

Brand Name Bullies: The Quest to Own and Control Culture

By David Bollier

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Copyright and trademark law must serve the people. Today copyright and trademark law has expanded so that the owners of these forms of intellectual property continuously assert new rights and stifle the public and future creators. This marks a departure from the tradition of finding the balance between private control and public access with respect to rights allowed by copyrights and trademarks. We, as consumers, usually think that creativity is shared by many rather than controlled by one. Increasingly, we must recognize the exchange between creativity and knowledge as control of the privatization of this market strengthens.

The legal control through copyright and trademark law seems to reach throughout the world of creativity. Private owners of these legal rights are enforcing these rights with a driven force. Copyright and trademark law has reached a point where its original goals need to be remembered and re-established. As a result of the lack of knowledge about what can be done about the bullying by corporations, famous personalities and large law firms, the public has been unaware of how to fight back. These intimidating large powers have pushed hard and far to win their fight, especially when they encounter a lack of resistance from the other side. Do free speech and culture belong to the masses or primarily to commercial groups? This main question drives the discussion in *Brand Name Bullies* as the author questions the direction that copyright and trademark law is headed and asserts that consumers must learn the stories of abuse to have the power to make copyright and trademark law work for the people.

David Bollier, an independent policy analyst, journalist, activist and consultant, has worked more than twenty years in this arena. His credentials include employment as a Senior Fellow at the Norman Lear Center, USC Annenberg School for Communication and cofounder of Public Knowledge¹, an advocacy organization working to defend public rights in the emerging digital age. He attended Amherst College (B.A.) and Yale Law School (M.S.L.). He has written several books with a focus on “developing a new analysis and language for reclaiming "the commons, “the diverse array of publicly owned assets, gift-economies and natural systems that function in tandem with markets.”²

The book begins with a discussion of copyright and trademark law’s use in art and culture. The original purpose of stimulating artists to create new works by giving them rights over what they create has been lost. Instead, copyright and trademark law is overly broad and works against the creative drive by restricting an artist’s ability to draw upon past creations during her creative process. Bollier illustrates his arguments with many real world examples, including one that shows that the public voice can have a role in copyright enforcement. With the development of digital technologies and alternative means of distribution comes the need for stronger copyright protection. The American Society of Composers, Authors and Publishers (ASCAP), a performance-rights body that licenses and distributes royalties for the non-dramatic public performances of its members’ copyrighted works, tried negotiating with hundreds of summer camps to collect fees for singing protected campfire songs such as “Puff the Magic Dragon” and “This Land Is Your Land”. The Girls Scouts of America owned several of these camps and did not have the funds to pay ASCAP, so they discontinued singing at the camps to

¹www.publicknowledge.org

²<http://www.publicknowledge.org/about/who/board/#david>

the sadness of the campers. The negative press received by ASCAP led it to withdraw its threats and to allow the singing at the Girl Scouts camps to continue as an indulgence, not as a legal right.

Bollier writes about several other aspects of music creation that are treading closely to the line of copyright rights. Often composers create new works that are similar to someone else's works or are meant to pay homage to the previous work. Artists can sample portions of a song with permission from the copyright holder, but this requires significant funds that new and struggling artists generally do not have. DJ and rap music sampling has blurred the lines between creation and copyright as courts have been left to decide who the author of the new work really is and have been enforcing the copyrights since a 1991 decision against rapper Biz Markie for "stealing" the first eight bars of a Gilbert O'Sullivan hit. Bollier argues that ultimately the creativity in the rap market has been stifled as it had been an art form open to everyone, especially impoverished inner-city youths, and it became a strongly regulated proprietary market.

In one chapter, Bollier focuses on the everyday creativity and sharing in communities that has become illegal because of the dominance of copyright and trademark law. The community history is rich with folk music, fairy tales, myths, classical dances, handicrafts, and native traditions. Many valuable empires now claim to own and control this previously public domain material. Disney, for example, has taken many folktales, such as *Aladdin*, *Beauty and the Beast*, *Robin Hood*, *Cinderella*, and *Sleeping Beauty*, and gathered rights over them. Many smaller companies do not have the resources to risk Disney bullying them, so they usually cease using the allegedly infringing material rather than face a court battle where they legally may have the upper hand. Bollier writes that Disney's situation strikes a sad note as a company that

built its wealth on public-domain morsels has become a proprietary bully that becomes more powerful with each battle.

The existence of the two tools of trademark law and publicity rights law has allowed companies to monopolize certain words, images, and symbols of the common culture. Now that the marketplace has become the culture of the people, the justification for these trademarks does not make as much sense as companies should not control the flow of these symbols in our culture. The Trademark Dilution Act of 1995 gave owners of famous trademarks a new right as they could now prevent against blurring or dilution of their trademarks even if no likelihood of fraud or confusion existed. The power these owners acquired often leads to legally dubious or erroneous threats that the victims cannot afford to fight against. Often the trademark holders want to prevent damage from ridicule or criticism, but the rights of free speech and artistic commentary should not suffer as a result.

Mattel has engaged in dozens of legal battles to protect its rights in the American icon Barbie against anyone who has tried to depict or invoke Barbie without Mattel's permission. In 1997, Aqua, a Danish band, wrote a song called "Barbie Girl" mocking the doll. Mattel sued the band claiming dilution, but the court found no legal basis for trial and said the song was a social commentary. Tom Forsythe, an independent art photographer, created seventy-eight images of Barbie entitled Food Chain Barbie with such depictions as Barbie inside a blender and Barbie inside a party glass. He barely made any money off the sale of these images, but he perseveringly fought back against Mattel's lawsuit after searching for five months for legal counsel and finding representation with the ACLU of Southern California and a San Francisco law firm. Mattel's ferocious legal battle included using tactics to scare witnesses from testifying and trying to show the images were a parody based on an opinion poll. One attorney for

Forsythe commented that Mattel's counsel "engaged in unprofessional, abusive and manipulative tactics" and even called the defense counsel liars.³ The Ninth Circuit Court ruled for Forsythe as public interest excludes allowing Mattel to control artistic works that use Barbie for cultural criticism and comment.

Bollier questions whether copyright and trademark law have been taken too far as companies have successfully obtained rights over letters of the alphabet. McDonald's Corporation has protected the use of the "Mc" prefix and has successfully defended its rights many times, including against a chain of Quality Inn hotels to be called "McSleep". The court refused to agree that McDonald's had lost the right to enforce the mark because it had acquired a single meaning and McDonald's had lost complete control of its use. The owner of *O*, a German soft-porn magazine, asserted its ownership over the mark when *O, The Oprah Magazine*, launched. In 2002, a federal judge ruled for Oprah Winfrey and held that little chance for confusion between the two existed as the magazines were so different. The ownership of letters sends a dangerous message of control over global culture.

The book has hundreds of other stories of the often absurd levels of control that corporations have over culture by their intellectual property rights. Bollier remarks about Starbucks trying to make it illegal to take pictures inside its stores; Birkam Choudhury, a yoga entrepreneur, asserting copyright ownership against many yoga studios over yoga phrases and poses; J.M. Smucker Co. patenting a crustless sandwich; and a musical performer who first performed silence successfully obtaining a copyright for his performance. These endless stories focus on just how far the owners of these intellectual property rights are pushing for protection and control. These monopolies often come at the expense of the public.

³Bollier p. 91.

The positive note comes at the end where Bollier asserts that key groups such as consumers, artists, academics, scientists and librarians have started a new movement to assert the interest of the public. The development of technology brings the reality of these battles and lawsuits closer to home for the public as evidenced by the Napster controversy. Public education stands as the key to unlock this challenge and public debate about the future changes in copyright law may translate into a positive development and influence over the legislature. Bollier argues that a new language for copyright and trademark law is needed to strengthen the agenda of protecting an open culture. The reality is that creativity does not come from one individual, but from society and communities as a whole and the public deserves greater protection as an equal.

Brand Name Bullies is a great combination of history and narrative into this battle over proprietary control. This book provides an easy, hands-on approach that allows the reader to become engaged in the stories and develop an appreciation for the situation. The book is an enjoyable fast-paced read that is recommended for anyone seeking real world cases and examples of the current situation in trademark and copyright law. Those who read this book may even feel compelled to further the voice of the public in this situation where corporations are silencing the public with their intellectual property rights.