

Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity

By Kembrew McLeod

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Through giving dozens of examples of often humorous, occasionally tragic examples of copyright, patent and trademark cases and settlements, this book utilizes an historical survey to advocate its position that freedom of expression is being curtailed by current U.S. intellectual property laws. By painting a picture of the intellectual property past where, for example, musicians could liberally borrow entire scores from other musicians, add their own lyrics and reap the benefits by calling it one's own without facing suit, McLeod highlights just how far intellectual property law has come. McLeod focuses on the fields of copyright and trademark law and urges that a new system must be developed to enable access to materials in our culture guarded by copyright or trademark protection, such as phrases and trademarks, if the freedom of expression guaranteed by the Constitution's First Amendment is to survive.

The author Kembrew McLeod is a renaissance man who tackles intellectual property law in a variety of mediums. Though he did not attend law school, he has extensive education and holds a Ph.D. in communications from the University of Massachusetts. McLeod is a professor in the University of Iowa's Department of Communication Studies and has exercised his freedom of expression in a variety of ways. His extensive curriculum vitae includes another book on intellectual property, his professorship, a full-length film documentary on intellectual property law, and several papers, presentations and lectures. McLeod is an activist and an expert in the cultural ramifications of intellectual property law.

The book begins with a discussion of the age-old practice of music sampling. McLeod starts with an historical look at the practice of using the music of another in one's own work (sampling) in the early to mid twentieth century. The book recalls the custom among folk artists of using melodies and entire songs of others and rewriting the lyrics to produce their own musical commentary. The book highlights the irony that many songs created in this way, using the music that is the fruit of another's labors, are now copyrighted and use of the song in the same way as it was created requires permission. No longer can folk artists (or artists of other genres) freely sample to create social commentary and affect cultural change. But copyright protection does not end with music. Perhaps one of the most remembered and effective speeches in the twentieth century, Dr. Martin Luther King, Jr.'s "I have a dream", is now copyrighted. His estate controls the speech and its use for almost any purpose requires permission. Through giving examples such as these, McLeod details the reaches of copyright protection rather well. However, his numerous examples do little to elucidate the law in the copyright arena, other than by giving some indicia of what may or may not be illegal.

McLeod moves on to explain that copyright protection has curtailed creativity and freedom of expression in the field of music sampling in the past few decades. In many ways, hip-hop began in the 1970s as an art almost wholly based on sampling. In the housing projects where sampling began, there was little likelihood that a deejay creating music would be hunted down and prosecuted by a copyright owner. But, as McLeod explains, as the underground musical movement came to the forefront, the samplers were required more and more to obtain permission to use copyrighted material or face the corporate lawyers who represent large music companies and risk large fines and settlements. Many musicians, especially those without the

support of such lawyers, simply cease use of the sampled music, even if certain they're in the legal right, for fear of large litigation fees.

McLeod illustrates this phenomenon through detailing a case in which hip-hop group 2 Live Crew was sued when they sampled instrumentals from Roy Orbison's "Oh, Pretty Woman". The lyrics, save for the first line, were completely changed. Based on the 1976 Copyright Act¹, the Supreme Court considered whether the use of Orbison's material was "fair use".² The fair use doctrine allows for the use of copyrighted material without permission in certain circumstances.³ The court found that the song was a parody with commentary and considered the commercial nature, character and purpose of the use of the copyrighted material, among other factors and held the use was a fair use.⁴ But, as McLeod points out, the result in that case was rare and copyright law often curtails freedom of expression by instilling fear of strong penalties for infringement.

The book then explores further areas in which intellectual property law threatens First Amendment freedoms in its section on "illegal art". McLeod again turns to sampling to support his argument that protection of copyrighted material often limits the means by which social commentary and criticism can be made. McLeod delves beyond musical sampling into other forms of art. He details the plight of artist Tom Forsythe. Forsythe was sued by Mattel after he created a series of photographs featuring nude Barbie dolls inside various kitchen appliances. Though Forsythe eventually found an attorney willing to work pro bono and was victorious in the case⁵, this came at the expense of time, money and effort, and, as McLeod highlights, many artists simply lack the resources to fight these types of battles. McLeod's many examples of

¹ 17 U.S.C. §102 (1976).

² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

³ 17 U.S.C. § 102(a).

⁴ 510 U.S. at 594.

⁵ *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003).

illegal art cases further lend support to his position that intellectual property law threatens to cramp our freedom of expression and in turn, threatens to homogenize our social views.

McLeod additionally explores the effects of brand names, the Internet, and privatization on our culture. Again giving a plethora of often humorous and clever examples but without giving much reference to the law, McLeod argues that trademark protection threatens our society and our freedoms by restricting the various means of expression available to those critical of corporations who are identified by their logos. The book goes on a tangent about the Internet and music file-sharing, again with only a perfunctory review of the law and what amounts to basically a one-line explanation of the Digital Millennium Copyright Act.⁶ McLeod devotes a substantial portion of text to advocating loosening the laws regarding music file-sharing. He supports his position well, giving statistics and quoting musicians who share McLeod's view. However, McLeod fails to tie in this tangent with the rest of the book.

The book is well-written and quite an enjoyable read. The various real world examples in the book provide humor and elucidate the far reaches of intellectual property law in our society. Through these illustrations, McLeod certainly convinces the reader that current copyright, trademark, and patent law endanger our freedom of expression through limitations on the specific composition of expression. However, the book disappoints in two areas: it fails to explain fully the applicable law and the book does not present a solution or propose an alternative legal approach to these perceived intellectual property problems. While copyright and trademark statutes are mentioned, they are never fully explained or detailed. Further, while McLeod fully develops his argument that these unexplained laws threaten to constrain freedom of expression, he never presents a comprehensive solution. However, the book is an entertaining

⁶ 17 U.S.C. 512 (1998).

read and recommended for those seeking a survey of prominent cases and en pointe examples of the current reaches of intellectual property law.