

MAJOR INTELLECTUAL PROPERTY DEVELOPMENTS of 2006 for SCHOLARS of COMPOSITION, RHETORIC and COMMUNICATION

The first of the enumerated goals in the Intellectual Property Committee of CCCC's mission statement reads as follows: "keep the CCCC and NCTE memberships informed about intellectual property developments, through reports in the CCCC newsletter and in other NCTE and CCCC forums." To this end, the Intellectual Property Committee is, with this publication, delivering its second annual report on major developments in intellectual property law, policy, and research. The following four articles — written by volunteer scholars from the Intellectual Property Caucus (CCCC-IP) — will serve to inform and orient others in the field who increasingly find themselves engaged with intellectual property questions as they pursue their teaching and research. I am grateful for these contributions to our better understanding of these challenging and fluid concepts.

*John Logie
Chair, Intellectual Property Committee
Associate Professor of Rhetoric
University of Minnesota*

Virginia High School Students Rebel Against Mandatory Use of Turnitin.com
Wendy Warren Austin, Ph.D., Edinboro University of Pennsylvania

OVERVIEW

In 1996, John M. Barrie founded iParadigms, LLC, and began marketing Turnitin.com, a plagiarism detection service (PDS) that has since become the most widely adopted PDS at many universities and high schools. In 2003 and again in 2005, two Canadian college students refused to submit their student work to the Turnitin database through their McGill University classes that mandated using the service. In both cases, the McGill University Senate decided in favor of each student's right to have their papers graded without running them through the Turnitin database. Until September 2006, no students in U.S. schools and universities had publicly objected to having their papers submitted to the database on a mandatory basis. However, that changed when a number of students at McLean High School in Fairfax County, Virginia, circulated a petition objecting to having their student papers uploaded to the school's newly adopted Turnitin.com. Seven students formed the Committee for Students' Rights, rounding up 1,190 student signatures. Their petition simply requested that the school remove the mandate to submit their papers and allow an opt-out option.

The students contacted a reporter at *The Washington Post* who wrote a front-page article called "Students Rebel Against Database Designed to Thwart Plagiarists," (Glod, 2006) which was subsequently circulated via the *Washington Post* newswire to many papers,

such as the *Seattle Times*. Immediately, bloggers also began writing about and discussing this situation on such blogs as *The Wired Campus* from *Chronicle for Higher Education* (Read, 2006), *PBS.org* (Carvin, 2006) and *Ed-Tech Insider* (Hoffman, 2006). Also, one of the students who helped organize the Committee for Students' Rights, Ben Donovan, appeared on the *Today Show*.

After students presented their petition to school officials, McLean High School decided to change its policy to exclude juniors and seniors from the mandate, with plans to reinstate it after those two cohorts graduated. While the students' list of reasons against Turnitin.com did include the school's mandatory application of it for all student papers, this was certainly not the only one. Their primary issues with Turnitin.com, include:

- 1) **The presumption of guilt**—The idea of “guilty until proven innocent” prevails in this model of plagiarism detection, especially when the submission of papers is deemed as mandatory, not voluntary.
- 2) **The violation of a students' privacy**—Even though the school district claims the submissions are anonymous, by virtue of the password authentication process through an off-site server, students still have to input their email addresses and names.
- 3) **The violation of intellectual property laws**—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 even though they add considerably to the products' 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.

DEVELOPMENTS

On October 16, John Barrie attended a McLean High School Parent Teacher Student Association (PTSA) meeting to address the Turnitin.com concerns, although from student and parent reports, he did not do so satisfactorily, instead saying things like “[I]f Harvard, Yale, and other Ivy League schools use it, it certainly can't be bad,” and denying that there were any intellectual property issues involved with the use of his product. In fact, at that time, most (or all) of the Ivy League Schools had not adopted Turnitin because they felt it created a culture of mistrust. Soon after this date, however, Harvard became the first Ivy League school to announce that they were going to adopt Turnitin, albeit on a pilot basis. None of the other schools has yet adopted the service.

A local attorney, Robert Vanderhye, offered to represent the McLean Committee for Student Rights and subsequently sent a detailed letter dated November 15, 2006, to John Barrie requesting that if/when students submitted any of their papers to Turnitin.com, Barrie would agree to remove those student papers from its database within a week of the paper's submittal. If they would not, Vanderhye's clients would sue iParadigms. The attorney received a phone call from iParadigms in response to the letter, indicating they

were not going to respond to the request. Vanderhye's clients then filed suit in federal court in Alexandria, Virginia, for copyright infringement. Barrie's company promptly followed up the request with a countersuit against the high school student committee, but when a reporter from the *Washington Post* called Barrie to seek information about this countersuit, he replied, "What suit?" (Donovan, 2007). It was found that the countersuit was actually dismissed on December 20.

Back in McLean High School, the PTSA Executive Board asked the principal for an update on the Turnitin situation. In a letter dated December 21, 2006, Principal Paul Wardinski reported to them that:

Mr. Vanderhye sent several letters threatening to bring a lawsuit for damages and injunctive relief against Turnitin if the company did not acquiesce in Mr. Vanderhye's legal interpretation, and if it did not withdraw the students' papers from the Turnitin database.

From the correspondence we have seen, it appears that Turnitin engaged in settlement discussions with Mr. Vanderhye and the Committee and proposed a technical solution to the school's primary concern. . .

The letter, which is posted on a site called *DontTurnItIn.com* that contains most of the pertinent data related to this situation, goes into more depth (Wardinski, 2006), but, according to a letter written in response to Wardinski's, (Donovan, Bouchard, Gayer, and Kaylor, 2007) much of the information contained in it was misleading or inaccurate. At another McLean High School PTSA meeting in early 2007, another representative from the school district came to address more questions the two letters had raised, scolding the parents for harping on the issue, and dismissing their concerns by saying that they shouldn't get upset at the principal's letter because he didn't even write it himself. Many of the parents were shocked at this statement because "*the whole debate is about academic integrity* and here he is saying the writer of the first letter didn't even write it himself and he's telling us we shouldn't worry about the whole issue" (personal communication, Rose Donovan, March 17, 2007).

A major help to anyone wanting to find out more details about this situation is a very nicely done web site that one or more of the parents of the students involved with the Committee on Students' Rights helped establish called *dontturnitin.com*. In addition to the "Welcome" page as a home page showing an overview of the situation, the site features pages that contain "Links and Other Information," "What is turnitin.com?," "Primary Issues," and "How You Can Help." The "Links" page is especially useful for its breakdown into documents and links marked "From the Students' Perspective," "From the McLean High School Administration and PTSA," "From the Press," "From Parents and Counsel," "From turnitin.com," and "Additional Links about turnitin.com."

RELATED EVENTS and DISCUSSIONS

About the same time that all this was going on, starting in mid-September, a small number of members from the CCCC-IP Caucus was finalizing its statement regarding

recommendations about academic integrity and the use of plagiarism detection services, a statement that had been presented to the Caucus earlier that year in draft form at the 2006 CCCC. The statement is posted online at <http://ccccip.org/files/CCCC-IP-PDS-Statement-final.pdf> as a link connected to the CCCC-IP blog.

At Grand Valley State University, Charlie Lowe, and two other writing professors developed a statement for their faculty, outlining concerns they had with the adoption of turnitin technology at GVSU. Brock Read's article of Sept. 19 in *Chronicle of Higher Education* and in *The Wired Campus* blog, "The Pros and Cons of Turnitin" mentions their statement, as well as a lengthy blog entry and comments with responses section, starting with a post by Michael Bruton, who works for iParadigms helping schools install and implement Turnitin.com. This thread was one of the most open discussion forums to date between compositionists and PDSs advocates. The *School Library Journal* reported (Oleck, 2006) that the University of Kansas at Lawrence was not renewing their subscription to Turnitin because of faculty's negative reactions and IP concerns.

At George Mason University, the journal *Inventio: Creative Thinking about Learning and Teaching* published a feature webtext article in their Fall 2006 issue called "(Mis)Trusting Technology that Polices Integrity: A Critical Assessment of Turnitin.com" (Donnelly, et. al, 2006). The authors explore many of the same issues about consent and intellectual property that concern the students and parents at McLean High School.

A few more dubious contributions to the McLean High School situation and issues surrounding it include an unsigned article on a site called EssayFraud.org dated October 20, 2006 called "Guilty Until Proven Innocent: The Well-Known Secret about Turnitin.com." At almost all the blog sites that mentioned these issues about this time or a little after, someone named Dan pointed out this article and its link to others. It may or may not be a coincidence that Dan is the name of one of the students on the Committee for Students' Rights, but the lack of attribution on the EssayFraud.org page anywhere makes it difficult to include within a serious bibliography on the subject. Nevertheless, the article is pretty well researched.

This spring, in the online version of *BusinessWeek*, Doug MacMillan's article (2007) mentioned a backlash against Turnitin.com from McLean High School students, citing privacy and intellectual property concerns. The CCCC-IP and our statement addressing plagiarism detection services were mentioned in the article, along with a (mis)quote from Michael Day, which prompted him to write a public apology on the CCCC-IP blog. If journalists can eventually translate our viewpoints translated clearly and correctly in the mainstream press, we might be better able to maintain momentum and visibility. Even so, it's possible that "the only bad publicity is no publicity."

IMPLICATIONS FOR COMPOSITIONISTS AND RESEARCHERS

Being able to articulate our positions in sound-bite or quote-tidbit formats might be useful in the future when or if we are asked by the press to comment on current events such as these. We must be ready to anticipate journalists' needs and their impossibly

speeded-up timetables, or else they will seek out someone else who may offer a different viewpoint than ours.

Other more direct and easy-to-control avenues for our opinions are in blog discussions and statements we author at our schools. As noted in the citations below, all three of the blogs cited above in the second paragraph posted entries *the same morning* the *Washington Post* article came out, and time was of the essence in posting blog entries and comments as all these events were taking place. Charlie Lowe, Karen Lunsford, and others urged members of the CCCC-IP listserv to jump in to the discussions with both feet. “Now would be a great time to join these conversations, post on your own blogs, send in materials to discussion lists, etc. The PDS issue is particularly important for the Caucus, as we have a document regarding PDSs currently posted for your final review...” urged Karen Lunsford in an email message on Sept. 21, 2006. So, we have to be poised to respond quickly and well to speak to these issues on any and all venues, both globally and locally. Charlie Lowe suggested we could be reaching “critical mass” as we make these voices heard. Journalists read these blogs and comments as well as scour the Internet for pertinent materials we could post, so we should take advantage of these writing situations.

Rose Donovan, mother of one of the most vocal members of the Committee for Students’ Rights at McLean High School, asked beseechingly one of the most important questions that might help bolster our claims: is there any research out there on plagiarism or plagiarists or use of plagiarism detection services vs. teaching to prevent plagiarism (i.e. instead of deterring with technology)? James Purdy’s (2005) article in *Pedagogy*, “*Calling Off the Hounds: Technology and Visibility of Plagiarism*” is one such example of research involving PDSs, but more research needs to be done. The CCCC-IP Statement urges compositionists to:

[C]onduct empirical studies to explore the effects of available strategies—including PDSs, pedagogy, and honor codes—on students’ ethical writing from sources. Such studies need to explore whether or how PDSs, pedagogy, and honor codes produce results such as these:

- Students’ proficiency and confidence as writers;
- Students’ understanding of what they can gain from completing their writing assignments;
- Students’ sense of investment in and commitment to doing their own writing;
- Students’ understanding of what constitutes plagiarism and ethical writing in a variety of contexts;
- Students’ commitment to establishing a community of integrity and mutual trust;
- Reduced incidence of cheating and fraud.

These research imperatives need to be explored more urgently than ever. Meanwhile, we need to stay alert to what is happening around us and ready to act. This has been an exciting year; 2007 may hold even more opportunities.

RELEVANT SOURCES

Bruton, Michael (2006, Sept. 15). Turnitin's response to recent posts concerning proper pedagogy. *Kairos News*. Retrieved October 16, 2006 from <http://kairosnews.org>.

CCCC-IP Caucus recommendations regarding academic integrity and the use of plagiarism detection services (2007, March). Caucus on Intellectual Property and Composition/Communication Studies. Retrieved March 17, 2007 from <http://ccccip.org/files/CCCC-IP-PDS-Statement-final.pdf>

Carvin, Andy. (2006, Sept. 22). The politics of plagiarism detection services. *Learning.now*. PBS Teachers. Retrieved March 17, 2007 from <http://www.pbs.org/teachers/learning.now/>.

Donnelly, Michael, et al. (2006, Fall). (Mis)trusting technology that polices integrity: A critical assessment of Turnitin.com. *Inventio*, 8(1). Retrieved February 11, 2007 from http://www.doit.gmu.edu/inventio/issues/Fall_2006/Donnelly_1.html.

dontturnitin.com. (2007). A forum for McLean High School parents & students. Retrieved February 25, 2007 from <http://www.dontturnitin.com/>

Glod, Maria. (2006, Sept. 22). Students rebel against database designed to thwart plagiarists. [Electronic version]. *Washington Post*, p. A01.

Hoffman, Tom. (2006, Sept. 22). Turnitin vs. student intellectual property rights. *Ed-Tech Insider*. Retrieved March 17, 2007 from <http://www.eschoolnews.com/eti/index.php>.

MacMillan, Douglas. (2007, March 13). Looking over Turnitin's shoulder. *BusinessWeek.com* Retrieved March 13, 2007 from <http://www.businessweek.com/print/technology/content/mar2007/tc20070313.htm>

Oleck, Joan. (2006, Oct. 4). Students claim Turnitin violates intellectual property rights. *School Library Journal*. Retrieved March 17, 2007 from <http://www.schoollibraryjournal.com/article/CA6377874.html>.

Purdy, James. (2005). Calling off the hounds: Technology and the visibility of plagiarism. *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture*, 5 (2), 275-295.

Read, Brock. (2006, Sept. 22). Taking a hard line on Turnitin. *The Wired Campus*. Retrieved March 17, 2007 from <http://chronicle.com/wiredcampus/>.

The well-known secret about Turnitin.com. (2006, Oct. 20). EssayFraud.org. Retrieved March 17, 2007 from http://www.essayfraud.org/turnitin_john_barrie.html

Remix as “Fair Use”: Grateful Dead Posters’ Re-publication Held to Be a Transformative, Fair Use

Martine Courant Rife, JD, Lansing Community College and WIDE Research Center, Michigan State University

CASE OVERVIEW

On May 9, 2006, in *Bill Graham Archives v. Dorling Kindersley*, the US Court of Appeals for the Second Circuit upheld the lower court, finding the use of several Grateful Dead Poster images appearing in a band biography was a “fair use” under section 107 of the US copyright statute. In the case, the publisher Dorling Kindersley used without permission seven images of Grateful Dead concert posters or tickets in the book *Grateful Dead: The Illustrated Trip* (2003). Prior to the book’s publication, the publisher had unsuccessfully attempted to negotiate permissions with the copyright holder, Bill Graham Archives. Due to what the publisher perceived as an unreasonable licensing fee, permission agreements were never reached. Nonetheless, the publisher used the seven images in the book, incorporating them into remixed compositions, consisting of collages mixed with graphic art and textual explanations and commentary. Over 2000 images were used in the book. After the book’s publication, Bill Graham Archives brought suit for copyright infringement, and requested an injunction blocking further publication.

After conducting a careful four factor fair use analysis, the Second Circuit Court of Appeals upheld the lower court’s determination in favor of fair use. The Second Circuit found that with respect to the first factor, purpose and character of the use, the use of the Grateful Dead images was transformative since the images were used in a timeline and for historical purposes rather than for the posters’ original purposes of concert promotion. On the second factor regarding the nature of the copyrighted work, the court acknowledged this factor weighed against fair use because the posters were creative. Yet, the court limited the weight of this factor because the biographical book did not exploit the creative aspects of the posters. On the third factor, amount and substantiality of portion used, the court said that even though entire images were used, their reduced size was consistent with Dorling Kindersley’s transformative use. And finally, on the fourth factor, the court stated that Dorling’s use didn’t harm the potential market because no actual market harm was sustained, and, in this case, the court wouldn’t find market harm based on “hypothetical loss” of revenue.

While some of the pro-fair use discussions within the opinion should likely be approached with caution, the opinion does hold some useful material for educators and writing teachers. Certain guidelines might be extracted from the opinion for use by students creating new media compositions (as well as alphabetic ones), and for teachers in their pedagogies. The opinion upholds the concept that one should use others’ materials thoughtfully and sparingly, but that using entire images is not necessarily prohibited as long as the images are used transformatively, in this case, remixed with graphic art, text, and additional images. More care should be taken by writers who are

composing purely “creative” works, in contrast to those who are composing something factual, historical, research based, for criticism or commentary. The opinion supports the view that permission is not always needed. And finally, the opinion brings to life the notion that hypothetically, the percentage of the new work that depends on prior work will prove determinative, even when dealing with purely alphabetic texts (the example given is a text wherein 40% of the total content was drawn from author J.D. Salinger’s letters via quotations and paraphrases). The opinion overall can be said to support using other’s work in remixes, especially when such compositions reflect synthesis of many works, including those of the remix author. According to the opinion, one might plausibly argue that the more synthesis a remix accomplishes, the more likely any uses of copyrighted material it contains will be deemed fair uses.

DISCUSSION OF THE CASE

The case came to the Second Circuit Court of Appeals after a favorable fair use judgment in the lower court, the US District Court for the Southern District of New York. The district court granted summary judgment in favor of the publisher-defendants on their fair use defense. The main question before the second circuit appeals court was to define the scope of copyright protection for artistic posters, subsequently reproduced in reduced size, in a biography of the Grateful Dead. Bill Graham Archives, LLC (BGA) owned the copyrights in the posters, while Dorling Kindersley Limited and its affiliates (DK) published the commercially available biography, in collaboration with Grateful Dead Productions. The 480-page coffee-table-book-biography, *Grateful Dead: The Illustrated Trip (Illustrated Trip)*, was published in October 2003, and told the chronological story of the Grateful Dead via the use of a timeline along with over 2000 images. Throughout the book, images often appeared as remixes, in collage form with other images and graphic art, and throughout the book, explanatory text accompanied the images. Of the 2000 images reproduced in the book, DK used seven BGA owned images that had been originally depicted on Grateful Dead posters and tickets. To be exact, DK used the following images on the following book pages, as recited in the opinion:

- 1) Concert poster depicting the Grateful Dead, Jefferson Airplane, and Big Brother and the Holding Company at the Hollywood Bowl (p.76);
- 2) Concert poster of the Grateful Dead, Jefferson Airplane, and Sons of Chaplin at the Winterland Arena (p. 103);
- 3) Image of both sides of a concert ticket for Fillmore Theatre-Winterland Arena shows (p. 130);
- 4) Concert poster for Grateful Dead at the Warfield Theater (p. 254);
- 5) Concert poster for Grateful Dead at the Oakland Coliseum (p. 361);
- 6) Concert poster for a Grateful Dead show on New Year’s Eve (p. 397);
- 7) A “fake in-house” poster for a 1993 New Year’s Eve Concert (p. 421).

Prior to publication, Grateful Dead Productions contacted BGA requesting permissions to use the images. BGA responded by offering to allow use in return for BGA's right to use Grateful Dead concert videos in CD and DVD production. Subsequently, BGA offered licensing of the images for a set licensing fee, one that DK ultimately determined to be too high. Therefore, DK used the images in the book without permission of the publisher, even though licensing was available.

Once the book was published, BGA contacted DK and demanded post-production licensing fees. DK refused, prompting BGA to file suit for copyright infringement as well as an injunction from further production of the book. After applying a four factor fair use analysis to the posters' reproduction, the lower District Court determined the use to be a fair use. BGA appealed, and the Second Circuit Court of Appeals determined the main question was to review whether DK's use of BGA's copyrighted images was a fair use.

Citing *Harper & Row*, the second circuit noted that such determinations must be made case-by-case based upon the four factors as recited in section 107 of the copyright statute:

1. the purpose and character of the use;
2. the nature of the copyright work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. the effect of the use upon the potential market for or value of the copyrighted work. (17 USC Section 107)

The court then engaged in a very detailed factor-by-factor analysis of the use, noting first that after weighing "the purpose and character of the use" factor, this factor weighed in favor of fair use. Notably, *Illustrated Trip* was a biography, while the posters were for concert promotion. According to the court, this created a strong presumption in favor of fair use. In educational contexts, we often hear statements that if a use is non-profit, than it will be presumed to be a fair use, but in this case, the court made clear that if a use is different in nature to the intended use of the original material, that too may create a strong presumption in favor of fair use.

As a counter argument, BGA argued that placing the images along a timeline was not transformative, and that additionally, each image should have had some kind of commentary or criticism in order to be a fair use. The court denied this, noting that a 30 year biography of the Grateful Dead served very different purposes than those of the original posters -- concert promotion. The court also noted that biographical use of copyrighted material is frequently supported as a fair use, because it allows for commentary, research, and criticism, as stated in the preamble of section 107, language introducing the four fair use factors. "Remix" wasn't used in the opinion as a term, however on page 12, the court noted that ". . . to further this collage effect, the images are displayed at angles and the original graphical artwork is designed to blend with the images and text . . .DK's layout ensure that the images . . .are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit the copyright artwork for commercial gain." Still discussing the first factor, "purpose and nature of the use," the court listed the exact size of the seven images, and noted that DK's images

amounted to less than 1/20 of the original size (even though entire images were used). Here, the court also noted the percentage of total copyrighted material used within a subsequent text was not determinative, citing *Harper* and *Salinger*; neither case found fair use. In *Harper*, the infringing material was only 13% of the entire copyrighted piece, while in *Salinger*, 40% of the subsequent work consisted of Salinger's quoted or paraphrased letters. On the issue of DK's commercial use of the images, the court noted that BGA's images were not used to promote the book, and the images' use was incidental to the commercial biographical value of the book.

With respect to the second, third, and fourth factors (which together took up less than half the opinion, since, as should be obvious, many of these last three factors were addressed when the court examined "purpose and character"), the second circuit agreed with the lower court that the "nature of the copyrighted work" factor weighed against fair use, since the posters were creative in nature. However, the court found this factor of limited use since the posters were not used to exploit their creative nature, but were instead used for historical purposes. On the "amount and substantiality of the portion used" factor, the court acknowledged that entire images were used. Yet, the court decided that entire images had to be used in this instance in order to communicate the history of the band. Reducing the images in this case, was deemed sufficient to overcome the presumption against fair use. Legal scholar Wendy Gordon (see reference below) found the court's analysis of influence on market value to be most interesting, because here the court held that even though licensing was available, DK could still operate under fair use. Here, the court notes that the book was not commercially successful, but if it had been, it may even have increased the potential market for the posters. Nonetheless, the present use did not supercede the market for the copyrighted work, nor did it serve as a substitute. Citing *Campbell*, the court stated that "a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images" (p.21). In other words, the availability of licensing does not necessarily preclude fair use protections under the statute. The court therefore found in favor of fair use on this factor as well – thus stating that in balancing the four factors, BK's use of the images was a fair use.

IMPLICATIONS FOR EDUCATORS AND WRITING TEACHERS

Fair use, for a significant period of time, has been of great interest to educators and particularly writing teachers (See for example Herrington, 1998; Kennedy, 2006; Logie, 1998; Reyman, 2006; Rife, 2007; Westbrook, 2006; Walker, 1998). This case provides a very clear four factor fair use analysis that should be helpful to any teacher dabbling in new media composing, either solo, or with their students in the classroom. On a pragmatic level, the opinion itself is clearly written and might provide excerpts or a starting point for further student-generated readings, research, and discussion in the classroom.

As far as its instructive qualities on conducting a fair use analysis, the written opinion itself points to the blurred and overlapping boundaries of the four factors. In its analysis of the first factor, "purpose and character of the use," the court also considers the nature of the copyrighted work as well as the amount used. Also, while the court notes on page 7

that fair use has often been upheld in biography contexts, the three biography opinions the court cites in the opinion held against fair use (*Harper, Salinger, Elvis*). Yes, the court cites *Campbell*, which many assert upheld “fair use” in the context of 2 Live Crew’s parody use of Roy Orbison’s song, “Pretty Woman,” but one must remember that the *Campbell* court remanded the final decision back to the lower court for a consideration of impact on the copyright holder’s potential market, and so was not really a “holding” in favor of fair use in the strict legal sense. Thus, while it would be nice to hail the *Graham Archives* opinion as a highly favorable upholding of fair use, the opinion should be approached with some caution.

Even so, there are many fair-use-positives in this opinion. The court clearly described and acknowledged “remixed” compositions, although it doesn’t call the mix of graphic art, text, juxtaposed images, “remix.” This court does acknowledge though that such use, in the right context, can be a fair use, remarkably, *even though licensing is available*. First noting that ultimately, a second circuit opinion is not a Supreme Court opinion, and therefore will only have precedent within the second circuit (Connecticut, New York, Vermont), we may yet generalize and extract some basic guidelines from the opinion for use in pedagogy, and as suggestions for student remixing. These guidelines might be summarized as follows:

- 1) If you are going to use another’s copyrighted image, use as little as possible (either in size or in amount) in order to accomplish your own writerly goals.
- 2) Remixing another’s materials with bits and pieces you’ve created yourself, as well as more than one outside author’s work, will make your use more likely to be a fair use. Think synthesis.
- 3) If you yourself are making something purely “creative” (a digital poem, movie, art), and using another’s material that is also “creative,” your use is less likely to be a fair use. But if you are taking a position on an issue, or creating a history or documentary meant to comment and criticize an issue or events, your use may be more likely to be fair even if the copyrighted materials you remix are creative.
- 4) Despite a culture where permission requests are increasingly required (especially via institutional policies), the fair use doctrine does not necessarily require such permission requests.
- 5) Finally, the opinion cites a case where 40% of quoted and paraphrased text came from another’s copyrighted material and notes that this creates a presumption of no fair use – therefore always contemplate your final work regardless of whether it’s pure alphabetic text or new media, and honestly evaluate whether it is truly “your own” work. If citations were done correctly, you may have avoided plagiarism, but even in a pure alphabetic essay, it does not necessarily mean you avoided potential copyright liability. The opinion provides further argument for beginning college-level writers: Most of the final written product, whether pure alphabetic text, or new media, should be your own work.

RELEVANT SOURCES

- Bill Graham Archives v. Dorling Kindersley Limited, et al.* (2006, May). USCA(2nd Cir.).
http://www.fairuse.stanford.edu/primary_materials/cases/GrahamKindersley.pdf.
- Campbell v. Acuff-Rose Music, Inc.* (1994). 510 U.S. 569, 583-585.
<http://supct.law.cornell.edu/supct/html/92-1292.ZS.html>.
- Elvis Presley Enters., Inc. v. Passport Video.* (2003). 349 F.3d 622 (9th Cir.). (Available on Find Law).
- Harper & Row, Publishers, Inc. v. Nation Enters.* (1985). 471 U.S. 539, 589-90.
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=471&invol=539>.
- Herrington, T. K. (1998). The interdependency of fair use and the first amendment .
Computers and Composition, 15, 2, 125-143.
- Hunter, R., Stephen, P., Wills, C., & McNally, D. (2003). *Grateful dead: The illustrated trip*. DK Adult.
- Kennedy, K. (2006). Google faces legal challenges in its effort to digitize university library contents. *CCCC Online*.
<http://www.ncte.org/cccc/gov/committees/ip/125703.htm>.
- Logie, J. (1998). Champing at the bits: Computers, copyright, and the composition classroom. *Computers and Composition, 15*, 201-214.
- Reyman, J. (2006). Copyright, distance education, and the TEACH Act: Implications for teaching writing. *College Composition and Communication, 58*,1, 30-45.
- Rife, M.C. (2007, June). The fair use doctrine: History, application, and implications for (new media) writing teachers. *Computers and Composition, 24*,2. Forthcoming.
- Salinger v. Random House, Inc.*(1987). 811 F.2d 90 (2nd Cir.).
http://www.law.cornell.edu/copyright/cases/811_F2d_90.htm.
- US Court of Appeals Circuit Map. <http://www.uscourts.gov/images/CircuitMap.pdf>.
- Walker, J.R. (1998). Copyrights and conversations: Intellectual property in the classroom. *Computers and Composition 15*, 243-251.
- Wendy Gordon speaks about the Graham Archive case. (2006). <http://ccccip.org/wendy-gordon-speaks-about-the-graham-arc>.

Westbrook, S. (2006). Visual rhetoric in a culture of fear: Impediments to Multimedia Production. *College English* 68.5 (May 2006), 457-80.

Joyce Estate Retreats in Copyright Battle With Carol Loeb Shloss

Kim Dian Gainer, Ph.D., Radford University, Radford, VA

OVERVIEW

Carol Loeb Shloss is a James Joyce scholar who teaches at Stanford University. Her attempt to write and publish a biography about Joyce's daughter (*Lucia Joyce: To Dance in the Wake* [Farrar, Straus and Giroux, 2003]) was met with threats of litigation by the estate of James Joyce. As a result, material that arguably should have fallen under the aegis of fair use was stripped from the book. Her attempt to provide scholars with the missing material via a web-based electronic supplement was also met with threats of litigation. With the help of the staff of the Fair Use Project of Stanford University's Center for Internet and Society, Shloss brought suit in federal court in an effort to win a ruling verifying that her intended use of the material was indeed protected by the doctrine of fair use. The suit was filed in June of 2006, with an amended suit being filed in October of that year. The estate of James Joyce filed for a dismissal in January of 2007. In February the motion to dismiss was rejected by the Court in a twenty page ruling whose language exposed serious weaknesses in the estate's defense against the amended complaint. By the end of March, the estate had settled, and Shloss had not only prevailed but won concessions that went beyond her original request for relief. One of the significant intellectual property cases of 2006 was settled in under a year, but its effects may be felt considerably longer.

BACKGROUND

The James Joyce estate in general and Joyce's grandson Stephen Joyce in particular have a well-established record of attempting to control the author's reputation by threatening to file lawsuits alleging copyright infringement. Thus, in 1988, for example, pressure by the estate forced the excision of material from Brenda Maddox's biography of Nora Joyce (*Nora: The Real Life of Molly Bloom* [Houghton Mifflin, 1988]). In the 1990s the estate blocked a performance based upon a short story by Joyce that, ironically, was itself based upon a folk tale. In 1998 the estate sued to block live readings of *Ulysses* on the internet. In 2000 the estate sought and won an injunction against a university press that wished to include an excerpt from *Ulysses* in an anthology but objected to the size of the licensing fee (7,000 Euros) demanded by the estate. In 2002 the estate prevailed in a case against a publisher who wished to bring out a version of the 1922 edition of *Ulysses*, an edition that had entered the public domain but for which copyright had been retrospectively restored. Perhaps most dramatically, in 2004 Stephen Joyce threatened legal action that would have derailed exhibits and readings intended to be a part of the ReJoyce Dublin 2004 festival. This dispute led to an act of parliament. In order to safeguard this centennial celebration of Bloomsday, the Irish legislature hastily passed an act that protected public exhibits and readings from charges of copyright infringement.

THE DEVELOPMENT AND PUBLICATION OF THE BOOK IN DISPUTE

Against this background, Carol Loeb Shloss, began work on a biography of Lucia Joyce (*Lucia Joyce: To Dance in the Wake* [Farrar, Straus and Giroux, 2003]). As had Brenda Maddox before her, Shloss ran into roadblocks thrown up by the Joyce estate. In 1996 she contacted Stephen Joyce and requested his assistance in pursuing her project. His reply went well beyond refusing his aid. He stated that Shloss could not use the letters or papers of Joyce's daughter. He first granted and then withdrew permission for the use of a published poem, apparently taking the latter action because Shloss intended to use other materials of which he did not approve. In 2002 Stephen Joyce wrote to Shloss to add to the list of materials that she was blocked from using. Among these materials: the medical files and records of Lucia Joyce. That same year Joyce contacted Shloss' publisher, Farrar, Straus and Giroux, and in a series of contacts via phone and letter threatened legal action against the book. He also enlarged his list of materials whose use he wished to block, adding to the roll letters written by individuals who were not members of the Joyce family. The publisher's attorney, Leon Friedman, responded to Joyce by adducing the fair use doctrine. Joyce wrote in reply that the estate had shown itself willing in the past "to put our money where our mouth is." This and other statements suggested that Joyce intended to sue if he was not satisfied with the response to his demands. Correspondence between Joyce and Friedman then broke off, as the attorney concluded that the estate would never grant Shloss permission to use any material for which it claimed to hold copyright, and the publisher's attention turned to editing Shloss' manuscript to avoid legal action by the Joyce estate. These edits resulted in thirty pages being cut from the manuscript. Shloss contended that these cuts removed vital evidence, and the reviews that the book received upon its publication in 2003 suggest that, if not eviscerated, the book had at the very least been enervated.

POST-PUBLICATION DEVELOPMENTS

Given that she had been blocked from including material in her book that she felt had been vital evidence for the support of her thesis, Shloss decided to make the material available in another form, via an electronic supplement at a password-protected website that would be available only to users with US Internet Protocol (IP) addresses. Even though she felt that her use of the material was protected under the doctrine of fair use, she offered the Joyce estate the opportunity to review the material. In the succeeding exchange, the Joyce estate once again refused to concede that Shloss had any right to use the materials and again raised the threat of litigation. What followed could be considered a pre-emptive strike on the part of Shloss: an effort to put paid once and for all the question of whether her use of the materials was or was not protected under the doctrine of fair use. In June of 2006, attorneys for the Fair Use Project of Stanford University's The Center for Internet and Society filed suit against the estate of James Joyce in an effort to obtain injunctive relief and declaratory judgments for Joyce scholar Carol Loeb Shloss on the grounds that Professor Shloss' ability to support her interpretations of Joyce's writing had been severely compromised by repeated threats of litigation, especially on the part of Joyce's grandson, Stephen Joyce. Lawyers representing Shloss included Lawrence Lessig, well known for his studies of copyright law and its implications for scholarship and for the culture as a whole, and Robert Spoo, himself a

Joyce scholar who had first-hand knowledge of the difficulty of pursuing studies of Joyce in the face of opposition from the estate.

The suit, as amended in October of 2006, alleged four causes of action in support of the request for injunctive relief and declaratory judgment. The first count was that the web site intended to provide the documentation excised from the book would not infringe upon any copyrights held by the Joyce estate. The second was that the use of any copyrighted material at the web site would fall under the aegis of “presumptively fair use.” The third was that the estate had in fact misused its copyrights in its effort to control scholarship pertaining to James Joyce. The fourth was an outgrowth of the third, depending as it did upon the notion that the estate’s misuse of copyright had left it with “unclean hands” so that it had in fact forfeited its right to wield its claims of copyright. The lawyers for the estate filed a reply to the amended complaint in January of 2007. In it they argued for dismissal of the suit on four grounds: first, that the correspondence between Shloss, her publisher, and her publisher’s attorney “could not give rise to a reasonable apprehension of suit”; second, that the electronic supplement did not exist in finished form at the time Shloss’ complaint had been filed and that as a result no cause for action existed (“no actual controversy”); third, that the estate had stated its intention not to file a copyright infringement suit over the material at the website; and fourth, that since the original complaint was filed in June of 2006—and since the web site was still under development—no steps had been taken by the estate that could currently give rise to a “reasonable apprehension of suit” based upon the material at the web site as it currently existed.

In February of 2007 the Court issued an opinion in which it refused to dismiss any of the four counts and in its opinion systematically demolished the reasoning behind all but one of the arguments proffered in support of the call for dismissal or for, alternately, the striking of portions of the complaint. The Court determined that it had jurisdiction, that there was a cause for action, and that any current statements by the estate abjuring litigation had no relevance or future force. The heart of the Court’s refusal to dismiss was that Shloss did indeed have a “real and reasonable apprehension” of legal action on the part of Joyce’s estate and this “real and reasonable apprehension” was a cause for action:

Plaintiff undertook to write a scholarly work on Lucia Joyce—the type of creativity that the copyright laws exist to facilitate. Defendants’ alleged actions significantly undermined the copyright policy of “promoting invention and creative expression,” as Plaintiff was allegedly intimidated from using (1) non-copyrightable fact works such as medical records and (2) works to which did not own or control copyrights, such as letters written by third parties. The Court finds that the Plaintiff has sufficiently alleged a nexus between Defendant’s actions and the Copyright Act’s public policy of promoting creative expression to support a cause of action for copyright misuse.

(Order Denying Motion to Dismiss 16)

The Joyce estate prevailed in only one small matter: the Court ordered the striking of a paragraph of the amended complaint that pertained to the physical destruction of

documents that were in the possession of Stephen Joyce. The Court ruled that no copyright issues were involved in the decision of the owner of the physical objects as to whether to keep or destroy personal property.

The ensuing settlement represented a complete capitulation by the estate. First, the estate abandoned its pretense to a right to control the fair use of both the printed and unprinted writings of James Joyce, as well as of the materials pertaining to Lucia Joyce. (The estate had already acknowledged in court filings that it could claim no control whatsoever over the letters written by individuals who were not members of the Joyce family.) The estate provided the assurances that Shloss had originally sought from the court: that Shloss could publish the electronic supplement on the web without fear of being sued for copyright infringement. Moreover, the settlement empowered Shloss to go beyond her original plans for rectifying the damage done to her book. Instead of being password-protected, the website would be made available to any user, provided that the user had a US IP address. Finally, the estate put in writing a commitment not to sue for copyright infringement should Shloss publish the material in more traditional form, leaving her free either to include the supplement in future editions of her book or to reintegrate the material into the actual text of her work. As in the case of the website, such publication would be restricted to the United States.

IMPLICATIONS FOR THE FUTURE OF FAIR USE

Stephen Joyce attempted to restrict the use a scholar could make of materials by or related to James Joyce and his daughter Lucia. The outcome of Professor Shloss' suit suggests that by so doing he and the Joyce estate exceeded their prerogatives as copyright holders. However, the Joyce estate is not the only one that has attempted to use claims of copyright infringement to inhibit scholarship that the Court described as "the type of creativity that the copyright laws exist to facilitate." Although no precedent was set by the Court's refusal to dismiss Shloss' suit, the outcome of the case suggests that future litigation may help establish the principle that, regardless of their personal preferences, copyright holders do not possess the power to veto scholarly and creative uses of copyrighted material. In press releases and interviews, the attorneys associated with Shloss' suit have indicated that they are willing to pursue additional cases such as this one. In addition, Shloss has now filed suit to recoup expenses arising from her ten-year struggle to win acknowledgement of her rights as a scholar under the doctrine of fair use. Both legal and financial pressure may now be brought to bear on copyright holders who attempt to inappropriately control the transformative use of copyrighted material.

RELEVANT SOURCES

Anderson, Nate. (2006, 13 June). Is James Joyce's Estate Misusing Its Copyright? *Ars technica*. Retrieved April 11, 2007 from <http://arstechnica.com/news.ars/post/20060613-7048.html>.

Bollier, David. (2006, 31 July). James Joyce's Estate vs. the Cultural Commons. *OnTheCommons.org*. Retrieved April 11, 2007 from <http://onthecommons.org/node/947>.

Craven, Sarah. (2006, Dec. 5). Update: Shloss v. Estate of James Joyce. *The Center for Internet and Society*. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/node/5045>.

District Court Finds Plaintiff Satisfies “Case or Controversy” Requirement and Sufficiently Alleges Copyright Misuse in Declarat[ive Judgment].” (2007, March 9). *Packets*. The Center for Internet and Society. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/packets/200703/district-court-finds-plaintiff-satisfies-case-or-controversy-requireme>.

English Professor Raises Copyright Misuse in Complaint against Estate of James Joyce. (2006, July 6). *Tech Law Journal Daily E-Mail Alert*. Retrieved April 11, 2007 from <http://www.techlawjournal.com/alert/2006/07/06.asp>.

Fair Use Project and Cyberlaw Clinic at Stanford Law School Represent Scholar in Lawsuit against Joyce Estate. (2006, June 12). *The Cyberlaw Clinic*. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/attachments/Shloss%20v.%20Joyce%20Estate%20Press%20Release.pdf>.

Falzone, Anthony. (2007, March 22). An Important Victory for Carol Shloss, Scholarship and Fair Use. *The Center for Internet and Society*. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/node/5299>.

Foster, Andrea L. (2007, March 26). James Joyce Scholar, in Deal with Author’s Estate, Wins Right to Use Copyrighted Works. *The Chronicle of Higher Education*. Retrieved April 11, 2007 from <http://chronicle.com/daily/2007/03/2007032604n.htm>.

_____. Lawsuit over Joyce Papers May Clarify Copyright’s Fair-Use Exemption for Scholars. (2006, June 14). *The Chronicle of Higher Education*. Retrieved April 11, 2007 from <http://chronicle.com/daily/2006/06/2006061401t.htm>.

Leff, Lisa. (2006, June 12). Stanford Professor Sues Joyce’s Estate. *SFGate.com*. Retrieved April 11, 2007 from <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/06/12/entertainment/e171020D91.DTL>.

Max, D.T. (2006, June 19). The Injustice Collector: Is James Joyce’s Grandson Suppressing Scholarship? *The New Yorker*. Retrieved April 1, 2007 from http://www.newyorker.com/archive/2006/06/19/060619fa_fact.

Olson, David. (2007, Feb. 2). Victory in Shloss v. Estate of James Joyce. *The Center for Internet and Society*. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/node/5184>.

Rimmer, Matthew. (2005, Sept.) Bloomsday: Copyright Estates and Cultural Festivals.

- Script-ed* 2.3 (Sept. 2005). Retrieved April 11, 2007 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=759244.
- Shloss, Carol Loeb. (2007). *Lucia Joyce: Supplemental Material*. Retrieved April 11, 2007 from <http://www.lucia-the-authors-cut.info/>.
- Shloss v. Estate of James Joyce. (2006, Oct. 25). Amended Complaint for Declaratory Judgment and Injunctive Relief. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 as attachment to <http://cyberlaw.stanford.edu/node/5045>.
- _____. (2006, June 12). Complaint for Declaratory Judgment and Injunctive Relief. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/attachments/Complaint%20Endorsed%20Filed%206-12-06.pdf>.
- _____. (2006[, Oct. 25]). Declaration of Grace Smith. Exhibits 1-8. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 from http://cyberlaw.stanford.edu/system/files/Grace+Smith+Decl_Exhibits%5B1%5D.pdf.
- _____. (2006, Nov. 17). Declaration of Maria K. Nelson in Support of Defendants' Motion to Dismiss Carol Loeb Shloss's Amended Complaint. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/system/files/Nelson+Decl%5B1%5D.pdf>.
- _____. (2006, Oct. 24). Declaration of Séan Sweeney in Support of Defendants' Motion to Dismiss Carol Loeb Shloss's Amended Complaint. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/system/files/Sweeney+Decl%5B1%5D.pdf>.
- _____. (2007, April 10). Notice of Motion and Motion for Award of Attorneys' Fees and Costs. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 12, 2007 from <http://cyberlaw.stanford.edu/system/files/Shloss+Fee+Motion.pdf>.
- _____. (2006, Nov. 17). Notice of Motion and Motion of Defendants Séan Sweeney and the Estate of James Joyce to Dismiss. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 from <http://cyberlaw.stanford.edu/system/files/Motion+to+Dismiss+Shloss+Complaint%5B1%5D.pdf>.

_____. (2007, Feb. 9). Order Denying Defendants' Motion to Dismiss and Granting in Part Defendants' Motion to Strike. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007
<http://cyberlaw.stanford.edu/system/files/Order+denying+Motion+to+Dismiss.pdf>

_____. (2007, Jan. 22). Plaintiff's Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike. US District Court, Northern District of California, San Jose Division. Case No. CV 06-3718 JW. Retrieved April 11, 2007 from
<http://cyberlaw.stanford.edu/system/files/Shloss+Brief+FINAL.pdf>.

_____. (2007, March 16). Settlement Agreement. Retrieved April 11, 2007 from
<http://cyberlaw.stanford.edu/system/files/Shloss+Settlement+Agreement.pdf>.

Shloss v. The Estate of James Joyce. (2006, June 12). *News Center*. Stanford Law School. Retrieved April 11, 2007 from
<http://www.law.stanford.edu/news/pr/23/Shloss%20v.%20The%20Estate%20of%20James%20Joyce/>.

Smith, Dinitia. (2003, Nov. 22). A Portrait of the Artist's Troubled Daughter. *The New York Times*. Retrieved April 11, 2007 from
<http://www.nytimes.com/2003/11/22/arts/dance/22JOYC.html?ex=1176436800&en=e8c6e65047f7a49d&ei=5070>.

Stanford Scholar Wins Right to Publish Joyce Material in Copyright Suit; James Joyce Estate Agrees to Settle. (2007, March 22). *News Center*. Stanford Law School. Retrieved April 11, 2007 from
<http://www.law.stanford.edu/news/pr/55/Stanford%20Scholar%20Wins%20Right%20to%20Publish%20Joyce%20Material%20in%20Copyright%20Suit%3Cbr%2F%3E%20%20%3Cem%3EJames%20Joyce%20Estate%20Agrees%20to%20Settle%3C%2Fem%3E/>

"Walled Gardens": How Copyright Law Can Impede Educators' Use of Digital Learning Materials

Clancy Ratliff, Assistant Professor of Rhetoric and Composition, Department of English, East Carolina University

OVERVIEW

In August of 2006, law professors William W. Fisher and William McGeeveran of the Berkman Center for Internet and Society, Harvard Law School, published "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age," a white paper based on their research and two all-day workshops in which

librarians, teachers, lawyers, and scholars gathered to discuss their encounters with copyright law. Their collective efforts and the publication of this white paper constitute one of the top intellectual property developments of 2006 because they have revealed and clarified four central problems related to the intersections among digital media, education, and copyright law:

- Unclear or inadequate copyright law relating to crucial provisions such as fair use and educational use;
- Extensive adoption of 'digital rights management' technology to lock up content;
- Practical difficulties obtaining rights to use content when licenses are necessary;
- Undue caution by gatekeepers such as publishers or educational administrators.

To illustrate these problems, Fisher and McGeeveran present four case studies of digital educational endeavors that were delayed or jeopardized by copyright law. These include: 1.) a proposal to create a network for social studies teachers to share teaching materials; 2.) the use of movie scenes on DVD in film studies courses; 3.) the Database for Recorded American Music (DRAM), a repository of obscure music; and 4.) the conflict that arises when public broadcasters, who are allowed to use some third-party content in their programs, make programming available on the Web. In this review of Fisher and McGeeveran's white paper, I make connections between their case studies and situations faced in rhetoric and composition pedagogy, and I explain what composition scholars can do to help protect teachers' rights to use third-party content for noncommercial, educational purposes.

Copyright: Common Ground Shared Among Rhetoric and Composition, Film Studies, Music, and K-12 History

Material from the first three case studies is particularly relevant for rhetoric and composition scholars who do work with digital media, and I focus on those three cases in my review. The first case is a proposed project by George Mason University's Center for History and New Media called the History Teacher Network. The network, modeled on social software, was to be designed as a place where K-12 teachers can upload and share the learning materials they create, such as PowerPoint presentations or online modules. From the perspective of copyright law, the problem was that some of the learning materials may feature copyrighted third-party content: photographs, music, or video clips. That George Mason University would risk secondary liability for hosting these materials and enabling their distribution constituted an insurmountable obstacle, and the Center for History and New Media "has been forced to curtail its plans for a resource exchange component of the network because of the risk of secondary liability for copyright infringement" (Fisher and McGeeveran 20). In rhetoric and composition studies, scholars have proposed similar networks for sharing teaching materials. In April of 2006, I attended a meeting in Los Angeles for Next/Text, a project of the Institute for the Future of the Book. The meeting was devoted to discussion of what rhetoric and writing textbooks could become if their authors used digital technologies creatively and innovatively. We imagined just such a network, composed of materials from teachers;

textbooks could be *curated* by users' creating various collections and arrangements of these materials. They could be tagged with categories of the users' choosing, and they could be linked through a system similar to Amazon.com's recommendations based on users' tastes. We hadn't gotten so far as to propose potential hosting sites for the network (though futureofthebook.org, the Institute's domain, would have been an intuitive first choice), but a network of teaching materials in rhetoric and composition studies would almost certainly face the same secondary liability issues that thwarted the History Teacher Network.

In their second case study, Fisher and McGeveran explain the pedagogical and legal dilemma faced by film studies teachers. In order to illustrate and teach techniques such as jump cutting, *mise en scene*, wipes, and split screen, they must be able to show scenes from films. A teacher may, for example, want to create a montage of scenes from eight to ten films to show the evolution of special effects over time. If she wants to do that, or if she wants to make a scene or two available to students for a homework assignment, she must circumvent copy protection technology on the DVDs she uses. Otherwise, she and the students must waste class time sitting through “forced watching,” as Fisher and McGeveran put it – previews, advertisements, and copyright warnings. Such circumvention constitutes a violation of DRM, or Digital Rights Management, even though the teacher's use of the content falls under fair use.

The result is what Fisher and McGeveran call an “uneasy equilibrium” in the violation of the Digital Millennium Copyright Act. Rhetoric and composition teachers may face the same dilemma as more rhetoricians – Joyce Irene Middleton's work is one example – study film as rhetorical text, or when composition teachers wish to use film clips to illustrate issues of representation, including race and sexuality. In order to settle the dilemma for film teachers, Fisher and McGeveran argue that “[t]here should be no penalty under the DMCA when DRM systems are circumvented purely to enable uses of content that are educational, legally permitted, and noncommercial – perhaps with a proviso that reasonable efforts are made to avoid subsequent leakage of the content” (97). While their suggestion would relieve film teachers' concerns about copyright law, it still does not address another major problem with copyright law: its labyrinthine complexity. Scholars such as law professor Jessica Litman have argued that copyright law should be easier for the general public to understand, which would cohere with copyright law's ostensible concern for the public interest and help the public to respect it and take it seriously.

The third case study Fisher and McGeveran present is an effort by New York University and New World Records, a nonprofit record company, to create DRAM, or the Database for Recorded American Music. The database is devoted to obscure music and “underrecognized composers” (31), so the administrators of DRAM prioritized good financial compensation for the artists. Despite New World Records' and NYU's commitment to fair compensation, as well as the nonprofit educational nature of the use of the music, the rights clearance process proved to consume a prohibitive amount of money and time. Fisher and McGeveran report, “All told, rights clearance for DRAM consumed several years and enormous amounts of staff effort and expense. The small scale and nonprofit status of the initiative often made rightsholders or their intermediaries less interested in responding to those efforts” (34). The content industries had little to gain from DRAM, it seems. At least one project in rhetoric similar to DRAM exists:

AmericanRhetoric.com, a repository of audio, video, and text transcripts of famous speeches. While much of the content on AmericanRhetoric.com consists of presidential and senatorial speeches, which are considered government documents and therefore are public domain, the site does feature some copyrighted content. The site has a fair use statement, an excerpt of which reads:

AmericanRhetoric.com contains copyrighted materials (html/pdf/flash text, audio, video, digital images), the use of which in many cases has not been specifically authorized by the copyright owner(s). These materials include all of the artifacts in the “Movie Speeches” site area as well as various artifacts in the “Top 100 Speeches” and “Speech Bank” site areas. [...]

The site is making such material available in the effort to advance understanding of political, social, and religious issues as they relate to the study and practice of rhetoric and public address deemed relevant to the public interest and the promotion of civic discourse.

AmericanRhetoric.com believes that the nature and use of the artifacts on this site not in the public domain or not the property of the owner of this site constitutes “fair use” of any such material as provided for in section 107 of the U.S. Copyright Act. The material on this site is intended primarily for research and educational purposes, has been previously published, and is distributed without profit.

I do not know whether Michael E. Eidenmuller, the owner of AmericanRhetoric.com, has received cease-and-desist letters for his inclusion of copyrighted content, but I am speculating that the resource he has created has gone unchallenged due mainly to the fact that he maintains it individually and does not seem to have the endorsement of his institution, the University of Texas at Tyler. He features ads on the site, presumably to help cover hosting costs and domain name registration.

The Classroom Use Exception, the TEACH Act, and Digital Media

Each of these three cases has implications for projects proposed or already underway by scholars in rhetoric and composition. From their case studies, Fisher and McGevean articulate several “obstacles to digital learning” (42). They explain the classroom use exception to fair use, which gives teachers additional freedom beyond fair use to make use of third-party content in classrooms for educational purposes. We’ve all, for example, probably heard about a loophole in copyright law that permits the photocopying of an article if the teacher is struck with inspiration to use it right before the class meeting. This understanding is correct; a spontaneity exception does exist, but the use of third-party content for digital materials — blogs, wikis, web-based class projects - is more legally fraught, even if the digital materials were only available to the students enrolled in the course.

The classroom use exception is intended for face-to-face teaching that takes place within the walls of classrooms, not necessarily for hybrid courses, online courses, or homework

assignments for a face-to-face course. The TEACH Act of 2001 addressed the incompatibility of the classroom use exception by no longer requiring students to be in the same location to use third-party content distributed by teachers. However, the act stipulated that the content must be integral to the course objectives, and that only accredited, nonprofit institutions were covered. Fisher and McGeeveran critique the boundaries of the freedoms (47):

This bias excludes, for example, an adult education class offered by a nonprofit but unaccredited institution; asynchronous instruction and discussion that occurs outside of class sessions at preset uniform times; and even access to material by students in other related classes at the same institution.

Also, Fisher and McGeeveran suggest, it would seem that DRM and the DMCA would supersede the TEACH Act, which says that teachers have to make sure the content isn't available after the class session, thereby preventing it from being disseminated, which is not architecturally possible to do in online environments. Fisher and McGeeveran conclude that as far as the TEACH Act is concerned:

Congress might well need to start from scratch. In particular, the across-the-board exclusion of asynchronous teaching and learning sacrifices one of the principal benefits of digital technology. Likewise, the limited conceptualization of education as tied closely to highly traditional academic institutions limits the statute's effectiveness in the decentralized digital environment (96).

I agree that education ought not be bound up with institutions, and their observation certainly acknowledges some of the educational efforts online, such as academic weblogs and wikis created by individuals or groups not affiliated with one particular university.

Libraries and Rights Clearance

The white paper also takes up the copyright issues associated with libraries and archives. Fisher and McGeeveran identify statutory and actual damages as problems faced by libraries. It costs nearly one million dollars to defend a copyright case, and that cost may only cover the statutory damages (the pre-established charges that come in to play when calculating exact damages proves difficult). Actual damages, if awarded, could be even higher. Additionally, the copyright holder might seek a trial by jury – which may result in more money being awarded in damages – instead of a hearing before a judge. The prohibitive cost of copyright infringement lawsuits has several consequences for libraries and universities, not to mention the collections of archives online that function as libraries but are not recognized as such: Educators often ask for licenses, or permission to use content, even when it is not legally necessary because their use would be protected under fair use. Because universities do not want to risk lawsuits (a risk aversion that Fisher and McGeeveran feel may be unwarranted by actual lawsuit occurrence), they are “overly cautious” (85). They sink time and labor into a cumbersome rights clearance process to find that content industries don't have any incentive to provide differential licensing of content for the benefit of educational institutions, teachers, and most important of all, students. They use closed content management systems for courseware,

such as Blackboard and WebCT, instead of open access courseware. They institute and abide by university photocopying policies that are more stringent than the 1976 Guidelines for Classroom Copying. In other words, the law is actually more lenient than the universities.

The rights clearance process is made even more difficult by digital technology. For the Copyright Clearance Center and other intermediaries, there are strikingly different processes for comparable actions, like making thirty copies of a print article for classroom use as opposed to making a digital copy available on an intranet site for 30 days (80). Permission costs, or royalties, can be costly, as anyone who has created a course pack for a composition course knows, but most rightsholders still do not see education as an important market or source of revenue. Thus, they don't offer discounts, or reduced royalty fees, especially for digital content. Fisher and McGeeveran argue that “many rightsholders are unsure about digital distribution formats, and their uncertainty translates into higher fees” (84). In the end, Fisher and McGeeveran recommend a broadening of the definition of libraries and archives, so that “untraditional noncommercial entities and 'virtual' collections available online” may also be protected by the libraries and archives exceptions to copyright law. They also argue that the libraries and archives exceptions could be revised, particularly in light of digital technology, to address the “number of copies” limitation (94).” Fisher and McGeeveran suggest two other measures to make the rights clearance process less arduous. First, they recommend the creation of a technological tool that would help to figure out whether or not permission to use the work is necessary. If it turned out that permission was needed, the software would search for licenses the institution has already secured and currently uses, such as blanket licenses and library consortia agreements, and it would search for similar material that was already cleared – Creative Commons licensed material, for example. Second, they recommend that universities and K-12 teachers get together and come up with a list of best practices – for figuring out whether something is fair use or not, for licensing negotiations, and deployment of DRM systems – all of these with specific illustrative cases that model the best practices.

Conclusion: How You Can Contribute to the Open Access Effort

Fisher and McGeeveran conclude their white paper with several suggestions for what scholars can do to help bring about copyright reform, some of which connect to the work that the CCCC Intellectual Property Caucus is doing. Scholars in our field can contribute to open access by doing research about it. Fisher and McGeeveran point to several areas for future research, and I have highlighted three that may be of particular interest to scholars in rhetoric and composition:

- Documenting how often educational users of content in fact are threatened with copyright infringement suits, and how often such suits are filed (the dearth of judicially decided cases in this area suggests that these numbers may turn out to be surprisingly low).
- Analyzing how frequently rightsholders decline permission for educational uses of content and the typical reasons for such refusal.

- Updating empirical data concerning policies and guidelines adopted by universities and school districts concerning educational use of content.

These projects would make excellent master's theses and dissertations for rhetoric researchers interested in legal discourse. Fisher and McGeveran also offer a series of recommendations for what kinds of action we can take to help the open access movement, and I end with these (quotations from pages 107-108 of the white paper are in italics):

1. *The “some rights reserved” licensing schemes promoted by Creative Commons and Science Commons, which can be easily customized at their web sites.*

Rhetoric and composition studies scholars are already using Creative Commons licenses on their weblogs, and several journals, including *Kairos*, *Lore*, *The Writing Instructor*, and *Computers and Composition Online*, allow authors to use Creative Commons licenses. *Scholar and Feminist Online*, while not a rhetoric journal, also allows Creative Commons licensing. Admittedly, these are all online journals and, as the common argument goes, they have nothing to lose by making this an option for authors. However, Parlor Press, which publishes print monographs, also has allowed for Creative Commons licensing. The move to license more scholarship under a some-rights-reserved model is still new, and it needs leadership within the discipline. Specifically, junior faculty and graduate students may be especially loath to ask publishers to give copyright back to them after a period of a few years, or to give them permission to archive a copy of the article or book on their personal web sites, or to use a Creative Commons license for the work. Junior scholars are in a position of vulnerability with publishers, which is why it is particularly important for senior colleagues in rhetoric and composition (as well as other fields) to publish their work in open-access journals that allow Creative Commons licenses and to state openly that access and copyright reform efforts led them to choose to publish in these journals.

Also, scholars can use the Author's Addendum, published by the Scholarly Publishing and Academic Resources Coalition of the Association of Research Libraries, during copyright negotiations with publishers. The addendum is available at <http://www.arl.org/sparc/author/addendum.html>.

2. *The Free Software Foundation’s GNU Free Documentation License, intended for use in “textbooks and teaching materials for all topics” and used as the license for Wikipedia entries;*

In rhetoric and composition studies, Matt Barton's open-access textbook comes to mind. He and students at St. Cloud State University co-wrote a rhetoric and composition textbook and published it at Wikibooks, and they continue to update it. The textbook is licensed under a GNU Free Documentation License. I would like to see more projects such as this one.

3. *Numerous open access journals, such as those sponsored by the Public Library of Science (PLOS) (a list can be found at the Directory of Open Access Journals);*

Open access journals in rhetoric and composition include *Kairos*, *Enculturation*, *The Writing Instructor*, *Lore*, *Composition Forum*, *Across the Disciplines*, and more. Support these journals by submitting work to them, reading them, linking to the articles on your weblogs, and citing their articles in your own work if applicable.

4. *Efforts by universities, including the University of California and Harvard, to require their faculty to make copies of their scholarly articles available in open access repositories, and to provide the faculty technical assistance in doing so;*

The University of Kansas has also joined the open access project with KU ScholarWorks, which “makes important research available to a wider audience and helps assure its long-term preservation” (online). The university passed a Resolution on Access to Scholarly Information in early 2005, and they strongly encourage faculty to keep copies of their publications in the repository.

5. *Increased self-archiving by professors and other educators on personal or institutional web sites;*

Several rhetoric and composition scholars already archive their publications on their personal sites; especially impressive examples are archives by Carolyn Miller, Charles Bazerman, and Michael Day. I would add that journal publisher Elsevier (whose *general* policies I am not endorsing) now allows authors to make and distribute copies of articles published in their journal for classroom use and for research colleagues. They also allow authors to post preprint copies of articles on their personal web sites, and they allow authors to post revised copies of articles on personal web sites as long as they are accompanied by a link to Elsevier's web site. Authors have these rights automatically without having to ask Elsevier for them.

6. *Multiple initiatives to make curricular materials, syllabi, and other educational content accessible to the general public, including Connexions, LionShare, MIT OpenCourseware, and the Berkman Center's own H2O project;*

These initiatives are best carried out at the university level rather than the level of the discipline. However, rhetoric and composition scholars can contribute to this effort by serving on faculty senate and other university-level committees to set policy related to open access teaching materials.

7. *Increased discussion of legal mandates for open access to research funded by government grants – effectively including most major biomedical research in the United States and Europe.*

I would add that the Petition for Public Access to Publicly Funded Research in the United States, which would require open-access publication of all articles or books funded by the U.S. Federal Government, would help to create an archive of research available to the public. Over 24,000 people have signed the petition, available at <http://publicaccesstoresearch.org>.

RELEVANT SOURCES

“Author Rights: Using the SPARC Author Addendum to Secure Your Rights as the Author of a Journal Article.” 27 Apr. 2007
<<http://www.arl.org/sparc/author/addendum.html>>.

“Authors – Elsevier.” 27 Apr. 2007
<<http://www.elsevier.com/wps/find/authorsview.authors/copyright#whatrights>>.

Bazerman, Charles. “Charles Bazerman | UCSB | Homepage.” 27 Apr. 2007
<<http://education.ucsb.edu/~bazerman/>>.

Day, Michael. “Michael Day: Selected Webbed Publications.” 27 Apr. 2007
<<http://www3.niu.edu/~tb0mxd1/pubs.html>>.

Eidenmuller, Michael E. “American Rhetoric: Copyright Information.” 27 Apr. 2007
<<http://americanrhetoric.com/copyrightinformation.htm>>.

Fisher, William W., and William McGeeveran. "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age." 27 Apr. 2007
<http://cyber.law.harvard.edu/home/uploads/823/BerkmanWhitePaper_08-10-2006.pdf>.

“KU ScholarWorks: Home.” 27 Apr. 2007 <<https://kuscholarworks.ku.edu/dspace/>>.

Miller, Carolyn R. “Carolyn R. Miller: Publications.” 27 Apr. 2007
<<http://www4.ncsu.edu/~crm/publications.htm>>

“Petition for Public Access to Publicly Funded Research in the United States.” 27 Apr. 2007 <<http://www.publicaccesstoresearch.org/>>.

Reyman, Jessica. “Copyright, Distance Education, and the TEACH Act: Implications for Teaching Writing.” *CCC* 58:1 (2006): 30-45.

“Rhetoric and Composition – Wikibooks, Collection of Open-Content Textbooks.” 27 Apr. 2007 <http://en.wikibooks.org/wiki/Rhetoric_and_Composition>.