *Tip* (1996-7) appeared on Hallensteins t-shirts. This was found to be Fair Dealing under section 73 (NZ) which allows for copying of works of art which are permanently on display in a public place. An appeal claiming Moral Rights infringement has been lodged. **See Casebook.**

Frank Gaylord vs United States (2009)

Gaylord filed a suit filed against The US Post Office for their use of an image, based on his sculpture, *The Column* (Korean War Veteran's Memorial sculpture), on a postage stamp. **See Casebook.**

RELEVANT CASES 2D to 3D

Tom Franklin (2001) and "The Firefighters" sculpture

A memorial sculpture depicting three firefighters raising a flag at Ground Zero on September 11, 2001, was forced to be abandoned after the prototype was found to be an unauthorised derivative of a photograph taken by Thomas E. Franklin.¹⁰

Koons vs Rogers (1992).

Jeff Koons made a life-sized sculpture for his "Banal" exhibition, which parodied a postcard depicting a litter of cute puppies. Koons lost this one. **See Casebook.**¹¹

RELEVANT CASES 3D to 3D

Damien Hirst, "Hymn" (2000)

Hirst admitted the inspiration for this work was his son's anatomy set. This case raised issues in copyright and design right. He settled out of court when a claim was lodged by the designer of the original model and the manufacturers of the child's toy which looked exactly like Hirst's 20ft bronze sculpture *Hymn*, (which sold for £1m).¹²

Oscars and Spongebob Square Pants (2010)

A small costume hire service in Auckland was given notice, by the organisers of The Academy Awards, over hiring out 2.5m replicas of the "Oscar" statues. The US company says First Scene can no longer hire or sell them as the Academy owns the copyright and no one else had been issued a licence to make copies.¹³ Similarly organisers of the annual Dunedin Christmas Parade were told to destroy their "Spongebob Squarepants" costume as it infringed the copyright of copyright holders Viacom.¹⁴

RELEVANT CASES 2D-moving image

Lebbeus Woods and 12 Monkeys (1992)

A drawing by Lebbeus Woods, *Neomechanical Tower (upper) Chamber* (1987) was used as the basis of a movie set in *12 Monkeys*. Woods was able to get an injunction on the movie's release until the case was resolved.¹⁵

RELEVANT CASES Moving image to 2D

Diana Thorneycroft and Sesame Street (2001-2)

Thorneycroft's, "Goofy," "Mickey," "Bert," "Barney," "Pinky," "Bart" all graphite on paper, had to be withdrawn from an exhibition in Canada to avoid getting sued.¹⁶

NZ LAW

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)

NZ Copyright Act S. 98 Moral Rights (alteration and adaptation)

s73 (covers what is meant by on display permanently in public places)

NZ Contract law

COPYRIGHT RISK MANAGEMENT

Skill and labour is involved in creating a new image in a new (non-reprographic) medium. In law this relates to questions of labour or work or "sweat of the brow" and definitions of "originality". **See Words.** However, the legal interpretation of originality only relates to the first (original) work. The law sees medium shifting as a form of copying and does not see it in the same terms as the art world.

Uses may be covered by fair dealings if the use is considered to be "fair" and the final work/s are transformative. Art and law ask at what point does value added exceed that of the original? The new work must not merely supersede the original, it must add something new, thereby altering the original.¹⁷ In the art world, value is judged on aesthetic and not merely economic terms.

Looking at the selection of court cases listed above, the student may wish to consider drawing from life or taking their own photos. The student should first check the source by looking at the copyright statement and Terms of Use for each page or image. They may also wish to learn how to filter image search engine results using advanced settings so that they return images more suitable for reuse, such as copyright "free" resources and works licenced under Creative Commons BY and SA. **See Copyright Alternatives and Creative Commons; and Digital Sources for all Media.**

RELATED QUESTIONS

Finally in the world of intellectual property (IP) we are constantly reminded that IP is “property”. In the real world property owners have responsibilities as well as rights and it is often pointed out how easy it is for sites to exclude their images from image search results or protect them from unauthorised downloading, should they chose to take the time and trouble and desire to do so.¹⁸

OUTCOME

The student continues to follow the tradition begun with the Impressionists, and use photographs as source materials, as do all other students at all art schools.

Teachers Respond

Below is an indicative random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of ‘it’s OK’ to ‘STOP’).

DESCRIPTION: Using photographs as the basis for a drawing project. Copyright owner is uncontactable or not replying – Should student carry on with proviso?

12.1 Student carries on with the kind of statement you always get in books – copyright was sought and etc....

12.2 Go ahead if they clearly reference the authorship of the material as not their own.

12.3 Student is operating in good faith. Once the work is out there it is fair game for comment.

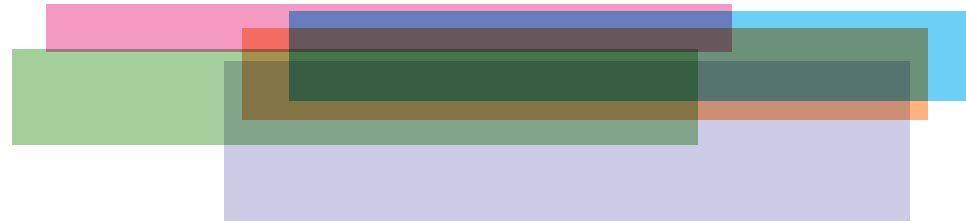
12.4 Yes. They are drawing from the photographs. They have made a best effort to approach the copyright holder. They should continue.

12.5 Explain risks if photographer gets back in touch before/during/after work has been made and does not grant permission to use work, re: copyright act.

12.6 Find another photo, take one of your own.

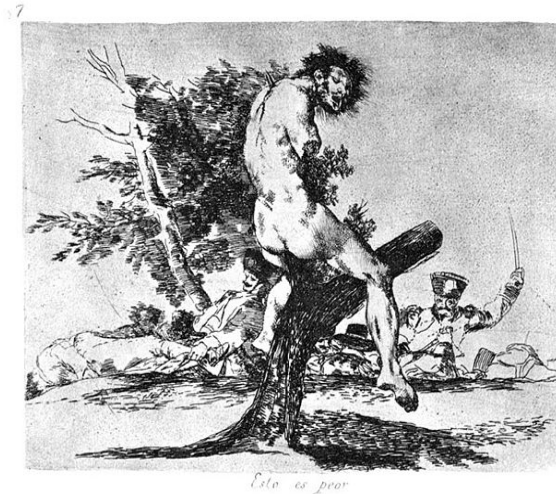
12.7 Tell them to stop and wait for the okay. They might waste a lot of time on their project if permission was withheld.

4. Shone, *Dear Images*, 357-358. This painting is inscribed by Sickert at the top "By Courtesy of Topical Press Agency/11."
5. Shone, *Dear Images*, 356.
6. Brian Stelter, "An Emmy for Rebuilding a Galaxy", *New York Times*, (27 August 2010), http://www.nytimes.com/2010/08/28/arts/television/28uncut.html?_r=4&th&cemc=th
7. Mary Ann Fergus, "Derivative Works And Copyright: Painting from Another's Photograph", *The American Society of Portrait Artists*, (2002-2009), <http://www.asopa.com/publications/2000winter/law.htm>
8. Johnathon Delacour, "Appropriation Art and Walker Evans," *The Heart of Things blog* (7 Feb 2009), <http://weblog.delacour.net/photography/appropriation-art-and-walker-evans/> (accessed 12 June 2009)
9. Jean S.. Perwin, "Legal Lowdown," *How*, (Vol.17, Issue 4, August 2002): 28-32.
10. Susan Chaires, "Something Old, Something New, Something Borrowed ... Someone Sued!" *Sculpture Review*, (Summer 2002): 16-17.
11. Harvard Law School, "Image Rights," *Art Law* http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm (accessed on 16 June 2009).
12. Claire Dyer, "Hirst pays up for Hymn that wasn't his" *The Guardian*, (19 May 2000), <http://www.guardian.co.uk/uk/2000/may/19/claredyer1>, (accessed 12 June 2009)
13. NZPA, "Oscars get grouchy over statue hire," *TVNZ News*, (March 25, 2010), <http://tvnz.co.nz/entertainment-news/oscar-get-grouchy-over-statue-hire-3431630>, (accessed March 25 2010)
14. Debbie Porteous, "Plea to save Spongebob for Santa Parade" *Otago Daily Times, News*, (29 March 2010), <http://www.odt.co.nz/news/dunedin/99466/plea-save-spongebob-santa-parade> (accessed 30 March 2010). The annual Christmas parade is a not for profit venture which aims to provide a parade for the city's children in the lead up to Christmas. It has always featured costumed versions of current favourite children's characters from children's stories and, since its arrival, children's cartoons and television programmes.
15. Susan Chaires, "Something Old, Something New," 11.
16. Stay Free, "Illegal Art: Freedom of Expression in the Corporate Age," *Illegal Art* (2002), <http://www.illegal-art.org/articles/index.html> (accessed on 16 June 2009).
17. Australian Government, "Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age. Issues Paper," (May 2005) Australia.
18. William F. Patry, *Moral Panics and Copyright Wars* (Oxford University Press, 2009), 186. In falsely asserting that free-riders are engaged in unauthorized conduct Mr Curley [from ACAP] was well aware there exists, and since 1994, a simple and effective computer protocol ... that ACAP's members can use to either prevent search engines from crawling their site, or to control which parts should not be searchable or remain visible during search results ... This protocol is called a 'robots.txt' extension. And it prevents trawling and retrieval of information from sites."



1. Kathy Bowrey, "Who's Painting Copyright's History?" in *Dear Images: Art Copyright and Culture*, eds. Daniel McLean and Karsten Schubert, (Arts Council of England: London, 2002), 266.
2. Richard Shone, "Copies and Translations" in *Dear Images: Art Copyright and Culture*, eds. Daniel McLean and Karsten Schubert, (Arts Council of England: London, 2002), 355.
3. Karsten Schubert, "Raphael's Shadow: On Copying and Creativity" in *Dear Images: Art Copyright and Culture*, eds. Daniel McLean and Karsten Schubert, (Arts Council of England: London, 2002), 361 -368. Picasso also referenced Velazquez and Holbein and others.

These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context



Case Study E

Source: Google Images

Use: Public Domain images as basis of drawing and animation

PROJECT

Student E used famous artworks by Francisco Goya and Hubert Robert as the inspiration for new artworks. The aim of the new works was to “update” these older images in order to show their continuing relevance as subject matter in the twentyfirst century, while still retaining references to the originals.

The works referenced in the project were:

left top: Francisco Goya “Esto es peor (This is worse)”

from *The Disasters of War* (1810-1820). A series of prints depicting the horrors of war.¹

left bottom: Hubert Roberts *Imaginary view of the Gallery of the Louvre as a Ruin* (1796) which shows a fictional Louvre presented as Roman ruins.²

legal node

Although the images are in the Public Domain the original source of the image is still an issue. A book may claim typographical copyright and museums or art galleries will often claim a new copyright in their reproduction.

ethical node

There are questions currently being raised as to the legality and ethics of re-copyrighting the Public Domain. An example of this is when publishers claim copyright over their reproductions of public domain works.

Susan Bielstein asks “If the copyright of a work in the public domain has lapsed, why should reproductions of that work qualify for protection? Copies, not auratic in their own objecthood, are now relentless in their implications, putting the entire basis of copyright at risk”.³ Museums and the like do this by claiming new copyright in the reproduction image, for which a fee is requested. This is in fact an “access” fee and shouldn’t be confused with a licensing fee.⁴ This is sometimes known as “copyfraud.” **See Words.**

art node

The art node for this case study addresses the use of art works, and references from history, in contemporary art.

Drawing after the “masters” was a traditional “academy” way of learning to draw. Indeed there were major heated arguments about the merits of drawing from the masters versus drawing from life. It was thought that if one copied from the masters one would be copying the most perfect proportions and it was felt this was in the best interests of creating an ideal beauty. In the words of Mr Hartly Pond (a character in Barbara Ewing’s, *The Fraud*):

“It was the ancient Greeks who elevated the figure of Man to that of a God. That is the beginning of Art as we know it: nobody can speak of Art until they have studied the sublimity of the Grecian human form as crafted by the Master Sculptors”.⁵

Raphael, Titian, Annibale Carracci

and most other notable “masters” all drew from Greek originals, Roman copies and other models of antiquity. In addition they also copied the admired works of other less ancient predecessors. Carracci paintings are sometimes noted for their cut and paste approach to composition. Titian’s allusion to the original models of ‘antiquity’ was not lost on his audience of the day and continues to fascinate art historians today. As Roger Fry has said “Each generation ... has to remake it’s Old masters. If we did not continually go on revaluing and remaking them, they would be not merely old but dead.”⁶

Raphael Judgement of Paris (pre 1516)

A classic example of medium shifting over the ages is Raphael’s *Judgement of Paris*. It survives today only as a “copy”, in a print made by Marcantonio Raimondi (c1516). Re-incarnated in *Judgement of Paris*, a painting by Anton Raphael Mengs (c1757), Raphael’s Judgement is later recontextualised in Manet’s *Les Dejeuner Sur L’Herbe* (1873) and later still in Picasso’s *Les Dejeuners* (1961).⁷

Marcel Duchamp

Duchamp famously used the *Mona Lisa* (1503-1506) as a found object, in *L.H.O.O.Q.* (1919).⁸

AES+F Group

Last Riot (2005-2007) See the film still of the beautiful reclining youth, which some say draws on the tradition of painting Narcissus or maybe *The Dying Gaul* 220-230 BC as its prior model.⁹

Nina Akamu (1999)

Based on the drawings of da Vinci, Akamu created a larger than life sculpture entitled, *Leonardo da Vinci’s Horse* (1999).¹⁰

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Chapman Brothers (2003 and 2008)

The Disasters of War (1810-1820) series by Goya were also the basis for an installation work using a series of prints by the Chapman Brothers, where they “rectified” a rare edition of original Goya prints.¹¹



Student E - Still from digital animation.

Risk Management

FIRST STEPS

Ask, is the original image in the Public Domain?

There are different periods of duration in different jurisdictions, at which point works are said to fall out of copyright and/or into the “Public Domain”. Some countries such as New Zealand Aotearoa do not have a Public Domain as such.¹² **See Words and International Contexts for Copyright.** There are also rules about using or copying previously “unpublished” works. **See Words** for more on this.

There have also been some instances when works that ought to be public domain works are not public domain works. An example is the photographs by Lewis Carroll who died in 1898, and which ought to be out of copyright. These were published in 2002 by an American publisher and through a quirk in US copyright law are now under copyright until 2047.¹³

RELEVANT CASES

In this case the images are in the public domain.

Bridgeman vs Corel (1999)

The finding in this case was that exact reproductions of Public Domain Works are not considered infringing copyright (in US) however an amicus curiae brief was less decisive about the UK jurisdiction. **See Casebook.**

NZ LAW

NZ Copyright law– Duration– out of copyright
NZ Contract Law

COPYRIGHT RISK MANAGEMENT

We recommend that students use Wikimedia Commons as a source of images. Wikimedia Commons makes available public domain and freely licenced educational media content. The original works are out of copyright. The new works are original. **See Copyright alternatives and Creative Commons;** and **Digital Sources for all Media.**

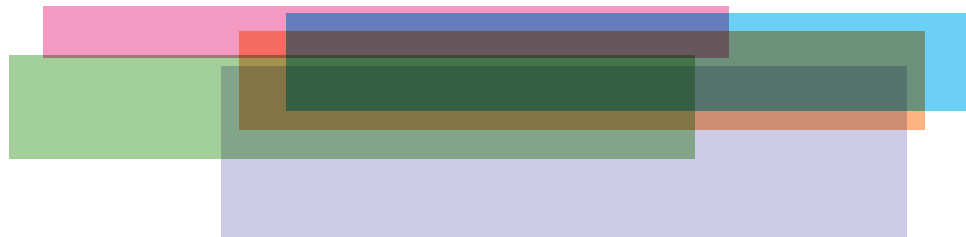
RESULT

The student created a successful tryptich of digital animations based on this public domain source material.



Keith Aoki, James Boyle and Jennifer Jenkins and, Tales from the Public Domain: BOUND BY LAW?, Center for the Study of the Public Domain (March 15, 2006) 33





1. “Goya”, *Wikipedia*, http://en.wikipedia.org/wiki/File:Goya-Guerra_%2837%29.jpg (accessed 12 July 2010).

2. “Hubert Roberts”, *Wikipedia*, <http://en.wikipedia.org/wiki/File:Louvre-peinture-francaise-p1020324.jpg>

3. Susan M Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property*, (The University of Chicago Press: Chicago and London, 2006), 41. In the same vein see Nicolas Pioch in “Copyright Laws around the world”, *Web Museum, Paris*. <http://www.ibiblio.org/wm/about/copyright-issues.html>

4. Susan M Bielstein, *Permissions*, 56. The repro. fee “represents a not-so-subtle claim to the right to authorize the reproduction of a work, which ... is the functional basis of copyright and not an automatic privilege of the owner of the material object.”

5. Barbara Ewing, *The Fraud*, (Sphere: Great Britain, 2009), 91.

6. Richard Shone, “Copies and Translations” in *Dear Images: Art Copyright and Culture*, eds. McLean, Daniel and Karsten Schubert, (Arts Council of England, 2002), 355.

7. Karsten Schubert “Raphael’s Shadow: On Copying and Creativity” in *Dear Images: Art Copyright and Culture*, eds. McLean, Daniel and Karsten Schubert, (Arts Council of England, 2002), 361-368. Picasso also referenced Velazquez and Holbein among others.

8. *Wikipedia*, “Duchamp”, http://en.wikipedia.org/wiki/File:Marcel_Duchamp_Mona_Lisa_LHOOQ.jpg

9. Mary McCaughey, (English Garden Lounging), “Moscow’s AES + F Group in London”, *Art of Russia Gazette, Geo-Cultural Navigation*, (26 Oct 2007), <http://www.gif.ru/images/doc/lastriot-best-02-5061d.jpg>.

10. Susan Chaires, “Something Old, Something New, Something Borrowed ... Someone Sued!”, *Sculpture Review* (Summer 2002): 8. See Leonardo’s drawing of the horse at *Wikimedia* http://commons.wikimedia.org/wiki/File:Study_of_horse.jpg, see full size original marquette based on the historic Sforza equestrian before Nina Akamu’s modifications at Garth Herrick, “Leonardo da Vinci’s ‘Gran Cavallo’” (1991), <http://www.garthherrick.com/Portraiture/LeoA.html> (accessed 12 July 2010) and the front cover of the *Smithsonian* magazine featuring the sculpture (including people to give it some scale) Akamu, Nina, “A long shot pays off,” *Smithsonian*, at <http://ninaakamu.com/smithsonian.html> (accessed 12 July 2010)

11. The Chapman brothers made two series of works based on these images. The first was a series where changes were made to images printed from the artists own plates which you can see at Francesca Gibbons, “Chapman brothers ‘rectify’ Disasters of War: Art’s enfants terribles pay tribute to Goya” *The Guardian*, <http://www.guardian.co.uk/uk/2003/mar/31/arts.turnerprize2003>, (accessed 12 July 2010) and the second was a mixed media installation, *Fucking Hell*, 2008 White Cube, “Jake & Dinos Chapman” *White Cube Gallery*, <http://www.whitecube.com/artists/chapman/vi/>, (accessed 12 July 2010)

12. Lolly Gasaway, “When U.S. Works pass into the Public Domain,” University of North Carolina, <http://www.unc.edu/~unclng/public-d.htm> (accessed 12 June 2010). See Suzy Frankel, *Intellectual Property Law in NZ*, (Butterworths: Wellington, 2002), for NZ duration.

13. Bielstein, *Permissions*, 23.

43 These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



Student F: still from digital animation and installation

Case Study F

Source: Second Life

Use: Screen shots and recording for a video installation

PROJECT

Student F created an avatar in Second Life (SL) and recorded the embodied virtual life of that avatar over a period of time in Second Life, as an exploration of representation and portraiture. The recordings were used as a video installation.

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legal node

In Second Life the user is the driver/creator. The avatar is an original creation but it is also built on the work of others, from componentry (code) on web site.

What is the copyright status in the new work?

art node

This art node looks at works made within Second Life as well as video works that use virtual worlds as their source.

Trish Adams Mellifera Project (2009-2010)

Mellifera is an eco-system time lapse in Second Life. It documents “a generative virtual environment created during a ten day residency at the RMIT Virtual Reality Centre in Melbourne.”¹ This work creates a real time 3D environment from data it collects from the ‘mellifera’ environment in Second Life and explores ways of representing and re-representing data and audio-visual experiences in an online generative environment.

Cao Fei RMB City (2008-2010)

Cao Fei worked collaboratively to create a city in Second Life that is now inhabited by other artists and avatars. The city has its own mayor, Cao Fei’s avatar China Tracy who runs a blog and online community discussions of the ongoing building projects in RMB City.²

World Of Warcraft (WOW) Machinima fan portal

This includes an Artist’s Residency in Second Life.³ Machinima has grown from low tech remixes made as fan tributes to its own fully fledged genre complete with festivals and many hosted websites⁴

Red vs Blue (RvB) (2003-2008)

A work of machinima, created by Rooster Teeth Productions, RvB is a series of comic videos which parody the popular multiplayer game *Halo: Combat Evolved*. Over 100 episodes have now been made.⁵

Phixor2000 (2007)

In 2007 Phixor 2000 won the GEE Machinima Award - BitFilm festival 2007 with a parody remix of a Beatles song featuring Olibith, a character from WOW.⁶

misrepresenting their software. Students are advised to take care when using screen shots that have Trademarks or logos in them.¹¹

Risk Management

FIRST STEPS

Second Life is owned by Linden Labs. The first thing to do is read the Terms of Use.⁷

Spend a little time watching: Dan Hunter, talking about virtual IP and Fred von Lohmann talking about machinima at the Computer Games, Law, Regulation, Policy Symposium in Melbourne, 2008.⁸

RELEVANT CASES

Kheri Batal (2009)

Machinima YouTube takedown. Kheri was issued with a takedown notice due to copyright in soundtrack infringement. She also advises how to serve a counter DMCA notice against YouTube for videos which are mistakenly removed.⁹

NZ LAW

Contract law

COPYRIGHT RISK MANAGEMENT

Linden Labs says a user retains any and all intellectual property rights in content they submit to their service. Their deal can be seen as an exclusive licence to “almost” own. Students should note that sometimes service providers change their Terms of Service (Second Life has changed its TOS since last year) and should check them at regular intervals.

Students should take care when using standard environments in Second Life and try not to use other people’s creations or import any “real” world IP issues such as Trademarks for example Nike logos on T-shirts or copyrighted materials, such as soundtracks.¹⁰

“Fly-over” software such as “screenflow” and/or in-game functions enable and encourage recording of life in-world. Many recordings of these are uploaded to YouTube and Facebook often as diary footage every day.

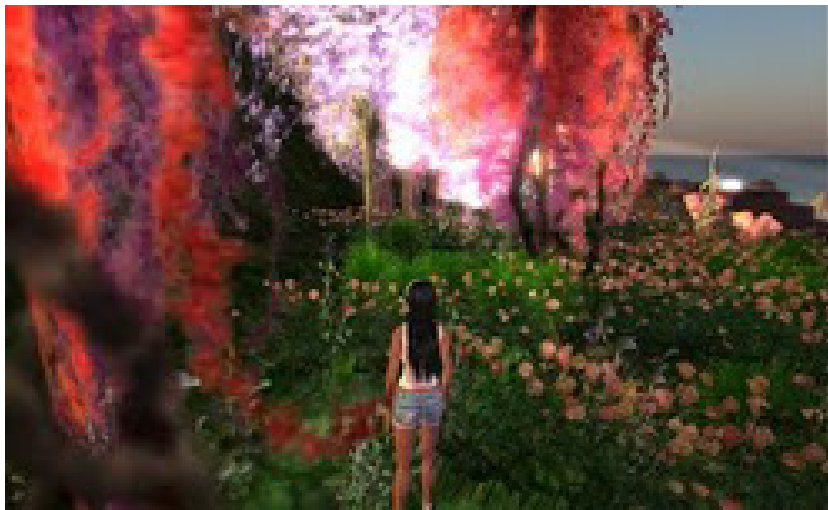
For other software students need to check the terms of service. Some companies consider screenshots an infringement on their program, seeing them as derivative works and

SEE ALSO

Not all services have the same Terms of Use. Some software companies will have a different take on the copyright of ‘your’ creations. Students are encouraged to look at and discuss other character creator-creation type software for example *SPORE*.

OUTCOME

Student created an immersive installation with multiple screens showing recorded footage of the avatar in different locations and situations (all within Second Life).



Student F: still from digital animation and installation

1. Trish Adams, *Mellifera Project*, part of 'Drawing Out 2010', RMIT School of Art and the Design Research Institute, Melbourne, http://www.youtube.com/user/melliferaProject#p/a/u/2/_YBoBrEPRTI (accessed 12 July 2010)
2. China Tracy (Cao Fei), *RMB City Blog*, <http://rmbcity.com/>
3. Ars Virtua Guild, "Projects Reaching Into the Realm of Warcraft", <http://arsvirtua.com/guild/> (accessed 12 June 2010). Ars Virtua is an online-only artists's collective (guild) on WOW with a gallery space in Second Life. Check out their gallery at Ars Virtua Gallery New Media Center, <http://arsvirtua.com/projects/> (accessed 12 June 2010).
4. World of Warcraft, *Machinima.com*, <http://www.machinima.com/channel/view&cid=5> (accessed 12 June 2010). Machinima portal for WOW fans complete with a "how to make" in machinima 101. See more uploads in Warcraft Movies, <http://www.warcraftmovies.com/fr/pv.php?l=Olibith> (accessed 12 June 2010).
5. Rooster Teeth, "Red vs Blue - Why are we here?" *YouTube*, (2 June 2008) <http://www.youtube.com/watch?v=9BAM9fgV-ts>.
6. Phixor2000, "[WoW Music Video] I'm only sleeping #", *YouTube*, (23 April 2007) http://www.youtube.com/watch?v=E60-SrBLilw&feature=player_embedded (access 12 June 2010).
7. Linden Research Inc., "Terms of Service", *Second Life*, <http://secondlife.com/corporate/tos.php>, (accessed 12 June 2010). Take note of section 7 in particular.
8. Fred Von Lohmann, "Fred Von Lohmann at the Computer Games, Law, Regulation, Policy Symposium 2008" <http://testpattern.blip.tv/file/672264/>, (accessed on 16 June 2009). Fred von Lohmann from the EFF includes examples of Machinima in his key note lecture; Dan Hunter, "Dan Hunter at the Computer Games, Law, Regulation, Policy Symposium 2008" <http://blip.tv/file/672194> (accessed 13 July 2010), Take a listen to Professor Dan Hunter speaking on innovation, property and virtual worlds.
9. Kheri Batal, "Machinima, Through My Eyes: Copyright Infringement and YouTube" *Kyrywolf* (February 2009) <http://khrywolf.blogspot.com/2009/02/copyright-infringement-and-youtube.html> (accessed 14 July 2010)
10. Dan Hunter, "Dan, Dan Hunter at the Computer Games, Law, Regulation, Policy Symposium 2008", <http://blip.tv/file/672194> (accessed 13 July 2010).
11. Tamara Rice, "What Every Blogger and Freelance Writer Should Know About Internet Copyright and Libel Laws" *Odesk Blog* (22 Feb 2010), <http://www.odesk.com/blog/2010/02/what-every-freelance-writer-bloggershould-know-about-internet-copyright-and-libel-laws/> (accessed 14 July 2010).

47 *These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.*



Student G: still from digital video.

Case Study G

Source: YouTube (user-generated footage)

Use: Remix

PROJECT

Focusing on the visual indicator of individual women “crying”, Student G sourced and remixed different user generated vlogs of visually similar scenes to create a recontextualised interplay of the different impulses that had led to their creation.

Art At Risk: copyright, fair dealings and art in a digital age

legal node

Is the work a transformative use?

Is it necessary to acknowledge sources for footage?

What about the inclusion of clips from “commercial footage”?

Do fair dealings apply when using visual quotation, as when making a critical, parodic or satiric artwork commenting on a common social phenomenon?¹

ethical node

Does the material include private or sensitive information about the person that may be seen as objectionable or harmful if it were to be re-contextualised?

Can we expect personal material posted online to be treated as we intended?

What do we need to know about privacy on the internet?

art node

The works in this art node all make use of videos that have been uploaded to YouTube.

Kutiman (2009)

Cohesive mash-ups from various disparate music video clips found on YouTube which WIPO called “One of the finest examples of a work created from sampling.” Using mostly the works of amateur musicians – what he calls “ordinary people like myself sitting in their homes”, Ophir Kutiel (Kutiman) painstakingly meshed together little bits from disparate clips to create these works.²

Negativland

Avantgarde sample based video using video and sound.³

Candice Breitz (2005)

“Through her pointed and deftly edited video installations, Candice Breitz looks at the stereotypes and visual conventions in film and popular culture.” Breitz mixes isolated fragments into a new and single narrative.⁴

Risk Management

FIRST STEPS

You Tube

Read the terms of use (especially if you are uploading your remix)⁵

Re-cut/Reframe/Re-cycle

Read the guidelines for on-line video and Fair Use in “Recut, Reframe, Recycle” article. The study looked at nine categories of use of copyrighted material within amateur online video: 1) parody and satire; 2) negative or critical commentary; 3) positive commentary; 4) quoting to trigger discussion; 5) illustration or example; 6) incidental use; 7) personal reportage or diaries; 8) archiving of vulnerable or revealing materials; and finally 9) pastiche or collage.⁶

Dr Strangelove blog

For regular updates this blog takes the pulse of YouTube, online video (particularly amateur practices), new media, and digital culture.⁷

RELEVANT CASES

There are an increasing number of music publishers instigating YouTube take downs.

Lenz vs Universal (2007)

A case where a Mum uploaded a 29 second video her baby running around in the kitchen with “Let’s Go Crazy”, by the artist then known as Prince, playing (incidentally) on a sound system in the background. The case was taken on by the EFF (Electronic Frontier Foundation) and has just won in favour of the Mum, including damages and the video has been reinstated.⁸ **See Casebook.**

Negativland U2 (1991)

Avantgarde sample base video applied to video and sound. **See Casebook.**

The Chilling Effects (2010 -)

This is a joint project between the EFF and multiple US law faculties and clinics which has resulted in a repository of take down notices. It introduces online rights, potential liabilities and features FAQs and online “weather reports” which assess the internet climate.⁹

YouTomb (2006 -)

The YouTomb take down project is an MIT student initiative which is a record of videos removed from YouTube for allegedly infringing copyright compliance.¹⁰

NZ LAW

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)

NZ Copyright Act S. 98 Moral Rights (alteration and adaptation)

COPYRIGHT RISK MANAGEMENT

Just as the first novels were based on letters and diaries so too this type of user generated content is becoming the nascent source material for creative works.¹¹ New web tools make it easy for anyone to upload a video log or personal diary video to the internet for public consumption. Student G is creating new conversations around existing vlog material.

Many YouTube videos are “response” videos, which acknowledge and easily link to their sources. Attribution can be as simple as placing a comment in “comments box” or including a reference to the original in the title.

These online lives or “personal media” are in a different category to “mass media”. Videos posted to on-line “communities” are often uploaded with the implicit expectation of online participation.¹² However students should be very wary of uploading or remixing content that is viewed as objectionable, harmful or featuring vulnerable persons, for which they may find themselves the target of more than a take-down notice. Recently, Google executives in Italy were found responsible and convicted for a clip of abusive behavior uploaded to a YouTube subscriber’s account.¹³

SEE ALSO

The YouTube re-Mixer tool which is designed to allow streaming remixing of YouTube clips online from YouTube itself.¹⁴

Students may have noted from the relevant cases that YouTube is roamed by automated takedown software. These automatically filter, post take-down notices and remove material, even if the use is “fair”. It is possible to file a counter claim but as this is not an automated process it may take months for their video to be reinstated if at all.

As Lessig points out in *Free Culture*, “On the Internet ... there is no check on silly rules, because on the Internet, increasingly, the rules of copyright law, as interpreted by the copyright owner, get built into the technology that delivers copyrighted content. It is code, rather than law, that rules ...unlike law, code has no shame.”¹⁵

OUTCOME

The work was used in a video installation to mixed response. Some viewers felt that the works breached the boundaries of privacy, others felt that it was a powerful indictment of individual understandings of privacy and public expression of personal grief.

1. **See Words:** Absorbative logic theory, Fair dealings, Parody and Satire.
2. WIPO, “Kutiman, ThruYou”, *WIPO Magazine*, (No. 6. Geneva, December, 2009), http://www.wipo.int/wipo_magazine/en/p.20 (accessed 23 July 2009); Watch the videos at Kutiman, (Ophir Kutiel) at “Thru You, Kutiman mixes YouTube”, <http://thru-you.com/> (accessed 12 July 2010).
3. Negativland - Gimme The Mermaid, *YouTube*, (September 2006), <http://www.youtube.com/watch?v=TTrHwH2gEY8> **See Casebook**
4. White Cube, “Candice Breitz,” *White Cube Gallery*, <http://www.whitecube.com/artists/breitz/aiwa/> (accessed 12 July 2010)
5. *YouTube*, “YouTube Community Guidelines” (2010), http://www.youtube.com/t/community_guidelines
6. American University School of Communication, Center for Social Media, *Code of Best Practices in Fair Use for Online Video*, (May 2009), <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video> (accessed on 16 July 2010).
7. Dr Strangelove, *Watching YouTube*, <http://www.strangelove.com/blog/article-indexes/subject-index/>, (accessed 13 July 2010); See also Michael Wesh’s “An anthropological introduction to YouTube” http://www.youtube.com/watch?v=TPAO-lZ4_hU&feature=channel
8. EFF(Electronic Frontier Foundation), “Lenz v. Universal”, <http://www.eff.org/cases/lenz-v-universal>
9. *Chilling Effects*, “Chilling Effects Clearing House” <http://www.chillingeffects.org/>
10. YouTomb, “Videos Removed for Copyright Complaint”, *MIT*, <http://youtomb.mit.edu/>
11. Jill Walker, “personal narratives, corporate templates” *Jill/txt* (9 Sept 2009), <http://jilltxt.net/?p=2448> (accessed 12 July 2010). Jill Walker is Associate professor at the University of Bergen, affiliated with the Department of Linguistic, Literary and Aesthetic Studies.
12. Carrie James, *Young People, Ethics and the New Digital Media: A Synthesis from the GoodPlay Project*, (MIT Press: Cambridge Massachusetts and London England, 2009), 35.
13. Paul McNamara, “Conviction of Google Execs in Italy Sheer Madness”, *PC World*, (25 February 2010) http://www.pcworld.com/article/190125/conviction_of_google_execs_in_italy_sheer_madness.html
14. Kristin Nicole, “YouTube Remixer – Online Video Editing for YouTube”, *Mashable Social Media*, <http://mashable.com/2007/06/16/youtube-remixer/>
15. Susan M. Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property* (The University of Chicago Press: Chicago and London, 2006), 148. Bielstein quoting Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin: New York, 2004) 148.



Because of the nature of this project we are unable to reproduce an image.

Case Study H

Source: Footage filmed of a band at rock concert

Use: Remix

PROJECT

Footage of a band playing at a rock concert was remixed with a different soundtrack. Band members and festival goers had been informed that filming was going to be taking place for a number of documentaries during the music festival. However the footage used in this short film was not made by one of the original documentary makers but someone attending the concert. The footage was of one of the headline bands playing but it was remixed with a different soundtrack (of music also played at the festival by one of the other bands.)

Art At Risk: copyright, fair dealings and art in a digital age

legal node

Footage used in this film was not taken by one of the original documentary makers – does this make a difference or was blanket permission implicit in original ticket purchase and participating band agreements? The venue has the appearance of a public space (like a mall) but technically is private property where access rights to the property can be defined.

As footage of one of the bands playing was remixed with different soundtracks – do synchronisation rights and performers rights apply?

Are there any other rights that might apply such as publicity rights or moral rights?

ethical node

What rights do we have to use images of other people, even if they are celebrities?

Can anyone own the experience of attending a rock concert? There is a sense that a collective experience potentially overrides the individual claims to ownership of the image.

art node

The examples in this art node address the cult of celebrity

Sam Taylor Wood “David” (2004)

Video of David Beckham sleeping. Filmed up close, David Beckham sleeps in a Madrid Hotel room.

Phillipe Parenno and Douglas Gordon “Zidane: a 21st Century Portrait” (2006)

A multi-angle documentary that shows Zidane playing for Real Madrid. The film seems to disregard the movements of the game and focuses solely on Zidane for the entire 90 minutes. The sound track is cut in and overlaid with music by Mogwai.

Martin Scorsese “Shine a Light” (2008)

Documentary that follows the Rolling Stones behind the scenes and in concert, interlaced it with footage from previous interviews. Contains discussion with Scorsese about the content of the film and the playlist of the concert. Includes multiple shots of the audience and other bands.

Risk Management

FIRST STEPS

Student H needs to check their ticket for original terms of entry/access to the property where the concert was held. The concert attended by the public was in a private (-ly owned) space (or building) so it is not entirely a public space scenario.

Read the Australasian Performing Right Association (APRA) outline on how to obtain permission to use soundtrack rights. **See Appendix ii APRA Information Sheet.**

RELEVANT CASES

Enigma, “Return to Innocence” (1994)

In 1994 a traditional Taiwanese song, “Jubilant Drinking Song”, was used as a backing track for Enigma’s Top Ten hit record “Return to Innocence”. The singers (two octogenarian Taiwanese women) disputed the use of their song, without credit, which had been recorded in France as part of a cultural exchange. In the resolution Enigma settled out of court and subsequent releases credited the original singers and in addition they received royalties.¹

Shredders (2007)

In what some people call the “lamest copyright-related takedown[s] in the history of YouTube,” parody videos that paired video footage of famous guitarists “shredding” with expertly-done amateurish guitar buffoonery were removed and YouTube accounts were suspended.²

Corey Vidal vs Warner (2009)

Corey Vidal is known on YouTube for a number of video clips featuring music and dance and is also infamous for being issued with a number of DMCA takedown notices which to date he has fought and won against his videos.³ The first claim (from Warner Brothers) was over a video to Madonna’s *4 Minutes*.⁴ **See Casebook.**

Beyoncé (2007)

During a performance in Florida, Beyoncé’s fall down a flight of stairs was captured on camera by several fans and posted on YouTube where they were issued take down notices under the DMCA, citing Publicity Rights.⁵

NZ LAW

Fair Dealings– Note, NZ does not have a Parody clause

NZ Property law– Rights of Admission

Moral rights (Misattribution)

Fair Trade– Passing off

COPYRIGHT RISK MANAGEMENT

Student H was unable to check their ticket from the concert and so was not able to comment on the access terms.

Under certain conditions, a person might film part of a performance as a “diary” piece for their “own use.” Did other people film at the same concert and upload their clips to Facebook or YouTube?

Synchronisation rights exist where recorded music is matched with moving images. These occur whenever recorded music is matched with moving images, thereby exploiting the dramatic potential of the music and potentially altering the songs original intended meaning through juxtaposition in the music and lyrics.⁶

Performers also have rights in their performance (performance rights) and to their persona, known as publicity rights. These usually relate to product endorsement or specific promotions.

OUTCOME

Although the work was transformative, it plays close to the boundaries of ‘passing off’ and ‘misattribution’.

The student has not resolved how they will use the work.

Teachers Respond

Below is an indicative random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of 'it's ok' to 'stop').

DESCRIPTION: Re-mix with different soundtrack

11.1 *No problem*

11.2 *Okay*

11.3 *Acknowledge sources?*

11.4 *Fine. Its just like collage or montage.*

11.5 *Recording of broadcast material is covered by fair use and the educational context.*

Problem that the format is not being retained and the remix is introducing new ideas and different contexts into the work. within the classroom this is an ok practice, but for exhibition there may be some questions, but I don't feel that this would be a serious breach.

11.6 *Dependent on how much and who it is shown to: for assessment ok. BUT Broadcast not ok.*

11.7 *Don't know.*

1. The CopySouth Research Group, *The CopySouth Dossier*, (May 2006), http://www.copysouth.org/portal/details_of_Enigma_Return_to_innocence_as_a_case_study, 145f.

2. Eliot Van Buskirk, "Copyright Vampires Delete Guitar Shred' Videos from YouTube", February 2008, *Wired*, *Wired Blogs*, http://www.wired.com/listening_post/2008/02/copyright-vampi/.

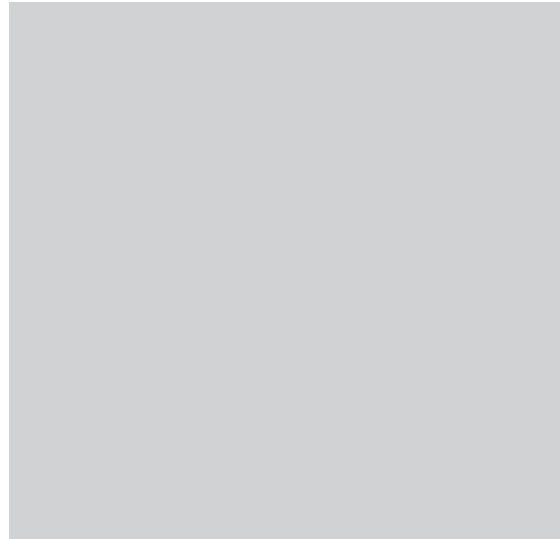
3. Joe Windish, "A Warner Music, Corey Vidal Take Down Tale" *The Moderate Voice Technology*, (27 Jan 2009) <http://themoderatevoice.com/25981/a-warner-musiccorey-vidal-take-down-tale/>. First read the story by Windish. Then to get a taste of the Corey Vidal experience check out the following two videos; one is a split screen video of Vidal in a lip synch tribute to parody acapella group "Moosebutter" and the other is a video response from that a capella group "Moosebutter". Tribute video - Corey Vidal, "Star Wars (John Williams Is The Man)' medley - Corey Vidal and Moosebutter - a cappella tribute", *You Tube*, http://www.youtube.com/watch?v=lk5_Osawz4&eurl=http://www.boingboing.net/2008/11/03/great-john-williams.html, and Moosebutter's response: Moosebutter, "Star Wars (John Williams Is The Man)' medley - a cappella tribute by Moosebutter (VIDEO RESPONSE)", *You Tube*, http://www.youtube.com/watch?v=PGYAPr6UKhs&feature=Playlist&p=D4AFA5300B463101&playnext_from=PL

4. "Corey Vidal", *Wikipedia*, http://en.wikipedia.org/wiki/Corey_Vidal (accessed 12 July 2010); tells the story of the original DMCA claim complete with Madonna input.

5. James Montgomery, "YouTube Yanks Videos Of Beyonce's Tumble, Citing Copyright Infringement: Videos are pulled faster than an R&B singer falling down a flight of stairs." *MTV*, (25 July 2007), http://www.mtv.com/news/articles/1565743/20070727/knowles_beyonce.jhtml, it is completely possible that most of them have been reposted since that time with over 2 million views each.

6. Lucas Hilderbrand, *Inherent Vice, Bootleg Histories of Videotape and Copyright*, (Duke University Press, Durham and London, 2009), 173.

55 These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



Because of the nature of this project we are unable to reproduce an image.

Case Study I

Source: CD track

Use: sound track for student's original flash animation

PROJECT

Student I used a favourite song track, as basis for their original cartoon animation. The lyrics, theme, history (traditional) and new version by the recording artist were integral to the meaning of the animation.

Art At Risk: copyright, fair dealings and art in a digital age

legal node

This is permissible in a student work in a classroom situation but does the copyright held in the recording of the CD track mean it cannot be shown in any other context to a wider audience beyond the classroom?

Is copying the track for re-use in another context without permission of the recording artist an infringement?

Do students need to obtain permission?

How would they go about this?

What costs would be involved?

What if the song is out of copyright?

What if the recording is out of copyright?

ethical node

The track used was a traditional song, “Johnny I hardly knew ye” which has a strong anti-war message dating back to the early 19th century and has had a long history of covers.¹ The version the student wanted to use was by the Drop Kick Murphys. It is a Celtic punk rock version and follows in the footsteps of other versions and variations; a 1961 cover by The Clancy Brothers, versions by Joan Baez and Bob Dylan (for whom the lyrics retained their resonance as a protest song during the Vietnam War) and other punk versions by bands such as the Tossers.²

“Johnny I Hardly Knew Ya” by the Drop Kick Murphys is registered as written by Casey/Kelly/Barr/Lynch/ Orrell/Brennan and published by Mushroom Music (thus the song and recording fall under APRA’s jurisdiction). The band appear to claim it as their own original work as there is no reference to it being an arrangement of a traditional song.³ There are other listings of the song by other artists using different spellings of the last word (You, Ye) which are registered as arrangements of the traditional work. Once somebody registers an arrangement of a traditional or public domain song they then own the copyright of that arrangement. Legally this fits perfectly but we wonder about the ethics of this.

art node

The works in this art node all rework existing songs with different visual imagery.

FrEckleStudios, Daft Hands - Harder, Better, Faster, Stronger (2007)

The *Daft Hands* video title is a play on words of the band’s name Daft Punk. It features dancing hands in a skilled sequence of metacarpal dexterity, to the song “Harder, Better, Stronger, Faster”, and has since spawned a tide of viral video responses of YouTubers trying to outdo themselves in harder, better, stronger, faster choreography.⁴

Javier Prato, Jesus Will Survive - Jesus Christ! The Musical (2007)

This parody of “I Will Survive” by Gloria Gaynor, features Jesus in a musical rendition of his final moments. This clip was included in Lawrence Lessig’s seminal TED talk which looked at several aspects around remix and the ‘permission culture’.⁵

Jane Korman (2010)

Recently there was furore over a use of the same song but for different reasons, when Korman’s video “I will survive” was removed from YouTube. Journalist Matt Frinkman writes that, “on a recent trip to Europe, a family of three generations (a Holocaust survivor, his daughter and his grandchildren) danced to Gloria Gaynor’s pop song - ‘I Will Survive’ at concentration camps and memorials throughout Europe.”⁶ The video was called into question because of the perception of potential harm to holocaust survivors, if the footage was recontextualised. This action was spearheaded by the Anti-defamation league and was later removed subject to an APRA/AMCOS takedown notice.

Weird Al Yankovitch (1983)

Parody musician, Weird Al Yankovitch’s works qualify as fair use in the US under Parody and don’t need permission but Yankovitch always asks out of courtesy and as a sign of “good faith”.⁷ **See Words.**

Mark Wallinger “Hymn” (1997)

In this video Wallinger standing on a plinth, takes puffs of helium gas and sings a victorian hymn, which becomes laden with meanings surrounding childhood, blind faith and obedience.

YouTube animations to well known soundtracks

kct7, “Every body dance now stickman”, *YouTube*, 16 November 2006.⁸

Krikonn, “Bohemian Rhapsody LEGO”, *YouTube*, 23 August 2007.⁹

Zopozopo, “Sexy Thing”, *YouTube*, 07 October 2006.¹⁰

Thajigisup, “”Thriller”... with Legos”, *YouTube*, 04 March 2006.¹¹

BozzFromOz, “ Animated monkey dancing to Men in Black”, *YouTube*, 11 February 2008.¹²

Risk Management

FIRST STEPS

Creative Directions (2010). This is a resource co-developed by the Intellectual Property Office of New Zealand (IPONZ) and the Ministry of Education, to help media students learn about IP. Check out the chapter on layers of IP in music. **See Beginners Online Guide to Copyright.**

See also EFF, (Electronic Frontier Foundation) Teaching Copyright for an excellent resource on how to make decisions around Fair Use. **See Beginners Online Guide to Copyright.**

The quick guide, *Nolo Legal Encyclopedia*, explains when students would need permission to sample others’ work, some instances of when they might not need to obtain a clearance and also possible “road blocks” to obtaining permissions for the material students might want to use.¹³

YouTube

YouTube contains multiple examples of others using the same track in anti-war remixes of still and moving images of famous and fantasy battle scenes (*LOTR*, *Star Wars*, *Halo*, also Anime genre and Manga genre) and most recently actual footage of war zones (featuring footage posted by armed forces members from Afghanistan and Iraq). The song and lyrics provide a powerful counterpoint to the imagery. By far the most popular videos were the diary uploads of *Guitar Hero III*.¹⁴ The student could choose to follow these examples as a precedent (even so, they may legally be breaching copyright).

Code of Best Practices in Fair Use for Online Video, 2009

While the *Code for Fair Use* was written from a US law perspective we can look at some of the principles. This Code says in point one; so long as the maker analyzes, comments on, or responds to the work itself, fair use should apply. This should be made evident in the title of the work also to indicate that the work is commenting or responding to an ongoing discussion. In point six it says; a work may qualify as a transformative use. Quoting in order to recombine elements to make a new work that depends for meaning on relationships between both or all elements. This kind of activity is covered by fair use to the extent that the reuse of copyrighted works creates new meaning by juxtaposition.

Art At Risk: copyright, fair dealings and art in a digital age

Please read the whole code and also note LIMITATIONS.¹⁵

See Appendix ii APRA Information Sheet. APRA deal with clearing the performers rights.

RELEVANT CASES

Fan tribute sites.¹⁶

U2 vs Negativland (1991)

See Casebook.

Britannica Dreams (2009)¹⁷

Kheri Batal, formerly of Britannica Dreams Productions, tells a tale of machinima takedowns from YouTube and how to file a counter claim if videos are unfairly removed.¹⁸

NZ COPYRIGHT LAW

NZ Copyright Act S.157-160 Collecting Societies

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)

NZ Copyright Act S. 98 Moral Rights (alteration and adaptation)

COPYRIGHT RISK MANAGEMENT

As with the other examples in this study, use of the soundtrack is permitted in a classroom context, under the education exemptions section of the copyright act regarding the teaching and learning context of making a film. The student cannot enter it in film competitions, show it outside of the classroom as a screening nor upload it to the internet without a copyright clearance.

Students should understand that there are layers of copyright in music and that at least two clearances are required for each song; one from the songwriter and the other of the sound recording.¹⁹ Lucas Hilderbrand says using songs in films requires not only licensing but also paying for synchronisation rights. These are required “whenever recorded music is matched with moving images, thereby exploiting the dramatic potential of the music and potentially altering the songs original intended meaning through juxtaposition.”²⁰

If the sound recording is out of copyright it means that version is in the public domain and no royalties are payable for the sound recording. However the composition (or musical work) may still be in copyright as this is defined as fifty years after the composer’s death. So even when a recording is in the public domain/out of copyright students may

still need to ask permission to use the out of copyright recording. In NZ the copyright term in the musical work lasts for 50 years after the composers death and the Copyright term in the sound recording lasts for 50 years after the year it was released.²¹

In order to “legally” upload the animation in this case study, the student would need to email the band or their representatives and see APRA regarding costs of clearing permission.²² One of the reasons this is important is that musicians have rights regarding product endorsement.

If the student decided to record their own cover of the traditional version of the song they would not need a recording clearance. They would, however, still require the publishing rights to be cleared if it was a song or arrangement that was still in copyright.

With regard to costs there is no across the board rate-card. Each request is handled on a case-by-case basis.²³ A local band might start from AUD\$200.00 per 30 seconds even for a student film.

There are also extremes to the copyright spectrum where some recording artists won’t license their music at all and yet others who release albums with no copyright protection. Radiohead’s 10th album *In Rainbows* was released exclusively as a digital album with no copyright protection. Further they left it up to the consumers to decide how much they wished to pay for the music.²⁴

SEE ALSO

The same rules that apply to sampling music in many cases also cover film. Typical fees for film clip use (for example 6 – 22 seconds) could attract a fee of between \$US5,000 – \$US10,000 per use.²⁵

OUTCOME

Aside from the costs obtaining permission is a time consuming element in a student project. After the initial trials, Student I rethought the project and for exhibition went the way of free software and a free music library.

Teachers Respond

Below is an indicative random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of 'it's OK' to 'STOP').

DESCRIPTION: Using a song from a CD as a soundtrack to the student's original Flash animations. Song chosen was necessary to the meaning of the animation imagery.

2.1 Suggest that the student might find an appropriate way of manipulating the song to make formal sense and avoid copyright infringement.

2.2 Permissions- this is about intellectual property isn't it? Or can it be ring-fenced within learning environment?

2.3 Can permission be obtained easily. If not acknowledge.

2.4 Use of copyright material is not recommended. However if this is to be made only within a school context this is fine. However there becomes an issue if the work is included in a portfolio or screened outside the school. This would be a breach of copyright. My final advice would be to select a new piece of open-rights music, or if the film has already progressed too far to advise that it can only be played within the educational context.

2.5 Copyright allows this as I understand for student works. The student and I would need to clarify if this work was going to have a public exhibition and then clarify if permission is required etc. or if a sample from the full length song can be looped and used freely instead.

2.6 Make student aware of copyright act and have them identify the copyright permissions/restrictions of the song. -discuss legal ramifications and risks -make student aware of other ways to obtain music that have different permissions (i.e. share/attribute/etc.)

2.7 Depends on whether it is going to be published? Or the means of distribution. If it is an art school experiment it is okay, otherwise contact the copyright owners.

2.8 Go ahead. however when using the soundtrack you will need to get permission from the author of the soundtrack. Contact them directly if possible. They may redirect you to the rights holder.



right: Dylan Horrocks, "An important message from the Global Entertainment Industry", **Critic**, Issue 16, 20 July 2009, 28-29..

Art At Risk: copyright, fair dealings and art in a digital age

1. **See also Matauranga Maori Contexts.** Wimoweh example of traditional song with a history of covers.
2. “Johnny I Hardly Knew Ye”, *Wikipedia*, http://en.wikipedia.org/wiki/Johnny_I_Hardly_Knew_Ye (accessed 12 July 2010)
3. Information available from APRA on request.
4. FrEckleStudios (Austin Hall), “Daft Hands - Harder, Better, Faster, Stronger,” *YouTube*, <http://www.youtube.com/watch?v=K2cYWfq--Nw> (accessed 12 July 2010).
5. Javier Prato, “Larry Lessing’s TED talk” (Jan 28 2010), <http://www.javierprato.com/> (accessed 12 July 2010). See here for links to Prato’s parody of “I will survive” by Gloria Gaynor called “Jesus will survive – Jesus Christ the Musical.”
6. Matt Frinkman, (Associated Press), Holocaust survival dance causes row” *NZ Herald*, (16 July 2010) http://www.nzherald.co.nz/world/news/video.cfm?c_id=2&gal_cid=2&gallery_id=112650 (accessed 12 July 2010). See the interview with the Grandfather at the *NZ Herald* site and for the full video of the dancing family see Jane Korman, “I Will Survive Dancing Auschwitz” *YouTube*, <http://www.youtube.com/watch?v=cDYb6ijH2q0> (accessed 12 July 2010).
7. *Weird Al Yankovic*, <http://www.weirdal.com/>, (accessed 12 July 2010). See the Weird Al channel on *YouTube* at http://www.youtube.com/results?search_query=%22Weird+Al%22+Yankovic&aq=f For example: “Star Wars American Pie Parody” http://www.youtube.com/watch?v=QZ9GdDYGT_0
8. kct7, “Every body dance now stickman”, *YouTube*, (16 November 2006), <http://www.youtube.com/watch?v=5JzuJbCvtNI&feature=related>
9. Krikonn, “Bohemian Rhapsody LEGO”, *YouTube*, (23 August 2007), http://www.youtube.com/watch?v=0_15G_tIl38&feature=related
10. Zopozopo, “Sexy Thing”, *YouTube*, (07 October 2006), <http://www.youtube.com/watch?v=9mO8fzoBo-c&feature=related>
11. Thajigisup, ““Thriller”... with Legos”, *YouTube*, (04 March 2006), <http://www.youtube.com/watch?v=MThEoxSWURA>
12. BozzFromOz, “Animated monkey dancing to Men in Black”, *YouTube*, (11 February 2008) <http://www.youtube.com/watch?v=esPCwCv6CIE>
13. Richard Stim, “When You Need Permission to Sample Others’ Work” *Nolo*, <http://www.nolo.com/legal-encyclopedia/article-30165.html>.
14. American University School of Communication, Center for Social Media, *Recut, Reframe, Recycle* (December 2007). http://www.centerforsocialmedia.org/resources/publications/recut_reframe_recycle (accessed on 16 June 2009); gamers may record their performances to memorialize a personal experience, however, fair use reaches its limits when the entertainment content is reproduced in amounts that are disproportionate to purposes of documentation.
15. American University School of Communication, Center for Social Media, *Code of Best Practices in Fair Use for Online Video*, (May 2009). <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video> (accessed on 12 July 2010).
16. Lauren Yamamoto, “Copyright Protection and Internet Fan Sites: Entertainment Industry finds solace in traditional copyright Law” *Entertainment Law Review* (vol. 20, no.1, 2000) <http://www.ells.edu/issues/v20-issue1/>
17. Kheri Batal, “Machinima, Through My Eyes: Copyright Infringement and YouTube” *Khrywolf*, (February 2009) <http://khrywolf.blogspot.com/2009/02/copyright-infringement-and-youtube.html> (accessed 14 July 2010)
18. William F. Patry, *Moral Panics and Copyright Wars*, (Oxford University Press, 2009), 69-170. Outsourcing of take-down notices by third-party firms relies on automated processes which maybe issued regardless of the responsibility to ensure the takedown notice issued is accurate.
19. New Zealand Government, *Copyright, Act 1994* No 143, <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html>. There are two rights with any recorded song. 1. The composition (or musical work) - as owned by the songwriters/publishers; and 2. The sound recording (or master) - as owned by the record label/artist
20. Lucas Hilderbrand, *Inherent Vice, Bootleg Histories of Videotape and Copyright*, (Duke University Press: Durham and London, 2009), 173.
21. New Zealand Government, *Copyright, Act 1994* No 143 , <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html>.
22. Drop Kick Murphys, <http://www.dropkickmurphys.com/about>, (accessed 12 June 2010). Until recently it was possible to contact the band through their official web site. However in the most recent version of the website as their popularity has increased this would seem less likely (as no doubt so has the volume of fan mail). The Drop Kick Murphy’s website also has a fan page where fans can upload tributes.
23. Brett Gaylor, *RiP: A Remix Manifesto*, (2009) <http://www.opensourcecinema.org/project/rip2.0>, (accessed 13 July, 2010). See *Remix Manifesto* for a discussion about what it might cost mash-up artist “Girl Talk” to legally create one of his tracks. Some of the considerations taken into account when licensing fees are negotiated are “Most Favoured Nation” basis. This means that if at any time the Record Label is paid a higher fee, the music publishers get paid equally for the publishing rights, or vice versa. The potential number of people who will see the film and the media territories it is to be distributed in and the popularity or worldwide recognition of the band in question will also determine the fee.
24. Romow News and Media Directory, “Radiohead Says “No” to Digital Copyright Protection”, (October 10, 2007), <http://www.romow.com/news-blog/radiohead-says-no-to-digital-copyright-protection/>
25. Roger L. Sadler, *Electronic Media LAW*, (Sage Publications: London 2005), 311.

61 These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



Student J: Film still from Art History film montage.

Case Study J

Source: Google Images (reproductions of famous artworks)

Use: Remix – Film collage

PROJECT

Using thousands of low res JPEG images of “master works” from the art-history canon Student J edited them into a filmstrip which played at high speed to create an indistinguishable blur of colour streaks, in effect using the JPEGs of the masterworks as a gush of “digital paint”.

Art At Risk: copyright, fair dealings and art in a digital age

legal node

Were the images used in or out of Copyright? **See Words** “Duration” and “Public Domain”.

If any of the reproductions are still in copyright what would be the costs of clearing rights and getting permissions?

Is it a transformative use? **See Words**.

art node

*In each of the examples given below it is clear from normal viewing where the image may have been derived from. However, this is not the case with student J's artwork. Although on the surface it may appear different (because it is a moving image), this project has more in common with the “composite photograph” scenario than remix video or collaged works, although aspects of both still apply. **See Case Study B***

Nam June Paik “Video Flag” (1985)

Paik made a number of video flag works. In one of these works seventy small monitors were arranged like the American flag “pulsing out a barrage of microsecond-long snippets culled from television news casts, documentaries, commercials and films.”¹

Blue Sfeer [2009]

Digital art Worm was created by the artists at Blue Sfeer with the goal of creating the largest graphics worm on the internet. You can see the work in progress at the link below. This is a multi-author internet art collaboration.²

Negativland

Avantgarde sample based video using video and sound.³

Bruce Conner, A Movie (1958)

Bruce Conner's first movie was a skilful film montage of clips from existing or found footage.⁴

Alex Monteith (2006)

Sonic Pixel and the Blockbuster was a two channel projection of a video by Alex Monteith, with live sound by Clinton Watkins and Sean Kerr. It featured the first and last 10 minutes of the highest grossing films up to 1956 and 2006 as a digital composite video.⁵

In the works looked at above the artists have made digital moving images. Their work in time based media builds on the work of more traditional collage artists which we discuss below:

Picasso , Braque, Gris, Schwitters, Hannah Hoch

There are numerous early collages of “found” objects which include an odd variety of general urban flotsam such as newspaper and magazine clippings, photographs, string.⁶

Richard Hamilton “Just What Is It that Makes Today's Homes So Different, So Appealing?” (1956)

This collage of advertising clippings was considered the first *bona fide* Pop Art work. Pop Art embraced everyday art from the media and culture at large, particularly advertising. It was defined as “popular (designed for a mass audience); transient (short-term solution); expendable (easily forgotten); low cost; mass produced; young (aimed at youth); witty;

sexy; gimmicky; glamorous; and last but not least, Big Business.”⁷

Robert Rauschenberg “Pull” (1974)

Robert Rauschenberg incorporated a photograph called *Diver*, by Morton Beebe, into a print name *Pull* part of the “Hoarfrost” series. **See Casebook.**

Red Rag to a Bull Foundation (2008)

The image of Damien Hirst’s diamond encrusted skull was parodied and later used as poster and t-shirt art.⁸

Risk Management

FIRST STEPS

Read:

Jon Ippolito, *Permanence Through Change: The Variable Media Approach*.⁹

Lissa Mitchell, “Where is the art?” *arc Journal* (Australasian Registrars Committee Journal), 58, June 2009.

Lissa Mitchell, “New Data: Curating and Archiving Digital Art in New Zealand”, in *The Aotearoa Digital Arts Reader*, edited by Stella Brennan and Su Ballard, (Aotearoa Digital Arts and Clouds, 2008).

RELEVANT CASES

Bridgeman vs Corel (1999)

The finding in this case was that exact reproductions of Public Domain Works are not considered infringing copyright (in US) but an amicus curiae brief was less decisive about the UK jurisdiction. As our law is derived from UK law the question remains open. **See Casebook.**

National Portrait Gallery vs Derrick Coetzee (2009)

This was a case whereby another donation of public domain images was made to *Wikipedia*. This time the source was not a CD (as in *Bridgeman vs Corel*) but fragments of images had been downloaded from the NPG’s web pages and stitched back together again to form a whole. **See Casebook.**

Negativland (U2s lost song - 1991)

Avantgarde sample based video using video and sound. **See Casebook.**

NZ LAW

NZ Copyright Law – Duration – Out of Copyright

NZ Copyright Act S. 43 Fair Dealings (Purpose of copying, effect of copying, amount and substantiality)

NZ Copyright Act S. 98 Moral Rights (alteration and adaptation)

NZ Contract law

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COPYRIGHT RISK MANAGEMENT

Although whole low res thumbnails were copied, the montage is played at such high speed that the effect of the clip is a blur of shifting colour flashing by. Is this a transformative use? The way in which the individual components are (not) viewed alters their reading entirely. In addition the context and dialogue accompanying the artwork creates new meaning.

However, it is our understanding that *time* may not be admitted as an essential element in the work – strange but true, as it is a *moving* image (which is a time-based media) that we are talking about. Under the law a copy, is a copy, is a copy. A legal someone could potentially pull the work apart and view the film image by image as individual frames but to do this would mean destroying the new artwork. This would be analogous to taking a page of text apart word by word. It loses all meaning and integrity, at which point you are no longer considering the artwork at all.

The video is unique to this art work. We use “unique” in the dictionary sense of the term, that there was only one instance of this work made and used in the artwork. The art work in this instance functions as a whole and would not affect the market for the originals. The (unseen) JPEGs would not conceivably be considered as an image library, which is the closest commercial model. In addition as a digital compilation the work may attract protection in its own right, as long as the components of the database do not individually attract any copyright.¹⁰

Outcome

The student continues to work with this video format.

1. Yuting, “Video Flag Y” *Art and Electronic Media*, (23 August 2009), <http://artelectronicmedia.com/artwork/video-flag-y> (accessed 12 July 2010). Looking at Nam June Paik, Video Flag, 1985, In 1982 Paik created *Tricolor Vidéo* for the Musée National d’art Moderne, Paris, using television images to form a configuration of the French flag. In 1985-86 he used the American flag as the basis for three sculptures.
2. Matthew A. Crist, *Official Bluesfear Worm*, <http://worm.bluesfear.com/index.php?content=su&bmissions&action=view> (accessed 12 July 2010). The script was created by Matthew A. Crist of Immutable Productions.
3. Negativland, “Negativland – Gimme The Mermaid” (September 2006) <http://www.youtube.com/watch?v=TTrHwH2gEY8> (accessed on 16 June 2009).
4. Stefano Basilco, ed., *Cut: Film as Found Object in Contemporary Video*, (Milwaukee Art Museum: Milwaukee, 2004), 17.
5. Su Ballard, “Old Noise, New Sounds: Sonic Explorations in Gallery Spaces” *The Aotearoa Digital Arts Reader*, Stella Brennan and Su Ballard eds., (Aotearoa Digital Arts and Clouds: Auckland, 2008), 157 and fig 10, 159.
6. Chelsea Zhou, “Tomorrow may be too far away” *Artsvis 54*, Duke University, Visual Studies blog archive, <http://www.dukevisualstudies.org/artsvis54/?cat=16> (accessed 12 July 2010)
7. Paul DiLascia, “Richard Hamilton: Just what is it that makes today’s homes so different, so appealing? Collage, 1956” *digital dream collage*, <http://www.dreamcollage.com/richard-hamilton-collage.htm> (accessed 12 July 2010). Di Lascia quoting Eddie Wolfram from *History of Collage*, 159
8. Red Rag to a Bull Foundation, “Street urchin Art Appeal” <http://www.redragtoabull.com/acatalog/Books.html> (accessed 12 July 2010).
9. Variable Media Network, “Permanence Through Change: The Variable Media Approach”, *Solomon R. Guggenheim Museum*, http://www.variablemedia.net/e/preserving/html/var_pub_index.html
10. Carla Shapreau, “Art, Internet and US Copyright Law” in *Dear Images: Art Copyright and Culture*, eds. McLean, Daniel and Karsten Schubert, (Arts Council of England, 2002), 147. See the case of David Brooks who created his own Internet Gallery which took him five years to complete. It was copied wholesale to a print-merchandising site. (This no longer exists but the functions of it appear to have been subsumed under Brooks’ current site umbrella.) David Brooks, “Vincent Van Gogh Gallery” <http://www.vangoghgallery.com> (accessed 12 July 2010)

65 *These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.*



Student J: Photograph of fern frond

Case Study K:

Matauranga Maori

Source: photograph of fern frond

Use: photograph sold to organisation

PROJECT

Student K took a photograph of a fern frond or pitau while tramping. A request was made to purchase the photograph by an organisation.

Art At Risk: copyright, fair dealings and art in a digital age

legal node

In this case the student has been approached to sell the image. It is the responsibility of the purchasing organisation to think about the context in which it is choosing to use the image. The purchaser should also negotiate reproduction fees and rights for future use with the student. The student needs to be aware of these requirements and actively facilitate negotiations.

ethical node

There are two main questions here. Firstly students should ask when does a photograph of a pitau become equated with the design element, commonly known as the koru, which has emblematic connotations for both Pakeha and Iwi Maori? Secondly, who has a claim or right over this ubiquitous image, frequently used by Iwi Maori in kowhaiwhai and pounamu carving?¹ For more context about traditional knowledge and Maturanga Maori. **See Maturanga Maori Contexts.**

art node

In this case study artistic and commercial uses are considered together. There are many examples of commercial uses of the 'koru'. The ubiquity of these images mean that often a false notion of public domain can override cultural and critical ethical considerations.

“NZ Today”

NZ Today uses a koru type design element in its magazine masthead.²

Air New Zealand

Air New Zealand claims it has property rights over its use of the koru in the Air New Zealand logo and it features as a motif in their flight attendants' uniforms.³

Canterbury Rugby boots

Peter Shand writes: “The “Moko” series was designed by a Maori carver to bolster the appropriateness of its use. However, more problematic was the incorporation of words in the boot promotion [because of the potential for the trademarking of words and] further concerns regarding the tapu/noa disposition of having words such as Rangatira, used in particular, for a range of footwear.”⁴

Royal Doulton tea sets

British-based Royal Doulton produced a number of New Zealand-themed porcelain series including the *Kia Ora* stoneware (1907), *Art Teaware* (1907) and a New Zealand International Exhibition series (1906). *Maori Ware* which feature red, black and white kowhaiwhai design (based on the koru).⁵

Risk Management

FIRST STEPS

Consideration of the context or intended use is the key question with this work. Looking at the purpose and intent for using the design the student needs to work out their prior relationship to the image of a koru (rather than the pitau frond) and how such things fit into their current practice and *why*? Are they referencing the spiral form found in shells and ferns and the beauty of untrodden nature? Is their approach from their own ancestral heritage or are they referencing the culture of Iwi Maori? Could the intended use be considered offensive or as detrimental to cultural identity (by those in the affected group)? Are there those who may consider they have guardianship (kaitiakitanga) over the image?

COPYRIGHT RISK MANAGEMENT

At this point in time the question is moral rather than legal. The context of end use is key. If there is anything of interest or significance to Iwi Maori in student's work, students might want to think about sitting down with the appropriate people. Further, in the case of images from other cultures, there will need to be consultation with the originating cultural community from whom the image evolved. A partial corollary here is when a buyer purchases a painting. They do not have carte blanche to do whatever they like with the painting, that is they cannot then use it as a logo for their business without prior permission from the artist.

When using *any* material that is not their own, students need to identify their reason and intent for wishing to use it. Note; if there is a question in student proposals that asks whether, there is anything potentially of interest to Iwi Maori in their project and the answer is "yes" then staff could refer students to their Mātauranga Maori IP Policy and raise it with their Kaitohutohu or local iwi representative. Also remember one swallow does not make a summer, nor one god-wit a spring. A single (token) person cannot act as a clearing house for *all* Iwi Maori. You need to make contact with the appropriate group.

OUTCOME

The photograph was purchased by the organization and then gifted to another party (thus the photograph was treated as an artwork).

1. Suzi Wereta, "Engaging with Māori Art and Identity: A Conversation with Māori Artists in Otepoti," *MAI Review* (2007, 1, Intern Research Report 9) <http://tiny.cc/nf0pv> (access 12 July 2010)
2. *New Zealand Today Magazine* subscription page, http://www.isubscribe.co.nz/title_info.cfm?prodID=9925
3. Sam Sachdeva, "Air NZ's new uniforms disrespect Maori", *The Press*, (29 Jan 2010) <http://www.stuff.co.nz/national/3272904/Air-New-Zealands-new-uniforms-disrespect-> (accessed 12 July 2010); Air NZ (press release) "Air NZ claims property rights over koru", 29 Nov 2006 *Scoop Independent News* <http://www.scoop.co.nz/stories/PO0611/S00424.htm> (accessed 12 July 2010).
4. Peter Shand, "Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion", *Cultural Analysis* (Volume 3, 2002, University of Auckland, New Zealand), http://socrates.berkeley.edu/~caforum/volume3/vol3_article3.html (accessed 12 July 2010)
5. Adrienne Rewi, "Tea anyone" *Introducing Maori Lifestyles blog*, (December 2, 2009) <http://lifestyles.blogspot.com/2009/12/tea-anyone.html> (accessed 12 July 2010)

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Student L: Still from video installation of performance

Case Study L

Source: Recording in Public Space

Use: Performance

PROJECT

This was an experimental performance art work where the student followed mobile phone users talking loudly in public spaces, such as the main street. The project was an experiment in issues of perceived boundaries of privacy. The student was filmed, for documentation purposes only, as the main aim of the work was a performance.

legal node

Is permission required to photograph, film or record in public spaces?

Is an action by a member of the public any different to CCTV recording?

ethical node

When is surveillance an invasion of privacy? Is it when the person filmed is named or identified in some way?

Is it necessary to obtain media release statements from members of the public included in the footage?

“There is a general belief that if you photograph someone in a recognizable likeness, you need a release to publish it. Certainly this is true if you make the photograph in a private space, but in public different principles come into play.”¹

The UK Film Council says “you do not need to ask passers-by for permission to feature their faces in a film. The copyright of film shot in a public place resides with the filmmaker.”²

Would a sign or warning that recording is taking place serve as a courtesy notification and/or blanket permission?

Are there any special restrictions on equipment that can be used, for example parabolic or booster microphones or telephoto lenses?

Is a loud conversation in a noisy public space over a mobile phone, using open insecure wireless networks really private?

art node

The works in this node look at performances and behaviours in public spaces.

Walker Evans (1940s)

Evans's 1946 *Labour Anonymous* series centered on studies of pedestrians in Detroit and Michigan, in which the street was the studio.³ Where does documentary street photography stand in the twentyfirst century? Some answers can be found in relevant cases below when we look at the stories of some of the *Guardian* photographers.

Sophie Calle (1981)

Calle looked at the rhetorics of following and being followed by a private eye, with photographic documentation (from both sides) in her 1981 work.⁴

Allan Kaprow (1940-1997)

Kaprow was a conceptual artist whose works look at the boundaries where life and art “blur” and where the viewers reactions were integral in defining what had just “happened”.⁵

Hamish and Andy (2008)

Rove Live – A duo who performed “Ghosting” (Personal Space Invading) and “Forbidden Ghosting” as comedy sketches.⁶

Dougal Stevenson (2010)

Dietary Tales, broadcast on National Radio in the very best of BBC-style diction. In this piece of radio prose a cellphone user in a Fish and Chip shop makes the story teller an unwitting and unwilling participant in their cell-phone universe.⁷

Risk Management

FIRST STEPS

Electronic Media Law. Written from a communications media perspective, this is an excellent book for all things ever filmed in public or aired in the public sphere.⁸

The Missouri Bar Media Law Handbook offers some excellent advice on privacy.⁹

See What's Fair: People watching People poster.

RELEVANT CASES

In 2008, Google executives in Italy were found liable for a clip of abusive behavior uploaded by a subscriber to YouTube.¹⁰ The case is currently going through an appeal process.

Cellphone, video surveillance

Police surveillance of protesters and vice versa.¹¹

Mike Hosking and “New Idea” (2003)

This case looked at the boundaries of intrusion and the privacy rights of the children of celebrities.¹² The case asks questions about the rise of celebrity and the roots of fame and cultivation of such in the public persona (or having your cake and eating it too).¹³

Secret taping of a conversation (2008)

(MP at a private function.) Although members of the public were present it was a private function and at the time of the recording it is widely held that the MP could reasonably expect his comments to remain confidential.¹⁴ The making of a record of spoken works for news or reporting purposes is not allowed if the speaker specifically prohibits the recording. Hence the saying “off the record”.¹⁵

The Guardian Photographers (2010)

Street photography by the public in public spaces is under pressure not because of privacy concerns but from new anti-counter terrorism measures which threaten to bring it to a halt. A new anti-terrorism law in the UK says that police officers can stop and search someone taking photographs within an authorised area. However, as Sean O'Hagan, of *The Guardian*, writes this does not prohibit the taking of photographs and members of the public and the press should not be prevented from doing so.¹⁶

Deteresa v ABC (1997)

In this case a woman was interviewed by reporters after a murder. The reporter was wearing a hidden microphone and the interview was filmed from a car across the street. **See Casebook.**

Google Streetview (2009)

Google Street View protects individuals privacy by blotting out their faces. In the same vein television news items also blot out vehicle registration plates. An article in *Gigazine* notes that Google has also given the modesty treatment to a statue.¹⁷

Jane Korman “I Will Survive Dancing Auschwitz” (2010)

There has been a furore over this video which was removed from YouTube. “On a recent trip to Europe, a family of three generations (a Holocaust survivor, his daughter and his grandchildren) dance to Gloria Gaynor’s pop song - ‘I Will Survive’ at concentration camps and memorials throughout Europe.” Objections to the video were initially raised because of the perception that it could be construed as anti-Semitic if the material was recontextualised, thereby causing offense and harm to holocaust survivors, even though the video features the grandfather who was a survivor, dancing with his grandchildren. The takedown action was spearheaded by the Anit-defamation league and the work was later the subject of an APRA/AMCOS takedown.¹⁸

NZ LAW

Privacy Act

Human Rights Commissioner

COPYRIGHT RISK MANAGEMENT

This work had many of the marks of a conceptual piece.¹⁹ As a work taking place in a public space we needed to ask several questions of the student’s project. Students need to take into account the ethics around the privacy and type of public space, whom and where surveillance takes place, how they use the footage and its distribution. **See Privacy and the Digital Image.** The first thing to note is the law is not as concerned with the making of the recording but with its publication. For example, if it is subsequently published (including on social network sites such as Facebook).²⁰

If a conversation is easily audible and can be seen and heard in a public space (with no technological enhancement) the student is probably legally safe as there are in fact responsibilities upon the individual phone users to protect their conversations in public if they wish them to remain “private”.²¹ The listening or recording would only possibly be okay if it was in the range of normal human hearing and was preferably incidental, that is by the proximity and volume of the talker.²² The case is different again where the

recording person is party to the conversation itself.²³

Student L also needed to take care not to be “intruding” on the phone user’s personal space. If the phone user was to ask them to back off, they should immediately comply when requested.²⁴ As with other “rights” they only come into play when verbally or contractually asserted or notified. Related to privacy are “Intrusion” and “Nuisance” which are matters of trespass law – this is how trespass notices work even in public spaces.

Although no subterfuge was used to hide the act of “following” another factor which needed to be considered was the covert nature of the recording. **See Casebook:** the case of Deteresa. Covert filming requires a different ethical assessment as there may be different repercussions. In many circumstances this is not problematic but changes in context (such as sensational media stories) bring about changes in the public mind with evolving standards in expectations of personal privacy. We see this regularly with complaints to the Broadcasting Standards Authority.

The safest way to present a person in a public space is in a way that is a fair and literal record of current circumstances such as in news reporting. The showing of people when vulnerable, sick or those under age (without explicit consent) is exploitative and harmful and your project may be viewed as unethical behaviour.²⁵

Students should also acquaint themselves with what exactly a public place is. Non-government-owned malls are examples of ‘private space’ with the appearance of being ‘public space’.²⁶ If it is a privately owned space to which the public are invited, students should be aware if any terms of access are in place. There are also other public “non-public” spaces in the privacy sense such as swimming pools, prisons, and hospitals.

OUTCOME

A media release was obtained from one of the filmed mobile phone users who was filmed in a shopping mall and who was an employee there. The work was an experimental performance piece. It was only filmed for documentation purposes. The student moved on in another direction.

Teachers Respond

Below is an indicative random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of ‘it’s ok’ to ‘stop’).

DESCRIPTION: Student L proposes following people who are using cell phones in public places and recording overheard conversations as a performance filmed for documentation.

1.1 Fine but proviso. Context: depends on what you do with it. How is it going to be used?

1.2 Great idea. Fantastic. However please think through any Ethical issues. To do this you need to contact the Art School person on the Ethics committee because you are involving members of the public directly in your artwork. Be aware.

1.3 There is an issue here with invasion of personal privacy. It seems like eavesdropping, but if the content of the conversation is not recorded I would suggest that as a performance in public space this would be ok. My final advice would be to frame the work as a film work in public space, with certain individuals chosen to focus on, needs to be done with respect, but no major issues.

1.4 Tell the student to look at Baudrillard’s article on “Please Follow me” Sophie Calle. If the student still wants to proceed after this suggest that they might like to make an appointment with the art school ethics committee person.

1.5 I would ask the student if they have checked the privacy laws/acts in regards to recording in a public space (citing the Bill English recorded conversation at National Party conference example). If the student is working with public sites as part of their studio research, then a brief working knowledge of the law and ethics for this project would be a required part of this project in my mind.

1.6 Make student aware of privacy act and the rights of people in artworks (i.e. right to privacy, and right to be represented the way they want to be) –discuss legal ramifications –discuss risks –discuss intention of the work, if people can be identified and whether the work can move past this stage in some way?

1.7 Ethical issue. Not okay for student to record private conversations with out knowledge

1.8 I think this needs permission.

Art At Risk: copyright, fair dealings and art in a digital age

1. Susan M. Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property* (The University of Chicago Press, 2006), 64.
2. The UK Film Council, "Filming in Public Spaces" (2010) <http://www.ukfilmcouncil.org.uk/publicspaces> (accessed 18 October 2010).
3. Sarah Jones, "On August Sander, Thomas Ruff and Walker Evans" *Tate Etc*, <http://www.tate.org.uk/tateetc/issue13/shocking.htm>, (accessed 12 July 2010). Walker Evans Archive, Labour Anonymous series, commissioned by *Fortune* magazine
4. Petra Gördüren, "On the Trail of the Ego: Sophie Calle's Pursuits" *ctrl[space]*, <http://hosting.zkm.de/ctrlspace/d/texts/10?print-friendly=true> Sophie Calle, *Double Game* 1981.
5. Getty Research Institute Special Collections, "Inventory of the Allan Kaprow Papers 1940-1997", *Online Archive of California*, See Kaprow's Essays on "The Blurring of Art and Life" (1993), <http://www.oac.cdlib.org/findaid/ark:/13030/tf9d5nb3dv>
6. Hamish and Andy, "Hidden Ghosting", *Rove Live*, "Rove Live - Hamish and Andy Ghosting - Part 1", *You Tube*, <http://www.youtube.com/watch?v=JSd4TFyLCAU>, (accessed 12 July 2010); Hamish and Andy, "International Ghosting" *Today Network Fox*, <http://www.fox.com.au/shows/hamishandandy/beijing/ghosting> (accessed 12 June 2010). Originally aired on *Rove Live*, the "Ghosting", "Person Space Invasion" and "Forbidden Ghosting" clips are regularly removed from YouTube but spring up again at equally regular intervals.
7. Dougal Stevenson, "Notes from the South: Dietary Tales," *National Radio*, Sunday 22 August, 2010, 10:37.
8. Roger L. Sadler, *Electronic Media LAW*, (Sage: London, 2005).
9. The Missouri Bar, *The Missouri Bar Media Law Handbook* <http://www.mobar.org/18bad3ec-d0a6-4065-bc57-c3d54bb84ef7.aspx> (accessed 12 July 2010).
10. BBC, "Google bosses convicted in Italy" *BBC News*, (24 Feb 2010) <http://news.bbc.co.uk/2/hi/8533695.stm>
11. Michael Holden, "Cellphone, video surveillance: the new jury?" in *The Otago Daily Times*, (World Focus, supplement Monday April 27 – Sunday May 3, 2009): 4-5. Original Reuters article here: Michael Holden "Technology advances put police behavior in focus" *Reuters*, <http://www.reuters.com/article/idUSTRE53E3TV20090415>
12. Read Katrine's report on the decision. Katrine Evans, "Reverse gear for NZ's privacy tort: the Hosking decision," *Privacy Law and Policy Reporter* <http://www.austlii.edu.au/au/journals/PLPR/2003/35.html>
13. Larry Gross, "Privacy and Spectacle: The Reversible Panopticon and Media Saturated Society", in Larry Gross, John Stuart Katz and Jay Ruby (eds.), *Image Ethics in the Digital Age* (University of Minnesota Press, Minneapolis, 2003).
14. New Zealand Herald, "Dirty tricks benefit no one" *NZ Herald* (7 Aug 2008, Editorial) http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10525674
15. Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 63.
16. Sean O'Hagan, "Why street photography is facing a moment of truth" *The Guardian* (18 April 2010), <http://www.guardian.co.uk/artanddesign/2010/apr/18/street-photography-privacy-surveillance>. Marc Vallee, "We're photographers, not terrorists" *The Guardian*, Comment is Free, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/dec/11/photographers-section-44-terrorism-act>
17. Google Maps, "Privacy," <http://webcache.googleusercontent.com/search?q=cache:Ep6bPiNAeH UJ:maps.google.com/help/maps/streetview/privacy.html+GOogle+street+view+privacy+faces&cd=9&hl=en&ct=clnk&gl=nz> (cached page); Gigazine, "Google Streetview respects privacy of a statue" *Gigazine* (20 May 2009), http://en.gigazine.net/index.php?/news/comments/20090520_googlestv_privacy/ (accessed 12 July 2010)
18. Matt Frinkman (Associated Press), "Holocaust survival dance causes row" *NZ Herald*, (16 July 2010) http://www.nzherald.co.nz/world/news/video.cfm?c_id=2&gal_cid=2&gallery_id=112650, (accessed 12 July 2010). See the full video here: Jane Korman, "I Will Survive Dancing Auschwitz", <http://www.youtube.com/watch?v=cDYb6ijH2q0> (accessed 12 July 2010). You may have to search for it, it disappears and reappears at regular intervals.
19. This project is different from a soundscape recording project which is something else again. We would have had to look at things differently if there were no visuals.
20. JISC Digital Media, "Still Images: Frequently Asked Questions about Copyright" (2006-2009). <http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/>.
21. Sadler, *Electronic Media LAW*, 210. Individuals do have privacy rights – we have a right to communicate privately – but we have privacy responsibilities too. We need to protect these rights by not talking in a public space where we will be overheard and by not using an insecure communication device. *Wilkins vs NBC* is a case where two men speaking freely in a crowded restaurant were recorded for a news item (again no personal information was aired in the news item). This was found to be okay. **See Privacy and the Digital Image.**
22. Sadler, *Electronic Media LAW*, 218. In *Wolfson vs Lewis* reporters were sued for harassment, stalking, trespass, intrusion and invasion of privacy, for their "ambush" tactics.
23. *The Missouri Bar Media Law Handbook* chapter 2 "Invasion of Privacy" says if the recording is of a telephone conversation and if the person doing the recording is a legitimate party to the conversation they may be exempted from this prohibition as long as no "off the record" statement or words to that effect has been issued. Where a recording is made of a conversation which is by telephone or other similar device, the law seems to presume both a reasonable expectancy of privacy and that a deliberate, non-consensual interception of such a communication by a non-party constitutes a highly offensive intrusion. Whether a conversation is oral or by telephone, both statute and tort law hold that a party to the conversation has the absolute right to secretly record that conversation or to consent to a third party's secret recording of that conversation.
24. Sadler, *Electronic Media LAW*, 167. The recording must not be seen as causing "intentional infliction of emotional distress."
25. JISC Digital Media, "Still Images". Question 10 says: before taking any images of children or minors then permission from a parent or guardian should be sought. It is okay to take pictures of people in public places as long as the subject is not harassed.
26. *Absolute Astronomy*, "Public Space" http://www.absoluteastronomy.com/topics/Public_space (accessed 12 June 2010)

These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



Student M: home made surveillance equipment

Case Study M

Source: CCTV security footage

Use: Parallel recording

PROJECT

The student took homemade surveillance equipment out onto the street in order to imitate closed circuit security surveillance. The project looked at exposing the pervasiveness of overt security surveillance of the public. It asked the question is watching the same as security? Do cameras have any effect on people's behaviour?

Art At Risk: copyright, fair dealings and art in a digital age

legal node

Is permission or notification required to photograph, film or record in public spaces?

Does a sign warning that recording is taking place serve as blanket waiver?

ethical node

All art involves looking. But some looks are more invasive than others. Where's the line to be drawn? What's allowable and what's exploitative?¹

What is a public space? **See What's Fair? People Watching People**

What is privacy?

Do we have rights of privacy in public spaces?

Is CCTV necessary? What other forms of surveillance are happening?

In the US the government can use GPS to track the public without warrant. "Government agents can sneak onto your property in the middle of the night, put a GPS device on the bottom of your car and keep track of everywhere you go. This doesn't violate your Fourth Amendment rights, because you do not have any reasonable expectation of privacy in your own driveway — and no reasonable expectation that the government isn't tracking your movements."²

art node

These works all focus on artists using CCTV cameras.

Steve Mann "Shooting Back" (1995)

In this movie those who would record us for security reasons have the cameras turned on them. "Shooting Back" 1995 is a protest against the ubiquitous "security" camera, and an exploration of the privacy issues of wearable cameras versus surveillance cameras."³

Surveillance Camera Players (1996)

These CCTV intervention artists "banded together to present a specially-designed series of famous dramatic works of the modern period for the entertainment, amusement and moral edification of the surveilling members of the law enforcement community."⁴

Jerome Scemla, "Citizen Cam" (1999)

This was a spoof about Rejivick Surveillance CCTV set in Iceland. It was done in the style of a satirical documentary and featured the fictional Icelandic TV station Humani TV.⁵

Banksy "One Nation Under CCTV" (2008)

"Despite being observed by CCTV cameras, elusive graffiti artist Banksy managed to create his latest - and biggest - work to date under the cover of darkness."⁶

Risk Management

FIRST STEPS

CCTV is not broadcasting because it transmits camera information to a limited set of monitors. Think about whether the project will affect people's privacy. Work through the resources provided here.

See What's Fair? Public and Private Space Poster

See Privacy and the Digital Image

These references offer specific information about security and privacy:

UK National Photography Symposium : NoPhoto: Privacy, Permission and Personal Space in Photography⁷

Brian Holmes "Security Aesthetic Systems Panic" - This essay originated from the anthology *DATA browser 04: Creating Insecurity: art and culture in the age of security* edited by Wolfgang Sützl and Geoff Cox.⁸

RELEVANT CASES

Cellphone, video surveillance

Police surveillance of protesters and vice versa.⁹

CCTV on TV (2006)

A channel where locals can view local CCTV footage. Is this an effort to curb crime by enlisting local support from the community or something other?¹⁰

Anti-prostitute vigilantes (2009).

TV One ran a story about a group of anti-prostitute vigilantes wishing to move street workers away from a particular area of town. They filmed the prostitute's customers and threatened to track them back through their licence plates.¹¹

Guardian Photographers (2009).

Street photography by the public in public spaces is under pressure not because of privacy concerns but from new anti-counter terrorism measures which threaten to bring it to a halt. A new anti-terrorism law in the UK says that police officers can stop and search someone taking photographs within an "authorised" area. However, as Sean O'Hagan, of *The Guardian*, writes this does not prohibit the taking of photographs and members of the public and the press should not be prevented from doing so.¹²

NZ LAW

Privacy Law

Wiretapping Regulations

COPYRIGHT RISK MANAGEMENT

As a work taking place in a public space we needed to ask several questions of the student's project.¹³ Students need to take into account the ethics around the privacy and type of public space, whom and where surveillance takes place, how they use the footage and its distribution. **See Privacy and the Digital Image.** The first thing to note is the law is not as concerned with the making of the recording but with its publication. For example, if the media is subsequently published (including on social network sites such as Facebook).¹⁴

There is a general belief that if you photograph someone in a recognizable likeness, you need a release to publish it. Certainly this is true if you make the photograph in a private space, but in public different principles come into play.¹⁵

The UK Film Council says "you do not need to ask passers-by for permission to feature their faces in a film. The copyright of film shot in a public place resides with the filmmaker."¹⁶ If what the student is filming can be viewed from a public space, with *normal* range equipment the student is probably legally safe, particularly in light of the extent to which they went to draw attention to the fact that their project was occurring.

No subterfuge was used to hide the fact that filming was taking place in this instance. Other situations such as covert recording would require different ethical assessment as there may be different repercussions. In many circumstances this is not problematic but changes in context (such as sensational media stories) bring about changes in the public mind with evolving standards in expectations of personal privacy. We see this regularly with complaints to the Broadcasting Standards Authority. **See Casebook:** Deteresa.

Other considerations to take into account when using the film are the unpredictable effects that happen when viewing a person's life decontextualised and represented in another time and space. The safest way to present a person in a public space is in a way that is a fair and literal record of current circumstances such as in news reporting.

Students should also acquaint themselves with what exactly a public place is. Non-government-owned malls are examples of 'private space' with the appearance of being 'public space'.¹⁷ If it is a privately owned space to which the public are invited, students should be aware if any terms of access are in place. There are also other public "non-public" spaces in the privacy sense such as swimming pools, prisons, and hospitals.

Art At Risk: copyright, fair dealings and art in a digital age

Privacy laws around the world are variable. In general Rights of Privacy include rights against; Intrusion, Embarrassment, False Light and Misappropriation. Note the tort of trespass lays out the boundaries for personal trespass and nuisance. Despite variations they all agree that showing people when vulnerable, sick or those under age (without explicit consent) is exploitative and harmful and your project may be viewed as unethical behavior.

¹⁸ Also remember the medical imperative, that private parts are always PRIVATE! ¹⁹ **See What's Fair? People watching People.**

Outcome

The outcome of this project is unknown.

Teachers Respond

Below is an indicative random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of 'it's ok' to 'stop').

DESCRIPTION: Filming under CCTV camera and recording/playing back what it records.

5.1 Unless student is trespassing can't see the harm.

5.2 Fine

5.3 Okay

5.4 No problem, would have the same issues as filming anywhere in public space, would be hard to not film under a cctv in many places (eg. London). Would depend on the content of what is filmed but the CCTV link is a red herring.

5.5 Discuss intention of the work and intention of the cctv cameras – are they in 'public space' for example?

5.6 No problem – although the police or people who set up surveillance may want to know about your project and what connection it has to theirs?

5.7 Dodgy

5. For the benefit of those who are not fluent readers of Icelandic here is the translated page: http://translate.google.co.nz/translate?hl=en&sl=de&u=http://de.wikipedia.org/wiki/Citizen_Cam&ei=7P0VSquuGKeUtgP0lcjWCw&sa=X&oi=translate&resnum=3&ct=result&prev=/search%3Fq%3Djerome%2Bscemla%2Bcitizen%2Bcam%2Bwikipedia%26hl%3Den%26client%3Dfirefox-a%26rls%3Dorg.mozilla:en-GB:official%26hs%3Dd7y%26sa%3Dg

6. Daily Mail, "Graffiti artist Banksy pulls off most audacious stunt to date - despite being watched by CCTV" *Mail Online, News*, (14 April 2008), <http://www.dailymail.co.uk/news/article-559547/Graffiti-artist-Banksy-pulls-audacious-stunt-date--despite-watched-CCTV.html>

7. Richard Evans, Sarah Jane Eyre and Alison Vasey, "Redeye National Symposium 2004 Report", <http://www.redeye.org.uk/redeye/pdf/Redeye%20NoPhoto%20Symposium%20Report%202004.PDF>

8. Brian Holmes, "Security Aesthetic = Systems Panic", *Rhizome, News*, (August 26, 2009). This essay originated from the anthology *DATA browser 04: Creating Insecurity: Art and Culture in the age of Security*, edited by Wolfgang Sutzl and Geoff Cox, published by Autonomedia, under Creative Commons licence. <http://rhizome.org/editorial/2885>

9. Michael Holden, "Cellphone, video surveillance: the new jury?", in *The Otago Daily Times: World Focus*, (supplement Monday April 27 – Sunday May 3, 2009): 4-5. Original *Reuters* article here <http://www.reuters.com/article/idUSTRE53E3TV20090415>

10. BBC, (British Broadcasting Corporation), "Rights Groups criticise Abso TV", *BBC, News*, http://news.bbc.co.uk/2/hi/uk_news/england/london/4597990.stm (accessed 12 July, 2010).

11. One News, "Criticism of anti-prostitute campaign", *TVNZ, News*, (21 April 2009).

12. Sean O'Hagan, "Why street photography is facing a moment of truth" *Guardian, Culture*, (18 April 2010), <http://www.guardian.co.uk/artanddesign/2010/apr/18/street-photography-privacy-surveillance>; Marc Vallee, "We're photographers, not terrorists" *Guardian: Comment is Free*, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/dec/11/photographers-section-44-terrorism-act>

13. Michael Freeman, "Couterterrorism and Privacy: The changing Landscape of surveillance and civil liberties", *Information Ethics: Privacy and Intellectual Property*, Lee Freeman and A. Graham Peace eds., (Idea Publishing Group, 2005), 173. The law on privacy is most developed in the US but even here "Video surveillance is not protected by the Fourth Amendment because there is no expectation of privacy in public spaces."

14. *JISC Digital Media*, "Still Images: Frequently Asked Questions about Copyright" (2006-2009). <http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/>.

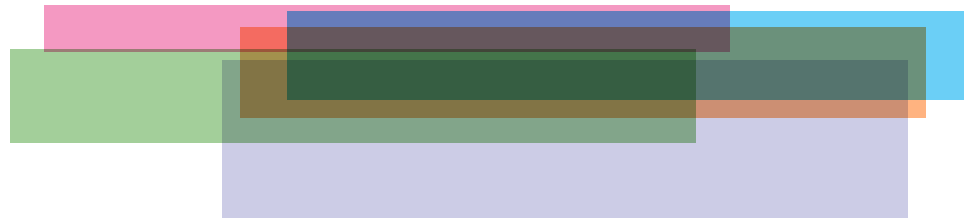
15. Susan M. Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property*, The (University of Chicago Press: Chicago, 2006), 64.

16. *The UK Film Council*, "Filming in Public Spaces", <http://www.ukfilmcouncil.org.uk/publicspaces>

17. *Absolute Astronomy*, "Public Space", http://www.absoluteastronomy.com/topics/Public_space

18. *JISC Digital Media*, "Still Images", see question 10.

19. Lee Wilson, "The Right of Publicity, The Right of Privacy, and You" *Communication Arts* (Vol 36, no. 3, July 1994): 194.



1. Blake Morrison, "Exposed: Voyeurism, Surveillance and the Camera", *The Guardian, Culture* (May 2010) <http://www.guardian.co.uk/culture/2010/may/22/exposed-voyuerism-exhibition-blake-morrison>.

2. Adam Cohen, "The Government Can Use GPS to Track Your Moves", *Time*, (25 August 2010), <http://www.time.com/time/nation/article/0,8599,2013150,00.html#ixzz0yhrZVF35>

3. Steve Mann, *Shooting back* (1995), <http://www.eyetap.org/wearcam/shootingback/>

4. Not Bored, "The Surveillance Camera Players" <http://www.notbored.org/scp.html> See documentation of SCP projects 12 October 2006 where CCTV fields of view are used as the stage for performance art; kuparanto, "Surveillance Camera Players: 1984" *YouTube* <http://www.youtube.com/watch?v=RILT18mxEnE>

These case studies focus on student artworks proposed or created in a classroom situation only. The issues encountered have been thought through according to a set of questions emerging from legal, ethical and art contexts. The discussions and analysis that follow are designed to offer guidelines and advice for teachers encountering similar scenarios. We also discuss possible ramifications (particularly surrounding copyright) were the project to leave the teaching and learning context.



WiFi Nirvana
This Brooklyn Museum visitor uses free wifi in the Museum's
Steinberg Family Sculpture Garden
cc-by-nc-nd
http://www.flickr.com/photos/brooklyn_museum/134157307/

Case Study N

Source: CCTV security footage

Use: Experimental– accidental and incidental interception of a Wi-Fi feed in an inner-city hotspot.

PROJECT

This experiment in surveillance tested the waters regarding the degree and sensitivity of porosity in local Wi-Fi networks from a public space.

legal node

Is accidental and incidental interception of a Wi-Fi feed regarded as electronic or data trespass?

Can I sit outside your house and make use of your Wi-Fi network?

Can I sit outside a business and watch their security Wi-Fi video feed?

ethical node

Is interception an infringement on a person's private information?

Does it matter if I borrow your electronic data?

art node

These art works all focus on surveillance or Wi-Fi networks.

Julia Scher "Superdesk" (1993/2001)

"Julia Scher's work focuses on the subjects surveillance and cyber-sphere. Aiming at the exposure of dangers and ideologies of monitoring systems."¹

Blast Theory "Can You See Me Now?" (2005)

Using 3G mobile phones players navigate a city space, using the Wi-Fi network to trace their movements and send messages back to the online game space.²

Douglas Bagnall "The Film Making Robot" (2005)

The Film-making robot is a camera that films what it sees as it travels through Wellington by bus. As it passes a city.net Wi-Fi node it downloads its footage. Each night the camera 'dreams' making films from the footage it has stored.³

PVI Collective "Transumer" (2010)

Interactive work where people scan barcodes located in public space to reveal new information on their cellphones.⁴

Sonic Scene

"Sonic Scene is an artistic intervention into both the physical and wireless city that aims to develop experiential, cultural content for public wireless reception. A fragmented artwork (sound, video, text) is distributed across a selection of ISF hotspots, encouraging the user to drift from hotspot to hotspot to experience the totality of the work."⁵ It is one of the artistic uses being made of the WiFiDog open source software on the ilesansfil hot spot network in Montreal.

Risk Management

FIRST STEPS

See What's Fair? Public and Private Space Poster.

Read Brian Holmes, "Security Aesthetic Systems Panic." This essay originated from the anthology *DATA browser 04: Creating Insecurity: art and culture in the age of security* edited by Wolfgang Sützl and Geoff Cox.⁶

Understand the rules surrounding Wi-Fi providers. Terms and conditions disclaimers often include information about what parts of a Wi-Fi system could be going public. Remember that individuals are completely responsible for ensuring their own data protection. TurnKey Hosting Solutions (THS) says,

the data and information Customer sends and receives may be subject to privacy and security invading activities including, but not limited to, eavesdropping, electronic trespassing, "sniffing", "spamming", "nuking", "spoofing", "imposture" ..

that is, various means which may cause harm to your equipment or infringe on your privacy, they continue:

ANY INFORMATION OR DATA CUSTOMER DOES NOT WISH TO BE FREELY ACCESSIBLE AND GENERALLY AVAILABLE TO INTERNET USERS should not be sent via the service.⁷

RELEVANT CASES

Google Streetview Wi-Fi interception (2010)

Government representatives from the United States, Germany, France and Spain are seeking answers from Google about their Wi-Fi data collection practices which "violate the public's reasonable expectation of privacy".⁸

Remote controlled Cellphone tapping (2008)

An Investigation by television programme "13" explains how your cell phone can be secretly hijacked and used against you (and how to protect yourself).⁹

CCTV on TV (2006)

A channel where locals can view local CCTV footage. Is this an effort to curb crime by enlisting local support from the community or something other?¹⁰

Media Sentry (2009)

This is a company used by RIAA to trespass electronically into personal computers to gather evidence in music file sharing cases.¹¹ A case brought by the RIAA in August 2007 against Tania Andersen was suddenly dropped after counter-claims including invasion of privacy and electronic trespass.¹²

NZ LAW

Privacy Law

Wiretapping Regulations - restrictions of government on civilian communications

COPYRIGHT RISK MANAGEMENT

As a work taking place in a public space we needed to ask several questions of the student's project. Students need to take into account the ethics around the privacy and type of public space, whom and where surveillance takes place, how they use the footage and its distribution. **See Privacy and the Digital Image.** The first thing to note is the law is not as concerned with the making of the recording but with its publication. For example, if those media are subsequently published (including on social network sites such as Facebook).¹³

If what the student is filming can be viewed from a public space, with *normal* range equipment the student is probably legally safe.¹⁴ **See Privacy and the Digital Image.** In our experience detection of Wi-Fi waves goes beyond the normal range of senses!

We asked the question: is accidental and incidental interception of a Wi-Fi feed regarded as electronic or data trespass? In the translation of tort law to cyberspace it has been legally 'proved' that the passage or receipt of electrons constitutes a trespass.¹⁵

Despite the onus being on individuals to configure their own Wi-Fi security, a student's interception of Wi-Fi will very likely be considered electronic trespass, if it is done deliberately. This is so even where the context of the artwork is highlighting this very porosity. The involvement of Media Sentry in recent RIAA cases spells out the ramifications of electronic trespassing. If the RIAA doesn't go there any more, then neither should a student.

OUTCOME

Final work was an installation and performance piece – surveillance of exhibition goes *in situ* at an art gallery.

Teachers Respond

Below is a random sample of responses to the case study from tertiary art teachers. We have colour-coded the responses from green to amber to red, (from a response of 'it's ok' to 'stop').

DESCRIPTION: Interception and recording of business security CCTV.

6.1 No problem

6.2 Already public domain? Tend to feel this one is ok...

6.3 I believe this is illegal however, in an art context the breaking of laws may be necessary to maintain the integrity of the work and to achieve the intention/aim of the artist. The artist/student should know the consequences of these actions for themselves and for their institution. By exploring the politics of the student, lecturer, school and institution, a pathway though the territory may be achieved. Staff have contractual responsibilities to their institution to consider but as artists also have responsibilities to the creative community. How one would act may depend on the content of what was filmed and why; as ever it is about the intention and context of the student's work.

6.4 Dodgy

6.5 -oooh -privacy act -rights of people in artworks -intention of the artwork?

6.6 No. This is illegal.

6.7 I think this might be a problem, intellectual property, trespass

6.8 This is trespass or invasion of privacy. The student is connecting into wireless networks and potentially stealing bandwidth. This is also a breach of security. I would advise extreme caution with this material

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6. Brian Holmes, "Security Aesthetic = Systems Panic" *Rhizome, News* (August 26, 2009) essay originated from the anthology *DATA browser 04: Creating Insecurity: Art and Culture in the age of Security*, edited by Wolfgang Sutzl and Geoff Cox, published by Autonomedia, under Creative Commons licence. <http://rhizome.org/editorial/2885>.
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10. BBC, "Rights Groups criticise Abso TV", *BBC, News*, (10 Jan 2006) http://news.bbc.co.uk/2/hi/uk_news/england/london/4597990.stm (accessed 12 July, 2010). "Civil rights campaigners have voiced concern about a new channel allowing households in east London to monitor local CCTV cameras."
11. Nate Anderson, "No mistakes? NH P2P case highlights MediaSentry's issues", *ars technica*, (22 June 2009) <http://arstechnica.com/tech-policy/news/2009/06/no-mistakes-nh-woman-settles-with-riaa-for-0.ars>
12. Jaikumar Vijayan, "Lawsuit Could Force RIAA to Reveal Investigation Techniques" *PC World*, (15 March, 2008) http://www.pcworld.com/article/143458/lawsuit_could_force_riaa_to_reveal_investigation_techniques.html
13. *JISC Digital Media*, "Still Images: Frequently Asked Questions about Copyright" (2006-2009). <http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/>.
14. *UK Film Council*, (United Kingdom Film Council), "Filming in Public Spaces" <http://www.ukfilmcouncil.org.uk/publicspaces>, under UK law "you do not need to ask passers-by for permission to feature their faces in a film shot in a public place. Under UK law, the copyright of film shot in a public place resides with the filmmaker."
15. Tom W. Bell, "Trespass to Chatels" *Internet Law*, (29 Sept 2005) <http://www.tomwbell.com/NetLaw/Ch06.html> (accessed 18 October 2010)

Casebook

The cases outlined below are far from an exhaustive list and are included here for their relevance to the student projects included in this study. We have used a casebook type format so that we can reference the most relevant cases here in one place rather than refer to them repeatedly throughout the case studies. For teachers and students wanting to do more research in this area we refer them in the first instance to the Electronic Frontier Foundation (EFF) list of cases. ^{EFF}

(Electronic Frontier Foundation), "Cases", EFF, <http://www.eff.org/cases>.

What is a casebook?

In law many decisions happen as a result of previous cases. The law is the default position but this can often be extended according to interpretation and by *stare decisis*. *Stare decisis* is the legal principle by which judges are obliged to obey the precedents established by prior decisions. The words originate from the latin *Stare decisis et non quieta movere*, "Maintain what has been decided and do not alter that which has been established."

(2 LIVE CREW) CAMPBELL vs ACUFF-ROSE (1989)

The rights holders to Roy Orbison's "Pretty Woman" claimed that 2 Live Crew had plagiarized the song in their rap version. On appeal the courts found for 2 Live Crew and their use as a parody. ^{Benedict, Copyright Website, 1995-2009; read the opinion here http://cip.law.ucla.edu/cases/case_campbellacuff.html}

Although this case relates to music (sampling) the summing up contains some important opinion which is why this case is referred to so often. "A judge's task is not to be simplified by bright-line rules because the Fair Use doctrine calls for case-by-case analysis and recognise[s] that every work of intellectual property is to some extent derivative, as all works necessarily borrow and use that which preceded them." ^{Okpaluba, in Dear Images, 2002, 209; Sadler,}

^{Electronic Media LAW, 2005, 318f.} **See Case Studies H and I.**

BRIDGEMAN ART LIBRARY vs COREL CORP (1999)

In which a great number of public domain images were donated to Wikipedia and Bridgeman (Image) Art Library objected. The court held that even if the photographs were protected by copyright, they could not be infringed by Corel's photographs as the only similarity between them is that "both are exact reproductions of public domain works of art". Under US law this means that they lack "originality". ^{Simon Stokes, in Dear Images, 112-113.}

The Bridgeman ruling has since become a highly influential authority. ^{Wikipedia} **See Case Studies E and J.**

BROWN vs ROBERTS (2000)

2000 Turner Prize winner Glenn Brown, "Loves of Shepherds", 2000, appropriated an image "Double Star", 1973, by sci-fi artist Tony Roberts. ^{BBC, "Copycat row hits Turner Prize."} Brown claimed that "to make something up from scratch is nonsensical. Images are a language.

See Case Study D.

BURROW-GILES LITHOGRAPHIC Co. vs SARONY (1884)

U.S.. Supreme Court 111 U.S.. 53 March 17, 1884. Sarony, a photographer took the lithographers to court over copyright infringement of one of its authorised Oscar Wilde photographs.^{Michael Goad, "U.S.. Supreme Court 111 U.S.. 53 BURROW-GILES LITHOGRAPHIC Co. v. SARONY, March 17, 1884.}

2005" **See Case Study D.**

COMEDY III PRODUCTIONS INC. vs SADERUP (2001)

In this case Gary Saderup created T-shirts featuring *his* drawings of The Three Stooges.^{Perwin, "Legal Lowdown", 28-32} He lost the case on the grounds that he had used a celebrity likeness. This case was brought under California's right-of-publicity statute where "you cannot use the likenesses and images of celebrities – even dead ones – without the consent of the heirs or owners of the image and LIKENESS RIGHTS".^{Perwin, "Legal Lowdown", 28.} In the ruling the court used the example of Andy Warhol's *Marilyn Monroe* (1962) as an example of celebrity likeness that was creative enough to be transformative! Although Gary was served an injunction for printing and distributing any further copies of his work, the injunction did not apply to his original charcoal drawing. **See Case Study D.**

DANGERMUSE vs EMI (2004)

The Grey Album, made by Danger Mouse remixing the words from rapper Jay-Z's *The Black Album* on top of the rhythms and chords from The Beatles' legendary *The White Album*. EMI said he had no permission and it was an infringing use.^{Shachtman "Copyright Enters a Grey Area."} **See Case Studies H and I.**

DETERESA vs American Broadcasting Companies (1997)

In this case a woman was interviewed by reporters after a murder. The reporter was wearing a hidden microphone and the interview was filmed from a car across the street. The ruling found the plaintiff "could have no expectation of privacy because she never told the reporter her statements were 'off the record' or 'in confidence'".^{Sadler, *Electronic Media LAW*, 209.} She never said he could not share the statements with anyone else. In addition ABC

did not air any private facts (not even her name). They were found to be not intruding on Deteresa's privacy. However, in a nearly identical case a Japanese broadcaster was sued for invasion of privacy for using the same tactics in *Alpha Therapeutic v Nippon Hoso Koikai* (this was an investigative report looking at the shipping of AIDS-tainted blood products). The reporters were found to be unlawfully eavesdropping.^{Sadler, *Electronic Media LAW*, 210.} **See Case Studies I and L.**

FAIREY vs (AP) Associated Press (2008)

Shepard Fairey, a Los Angeles based street artist, used one of Mannie Garcia's photographs of Presidential nominee Barack Obama, in the *Hope* poster used in the lead up to the 2009 election.^{Delacour, "Appropriation Art and Walker Evans."} The case rested on Fairey's claim of "fair use". The AP claimed he used the photograph taken by Garcia of Obama, as the model, and it amounted to "uncredited, uncompensated use of an AP photo [which] violated copyright laws and signalled a threat to journalism". The Stanford University Fair Use project led by Anthony Falzone originally represented Fairey but after Fairey had falsified evidence Stanford withdrew their services. Fairey said regardless of which image he used, the real issue, still, was the right to fair use.^{Hillel Italie, "AP alleges copyright infringement of Obama image."} The case is set down for early 2011 with new counsel. "Georgetown University law professor Rebecca Tushnet told the BBC that while Mr Fairey clearly copied the photograph, it could be argued that what he took from it was the basic fact of Mr Obama's features, which do not have a copyright. If the case were to go to court, the creative elements of the photograph would have to be established in the first place," she said. "There's a lot of transformation going on in Mr Fairey's image, and the photograph was pretty factual, so it could prove tricky for AP", she said.^{BBC, "Copyright battle over Obama image."} See also **Comedy III Productions Inc. vs Saderup. See Case Study D.**

GAYLORD vs THE UNITED STATES (2009)

Frank Gaylord filed a suit filed against The US Post Office's use of an image, based on his sculpture, *The Column* (Korean War Veteran's Memorial sculpture), for not obtaining his consent to have it photographed and reprinted on a postal stamp (the stamp was issued in July of 2007). In the first instance this was found not to be fair use and failed under

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the exemption for architectural buildings and public sculptures in the original opinion. However, on appeal the finding concluded with “an affirmation in part, a reversal in part and on remand regarding damages.” Clancco, “US Post Office Use of Sculpture Not Fair Use,” read the opinion in the PDF attached at the bottom of the article. If you read to the end you will find the appeals verdict which tells a slightly different story than the Clancco article.

The sculpture is on permanent display in a public place (permanent war memorial) and the photographer who took the photograph in the snow has copyright in the photograph he took at a unique moment in time. The crux of the case in US law seemed to be that Gaylord had overclaimed his rights and had filed for copyright as sole author. Judge Thomas C. Wheeler found that for the commissioned piece Gaylord had at the time been on contract to the US and therefore was not at liberty to sue them under the employment contract provisions, that the US was a co-author and that further, the photograph and photoshopped enhancements by the stamps producers were a transformative use, under Fair Use. **See Case Study D.**

GRAVES CASE (1869)

Often cited in UK law but now outdated and superceded by **Bridgeman** in the late twentieth century. In the nineteenth century when it had relevance Graves case was an example of a photography case from a time when a photographer needed an alchemist’s knowledge of chemistry necessary to produce an emulsion, not only capable of staying ON the plate but capturing light and rendering a composition after exposure. The exposure itself was manual and required skill in knowing the correct aperture and timing to make the exposure. The whole process could fall apart at any stage. Today we have automatic point and click image takers and makers with built in telescopic lenses and hand shake stabilisers. Almost all “problem” areas have been removed so that even 3 year olds can take a competent photograph. Simon Stokes says, afterall “all photographs are a copy of something.” Simon Stokes, in *Dear Images*, 111. **See Case Study D.**

KELLY vs ARRIBA SOFT (2002 and 2003)

Leslie Kelly, a professional photographer, had found some of his photographs on a search engine operated by Arriba Soft. However, because the thumbnail linked to an image in its primary context, the thumbnail didn’t substitute for the original or undermine Kelly’s ability to capitalize on his work. Bielstein, *Permissions*, 93. **See Case Study B.**

KOONS vs BLANCH (2005)

“Koons drew on part of a photograph taken by Andrea Blanch titled “Silk Sandals”, by Gucci, published in the August 2000 issue of *Allure* magazine to illustrate an article on metallic makeup. Koons took [part of] the image of the legs and diamond sandals from that photo (omitting other background details) and used it in his painting “Niagara”, which also includes three other pairs of women’s legs dangling surreally over a landscape of pies and cakes.” NEWSgrist, “Koons Wins Landmark Copyright Lawsuit.” You can see the summary judgement at Brian Rowe, *FC2008 Remix Panel*, October 2008. Download and read the decision, No. 05-6433 (2nd Circuit, October 26, 2006) **See Case Study B.**

KOONS vs ROGERS (1992)

Jeff Koons’ commissioned sculpture, *String of Puppies*, based on Art Rogers’ photographic 1985 postcard was adjudged a violation of Rogers’ copyright. Harvard Art Law, “Image Rights” Koons commissioned the sculpture to be made for his parody-based exhibition “Banal”. “Koons argued that he had made significant changes in the expressive elements of Rogers’ work and that he had only appropriated the factual visual information . . . namely ‘two people with eight puppies, a bench and a background’”. Okpaluba, *Dear Images*, 206. However this was a case of parody that didn’t succeed. In the main this was because the jury never got to appreciate how the finished piece, a large life-sized, fantastically painted wooden sculpture, was very different to the small black and white photo in effect as well as meaning. Koons, in defiance of a court order, shipped his sole remaining copy of the sculpture (one of four) out of the country to prevent its destruction and so in evidence all the Jury got to see were two similar sized photographs (one in colour and the other not) of seemingly the same subject and composition – one of which was created by a man in contempt of court. Koons had also argued that Rogers would never have considered making a sculpture derivative of his notecard. In reply the judge said that what mattered was not that

Rogers had not made a sculpture but that a potential market for the sculpture existed. Bielstein, *Permissions*, 86. Koons argued his 3-dimensional sculpture was a new work embodying HIS message, which was quite distinct and different from the intent of the Rogers. If Koons had used the same idea but different people and puppies there would have been no problems. Chaires, "Something Old, Something New, Something Borrowed ... Someone Sued!" 10. If Koons had fronted up with the actual sized evidence things may have been *seen* differently too. **See Case Study D.**

LANE HARTWELL vs RICHTER SCALES (2007)

A video, by a cappella group Richter Scales, mixed original imagery with photos found online, all set to Billy Joel's *We Didn't Start the Fire*. Lane Hartwell, a freelance photographer, objected to the use of one of his images being used in the video. Wallace, "Copyright Claim Erases Parody Video From YouTube" A similar Richter Scales video, based on *There's a Fine, Fine Line* from the musical *Avenue Q*, tackled the credit crunch and mortgage situation but generated no complaints. **See Case Study B.**

LENZ vs UNIVERSAL (The dancing baby case) (2007)

The Electronic Frontier Foundation (EFF) filed suit against Universal Music Publishing Group (UMPG), asking a federal court to protect the Fair Use and Free Speech rights of a mother who posted a short video to YouTube of her toddler son dancing to Prince song, *Let's go Crazy*. EFF(Electronic Frontier Foundation), "Lenz v. Universal" In a second ruling, U.S.. District Judge Jeremy Fogel ruled that Stephanie Lenz can get limited recompense from the music label for ordering YouTube to drop the 29-second video. Elinson, "Universal May Have to Pay the Piper Over Takedown of Dancing Baby" and watch the video here: edenzw, "Let's Go Crazy" #1" **See Case Study G.**

NATIONAL PORTRAIT GALLERY vs DERRICK COETZEE (2009)

Britain's National Portrait Gallery threatened to sue Wikipedia for including some of its high-res scans of public domain portraits after Derrick Coetzee downloaded thousands of fragments of images from the NPG's website, reconfigured the images and uploaded them to the Wikimedia Commons archive. Doctorow, "UK National Portrait Gallery threatens Wikipedia over scans of its public domain art", See also Ragesoss, et al. "UK public gallery threatens Wikimedian" for a more well rounded summary of the story. **See Case Study J.**

NEGATIVLAND vs U2 (1991)

U2's lost song? blastingcaps "U2's lost song NEGATIVLAND", *YouTube* In 1991 an experimental music/collage group Negativland, "released a single called U2 that featured a U-2 spy plane, the lettering "U2," and Negativland's name in small print on its cover. The recording included about 35 seconds of a U2 song and American Top 40 icon Casey Kasem making disparaging comments about the band. The resulting cases taken against them nearly bankrupted them. Berry, "The Letter U and the Numeral 2" *Wired* Negativland has since argued that fair use should be revised to "give benefit of the doubt to artistic re-use and place the burden of proof on the copyright owner [to show] the usage does not result in anything new beyond the original work appropriated". Poynor, "Optic Nerve: Fair Game", 339. This is a reversal of the current position in copyright law. **See Case Studies G and I.**

PRINCE vs CARIOU (2009)

Photographer Patrick Cariou has filed a lawsuit against artist Richard Prince, Larry Gagosian, Gagosian Gallery, and Rizzoli books "for using a number of his photographs in Prince's 'Canal Zone' exhibition without permission." Zaretsky, "Prince Suit (UPDATED)", 2009. These photographs first appeared in Cariou's book, *Yes Rasta*, 2000. Richard Prince never denied that he made use of some images from *Yes Rasta*, but said his use of these in his paintings was transformative and qualified as fair use. Cariou says he spent 10 years on the project in a remote part of Jamaica capturing these unique images. Prince says Cariou's images are not 'strikingly original' or 'distinctive in nature'. Lydiate, "Appropriation Art and Fair Uses: Cariou v Prince." Cariou wonders why then did Prince feel the need to use 20 of his images in the works in

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question? This, Cariou, says this goes beyond fair use. ^{Goldstien, "Prince and Gagosian fight back over copyright," 5.}

Lawyers for Prince assert fair use because Cariou's photographs are factual while Prince's works "create a new and unique work which comments upon certain aspects of culture." Further more they claim the use has caused no harm to the value of the photographs themselves, rather the converse is true. ^{Canton, "Copyright – derivative vs transformative works"} **See Case Study B.**

PRINCE vs KRANTZ (1970s)

"In the 1970s Richard Prince became known as a pioneer in "appropriation art" by photographing other photographs, usually from magazine ads, enlarging them and exhibiting them in art galleries. One of his photographs from a Marlboro ad [and] sold by Christies for \$1.3 million, ... was taken by Richard Krantz on assignment for Marlboro cigarettes ads." ^{Rosenberg, "Artist: Richard Prince" 2005} Krantz says he considered corresponding with Prince to complain but felt it would probably do no good. "At this point it's been done, and it's out there," he said. "My whole issue with this, truly, is attribution and recognition." ^{Deeds, "Richard Prince's Art, Fair Use or Piracy?"} **See Case Study B.**

RADFORD vs HALLENSTEINS (2004-2005)

John Radford's sculpture *Tip* appeared on Hallensteins T-Shirts. This was found to be a fair dealing under section 73 (NZ Copyright Act) which allows for copying of works of art which are permanently on display in a public place. An appeal claiming moral rights infringement has been lodged. Under Section 73 of NZ Copyright Law it is considered reasonable to allow the making of a painting, drawing or photograph of these works as it is impractical to control this type of copying. ^{Vine, "Fair Go Copy Right?", 19 March 2008. Peter Calder in "Stealing}

^{Beauty" looks at this case and others and asks what comeback do artists and designers have when their work is appropriated for commercial gain.} It

is also considered legitimate to allow for publication of legitimate reproductions of these works in Australia. ^{Australia. Attorney-General's Department, *Fair Use and other Copyright exceptions: an examination of Fair Use, fair Dealing*}

^{and other exceptions in the digital age: Issues Paper, 44. See the table of exceptions and statutory licences.} **See Case Study D.**

RAUSCHENBERG vs TURNER (1991)

"Questions of intellectual property have been complicated by the postmodern aesthetic which often makes extensive use of sampling, versioning, and collaging of sound and visual elements to make new works of art."

One particular work by Rauschenberg "includes a page torn from an old issue of *Time* magazine. The page in question contains an ad for an automobile, which is principally comprised of a photograph, and which photograph was taken by a commercial photographer. The photographer, Pete Turner, successfully sued Rauschenberg for unauthorized use of the photograph." ^{Soules, "Intellectual Property", 24 July 2010. See also *Benedict, Copyright Website*} **See Case Study B.**

RAUSCHENBERG vs BEEBE (1976)

Robert Rauschenberg incorporated a photograph called *Diver*, by Morton Beebe into his print named *Pull*, part of the *Hoar frost* series (1974). Rauschenberg settled with Beebe an undisclosed sum and attribution rights in the image. ^{Okpaluba, *Dear Images*, 201. See illustrated discussion by} ^{Chaires "Something Old, Something New," 10.} **See Case Study B.**

VIACOM vs YOUTUBE (2007)

Viacom initiated litigation against YouTube and Google for infringement of Viacom's copyrights. ^{Fricklas, "Our Case Against YouTube."} YouTube – revolutionary, viral or phenomenon?

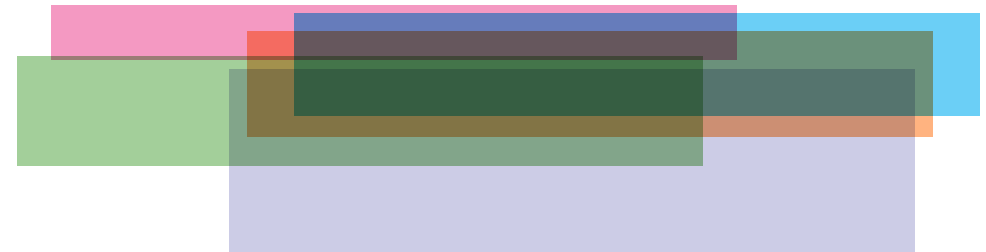
Much of the popularity and angst about YouTube is tied up with television-computer convergence. Products such as TiVO are an attempt to move the personal viewership back in the other direction. ^{Hilderbrand, *Inherent Vice, Bootleg Histories of Videotape and Copyright*, 226.} **See Case Study G and the Dylan Horrocks cartoon in Case Study I.**

VIDAL vs WARNER (2009)

YouTube Parody take down which Vidal won.^{Windish, "A Warner Music, Corey Vidal Take Down Tale", 2009} Corey Vidal is known on YouTube for a number of video clips involving music and dance and is also infamous for being issued with a number of DMCA takedown notices which to date he has fought and won against his videos. The first claim (from Warner Brothers) was over a video to Madonna's *4 Minutes*.^{Wikipedia.} **See Case Study H.**

YES MEN VS BP (2008)

The Yes Men made a parody of the official BP website. The Yes Men site was called "beyond petroleum". The other site of course was BP (British Petroleum). They were in correspondence with the legal department at BP for some time before the Yes Men website disappeared.^{Baoill, "Yes Men bow to BP complaints – in their own way", 2008.} **See Case Study C.**



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