

**The CCCC-IP Annual:  
Top Intellectual Property Developments of 2007**



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## ***Introduction***

*Clancy Ratliff, University of Louisiana at Lafayette*

*Co-Chair, 2008 CCCC Intellectual Property Caucus*

The year 2007 carried quite a few key developments for those who follow issues and debates related to copyright and intellectual property. For the third year running, then, the CCCC Intellectual Property Committee is pleased to publish this annual report in the service of our first goal, to “keep the CCCC and NCTE memberships informed about intellectual property developments, through reports in the CCCC newsletter and in other NCTE and CCCC forums.”

In assuming the editorship of this year's collection, I have chosen to implement two changes which I believe embody the values of the Caucus and the IP Committee. First, I have licensed the collection under a Creative Commons license. This license allows readers to use the collection beyond the boundaries of fair use, provided the collection is not used for commercial purposes, the authors of the articles are credited, and no derivative works are made. One exception to the condition regarding derivative works concerns modifications for purposes of accessibility. Readers can, for example, create an audio recording of the collection or increase and change the font for the visually impaired. The main purpose for the Creative Commons license is to enable cross-publishing of the collection in a variety of online publication venues. I also hope that readers find the collection useful for the classroom. This collection may be reprinted in course packs or archived on course web sites under the terms of the Creative Commons license.

The second change I have made is to make the collection available in Open Document Format. In the past, the collection has been published in html and pdf format, as it is this year, but I am also publishing it as an .odt file, which can be opened in at least two open source word processing programs: OpenOffice and NeoOffice. I am uploading the file in .odt format as a public acknowledgment of the IP Caucus's growing awareness of software as intellectual work and open source software as intellectual work that is free and open for all to use and build upon.

## ***McLean Students File Suit Against Turnitin.com: Useful Tool or Instrument of Tyranny?***

*Traci A. Zimmerman (Pipkins), James Madison University*

In March 2007, two students at McLean High School in McLean, Virginia along with two students at Desert Vista High School in Phoenix, Arizona filed a lawsuit against Turnitin.com, a California company hired by their respective schools to aid in the fight against plagiarism. Turnitin.com (“turn it in”) is a for-profit service used by over 6,000 academic institutions in 90 countries (1). According to the Turnitin.com website:

iParadigms, the company behind Turnitin got its start in 1996, when a group of researchers at UC Berkeley created a series of computer programs to monitor the recycling of research papers in their large undergraduate classes. Encouraged by a high level of interest from their peers, the researchers teamed with a group of teachers, mathematicians, and computer scientists to form Plagiarism.org, the world's first internet-based plagiarism detection service. In the years since, [Plagiarism.org](http://Plagiarism.org) has continued to grow and evolve, and is now recognized around the world as [Turnitin](http://Turnitin) and iThenticate, the internet's most widely used and trusted resources for preventing the spread of internet plagiarism. (5)

In the following brief report, I will describe the context and motivation for the 2007 lawsuit, the details and central points of debate surrounding the case, and the implications that the case has for the rhetoric and composition classroom. It will be impossible in such short space to provide the kind of depth and breadth of research that a subject like this demands; for that reason, I have provided an additional list of references which should serve as a solid starting point for further inquiry.

## The Case Against Turnitin.com

Though the March 2007 filing is the first lawsuit in the United States to be brought against Turnitin, it is not the first time students have expressed concern with the plagiarism detection software. In 2003 and 2005, two McGill University students refused to submit their work to the Turnitin database in classes that mandated their using the service (2). In at least one of the cases, the student received failing grades for his work just because he refused to submit his assignments to Turnitin. Ultimately, the McGill University Senate decided “in favor of each student’s right to have their papers graded without running them through the Turnitin database” (2).

The events that led up to the eventual filing of the lawsuit in March 2007 began in September of 2006, when a group of students at McLean High School circulated a petition to oppose the mandatory submission of their work to a newly adopted Turnitin.com (2). The petition, which garnered 1,190 student signatures of the approximately 1800 students that attend the school, requested that the mandate to submit work to Turnitin be removed and that an “opt-out” option be allowed (2). School officials responded to the petition by easing (but not removing) the mandate: instead of having all students in all grades submit their work to Turnitin, only 9<sup>th</sup> and 10<sup>th</sup> grade English and social studies classes would be required to use the service. Ultimately, this was no solution at all, since it meant that the current policy would be changed to exclude junior and seniors from the mandate only *temporarily*; after those two groups graduated, the policy would be reinstated, offering a kind of “grandfather clause” to the older students, but no consolation to those students who would come after.

In October of 2006, Dr. John Barrie, the President and CEO of iParadigms attended a McLean High School Parent Teacher Student Association (PTSA) meeting to address the growing Turnitin concerns (2). According to many reports, this meeting was wholly unsuccessful; Barrie tended to defend rather than explain his product, saying things like “if Harvard, Yale, and other Ivy League schools use it, it certainly can’t be bad” though at the time Barrie made the claim, none of the Ivy Leagues had adopted Turnitin (2). Harvard would become the first Ivy to adopt the service, and even then, only on a pilot basis (2). But it

would not be the last. When Princeton announced later that same year that they “had no intention of using Turnitin.com,” the student newspaper contacted Barrie for a comment. He had one: “Princeton is soft on cheating” (3). Brock Read, who writes about Barrie’s zealous attack on Princeton as an “anti-cheating” crusader, admits that

Mr. Barrie’s vehemance may have made him a persona non grata at Princeton, but it has helped him persuade instructors at more than 8,000 high schools and colleges – including two of Princeton’s Ivy League rivals, Harvard and Columbia, the University of California system, and the University of Oxford, in England – to use his service. Last year [2007], professors and teachers submitted a whopping *30 million papers from their students to Turnitin.* (emphasis mine) (3)

Ironically, the very reasons that propel Turnitin’s success are the same reasons that make McLean High School parents and students wary of the service: the sheer size of the database. As he worked out the earliest versions of what would become Turnitin.com, Barrie knew that the strength of the service would lie in its numbers; Turnitin would only succeed if it were built on “a database so massive that it creates a deterrent.” (3) On their comprehensive and informative website “dontturnitin.com” (don’t turn it in), McLean parents and students certainly see the database as such a deterrent, noting as a “prohibitive factor” the fact that “original, intellectual work produced in a public school is being transferred to, archived by, and utilized for profit by a private company against the student’s wishes, but with the permission of the school administration” (6). The fact that Turnitin uses these archived student papers to look for plagiarism in future submissions is what fuels the McLean lawsuit. The four student plaintiffs allege that this practice constitutes copyright infringement and are asking for \$900,000 in compensation for six papers that they claim were “added to Turnitin’s database against their will” (3). Turnitin’s lawyers argue otherwise, claiming that the use of the papers fall under the “fair use” clause of the U.S. Copyright Act -- the papers are neither “displayed [n]or distributed to anyone” and the students have to give their consent (by clicking “I agree”) before the paper is accepted by Turnitin.com (qtd in 7).

Robert A. Vanderhye, a retired lawyer in Virginia who has taken on the student’s case

pro bono, says that Turnitin “tarnishes its claim of fair use by redistributing papers in its database: Turnitin offers to send professors complete copies of works that it identifies as the sources of plagiarized material” (3).

The parents and students who created Dontturnitin.com agree that “cheating and plagiarism should never be tolerated in any academic or workplace setting” but go on to note that McLean High School has “a comprehensive honor code” in place that could possibly be “augmented” by Turnitin.com on a “voluntary” basis; however, the current system of using Turnitin (as a kind of punitive tool rather than a pedagogical one) seems more of a solution in search of a problem than anything else. A recent article in *The Chronicle of Higher Education* (February 29, 2008) echoes this concern:

When Mr. Barrie founded Turnitin, just over a decade ago, few professors had even thought about, let alone clamored for, plagiarism-detection software. In essence, iParadigms has built a fast growing business out of almost nothing. (3)

Even Barrie himself agrees: “It’s safe to say that Turnitin is now a part of how education works” (3).

## **Implications for the Rhetoric and Composition Classroom**

On the surface, it might seem a salient fact that Dr. Barrie majored in (of all things) *Rhetoric* and Neurobiology while an undergraduate at the University of California, Berkeley (5). In one of his later iterations as an entrepreneur and crusader in the area of plagiarism detection, he has become “a national leader and expert on the problem of plagiarism in education” (5). But to whom? The various blogs spawned by the McLean lawsuit, such as *The Wired Campus* from *The Chronicle of Higher Education* (September 22, 2006 and March 30, 2007) or Andy Carvin’s blog on PBS.org entitled “The Politics of Plagiarism Detection Services” (September 22, 2006), only complicate the issue further, as teacher, student, principal, and Jane Q. Citizen draw virtual lines in the sand about where the boundaries of creativity and plagiarism, teaching and totalitarianism begin and end. Is Turnitin.com solely to blame? Or should we

look to those secondary schools, colleges, and universities that compel their students to submit to the service?

The implications for the rhetoric and composition classroom can be separated into three main categories – two of which, “pedagogical” and “ethical” – are categories articulated brilliantly by Michael Donnelly in the introduction to “(Mis)Trusting Technology that Polices Integrity: A Critical Assessment of Turnitin.com.” (4) I shall use his designations as well as add one additional category, “theoretical,” to sum up the main points of conflict.

### ***Pedagogical***

In their statement on best practices entitled “Defining and Avoiding Plagiarism,” the WPA lists 18 “shared responsibilities” among students, faculty and administrators to address the problem of plagiarism. None of them include or advocate the use of plagiarism-detection software. When the WPA does mention “plagiarism detection services,” they do so with a word of caution, noting that “although such services may be tempting, they are not always reliable. Furthermore, their availability should never be used to justify the avoidance of responsible teaching methods” (9). Instead they offer, as one of their “best practices,” the following advice:

Make the research process, and technology used for it, visible. Ask your students to consider how various technologies – computers, fax machines, photocopiers, email – affect the way information is gathered and synthesized, and what effect these technologies may have on plagiarism. (9)

The CCCC-IP Caucus, in their “Recommendations Regarding Academic Integrity and the Use of Plagiarism Detection Services,” is even more forceful and focused in their recommendations against such services as Turnitin noting that

Use of Plagiarism Detection Services poses several compromises to academic integrity and effective teaching of which educators need to be aware before or if their institutions avail themselves of these technologies. The CCCC-IP Caucus recommends that compositionists take a leadership role in educating their institutions about the

limitations of these services and conduct more empirical research to understand better how these technological services affect student's writing and the educational environment. (8)

It is this "educational environment" that seems most damaged by the inclusion of plagiarism detection services like Turnitin. In reading through the numerous articles and blogs about the McLean lawsuit, I noticed the repetition of comments centered on the culture of mistrust and fear that is created when students are forced to use Turnitin. The idea of "guilty until proven innocent" (2) prevails, and students are left to grapple with the uncomfortable assumptions that the use of Turnitin reveals: that students are cheaters who need to be policed.

"Plagiarism is not," Michael Donnelly writes, "a simple matter of catching dishonorable students and prosecuting them" (4). If anything, it should be more about understanding connections than it is about policing boundaries. Yet I certainly recognize what Charlie Lowe calls "the culture of fear" that attends to plagiarism and its detection; even as I wrote this article, I worried, perhaps even more than usual, about proper attribution and citation. This anxiety might be a way to connect to the concerns raised by the student lawsuit: "Faculty might want to ask themselves," Lowe says, "about how they would feel if their departments asked them to submit everything they wrote to a plagiarism detection service" (qtd in 3).

### ***Theoretical***

Rebecca Moore Howard keenly identifies the theoretical implications of plagiarism detection services on the composition classroom in her book *Standing in the Shadow of Giants: Plagiarists, Authors, Collaborators*. In it, she illustrates the ways in which these services stand to oversimplify and undermine our understandings of authorship, text, and reader. She writes

The irony of [using] mechanical means for detecting plagiarism, especially as such means are enacted by computers, should not be overlooked. Plagiarism-checking software would mechanize the monitoring of textual purity, excluding all but textual criteria. Plagiarism-detection software excludes both authorial intention and reader

interpretation in the construction of authorship. By automating textual purity, plagiarism-checking software naturalizes the increasingly embattled modern economy of authorship, even as the human factors that it elides would reveal that economy as a cultural arbitrary. In the face of a revolution in authorship that rivals the introduction of the printing press, plagiarism-checking software would deploy digitized information technology to protect that which is threatened. Instead of transforming the ways in which we think of reading and writing, this technology would freeze and reassert the notion of authorship in which writing is unitary, originary, proprietary, and linear, and in which the text is the locus and sole arbiter of meaning. (11)

### ***Ethical***

There are two main areas of ethical concern when plagiarism detection software is used in the composition classroom: student privacy and student property.

#### **Student Privacy**

The school that compels its students to submit their work to Turnitin may also compel the violation of those students' privacy. In the case of the McLean High School lawsuit, students were told that their submissions were "anonymous," but "by virtue of the password authentication process through an off-site server, students still have to input their email addresses and names" (2). Also, as noted earlier, entire copies of student work are offered to professors should the work be deemed the source of plagiarized material.

#### **Student property**

Dontturnitin.com calls the violation of Intellectual Property Laws "the most complicated of all the issues...perhaps the most egregious issue of all" (6). And they are not alone in their thinking. Michael Donnelly writes that plagiarism detection software like Turnitin "doesn't merely infringe on [student] rights, it simply ignores them" (4). Wendy Warren Austin further illustrates the point, arguing that

Mandatory submission of student papers helps build Turnitin.com's database without

any monetary compensation. Although licensing fees are paid for professional articles that are contained within the database, students' papers are obtained with no compensation though they add considerably to the product's profitability.

Furthermore, although these high school students digitally sign a "consent" form as they have their papers submitted, they are in fact "signing" these consents under duress, i.e. under penalty of getting a zero, and by virtue of their status as minors, lack capacity to enter into a binding contract.

As Michael Donnelly soberly reminds us, this issue should be "even more pressing when faculty at colleges and universities across the country...are lobbying for better, clearer protection of their own Intellectual Property Rights" (4). What might prove a more sobering reality is the most recent iteration of the McLean lawsuit: just last week, Judge Hilton issued an Order and Memorandum Opinion in which he grants summary judgment in favor of iParadigms (12).

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## ***The Importance of Understanding and Utilizing Fair Use in Educational Contexts: A Study on Media Literacy and Copyright Confusion***

*Martine Courant Rife, Lansing Community College and Michigan State University*

### **Report Overview**

In September 2007, the Center for Social Media at the School of Communication at American University released a report, *The Cost of Copyright Confusion for Media Literacy*, explaining the results of a study regarding the understanding and use of fair use and copyright by individuals in educational-media literacy contexts. The main inquiry explored the relationship between copyright beliefs and teaching practices. The research found that the key goals of teaching media literacy were “comprised by unnecessary copyright restrictions and lack of understanding about copyright law” (p. 1).

According to the report, copyright law, particularly fair use, provides broad protection for folks working in education. However, due to participants’ lack of knowledge and understanding about the law’s protections, their ability to share, teach, and have students produce media-rich texts was severely circumscribed. Not only that, but the researchers found that teachers’ lack of knowledge was passed on to students as well as colleagues, perpetuating “copyright folklore” that often sees the law as much more restrictive than it is.

The report recommends increased understanding of fair use for educators as well as their institutions, and suggests the development of a statement outlining policies for use of copyrighted materials in education-media literacy contexts.

### **Discussion of the Study**

In order to gather data, the researchers contacted teachers, media literacy curriculum producers, and organizational leaders. While many of the participants worked in K-12, a number of them were from universities. Interviews were conducted by phone and lasted about 45 minutes. According to the researchers, the interview questions were open-ended and

explored how teachers use copyrighted materials for education and asked teachers to describe how their students use copyrighted materials in student-created coursework.

A unique aspect of the study was that all interviewees were named along with their area of expertise and institutional affiliations – 62 participants are listed in the appendix, about 30% are associated with teaching in K-12. Many of the participants were from the geographical regions near Temple University (Pennsylvania), but some were from as far away as California. The researchers did not describe their participant recruitment methods in the report except that they did use membership lists of various organizations, including the Action Coalition for Media Education, Alliance for a Media Literate America, The National Council of Teachers of English, the Student Television network, the National Alliance for Media Arts and Culture, and the Youth Media Reporter (p. 23).

The major finding of the study was that the key goals of teaching media literacy were “comprised by unnecessary copyright restrictions and lack of understanding about copyright law” (p. 1). Because of participants’ lack of knowledge and understanding about the law’s protections, their ability to share, teach, and have students produce media-rich texts was severely circumscribed. Not only that, but the researchers found that teachers’ lack of knowledge was passed on to students as well as colleagues, perpetuating “copyright folklore” (p. 12) that often characterized the law as much more restrictive than it is.

Additionally, the study offered the following findings:

- During the last decade, copyright awareness has greatly increased among the educational community.
- Teachers believe that the ability to access and use copyrighted materials is central to educating citizens, and is a necessary component to maintaining a democracy. “More than any other feature of copyright law, fair use recognized the core speech values enshrined in the first amendment” (p. 6).

- Too many teachers are unaware of the expansive nature of fair use, and instead rely on various “Guidelines” circulating on the web and adopted by some institutions. The guidelines have varying histories, but are mainly products of the publishing industry.
- Teachers are confused about the differences between plagiarism and copyright, and talk about the two interchangeably although they are separate doctrines (attribution is irrelevant to the issue of “fair use”).
- Teachers received their information from the media, their institutions, and lore. The information they receive either negates fair use or casts it in a conservative light.
- Many institutions have extremely restrictive policies about using copyrighted materials – including how students’ texts can be displayed. For example, some schools would only let student multimedia pieces be displayed in individual classrooms rather than on school-wide media display systems. Such policies fail to recognize fair use as a legitimate part of US law.
- Gaining permission from copyright holders for educational use was not “an option among interviewees” (p. 10). Either the permission was not granted, or the fee requested was unreasonable in the context.
- Teachers’ lack of understanding (characterized as “cognitive dissonance” by the researchers), caused them to develop three coping mechanisms: 1) studied ignorance; 2) quiet transgression; 3) hyper-compliance (p. 14).

“Studied ignorance” was defined by the researchers as the “what I don’t know can’t hurt me” attitude. Teachers believed that if they stayed ignorant of the laws, they didn’t need to worry

or comply. “Quiet transgression” described teachers’ willingness to do what they considered illegal with the hopes that they were unlikely to get caught. “Hyper-compliance” was defined as teachers who created blanket prohibitions in the area of student work especially – such as not permitting students to use any copyrighted materials in their own coursework.

The “costs” of this confusion, according to the report, are less effective teaching materials, constriction of creativity for teachers and students, and the perpetuation of misinformation. Recommendations included developing a code of practice or a statement of fair use practices to assist the educational community. As an example, the authors refer to the recently developed Documentary Filmmakers’ Statement of Best Practices in Fair Use which have been negotiated with the Cost of Copyright Confusion co-authors along with documentary filmmaker organizations. Apparently, the Statement had an immediate effect. “Filmmakers themselves, commercial networks, and the Public Broadcasting System all refer to it on a regular basis . . . it has permitted filmmakers to portray reality as they see it without compromise” (p. 23).

## **Implications for Educators and Writing Teachers**

The study, conducted through Temple University’s Center for Social Media and funded by the John D. and Catherine T. MacArthur Foundation, connects to teachers of writing both directly and indirectly. It’s directly connected to us as writing teachers in two ways. One, the reports’ co-authors are Renee Hobbs, founder of the Media Education Law at Temple University School of Communication, Peter Jaszi, Program on Information Justice and Intellectual Property in the American University Washington College of Law, and Pat Aufderheide, Center for Social Media at American University School of Communication. Notably, Peter Jaszi has in the past, co-authored pieces with Martha Woodmansee (1994, 1995) regarding the teaching of copyright in the context of composition instruction. Two, the report states that study participants were recruited from various membership lists, including the National Council of Teachers of English (NCTE).

The study is indirectly connected to us simply because it is situated in existing scholarship within our field on a number of issues. For a small example consider the issue of copyright and chilled speech (Porter, 2005; Westbrook, 2006), ethics, copyright, and fair use (DeVoss & Porter, 2006), first amendment and copyright (Herrington, 1998), the teaching of fair use (Logie, 1998; CCCC IP Caucus statement; Walker, 1998), importance of understanding the TEACH Act (Reyman, 2006), and rhetorical tactics used to scare potential content users (Logie, 2006). I think we will all agree that the Cost of Copyright Confusion study speaks to issues that many of us care about. But what should we do, based on this study? One thing that we are already doing is working in this area in a way that is relevant to the teaching of composition and rhetoric. I have listed some existing scholarship in composition studies as a small example. This work should of course continue.

As such scholars (Herrington, Logie, Porter, DeVoss, etc.) have already suggested, we as composition teachers should take ownership of these issues. While I commend the Center of Social Media for its important work in the area of teaching, copyright, and fair use, I also implore researchers in rhetoric and writing (R&W) to conduct their own research with their own methodologies, and in a fashion that makes sense to us in R&W. For example, while researchers with the Cost of Copyright Confusion study interviewed 62 individuals about their understanding and practice regarding fair use, it seems to me that an important population was not included, and that is the students who also need fair use rights, and who are also impacted by the so-called “misinformation” that their teachers are passing on. Student perspectives would add rich details to the study’s findings. For a beginning, see Sue Webb’s (2008) reflection on composing and displaying her “Grand Theft Audio” multi-media piece.

The idea of developing a statement of fair use has previously been addressed in our field. We do have the existing CCCC IP Caucus (2000) fair use statement, but that was published almost a decade ago. It might be worthwhile to consider updating, renegotiating, and re-publishing this statement, perhaps using the CCCC IP caucus as a vehicle to do so. Including other stakeholders might give such a statement more punch. I am thinking of

organizations like NCTE and affiliates, the American Association of University Professors, and perhaps key textbook publishers like Bedford/St. Martin's, Erlbaum, and so on. We might enlist the help of Educause (through our institutional representatives). With collaborations like this, teachers and researchers within R&W should explore and pursue funding opportunities such as that offered by the MacArthur Foundation. These kinds of funds will support our work and further our expertise and legitimacy as experts of new-media writing.

Apart from direct political action, I think as new-media specialists we also want to take it upon ourselves to self-educate on copyright and fair use, and develop accurate and appropriate curriculum. We should make a space for this in our writing programs and professional development seminars. To do otherwise runs the risk that statements on fair use will be developed by lawyers outside our field rather than us: "us" as the experts on writing and the teaching of writing, for whom fair use is central.

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## ***The National Institutes of Health Open Access Mandate: Public Access for Public Funding***

*Clancy Ratliff, University of Louisiana at Lafayette*

In December 2007, President Bush signed into law the NIH Open Access policy, which concretized what had been an agenda item in the open access movement for over three years. This policy requires scholars who receive NIH funding for their research to submit copies of publications based on that research to PubMed Central, an open access repository. They must do this within 12 months of the article's publication in a professional journal or other scholarly venue. In the following report, I will describe the timeline and reasons for the policy, how the policy works, and its implications for research in disciplines other than the medical sciences, including rhetoric and composition.

### **Original Proposal and Rationale for Open Access to NIH-Funded Research**

What is now the open access mandate was for over two years prior only voluntary. The original policy was proposed in 2004 by the House Appropriations Committee and sponsored by Ralph Regula, a Democratic congressional representative from Ohio. A report filed by the Committee in July 2004 explains the need for an open access policy (emphasis mine):

The Committee is very concerned that there is insufficient public access to reports and data resulting from NIH-funded research. **This situation, which has been exacerbated by the dramatic rise in scientific journal subscription prices, is contrary to the best interests of the U.S. taxpayers who paid for this research.** The Committee is aware of a proposal to make the complete text of

articles and supplemental materials generated by NIH-funded research available on PubMed Central (PMC), the digital library maintained by the National Library of Medicine (NLM).

The problem of subscription rates for scholarly journals and the public interest argument come directly from open access rhetoric, including positions taken by members of the CCCC Intellectual Property Caucus. Arguing from the taxpayers' interest in this context also sets an important precedent for government-funded research in other disciplines. It is unclear exactly why such an open access policy would originate in research in the health sciences, but one obvious speculation is the need, from a public health standpoint, to share research results quickly and inexpensively in the service of eradicating chronic conditions and infectious disease. Another is the relationship between researchers in the health sciences and pharmaceutical companies, which can be complex and necessitate a distancing move and a claim of the research by the public. The July 2004 report goes on to recommend:

The Committee supports this proposal and recommends that NIH develop a policy, to apply from FY 2005 forward, requiring that a complete electronic copy of any manuscript reporting work supported by NIH grants or contracts be provided to PMC upon acceptance of the manuscript for publication in any scientific journal listed in the NLM's PubMed directory.

The proposed policy continued to gain ground, and in February of 2005, the NIH issued a report announcing details of the policy. They gave the following reasons as an explanation of the need for an open access initiative ("Policy on Enhancing Public Access"):

The Policy is intended to: 1) create a stable archive of peer-reviewed research publications resulting from NIH-funded research to ensure the permanent preservation of these vital published research findings; 2) secure a searchable compendium of these peer-reviewed research publications that NIH and its awardees can use to manage more efficiently and to understand better their research portfolios, monitor scientific productivity, and ultimately, help set research priorities; and 3) make published results of NIH-funded research more

readily accessible to the public, health care providers, educators, and scientists.” These reasons demonstrate the potential of an open access repository, especially an organized and searchable one, to provide an aerial view of the history and evolution of a discipline for any interested reader. In rhetoric and composition, a similar (though not open access) effort is Collin Brooke and Derek Mueller's transformation of *CCC Online* into a dynamic, categorized, searchable archive.

In addition to laying out the intentions of the policy, the February 2005 report addressed several objections to it, including its perceived incompatibility with copyright law and its conflict with the market interest, particularly that of journal publishers. The NIH responded to these criticisms by citing the government purpose license, which applies generally to work by government contractors and allows government agencies some rights to copyrighted or patented work. They also pointed out one of the policy's provisions, which states that authors may wait up to twelve months to post their articles to PubMed Central. The holding period is a concession for journal publishers to address the objection that they may lose subscriptions as a result of the policy.

Starting in 2005, per the Appropriation Committee's recommendation, recipients of NIH funding were encouraged -- but not required -- to submit their publications to PubMed Central, a government repository of open-access medical research publications. According to Peter Suber, a senior researcher at the Scholarly Publishing and Academic Resources Coalition (SPARC), compliance rates were low under the voluntary system: in February 2006, the rate was below 4% ("NIH FAQ"). Throughout 2006 and most of 2007, the House and the Senate argued over specific matters related to language in the bill and budgetary concerns, as PubMed Central is part of the NIH budget, and the costs rise with the number of submissions and the heft of repository use ("SPARC Open Access Newsletter, August 2007"). After passing in the House and the Senate, President Bush signed the open access policy into law on December 26, 2007, the language of which states:

The Director of the National Institutes of Health shall require that all investigators funded by the NIH submit or have submitted for them to the

National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law.

While open access advocates have expressed disappointment that the "embargo period" is not shorter than twelve months, most agree that the NIH's policy is progressive and moves research in general closer to the public interest. The policy will help researchers in the health sciences share their research on a global scale and will, ideally, enable innovation. It will go into effect on April 7, 2008.

## **Implications for Research in Other Fields, Including Rhetoric and Composition**

Rhetoric and composition studies are not fields that are historically well funded by government agencies such as NIH (a possible exception being technical communication), but the NIH Open Access Mandate, with its driving argument as the issue of fairness and the public interest – the public funded it, so the public should have access to it – has two key implications for research in the sciences, social sciences, and humanities, including rhetoric and composition:

1. Other government funding organizations (National Science Foundation, National Endowment for the Arts, National Endowment for the Humanities, Dept. of Ed.) may decide to implement similar policies. Open access advocacy will be necessary for this effort, and publishers will lobby against it, but a precedent has been set nonetheless. The Alliance for Taxpayer Access, an alliance of 84 different libraries and advocacy groups for sufferers of specific diseases such as cystic fibrosis and AIDS, will continue with SPARC to push for open access to all government-funded research. I recommend that members of the CCCC IP Caucus create awareness of this organization on our individual campuses and encourage our libraries to join the ATA.

2. This policy may encourage similar policies at the state or university level, such as ScholarWorks at the University of Kansas. Faculty at the University of Kansas, starting in March 2005, have been encouraged to submit their research to ScholarWorks on the grounds that doing so will increase its visibility and cause it to be cited more often, and administration at KU has provided faculty with language to use when requesting publishers' permission to post work to ScholarWorks ("Resolution on Access"). The University of California system and the Massachusetts Institute of Technology also have such repositories.

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## ***"Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video"***

*Laurie Cubbison, Radford University*

In December 2007, the Center for Social Media, led by Pat Aufderheide and Peter Jaszi of American University, released "Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video", a study of the use of copyrighted material in videos produced by amateur video producers and posted online to Youtube.com and many other sites. In this study, the authors examine and categorize the ways in which such material is used and argue that Fair Use guidelines can apply to much of the work being produced and posted online.

The study frames the practices of amateur video producers in relation to participatory culture as described by Henry Jenkins, Lawrence Lessig, Yochai Benkler, Rosemary Coombe, Kembrew McLeod and others. The report argues that copyright owners "are shaping the emergent environment with private regulation and legal actions. They are doing so largely without information about creator practices in this unprecedentedly participatory popular culture". Thus, the goal of the study is to describe the uses of copyrighted material and argue that many of the practices constitute fair use.

The report defines fair use and describes its implications for video production, in particular the aspect of fair use related to whether or not a use is transformative. It also refers to the role of communities of practitioners in developing statements of how to meet fair use guidelines by citing a 2005 report also published through the Center for Social Media: "Documentary Filmmakers' Statement of Best Practices in Fair Use" by the Association of Independent Video and Filmmakers, the Independent Feature Project, the International Documentary Association, the National Alliance for Media Arts and Culture, and the Washington, D. C. chapter of Women in Film and Video. That statement detailed guidelines for documentary producers who wished to use copyrighted materials for critique, illustration, ambiance, and/or historical significance. The 2005 statement also distinguished between

material that must be licensed and those uses which qualified as fair. Aufderheide and Jaszi cite the statement by documentary makers as an example of a community of producers whose claims about fair use have been accepted by copyright stakeholders, and they identify similar uses of copyrighted material among amateur video producers. However, in the more recent "Recut, Reframe, Recycle", they describe other kinds of practices using copyrighted material that may also be considered fair use, even if using a significant amount of quoted material.

Even though fair use may be applied to the use of copyrighted materials by amateur video producers, Aufderheide and Jaszi point out that producers may fall afoul of the Digital Millennium Copyright Act, since a copyright holder may require a hosting company to remove a user-generated file which contains copyrighted material, even if that material may qualify as fair use. The aim of this report, according to its authors, is to clarify the fair use issues for online video by detailing "the difference between quoting for new cultural creation and simple piracy" while also "clarify[ing] the significance of the legal doctrine of fair use within the online environment" .

According to the report, the study "conducted an environmental scan of online video practices between September and December 2007" for video that had been created by amateurs, posted to the Internet, and which indicated a degree of originality and/or transformation . Sites scanned included YouTube, Revver, Google Video and many others, with researchers using search engines and contributed links to find the materials in question. According to the report, the researchers distinguished between videos with no copyrighted material, those which were exclusively copyrighted and contained no user-generated content, and those "that incorporated copyrighted works into new creations" , the latter category being the subject of the study.

The researchers identified nine categories of use of copyrighted material within amateur online video: 1) parody and satire; 2) negative or critical commentary; 3) positive commentary; 4) quoting to trigger discussion; 5) illustration or example; 6) incidental use; 7) personal reportage or diaries; 8) archiving of vulnerable or revealing materials; and finally 9) pastiche or collage . The report specifies parody/satire as particularly popular, with

celebrities, politicians, and popular culture texts such as movies and television shows as common targets. This usage is significant, since courts have consistently supported fair use in relation to parody. Closely related to parody was negative critique, much of which was political but which also included meta-commentary on media texts. Positive commentary included tributes to deceased celebrities such as Steve Irwin as well as fan tributes to particular movies and television shows. The category of quoting to trigger discussion included much evaluative material, with the copyrighted material often being framed as the best or worst within a particular category as specified by the poster. The illustration or example category included copyrighted material in order to support a thesis, and Aufderheide and Jaszi point out the importance of this type of use in the statement by the documentary filmmakers. Incidental use also mapped to the documentary statement in that these videos often contained copyrighted material as a backdrop to other activities. The personal reportage/diary category generally included material in which the video's producer appeared on a television show or with a performer in a way that featured the producer in the context of someone else's copyrighted material, as when a fan goes onstage to participate in a concert. The archiving category included videos that the poster perceived as vulnerable to censorship or lack of publication, including various statements by public figures that the posters wish to keep in the public eye. Finally, the pastiche/collage category included a wide variety of materials which may or may not include critique but which juxtapose images and sounds in order to create a specific effect on the viewer.

## **Implications**

Although this report specifically addresses online video, its implications for fair use extend to a variety of other practices by "the people formerly known as the audience", from the creation of fan fiction and fan art to multimedia presentations for the classroom. By categorizing the kinds of use of copyrighted materials and indicating ways in which these uses may or may not meet Fair Use guidelines, "Recut, Reframe, Recycle" frames the conversation about the Fair Use of copyrighted materials in ways that acknowledge the creativity that media consumers apply to the texts they consume. These implications extend

to the classroom, where students may construct multimedia presentations that use copyrighted material and then may wish to include them in electronic portfolios posted to the Internet. In fact, it would be worth determining in an additional study how many of the videos in the commentary and illustration categories began as class projects. As yet, however, no actual legal precedents exist to clarify the fair use guidelines of these materials, particularly in the context of the Digital Millennium Copyright Act.

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## ***One Laptop Per Child Program Threatens Dominance of Intel and Microsoft***

*Kim Dian Gainer, Radford University*

### **Overview**

For the past three years, several companies and organizations have been competing over what model to follow in making computer hardware and software available to primary and secondary students in the developing world. The outcome of this competition may have a serious effect upon the question of whether open source software will make inroads against the Microsoft operating system that is installed in the vast majority of computers.

### **Background**

In 2005 Nicholas Negroponte, co-founder of the Massachusetts Institute of Technology Media Laboratory, announced the formation of the nonprofit One Laptop Per Child (OLPC) Foundation, an organization dedicated to the goal of placing a low-cost laptop in the hands of each child in participating developing nations. The foundation proposed to develop a rugged laptop that would be sold in bulk to nations that would distribute units to individual students. It was the intention of the foundation to keep the cost of each unit in the range of one-hundred dollars. That goal was not realized, and the projected price of each unit was approximately two-hundred dollars when mass production began in November of 2007. However, the technical goals of the project have been met. The XO (if you turn the logo sideways, O upwards, it is supposed to look like a child with limbs outstretched) is based on an Advanced Micro Devices processor, and its software, provided by Red Hat, is a version of the open source – and free – Linux system. Built in are a camera and microphone, and it comes equipped with a memory-card slot, a graphics tablet, and a game-pad controller. Its

screen rotates so that it can be used as a tablet. It is enabled for both Bluetooth and Wi-Fi, and even in the absence of an internet connection, the computers link with each other as part of a 'mesh network' that is established automatically whenever one XO is turned on in the vicinity of another. (The internet connection is also automatic.) It is light, weighing a little more than three pounds, in part because the need for a fan has been engineered out of it. Its battery will last for six hours and can be recharged by a pull cord. Both its screen and the system by which it is powered incorporate what many industry analysts consider to be breakthrough technology.

However impressive its technological specifications, foremost in the minds of the developers was the need to make the laptop suitable for use in developing nations. The XO was designed to be energy efficient because it is intended for use in a market where electricity may be limited. It also was designed for an environment in which conditions may be harsh and technical support lacking. It has a sealed keyboard and is intended to be spillproof and impervious to rain and dust. It may be dropped from a height of five feet without suffering damage. Impressed by its suitability for use by children in developing nations, the Smithsonian's Cooper-Hewitt National Design Museum included the XO in its exhibit of affordable inventions intended to address Third World needs in the areas of shelter, health, water, education, energy, and transport.

## **The Struggle for Market Share**

Initially, the technical appeal of the XO was not sufficient to entice many nations to participate in the project. When mass production began, the OLPC Foundation was certain of only one order: 100,000 units destined for Uruguay. To achieve the necessary economy of scale, the Foundation then adopted a "get one give one" model that was in force for the final two months of 2007. Consumers in developed nations would purchase two computers for four-hundred dollars, one to be delivered to the purchaser, the other to be delivered to a student in a developing nation.

In the opinion of some observers, developing nations may have been reluctant to order the laptop because for-profit companies were actively seeking to discourage the mass adoption of an open source product that was not Windows compatible and did not rely upon an Intel chip and thus had the potential to devalue proprietary software and hardware. For companies such as Windows and Intel, the stakes may be very high. The potential market targeted by the OLPC program is huge, consisting of two billion students in developing nations. If the OLPC program were to succeed in placing low-cost laptops in the hands of these children, for-profit corporations would not only forfeit immediate sales of laptops and bundled software; the students participating in the program might grow into adult consumers familiar with alternatives to Windows software and Intel chips.

For-profit companies, in particular Microsoft and Intel, appear to have taken a three-fold approach toward discouraging the mass adoption of the XO. First, industry spokesmen ‘talked down’ the project. Craig Barrett, the chairman of Intel, was quoted as calling the XO a “\$100 gadget” (Johnson), and Microsoft’s Bill Gates repeatedly raised doubts about the suitability of the XO for children in developing nations. The most egregious incident, however, probably took place after Peru agreed to participate in the program. Shortly afterward, an Intel representative visited a Peruvian official and roundly criticized the XO—this in spite of the fact that Intel had only a few months prior signed on to the project and pledged financial support for it. This incident caused a bitter public breach between Intel and the OLPC Foundation that included the resignation from the board of the Foundation of an Intel executive who had taken a seat on the board only a few months earlier.

Companies have also introduced competing laptops. Asus Computer International of Taiwan has had some success with individual sales of its Eee PC, sold at prices that range from two-hundred to four-hundred dollars, and reports that it is in negotiations to sell bulk orders to governments in both developed and developing nations. The Eee PC is a retail brand of Intel’s Classmate PC mini-laptop that is being sold at a price of between two-hundred and three-hundred dollars. Unlike Asus Computer, Intel markets the Classmate PC only to governments, educational institutions, and nonprofit organizations and thus has

positioned its laptop as a direct competitor to the OLPC's XO. Moreover, OLPC's Negroponte has accused Intel of offering the Classmate at below cost in order to undercut sales of the XO.

Finally, for-profit companies have sought to derail the project by offering software and services that encourage the purchase of competing laptops. In certain developing nations, Windows offers governments and schools a software bundle at a cost of \$ 3 per unit, turning its software into a loss leader for the sale of Windows-compatible hardware. As for Intel, it has initiated what it calls the "World Ahead" program,

a strategy to increase the use of computer technology in developing countries.

For example, Intel's Rural Connectivity Platform project is working on ways to extend the range of WiFi wireless networking from a few hundred feet to a dozen or more miles. Such a WiFi system could deliver cheap Internet access to remote villages, and make it easy to put the Classmate laptops online. It would also give everyone in the village an incentive to buy more computers, most of them loaded with Intel chips.

(Bray, Nov. 14, 2007)

## **OLPC Fights Back**

Negroponte had always been outspoken in defending the OLPC program, and following the revelation that Intel had sought to interfere with the Foundation's contract with Peru, he went on a verbal offensive. In addition, as mentioned above, the program initiated the "get one give one" program. Advanced Micro Devices and Red Hat continued to stand behind the program, as did other entities, such as Google. The Foundation entered into an agreement with the United Nations International Children's Emergency Fund to place UNICEF-generated educational content on the laptops. By March of 2008, orders of the XO were verging on the half a million mark. Countries participating, in addition to Uruguay and Peru, include Rwanda, Thailand, Brazil, Mexico, and Mongolia. Meanwhile, Intel has been unable to sell as many of its Classmates PCs as it had anticipated. By the end of 2007, Libya and Nigeria had signed orders for approximately 170,000 of the laptop, but Intel has suffered

significant bad press as a result of its attempt to sabotage sales of the XO to Peru.

## Implications

Interestingly, orders for the XO now include 15,000 for schools in Birmingham, Alabama. Designed for developing nations, the XO has nonetheless found a small market in the United States. This development may presage a long term threat to Intel's and Windows' dominance of the computer and software market in developed nations. At the moment, however, the battle is for control of emerging markets in the developing world. In a move that may be an acknowledgement that a low-cost open source laptop would interfere with its attempts to penetrate and dominate this market, Microsoft is now pressing the OLPC Foundation to modify the XO so that it will run Windows XP. However, the requested modifications would raise the cost of the laptop, and the Foundation has declined to alter the design of its laptop.

In addition to raising the price of the XO, the requested modifications would run counter to the Foundation's vision of children as independent thinkers in control of the learning environment. The XO is designed so that children themselves can service the computer. The battery, for example, is easily replaced. Similarly, the Foundation has embraced open source software not only for reasons of cost but also because its transparency, it was hoped, would encourage children to create their own programs or modify existing ones. As one reviewer wrote,

The OLPC is designed to follow the "constructionist" theory of education (where children learn by doing and experiencing), which means that its creators wanted every level of the machine to be tinkerable, explorable and configurable by a curious child. Both Microsoft and Apple offered their operating systems for free for the project, but were turned down in preference to open software that could be manipulated and improved upon by the OLPC's own users. (O'Brien)

That such tinkering within an open source environment may threaten the dominance of proprietary software was illustrated by a project undertaken by a group of hackers at the

Twenty-third Chaos Communication Convention held in Berlin in January of 2007. These hackers set out to enable an XO to play Flash content without the use of Adobe's proprietary Flash software. Among the group was Rob Savoy, "the creator of Gnash, a free reimplementation of Flash" that was "painstakingly coded by developers who've never agreed to Adobe's licence [sic]" (O'Brien). After several hours, Savoy and his compatriots were playing Flash movies on the XO without ever having installed Flash. Not only would their additions to the XO's open source software allow children to watch Flash; the modifications would also allow youngsters to create Flash-compatible content.

In spite of a recent upsurge in orders for the XO, it is much too soon to tell whether the OLPC Foundation will succeed in its goal of placing laptops in the hands of significant numbers of children in developing nations. However, if the Foundation does meet its goal, the above scenario suggests that control over computer applications may shift as proprietary software is bypassed by users who create their own programs or modify existing ones. For this reason, in the coming year, Microsoft and Intel will no doubt continue to battle to prevent the XO or similar open source computers from establishing a foothold in a market potentially so profitable.

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## ***Bosch v Ball-Kell: Faculty May Have Lost Control Over Their Teaching Materials***

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The case of *Barbara Bosch v Susan Ball-Kell and Ronald Rager* Not Reported in F. Supp.2d, 2006 WL 258053 (C.D.Ill. August 31, 2006), 80 U.S.P.Q2d 1713 is one of the only cases in federal court since the 1976 revision of the Copyright statutes that directly addresses faculty ownership of teaching materials. As a result, its findings have important implications for university faculty on issues of work for hire, the common law teacher exemption to work for hire, fair use, and intellectual property policies. In this short article, I will not lay out the historical framework for these arguments, several of which I address in "Own Your Rights: Know When Your University Can Claim Ownership of Your Work." Rather, I'll offer enough context to understand the issues raised by this case to highlight its potential impact on ownership and control of faculty teaching materials in American universities.

### **Case Background**

Barbara Bosch brought a copyright infringement suit against the Susan Ball-Kell and a former university Dean, Karl Rager, based on their unauthorized copying and distribution of her pathology course materials. In light of the Court's reading of the teacher exception to the work-for-hire doctrine and the history of the University's copyright policy, the Court denied the defendants' summary judgment motion on claims of work made for hire. The Court also denied summary judgment on a fair use defense so that "all facts and reasonable inferences" could be made in court where they could be fairly judged. The judge did warn, however, that the plaintiff's "ability to succeed on her infringement claim at trial is far from clear." Summary judgment was not awarded to Defense to Dismiss Contributory and Vicarious Infringement on the part of the former Dean because direct infringement by a primary

infringer required additional findings of fact. Until the fair use claim could be settled, direct infringement could not be established. The Court did award summary judgment on Plaintiffs Request for Damages and Injunctive Relief and Intentional Infliction of Emotional Distress.

While court documents before the jury trial and after are publicly available, a summary of the trial itself is not. The following analysis is derived from public court documents, several documents collected from the plaintiff, and a personal interview with the plaintiff in the Spring of 2007.

The full historical details that pressed Barbara Bosch to file suit against Susan Ball-Kell and Dean Karl Rager are worth noting but are beyond the scope of this case summary. The record represents a story of outrageous treatment of Bosch, which led to a Senate Committee on Academic Freedom and Tenure report that censured the Dean for “interference with a department’s curriculum affairs,” creating “an environment hostile to intellectual enquiry and academic debate,” “attempting to isolate Dr. Bosch physically, by locking her out of her office and other department areas, and by ordering department staff not to communicate with her,” “casual disregard for the tenure system,” and “condoning of the use (and seemingly even of the purloining) of intellectual property of a faculty member for someone else’s use” (13).

Bosch filed for copyright on her pathology teaching materials and later filed a copyright lawsuit Ball-Kell and Dean Rager for materials that Ball-Kell continued to use under her own name after Bosch filed her claim. Soon thereafter, Bosch resigned her position as Associate Professor and took a position at another medical school. Before the case went to court, Dean Rager finished his term as Dean and Ball-Kell stopped teaching in the department. The University hired an extremely aggressive law firm to defend the case. After multiple motions were filed and adjudicated, the case went to court.

The jury found that Bosch owned two of three documents she claimed. It also found, however, that the University had a right to use her course materials under fair use provisions. She filed a motion for a new trial based on bad jury instructions, which was denied.

The University filed for compensation for all court fees of over half a million dollars. The Court awarded the University half of the allowed fees, \$256,391.25 *Not Reported in*

*F.Supp.2d*, 2007 WL 2994085 (C.D.Ill. Oct. 11, 2007), an amount on top of what she had already paid her own attorney for several years of legal work. The case is in the final stages of settlement in March 2008.

## **Arguments**

Two primary arguments concern faculty and their teaching materials: 1) whether Bosch should retain ownership of her teaching materials or whether they belong to the university as work for hire; and 2) Even if Bosch retains ownership, whether the university has fair use rights to them without her permission.

## **Copyright Ownership of teaching materials or Works for Hire?**

The court ruling on “Works Made for Hire” appears to be the most definitive rejection of work for hire ownership in academia to date. The Court held that “in an academic setting, an employee may be assigned to teach a particular course, but then is generally left to use his or her discretion to determine the focus of the topic, the way the topic is going to be approached, the direction of the inquiry, and the way that the material will ultimately be presented” *Bosch v. Ball-Kell*, No. 03-1408, 2006 WL 2548053, at 7 (C.D. Ill. Aug 31, 2006). When the Defendants argued that “these cases apply solely to faculty publications for scholarly review or self-promotion,” the Court held that it “does not read the cases that narrowly,” but qualified that “Bosch does not rely solely on the case law.” The Court found arguments of *Weinstein v. University of Illinois* and *Hays v. Sony Corporation of America* so compelling that it recognized the survival of the common law teacher exemption in the 1976 Copyright Act. As a result, the Court deferred to language of the UIC Intellectual Property Policy, minutes concerning the implementation of the policy, the Senate Committee on Academic Freedom and Tenure report condemning Dean Rager’s behavior, and the American Association of University Professors Statement on Copyright to determine “legislative intent” of language in the policy. This evidence proved that the term “class notes” included teaching

materials such as course syllabi within the definition of Traditional Academic Copyrightable Works from the UIC IP policy. This determination convinced the jury that Bosch owned two of the three sets of copyrighted materials that she had registered.

## **Fair Use Defense Upheld for Use of Teaching Materials**

While *Bosch v Ball-Kell* may have set a new standard for determining faculty ownership of their teaching materials at universities, its findings of fair use of those same materials has set what may be a new and troubling standard. The defense asserted that even if the works in question could not be defined as Works Made for Hire, the Defendant's use of the materials was fair use according to section 107 of the Copyright Act. In the absence of a trial summary, I piece together below the decision on an affirmative fair use defense from the summary judgment hearing, "Plaintiff's Motion for New Trial and to Alter or Amend Judgment," and the Court's response to combined "Plaintiff's Motion" and "Defendants' Rule 50 Motion to Direct Entry of Judgment." The jury decided that use of the materials was fair use based on the standard four-part test:

### ***Character***

There was no doubt that the works were for educational rather than commercial purposes. The works were not deemed transformative in any way *Cambell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), citing *Harper & Row*, 471 U.S. at 562. In fact, evidence was presented that Bosch's name was removed from the documents and replaced with Ball-Kell's. In the Plaintiff's Motion for a New Trial or Alter or Amend Judgment, the Court held that in a case like this which concerns educational purposes, "factor one will normally tilt in the defendant's favor." *Nixiom Corp. v. Ross Institute*, 364 F. 3d 471,477 (2<sup>nd</sup> Cir.2004), cer. denied, 543 U.S. 1000 (2004). Summary judgment was not granted concerning "[e]vidence of bad faith conduct or predatory intent" *Sony Corp. V. Universal City Studios.*, 464 U.S. 417, 448 (1984); *Weissmann v. Freeman*, 8a68

F.2d 1313, 1323 (2<sup>nd</sup> Cir. 1989). Bad faith was not found, however, at trial.

### **Nature**

The works in question were found to be largely factual and scientific in nature rather than creative, despite the fact that fair use “has not been traditionally recognized as a defense to charges of copying from an author’s as yet unpublished works” *Not Reported in F. Supp.2d, 2006 WL 258053* (C.D.Ill. August 31, 2006), 80 U.S.P.Q2d 1713

### **Amount**

Defendants contended that their use of teaching materials was *deminimus* and insubstantial, amounting only to 21 pages. This claim proved convincing because ownership to the third set of materials was awarded to the University by the jury. Despite the fact that Bosch’s former Chair gave her the “General Pathology Course Introduction” with the intent to transfer copyright, the jury was convinced that documents in question were developed by her former Chair “specifically for the University’s General Pathology Course in the scope of Dr. Bartlett’s employment and had been given to students in that course for many years” *Defendants’ Rule 50 Motion to Direct Entry of Judgment as a Matter of Law and Plaintiff’s Motion for a New Trial and to Alter or Amend Judgment Not Reported in F. Supp.2d, 2007 WL 2572383* (C.D.Ill. Aug 29, 2007).

### **Impact on Market**

Bosch contested that the “Court erred in instructing the jury to find in favor of Defendants on factor four of the fair use defense . . .” because “she was entitled to an instruction allowing the jury to determine whether unrestricted and widespread conduct of the sort engaged in by Defendants would result in a substantially adverse impact on the potential market for the original. *Not Reported in F.Supp.2d, 2007 WL 2572383* (C.D.Ill. Aug. 29, 2007). The Court held that Bosch made no attempt to publish these works, and the Defendants used the works in the same way as Bosch for

classroom purposes. Furthermore, “Bosch fails to acknowledge the fact that there was no evidence produced at trial from which a reasonable jury could have discerned any impact on the potential market or value of the works. Therefore, the question of harm or market for the works would amount only to “rank speculation.”

## **Implications for Ownership of Teaching Materials**

1) The extraordinary summary of works made for hire, the assertion that the teaching exemption for works in academia survived the 1976 Copyright Act, and the reliance on university intellectual property policies with emphasis on legislative intent make this case a must read for any ownership dispute of teaching materials at a university. Unless, there are explicit statements in letters of appointment or other official university policies, this case suggests that faculty may typically own copyrights in their teaching materials. Furthermore, this case reminds us how important it is for us all to read carefully our institutions' intellectual property policies and to know how key terms are defined such as Substantial University Support, Traditional Works of Scholarship, Instructional Works, and Institutional Works (see *Own Your Rights* for a full analysis of IP policies).

2) On the other hand, this case alerts faculty that universities may have rights that enable them to use some of our teaching materials without our permission even if we own the copyrights outright. Some universities have formalized this relationship by "unbundling" intellectual property rights for teaching materials by retaining perpetual licenses for use while faculty retain other rights. Many programs desire such rights to insure consistency and continuity of academic programs. This case also suggests that publishing teaching materials, documented plans to use them in research or a textbook, or other demonstration of market value can give faculty greater control of their teaching materials if a dispute arises over them.

3) It behooves us all to note further the chilling effect this case has on future litigation over these issues. The emotional, financial, and professional costs of such litigation are devastating. Universities that threaten litigation can point to this case to coerce faculty into

controlling contracts or unfair practices. Bosch was motivated to pursue her rights, but has paid dearly for them. It is unlikely that such a case will move through the Federal courts for quite some time.

For all of these reasons, *Bosch v. Ball-Kell* may become a landmark case like *Weinstein*, *Hays*, and *Cambell*. It has certainly provided us with ample reasons to know our rights over our teaching materials.

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