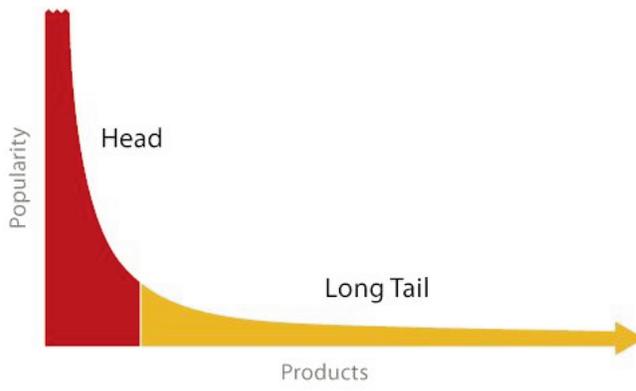


Content in the creative commons. Who profits?

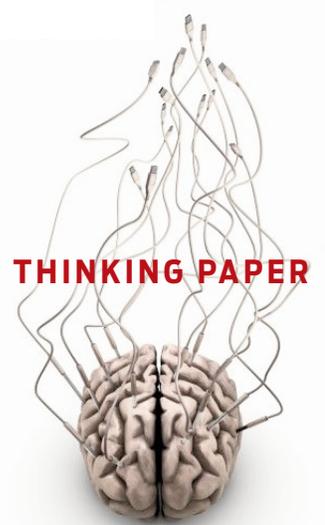
The artist, the Long Tail and the clash over rights

By DALE PESKIN | There's a story going around that touts the Internet as a perpetual money machine. It goes something like this: many pieces of old content on the digital-now network have aggregate residual value that, over time, exceed present value of fresh content, which spikes and subsides quickly. The story is called the Long Tail. It is part economic theory, part myth, part common sense, and one good chapter in a popular book.



Today's entrepreneurs wag the Long Tail like an excited puppy. Marketers and buzzmeisters tout it as magic elixir. Content creators, particularly those who have amassed giga-terra-peta-bytes of the stuff, covet the alchemy of a story that turns tons of lead into gold.

There's another story about the Internet as the model democratic society. It goes like this: once published, content belongs to everyone and anyone. Do with it what you will. Create something new from the old. Add something to it. Share it and spread it. Make it personal. Create a new business from it. Call it a mash-up. That's so cool.



DIGITAL RIGHTS
THE LONG TAIL
BUSINESS MODELS
ASSOCIATED PRESS
SHEPARD FAIREY
COPYRIGHT
FAIR USE
OPEN ACCESS
ORIGINALITY
CREATIVE COMMONS
THE NEWS SPIRAL



(Top) Manny Garcia's photo for AP.
(Middle) Shepard Fairey's poster.
(Bottom) Time magazine's take,
also by Fairey.

The stories are essentially about rights. And money.

One story is about the right to capitalize what is costly to produce, distribute and store. It assumes that those who create or distribute original content are entitled to capture or extract value for their efforts.

The other is about fair use. It assumes society benefits from content we all make available in the commons. Credit the source, but content exists for the benefit of all. Copyright is a mere suggestion. That's the idea behind the Creative Commons, a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others. CC provides free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry, so others can share, remix, use commercially, or any combination thereof.

Now comes the story of the artist who created a poster that helped elect a president. Using a 2006 photograph taken at the National Press Club in Washington by a freelance photographer on assignment for the Associated Press, graphic designer Shepard Fairey rendered an op-art, multimedia portrait that represented Barack Obama's campaign of hope. The image became a defining symbol of the campaign, which embraced and endorsed it.

The "HOPE" poster has become a sensation. Thousands have bought it in a variety of formats and products. Signed copies sell for thousands of dollars on eBay. One version has been added to the permanent collection of the National Portrait Gallery.

AP says it deserves a piece of the action. It contends it owns the copyright and wants credit and compensation.

In a preemptive strike, an unapologetic Fairey filed a lawsuit against AP asking a federal judge to declare that he is protected from copyright infringement claims. It takes *chutzpah* to cultivate a profitable reputation as a guerrilla street artist.

Further complicating the dispute, the photographer Manny Garcia contends that he, not AP, owns the copyright for the photo, according to his contract with AP, at the time.

Take a look at the original photo. There's little doubt that, with inspiration from Andy Warhol, a few clever swatches of color, and the addition of a powerful word, the artist co-opted someone else's work.

Fairey has acknowledged that he based the Obama portrait on the photograph that AP distributed. He said he found the photo on Google Images. He never sought a license, gave credit, or asked permission. Rather, he used the photograph to create a fresh work of art in a different format – mixed media. He released the image on his Web site in early 2008, two long-tail years after the photo was taken, then made thousands of posters for the street.

Fairey’s technique is a little like jazz, where a musician creates new music in a different style from an old composition. Many artists, including those working at newspapers with extensive photo files, use photographs as a foundation for illustration, deconstruction, or inspiration. Most of the time the work falls under the “fair use” standard, a legal concept that allows exceptions to copyright law, based on, among other factors, how much of the original is used, what the new work is used for and how the original is affected by the new work.

With its endless access to visual references and a constituency of free-and-open demagogues, the Internet has rendered the old standards obsolete, if not wholly unenforceable. In a world where all information is miscellaneous, multiple uses of discrete content become challenging to monitor and nearly impossible to trace. Transgressions are assumed; every creative digerati has stepped on the rule at some point during their life online.

AP and content companies such as Conde Naste and Thomson Reuters now deploy a software program called Attributor to scan web sites, blogs and social networks across the Internet for content thievery or unlicensed usage. Despite uncovering numerous violations, the companies are typically judicious in their enforcement.

Even if they are aware of violators, content originators rarely act on either the copyright standard or fair use. There’s little to gain from asking a generation of digital natives to credit the source and share the benefits of their latest You Tube video or Facebook post.

Predatory protectionism can come back with a vengeance. The trail of information can lead to unexpected places. And few institutions want to exercise ownership rights in a democratic society that prides itself on news and knowledge for the common good.



Does AP “own” a photograph that a hired shooter takes of a presidential candidate at a public event at the National Press Club?
At what point does news belong to everyone?

Did the photographer waive a right to ownership? He took the picture, albeit for hire.

How about the Press Club? It happened on its property. If this were a football game at FedEx Field, the Redskins and the NFL would want a piece. They charge the TV networks millions to broadcast from their turf. They charge fees or require credentials for others who tread upon it.

How about Obama? Afterall, it’s a photo of him. Does he get a say on how the photo is used or if money is made from it?

Does Shepard Fairey have the right to grab someone else’s work off the Internet and do anything he wants to it? Or little at all.

Should all of us be permitted to do the same in the name of creativity? Why pay several thousand dollars for a signed poster when I can download a high-resolution image on my computer, enhance it in Photoshop, then print a high-quality version on my Laserwriter.

Can I publish Fairey’s version, or my own, on websites and distribute them for republication without recrimination?

Where does content originate? Where and when can you apply rights as news and information spiral through the mediascape, changing as it goes?

Factor money into these questions, and the Long Tail becomes a long tale of complexity and competing values.

Creators are right to seek compensation for content they originate, and right to capitalize on new models from old assets. But in an age when everyone is a creator, we’re going to have to rethink a few rules and rights.

To work, the creative commons needs to be more than common ground in which all content is created equal. It needs to reward originality as well as inspire it.



Graphic designer Shepard Fairey

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info@ifocos.org
703.899.6149 or 703.474.5563

Dale Peskin is founder and managing director of iFocos and a principal of the SEVEN26group. dale@ifocos.org