

The CCCC-IP Annual: Top Intellectual Property Developments of 2013

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Introduction to the 2013 *CCCC-IP Annual*

This is the ninth volume of the *CCCC Intellectual Property Annual*, my seventh as editor. I've been reflecting lately about the type of authorship we engage in as we create the *CCCC Intellectual Property Annual* each year. This publication is not quite like a typical edited collection or issue of a journal. Ever since John Logie started the *Annual*, the calls for submissions included specific suggested topics – events that took place over the previous year in copyright and intellectual property news. I followed suit when I took over; I suggested a few topics, but when those were claimed, there were other people who also wanted to write for the *Annual*. I encouraged them to write about any topic they found interesting, but they preferred that I provide a list of additional topics.

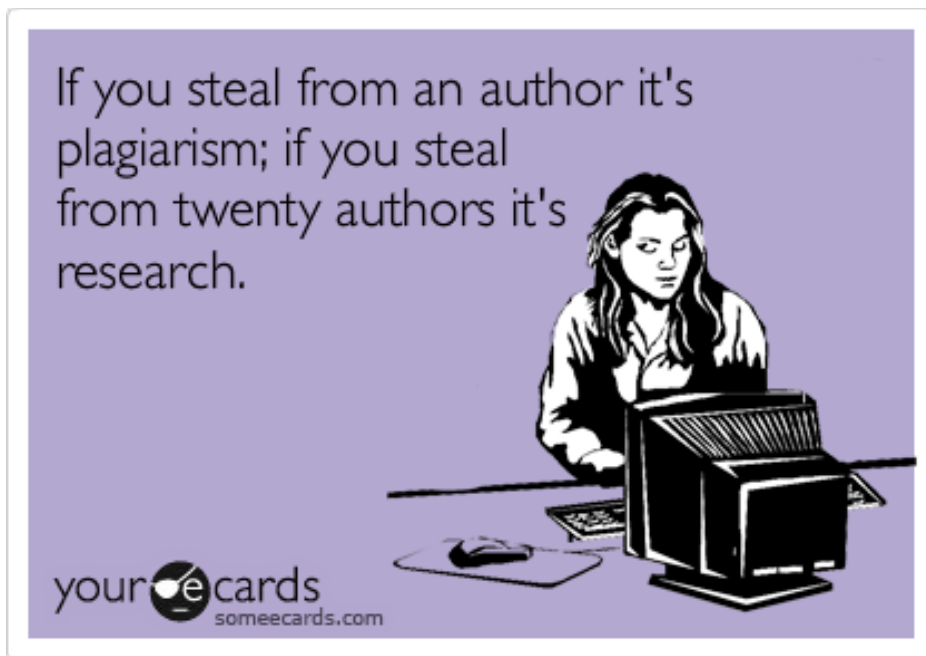
So that's been my invention process: I collect news over the course of the year, and toward the end of each calendar year, I sift through the archives of the Creative Commons blog and the Electronic Frontier Foundation blog, and I generate a list of events for contributors to write about. I post this list, first to the IP Caucus list, and then to the other rhetoric and composition listservs, while still inviting people to write about other events. People claim the subjects they want to write about, and before too long, the new *CCCC-IP Annual* is published. What I do could be called distributed authorship, macro-authorship, cooperative authorship, or delegated authorship. I'm thinking of doing something similar in my first-year writing classes, but on a subject selected by the students.

The 2013 *Annual* features a report from Mike Edwards about Elsevier's ordering scholars to take down the copies of their journal articles that they'd posted to academia.edu and the counter-movement among some professors who pledge not to review for or submit articles to journals published by Elsevier. Laurie Cubbison explores the debate about whether or not Arthur Conan Doyle's work can be legally considered as an oeuvre for copyright purposes – some stories are in the public domain, but the last one in the series is still under copyright, so are the characters protected?

Chris Gerben gives us an overview of the Copyright Alert System – ISPs detect possible copyright infringement and send “warnings” to users, with the possible slowing down of their internet speed. Copyright activists, Gerben claims, overreacted to the CAS when it was formed, and calls for a more measured rhetorical response when encountering such content industry strategies. Timothy Amidon reports the problems in the formation of the Trans-Pacific Partnership, which seems to be in a star chamber. It stands to extend all the nations' copyright terms to those of the Digital Millennium Copyright Act, and the architectural regulation of software will inhibit free exchange of ideas.

One of the more memorable copyright skirmishes from 2013 was toy company GoldieBlox's use of the song "Girls" by the Beastie Boys in their online commercial. Kyle Stedman gives us a very lucid parsing of the various factors in play in this case. Traci Zimmerman reviews *The Future of Creative Commons: Realizing the Value of Sharing in a Digital World*, which reflects on Creative Commons' accomplishments over the last decade and gives an idea of what their future plans are, including translating their documents into multiple languages and making their licenses truly global in reach. Finally, Kim Gainer walks us through the fair use test as applied by the court to Google's digitization of books.

I will close by saying that we are now well into 2014, and I am gearing up for the next issue of the *CCCC Intellectual Property Annual*. I don't want to give any spoilers, but I will say that I want to be a bit less conventional regarding genre in the future. When John Logie first started the *Annual*, he described the articles he was looking for as "a step up from a blog post." Certainly we will still have several of those. However, I would like to branch out into listicles ("Ten Things Rhetoric and Composition Teachers Need to Know about ____"), short tweet-style annotated bibliographies, and image macros or someecards with brief accompanying analyses. Taking the humor about authorship seriously can yield some insights that we can share with each other and with students. Here are some examples, the last, and cleverest, one by Collin Brooke.



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**I DON'T ALWAYS PLAGIARIZE, BUT
WHEN I DO**



**I PREFER TO THINK OF MY WORDS AS
"PRE-OWNED"**

memegenerator.net

Mike Edwards

Publisher Elsevier Requires Scholars to Take Down Their Research

In late 2013, academic publisher Elsevier demanded that universities and the academic network Academia.edu take down scholars' copies of their own research that they had shared online. As is the practice with many academic journal publishers, scholars often relinquish copyright to their articles when those articles are published with Elsevier.

As Andrea Peterson relates, Elsevier sent takedown notices "to the University of Calgary, the University of California-Irvine, and Harvard University" in addition to those sent to Academia.edu, and "[i]n these cases, Elsevier is within its legal rights to demand the material be taken down." Peterson reports the account of Academia.edu CEO Richard Price, who notes that "[o]nly very recently did Elsevier start sending take-downs in batches of thousands." Washington Post reporter Jennifer Howard offers the account of the University of Exeter's Guy Leonard, whose article was taken down by Academia.edu: "The takedown notice had made him rethink where he would choose to publish in the future, Mr. Leonard said. 'If I have any say in the next papers published with my work/name, they won't be in Elsevier journals,' he said. 'But either way I will keep posting PDFs of my articles.'"

Archiving

Many academics engage in the same practice as Mr. Leonard by posting PDF copies of their articles on their own sites or on University sites or on sites like Academia.edu. Doing so helps scholars maintain a public online professional presence and share the results of their research, a practice that seems to many to be in keeping with the ethics and best practices of the academic profession. Howard quotes the observation of paleontologist Michael P. Taylor regarding the widespread practice of self-archiving, who asserts that "even though technically it's in breach of the copyright transfer agreements that we blithely sign, everyone knows it's right and proper."

Motivations

Elsevier Vice President and Head of Global Corporate Relations Tom Reller does not share Taylor's view, noting in a press release that "we issue takedown notices from time to time when the final version of published journal articles is posted on unauthorized public websites." Reller defends the practice of sending takedown notices, arguing that their purpose is "to ensure that the final

published version of an article is readily discoverable and citable via the journal itself in order to maximize the usage metrics and credit for our authors, and to protect the quality and integrity of the scientific record” and that Academia.edu inappropriately “made final versions of articles publicly available.” However, Reller also later updated that press release to suggest that he had

been interpreted by some as suggesting that author benefits are the only reason we sent takedown notices. It was not our intent to suggest this was the only reason, although we do serve the research community and are mindful of their perspectives. We know we only succeed in supporting the research community if we consider and act upon the objectives of all the stakeholders in our community. There is indeed also a business-focused reason for takedown notices.

That “business-focused reason” seems to be the primary motivating factor for Elsevier.

Economics

Elsevier is one of the largest publishers of academic journals in the world, and the business of academic publishing seems to be quite good. Authors write journal articles for free, the peer review process is free, and for many journals the subsequent editorial process is free as well. Publishers like Elsevier are then able to sell the results of that free academic labor back to academics and university libraries, and in the words of Elsevier Vice President Tom Reller, “we can't allow published journal articles to be freely accessible on a large scale.” For that reason, Elsevier is highly suspicious of the open access movement (despite its limited involvement in some open-access journals, which some scholars suspect is largely for public relations purposes), and “Elsevier's own financial disclosures describe the movement as among the ‘risk factors’ for their business” (Peterson).

Communications scholar David Parry lambasted Elsevier and other academic journal publishers in his keynote address at Computers and Writing 2012 (later revised into an article for *Enculturation*), explicitly characterizing them “knowledge cartels” unethically profiting from the free labor of scholars and immorally restricting the circulation of knowledge by making that knowledge economically out of reach: many universities cannot afford the bundled subscription fees charged by Elsevier and other publishers. In the age of the World Wide Web, this would seem to be a curious circumstance:

With academics doing much of the work and the Internet reducing distribution costs, you might expect the cost of academic publishing to fall as the Internet makes communication more efficient. Instead, the opposite has happened. Subscription rates for top academic journals have skyrocketed in recent decades – with one study reporting per journal subscription costs rose 215 percent

between 1986 and 2003, despite the consumer price index only increasing 68 percent in that same time period. (Peterson)

Such increasing costs are a burden for higher education, which is trailing other sectors of the economy. As documented in a recent report in *Academe* from John W. Curtis and Saranna Thornton, despite a sputtering economic recovery following the recent recession, “important long-term [economic] trends are still heading in the wrong direction for higher education” (4).

In such an economically challenging environment, Elsevier’s pricing practices and its issuance of takedown notices seem particularly problematic, especially when the publisher “generated over \$1 billion profits in 2012 with a 34 percent profit margin,” with “approximately 65 percent of revenue. . . from subscription sales’ like those to academic institutions” (Peterson). One cannot imagine that some researchers’ practices of posting their research on their own sites or on university sites or Academia.edu will cause libraries to stop subscribing to journals, yet that seems to be precisely the assumption Elsevier operates under in sending its takedown notices.

Implications

In the 35 journals listed by the Bedford Bibliography as being associated with rhetoric and composition studies, three are associated with Elsevier: *English for Specific Purposes*, *Computers and Composition*, and the *Journal of Second Language Writing* (Reynolds, Dolmage, Bizzell, and Herzberg). *Computers and Composition* seems a particularly curious case, given that many articles published in the journal have endorsed strong positions in support of fair use and knowledge circulation, and the journal has in fact published a special issue (15.2, 1998) on intellectual property and a special issue (27.3, 2010) on “Copyright, Culture, Creativity, and the Commons.” As I observed in the 2011 CCCP-IP Annual, Elsevier has a history of ethically problematic corporate behavior, including sponsoring legislation to paywall publicly-funded research and supporting SOPA and PIPA (Edwards 4). There, I cited economist Theodore Bergstrom’s argument that “high prices [charged by commercial publishers of academic journals] prevent the flow of scholarly information to teachers and researchers” (197). I believe that researchers who support easy access to scholarly research place themselves in ethically problematic circumstances in supporting Elsevier’s corporate behavior, and for that reason have added my name to the Cost of Knowledge protest (<http://thecostofknowledge.com/>) by more than 14,000 academics (including more than 1,200 in the arts and humanities) who “won’t publish, won’t referee, and won’t do editorial work” in Elsevier journals.

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Sherlock Holmes and the Case of the Last Ten Stories

Sherlock Holmes. Mickey Mouse. Anne Shirley. Cthulhu. When fictional characters such as these seize the public imagination, they become the focal points for a range of potential narratives. These potential stories may be serialized by the author and adapted for other media, becoming films, cartoons, toys and other products. As a character's popularity grows, fans see even more potential narrative paths suggested but not explored by the author and explore them through fan fiction. The most iconic characters, such as Sherlock Holmes, tempt professional writers as well, who reconceive the characters and their situations in ways never envisioned by the original author. However, the use of such iconic characters is complicated by copyright law. The world of the story becomes a playground, but the strictures of copyright law determine whether the playground is open access or barred by a ticket booth. The copyright status of these iconic characters is often hotly contested long after the author's death, as the author's heirs wish to continue to profit from a lucrative character and writers want to play with the unexplored possibilities of the narrative. In the case of *Klinger v. Conan Doyle Estate*, a ruling at the United States district court level has determined that while most of the Sherlock Holmes playground is public domain, the last ten stories published by Arthur Conan Doyle and their story elements remain under copyright.

Arthur Conan Doyle's first Sherlock Holmes story, *A Study in Scarlet*, was published in 1887, and his last, "The Adventure of Shoscombe Old Place" was published in 1927. This forty-year span means that earlier stories are in the public domain, with only the stories published after January 1, 1923 still considered to be in copyright in the United States. Through the Conan Doyle Estate Ltd., Doyle's heirs license the use of Sherlock Holmes and Doctor Watson, two very lucrative characters, for a variety of uses. Within the past decade, licensed uses have included the BBC series *Sherlock*, the CBS series *Elementary*, and two films starring Robert Downey Jr., among others.

Because copyright status is based on the date and place of publication and determined by law, characters whose adventures were published serially may not pass into the public domain all at once. The case of *Leslie S. Klinger v. the Conan Doyle Estate, Ltd.* illustrates the issues involved in determining the copyright status of serialized characters, and the case's implications extend to any fictional character whose copyright status is distributed across a number of publications. Klinger, a scholar and editor of mystery and detective stories, claimed that the Conan Doyle Estate was interfering with the publication of anthologies of short stories about Sherlock Holmes by professional authors, first by demanding unnecessarily that Random House license any use of the

characters in the anthology *A Study in Sherlock* and then by threatening to interfere with distribution through Amazon and Barnes & Noble of a sequel anthology titled *In the Company of Sherlock Holmes*. Klinger sought a declaratory judgment on the copyright status of "Sherlock Holmes Story Elements" in order to determine the extent to which such story elements could be used by other authors.

The Doyle estate claims that despite the earlier stories and novels being in the public domain, the characters of Sherlock Holmes and Doctor Watson will only enter the public domain when the very last story does: "The Conan Doyle estate believes that Holmes and Watson should be protected as the fully delineated characters their author created. The Holmes and Watson characters were not completed by Conan Doyle until 1927, and Congress has provided a copyright term of 95 years for such characters" (Allison, 2014). This point of view argues that regardless of the dates of individual publications, a character does not enter the public domain until the last installment of the series does so. Thus, as far as the estate is concerned, Holmes and Watson are not in the public domain, even though, as individual publications, the majority of Doyle's stories are. In effect, this argument treats the entire corpus of work produced by Arthur Conan Doyle featuring these characters as a single entity.

In his complaint Klinger, however, asked the judge to rule on the copyright status of particular story elements of the Doyle oeuvre, arguing that these characters, character traits, and storylines were in the public domain because they appeared in stories and novels published before 1923, and thus were available to be used in the anthology regardless of the Doyle estate's demand for licensing. These elements include such characters as Holmes and Watson, Inspector Lestrade, Mycroft Holmes, Mrs. Hudson, Irene Adler, and other characters, as well as various character traits revealed about Holmes and Watson over the course of the stories. Klinger further argued that story elements in the stories published after 1923 should be considered to be in the public domain because they consisted of events rather than specific characteristics of Holmes and Watson, and as such were not copyrightable. Klinger did not ask the judge to rule on whether *A Study in Sherlock* or *In the Company of Sherlock Holmes* are instances of copyright infringement, but rather whether particular story elements were available to be used in those books without licensing.

Judge Ruben Castillo ruled that while the story elements specific to the pre-1923 novels and short stories were in the public domain, those specific to the last ten stories were not. Such story elements include the reference to the untold story of the Giant Rat of Sumatra, Dr. Watson's past as a rugby player, and Sherlock Holmes' retirement as a beekeeper. This ruling rejects the Conan Doyle Estate argument that none of the Holmes stories are derivative and, rather, that "Sir Arthur Conan Doyle developed his characters throughout the entire Canon" (Klinger). The judge also rejected the argument by the Conan Doyle estate that all the stories written by Arthur Conan Doyle about Sherlock Holmes were part of a single narrative. Castillo cited the precedent of *Silverman v. CBS* to define all

the Sherlock Holmes stories after *A Study in Scarlet* as sequels, and therefore derivative works with their own copyright status distinguished from that of the first novel.

While the conflict between Klinger and the Doyle estate centered on whether the public domain stories sufficiently completed the characterization of Sherlock Holmes and Dr. Watson, the judge considered the issue to be irrelevant, saying that “Courts do not distinguish between elements that ‘complete’ a character and elements that do not; instead, case law instructs that the ‘increments of expression’ contained in copyrighted works warrant copyright protection” (Klinger). This focus on the increments of expression refers to those elements that distinguish a derivative work from an original. Increments of expression are copyrightable to the extent that they provide distinguishing features to the publication in which they appear, and their copyright is tied to the copyright of the individual, derivative publication.

An example of one of these increments referenced in the case is Dr. Watson’s past as a rugby player, information that is used in the context of describing a client who has been aged by the experiences that bring him to seek the aid of Holmes. That piece of information adds a degree of characterization to Dr. Watson, but the client who once played opposite him and the dilemma facing the client are the elements that add sufficient originality to the story. Castillo draws on various cases to find that “the Canon consists of subsequent works that are based upon material from pre-existing work, Sir Arthur Conan Doyle’s first Sherlock Holmes story. The subsequent works in the Canon, including the Ten Stories, thereby meet the definition of derivative works” (Klinger). Judge Castillo’s ruling positions Doyle’s stories as works, with particular dates that place them within a system of ownership and availability. He only sees them textually to the extent that particular features distinguish one work from another. For him, the work is the commodity that has to be determined in terms of ownership.

Both the plaintiff and the defendant see the narrative itself as the commodity. The value isn’t in the individual publication of Sherlock Holmes stories, but in the potential for new stories featuring these characters and set in their universe. It is less important to them, although still important, that the stories are particular objects or works to be sold through a bookstore. It is far more important to them that the universe of Sherlock Holmes be seen as a playground within which creative writers and filmmakers can play. Both see Sherlock Holmes and Dr. Watson as characters with narrative trajectories that span the whole collection of stories written by Arthur Conan Doyle and beyond to stories written by others. Neither view the individual stories as discrete units in a commodified structure, products with a shelf life. Klinger wants to have stories that take advantage of the whole canon, while the estate wants to protect the whole canon. For this reason, the judge’s ruling can’t satisfy either side completely.

While the character of Sherlock Holmes is so iconic as to reach the level of archetype, the implications of this case extend to other characters whose adventures were published serially, especially those published in the early 20th century. Although certain characters may appear to be in the public domain, their status isn't always clear, and so their playgrounds may or may not require tickets. Formal projects involving these characters and narratives must take into account the need to establish the copyright status of the particular story elements to be used. While educators and their students may wish to take advantage of all the possibilities of a particular narrative universe, the courts will pay more attention to the publications in which specific story elements first appeared.

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The Copyright Alert System: Implications of “Six Strikes” on Authorship

The Copyright Alert System is designed to curb copyright infringement via illegal sharing of materials on the Internet. The program is widely known by its reactive steps to alleged infringers: a series of warnings, or strikes, against Internet users.

This so-called “Six Strikes” program is neither limited to six warnings nor a program with any consistent punitive implications. In fact, it is neither a law nor a hard rule of any kind, but instead a voluntary program launched to much hand-wringing by Internet rights parties and users in early 2013. A year later, the Copyright Alert System (CAS) has yet to cause the waves and chilling effects on file sharing, open wireless movements, and authorship issues predicted only a few months earlier. This, despite some reports that a major player in CAS, Comcast, supposedly issued some 625,000 copyright warnings in the first year of the program (Morran).

The Copyright Alert System officially launched in February 2013. As described by the Internet rights group the Electronic Frontier Foundation (EFF), “CAS is an agreement between major media corporations and large Internet Service Providers to monitor peer-to-peer networks for copyright infringement and target subscribers who are alleged to infringe — via everything from ‘educational’ alerts to throttling Internet speeds” (Nazer).

Though biased against CAS, EFF’s brief description adequately describes the major players in CAS’s launch: media corporations like Comcast, AT&T, Time Warner, and Verizon; content owners like the Recording Industry Association of America (RIAA), the Motion Picture Association of America (MPAA), Disney, and Paramount; and users ranging from everyday browsers and educators to high traffic sharers of content.

The corporations and content owners see CAS as a chance to “educate” users about copyright violations, and to provide steps (taking the form of warnings, hence the six “strikes”) to discourage ongoing and future infringement. Users and Internet rights groups, however, tend to see CAS as a power grab meant to scare users about online activities such as sharing files online and/or maintaining an open WiFi network (at home or at small businesses) where others may share files. This latter group is quick to point out that not all file sharing is necessarily illegal, but under CAS’s wide umbrella, warnings and slowed Internet speeds may nonetheless be doled out if and when parties are seen as threatening to the content owners and providers.

However, despite the deep divide between these groups, there has not been much publicly available data about the program since its launch in early

2013. In late February 2014, Cory Doctorow noted that the parties behind CAS “[had] been totally silent for the past twelve months, not issuing a single press release (nor have its participating entities said anything about it in that time).” At the same time as this observation, Jill Lesser (an executive director of the organization behind CAS), gave a rare interview where she noted the success of the program by pointing to the implied evidence of the organization’s ability to “deliver a large number of alerts” in the first year of the program (qtd. in Tummarello). However, despite this brief pronouncement, no other data has been provided to point to the program’s success or failure in its first year.

Program Overview

The CAS was established after several years of development by the Center for Copyright Information (CCI). According to the CCI’s website, the organization was “formed to educate consumers about the importance of copyright protection and to offer information about online copyright infringement. Our goal is to alleviate confusion and help Internet users find legal ways to enjoy the digital content they love.” The site also equates copyright infringement to the word “piracy,” and makes mentions on every page about the content they’re looking to protect, namely: movies, TV, and music.

Under the program, content owners monitor Peer-to-Peer (P2P) networks (such as BitTorrent sites, which allow users to share large files in small exchanges, or “bits,” and which are not inherently illegal) in order “to see if the music, movies, and TV shows they’ve made available are being shared without permission and in violation of U.S. copyright law” (Center for Copyright Information).

Once a user is identified (via his/her ISP address) as sharing (either uploading or downloading) copyrighted materials, the first of the “strikes” is issued. As described on Wikipedia, “The first and second alerts will notify ISP subscribers that their Internet account has allegedly been used for copyright infringement via the use of BitTorrent and provide an explanation of how to avoid future offenses, as well as direct users to [a] lawful media content site,” such as the list of legal sites listed on the CCI’s page “A Better Way to Find Movies, TV & Music.”

Though the CCI often notes that the first and second strikes are ideally the end of communication (i.e. “educating” the user to avoid sharing copyrighted information in the future), the third and fourth strikes ask users to acknowledge receipt of the messages, apparently so that these users cannot later claim ignorance if alleged infringement occurs in the future.

Finally, at the fifth strike, “mitigation measures” begin. According to CCI Executive Director Jill Lesser, “the mitigation measures are intended to really get people’s attention. They range from putting a user through a copyright tutorial – you know, what is copyright, how have you potentially engaged in illegal behavior – to a couple-of-day reduction in Internet speed, depending on the ISP”

(qtd. in “The Copyright Alert System and Six Strikes”). Lesser claims the slowed down speeds are only in effect for 48 hours.

However, according to New York Law School Professor James Grimmelmann, content providers such as Comcast “might slow down your connection a bit to make it harder to download. They might block you from sites that are known to be sources of a lot of infringing files” (qtd. in “Piracy”). In other words, after the fifth (and subsequent strikes) it’s not quite clear to what degree content providers can “punish” users; but though Lesser admits that Internet connections may be slowed down to dial-up speeds (making a modern Internet connection all but unusable for most purposes), at this point no users will be terminated from their connection.

Authorship and Ownership Issues

The kinds of content being primarily protected for CAS are clear from the CCI website: movies, TV shows, and music. Though the website makes a passing reference to games and books in a general introduction, it is the only mention of text-based content being explicitly protected. Likewise, there is only one mention of personally authored content on the entire site. It occurs on the “Teens, Students & Others” resource page where CCI notes: “Whenever you create something like a poem, a story or a song, you own it – and no one else can use it without your permission. That ownership is called copyright.”

However, the next paragraph on the page goes on to draw an analogy between teens/students’ personal content to the “artists” of songs, movies, and TV shows that CAS protects. In other words, this program – even when directly addressing (teenage/student) users – is interested in corporately authored or “artist”-authored content, like that owned and distributed by the likes of Disney, Comcast, or the RIAA. Personal writing is used to draw comparisons, but not necessarily as text that deserves copyright protection by others.

The language that CAS, CCI, and Jill Lesser use to describe who is perpetrating potential infringement is equally indirect and impersonal. The construction of such sentences on CCI’s website as “Subscribers are responsible for making sure their Internet account is not used for copyright infringement” and “ISPs will make consumers aware of possible illegal activity that has occurred over peer-to-peer networks using their Internet accounts, educate them on how they can prevent such activity from happening again and provide information about the growing number of ways to access digital content legally” position users as passive, if not ignorant, of potential violations. Users are never directly accused of piracy on the CCI website.

Likewise Lesser positions users as potential victims (alongside content providers like Comcast) in saying CAS warnings will inform the “primary account holder that somebody made content available illegally over their Internet connection. They explain to the consumer how this might have happened and what the consumer can do to ensure it doesn’t happen again”

("The Copyright Alert System and Six Strikes"). In other words, "somebody" did something potentially illegal, and the CAS will do users the favor of alerting them to potential abuses by this other party.

Lesser and CCI also repeatedly refer to the purpose of CAS as an opportunity to "educate" the users about copyright infringement. In this way, the program and subsequent strikes are meant more as a deterrent than a punitive system such as when record companies infamously litigated against individual users who shared songs in the 1990s ("RIAA").

But the CCI website also specifically targets educators on their "Resources" page, discussing the use of copyrighted materials but never making reference to fair use practices nor open education resources (OERs) that may be copyright free or protected by Creative Commons licenses. CCI also makes mention of their foray into actual educational spaces such as their proposed curriculum in California public schools. "CCI is promising to partner with iKeepSafe to develop a copyright curriculum for California public schools. It will be called: 'Be a Creator: the Value of Copyright'" (McSherry). At the time of writing this no lesson plans or curriculum examples are provided on the CCI site, but it will be interesting to see how students are positioned (or not) as "creators" in a corporate-sponsored educational program on copyright.

Outside of school, CAS tends to equate one ISP to one user, and each Internet connection as being personally accountable to one individual. However, it is more vague about Open WiFi networks such as those featured at small businesses (like cafes) or in residential areas (like apartment buildings) where multiple users might access the same connection. If any violation is detected on such a connection, the owner is allowed to appeal the infringement just once. After that, the owner is held accountable regardless if she personally violates any copyright rules or not.

Internet rights groups like the Electronic Frontier Foundation, however, advocate for such open networks as a human right, saying in one somewhat alarmist post, "As the Open Wireless Movement aims to explain, the benefits of open wireless should be available in all spaces – commercial, residential, and public. Having ubiquitous access to the Internet through shared connections protects privacy, promotes innovation, and serves the public good" (Kamdar). Part of this framing of open wireless as a basic right on the Internet raises salient concerns about privacy and who can be held accountable when alleged illegal activity takes place on a shared network.

As a result of these various views on CAS's effects on Internet use, copyright awareness, and authorship, readers may be led to believe that the debate over CAS and CCI continues to be a major issue since its launch and burst into the media in 2013. However, a simple Internet search reveals that not much was written about or discussed in relation to CAS between the time of its launch and when various outlets marked its one year anniversary in early 2014.

While this doesn't mean that users should ignore the program and its implications (after all, if Comcast is serving up 1,800 warnings a day this remains

a large issue), the immediate uproar over CAS may provide a cautionary tale for users and groups to both get involved in pending programs before they are enacted and/or take a wait-and-see approach before any cries of panic go up. Regardless, with major media companies joining forces in groups like CCI or in major mergers (such as Comcast and Time Warner Cable), users and groups concerned about copyright and authorship issues should readily recognize that the frontlines of any future battles will be fought online.

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Timothy R. Amidon

Watch List: The Trans-Pacific Partnership

This brief report explores the Trans-Pacific Partnership (TPP), an international free trade agreement currently under negotiation between twelve nations. TPP is, or should be, of concern to rhetoric and composition, technical communication, and computers and writing, because this agreement touches upon, and has broad reaching implications for, issues central to the work that scholars and teachers in these fields perform. In this report, I provide a brief background on the TPP, outline a couple of the more controversial aspects of the trade agreement, and point to three areas of the TPP negotiations which members of these fields should continue to monitor.

Background

In 2008, the United States entered talks with a group of Pacific Rim nations regarding a regional free trade agreement known as the Trans-Pacific Partnership (TPP)¹. Aside from the U.S., countries currently involved in negotiations include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam (USTR, “Statement”). As a comprehensive free trade agreement between nations controlling nearly 40 percent global GDP², the TPP would have broad reaching economic, environmental, political, and social impacts on the world. According to the Office of the United States Trade Representative – an executive branch agency charged with negotiating U.S. interests in the agreement – TPP “will enhance trade and investment between [participating nations] promote innovation and competitiveness, economic growth and development, and support the creation and retention of jobs...” (USTR, “Ministerial”). The most recent round of talks held in Singapore concluded in February of 2014.

Within the U.S., the TPP has been a site of significant political struggle both within and outside of Washington. For instance, the USTR and the Obama Administration have framed the TPP as a crucial economic component of America’s 21st century foreign policy, while members from both sides of the aisle in Congress expressed displeasure with the trade agreement. While an oversimplification of the underlying objections, essentially Congress has mounted two main lines of contention toward TPP. First, members have not only accused the USTR of excluding Congress from meaningful participation in the negotiations, but have also posited that in pursuing Trade Promotion Authority (also known as “fast track”) the Obama Administration has fundamentally

¹ [Knowledge Ecology International](#) and [Public Knowledge](#) have created useful timelines surrounding the Trans-Pacific Partnership.

² GDP statistics drawn from Joshua Meltzer of the [Brookings Institute](#).

undermined the jurisdictional separation of the two branches of government. Consider, for instance, how Senator Ron Wyden [D-OR] chided the USTR for obstructing Congress from fulfilling its Constitutional mandate, while finding a seat for corporate interests:

It may be the U.S. Trade Representative's, USTR, current job to negotiate trade agreements on behalf of the United States, but Article 1 Section 8 of the U.S. Constitution gives Congress—not the USTR or any other member of the Executive Branch—the responsibility of regulating foreign commerce. It was our Founding Fathers' intention to ensure that the laws and policies that govern the American people take into account the interests of all the American people, not just a privileged few. Yet, the majority of Congress is being kept in the dark as to the substance of TPP negotiations, while representatives of U.S. corporations—like Halliburton, Chevron, PHARMA, Comcast, and the Motion Picture Associations of America—are being consulted and made privy to detail of the agreement. (S3517)

The second point of contention goes a bit deeper, as it argues that the USTR has not only excluded Congress, but that it also undermined the basic democratic principles on which the U.S. was built:

It is not a surprise that many citizens are deeply interested in tracking the trajectory of [TPP] trade negotiations and the language under consideration. But if members of the public do not have reasonable access to the terms of the agreements under negotiation, then they are unable to offer real input into the process. Without transparency, the benefit from robust democratic participation—an open marketplace of ideas—is considerably reduced. (Elizabeth Warren [D-MA])

Indeed, both are valid grounds for Congressional exasperation, but there is an important distinction to be drawn between locking Congress out and locking the American people out. Regardless, TPP negotiations have been shrouded in such secrecy that it is difficult to ascertain with any degree of certainty what the TPP is and how agreements might impact participating nations. In fact, aside from the "Intellectual Property Rights Chapter" that *Wikileaks* acquired and published in November of 2013 little, if any, public information exists about how the specific agreements would alter domestic laws and/or the sovereignty of participating nations.

Controversy Surrounding TPP

Aside from the disturbing ways with which TPP has been negotiated, including the degree to which it emphasizes mounting concerns about corporatist influence of state powers, there are significant reasons to be concerned about its content. *Wikileaks*, for instance, suggested that TPP could have "wide-ranging effects on

medicines, publishers, internet services, civil liberties, and biological patents.” Indeed, public interest groups with a diverse range of interests, such as Sierra Club, the World Wildlife Fund, and the Natural Resources Defense Council, (“Analysis”), Doctors Without Borders (“Trans”), the Electronic Frontier Foundation (Eff, “Trans-Pacific”), and Creative Commons, as well as academics including Lawrence Lessig, Pamela Samuelson, and Kevin Outterson (Rossini, “Prominent”) have publicly advanced concerns about the agreement.

The Electronic Frontier Foundation, for example, argued that the TPP “will have extensive negative ramification for [internet] users’ freedom of speech, privacy, access to information, and ability to innovate” (Rossini, “Prominent”). Indeed, the leaked IP Chapter included proposals for elevating participating nations’ copyright term limits above those contained in the Berne Convention to align with those contained in the Digital Millennium Copyright Act (DMCA). Professor Michael Geist of the University of Ottawa remarked that “the U.S. envisions using the TPP to export its copyright law to as many countries as possible while creating backdoor changes to its own domestic laws” (Rossini, “Prominent”). Put differently, by turning to an international context American corporatist interests are not only promulgating DMCA globally, but expanding it domestically with provisions of the Stop Online Piracy Act (SOPA) and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA) that were met with domestic resistance.

Again, beyond the fact that TPP railroads democratic due process – which, again, is of significant concern in itself – expanding on DMCA could hasten the effects of already over-protectionist copyright regime. Within composition studies, scholars such as Martine Courant Rife and William Hart Davidson (2006), Steve Westbook (2006), and James Porter (2005) have argued that copyright has adverse impacts on digital composing. In fact, Courant Rife testified at DMCA hearings in 2009 to advocate strengthening educators’ rights to circumvent digital locks in order to access content behind digital rights management protection technologies materials for the purpose of teaching (“CCCC’s”). Indeed, language within drafts of TPP seem to indicate that many of the very appeal processes that have been central to mitigating some of the more damaging impacts of DMCA may be omitted from the trade agreement (Rossini, “TPP”; Public Knowledge, “TPP”). Instead, TPP may function as a legal mechanism by which content industries might target the types of creative and innovative hacking and tinkering that enable users to customize tools (Higgins). Technologies for managing digital rights could grow increasingly strict to the point where even non-infringing fair-uses of software, hardware, and content were prohibited. Ultimately, free speech, innovation, and creativity would suffer.

Looking Forward

Scholars and teachers in rhetoric and composition, technical and professional communication, and computers and writing, should be paying attention to the

TPP. It could impact the work we do in classrooms; it could impact the work we do as researchers; it could impact the global economy; and, it could impact the environment. *But, presently, it is impacting the practice of democracy in this country.* As the TPP negotiations move closer toward completion, we should remain vigilant of three aspects of the trade agreement and be prepared to mobilize if needed.

First, we will need to monitor the transparency with which TPP is being negotiated. At present, the American public, members of Congress, and citizens from participating nations are locked out of the process. If and when the trade agreement enters Congress, it will be important to take note of whether or not it enters under “Fast Track” provisions. If the trade agreement enters under “Fast Track,” but the public and Congress hasn’t had an opportunity to meaningfully participate we should mobilize and oppose the trade agreement

Second, if access to working drafts of the TPP are officially and/or unofficially disseminated – that is, if the negotiation process becomes more transparent than it has been thus far – it will be important to take stock of how provisions in the agreement could impact domestic and international laws related to IP, the internet, and content governance³.

Third, an area of disagreement between participating nations at present surrounds exemptions and dispute resolution. It is important that the TPP includes fair use provisions, appeal processes, and reasonable enforcement mechanisms that promote and foster innovation, not stifle it. It’s a problem if those exemptions are omitted and mechanisms of appeal aren’t included.

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GoldieBlox, Beastie Boys, and Online Copyright Discourse

There's something about the dispute between rap group the Beastie Boys and toy company GoldieBlox that touches a nerve. Maybe it has to do with the loyalty listeners feel to their favorite music and musicians, or maybe it's the cathartic joy so many felt when they heard about GoldieBlox's line of engineering toys for girls.

The headlines of the stories give a sense of the emotional investment that many feel about the story, ranging from Jezebel's "Little Girls Defeat Princess Culture with Giant Rube Goldberg Machine" (Beusman) to Spin's "Shady Toymaker Attempts to Run and Hide from Beastie Boys Lawsuit" (Martins). Half of the web is saying, in effect: Girls can finally escape the pink princess palaces they've been slotted into! The other half: Let's never, ever step on the creative rights of our favorite musicians!

To contextualize these jubilant and frustrated voices, I'll briefly recount the details of what happened. Yet the more I read these stories, the more I'm convinced that the real story here isn't the fact that this dispute happened. The real story has more to do with the complex ways our emotional investments and convictions about copyright are wrapped up together--an entanglement that I suspect is related to the purposefully ambiguous nature of fair use law.

What Happened

GoldieBlox, founded and funded in 2012 through a Kickstarter campaign, produced a video late in 2013 that went viral online. It showed three girls bored with traditional, pink, princess toys who decide to put their engineering skills to work, creating a massively complex Rube Goldberg device.

Accompanying the girls' adventures was a song clearly based on the melody and lyrics of the Beastie Boys' "Girls," a song on their 1986 album *Licensed to Ill*. But instead of the misogynistic lyrics of the original--in which girls are there "to do the dishes," "to clean up my room," and so on--the new video's lyrics are an anthem of empowerment. The girls' voices sing, "Girls--to build a spaceship. Girls--to code the new app. Girls--to grow up knowing that they can engineer that." (The original video isn't too hard to find online; I'm watching the copy hosted at Katy Waldman's *Slate* article.)

The surviving Beastie Boys (Adam Yauch died in 2012 of cancer at age 47) weren't happy. According to court documents filed later, "On November 21, 2013, counsel for the Beastie Boys Parties contacted counsel for GoldieBlox to inquire about the company's use of the Beastie Boys song in the GoldieBlox Advertisement" (Beastie Boys v. GoldieBlox 12). It's not entirely clear what they

said to GoldieBlox, as their initial complaint hasn't been made public; the Beastie Boys described this first communication as an attempt "to simply ask how and why our song 'Girls' had been used in your ad without our permission" ("Open Letter").

GoldieBlox responded quickly. On the same day they were contacted by the Beastie Boys' counsel, GoldieBlox filed for declaratory judgment and injunctive relief, asking the court to declare their use of "Girls" as fair. Their filing relies on the parodic nature of the new song:

The GoldieBlox Girls Parody Video takes direct aim at the song both visually and with a revised set of lyrics celebrating the many capabilities of girls. . . . GoldieBlox created its parody video specifically to comment on the Beastie Boys song, and to further the company's goal to break down gender stereotypes and to encourage young girls to engage in activities that challenge their intellect, particularly in the field of science, technology, engineering and math. (GoldieBlox v. Island Def Jam 2)

Four days later, on November 25, the Beasties published online a brief "Open Letter from Beastie Boys' Mike D & Adrock to Goldieblox." In its 116 words, the letter praises GoldieBlox's foundational principles--"We strongly support empowering young girls, breaking down gender stereotypes and igniting a passion for technology and engineering"--yet it insists that "your video is an advertisement that is designed to sell a product, and long ago, we made a conscious decision not to permit our music and/or name to be used in product ads." (Yauch's will specifically forbids the use of any of his music in ads.)

The video, of course, went more viral than ever. Yet two days later, on November 27, GoldieBlox relented, in a sense. In a blog post, they asserted the importance of their message and their right to parody under fair use law while also stating their desire to get along. "We don't want to fight with you. We love you and we are actually huge fans," the post reads (Sterling). Taking it even further, the post announced that the video's music had been changed, with the original song replaced by a lyric-less jingle. (This is the version currently available on YouTube.)

That seemed to be the end of it, but on December 10, the Beastie Boys struck back with a counterclaim lawsuit citing copyright infringement, infringement of a registered trademark, false advertising, and misappropriation of right of publicity, along with a demand for a jury trial (Beastie Boys v. GoldieBlox). It wasn't enough that GoldieBlox had changed the music to remove "Girls" from the video; according to this filing, GoldieBlox had earned sales and name-recognition that were built on the shoulders of their song, and for that, they should be punished.

In the meantime, GoldieBlox got an ad on the Super Bowl. Software company Intuit paid the multi-million dollar price tag for the toy company to show a 30-second spot in the second half of the game, making GoldieBlox the first small business to ever do so. Those following the Beastie Boys case perhaps

weren't surprised to see that the ad featured rewritten lyrics to Slade's "Cum on Feel the Noize," changing it to "Come on Bring the Toys," an anthem sung as girls in the ad collect all their pink toys and fire them into the atmosphere on a giant, girl-engineered rocket. But according to one online article, GoldieBlox paid the licensing fees this time (Roberts).

Reactions

As I mentioned above, online reactions cover a wide range of positions--a range I can't hope to replicate here. But some of the major themes are worth exploring.

Reaction 1: GoldieBlox is wisely marshaling fair use to critique sexism.

This is fundamentally why many (including me) find the case to be so important: a win for GoldieBlox means a win not just for fair use, but also for the free speech necessary to critique troubling representations of women and girls in the media. A loss could lead to a chilling effect for those with parodic critiques of sexist voices.

My favorite statement of this reaction is from an interview between PJ Vogt and Julie Ahrens, Director of Copyright and Fair Use at Stanford's Center for Internet and Society. (The interview is aptly subtitled "Let's Ask An Actual Expert.") She says:

The way I look at it, you have this song that's very clearly a parody of the original. It's taking to task the idea that girls are there to do the dishes. And whatever else the original Beastie Boys lyrics said. And Goldieblox is changing it, putting it in a girl's voice. They're saying, "No! Here's what we do. We can engineer things, we can build apps." So, obviously they're criticizing the message of the original using and using the original to make fun of it as well.

Now obviously it's a commercial for the toy. But the toy and the commercial are part of a bigger thing than selling the toy. The greater message is, "Let's rethink how we stereotype what's a girl's role, or what a girl's product might be." So this product itself has its own social goal as well. So I think that gives the Goldieblox some real ammunition in a fair use argument. . . . The message of the product is tied with the parody. (Vogt)

Others (McSherry; Sklar) who discuss the case in light of the four factors of fair use law agree that GoldieBlox has a strong case. Yes, it's an advertisement, which weighs against fair use, but as Ahrens points out, that has to be weighed in the context of the parodic nature of the ad.

And as Andy Baio helps his readers see, the *Leibovitz v. Paramount Pictures* case (in which photographer Leibovitz took action against the parodic poster for *Naked Gun 33 1/3: The Final Insult*) upheld earlier precedents that parody can at times trump advertising when weighing whether a use is fair.

According to Baio, after the District Court found in Paramount's favor, Leibowitz appealed but was rebuffed by the 2nd Circuit Court, which affirmed the decision in favor of fair use: the court wrote, "On balance, the strong parodic nature of the ad tips the first factor significantly toward fair use, even after making some discount for the fact that it promotes a commercial product" (qtd. in Baio).

Former lawyer and writer Rachel Sklar reminds us that beyond the strong legal case, "GoldieBlox has the decided PR edge – righteously proclaiming themselves on the side of progress, equality, and a nation of adorable little girls. This leaves the Beastie Boys as, sure, the artists who created the song – but also the artists who said that girls were for making their beds, doing their laundry, and satisfying their urges." Indeed.

Reaction 2: This is all pretty ironic, right? I mean, it's the Beastie Boys.

Many writers ask (what seems to me) the obvious question: "The Beastie Boys built a career on sampling. How can they then turn around and tell Goldieblox their own work can only be recontextualized with permission?" (Vogt).

Consider the landmark Beastie album *Paul's Boutique*, released in 1989. Producers The Dust Brothers describe it this way: "On *Paul's Boutique* everything was a collage" (Tingen). Brad Benjamin's site *Paul's Boutique: Samples and References List* compiles a community-built list of more than a hundred samples on the album--some of which were cleared with licenses (which were cheaper then), though not all. One case from *Paul's Boutique* was decided as recently as September 2013 (two months before the GoldieBlox letters started flying) when a judge found largely in favor of the Beastie Boys in response to copyright concerns brought from R&B group Trouble Funk (Gardner).

The Beastie Boys have made clear that their problem with GoldieBlox is primarily related to the video's nature as an advertisement, how it fulfills a fundamentally different purpose than their own sampling. Yet it's hard for me to follow that logic very far: surely the Beastie Boys grew famous and made money based on their creative, laudable manipulation of these earlier tracks. Weren't they the brand being successfully advertised by the music that relied so heavily on earlier creative works?

The Electronic Frontier Foundation's Corynne McSherry puts this point well: GoldieBlox's video, ad or not, is "a classic example of growing the cultural commons by remaking existing cultural works to create new insights and expression. That kind of creativity what fair use is for. And it's part of what made the Beastie Boys great."

Reaction 3: GoldieBlox is one example of corporations stealing the soul of artists everywhere.

I have to admit, I was surprised at the number of Beastie-backers I found online. I came to the case thinking GoldieBlox was the party being bullied. But of course,

the Beasties see it differently, as do many of their supporters. “If you support the Beastie Boys,” writes PJ Vogt, “then there’s a good chance that this case still isn’t, at its heart, about copyright. It’s about artistic control and about the creep of commercialism.”

It’s true that some of the pieces fell in line rather neatly: after first being contacted by the Beastie Boys’ representatives, GoldieBlox responded with a speed suggesting that they were all ready to ask for summary judgment at the first sign of trouble. In other words, they didn’t proceed confident that their use was fair and that everyone else would see it that way too; they also were ready to play defensively.

Or offensively, depending on whose story you read. Many see their victory in the Super Bowl ad contest as the direct end of their unlicensed use of “Girls” a few months earlier. It’s hard to contest that if they had, say, sought to license “Girls,” been denied, and found another song to use--all behind the scenes, with no press covering those decisions at all for a brand new company--they might not have ended up with their name on the big screens of America during the biggest TV event of the year.

Felix Salmon at Reuters takes this argument to the furthest degree, even going back to look at GoldieBlox founder Debbie Sterling’s previous work to discredit her (a move that I found made me like her creativity even more, actually). Here’s how he puts it:

If all GoldieBlox wanted to do was get out a viral message about empowering girls, they could easily have done that without gratuitously antagonizing the Beastie Boys, or putting the Beasties in their current impossible situation.

Instead, however, GoldieBlox did exactly what you’d expect an entitled and well-lawyered Silicon Valley startup to do, which is pick a fight. . . . The real target of the GoldieBlox lawsuit, I’m quite sure, is not the Beastie Boys. Instead, it’s the set of investors who are currently being pitched to put money into a fast-growing, Stanford-incubated, web-native, viral, aggressive, disruptive company with massive room for future growth — a company which isn’t afraid to pick fights with any big name you care to mention.

So there’s that.

Reaction 4: It’s Complicated

My favorite complex take on the debate is from Andy Baio and the collection of smart commenters on his article “GoldieBlox and the Three MCs” at Waxy.org.

Baio’s piece (written before GoldieBlox cut the song from the video) takes the stance that 1) the use of “Girls” might be legal under fair use, 2) it still wasn’t in very good taste, and 3) we ought to know our fair use law well so we don’t find ourselves making decisions based on myths. Even though I don’t find

myself siding with Baio on everything--I support a creative economy where people really do get to remix without always asking for permission--I love the nuanced view he maintains, and which many of his commenters also help others see.

My favorite moment: one commenter named “indefensible” asks a simple question: “Legality of this aside (which you and I are unlikely to agree on), can we at least agree that appropriating someone else's artistic work without their permission is a dick move?”

Baio's response is worth quoting at length:

In this case? Yes, I agree. Like I said in the post, I think pursuing this case is crass and insensitive, especially in light of MCA's will and his recent passing. I personally think Goldieblox should have pulled it, or changed the music, once they were aware of the band's wishes.

But outside of this case, absolutely not. I know fair use doesn't exist in Australia, but we have a long history of cultural appropriation here that hinges on it, despite its flaws, and there are many, many works of art that should never require permission from the artist.

Virtually everything I love about the Internet involves some level of appropriation without permission. Fan fiction, fan art, mashups, remixes, and parodies are all made without the permission of the original artist. Almost every cover song on YouTube is unlicensed, every gameplay video, every supercut.

Girl Talk, Pogo, Evolution Control Committee, Danger Mouse, Negativland, The Kleptones, Steinski, Kutiman, Eclectic Method. The Beastie Boys. Not dicks.

Conclusion

I began by considering the deep-seated assumptions that we bring to a case like this, rooted in our convictions about gender and creative ownership. But I think there might also be another issue swimming around in that blender of emotion: the deep misunderstandings about fair use and copyright law that so many of us hold.

I seem to hear lore on these issues just about every day: someone says that any use is okay as long as it's noncommercial, someone else has a creative definition of what transformative really means, and so on. We make this stuff up as we go, it seems. So when a case comes up that touches other buttons, many of us rush in to assert that lore, spreading it around like truth.

Am I troubled that there's a possibility that a company like GoldieBlox is being pulled into a lawsuit that will probably be long and expensive, taking their time and attention away from the important work their company is doing? Absolutely. To my non-attorney eyes, the Beastie Boys seem to have a slim case,

and even a fundamentally wrong case. (If you write a sexist song, even twenty-five years ago, you deserve to be made fun of.)

But as I keep reading more and more news and analysis of the case, I find I'm less angered at that and more fascinated at the many voices out there, layered like samples on a hip hop track, a vocal remix of lore and claims about copyright spreading across the web like, well, like a Beastie Boys album.

Update

Just before the publication of this story, the case reached a settlement. On March 18, 2014, *Rolling Stone* reported that they had received the following statement from a GoldieBlox representative: "That settlement includes (a) the issuance of an apology by GoldieBlox, which will be posted on GoldieBlox's website, and (b) a payment by GoldieBlox, based on a percentage of its revenues, to one or more charities selected by Beastie Boys that support science, technology, engineering and mathematics education for girls" (Blistein). At the time of publication, no further details were available about the amount of the payment or the charity that had been selected.

GoldieBlox's apology currently appears at the bottom of its homepage (not on their blog, where their open letter appeared, perhaps so they could post the apology as an image file unreadable by Google, as explained by a frustrated Simon Dumenco at *Advertising Age*). It reads, in its entirety:

We sincerely apologize for any negative impact our actions may have had on the Beastie Boys. We never intended to cast the band in a negative light and we regret putting them in a position to defend themselves when they had done nothing wrong. As engineers and builders of intellectual property, we understand an artist's desire to have his or her work treated with respect. We should have reached out to the band before using their music in the video. We know this is only one of the many mistakes we're bound to make as we grow our business. The great thing about mistakes is how much you can learn from them. As trying as this experience was, we have learned a valuable lesson. From now on, we will secure the proper rights and permissions in advance of any promotions, and we advise any other young company to do the same. ("Announcement")

Of course, this leaves the deeper question unsettled: we're left without a precedent about whether the court would have found that the parodic or commercial nature of the ad was more weighty. But it also leaves GoldieBlox able to continue its mission.

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The Future of Copyright? A Look at the First Decade of Creative Commons

In 2001, Creative Commons was founded as a global nonprofit organization with the goal of enabling “the sharing and reuse of creativity and knowledge through the provision of free legal tools” (FAQ, “About CC”). In 2002, they made this goal manifest in the world, issuing their first Creative Commons licenses “designed specifically to work with the web,” making content offered there “easy to search for, discover and use” (FAQ).

Now in 2014, with over a decade since its founding and with a new CEO, Cathy Casserly, in place, the Creative Commons team saw this as the right time to reflect on past accomplishments and to use them as a foundation upon which to refocus/refine their vision for the future. This vision is strategized in *The Future of Creative Commons: Realizing the Value of Sharing in a Digital World*. Eliot Harmon, a CC staffer, wrote about the “intensive review of progress and priorities” that culminated in their newest strategy document:

Sometimes you need to use big milestones to stop and see where you are, and occasionally you find that decisions made to meet immediate demands don’t always hold up against long-term ambitions. The world is changing pretty quickly, and to remain effective, CC needs to do more than just keep up.

To facilitate such an intensive review, Creative Commons hired consultants to ascertain how the organization was viewed internally and by Affiliate Network members around the world, as well as by those people outside the organization (Harmon). “As navel-gazing goes,” Harmon writes, “we gave it a solid effort,” going on to emphasize that it was important for Creative Commons to clearly “declare [their] mission, vision and priorities for action” (Harmon).

The resultant publication does just that: laying out their mission, vision and strategic priorities in an inspiring and simply stated way. This strategy document is refreshingly easy to read, an inspiring mix of testimonials, statistics, examples, and quotes from founders and users across the globe. Ultimately, the document culminates into the essentializing of five strategic priorities (each with “Key Activities” that will be used to move Creative Commons forward into the future):

1. **Steward the Global Commons** (i.e. champion open standards, policies and procedures; support the global community of users through outreach, policy advocacy and education)
2. **Develop Innovative Products** (i.e. keep pace and enhance the technological means for users to build, remix and share; create new products to motivate further contributions to the Commons)

3. **Strengthen the Affiliate Network** (i.e. establish effective communication and mentoring channels among affiliates; support development of new affiliate organizations)
4. **Increase Platform Use** (i.e. increase outreach and support to existing and potential platform adopters to improve implementation of CC licenses; enhance public perception and awareness of CC and its mission)
5. **Ensure Sustainability** (i.e. secure adequate resources for core strategic needs; develop a long-term revenue model and strong organizational culture and structure)

Within this rich context, and informed by the strategic priorities they identify, Creative Commons articulates their vision for the future: as “nothing less than realizing the full potential of the Internet – universal access to research, education, and full participation in culture – for driving a new era of development, growth and productivity” (Future, 3). In their first ten years, CC has already “helped to grow a public commons of knowledge and culture” but because “the Internet is vast...so too is the untapped potential for people around the world to contribute to [this] commons” (2,4).

Informing this vision (and serving as epigraph and introduction to it in the report) are Articles 19 and 27 from the Universal Declaration of Human Rights: articles that reinforce the importance of and right to “seek, receive and impart information and ideas” and to “participate in the culture...regardless of frontiers” (2).

Forecasting the vision through the lens of universal human rights (and not copy “rights”) is a salient choice, as it places the emphasis squarely on sharing, access, and creative empowerment across and among the “vast” users of the Internet. Copyright was certainly designed with this goal in mind, “to promote the progress of science and the useful arts,” but the ways in which that “promotion” takes place in the 21st century is often in conflict with the laws intended to encourage and incentivize such production. As is highlighted in the report,

Copyright automatically bestows upon creators exclusive rights to reproduce, distribute, and modify what they create. The default status is ‘all rights reserved.’ Yet many creators do not realize that they are copyright owners, or what legal terminology allows them to share and invite others to reuse their work. Therefore, the opportunity to share often goes untapped. (5)

As a result, “Creative Commons licenses were designed to help creators utilize the Internet’s potential as a place for collaboration without copyright law getting in the way” (Future, 4). The six Creative Commons licenses “provide a simple vocabulary for what would otherwise be a complicated agreement between creator and licensee” (5). In selecting a license, creators can “choose which rights they’d like to keep and what types of reuse to allow” (5).

It is important to note that Creative Commons licenses neither change nor (re)interpret existing copyright law; instead it offers creators (and, by extension,

users) a way to more clearly delineate and customize those laws away from a default, “one-size-fits all” copyright that can and has “gotten in the way” of remixing, sharing, and innovating. As Cathy Casserly asserts:

The creators who thrive today are the ones who use Internet distribution most intelligently. In fact, the ones who are most generous with their work often reap the most reward. People used to think of reuse as stealing; today, not letting others use your work can mean irrelevance. (*Future*, 5)

Certainly, the *Future of Creative Commons* details just how much has already been done to facilitate and promote the kind of “generous” sharing Casserly describes. From the creation of numerous open educational resources (OER), to the sharing of governmental data and scientific research, to the open licensing of cultural and artistic artifacts, Creative Commons has made great strides in helping creators understand and utilize the opportunities for collaboration and sharing on the Internet.

But for all that Creative Commons has accomplished, there is much more to do. According to cofounder Lawrence Lessig, Creative Commons is ten years in and just getting started:

Over the past decade, Creative Commons has become the standard internationally for sharing creative works. But that’s just the beginning. The next ten years will be all about tapping the potential of the global community of Commoners to build a more open Internet and a freer world. (*Future*, 20)

And the future Lessig describes starts right now. At the end of 2013, CC issued an update to its copyright license suite that puts these goals into tangible, practicable form. Version 4.0 licenses are designed with a stronger global reach in mind: “among the most notable changes [to this version of the license], version 4.0 breaks with the earlier practice of ‘porting’ licenses to different jurisdictions, and is now designed to work all over the world. In the same vein, Creative Commons will provide official translations of the license deeds to that licensors and licensees can read the text in the local languages” (Higgins).

And much like the “intensive review” of the organization itself, Creative Commons developed the 4.0 licenses through a public, transparent, and inclusive process: “goals were laid out in public discussions at a 2011 global summit, and continued in blog posts, open meetings, and mailing lists for the following two years. As a result, the licenses have the legitimacy of public consensus.” (Higgins)

When contrasted with other models of creating and discussing multinational copyright policy, like the exclusive and secretive promotion of the Anti-Counterfeiting Trade Agreement (ACTA) or the “closed backroom negotiation sessions” for trade agreements like the Trans-Pacific Partnership (TPP),” the Creative Commons process not only looks to be the better model, but a feasible and effective model for the future (Higgins). Perhaps “open source legislation” is on the horizon?

Whatever the future holds, it seems clear that Creative Commons' guiding principles will allow them to be poised to make positive contributions to that future. Asserting, among other things, that "a voluntary, open and participatory community" is key to optimizing success; acknowledging that "the potential for sharing through open licensing has barely been tapped"; and grounding these in the understanding that "creative expression is critical to a vibrant Internet," Creative Commons will continue to cultivate the commons of the world, one license at a time.

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Kim D. Gainer

Fair Use and Digitization: Google Prevails in the Latest Court Ruling

In November of 2013, in the U.S. District Court, Southern District of New York, an important ruling was handed down in the case brought by the Authors Guild against Google Books. Although the case may not be at an end – the Authors Guild has announced its intention to appeal – the ruling was almost entirely favorable to Google. Combined with a 2012 settlement of a suit brought by publishers and a recent favorable ruling in the HathiTrust Digital Library case, in the U.S. Google's program of scanning books into a searchable digital format appears to be on firm legal footing.

Background

The Google Books project was introduced (under a different name) in late 2004, and by late 2005 two lawsuits charging Google with copyright violations had been filed, one brought by the Authors Guild and the other by the Association of American Publishers in concert with several individual publishers. In spite of the lawsuits, major research libraries continued to participate in the project, and others signed on over the course of the ensuing decade. The legal cloud hanging over the project seemed to be partially lifted in 2008 when Google and the plaintiffs in both lawsuits agreed to a settlement (Gainer 2-13). This settlement, or rather a revised version, was opposed by the United States Department of Justice on the grounds that it was anticompetitive; and in 2011 the settlement was rejected by Judge Denny Chin of the United States District Court, Southern District of New York, who cited, among other objections, the fact that the settlement placed the burden of 'opting out' on the copyright owners. However, the following year, Google did negotiate a final agreement with the publishers and as it did so managed to sidestep the court's oversight and its objections. As the Association of American Publishers stated in its press release, since "the settlement is between the parties to the litigation, the court is not required to approve its terms" (Association of American Publishers para. 2). The suit by the Authors Guild, however, was left unsettled.

Comparable Litigation: Authors Guild v. HathiTrust

The final settlement of the publisher's suit against Google was announced in October of 2012. That same month, Google was in a sense the beneficiary of a favorable decision in another case involving book scanning to which it was not a direct party. The previous year, the Authors Guild, joined by several other

organizations and individuals, had brought suit against HathiTrust. This organization, in collaboration with several universities, had created a digital repository, most of whose resources had been scanned by Google as part of its Google Books project (Zimmerman n.p.). The October 2012 decision was handed down by Harold Baer, Jr., of the U.S. District Court, Southern District of New York, the same court handling the suits against Google; and it is a ruling in favor of HathiTrust, primarily on the grounds that the organization's use of copyrighted material was defensible as fair use. It is ruling that will later be referenced by Judge Chin in his opinion in the Authors Guild's suit against Google (*Authors Guild, Inc. v. Google, Inc.* 27).

In deciding that the collection of digitized texts was an instance of fair use, Judge Baer applied the traditional four-prong test: (1) "purpose and character of the use," (2) "nature of the copyrighted works," (3) "amount of the work copied," and (4) "impact on the market for or value of the works" (*Authors Guild, Inc. v. HathiTrust* 15, 18, 19). It is not necessary that each test be passed for an infringement to be deemed fair use, but Judge Baer concluded that in every instance the HathiTrust fell on the correct side of the fair-use calculus—or at least did not run afoul of it. The first prong, purpose and character of the use, was satisfied on a number of levels. In terms of purpose, the repository facilitates scholarship and research; it provides access to material that would otherwise be unavailable to the visually impaired; and it preserves collections against loss, both catastrophic and routine (although this use is, the Judge observes, the weakest of the arguments in defense of fair use). In terms of character, Judge Baer found the digital repository to be transformative. He observed that "transformative use may be one that actually changes the original work" but that "a transformative use can also be one that serves an entirely different purpose." Applying this reasoning, he writes that the

use to which the works in the [HathiTrust Digital Library] are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material. The search capabilities of the HDL have already given rise to new methods of academic inquiry such as text mining.

(*Authors Guild, Inc. v. HathiTrust* 16)

According to the Judge, the "Plaintiffs' argument that the use is not transformative merely because defendants have not added anything 'new' misses the point." Making a copy identical in all respect to the original may be considered a transformative act if the copy is used for a function different than the original one, such as allowing for text mining or changing the text into a format that is usable by the visually impaired.

Turning to the nature of the copyrighted works, Judge Baer observes that "[c]opying factual works is more likely fair use than copying creative works" but that "where a use is transformative, the nature of the copyrighted works is not likely to 'separate the fair use sheep from the infringing goats'" (*Authors Guild,*

Inc. v. HathiTrust 18). The plaintiffs were able to point to the presence of ‘creative works’ in the HathiTrust Digital Library (roughly 76% of their examples even though in the digitized collection as a whole only about 9% of the texts were ‘creative’). However, since the digitizing was “transformative, intended to facilitate key-word searches or access for print-disabled individuals,” Judge Baer did not find this prong relevant as a means of separating fair use from infringement.

The third prong, the amount of the work copied, requires a judge to consider whether the amount is necessary given the purpose of the copying. In the case of the HathiTrust Digital Library, Judge Baer found that the copying of entire texts was justifiable in order to permit the transformative uses for which the copying was intended: key-word searches and access by the visually impaired.

Lastly, Judge Baer considered the impact on the market for or value of the works resulting from the creation of the digitized, searchable collection. More than one consideration was in the HathiTrust’s favor: the uses to which it put the copyrighted material were both transformative and noncommercial, and no sales were lost because the printed texts available for purchase would not have served the purposes to which the digital copies were to be put.

Judge Baer’s decision against the Authors Guild and in favor of HathiTrust Digital Library could have been a rehearsal for the decision against the Authors Guild and in favor of Google Books that was handed down by Judge Chin one year later. Although in some respects the opinions differ, the results were the same: rulings favorable to the infringer on the grounds of fair use.

Judge Chin’s Google Books Decision

In 2012, Judge Chin had certified the Authors Guild suit against Google as a class action. Google appealed the certification to the Second Circuit Court of Appeals, and in July of 2013, the appellate court overturned the class action certification and sent the matter back to the District Court. In its order, Judge Chin was specifically directed to consider the issue of fair use, as a ruling favorable to Google on the grounds of fair use would make further argument about class certification unnecessary. Judge Chin then proceeded to apply the same four-prong tests that were at the center of the HathiTrust decision, and he reached largely the same conclusion as had Judge Baer.

The use to which the copied texts are being put, Judge Chin wrote, is “highly transformative.” Through scanning and digitizing, Google Books “transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books” (*Authors Guild, Inc. v. Google, Inc.* 19). The display of snippets was likewise transformation. Judge Chin compared such displays to the

display of thumbnail images of photographs for search or small images of concert posters for reference to past events, as the

snippets help users locate books and determine whether they may be of interest. Google Books thus uses words for a different purpose—it uses snippets of text to act as pointers directing users to a broad selection of books. (*Authors Guild, Inc. v. Google, Inc.* 20)

Judge Chin also pointed out that the scanning and digitization project had “transformed book text into data for purposes of substantive research” (*Authors Guild, Inc. v. Google, Inc.* 20). The “mining” of data and text meant that the project had “created something new in the use of book text—the frequency of words and trends in their usage provide substantive information” (*Authors Guild, Inc. v. Google, Inc.* 20-21).

Overall, in his application of the purpose and character use prong, Judge Chin concludes that Google Books is not intended to be a method for reading books, and in the end this trumps any complaint that Google is a for-profit venture (something that was not a consideration in the HathiTrust case). Under some circumstances it is possible, the judge wrote, for the commercial use of copyrighted material to fall under the protection of fair use. Google does not sell the scans or the snippets or place ads on the pages displaying the snippets. Google thus avoids the “direct commercialization” of the books that it scans. It is true, Judge Chin writes, that the company benefits from the traffic drawn to the Google site, but he concludes that this fact is outweighed by another fact: “Google Books serves several important educational purposes” (*Authors Guild, Inc. v. Google, Inc.* 20-21).

Judge Chin next considers the nature of the copyrighted works scanned and digitized by Google. He rapidly dispenses with this prong, observing that most of books are non-fiction and that all have been published. Both factors would allow for a finding of fair use, but Judge Chin, like Judge Baer, does not find this factor to be of great significance, observing in a footnote that Google and the Authors Guild concur that this nature of the copyrighted works “plays little role in the ultimate fair use determination” (*Authors Guild, Inc. v. Google, Inc.* 22, n. 4).

Turning to the “amount and substantiality of the portion used,” Judge Chin applies the same reasoning as did Judge Baer, but with slightly different results. He writes that under some circumstances fair use may permit the copying of the entire text of a copyrighted text, and one of those circumstances may apply in the case before him: “[...] as one of the keys to Google Books is its offering of full-text search of books, full-work reproduction is critical to the functioning of Google Books” (*Authors Guild, Inc. v. Google, Inc.* 23). Judge Chin also observes that limits are placed on the amount of text that will be displayed via Google Books. However, in spite of that fact, and in spite of the fact that copying an entire text is arguably necessary in order to permit a full-text search, he “conclude[s] that the third factor weighs slightly against a finding of fair use” (*Authors Guild, Inc. v. Google, Inc.* 24). Presumably Judge Chin places greater weight than does Judge Baer on the fact that Google Books creates word-by-word copies of entire works.

On the final prong, the effect of the copying on the market for or value of the originals, Judges Baer and Chin are once again completely in accord. Judge Chin summarizes the arguments offered by the Authors Guild: book sales will be harmed, with scans replacing the originals, and readers will access entire books through repeated searches that rely upon different key words. The judge is blunt in his dismissal. "Neither suggestion makes sense," he writes (*Authors Guild, Inc. v. Google, Inc.* 24). Google is not selling the scans, he points out, and if libraries download them, they will only be accessing copies of books that they already own. He also does not find credible the notion that someone would expend the effort to piece together an entire book from multiple snippets, which would be impossible anyway as a certain percentage of the content of copyrighted books is blacked out. Instead of hurting sales, Judge Chin writes, "a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders" (*Authors Guild, Inc. v. Google, Inc.* 25). A book whose existence is unknown is one that will not be ordered by either libraries or individual readers, and Google Books not only brings books to the attention of both but also provides links to booksellers. Concluding that Google Books strengthens the book sales rather than harming them, Judge Chin writes that the fourth prong "weighs strongly" on the side of fair use (*Authors Guild, Inc. v. Google, Inc.* 25).

Moving from the application of the four-prong test, Judge Chin considers the public benefits of Google Books, which he finds to be "significant": It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. (*Authors Guild, Inc. v. Google, Inc.* 26)

Although he has some reservations about the "amount and substantiality" of the copying, after weighing not only the four prongs but also the educational and social value of Google Books, Judge Chin in the end came down firmly on the side of Google and granted its motion for a summary judgment dismissing the complaint brought by the Authors Guild.

The legal challenges to Google Books are not completely at an end, however. The Authors Guild has given notice of its intent to appeal the dismissal of its lawsuit, and the Guild also is appealing the judgment in its case against HathiTrust. In addition, there is one lawsuit whose merits have not yet been ruled upon. This is a case brought by photographers and several organizations of photographers, including the American Society of Media Photographers, the

Picture Archive Council of America, the North American Nature Photography Association, and Professional Photographers of America.

It should be noted, though, that in his decision in the Authors Guild lawsuit, Judge Chin cited three cases in which the duplication of copyrighted images was judged to be sufficiently transformative as to be protected by fair use, including a case in which a court concluded that the “use of ‘thumbnail images,’ including copyrighted photographs – to facilitate search was ‘transformative’” (*Authors Guild, Inc. v. Google, Inc.* 19-20). Given these earlier rulings on the fair use of images, combined with the more recent Google Books and HathiTrust rulings, Google, while it may be under legal pressure in other areas (e.g., privacy rights) begins to look like a juggernaut when it comes to the subject of fair use.

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