Epilogue

The Summer without Martha Graham

FOR SOME GOOD reasons, we could call the summer of 2000 "the Summer of Napster." Not a week went by when the Revolutionary music distribution software did not garner headlines in the popular press. Everyone from college students to the U.S. Department of Justice weighed in on the matter. But I prefer to remember 2000 as "the Summer without Martha Graham."

Martha Graham, who died in 1991, was one of the most influential dancers and choreographers in the twentieth century. She collaborated with artists such as sculptor Isamu Noguchi and composer Aaron Copland, and is responsible for such Revolutionary works as *Primitive Mysteries*, *Frontier*, and her 1944 masterpiece, *Appalachian Spring*.[1]

Because of a nasty dispute between the Martha Graham Dance Company and Ron Protas, the director of the Martha Graham trust and the person who claims to control the copyrights on Graham's choreography, the company was not able to perform Graham's work throughout the summer. Protas wouldn't license the work to the company that bears Graham's name. In response, the dancers in the company asked other dance companies to refrain from performing Graham's works as well. So the dancing stopped.

Is this what we want our copyright system to do? Isn't copyright supposed to encourage art? And isn't copyright supposed to be secured only "for limited times"? Instead, more and more, excessive and almost perpetual copyright protection seems to be squelching beauty, impeding exposure, stifling creativity.

At first glance, it seems that we were denied the beauty of Martha Graham's dances because of a series of poorly thought out changes in copyright law—specifically the extension of the duration of copyright. Protection now can extend to the life of the author plus seventy years. This extension does nothing to promote creativity. It rewards the

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established at the expense of the emerging. From 1909 to 1978, artists enjoyed copyright protection for a fixed term of twenty-eight years. They could renew the copyright for another twenty-eight years if they thought there was still a market for their work. Once copyright expired, a work belonged to all of us. It entered the "public domain." As their copyrights expired, artists had a strong incentive to produce new works to make money. Publishers could issue inexpensive editions of great works. New artists could borrow liberally for their own new creations. But despite what the Constitution says, Congress has decided to extend copyright protection for what might as well be forever. This creates an almost perpetual monopoly over creative works and starves the public domain of raw material.[2]

Martha Graham recognized the value of the public domain for the creative process. She used Greek myths, Native American legends, and the Declaration of Independence as raw material for her dances. She went to the deep well of cultural signs and tropes, and used them in fresh and powerful ways. As dance scholar Brenda Dixon Gottschild explains, Graham incorporated several specific African elements into her style, including pelvic contortions and barefoot performance. And Graham was vocal about her reliance on what she called "primitive sources," African and Native American cultures.[3]

That's how creativity happens. Artists collaborate over space and time, even if they lived centuries and continents apart. Profound creativity requires maximum exposure to others' works and liberal freedoms to reuse and reshape others' material. Graham understood the collaborative creative process better than any lawyer or congressman ever could. She clearly was not interested in fencing in her or anyone else's creativity.

In fact, Graham never bothered to register copyrights over most of her dances created before 1978. She filed to protect only one—the 1946 tale of Medea entitled *Cave of the Heart*. So it turns out the summer without Martha Graham might not have had to happen that way. The best of Martha Graham might just be in the public domain anyway. But by the time lawyers for the dance company discovered the lack of registration, it was too late. The company had canceled its summer shows in the face of legal intimidation.[4]

Reckless "intellectual property" intimidation can have nearly the same effects in the culture as bad laws can. Despite a clear U.S. Supreme Court ruling in favor of the principle that parody is fair use, culture in-

dustries and their lawyers still seem to resist the idea. In July 1999, journalist Michael Colton posted an Internet parody of *Talk* magazine, which is a partnership between Hearst Magazines and Walt Disney-owned Miramax Films. Miramax lawyers sent a cease-and-desist letter to Earthlink, the Internet company that owned the server on which the parody sat. Earthlink immediately shut down the parody. It restored the site only after *Talk* editor Tina Brown appealed to the Miramax legal department to let the parody stand. Because of widespread misunderstanding of copyright law, cease-and-desist letters carry inordinate cultural power and can chill if not directly censor expression.[5]

Corporate legal intimidation has even chilled political speech. While running for reelection in the spring of 1999, Dallas mayor Ron Kirk aired a radio commercial that used the words "Four years ago, we chose Kirk captain of the Dallas enterprise. Well four years later, Dallas has become the center of the enterprise. With the largest capital bond program in the history of Dallas, a half a billion dollars, the Trinity toll (road) and the new arena add up to be a Starship Enterprise." The commercial also sampled the voice of William Shatner saying, "Space, the final frontier." Lawyers from Paramount Pictures threatened the campaign with a cease-and-desist letter. The campaign capitulated.[6] And in August 2000, Green Party presidential candidate Ralph Nader parodied a MasterCard advertisement by issuing a television advertisement saying: "Grilled tenderloin for fund-raiser, $1,000 a plate; campaign ads filled with half-truths, $10 million; promises to special interest groups, over $10 billion; finding out the truth, priceless." MasterCard International, Inc., filed a federal suit seeking an injunc-tion against the campaign. The suit claimed trademark infringement and unfair competition, but not a copyright violation. Nader eventually prevailed in court. While neither of these political cases would fall under the parody-as-fair-use defense for a copyright case, they both show how chillingly vigilant the content industries have grown in recent years. These companies firmly believe courts should side with their proprietary interests over those of the electorate. At the turn of the twenty-first century, invoking "intellectual property" is as good as using a trump card in public discourse. All discussion and debate stops.[7]

Following a strategy more pernicious than mere intimidation, media companies are actually pursuing legal action to stifle criticism of themselves. They are also using copyright suits to squelch clearly

political speech. In October of 1998, the *Washington Post* and the *Los Angeles Times* filed suit against a conservative news forum web site called FreeRepublic.com. Members of the group had been pasting stories from various newspapers and annotating them, commenting on them. These newspapers brought legal action as an effort to control distribution of the web site's potentially valuable digital content. Other newspapers, including the *Wall Street Journal* and the *New York Times*, have signed contracts with a company called the Copyright Clearance Center so that it can meter, charge for, and regulate distribution of their digital content. The Copyright Clearance Center web site boasts, "CCC's new solution lets publishers and other content owners determine the types of reuse they wish to license. They decide whether to license use of their materials in electronic media such as e-mail, Internet, Intranet or CD-ROM; or in print media such as reprints or for republication. Copyright holders can also specify distinct rights, terms and conditions for different pieces of content." In other words, all electronic access, copying, and redistribution will require permission and payment. There will be no fair use of electronic news stories from the *Boston Globe*, the *New York Times*, *Barron's*, or the *Wall Street Journal*, arguably the most important news sources in the United States.[8]

In the 1970s, thanks to coverage of the Watergate scandal and the Pentagon Papers, the *New York Times* and the *Washington Post* were considered heroes for free speech and a free press. Now, as major "content providers" in the new digital economy, they are part of the problem. They are private copyright cops. And citizens who wish to gather, discuss, debate, and criticize must do so with one fearful eye on the front door, waiting for the cease-and-desist letter.

Recent expansions of copyright power have clearly stifled artistic creativity as well. Vladimir Nabokov's son, Dmitri Nabokov, succeeded in temporarily blocking American publication of Pia Pera's novel *Lo's Diary*, a revision of *Lolita* from the voice and point of view of the young girl. After some tense negotiation, Dmitri Nabokov agreed to allow publication as long as the American edition contained a nasty preface by the son. "Is *Lolita* to pay this price [the indignity of a transformative work] because it is too good, too famous? Are writers to strive for mediocrity lest their works similarly enter the 'common consciousness'? Are icons of popular culture—*Star Wars* perhaps—to be made subject to plundering by free riders because they have entered the common consciousness?" the younger Nabokov wrote in the preface.[9] Interestingly,

Star Wars screenwriter George Lucas "plundered" the work of Joseph Campbell and the myths of the collective public domain. Despite such an overt and acknowledged reliance on others for his material, Lucas himself has used lawyers to intimidate *Star Wars* fans who distribute their own unauthorized fanzines.[10] Despite entertaining such a narrow, elitist view of the creative process, Dmitri Nabokov had the law on his side. Copyright law grants estates control over transformative uses of their fictional characters. But is this good? Isn't the world better off with more than one perspective on the iconic yet controversial *Lolita* story? Wouldn't creativity flower if unfettered by fears of petty lawsuits by relatives who contributed nothing to the creative process in the first place? What public interest does it serve to enrich the heirs of Irving Berlin, Vladimir Nabokov, Martha Graham, or Gilbert O'Sullivan? Which system would better promote art: one in which anyone with a good idea for a James Bond story could compete in the marketplace of ideas for an audience or one in which those who control Ian Fleming's literary estate can prevent anyone from playing with his toys? A looser copyright system would produce more James Bond books, not fewer. Some might be excellent. Other might be crappy. Publishers and readers could sort out the difference for themselves. The law need not skew the balance as it has.

But there is hope in this story. All this talk of modern dances and MP3 files allows us to have a national—perhaps global—conversation about what sort of copyright policy we want to live with in the twenty-first century. Copyright policy should help—not hinder—the next Metallica, the next Martin Scorsese, the next Vladimir Nabokov, the next Martha Graham.

Maybe some summer not too many years from now a young woman will enjoy a performance of *Appalachian Spring* and will be inspired to borrow from it to construct a life of creativity and beauty. That's how Martha Graham would have wanted it.

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