

***Transformers:
found footage artists and intellectual property.***

“My ‘archive’ comes mostly from dumpsters... It’s a test of our ingenuity to take that material (from the trash) and redeem it, so to speak: the project new meanings into it.”
–Craig Baldwin, filmmaker (*Tribulation 99*, 1991)

“My excuse in a court of law would be that these images have corrupted us and it’s our turn at bat.” –Mark Rappaport, filmmaker (*Rock Hudson’s Home Movies*, 1992)

The repurposing of found footage material into new works has been a tradition of avant-garde film since the 1930s. Early masters such as Joseph Cornell and Bruce Conner drew film fragments from a variety of ephemeral sources, crafting them through editing into entirely different visual experiences. The constantly expanding tools for media-making available to the average consumer make it more and more possible (and likely) that the moving images around us will be appropriated and channeled into newer works. And while early practitioners of found footage filmmaking repurposed vintage films, increasingly contemporary – and therefore more likely copyright-protected works – are being put to transformative use. While many of these artists work on the peripheries of media culture, and scrutiny of the works themselves could probably make a case for Fair Use, the tightening control over intellectual property threatens to stifle the voices of those who recycle omnipresent media imagery in their efforts to comment back on it.

While digital technology makes capturing and repurposing existing media comparatively easy, Austrian experimental filmmaker Martin Arnold made his acclaimed trilogy of films (1989-98) on a 16mm optical printer. Using short sequences from Hollywood films as his raw material, Arnold step-prints (rephotographs frame by frame) an otherwise linear succession of images in unexpected ways. Bringing a film's straightforward narrative to halt, Arnold encourages new ways of seeing and thinking about human and cinematic movement. Film historian Scott MacDonald equates Arnold's "motion studies" with the pre-cinema experiments of Etienne Marey and Eadward Muybridge, noting that Arnold's wholly original method employs "central tactics for deconstructing and reframing conventional Hollywood visual and auditory gestures."¹ In many ways, Arnold's work is the antithesis of the ease and speed of the digital era. Not only is the action of the films brought down to a crawl, but Arnold does not employ the digital technology that would make his mathematical approach to filmmaking much easier. He writes out his "scores" by hand, mapping out which frames to shoot, which to skip, and how many times, a process that required 18 months to complete the first of these films, *Pièce touchée* (1989). While his method distinguishes him from most "culture-jammers," Arnold's approach is also markedly different from most of the found footage

¹ Scott MacDonald. "Sp...Sp...Space of Inscription: An Interview with Martin Arnold." *Film Quarterly*, Vol. 48, No. 1 (Autumn, 1994) p. 2.

collagists who preceded him. Arnold's films are typically comprised from a single source, that is, a specific Hollywood feature film, rather than a collage of fragmented material.

One work that anticipated Arnold was Ken Jacobs' *Tom, Tom the Piper's Son* (1971), a two-hour rephotographed version of Billy Bitzer's 1905 short film of the same name.² Of course, Jacobs' source material falls in the period before motion pictures were being copyrighted, and when his new work appeared there was no question (to those who even noticed) that the appropriated footage was firmly in the public domain. In the same year, Hollis Frampton compiled his aptly-titled *Public Domain* from sixteen short films from the Library of Congress. But Arnold and his contemporaries are repurposing work that – thanks to several extensions of copyright duration – are still very much protected. As copyright for moving images is not one, but rather a bundle of rights, such films are potentially infringing a series of “exclusive rights” controlled by someone else, such as the right to copy a work, to control derivative works, to control the synchronization of sound to film, and perhaps others.³ Intellectual property owners are becoming increasingly vigilant about protecting such rights, which is in part what these newer artists are reacting against.

A recent visit to the Motion Picture Association of America website is indicative of how grave a problem the industry perceives unregulated copying to be. The central window on the home page is dedicated to “catching movie thieves” and the two “Latest News” stories were about DVD piracy.⁴ Artist Keith Sanborn's video, *The Artwork in the Age of Mechanical Reproducibility by Walter Benjamin as Told to Keith Sanborn © 1936 Jayne Austen* (1996) is made up entirely of the warnings about copyright violations that precede movies on video. It is just one (and probably the most direct) example of new media artists responding to the ubiquitous imagery of large mediamaking organizations. Howard Besser writes:

² Rob Yeo. “Cutting Through History: Found Footage in Avant-garde Filmmaking,” *Cut: Film as Found Object in Contemporary Video* (Stefano Basilico, ed.), Milwaukee Art Museum exhibition catalog, 2004. p. 18-19.

³ Lawrence Lessig. “The Failures of Fair Use and the Future of Free Culture,” *Cut: Film as Found Object in Contemporary Video* (Stefano Basilico, ed.), Milwaukee Art Museum exhibition catalog, 2004. p. 48.

⁴ Accessed 1/21/06 at: <http://www.mpa.org>

Many believe that, due to the rise of commercial media in the 20th century, art responded by recontextualizing commercial images. This kind of art is a form of commentary on those images, and essentially a form of free speech. Artists known as ‘culture-jammers’ complain about being bombarded by billboards, advertisements, and media images from the corporate sector. They insist that incorporating pieces from these media images into their social commentary art works is the only way that other voices can be heard amidst a sea of corporate-controlled images that engulf our lives.⁵

The notion that such information is off-limits to others is an absurd situation that Duke Law Professor James Boyle equates with trying to write a novel only to find that the alphabet is owned by someone else.⁶ So at present, such works are presumptively illegal. Paradoxically, the cultural or artistic value that a repurposed work may have will not be apparent until it is complete, and the burden of proving fair use falls on the artist, who is unlikely to be able to afford a costly litigation.⁷ Still, despite its limitations, claiming fair use is probably the best defense for those who choose to work with such material.

Fair use, as introduced in Section 107 of the 1976 Copyright Act, states that protected material may be used in a limited capacity “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.” There are four factors for evaluating fair use, and I will use the work of Martin Arnold and other contemporary artists to test them. The first is the purpose and character of the use. Fair use is more successfully applied in the educational or non-profit sector, so can an artist like Arnold claim to be non-profit just because he says his films don’t make any money? Probably no, but there are other factors that often outweigh this one. Matthew Sag at Northwestern University School of Law says that “bright-line distinctions, such as commercial/non-commercial and educational/non-educational, have been superceded by a much more ambiguous notion, transformativeness.”⁸

⁵ Howard Besser. “The Commodification of Culture Harms Creators,” *The Information Commons*, Issue 1, June 2002. Accessed 1/28/06 at: <http://www.gseis.ucla.edu/~howard/Copyright/ala-commons.html>

⁶ James Boyle. *Shamans, Software and Spleens: Law and the Construction of the Information Society*. (Cambridge, MA.: Harvard University Press. 1996). p. 178.

⁷ Lessig, 52, 53.

⁸ Matthew Sag, “God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine,” *Michigan Telecommunications and Technology Law Review*, Vol. 11, No. 1, 2005. p. 6.

The Supreme Court's definition of a transformative use is one that "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."⁹ This second factor, the nature of the derivative work, if it is creative and sufficiently different from the source material, is "the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."¹⁰

Each of Martin Arnold's films, though comprised solely of material from a protected source, is rendered to completely different interpretative ends. With *Pièce touchée* (1989) Arnold uses a short excerpt from the 1954 B-movie *The Human Jungle*, an unremarkable crime picture, transforming an arguably superfluous domestic scene into a kind of drama not inherent in the original. The choice of shot was intuitive to him: "That representation of a man and a woman and time and space was a small universe that I wanted to observe in detail."¹¹ In the sequence, a man returns home to find his wife waiting in a chair for him. Their greeting, only a few seconds of screen time in the original, becomes a feverish study in movement. What intrigued Arnold was how playing with time altered the meaning of a shot. For example, the slowed-down gesture of the husband taking a knife from a drawer becomes menacing – even though in the original film the man is only preparing to make a sandwich!¹² He says, "I could have taken a similar scene from a thousand other movies. The scene does not stand for *The Human Jungle* in its individuality, but for Hollywood's 1950s version of a matrimonial living room."¹³

For Arnold's films, the transformative use is directly linked to the third factor of fair use: the amount and substantiality of the portion used in relation to the copyrighted work as a whole. *Pièce touchée* uses only 18 seconds from the 82-minute long *The Human Jungle*, turning that small sample of material into a 15-minute new work. His next film,

⁹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994), quoted in John Tehranian. "Whither Copyright? Transformative Use, Free Speech and an Intermediate Liability Proposal." *Brigham Young University Law Review*, 2005. p. 146. Accessed 1/28/06 at http://www.law.utah.edu/faculty/bios/tehranianj/Tehranian_Whither_Copyright.pdf

¹⁰ Supreme Court Justice David Souter, quoted in Sag, 6.

¹¹ quoted in MacDonald, 5.

¹² MacDonald, 4.

¹³ quoted in MacDonald, 8.

Passage à l'acte (1993), runs 12 minutes, rephotographed from only 35 seconds of *To Kill a Mockingbird* (1962). Again, Arnold takes one of the least memorable scenes of that acclaimed film and turns it into something else entirely. He says:

[I] finally chose the scene from *To Kill a Mockingbird* – a scene that is not vital for the narrative structure of the original movie and which does not have anything to do with the central theme of racism. The race issue made *To Kill a Mockingbird* famous... It's true that if somebody knows *To Kill a Mockingbird*, he could associate the rest of the film to what I am doing. But that wasn't my intent.¹⁴

Like *Pièce touchée*, the new work is a meditation on gesture in a domestic setting. In fact, Arnold's use is so transformative, he implies new relationships between the characters that aren't present in the original work. Arnold's man, woman and two children at the kitchen table suggest a nuclear family, though in *To Kill a Mockingbird* the "mother" of Arnold's work is actually just a neighbor. The scene in the original film is the first morning that Scout wears a dress to school, and her brother Jim rushes her to finish her breakfast. Arnold's step-printing draws out the tiniest moments –like the clanging of silverware or the slamming of a door – to excruciating lengths. With Arnold's manipulations, the original dialogue takes on a new meaning. The jerky action and stuttering voices comically reflect the time warp the characters are stuck in: Jim shouts "hurry up!" to his sister, with Scout helplessly replying "I'm trying!" Arnold's film is not a simple retelling of *To Kill a Mockingbird*, in fact it hardly even resembles it.

Arnold's painstaking interventions are evident with every frame, as is artist Douglas Gordon's more minimalist approach: the simple exhibition of iconic feature films in their original linear sequence. The difference is, they are projected very slowly. Gordon's *24 Hour Psycho* (1993) is just that: Hitchcock's film shown silently at the rate of 2 frames a second, rendering limp the original's raison d'être: the careful use of screen time to create suspense. In Gordon's version, the shower scene now runs one hour. A further projection by Gordon, *Five Year Drive-By* (2001), stretches John Ford's *The Searchers* to five years.

Jennifer & Kevin McCoy's first important piece was their installation *Every Shot*,

¹⁴ quoted in MacDonald, 9-10.

Every Episode (2001), which reduces the 70s television cop show *Starsky and Hutch* into individual, meticulously-indexed shots.* These shots are thematically cataloged and compiled onto separate video discs (on view as part of the work) each labeled by their representative content: “Every Over the Shoulder Shot,” “Every Zoom Out,” “Every Yellow Volkswagen,” and so on. *Learning From Las Vegas* (2003) is a variation of the prior work, this time borrowing from a handful of contemporary Hollywood films and filing their visual tropes under themes such as “learning from sequins,” “learning to smoke,” “learning from showgirls,” etc. Both *24 Hour Psycho* and *Learning From Las Vegas* were part of an exhibition at the Milwaukee Art Museum called *CUT: Film as Found Object in Contemporary Video* (2004-5), and curator Stefano Basilico says the McCoy’s “strategy enables us to see the repetitions and stock images and gestures that so many movies are made up of, which become a kind of cultural background noise.”¹⁵

Martin Arnold’s most ambitious and overtly subversive work is *Alone: Life Wastes Andy Hardy* (1998), which draws from the wholesome Mickey Rooney/Judy Garland film series and turns short sequences that originally demonstrated love the between mother and son into a protracted visual symphony that suggests instead a dark, incestuous relationship. “What was cute, peppy, and sentimental in the original films now reveals dissonant undertones of Oedipal passions and other barely controlled desires.”¹⁶ Most of these artists are operating beyond a cheap skewering of sacred texts, and instead demand that viewers look at them more critically. Arnold says: “The cinema of Hollywood is a cinema of exclusion, reduction and denial, a cinema of repression. Consequently, we should not only consider what is shown, but also that which is not shown. There is always something behind that which is being represented which is not represented.”¹⁷ The manipulation of time brings new ways of seeing, and as a result, the experience of these new works are markedly distinct from what their source originals

* Despite the title, the work does not draw from the whole run of the program, but rather a limited sample of episodes.

¹⁵ Stefano Basilico. “The Editor.” *Cut: Film as Found Object in Contemporary Video* (Stefano Basilico, ed.), Milwaukee Art Museum exhibition catalog, 2004. p. 37.

¹⁶ William C. Wees. “The Ambiguous Aura of Hollywood Stars in Avant-Garde Found-Footage Films,” *Cinema Journal* 41, No. 2, Winter 2002. p. 14.

¹⁷ quoted in MacDonald, 7.

offer. So while drawing exclusively from protected material, are they sufficiently different to make a claim of completely new derivative work?

The original solution to protect moving images from infringement was to register the works as a series of individual photographs. In *Edison v. Lubin* (1903) Judge Dallas concluded “it is requisite that every photograph, no matter how or for what purpose it may be conjoined with others, shall be separately registered, and that the prescribed notice of copyright shall be inscribed upon each of the them.”¹⁸ Though entire motion pictures would become eligible for copyright protection in 1912, Dallas’ determination makes for an interesting scenario when considering these newer works. If the individual frames had remained protected, Arnold’s manipulations for example, of altering the original linear sequence, would be irrelevant. Copyright scholar Siva Vaidhyanathan observed of this early case: “What matters about a strip of film is not what it expressed frame by frame, because nobody pays to see it frame by frame. People pay to see the effect of running a series of frames through a lighted projector: the action on the screen.”¹⁹ But today, limited audiences of avant-garde film and video are paying to see these images frame by frame, or at least in a new arrangement of projected frames dictated by the repurposing artist.

Contemporary courts would probably recognize the transformative uses of such works, but the burden of proof is only the beginning of the challenges facing these artists. Some advocates for a less constraining definition of intellectual property, like Lawrence Lessig and John Tehranian, consider fair use a mixed blessing at best. Tehranian says: “fair use is an affirmative defense. Prior to the development of the fair use doctrine, courts viewed acts of borrowing, if they were sufficiently transformative, as non-infringing uses. In other words, the burden of persuasion remained on the copyright holder to demonstrate that the work was infringing and not transformative.”²⁰ Today, if a rightsholder were to claim infringement, most likely an independent artist could not afford to defend their work in a costly litigation. The other option, of course, is to seek permission in advance.

¹⁸ quoted in Siva Vaidhyanathan. *Copyrights and Copywrongs*. (New York: New York University Press, 2001). p. 89.

¹⁹ Vaidhyanathan, 90.

²⁰ Tehranian, 115.

Regrettably, we live in what Lessig calls a “permission culture,” where any reuse of intellectual property is presumptively illegal. In his foreword to the *Cut* exhibition catalog, David Gordon writes:

The art world, however, has never been a permission culture, even though strategies of quotation, appropriation, pastiche and outright copying are virtually as old as the practice of art making itself. Artists have always drawn freely on the works of others as part of the creative process, and even if this has sometimes led them afoul of copyright law, it had also often resulted in exceptionally thought-provoking and visually compelling artworks.²¹

As Siva Vaidhyanathan points out in his book *Copyrights and Copywrongs*, if everyone had to obtain permission for a parody (which is covered by fair use) it would never be granted.²² Similarly, could Universal Pictures be expected to be sympathetic to (or even comprehend) the subtle reuse of *To Kill a Mockingbird* as employed by Arnold in *Passage à l'acte*? Most of these artists are unapologetic about lifting material from existing works. Arnold says:

I decided to use what I could get, a scene from a stolen German print of *To Kill a Mockingbird*. Sometimes I am afraid there may be consequences, but I'm not making money with my films, so I can't imagine anyone will be interested. When I decided to use the scene from *The Human Jungle*, I tried to find out who had the European rights. I located a distributor who told me on the phone that he didn't have the rights anymore, but that it was completely senseless for me to waste my time: as long as no one was getting richer or poorer, who would care?²³

Pièce touchée, on the other hand, borrows from a forgotten B-picture with no recognizable stars. The production company, Allied Artists Pictures Corporation, has been defunct since 1978. The rights may have transferred to another corporation, though the work has not been commercially exploited for years (no video release), suggesting that the film has been effectively orphaned. While the work may very well be owned by *somebody*, Arnold could probably make a due diligence case, as rightsholders are

²¹ David Gordon. “Foreword,” *Cut: Film as Found Object in Contemporary Video* (Stefano Basilico, ed.). Milwaukee Art Museum exhibition catalog, 2004. p. 6.

²² Vaidhyanathan, 26.

²³ quoted in MacDonald, 9.

notoriously difficult to locate. More potentially problematic is his use of films still protected and commercially viable: Universal's *To Kill a Mockingbird* and MGM's *Andy Hardy* films. The limited distribution of Arnold's works – 16mm prints by Canyon Cinema and a VHS compilation by Re:Voir* – may actually work in his favor. Digital or web distribution would create a bigger blip on the radar of media conglomerates, and the Digital Millennium Copyright Act (1998) would complicate the issue considerably. In essence, the fair use defense only applies to non-digital works.²⁴

Other artists engaging in this sort of work do so in a much more visible, institutional realm: the art museum for example. When Jennifer & Kevin McCoy made *Every Shot, Every Episode*, they were aware they were probably violating TV producer Aaron Spelling's copyright. And since the work initially appeared, *Starsky and Hutch* has seen a DVD release. Of course, even with the increased variability that DVD technology offers the consumer, the material is not indexed in any way like the McCoy's catalog of shots, perhaps further evidence of their transformative use. But again, the burden of proof is on the culture jammer. When the McCoy's sold the piece to the Metropolitan Museum of Art, their agreement explicitly stated that if lawyers appeared citing infringement, The Met would not be liable and would instead direct them back to the McCoy's.²⁵ Douglas Gordon's projections have received much notice by major media, but apparently not solicited any complaints from Universal Pictures or Warner Brothers.

There is also the question of publicity rights. The Gregory Peck estate could theoretically claim right to protect the likeness of Peck in *To Kill a Mockingbird*, though it seems unlikely they would object to the nature of Arnold's use (Peck was living when Arnold's film first appeared, and if he ever became aware of it he would have little reason to be humiliated by it). Most importantly, according to California civil code section 3344.1, the right to publicity can descend to a celebrity's heirs in circumstances of merchandising, but not for creative works.²⁶ More sticky perhaps is *Alone: Life Wastes*

* The Arnold compilation *Cinemnesia* features a copyright notice at the head of the tape, stating contents are protected under "international copyright" – no unauthorized copying or exhibition. Arnold added a © to his closing title for *Passage à l'acte*. The other two films merely bear his name and the production year.

²⁴ Rina Pantalony lecture, New York University. 10/7/05.

²⁵ Interview with Kevin McCoy, 12/9/06.

²⁶ Mark Litwak. *Dealmaking in the Film & Television Industry*. (Los Angeles: Silman-James Press, 2002). p. 303.

Any Hardy, which the still living Mickey Rooney might very well object to and claim defamation. However, he would have to demonstrate that Arnold acted with “actual malice”, which would be very difficult to do.²⁷ The film is also the most unmistakably comedic of Arnold’s works, and reuse of Rooney’s likeness could be seen as parody, which is protected by fair use. The trumping factor however, it that Arnold’s work is a creative expression, and the right to publicity is regarded by the law as secondary to First Amendment rights.²⁸ Again, while Arnold’s uses would probably be deemed legitimate by the courts, he has probably avoided the difficulty of defending his work by operating outside of the mainstream, illustrative of the paradox facing such artists – the fact that daring, subversive work can be made, but will ironically only “thrive” if it remains unseen!

The extent of transformativeness brings us to the fourth factor of fair use: effect on the market. None of these works, as reliant as they may be on their source material, replicate or replace the experience of the original work. Only the most fanatical museum patron will endure the complete *24 Hour Psycho* cycle, the effects of which are markedly distinct from the pleasure of watching the original 109 minute film in a repertory moviehouse or on DVD. Arnold’s use of the most banal sequence from *To Kill a Mockingbird* is not likely to dissuade a consumer from revisiting the drama of this well-loved film. In fact, most of these repurposed works do not explicitly undermine the reputation of their inspirations – they merely ask the viewer to examine them more closely and thoughtfully.

It ironic that Hollywood, who have liberally borrowed ideas from others since the earliest days of motion pictures, and who have profited enormously from the home video market they initially opposed on copyright grounds, are unrelenting in issues of intellectual property. Siva Vaidhyanathan notes: “Although the film industry has pushed for thicker copyright protection to protect its dominant place in the global marketplace, it should be clear that thin copyright protection, a rich public domain, and a strong legal distinction between the idea and expression made the American film industry powerful and creative

²⁷ Litwak, 310.

²⁸ Litwak, 303.

in the first place.”²⁹ The artists who respond to the culture around them by refashioning it into new works are not mere film pirates, but instead employ a consciously reflexive approach that does not threaten the integrity or the commercial market of the original material. Tehranian says that “copyrighted works are not just a form of property; they are also the primary means through which modern individuals exercise their expressive rights.”³⁰ Operating outside of the mainstream, these artists may be content to have their tiny voices heard by limited audiences. But as technology makes mediamaking and distribution easier, artists should not have to censor themselves nor fear of being silenced. Turning discarded found footage, or even rigorously protected moving image material, into completely new works is a practice almost as old as film itself, and the immersive volume of media in our culture only intensifies the urge to do so in an effort to make sense of the world around us. In a recent symposium on the avant-garde’s reuse of found footage, William Wees concluded: “In the post-modern age of mechanical-photochemical-electronic-digital reproduction, attempts to impose outdated ideas about the ownership and control of cultural property are doomed to failure.”³¹

²⁹ Vaidhyanathan, 115.

³⁰ Tehranian, 153.

³¹ William C. Wees, “Taking Another Look: Early Cinema and Recent Avant-garde Film.” Sixpack Film Symposium, March 2002. Vienna, Austria. Accessed on 1/28/06 at: http://www.sixpackfilm.com/archive/veranstaltung/festivals/earlycinema/symposion/symposion_wees.html#1