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INHERENT VICE: BOOTLEG HISTORIES OF VIDEOTAPE AND COPYRIGHT by Lucas Hilderbrand. Duke University Press, 2009, 320 pp. Paper $24.95.

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Over the past few decades, legal scholars have recognized the merit of focusing scholarly efforts on the role law plays in its interaction with other areas of academic and practical disciplines. Cross-disciplinary efforts that focus on law and society, law and economics, law and science and related areas have become the norm. Lucas Hilderbrand's 2009 book, INHERENT VICE: BOOTLEG HISTORIES OF VIDEOTAPE AND COPYRIGHT is a fascinating contribution to this cross- disciplinary oeuvre. Hilderbrand is an Assistant Professor of Film and Media Studies at the University of California, Irvine. Although not a lawyer or legal academic, he has consulted with attorneys and law professors in his endeavor to understand and offer commentary on the role copyright law played in the relatively short-lived history of videotape and videotape recorders.

The book is presented in two parts. The first part begins with a thirty-page introduction entitled *The Aesthetics of Access*, in which Hilderbrand introduces the array of agendas which inform the book, ranging from offering a validation of video via an aesthetic reading of its history and impact, to the presentation of an argument that copyright law includes users' rights of access in addition to creators' rights.

In his Introduction, Hilderbrand explains that the title, INHERENT VICE is derived from a phrase librarians use to describe the effect the acidity of chemically processed wood-pulp paper has on book pages—this is what turns the pages brown and brittle with age. Turning to video, he asserts that it has two inherent vices: its degenerative properties (known to anyone who now tries to play back videos recorded more than ten years ago—sound quality and picture deteriorate pretty quickly), and its role as a "bootleg

technology" created "for the purpose of recording television without permission" (p.6).

This characterization of video recorders as outlaw tech seems a bit of a romanticized stretch. Home audio taping was already the norm by the time video recorders were introduced to consumers, and no television networks brought suit against video recorder companies for unauthorized taping of shows. It was only motion picture companies, worried that home taping of uninterrupted cable broadcasts of their feature films would cut into the pre-recorded tape market, which led to Universal filing its action against Sony's Betamax recorder.

Hilderbrand continues this discussion with two assertions that are at the core of INHERENT VICE. I found both of these assertions troubling and largely unsupported. First, he asserts that "[i]t was imagined that video could become a medium for the people and a viable alternative to broadcast networks programming", and that "[A]udience access suggests a partial reorientation of power" (p.8). Hilderbrand doesn't explain who, if not the audience, does hold the power in this context. The issue is by no means a simple one. The television industry, particularly today, isn't dominated by a single source or group—artists, distribution companies, networks, cable distribution companies, and others share power in an uneasy union. To the extent Hilderbrand is arguing that the creation and presentation of art by artists places them in a power relationship with their audience, I am a bit dubious of this claim—the struggle most artists encounter in finding ways to get their work noticed, distributed and to make a living from their art suggests very little power resides in their hands.

The second assertion is that bootlegging, a concept generally defined as the unauthorized recording and distribution of audio tapes and performances, should be re-defined as a "[f]air use of video technologies"; a use Hilderbrand praises, saying: "Fair use bootlegging can be a beautiful thing" (p.23). He goes on to distinguish his conception of bootlegging from piracy, thusly: "Pirates steal for profit, not for the egalitarian or productive redistribution of culture and information". *Id.* He justifies the theft involved in this "redistribution" by noting that despite "[w]hining about piracy, the technology manufacturers and studios still reap enormous revenues and will surely find new business models to continue doing so." *Id.*

The distinction Hilderbrand offers between bootlegging and piracy, that the former is done with good intentions and for the benefit of the community, whereas the latter remains theft that should be punishable by law seems to

suggest that civil remedies for infringement should be eliminated or at least greatly narrowed. In essence he seems to be championing a sort of Robin Hood approach to copyright—that it is indeed acceptable to rob the rich for the benefit of the poor—a particularly difficult policy to apply in reality, given the difficulty of defining who fits in each category—human endeavor is a bit too fluid to pin down so easily.

The Introduction is followed in the first part by a detailed analysis of the history of video, entitled *Be Kind, Rewind: The Histories and Erotics of Home Video* (pp.33-72). In this chapter, Hilderbrand takes the reader back to the rise of video in the 1970's, chronicling the rapid spread of this groundbreaking technology throughout the world, and its unique qualities as a means of not only playing back pre-recorded videos (which actually came later in the history), but also as a way for people to record and distribute their own videos, and amateur versions, both copies and derivative works, of pre-existing copyright protected audiovisual works. In support of his bootlegging thesis from the Introduction, he notes that adult film entrepreneur David Friedman asserted that "the home video market was 'founded by pirates and pornographers'" [1] (p.34).

In the second chapter of part one of INHERENT VICE, Hilderbrand offers his analysis of how the law, and in particular copyright law, responded to video recorders and videocassette uses. This chapter, entitled *The Fairest of Them All? Home Video, Copyright, and Fair Use*, starts with a description of copyright law and fair use, followed by an analysis of *Sony v. Universal*[2], the seminal U.S. Supreme Court decision applying fair use doctrine to videotape technology, a case which has become known by the name of the first video recorder, the Sony Betamax, ie: the "Betamax Case" (pp.77-114).

In this section of the book Hilderbrand aligns himself with the views of Prof. Lawrence Lessig and the "copyleft" movement. Hilderbrand presents the argument that contemporary copyright has become a tool of corporate interests to suppress free expression, noting:

> The considerable liberty for users in the early, anonymous, and unregulated days of home video, the Internet, and even YouTube has repeatedly given way to more constrained, corporatized, and consumptive uses.
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> …

> As Lessig argues, in the digital media age, the content, the distribution, and the hardware are typically all owned or controlled by corporations with vested interests in regulating them.
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> …
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> But copyright law, in particular, has increasingly served the interests of big media at the expense of audiences and, to a certain extent, creators[3] (pp.78-79).

Hilderbrand supports the argument that this "corporatizing" of copyright is a movement away from copyright's fundamental grant, which he asserts was targeted not only to protect creators, but also those who view and engage with their works:

> Copyright works through a bargain: artists and publishers are granted protection to commercially exploit their works in exchange for making them publicly accessible. This means that copyright is intended to serve the interests of the audience as much as it rewards publishers, distributors, writers, filmmakers, musicians and artists….L. Roy Patterson and Stanley W. Lindberg argue that users' interests in copyright law are as important as those of authors and entrepreneurs, yet because users' rights of access are implicit, they are often forgotten[4] (p.80).

The argument that copyright law confers rights on users as well as creators is subject to criticism on several fronts: first, if this right exists, it must be implied from conduct, since nothing in Article 1, Section 8 of the Constitution expressly provides for it; second, since copyright rights exist and, under the 1976 Act, are vested, once a work is placed in a tangible form, publication is no longer required before rights exist—so artists are granted protection even if they never publish their works; and lastly, the argument that users have equal rights under copyright law has only come to the forefront of the debate as a result of the ease of copying and distribution the digital age affords users—no one claimed to have an inherent right to make copies of published books and distribute them without penalty until it became easily possible to do so online.

The position that copyright has, particularly through the terms of the Digital Millennium Copyright Act and the "opt-out" nature of the 1976 Act, aided in the "corporatizing" of creative works, has been cogently presented by Professors Lessig, Neil Netanel, Edwin Baker, Yochai Benkler, Jed Rubenfield[5], and many others. Yet these arguments are not unanimously accepted among copyright scholars. In my article, *Reason or Madness: A*

Defense of Copyright's Growing Pains[6], I note that articles by Professors Paul Schwartz & William Treanor, Kevin Galbraith and Julia Mahoney[7], as well as my work, offer a very different view. The explosive growth of creative, expressive works from millions of voices given new-found access in the digital age, offers a contrary view to the concern that expression is being suppressed by corporate giants. The global nature of this expressive explosion is also often overlooked by copyright's critics, whose focus often overlooks creative works in Asia, Africa, South America and the rest of the world.

Unfortunately, Mr. Hilderbrand does not devote, to any significant degree, any part of his critique of copyright to explore the other side, the pro-creators side, of this debate. Had he done so, the contribution INHERENT VICE offers in this debate might have been more balanced, and might have offered recognition of the nuanced nature of this issue.

A final note on this chapter dealing with law and video: Hilderbrand is critical of the DMCA, arguing that in its desire to protect the nascent Internet market, it went overboard in its pro-business orientation. He concludes as follows:

> Policies with a goal of starting up the Internet should have taken the form of short-term funding initiatives or regulatory guidelines rather than a permanent addition to copyright law; with the goal of establishing Internet commerce by and large achieved, the law is overdue for reevaluation—a reconsideration that the Supreme Court has yet to undertake (p.103).

This struck me as an odd proposal. It is not the Supreme Court's role to undertake a reevaluation of law—that is the province of Congress. Reevaluation of the DMCA has been on ongoing project of a number of congressional committees, a process complicated by the need to try to find new approaches that reasonably accommodate the often conflicting needs of a wide array of stakeholders.

The second part of INHERENT VICE offers readers three case studies: the conflict between the Vanderbilt Television News Archive and CBS over whether copyright protected television news broadcasts; the fascinating history of filmmaker Todd Haynes' 1987 satire of the sad story of pop singer Karen Carpenter, entitled *Superstar: The Karen Carpenter Story*, told using Barbie-style dolls, and chronicling the rise of the Carpenters as a pop group, and the decline and ultimate death of Karen Carpenter due to

complications stemming from her anorexia; and the use of video chain letters as a network in the riot grrrl feminist community (pp.117-224).

These case studies are offered to show the benefits bootlegging activity offers to these different communities, despite their being infringing copies and/or derivative works. The author views this activity as the kind of benign infringement the law should be able to discern and allow.

Scattered throughout the book are what the author calls *Video Clips*; these are short (4-6 pages) profiles depicting ways in which video had, and continues to have, cultural impact. One Clip focuses on video retailing, and how unauthorized duplication tapes, or "dubs" proliferate in the retail context, another features videos sold at genre expos, yet another explains the work of the Frameworks listserv, an e-mail discussion group about underground film, and the last clip offers a discussion about artists who use the deterioration of video over time to create artwork based on the distortion and deterioration of the media.

While I found the case studies and video clips to be interesting reading, particularly the discussion of the *Superstar* video, my sense is that if, after reading part one of the book, you have accepted the author's view of the importance and value to the "commons" of what he defines as bootlegging, then you will see the case studies and video clips as valuable anecdotal support of that thesis. Viewed independently, however, they don't offer sufficient support of his viewpoint given their fairly narrow focus.

Hilderbrand concludes the book with an Epilogue entitled: *YouTube: Where Cultural Memory and Copyright Converge*. His focus here is on the controversial practice of YouTube users uploading unauthorized video clips. He praises the impact this practice has in a variety of contexts. He posits that it is a form of community archive, while acknowledging that the lack of organization and completeness of it precludes considering it to be a true and formal archive that academics could use. He opines that the situation in which the same unauthorized clip is uploaded with added content, or in a parody form, results in "[b]lurring distinctions between authorship, ownership and distributing rights", suggesting that "[t]hese postings reflect the ethics of the cultural (and creative) commons" (p.240). This view is a restatement of his view about video—unauthorized non-profit use of others' content is a "productive redistribution" which should not be penalized. Current case law is split on this issue—a series of cases allowing unauthorized copying if the work is "transformative" have recently been followed by other cases (the Harry Potter codex case is an example)

finding that the changes to a work aren't transformative enough to escape copyright infringement liability. Historically, these kind of pendulum swings ultimately result in compromise approaches that adopt a middle-ground position – the next few years of case decisions may move us to that firmer ground.

One benefit of INHERENT VICE is that it gets you thinking about the uses of video in the past, and the extent and manner in which they are replicated today. For example, unlike the video recorders of the past, DVD players generally don't have recording capability, and the market for blank DVDs is not based on their use in these players. Does this mean that consumers no longer are interested in creating their own content? No, what has happened instead is that consumers have found a far more robust set of tools for creating video content—their computers and even more frequently, video cameras embedded in smart phones and related mobile devices. The ability to create visual mash-ups and add a sophisticated array of audio and visual effects far outstrips the capabilities available to consumers 30 years ago.

In sum, INHERENT VICE, with its blend of history and legal analysis, helps place video and videotape recorders in their rightful place in the history of copyright in the U.S. and provides food for thought and continued debate over the role of copyright in the digital revolution. It is an interesting read for scholars of law and culture.

ENDNOTES

[1] Citing Bob Davis, X-Rated Video Losing Share of Tape Sales, Wall Street Journal, January 18, 1984 at 33.

[2] Sony Corp. of Amer. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[3] Citing Lawrence Lessig, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2002) at 23-25, and generally Lawrence Lessig, CODE: VERSION 2.0 (2006).

[4] Citing generally to L. Roy Patterson & Stanley W. Lindberg, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991).

[5] See, e.g., Neil Weinstock Netanel, Locating Copyright Within the First Amendment, 54 Stan. L. Rev. 1 (2001); C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891 (2002); Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the

Public Domain, 74 N.Y.U.L.Rev. 354 (1999); and Jed Rubenfield, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1 (2002).

[6] Marc Greenberg, Reason or Madness: A Defense of Copyright's Growing Pains, 7 The John Marshall Rev. of Intell.Prop. Law 1 (2007).

[7] See, e.g., Paul M. Schwartz and William M. Treanor, Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property, 112 Yale L.J. 2331-2332 (2003); Kevin D. Galbraith, Note, Forever On the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent,12 Fordham Intell. Prop. Media& Ent. L. J. 1119 (2002); Julia D. Mahoney, Book Review, Lawrence Lessig's Dystopian Vision, 90 Va. L. Rev. 2305 (2004).

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