

**The CCCC-IP Annual:  
Top Intellectual Property Developments of 2014**

A Publication of the Intellectual Property Caucus of the Conference on College  
Composition and Communication

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Clancy Ratliff

## Introduction to the 2014 Annual

This issue marks ten years since the Intellectual Property Caucus and Intellectual Property Committee started publishing the *CCCC-IP Annual*. I'm proud to say that it has steadily grown since the first issue. While I do not have data about our readership, I can say that the number of articles has increased over time:

- 2005: three articles
- 2006: four articles
- 2007: six articles
- 2008: four articles
- 2009: nine articles
- 2010: nine articles
- 2011: six articles
- 2012: seven articles
- 2013: seven articles
- 2014 – this year's issue: ten articles

We have also made progress as a field in our thinking about authorship, copyright, and intellectual property, particularly in the area of open access. At the March 2015 meeting of the CCCC-IP Caucus, Heather Joseph, Executive Director of SPARC (the Scholarly Publishing and Academic Resources Coalition), spoke to us about several developments in open access research and publishing. She mentioned the Creative Commons Attribution license (CC-BY) as the most progressive standard of open access, allowing not only copying and distribution of published research, but the uses now possible with new research methods enabled by software code, such as data visualization and topic modeling. For fully open access, as well as for accessibility (for example, creating audio recordings of the *CCCC-IP Annual* for people with particular disabilities) derivative works should be allowed. Since 2007, we have used the Creative Commons Attribution-Noncommercial Use-No Derivative Works license, which is really only one step up from fair use: readers simply had permission to copy and distribute the full *CCCC-IP Annual*. We have now decided, though, to adopt a CC-BY license.

The Caucus and the Committee continue to work to keep the CCCC membership informed about intellectual property issues that work in favor of, or against, the interests of students and teachers, and readers and writers more generally. We recently applied for and received status as a CCCC Standing Group, and at the 2014 CCCC, we presented a panel about the history of the Caucus and our accomplishments. Many, many articles, book chapters, books, and special issues of journals have come out of Caucus meetings, as well as campus-specific advocacy. However, we still have work to do on several fronts, both legal and

pedagogical. One of particular interest to me is plagiarism detection services, which I want to re-frame, as we go into the second half of 2015, as *automated plagiarism detection*. The Caucus proposed a CCCC resolution about the use of plagiarism detection services, which was passed in 2013:

Whereas CCCC does not endorse PDSs;

Whereas plagiarism detection services can compromise academic integrity by potentially undermining students' agency as writers, treating all students as always already plagiarists, creating a hostile learning environment, shifting the responsibility of identifying and interpreting source misuse from teachers to technology, and compelling students to agree to licensing agreements that threaten their privacy and rights to their own intellectual property;

Whereas plagiarism detection services potentially negatively change the role of the writing teacher; construct ill-conceived notions of originality and writing; disavow the complexities of writing in and with networked, digital technologies; and treat students as non-writers; and

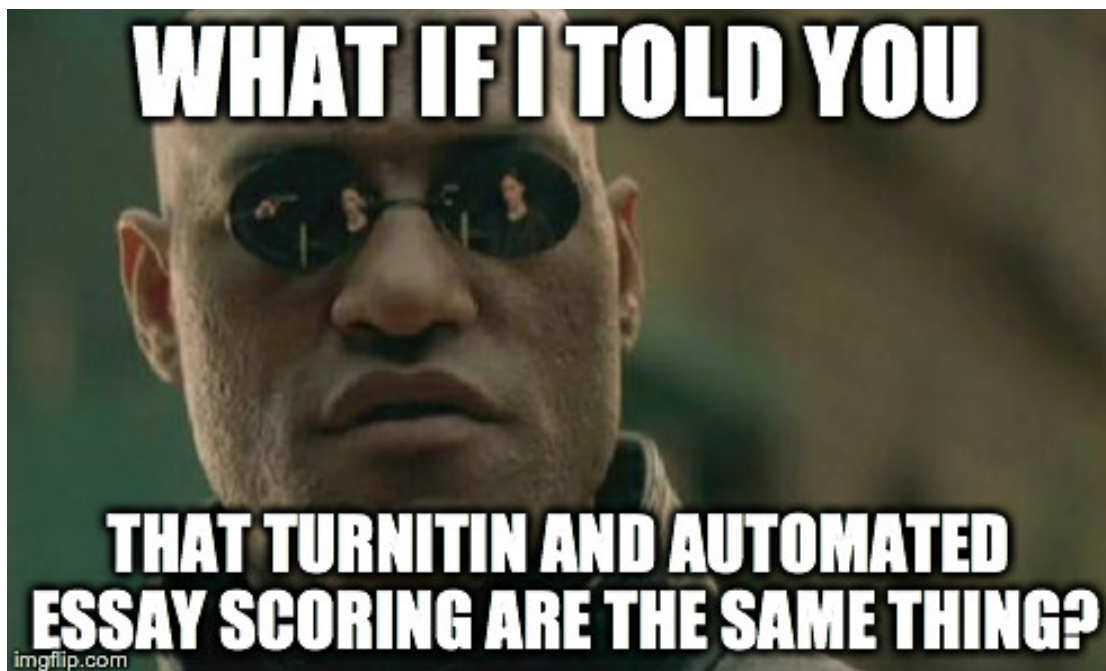
Whereas composition teacher-scholars can intervene and combat the potential negative influences of PDSs by educating colleagues about the realities of plagiarism and the troubling outcomes of using PDSs; advocating actively against the adoption of such services; modeling and sharing ideas for productive writing pedagogy; and conducting research into alternative pedagogical strategies to address plagiarism, including honor codes and process pedagogy;

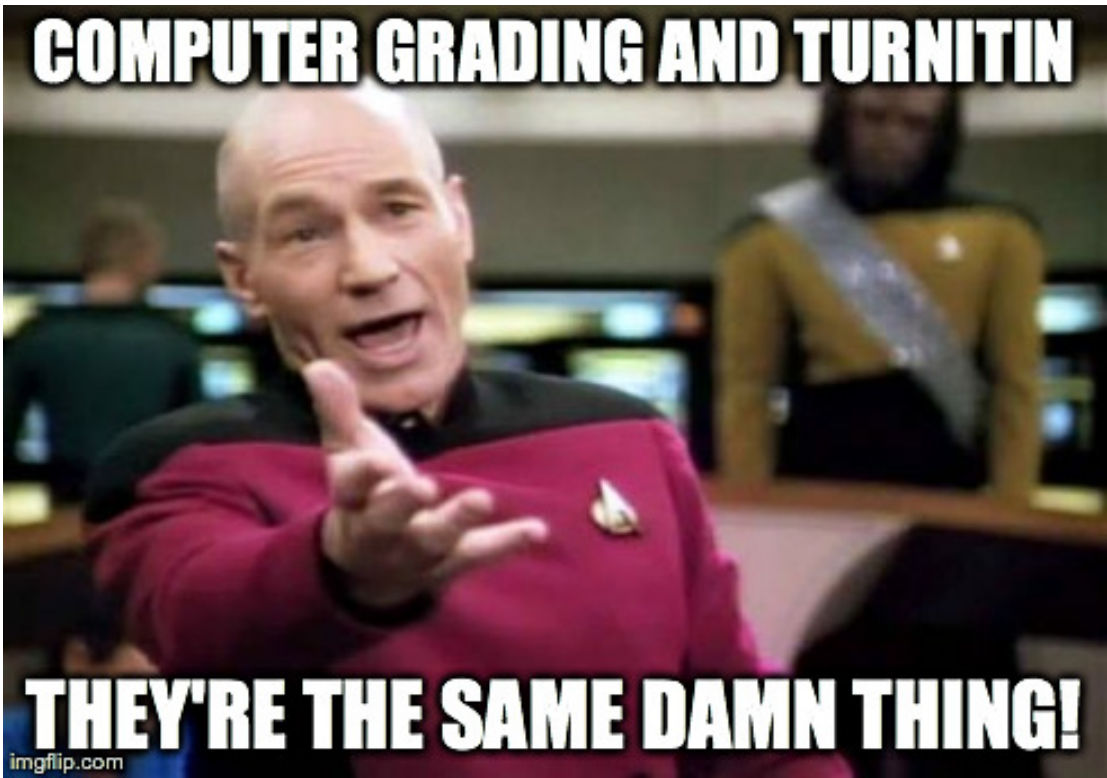
BE IT THEREFORE RESOLVED that the Conference on College Composition and Communication commends institutions who offer sound pedagogical alternatives to the use of PDSs and encourages institutions who use PDSs to implement practices that are in the best interest of their students, including notifying students at the beginning of the term that the service will be used; providing students a non-coercive and convenient opt-out process; and inviting students to submit drafts to the service before turning in final text.

While the above resolution represents what many of us agree to be the case about plagiarism detection services, of which Turnitin is the main PDS provider, there is also this grim but correct observation from Rebecca Moore Howard, posted on the Writing Program Administration listserv (emphasis in original):

Turnitin has become like abortion and the death penalty: A topic on which people are making decisions based on deeply held beliefs inaccessible to logos. I visit faculties at several campuses every year, and in each audience are instructors who cannot imagine teaching without Turnitin. I am in a post-debate state with such people, unwilling any longer to search for the common ground on which we will exchange principles and consider possibilities, at the end of which these folks will return to Mother Turnitin against all reason. I just tell folks why I don't use it, and turn to another topic. *No one* has ever said to me, "You know, I thought about what you said, and I changed my practice." No one.

In tandem with the discourse about Turnitin is the discourse about the Common Core State Standards Initiative and its assessments of writing, which according to some reports are set to use AES, or Automated Essay Scoring. Teachers and administrators in K-12 and higher education, as well as students and parents, have expressed serious concerns about this plan. I see an opportunity to re-frame plagiarism detection services in order to show what those of us studying intellectual property and composition have understood for years: that AES and PDS are basically the same – artificial reading that replaces quality instruction and contextualized feedback on student writing. Hence I propose *automated plagiarism detection*. Also, because I included image macros (known more commonly as memes, though these are only one kind of meme) in the introduction of last year's *CCCC-IP Annual*, I will end with these two image macros I created for the occasion. Though facetious, they are yet a potent way to communicate a point.







Steven Engel, Kerry Howell, Jacklene Johnson, and Jessica McGinnis

## Plagiarism and PTSD: The Case of Senator John Walsh's Plagiarized Paper

Last July when the *New York Times* reported that Montana Senator John Walsh had plagiarized his paper while completing a master's degree at the Army War College, it probably did not come as a surprise to many Americans. He became just another figure to add to the ever-growing list of politicians accused of plagiarism: Rand Paul, Barack Obama, Joe Biden, Mitt Romney, and Scott Brown, to name a few. Unlike his more prominent colleagues, however, John Walsh was unable to survive the political damage of these accusations and was forced to withdraw from the race for the Montana Senate seat. At first glance, his case appears to be fairly typical. Walsh's 19-page paper is a mix of citation errors, patchwriting, and large sections of cut-and-paste text from other sources. He cites some sources but fails to indicate that the passages are direct quotations. He incorporates several passages that are paraphrased but not cited. He also ends his paper with a handful of recommendations pulled directly from an unacknowledged source. As the *New York Times* infographic clearly shows, nearly all of Walsh's essay contains problematic engagement with sources (Keller et al.). But these practices are nothing unusual; first-year composition instructors often encounter papers that contain similar writing. Yet Walsh's case stands out for the way in which it was leaked to the press and Walsh's initial defense of his actions.

John Walsh's narrative reads like a typical American success story: He was born the son of a union pipe fitter and rose to prominence through the iconic pathways for success—the military and higher education. (See *Figure 1*.) Initially joining the Montana National Guard after high school to pay for college, Walsh advanced to the rank of colonel and was appointed to command the 1st Battalion of the 163<sup>rd</sup> Infantry in Iraq (Franz). When he returned home from the Middle East, Walsh enrolled in the U.S. Army War College and received a Master's degree in Strategic Studies in 2007 (Volz and Brown). He was tapped for the Montana lieutenant governor position and seemed to be well-positioned for a successful political career (Franz). When President Barack Obama appointed retiring Senator Max Baucus ambassador to China in 2013, Walsh, who had already announced his candidacy for the 2014 opening, was appointed the vacant seat (Chasmar). In June 2014, Walsh won the Democratic primary and was poised to begin a tough battle against Republican Steve Daines (Franz).

### The Leak and Walsh's Initial Defense

John Walsh's plagiarism was not discovered by a researcher looking for scholarly articles about American foreign policy. Nor was it discovered by the U.S. Army War College who awarded Walsh his master's degree. Instead, Walsh's

<b>2004-2005</b>
Walsh serves in Iraq as commander of the 1 <sup>st</sup> Battalion of the 163 <sup>rd</sup> Infantry. <b>October:</b> Walsh's Humvee is hit by an improvised explosive device (IED).
<b>2005</b>
Walsh returns home and attends the U.S. Army War College.
<b>2007</b>
Walsh graduates from the U.S. Army War College with a master's degree.
<b>2008</b>
Governor Brian Schweitzer appoints Walsh as Adjunct General of the Montana National Guard.
<b>2012</b>
Walsh tapped to be running mate for the Montana gubernatorial race.
<b>2013</b>
<b>October:</b> Walsh announces candidacy for Senate seat of retiring Max Baucus. <b>December:</b> President Barack Obama appoints Baucus ambassador to China leaving his seat vacant.
<b>2014</b>
<b>February:</b> Walsh sworn in to replace Baucus until election. <b>June:</b> Walsh wins Democratic primary. <b>July:</b> Republican oppositional research contacts <i>The New York Times</i> with evidence showing Walsh's plagiarized 2007 research project at U.S. Army War College. <b>July:</b> <i>The New York Times</i> publishes story. <b>August:</b> Walsh drops out of race. <b>October:</b> Master's degree revoked and Walsh's name is removed from the college plaque listing the students who received master's degrees in 2007. <b>November:</b> Republican Steve Daines wins senate seat.

*Figure 1: Time of Events in the Walsh Plagiarism Case*

plagiarism was ferreted out by a deliberate political strategy by the National Republican Senatorial Committee or NRSC (Hohmann). In 2013, the NSRC dedicated a quarter million dollars to investigate candidates. This was not merely a one-sided effort to discover dirt on Democratic politicians; it was also a plan to screen Republican candidates in order to avoid embarrassing revelations like the ones the Republican Party had suffered in previous election cycles

(Hohmann). Mark McLaughlin, the political operative who discovered the plagiarism, was at first struck by the paper's "Neo-con" tone and content. According to NRSC executive director Rob Collins, McLaughlin then ran the paper through plagiarism detection software and discovered that "the entire last five pages of it turned bright red...It was pretty dead-to-rights plagiarism" (qtd. in Hohmann). With this information, the story was sent to the *New York Times*.

When Walsh was interviewed by the *New York Times* about the evidence showing the similarity of his paper with identical passages from other sources, Walsh made a two-fold response. He indicated that he thought that he hadn't done anything wrong. Additionally, he claimed that he "didn't do anything intentional" (qtd. in Martin). Later in an interview with the Associated Press, Walsh explained that after coming back from Iraq, his "head was not in a place very conducive to a classroom and an academic environment" (qtd. in Chasmar). He admitted that he was being treated for post-traumatic stress disorder (PTSD) when he was writing his paper. Walsh said, "I don't want to blame my mistake on PTSD, but I do want to say it may have been a factor."

Walsh's initial defense reveals some of the complication of plagiarism. He defended himself by saying that he didn't do anything wrong. In the same breathe, he implied that even if he did do something that was inappropriate, it wasn't done intentionally. The textual evidence of the paper may indicate plagiarism, but Walsh directed his defense toward his intentions. In addition, he tried to provide important context—that his head was not in the right place. Perhaps this was a politician trying to scramble back from what he must have known were potentially damning accusations. Yet we can see the movement away from the textual similarities to morality to intentionality to frame of mind. While textual similarity is easy to see and assess, a writer's frame of mind is a particularly slippery notion. Where Walsh's head was seven years ago, after time in Iraq, under the stress of completing a paper, is nearly impossible to know for certain. And yet, our understanding of plagiarism as a literacy practice, one that Kathryn Valentine reminds us, "involves participants' values, attitudes, and feelings as well as their social relationships to each other and the institutions in which they work," pushes us to see plagiarism beyond textual similarity. While many observers, including the authors of this essay, were not persuaded by Walsh's argument, we have to acknowledge that his attitudes and feelings are indeed part of the plagiarism, even if they don't excuse it.

Walsh's comments that seem to link PTSD with his plagiarism were met with immediate condemnation, especially from Veterans groups. For example, Brian Rudolph, a veteran of the Iraq and Afghanistan wars, expressed his distaste for Walsh's PTSD excuse: "I feel like it's a slap in the face to people who have obviously been through more than he [Walsh] has" (qtd. in O'Connor). Rudolph also challenged the logic behind the claim:

I just don't see how if you have a PTSD issue it's going to cause you to plagiarize a paper. I can see how somebody could have a flashback and hit their spouse while they're sleeping. But if you're totally cognizant typing a paper and then say, "Ah I'm a little bit depressed so I'm not going to cite this." It just doesn't make sense.

Alex Horton, in an opinion piece in the *Washington Post*, went further: Walsh's case "has the potential to further distort society's understanding of mental trauma and create space for veterans to misuse their diagnoses in any number of situations, academic or otherwise." Horton's stance seemed to capture the position of many groups: Walsh may have been suffering from PTSD, but the challenges of this condition could not have led him to plagiarize his paper.

Later, Walsh reflected on the event and still appeared to want to create some distance between what he did and the label of plagiarism. He told the *Flathead Beacon* that this was a merely an issue of citation error: "Every statement that was in the paper, everything I took from somebody else, I used them as a reference, it was just that I left some quotation marks out. I just didn't properly reference those quotations. It was a mistake. I made a mistake on a paper." (qtd. in Franz)

Other reactions to the Walsh case reveal the wide variety of positions that plagiarism can elicit. For instance, Sean M. Lynn-Jones, one of the authors from whom Walsh had plagiarized, reacted by saying that he was "not outraged." Lynn-Jones noted that Walsh's "appropriation, without citation," guaranteed that Lynn-Jones' 2007 paper "will enjoy a much wider readership than if he [Walsh] had properly footnoted it in his student work." In addition, Lynn-Jones claimed to have some "political ambivalence." While he finds plagiarism "fundamentally wrong," he worried that this case would cause the Democrats to lose control of the Senate.

Walsh's supporters tried to minimize the damage. Senator Jon Tester told Michael A. Memoli of the *Los Angeles Times*, "Look, Walsh is a soldier, he's not an academic...And I just think if a person bores down below the surface, it's not near as big deal as it appears right now." Tester seemed to acknowledge that on the surface, the plagiarism appears to be a big deal, but that this plagiarism is an academic issue. Walsh's military record should speak more loudly than his academic past. Not surprisingly, this splitting of the soldier from the academic did not play well with graduates of the Army War College. Kenneth C. Braddock, a graduate from the class of 2006 defended the school: "Absolutely, there is an atmosphere of integrity. It was the military, and in the military, integrity is, by nature, second nature" (qtd. in Corasaniti and Martin). Others were more willing to place some of the blame on the culture of colleges like the Army War College. Joan Johnson-Freese, professor of national-security affairs at the U.S. Naval War College, argues that "war colleges are different" and are "more a professional school than a liberal-arts college." She notes that war colleges "also have no academic admissions standards, many of their faculty members have no teaching experience or education in the subject matter they are teaching." The combination of these factors may have caused a "distinctive wrinkle on ailments common to academe."

Eventually, an Army War College ruled that Walsh paper was plagiarized and revoked his degree. The review board found that the plagiarism was "egregious" and that the paper was "primarily composed of verbatim liftings from other sources" (qtd. in Volz and Brown). Walsh formally withdrew from the race for senator on August 7.

## Classroom connections

The Walsh plagiarism case can be productively used in the composition classroom. Extending Margaret Price's suggestion for classroom activities that explore the "differences among, and possible intersections of, what we mean by paraphrasing, quoting, and our own words" (109), Walsh's paper provides a vivid case study. In particular, the availability of the *NY Times* infographic allows for students to visualize the various writing practices that fall under the general category of plagiarism.

Additionally, this case provides several interesting points of discussion about plagiarism. We could imagine classroom conversations around the following questions:

1. Drawing from Rebecca Moore Howard's three-part definition of various practices generally conflated as plagiarism, which parts of Walsh's paper seem to be patchwriting? Which parts are citation errors? Do you see any of it as fraudulent?
2. While most people refuted Walsh's initial defense of PTSD, under what circumstances would you excuse plagiarism?
3. Does the institution where the plagiarism occurs make a difference in your understanding of plagiarism? Does it make a difference if the student is at the Army War College? At an Ivy League school? At a high school?
4. Does the density of plagiaristic writing in an essay change our understanding of the act?
5. What is our connection between the formal, textual similarities and our understanding of intent?
6. Should there be a statute of limitations? Walsh's was seven years removed from his college experience when the accusations were made. Is there a point when it feels unfair to revoke someone's degree?

The Walsh plagiarism case serves as yet another example for composition instructors to share with their students. It highlights that proper engagement with sources is a challenge for novice writers as well as master-level students. Simply reciting the school or university's plagiarism policy is not enough for students. Instead, we must create a longer, more critical, conversation about plagiarism throughout the semester, both in and out of the composition classroom.

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Wendy Warren Austin

## What We Can Learn from Two Plagiarism Accusations in 2014: Slavoj Žižek's and Nic Pizzolatto's Summer Scandals

In the past few decades, we can barely pass a season without hearing or reading about *this* famous novelist or *that* well-known historian who gets called out in the press for stealing someone's words or ideas. The summer of 2014 was no different when, within days of each other, well-known literary critic, Slavoj Žižek and up-and-coming scriptwriter, Nic Pizzolatto were accused of plagiarism. However, the manner in which they handled the accusations, the amount and type of material they reputedly borrowed, and public esteem of the "borrow-ee" (the person(s) from whom they allegedly plagiarized) weighed in unevenly, ultimately affecting the writers' reputations in divergent ways.

### Hey, Pal, Let Me Help You Out!

The scandal first started when, on June 8, 2014, blogger Steve Sailer, of *The Unz Review* pointed out a startling similarity between an article by the outspoken and wildly popular Marxist literary critic Slavoj Žižek in his 1996 *Critical Inquiry*, "A Plea for a Return Difference (with a Minor Pro Domo Sua)" to a review of an article from a white supremacist magazine, *American Renaissance*, nearly 7 years prior. By the next day, a blogger going by the name Deogulwulf published a side-by-side comparison between the two texts. The news broke wide open when *Critical Theory.com's* founder and editor Eugene Wolters featured consecutive days of headlines about Žižek's borrowing. *Critical Inquiry's* editorial desk had to have burned the midnight oil getting to the heart of the issue that week, with calls out to Žižek, scrambling to get his side, calls in from *Newsweek* wanting details about the juicy discovery, and calls from everywhere else to jump on the bandwagon for the surefire lead: "Somebody Famous has Plagiarized, Again!" Their official statement appeared three days later on the *Critical Inquiry* blog ("In the Moment").

Žižek told his editors at *Critical Inquiry* that a friend of his offered some material that would be useful for Žižek's current work. The friend said he had a summary of this potentially useful material, so he sent it to Žižek, who used it without questioning the originality of his friend's words. Žižek's prepared statement, which appears on the blog, implies that he didn't realize that his friend's contribution was a near copy of Stanley Hornbeck's review of a book called *The Culture of Critique*, by Kevin Macdonald published in 1999 in *American Renaissance*, a white supremacist magazine.

### Oops! How Was I To Know My Good Friend's "Gift" Was Plagiarized?

*Newsweek* reported that *Critical Inquiry's* Senior Managing Editor James Williams said in response to the discovery: "We're very sorry it happened. If we

had known Žižek was plagiarizing, we would have certainly asked him to remove the illegal passages” (Wofford). Žižek’s official response was:

A friend told me about Kevin Macdonald’s theories, and I asked him to send me a brief resume. The friend send [sic] it to me, assuring me that I can use it freely since it merely resumes another’s line of thought. Consequently, I did just that—and I sincerely apologize for not knowing that my friend’s resume was largely borrowed from Stanley Hornbeck’s review of Macdonald’s book. [. . .] As any reader can quickly establish, the problematic passages are purely informative, a report on another’s theory for which I have no affinity whatsoever [. . .] In no way can I thus be accused of plagiarizing another’s line of thought, of >>stealing ideas.<< I nonetheless deeply regret the incident. (Qtd. in Wolters, “I Nonetheless”)

Although those last six words of Žižek’s made up one of the week’s headlines, not much more was made of the incident. For some reason, my response to that apology makes me imagine Mike Myers’ wonderfully cheesy Dr. Evil (Austin Powers) saying “How convenient!” as he curls his pinky finger to his lip. *Slate* writer Rebecca Schuman commented that the only reason these passages were noticed were, ironically, because they were “far too lucid” compared to Žižek’s typical prose.

Žižek leads in Wolters’ *Critical-Theory.com* blog two more times that year: in September after the *New York Times* chastised Žižek for an essay it published in which he quotes himself (“New York Times”); then in October, Wolters (“Žižek’s Latest”) reports on Thomas Basbell’s blog post criticizing at length Žižek’s misunderstandings with an *International Journal of Žižek Studies* editor about whether he (Žižek) should be using a single or a double apostrophe to quote himself. Sounds rather nit-picky to me. However, one of the most astonishing features of this whole dustup is that these accusations flare like flash fires, but no one knows whose reputation will be scorched beyond recognition (e.g., Kaavya Viswanathan for *How Opal Mehtl Got Kissed, Got Wild, and Got a Life*) or whether the accused figures (e.g., Doris Kearns Goodwin or Stephen Ambrose) will simply brush off the stinging comments like some stray sparks at a cookout.

## Haven’t I Heard That Somewhere Before?

Hardly three weeks went by before the press got wind of another alleged plagiarism scandal, this time involving the writer of the HBO series *True Detective*. On August 4, 2014, Mike Davis penned the headline “Did the Writer of True Detective Plagiarize Thomas Ligotti and Others?” Thomas Ligotti is a prolific American horror writer with a cult following, along the lines of H.P. Lovecraft, including a fan website called Thomas Ligotti Online, authored by Jon Padgett. It was Ligotti’s 2010 book *The Conspiracy Against the Human Race*, from which Padgett and Davis claim writer Nic Pizzolatto lifted as a source for the words and philosophy of Rust Cohle, one of the main characters of the HBO



series' first season. Matthew McConaughey plays Rust Cohle, who spouts convoluted, grim cynicisms and bizarre, fatalistic ramblings that trouble Woody Harrelson's Marty Hart, his former crime-fighting partner.

## It's Not Plagiarism Because He's Not Taking a Test

The news cycle on this story goes like this:

- **July 10, 2014:** 2014 Emmy nominees are publicly announced. The HBO series *True Detective* receives 12 nominations, including Outstanding Writing for a Drama Series for Episode 5, "The Secret Fate of All Life" that contains a great deal of dialogue reflecting Cohle's dark philosophy.
- **August 4, 2014:** Mike Davis packs his eZine with vitriol, which, if printed out, comes to over 12 pages of line-by-line comparisons between Rust Cohle's words and Ligotti's *Conspiracy Against the Human Race*, bolstered by a lengthy transcript of an email interview Davis conducted with Ligotti's fan website leader, Jon Padgett.
- **August 5, 2014:** More Lovecraft eZine vitriol published. Davis is insisting that Pizzolatto's "homage" is plagiarism, pure and simple, not influence or inspiration ("Nic Pizzolatto's").
- **August 6, 2014:** Slate's blog *Browbeat* takes a stand both acknowledging Ligotti's strong influence on Pizzolatto and defending his integrity, stating that "the exchange between Padgett and Davis may spur interesting questions about pastiche, homage, attribution, and influence, but a 'strong accusation' of plagiarism it isn't" (Haglund).

A comment about the context of the writing both resolves and complicates the issue at once:

It's clear from these similarities that Pizzolatto has read the Ligotti book and borrowed from it—something **he has himself acknowledged** [emphasis in original], about which more below. *If True Detective was not a cop show on HBO but a term paper in a philosophy class, then it would indeed be wrong for him to lift such ideas and metaphors from an author without citing him in the work itself* [my italics]. But Davis, at least, does not seem to fully grasp that distinction: He explains his charges by quoting a Cambridge University statement on plagiarism that was **explicitly provided for people giving and taking written examinations** [emphasis in original]. *Nic Pizzolatto was not taking a test. He was writing a fictional TV show* [my italics]. (Haglund)

The distinction Haglund makes regarding context is quite revealing in how it informs his definition of plagiarism.

- **August 7, 2014:** The *Wrap's* "Covering Hollywood" features an article highlighting HBO and Pizzolatto's insistence that "nothing in the television show *True Detective* was plagiarized (Ge).
- **August 8, 2014:** Most major news outlets, including NBCNews, report that while Pizzolatto acknowledges Ligotti's influence on Rust Cohle's

worldview, he stresses that it isn't plagiarism (Fernandez). Fernandez's article ends by repeating *Slate's* insistence that this is not a college test or paper; "He was writing a fictional TV show." (Haglund as qtd. by Fernandez).

- **August 8, 2014:** *Rolling Stone* laments how these charges have "dampened" the "celebratory mood" for Pizzolatto and those associated with *True Detective* as they await the Emmy Award ceremonies to follow in September (Reed).
- **September 20, 2014:** Of 12 Emmy nominations, *True Detective* claimed five, none of which relate directly to writing.

While this brief timeline covers only July 10 to September 20, 2014, Michael Calia actually brought up the issue of *True Detective's* similarity to Thomas Ligotti's *Conspiracy Against the Human Race* in a *Wall Street Journal* article on January 30. Calia not only identifies the source of similarity in Ligotti's work, but captures excerpts from both Rust Cohle's dialogue in Episode 5: "The Secret Fate of All Life" (incidentally, from the very episode that was singled out for an Emmy nomination in writing) and several locations in Ligotti's book. Even with a common textbook explanation of plagiarism—that you must change both the key words and the sentence structure from the original—it is still hard to put the label of plagiarism on the Pizzolatto words. The closest match is Ligotti's phrase, "we must cease reproducing," echoing Pizzolatto-crafted dialogue with similar words, "stop reproducing." However, Cohle's words encase these phrases in different sentence structures from Ligotti's. Only one word is the same. Certainly many other similarities exist, especially in overall mood and key concept. But where do we draw the line and in what context?

### Why Are These Two Incidents Relevant for Compositionists?

As composition specialists and literary scholars, we must concern ourselves with issues of plagiarism that we read about in the news for many reasons. In the case of the accusation against Slavoj Žižek, his status as one of the most well-known literary scholars of our time compels us to consider the impact of an accusation like this on the profession and the academy. The prestige of a journal like *Critical Inquiry* was at stake, and, although somewhat less so, Žižek's own reputation as a scholar. Because Žižek's typical style consists of mixing high culture with low culture, and, as a Marxist and deconstructionist, he could easily take a casual, even flippant, approach to the idea of owning text. As an incredibly busy and prolific writer, with a solid and established reputation, like Goodwin and Ambrose, he can afford a few chips shaved off his legacy without losing much.

Finally, we should pay attention to this story because the field of composition and rhetoric overlaps so much with cultural criticism and is such an important part of English Studies that to ignore the relevance of Žižek's position in the academy would be shortsighted. Even so, Dan Harms points out in "Plagiarism, Publishing, and the Academy," that of four plagiarism investigations reported in the *Chronicle of Higher Education* in a short time span, each situation described "vastly differing responses to individual cases"(2).

Nic Pizzolatto's situation is relevant to us because he is a contemporary fiction writer and television series creator/scriptwriter. So many compositionists are also creative writers and/or come to the field of composition and rhetoric through the avenue of creative writing that we cannot ignore the implications for those aspiring to be creative writers, those who are creative writers, or those who simply write to get through the requirements of completing their college degrees. (And, are not all writers creative?)

Although both writers come from the field of English, various aspects of their situations differ. Although both Žižek and Pizzolatto seemed to share interchangeable headlines, the manner in which they came about the so-called "borrowed" material happened in completely different ways. Žižek's material was not immediately within his own bank of knowledge; he had a friend offer the material that he thought might fit with what he was writing. Žižek's problem in the re-using process was in not reviewing the proffered material as carefully or deeply as he should have. Pizzolatto's problem, on the other hand, was the complete opposite. He had read and digested so much of Ligotti's material, no doubt he had a hard time separating out what came to him as originating directly from Ligotti, versus the philosophy he began to develop in other fictional characters and circumstances inspired by Ligotti.

Another difference between the situations was the nature of the material they borrowed. While Žižek's borrowed material came from a white supremacist magazine, Pizzolatto's material derived from a lesser known but quite prolific and popular writer in his own genre. I believe that if both Žižek and Pizzolatto had not been so popular and famous in their particular areas—one in literary criticism, the other in television—the public might have reacted more strongly against both of them. As it was, it was also unpopular to hold them up to blame for too long or with greater scrutiny because they happened to be more useful for the public to see them as not really doing anything wrong. The truth is that even while famous and popular people get more attention and scrutiny for their misdeeds or perceived misdeeds, the public and press also cuts them more slack.

## What Can We Learn from These Incidents?

An important element of the scandals that should be noticed is the way both men responded to their accusations. Both reacted swiftly and succinctly and did not waver from prepared statements. Although Žižek alluded to the incident briefly some months later, Pizzolatto kept his comments tightly contained and did not make any reference to Ligotti's influence outside of the canned comment he made in collaboration with HBO.

Probably the most important things we can learn from these incidents is that

- 1) plagiarism does not have a stable definition;
- 2) the context in which plagiarism occurs makes a huge difference in how the act is perceived and judged;
- 3) famous and/or popular people who are accused of plagiarizing receive both more attention and more leniency from others and more forgiveness

for the action, because they are given more credibility (or second chances?) than “regular people”/students;  
 4) the material being borrowed makes a big difference in how the act is perceived; and  
 5) the issue of plagiarism is murkier than ever for teachers, students, and the public.

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## 3D Printing and Patent Theft: New Challenges to the Creative Commons

2014 saw many important landmarks for copyright, patent, and intellectual property in the Maker Movement, especially in relation to 3D printers. These printers allow users to generate a physical object from a design created with computer software that generates easily sharable files using a service like Thingiverse, a digital repository of designs for all manner of devices and products. Many of the major developments in intellectual property are occurring between individual users, a large 3D printing manufacturer, and the legal strength of Creative Commons licenses. The Maker Movement, with its emphasis on do-it-yourself manufacturing practices, continues to stretch traditional legal and ethical dimensions of intellectual property. With access to technologies like 3D printing on the rise, larger numbers of individuals can now create new objects outside of the traditional manufacturing sphere and present them to the public in a variety of venues. At least one manufacturer of 3D printers, Makerbot, has appropriated designs from the commons and filed patents on them, creating a battleground over intellectual property that many industry experts point to as a potential watershed moment for intellectual property policy. An important caveat for this investigation is the preliminary state of the evidentiary trail. I present here what has emerged publicly, mainly through the protests of individual content creators, though it's possible the scope of patent theft is wider. There are also issues apparent when considering a timeline. Some instances of patent theft have occurred over the past several years but are only come to light over the past several months. I begin with a description of Makerbot's actions, followed by their response to the community and some implications important to scholars interested in intellectual property.

Some of the first writing about Makerbot's patent practices occurred in October of 2013. Michael Molich, writing for *3D Printing Industries*, identified a large and increasing desire for a so called automated build platform (ABP), which is a conveyor belt used to advance completed prints off a print bed. Such a device allows for continuous printing of different items, useful to anyone interested in printing multiple objects overnight, for example. The problem is that Makerbot already filed a patent on the conveyor belt, a design originally released under a creative commons license. The wrinkle in this particular case is tied to the original designer of the conveyor belt who eventually went on to work for Makerbot and brought the design with him ("Open Source" par. 6). There's some question in this instance of whether the engineer or Makerbot have done anything explicitly wrong. The engineer-turned-employee of Makerbot is not in a good position to file a claim of patent infringement against his employer. There are other instances, though, that began in 2013 and have stretched into 2014 that are perhaps more legally clear, and that makes their outcomes very important.

In February 2013, Makerbot announced an upgrade kit designed to dramatically improve performance of one of its 3D printer models. A blog post explains the problem, then explains the solution:

There should be a design that makes the process much easier. Enter Thingiverse user whpthomas who came up with an improvement that has really seen some traction. It's a great mod that makes the machine more reliable in the long haul. Genius. We love this. Thing #42250 "Replicator 2 Extruder Upgrade" by whpthomas, is one of these very useful designs. It's based on an extruder mod from Thingiverse superstar emmett, who based his design on one from another star user, whosawhatsis...After extensive testing, we've decided that this approach is too good to ignore....We will be selling an upgrade kit that involves all the parts, including the printed part online this spring. (par. 1-5)

It's clear from this description that Makerbot is selling a modification of several designs published on Thingiverse under a Creative Commons Sharealike license. Blogger and maker Alex Davies worked to break this news explaining that the designs were clearly "too good to ignore... And apparently too good to let their competitors use as well, whatever the content creators want. For those counting, that's 3 separate thingiverse users (whpthomas, emmett, whosawhatsis) who presumably hold some rights to the creative commons licensed designs makerbot is patenting" (par. 2-3). The rhetoric used by Makerbot in this example is noteworthy, especially the positive tone that seemingly celebrates the creative contributions of the community while simultaneously staking a claim over them. The company appears to tap some of the positivity surrounding these new technologies in their justification.

More explicit instances of Makerbot patent seizure continue in 2014. In a blog post titled "Stay Classy, Makerbot," fabrication company Openbeam claims that Makerbot patented designs for an automatic print head leveling technology after several companies and individuals had already demonstrated working designs of the tech. Openbeam had even sent a working evaluation model to Make Magazine for review before Makerbot filed the patent. According to Openbeam, "it's not a stretch to imagine Makerbot coming after other open source 3D manufacturers that threaten their sales. After all, nobody acquires a patent warchest just to invite their competitors to sit around the campfire to sing Kumbaya. It is therefore vitally important that community developed improvements do not fall under Makerbot's (or any other company's) patent portfolio to be used at a later date to clobber the little guys" (emphasis in original par. 6). The "little guys" mentioned here are 2 other individuals who had already confirmed working versions of this technology via social media. Openbeam has since filed a third party prior submission form with the US Patent and Trade Office in order to challenge Makerbot's patent. This submission appears to be the only legal method of recourse. Demonstrating prior ownership would involve submitting blog post publications, white papers, and any other evidence to support the claim of the designer.

Makerbot's response to these content creators has largely side-stepped the important issues entirely. John Biggs, writer for *TechCrunch*, has covered Makerbot's responses in the press, and their justifications hinge on staying competitive in a global market. They suggest that the survival of Makerbot is tied to the ability to patent profitable designs (par. 2). As of this moment, the company has not included any pledges to restore any of the designs it has patented to the commons. Instead, they do express desire to continue working with the community and to continue evaluating the ways in which they use intellectual property. No official, legal challenges have surfaced to counter Makerbot's activities, leaving the situation precarious for individuals and small groups creating content. This case has started a conversation on how to best protect user designs in the commons. Some of the public fervor that's sprung up on social media has advocated for a boycott of Thingiverse, effectively holding the commons hostage. Michael Molich has noted that such a boycott would entirely remove the evidentiary trail from public view, potentially allowing Makerbot and other companies open season on designs in the commons. Molich suggests that we are seeing two distinct approaches to business clash within one agent: open vs. closed source ("Makerbot" par. 2-10).

Many legal observers are already beginning to suggest massive fallout from this case due to the growing scope and applications of 3D printing. The door has been thrown open in the manufacturing industry, and we are now seeing larger adoptions figures in the 3D printing industry, allowing for a flood of designs to enter the marketplace. It is important to note that 3D printers will continue to challenge traditional patent law due to scope. Parts that have been patented by large companies as part of an appliance, for example, have not traditionally been subject to mass-patent infringement. It's unlikely that most parts will, either, but it is likely that individuals will begin (and have already done so) recreating parts and devices that are patented under US law. This potentially invalidates, and at least strains, the traditional patent process in United States law. Observers fear that a series of cases like these will establish a precedent for large corporations that favors their status as content creators as privileged over the individual.

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Jeffrey R. Galin

## Keep on Keeping On: Georgia State Fair Use Case Faces a New Metric for Assessing Fair Use

The Georgia State case concerning use of online library reserves and courseware like Blackboard to provide class readings for students has taken a complex turn in the court of appeals. What was a decisive win for Georgia State, and for fair use, in the lower courts has now been vacated and remanded back to the lower court for revision. While GSU has currently lost the original award of some 3 million in attorney fees and a clear and manageable method of calculating what constitutes fair use, it is unclear what impact this ruling will have on academic fair use. There are, however, several important issues that Judge Gerald Bard Tjoflat has either affirmed from the lower court or has introduced in his own decision speaking for the majority in the 11th Circuit Court of Appeals. In essence, the higher court agreed with the overall logic of the decision (with some important qualifications) but not the method for determining fair use. For the time being, the injunctive relief that the lower court established and the award of litigation costs to the Defendants have been vacated. Since the Plaintiffs just filed a motion to reopen the record on remand in late February, it appears that they are not appealing to the Supreme Court and that Judge Orinda Evans will be using the new metrics for fair use set by the Appellate Court this past October. In the end, Judge Evans may reach the same conclusions she reached before, but she will have to use a significantly different metric to get there.

We will not know, however, how these changes will affect her revised decision until she rewrites her opinion with the higher court's guidance. Even though her new decision will only be binding in the 9th circuit in the Southern US, whatever emerges from this case will be used and cited for nearly all future fair use decisions concerning university fair use of published works because it is the only case to address directly the rights of libraries and professors to use copyrighted works for educational purposes and is the most comprehensive review of fair use practice since the 1976 Copyright statute was enacted. Thus, it is important at this junction to anticipate the impacts of revisiting this case and to outline what has been gained and lost. I offer here a set of interesting issues that will need to be taken into consideration as Judge Evans revises her previous opinion and may directly affect our own determinations of which readings we can justifiably provide to students in online reserves or through a course delivery system like Blackboard.

### Four Important Issues Settled

Among the more significant results of this ruling were confirmations of positions that the lower court established. These issues could be considered substantial losses for the publishing industry. They include:

- 1) the minimization of the 1976 Classroom Copying Guidelines that are used by many libraries today to restrict faculty uses of copyrighted works for teaching purposes;
- 2) reaffirmation that a four-part fair use test must be applied for each copyright violation rather than lumping together all uses in an ambiguous notion of ongoing university practices;
- 3) dismissal of coursepack decisions such as *Basic Books Inc. v. Kinko's Graphics Corp.* and *Princeton Univ. v. Michigan Document Servs.* as binding authority for non-profit institutions; and
- 4) affirmation that works without available licenses in the Copyright Clearance Center (CCC) weighs in favor of fair use.

Issue 1: For years, the 1976 Classroom Copying Guidelines have been mentioned, particularly in case dicta, footnotes, or as references to minimal standards against which fair use violations might be measured. Until this case, however, no Federal court had ever directly ruled on what role these decidedly narrow legislative guidelines for brevity, spontaneity, and cumulative effect should play for a fair use case for non-profit institutions. The plaintiffs asserted vehemently that these guidelines should be used as the standard for fair use practices. Judge Tjoflat put this issue to rest noting that although they are “part of the legislative history of the Copyright Act,” they “do not carry force of law” (88). He continues,

In any case, to treat the Classroom Guidelines as indicative of what is allowable would be to create the type of ‘hard evidentiary presumption’ that the Supreme Court has cautioned against, because fair use must operate as a “sensitive balancing of interests.” *Campbell*, 510 U.S. at 584, 114 S. Ct. at 1174 (quoting *Sony*, 464 U.S. at 455, n. 40, 104 S. Ct. at 795, n. 40).

This statement is a direct rejection of the Classroom Guidelines as legally binding and as a set of bright line rules for determining fair use. It echoes the interpretation in *Campbell v. Acuff-Rose Music, Inc.* that such guidelines undermine the sensitive constitutional balance of the rights of the public good and the limited monopoly of rights of the creator of a copyrighted work. Furthermore, dismissal of these guidelines reaffirms the mandate that a “fair use analysis must be performed on a work-by-work basis.” Many university libraries across the country currently use these guidelines to govern copyright use in their institutions. Judge Tjoflat has made it clear that such practices are problematic and should not be used in place of a four-part fair use test. When there is a final decision in this case, these institutions should seriously consider altering their current practices.

Issue 2: The Plaintiffs were working hard to limit the scope of fair use however they could. One of their strategies was to assert that there could be no non-profit use of works if the use was not transformative. This notion came chiefly from the coursepack cases, *Kinkos* and *Princeton* because the courts in these cases asserted that for-profit services could not copy works without seeking licenses for non-transformative works. While the Circuit Court did in fact find that none of the uses was transformative and that this fact impacted the

potential for market harm, it reaffirmed that a fair use ruling is not barred for non-transformative uses.

Issue 3: The three publishers involved; Oxford, Cambridge, and Sage; hoped to avoid the four-factor analysis altogether by using the same logic that was used for the for-profit copy shops. The Eleventh Circuit Court of Appeals dismissed the coursepack cases as binding precedent because Georgia State University is clearly a non-profit institution and the materials were used for teaching purposes. This reaffirmation is important for two reasons: first, the higher court reaffirmed that a four-part fair use test must be applied for each copyright violation rather than lumping together all uses into the “broader context of ongoing practices at GSU” (55). Judge Tjoflat reasoned that the court “would have no principled method of determining whether a nebulous cloud of infringements purportedly caused by GSU’s ‘ongoing practices’ should be excused by the defense of fair use.” Second, such a practice would effectively bypass the fair use analysis altogether and thereby ignore the first half of the constitutional mandate “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (United States Constitution, Article I, Section 8). The significance of this balancing cannot be underestimated.

Issue 4: The publishers were hoping that the Appeals Court would overturn Judge Evans’ analysis of license agreements. She argued that the absence of license agreements weighed against market harm (factor 4 of fair use) and thereby dismissed 17 works under consideration. The publishers hoped to get a ruling that “any unlicensed use is an economic loss for them, even if they have decided not to make the desired license available” (Smith, Oct 19th, 2014). Instead, the court found that logic circular. Any work used and defended by fair use could be argued to have potential future lost revenue. But if all works could potentially cause market harm, no matter the publisher’s investments to protect the work, then no work could likely be defended by fair use provisions. The court found that if publishers did not find the work worthy of purchasing a license with the CCC, then one could safely presume that the publishers did not anticipate sufficient return to pay for that license. The court noted that no license available for a work “creates a presumption that no market for digital permissions exists for a particular work” (102) and therefore generally weighs in favor of fair use for factor four (96).

The Appeals Court confirmation of this principle is consistent with the other three major issues that publishers wanted to use to dramatically shift copyright and fair use away from the delicate balance on which copyright law was founded as early as the Statute of Anne in 1710. Neither court supported these arguments, and both offered well-reasoned analyses of why they would not. As Kevin Smith notes in his October 19th blog post, this cluster of principles was likely the primary motivation for the publishers to go to court in the first place. The fact that they lost on all four leaves them only with the consolation of a revised four-part fair use test, a revision that is certainly more favorable for them than the lower court interpretations, but a result that is far short of what

they had hoped. For all intents and purposes, these four issues are resolved and will not likely play significant roles in future litigation for similar cases.

Despite the fact that Nancy Sims says, “NOTHING HERE (in the 11th Circuit Court decision) WILL HELP EVEN ONE TEACHER MAKE FAIR USE CALLS” (qtd in Butler, 3), there are a few important implications for teachers and librarians of these rulings. First, university libraries that use the Classroom Copyright Guidelines need to seriously rethink their online reserve policies; however, until Judge Evans rules again, we will not know exactly what advice to offer.

Second, as Brandon Butler argues in “Transformative Teaching and Educational Fair Use After Georgia State,” we need to redefine teaching use of works as transformative uses where appropriate and possible. For example, the audiences for a great deal of academic writing are other scholars rather than students. As such, the intent of such works is to move the knowledge of the field ahead rather than to have undergraduates discuss the debates in classrooms. Where audience objectives diverge, transformational uses have a role to play. This shift in defining transformational uses will have to be validated in future case law. But this argument cannot gain traction until users begin thinking of transformational uses differently than they have previously.

Third, faculty should continue to avoid services that provide student readings for a fee for which permissions have not been paid. Coursepacks with licensed readings may continue to be used in the near future, but that practice has dwindled significantly in the wake of the coursepack cases. As more and more courses go online in massive open online courses (MOOCs), one could imagine commercial services popping up that would want to provide works for students. All such services will be bound by the coursepack cases; thus faculty should find ways to provide readings for their classes, including MOOCs that do not involve for-profit vendors.

Fourth, faculty and libraries should provide no more of a work than necessary for the pedagogical purpose. Furthermore, works without licenses are more likely to be found fair use than those with licenses. This result cuts both ways. Libraries are required to provide CCC license checks and do not charge faculty for doing so, but publishers may decide to strike deals for licensing most of what they produce to avoid missing any potential revenue. Ultimately, librarians and faculty need to know which works they use have available licenses.

One major caveat to this last point is that the existence of a license for a work does not automatically disqualify it from a fair use defense. Based on the Appellate Court decision, however, the presence of a license weighs heavily in favor of the publisher for the fourth fair use factor.

## **Changes in the Four-Factor Fair Use Test**

While it is not surprising that these first four issues were decided as they were because of dicta in previous case law and work by scholars like Kenneth Crews that have made similar arguments for at least 14 years (“The Law of Fair Use and

the Illusion of Fair-Use Guidelines”), the following issues that redefine the four fair use factors have several surprising new implications and raise important concerns for faculty and librarians. Furthermore, they will make it exceedingly difficult for Judge Evans to develop a revised method for determining which texts should be found in violation of copyright, and even more difficult for librarians and faculty to make these same judgments.

Perhaps the most significant result of the appeals court decision is that factors 2-4 of the fair use defense have been significantly reconsidered, particularly for works that are not deemed to have transformative uses. The primary objections to the factor analysis were that Judge Evans weighed the relative importance of each fair use factor evenly rather than affording more weight to the fourth factor on market harm. Furthermore, she relied too heavily on a mathematical formula for determining the amount of the work used. She held that: “Where a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10% of the pages in the book is permissible under factor three” (88). It would be no more than one chapter for a book with more than 10 chapters. The higher court rejected this practice, noting that “The District Court should have analyzed each instance of alleged copying individually, considering the quantity and the quality of material taken—including whether the material taken constituted the heart of the work—and whether that taking was excessive in the light of the educational purpose of the use and the threat of market substitution” (Cambridge et al. v. Patton D.C. Docket No. 1:08-cv-91- 2). This statement makes what was a fairly straightforward process for calculating fair use, more complex and time intensive. The judge, who is not an expert in the subject matter of the works in question, will have to determine if the copied parts represent the “heart” or the most interesting and important parts of the work and how much of the work is too much for the pedagogical purposes of the professor. More importantly, professors will routinely have to make these determinations on their own as they choose materials for digital delivery to students.

The following list of changes in the fair use factor test mark subtle but interesting shifts in evaluating fair use that will guide similar cases in the coming years, many of which have implications for faculty.

- 1) Already mentioned is Judge Tjoflat’s admonition that the lower court had erred in applying the four-factor test as an equation. In the lower court balancing of factors, if two factors weighted in favor of fair use and two weighed in favor of the publisher, then an analysis of the actual income made from the license was completed to determine the outcome. Each factor was awarded the same weight.
- 2) While transformative works tend to tip factor 1 in favor of fair use, the absence of transformative copying is not determinative for deciding factor 1 in favor of commercial use rather than non-profit use. (Interestingly, the 11th Circuit Court found that the non-transformative copying raised “the threat for market substitution,” which might adversely affect the potential market for the works. This new analysis of

transformative works served as one of the 11th Circuit Court's justifications for weighing factor four more heavily than the other factors.)

- 3) Conversely, in determining both the character of the work and the amount used for factors 1 and 3, Defendants' educational purpose may increase the amount of permissible copying even if the use is nontransformative (111). Thus, it becomes essential for faculty to be able to articulate the educational purpose of the use and to justify the amount of work taken for that purpose. I assume that these elements will need to be included in any fair use checklist that is designed in response to the lower court's revised decision.
- 4) I would argue that the analysis of factor two, the nature of use, became one of the most surprising discussions of the case. The Appellate Court shifted the focus of this analysis from the traditional distinction between creative works and informational works to one of original contributions and communicated facts. The court argued that author contributions that include "evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information or derives from the author's experiences or opinions" (80-81) constitute creative contribution. This interpretation is unusual in the sense that creative works have typically been defined fictional or artistic works. Academic works have been considered less protected than creative works on the whole. This shift to protect artistic expression in academic works, drawing primarily on two cases *Harper & Row v. Nation Enterprises* and *Marcus v. Rowley*, means that only mere facts can be protected under this second factor and will almost never serve more than a neutral factor for either side concerning use of articles with students for academic purposes.

This conclusion is particularly surprising considering how the introductory language of section 107 of the Copyright Code defines fair use. It states: "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" (Article I, Section 8). The fact that "multiple copies for classroom use" is specifically singled out in the fair use statute suggests that case law may be moving farther away from the original intended definitions of "creative works." If only works that have no "evaluative, analytical, or subjectively descriptive material" beyond bare facts can be considered non-creative, then this factor will never be of value to academics who want to share readings for class discussion. The point of presenting such works for teaching purposes is fundamentally undermined. It would not surprise me if this element of the 11th Circuit Court's opinion were to be revisited in future cases because of this odd conflict.

- 5) Factor 3, amount and substantiality of the portion used compared to the whole work, was deemed to be mechanically determined by the District Court and therefore in need of reevaluation. As noted above, the formula asserted that no more than one chapter could be taken from a book with ten or more chapters and no more than 10% of books without chapters or with ten chapters or fewer may be copied unpaid. Because this formula appeared too rigid and because only the quantity but not quality of what was taken was being considered, it was dismissed as inflexible. It too was tied to factor four because the greater amount copied increased the potential for market substitution, which further elevates the relative weight of factor four in the overall analysis. Faculty will have to wait for guidance from Judge Evans before they will be able to judge the relative amounts of texts used and how those quantities will be justified.
- 6) One favorable result of this decision for fair use found that the District Court appropriately measured the amount copied based on the length of the entire book. This finding negates the fact that individual chapters might stand alone as individual works, which the publishers were trying to claim;
- 7) Even though the Supreme Court case *Campbell* and many that have followed have ruled that the fourth fair use factor should not be “conspicuously” singled out “as having any greater significance than the others” (ctd. in footnote 31, 93), the 11th Circuit Appeals Court has determined that it should be weighted significantly heavier in this particular case and for non-transformative uses in general. This shift is probably the most important and broad reaching impact of the 11th Circuit Court’s decision.
- 8) An additional favorable result for publishers may be found near the end of the decision where the Appellate Court noted that publishers, not academic authors, hold the copyrights in question and who are claiming infringement (108), thus incentive to create new works is not in question here. Rather it is the incentive to publish. This final clarification is important to all academics who publish their works and routinely and voluntarily give up nearly all rights to them when they sign publishing contracts. The irony, lost on the court, is that the creators have given up these rights even though they were the ones that copyright laws were originally designed to protect. Since those of us who write academic articles rarely, if ever, see any financial benefit from doing so and regularly supplement our primary class readings with articles and book chapters made available in digital forms, we should seek out opportunities to publish in open access venues, where our works can be broadly distributed and used by others for educational purposes, but still be vetted for promotion purposes. We should also actively seek out author addendums to publishing contracts that reserve sets of rights for ourselves and the uses of our works.

## Next Steps

With the formal filing of the Motion to Reopen the Record on Remand in late February of this year, the publishers in this case have taken the first step in its next phase. They have made clear the process they would like to follow starts with an entirely new round of discovery to update the factual record (2), which will likely take a great deal of time. They note in the motion that “appropriate injunctive relief must be based on an updated factual record” (2). The motion suggests a thorough analysis of the past five years of works used by GSU since they note that the “record on which this Court’s (District Court’s) decision was based is now more than five years old” (2). Since injunctive relief can only be provided for continuing and ongoing copyright violations, the record must be updated. However, GSU is using a new copyright policy that they revised based on Judge Evan’s August 12 decision of 2012, which can be found at <http://reserves.library.gsu.edu/reserves/instructorinfo.asp> with its corresponding fair use checklist. Kevin Smith notes in a blog post March 2, 2015 that Judge Evans has narrowed the scope of discovery once before when GSU argued that only current and ongoing practices can be subject to an injunction. Thus, one would expect that any new discovery will have to be based on copyrighted materials since that revised policy was put in place. If in fact they have effectively followed the revised policy and perhaps limited their use of the plaintiff’s works since the trial, the record may be even more sparse now than it was in the previous proceedings. But since the balance of the four factors has changed, the results may also become more problematic for GSU.

Clearly, the publishers expect that they will broaden the scope of works used, even if they must start discovery in 2012 rather than 2009. They note that a second step, once discovery is closed, is for both sides to submit briefs based on the 11th Circuit Court’s new analysis of the four fair use factors. In essence, they anticipate that both sides will have to reargue their positions in their briefs and analyze each work alleged to be in violation of copyright. This process will be long and costly for both sides. While there is still the possibility of a settlement, it appears that neither party is interested in one. Clearly the plaintiffs plan to proceed based on their recent motion to reopen the record. GSU took on this case in order to get it to court. A settlement now would simply undermine the work they have already achieved and leave no effective method for judging fair use.

So, the key principle to keep in mind as the two sides dig into discovery again is the fundamental principle on which this case is based, the delicate balance between the rights of copyright holders to retain and manage copyrights to their works for a limited period of time and the rights of other authors and users who should be able to build on and learn from the ideas of others. The 11th Circuit Court reminds us that fair use asserts “some unpaid use of copyrighted materials must be allowed in order to prevent copyright from functional as a straitjacket that stifles the very creative activity it seeks to foster. If we allow too much unpaid copying, however, we risk extinguishing the economic incentive to create what copyright is intended to provide” (4). A great



deal is riding on Judge Evans's ability to keep this balance in perspective. It will be interesting to see how she devises a system for "considering the quality and quantity of material taken" for the specific educational purpose in order to calculate market harm, provide a method that does not set new "bright line" rules but provides a method that can be simplified for faculty to use on a daily basis, negotiate the newly articulated distinction between creative and primarily factual works, and interpret the new emphasis on the potential for market harm. In the end, Judge Evans may reach the same conclusions a second time after adjusting her methodology based on the higher court's recommendations. We will all eagerly await her revised decision.

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Amy D. Proppen

## Open Data, Environmental Conservation, and the Digital Humanities: Mapping the Mangroves

CCCC's clear focus in 2014 on open access initiatives was not a discrete event or anomaly; rather, the thematic focus reflected what has been an ongoing trend in the expanding role of open access, open data, and participatory projects across many disciplines in recent years. Such projects have implications not only for environmental conservation and education more broadly but also for scholars of rhetoric and digital humanities more specifically.

In the past decade, fields like geography and environmental studies, for example, have seen a sharp increase in and readily acknowledged the value of community-based mapping projects. Writing in 2007, geographer Chris Perkins noted that “[t]echnological advances in the last five years have led to new community mapping initiatives that aim to build collaborative, community-led alternatives to commodified map data” (134-5). Since then, these community-led mapping initiatives have consistently revealed powerful implications for scientists, educators, and interested publics, and often rely on open data to help forward knowledge-making practices and citizen science endeavors.

A new online mapping project called *Mapping the Mangroves* (MTM) exemplifies such initiatives. MTM was first funded by Qatar Foundation International, and is now a “keystone project” of the organization MapWorks Learning (Meinke). *Mapping the Mangroves* “combines a mobile app and companion website, designed to promote citizen science in the conservation and scientific studies of mangroves forests, a critically important ecosystem” (“About”). Described succinctly in a recent Creative Commons article,

MTM uses a mapping application built on the open source Ushahidi software platform, relying on crowdsourcing to collect geographic and descriptive data about mangrove forests. The project's reporting system allows anyone to submit a report about mangrove forests, describing the area's biodiversity and pairing it with geographic coordinates and other sensor data. The data are then displayed on an interactive map on the project's homepage, with all reports searchable and explorable by geographic region and other habitat or report traits. (Meinke)

This community mapping project clearly reflects the ways open source tools can help promote and shape new approaches to citizen science and environmental education.

As their project site describes, MTM helps promote citizen science through the use of a mobile app that allows anyone with a smart device “to identify mangroves species, analyze biodiversity and plot field observations onto a real-time map” (“About”). The MTM app is used by “school groups, scientists and environmental organizations” (“About”). For example, one group from the

Guardiões do Mar Institute in Brazil, who has created a page related to their research project, monitors populations of the crustacean *Ucides cordatus* (a genus of mangrove crab) in the mangrove regions of the eastern portions of the Guanabara Bay (“Reports”). Clearly, projects such as this support environmental education by allowing students and interested parties to learn about mangrove ecosystems and participate in environmental conservation by helping to monitor and protect remote mangrove forests. Such efforts clearly align with basic definitions and understandings of citizen science. The Cornell Lab of Ornithology, arguably one of the original promoters of citizen science, defines the term thus:

In North America, citizen science typically refers to research collaborations between scientists and volunteers, particularly (but not exclusively) to expand opportunities for scientific data collection and to provide access to scientific information for community members. As a working definition, we offer the following: “projects in which volunteers partner with scientists to answer real-world questions.” (“Defining Citizen Science”)

In fact, it bears noting that the Cornell Lab of Ornithology has long sponsored wonderful citizen science projects like eBird, Project FeederWatch, and of course the Great Backyard Bird Count. They, too, also sponsor a community mapping initiative called YardMap, “an NSF-funded project that builds online communities to investigate the impacts of bird-friendly and carbon-neutral practices in backyards, community gardens, and parks” (“Mission: Citizen Science”). Participants can essentially find their yards or local parks on a Google Maps interface and then use online tools to create data maps (“Mission: Citizen Science”).

While community mapping projects like *Mapping the Mangroves* help promote citizen science and environmental education efforts more broadly, they also have implications for scholars of rhetoric and composition and the digital humanities in particular.

*Mapping the Mangroves* is not only a community mapping project but also arguably a digital humanities endeavor. That is, MTM is a project of MapWorks Learning, a community-funded, educational non-profit organization based in Washington, D.C. and Chicago. When we look at the goals and mission of MapWorks Learning as articulated on their website, we can see clear connections between the goals of their work and the goals of the digital humanities, broadly speaking.

In acknowledging the long history of debates about what counts as the digital humanities, Matthew Kirschenbaum references an early Wikipedia entry on the topic, which defines the digital humanities as “methodological by nature and interdisciplinary in scope. It involves investigation, analysis, synthesis and presentation of information in electronic form. It studies how these media affect the disciplines in which they are used, and what these disciplines have to contribute to our knowledge of computing” (Kirschenbaum 56). If, for the purposes of this short piece, we settle on this definition as suitable enough, and then juxtapose it with MapWorks Learning’s mission, we see evidence of

overlapping analytical and conceptual concerns, such that it becomes possible to make a case for understanding projects like *Mapping the Mangroves* as a digital humanities endeavor.

In describing their position on the value of mapping as a means of knowledge making, MapWorks Learning alludes to the interdisciplinary and methodological nature of mapping, when they note that “[t]hroughout time, maps have been used to create a record of where we have been and as an aid to helping us find where we want to go. Maps can also show the pathways we take through the process of learning towards understanding” (About Us”).

Moreover, MapWorks Learning creates tools that allow educational organizations and everyday citizens to investigate, analyze, synthesize, and present information in electronic form. That is, of their work, they note: “We aim to provide educational organizations--schools, school systems, and informal learning groups with mentorship, connections to peers, a new way of generating ideas and personalized interventions. ... We help to align your ideas with new methods of thinking and tools for learning to achieve your goals. ... We help to create inclusive learning environments and inquiry based approaches to content acquisition” (“Our Work”).

MapWorks Learning is also interested in how maps affect the various disciplines and groups who use them. For example, they note that one goal of the Mapping the Mangroves project is to raise awareness, promote dialogue, and increase action related to preserving the world’s mangroves (“About”). Finally, Mapworks Learning implicitly communicates an interest in understanding what these educational groups and concerned citizens then contribute to our knowledge of computing, through their participation in community mapping projects. They note: “Much in the same way that maps have been used to chart navigational pathways, MapWorks Learning aims to explore the connection between the physical nature of maps and how learners best make sense of their own learning pathways” (“About”). In other words, how can digital mapping technologies enable learners to create new knowledge, and how can this new knowledge then shape and reflect how we understand the work of these technologies in the public sphere? Moreover, how do these projects then shape discourses about mapping technologies, and subsequently, perhaps, discourses about the environment?

Thus, when we consider open data mapping projects like *Mapping the Mangroves* through the lens of the digital humanities or digital rhetoric, the implications for scholars of rhetoric and composition become clear. From a digital rhetoric perspective, as Douglas Eyman describes, we might also analyze MTM in terms of its “affordances and constraints” as an artifact of new media, or in terms of its “potential for building social communities,” or in terms of how it constructs or shapes ideas about agency—all of which are arguably areas of interest to scholars of rhetoric and composition (“On Digital Rhetoric”).

Finally, in closing, we might recall Donna Haraway’s landmark work, *Simians, Cyborgs, and Women: The Reinvention of Nature*, in which she asks: “What kind of constitutive role in the production of knowledge, imagination, and practice can new groups doing science have? How can these groups be allied

with progressive social and political movements?" (169). I suggest here that the ongoing efforts of organizations like MapWorks Learning to support projects like *Mapping the Mangroves* clearly demonstrates the ways in which open data mapping initiatives not only promote environmental education and conservation but have also become a significant feature on the landscape of the digital humanities and digital rhetorics, and will likely remain so for years to come.

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Karen Lunsford

## Another Piece in the Open-Access Puzzle: The California Taxpayer Access to Publicly Funded Research Act (AB609)

Ever since scientists and libraries boycotted the journal *Nature* in 2001 over skyrocketing journal prices, and ever since the subsequent founding of publication venues such as the *Public Library of Science* (now *PLOS*), momentum has been building in the United States towards making open access to published research not an ideal, but the norm. This norm is shared not only among academics, but also among a wide range of stakeholders, including members of the general public, policymakers, industry leaders, and healthcare providers. However, shifting from a limited-access, print-based knowledge society to an open-access, digital one requires fundamental changes in publication practices and in the laws that apply to them. One such policy-changing law was the 2008 NIH Public Access Policy (part of the Consolidated Appropriations Act, 2008; see "Frequently Asked Questions"). This federal law requires researchers who receive grant funding from the National Institutes of Health to deposit a copy of their publications in an open-access repository, namely *PubMed Central*. Despite its success, one federal law does not an open-access society make. Indeed, action at only the federal level threatens to introduce inconsistencies among federal, state, and local policies regarding open access to published research. Responding to the momentum first generated by grassroots campaigns among academics and later strengthened by federal response, legislatures in U.S. states have taken up open-access issues. On September 29, 2014, Governor Jerry Brown of California signed into state law one more piece of the open-access puzzle, the first state law to mirror federal policy by requiring open access to certain state-funded research (see accounts of the legislation and its history by Daughtery and Peet).

The California Taxpayer Access to Publicly Funded Research Act (AB609) mirrors the 2008 NIH Public Access Policy by requiring recipients of grant funding from the CA Department of Public Health to make a peer-reviewed copy of a publication available in an open-access repository within 12 months after publication in a journal (Assembly Bill No. 609; Daughtery; Peet). The bill was first submitted for consideration in February 2013, and its original provisions echoed two federal initiatives that were also introduced then (Peet). The first federal initiative, the proposed FASTR act (Fair Access to Science and Technology Research) in the U.S. Senate, would have required that research sponsored by 11 federal agencies be made available in open-access repositories within 6 months after publication in a journal (Peet). In other words, the federal act would have shortened the embargo that some journal publishers and authors might impose on new research publications as a means to protect profits and to temporarily restrict access to the information to subscribers (Peet). The initial CA Taxpayer Access bill would have likewise set a 6-month deadline. However,

there was pushback regarding this requirement from publishers and some industries (Kamdar; Peet), and the 12-month requirement has been maintained at both the federal and state levels.

The second federal initiative, the 2013 Executive Directive on Increasing Access to the Results of Federally Funded Scientific Research, extended the 2008 NIH Public Access Policy to all federal agencies that have research grant budgets of \$100M or more (SPARC-a). Over 20 federal agencies were affected, including the Department of Defense, the Department of Education, the Environmental Protection Agency, the National Science Foundation, and the Smithsonian Institution. Congress also passed the 2014 Omnibus Appropriations Act, which extended open-access requirements to the Departments of Labor, Health and Human Services, and Education (SPARC-b). The initial CA Taxpayer Access bill likewise would have applied to a wide range of state-funded research (Kamdar; Peet). However, instead of following the Executive Directive or Omnibus Act, the provisions of the CA bill were aligned with the 2008 NIH Public Access Policy. The final version of the CA Taxpayer Access Act applies only to research grants funded by the CA Department of Public Health (Assembly Bill No. 609; Kamdar; Peet).

The CA Taxpayer Access Act had bipartisan support, and it was justified with the backing of many IP stakeholders. California Assemblyman Brian Nestande (Republican) and Assemblyman Mike Gatto (Democrat) were its co-authors (Assembly Bill No. 609). The final draft of the CA Taxpayer Access Act and its accompanying Senate Floor Analysis provide explicit justifications that will be familiar to those following the open-access movement (links to both documents are provided in the Works Cited). First, the public has a right to access research that taxpayer dollars have already paid for, especially research on health issues. Second, the Senate Floor Analysis notes that the cost of journal subscriptions prevents most individual taxpayers and collective entities from purchasing access to research; even the University of California system of 10 campuses is struggling to pay nearly \$40M per year in journal subscriptions, in part for research that UC faculty members are themselves contributing. Third, the CA Taxpayer Access Act emphasizes the economic impact of intellectual property in California: the state has large IP producers (“research universities, national laboratories, and leading-edge, high-technology companies”) that can serve as economic engines for various other industries and enterprises. Ultimately, the CA Taxpayer Access Act was supported by industry leaders such as Google and Mozilla; well-known promoters of open access such as SPARC (Scholarly Publishing and Academic Resources Coalition), the Electronic Frontier Foundation, the Public Library of Science, and library organizations; public health organizations; and, substantially, by the University of California (Senate Floor Analysis).

The CA Taxpayer Access Act also identifies other pieces of the open-access puzzle that must be in place before an open-access culture can be established: the repositories that are eligible to host the articles (Assembly Bill No. 609; Senate Floor Analysis). Unlike the 2008 NIH Public Access Policy, the CA Taxpayer Access Act does not specify that open-access copies must be deposited

to a single repository, but allows for a variety of potential hosts. *PubMed Central*, the federal repository linked to the NIH, is one option, but so are other recognized repositories and state-sponsored entities. Among these is *eScholarship*, an open-access repository hosted by the California Digital Library and allied with the University of California system. Interestingly, the legislation also identifies the CA Digital Open Source Library. Established in 2012, and initially associated with the California State University and community college systems, its purpose is to make open-source/creative-commons textbooks available to students for free or at low cost (Senate Bill No. 1053). In short, the CA Taxpayer Access Act pragmatically taps into a large network of existing repositories that target various stakeholders, including students.

As these different repositories suggest, the state policy has strong partners within its educational systems, partners that are developing the needed infrastructures and analogous changes in attitudes towards IP at the local level. A major supporter of the CA Taxpayer Access Act, the University of California system simultaneously has been working on local governance policies. Responding to a grassroots movement among faculty, on July 24, 2013, the UC Academic Senate confirmed a new open access policy for faculty members throughout the system ("Open Access Policy for the Academic Senate"). The UC Open Access Policy echoes policies already established at Harvard, Stanford, MIT, Kansas, and other research universities and institutions. The new norm is that all faculty members are to make a peer-reviewed copy of their publications available through an open-access repository, either through a direct deposit to *eScholarship* (run by the California Digital Library) or through providing a link in the *eScholarship* database to a copy deposited elsewhere. In 2014, the policy was rolled out in a pilot program to UC-Irvine, UC-Los Angeles, and UC-San Francisco, along with a new publication management software system, and in 2015, the policy will encompass the remaining seven campuses ("Policy FAQs"). Importantly, the policy works on a voluntary basis – there are no connections to the promotion/tenure procedures, for example – and is intended to provide a benefit for faculty who want their research to be more visible ("Policy FAQs"). The UC administration has pre-negotiated with publishers to alert them that open-access deposits will be the norm, and that if they object, they must request a waiver ("Policy FAQs"). In addition, the California Digital Library can host open-access datasets (also required by some granting agencies) and can act as its own publisher (much like PLOS) (Cruse; Romansky).

On its own, then, the CA Taxpayer Access Act may appear to be restricted in both implementation (applying only to the CA Department of Public Health) and timeframe (requiring a deposit 12 months after publication, instead of a desired 6 months). However, it is better interpreted as a sign of a larger open-access movement within California and a sign of more initiatives to come at the local, state, and federal levels. The UC Press, for example, has just launched an open-access series and software platform to support long monographs/books, and more information about the first publications released via this new infrastructure will be forthcoming later in 2015 (Weston). At the state level, both New York and Illinois have proposed open-access laws, and the Illinois



legislation is likely to be implemented (Peet). Finally, discussions about open-access provisions continue at the federal level, discussions that can be followed through the SPARC website.

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Laurie Cubbison

## Will Taylor Swift and Spotify Ever Get Back Together?

Musicians may own the copyrights to their compositions and performances, but that may be little consolation if the music industry adopts business models that siphon off most of the profits—even while claiming that its practices are for the good of musicians and their fans. The recording industry is in flux, with album sales falling in the face of music piracy. Record companies and musicians are looking for ways to recoup their losses, and streaming companies like Pandora and Spotify argue that their services will allow the musicians and recording industry to recapture the youth market lost to torrents and other forms of file sharing. One problem is that digital sales via iTunes and Amazon aren't replacing dropping CD sales, but neither are revenues from the streaming services. Another problem is that one of the benefits of streaming services – exposure – is of little value to the biggest stars, leaving major artists and their record companies viewing streaming services as little better than the pirates.

In October 2014, Forbes suggested that Taylor Swift's *1989* could be the last platinum album, the last to sell one million units. Swift's *1989* sold 1.287 million copies in its first week of release, with Swift one of only four artists to take an album platinum in 2014, the others being Jason Aldean, Sam Smith and Arianna Grande, two well-established musicians and two newcomers. The two stars, Swift and Aldean, pulled their best-selling albums from the streaming service Spotify, believing that the service hurts album sales as much as pirates do.

By pulling their albums, Swift and Aldean engaged in *windowing*, or the practice of releasing material in a tiered way for different media. The movie industry's business model is based on this strategy, in which a film is released first to the theaters. Once the film no longer attracts sufficient ticket sales, preparations begin for the DVD/Blu-ray release, as well as Video-on-Demand. Eventually the film airs on pay-cable networks and then finally to basic cable and broadcast networks. Once a film has exhausted the profit potential of one media, its availability shifts to include the next. The music industry has not traditionally used this strategy, but Swift and her record company, among others such as Coldplay and Adele, are pursuing the practice in response to streaming music services like Spotify. In this model the artist would release an album for sale on CD and iTunes, but would not make it available to free streaming services until after initial sales have peaked, a month or so later.

The streaming services see this emerging practice as threatening their business models, which rely on making new and popular music available to listeners, with royalties to be paid in a fraction of a cent each time a song is played via the service. The business model of the streaming service is based on volume, with artists to make money by having their songs played over and over by a large number of listeners. Swedish-based Spotify offers a freemium-style

service, with certain features available free to registered users, with other services – offline listening, elimination of advertising, and no restrictions – available only to paid users. Chief Executive Officer Daniel Ek claims that “more than 80% of our subscribers started as free users” in order to justify the model.

The specter looming behind both models is music piracy. The streaming companies construct themselves as the alternative to piracy, while the artists and recording companies see the streaming companies as paying so little that they’re little better than pirates. Many artists say they have not seen the income that Spotify says it is generating for them. The value of having one’s music streamed by such services differs according to how well established the artist’s career is. For new artists, the streaming services may grant them needed exposure but with low payouts that may not sustain their careers.

In contrast, major stars like Swift and Aldean do not need the exposure, for their fans are eagerly awaiting their next releases. Swift, like a considerable number of other performers, even has a popular line of fragrances. For them, the issue is how to make the initial release as profitable as possible, with executives such as Scott Borchetta, head of Big Machine, and Jon Loba of BBR Music Group concerned that streaming hurts sales of big albums. Borchetta prefers to see such albums limited to only the premium tiers of the streaming services, so that listeners would need to pay for access:

The problem we have with Spotify is they don’t allow you to do anything with your music. They take it, and they say ‘We’re going to put it everywhere we want to put it. And we really don’t care about what you want to do. Give us everything that you have, and we’re going to do what we want with it.’ And that doesn’t work for us.

Daniel Ek, head of Spotify, argues that the freemium model is central to the company’s process, arguing that free-only streaming services never generated enough advertising income to pay royalties, while paid services generated income but not sufficient numbers of customers:

So our theory was simple – offer a terrific free tier, supported by advertising, as a starting point to attract fans and get them in the door. And unlike other free music options [...] we pay artists and rights holders every time a song is played on our free service. But it’s not as flexible or uninterrupted as Premium. [...] We believed that as fans invested in Spotify with time, listening to their favorite music, discovering new music and sharing it with their friends, they would eventually want the full freedom offered by our premium tier, and they’d be willing to pay for it.

The problem, as far as Swift and Aldean’s record companies are concerned, is that fans would be able to listen to the music without paying for it directly. But Spotify needs that free tier to be good enough to pull in enough customers who then decide to upgrade in order to avoid advertising and other inconveniences. Borchetta would prefer for access to certain music to be one of the perks for premium subscribers.

Both Borchetta and Ek cast their opinions in terms of supporting the fans. Borchetta explains that

We never wanted to embarrass a fan. What I mean by that is that if this fan went and purchased the record, CD, iTunes, wherever, and then their friends go, “Why’d you pay for it? It’s free on Spotify.”

We’re being completely disrespectful to that superfan who wants to invest, who believes in their favorite artist.

In contrast, Ek says: “We believe fans should be able to listen to music wherever and whenever they want, and that artists have an absolute right to be paid for their work and protected from piracy. That’s why we pay nearly 70% of our revenue back to the music community.”

Underlying this conflict is whether the album continues to be a viable form for the music industry. Digital music sales and streaming favors the single, and yet popular music is still packaged in album form, with the selection of the songs seen as forming a coherent thematic experience. Swift wrote in the *Wall Street Journal* that

the value of an album is, and will continue to be, based on the amount of heart and soul an artist has bled into a body of work, and the financial value that artists (and their labels) place on their music when it goes out into the marketplace. Piracy, file sharing and streaming have shrunk the numbers of paid album sales drastically, and every artist has handled this blow differently.

For Swift, the album as a composition comprised of a set of songs is what is important, but the both the digital sales and streaming services encourage the consumption of individual tracks, removing them from their musical and lyrical context.

Note that in the above quotation Swift equates piracy, file sharing, and streaming in their damage to the album, a ranking that Ek challenges by arguing that artists and their record companies believe three myths: that “free music for fans means artists don’t get paid”; that “Spotify pays, but it pays so little per play nobody could ever earn a living from it”; and that “Spotify hurts sales, both download and physical”. While challenging the assumptions and accusations about the streaming service, Ek does not address Swift’s concern about the state of the album as a musical format but instead points out that even as she removed her music from Spotify, 1989 was being downloaded extensively from pirate services.

It becomes clear that the economic effect of piracy and efforts to combat it are affecting the viability of the album as an art form. While artists like Taylor Swift still conceive of the album as a coherent form, music access is tending toward the more economically viable single. Meanwhile the recording industry and the streaming companies struggle with each other over the most lucrative way to distribute copyrighted music.

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Kim Dian Gainer

## The Case of the Missing Copyright: Sherlock Holmes and the Acerbic Judge

The legal dispute over the copyright status of two iconic fictional characters, Sherlock Holmes and Dr. John Watson, ended on November 3, 2014, with a one-sentence memorandum from the Clerk of the Supreme Court of the United States to the Clerk of the United States Court of Appeals for the Seventh Circuit: “The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is denied” (Klinger, “November 2014”). This terse note summarily dismissed an appeal by the estate of Arthur Conan Doyle of a ruling that prevents the estate from demanding licensing fees from authors and directors who create stories that use Holmes and Watson or other characters or elements from the pre-1923 portion of the Holmes canon, the point by which most of the stories (and all of the novels) had been published. The only caveat is that newly created narratives avoid characters or elements introduced in any of the last few Sherlock Holmes stories, those that have not yet entered the public domain.

### Background

The four Sherlock Holmes novels and forty-six of the stories are indisputably in the public domain because they were published before 1923. A further ten stories will enter the public domain one by one, depending upon original year of publication, during the period 2018-2022. The Conan Doyle estate indisputably controls the copyright of those ten stories. However, the estate further claimed a right to control the use of the characters of Holmes and Watson, as well as other elements of the Sherlock Holmes canon. As a result, while the estate could not demand royalties for reprints of the novels and stories published before 1923, it had been insisting upon licensing fees for fictional works based upon the Sherlock Holmes canon.

The legal filings in the case began on February 14, 2013, but the impetus for the case goes back to 2010, when Leslie S. Klinger and Laurie R. King signed a contract with the publisher Random House to edit a book that became known as *A Study in Sherlock*, which the initial filing by Mr. Klinger’s attorneys describes as

[...] a collection of new and original stories inspired by the Canon and the Sherlock Holmes Story Elements. The authors who contributed stories to *A Study in Sherlock* provide original perspectives on Sherlock Holmes by placing the detective in new situations and by creating new characters who solve Holmesian mysteries. Some of the stories in the collection contemplate Holmes in his later years, while others propose new narratives to fill in the chronological gaps in the Canon.

(Klinger v. Conan Doyle Estate Complaint 9)

The following year, the Conan Doyle estate contacted Klinger, his co-editor, and the publisher to assert that it had rights to elements of the Sherlock Holmes stories and to imply that an action for copyright infringement would result if a licensing agreement were not reached. Klinger and King's position was that the stories in the collection would not use any material that could be considered to be still under copyright, but Random House, "without conceding the legal or factual merits of the position asserted by [the estate], and for avoidance of litigation only, entered into a licensing agreement [...]" (10-11).

Later in 2011, Klinger and King began to negotiate with a different publisher, Pegasus Books, to edit a second collection of newly created narratives. As in the case of the earlier collection, Klinger, his co-editor, and the new publisher were contacted by the Conan Doyle estate, which again sought a licensing agreement. It appears, though, that Klinger had intentionally set the stage to sue for a declaratory injunction because, as reported in the ruling in his favor on the district court level, the estate first was contacted, "[a]t Klinger's insistence," by one of the contributors to the collection. After the estate was alerted by the contributor, it communicated its demands to Klinger, his co-editor, and the publishers (*Klinger v. Conan Doyle Estate Memorandum* 3). By this stratagem, Klinger laid the groundwork for a favorable ruling in district court and then on the affirmation on the appellate level that the Supreme Court would decline to review.

Pegasus responded to the estate by asserting that no use would be made of any characters or elements introduced in the ten stories still under copyright and that, moreover, it could not afford the proposed licensing agreement; but the estate persisted in seeking an agreement. Klinger's attorneys characterize the estate's response to Pegasus as having been made "despite the knowledge of [the estate] and [the estate's] Agent that the Sherlock Holmes Story Elements" were no longer under the protection of copyright. The attorneys cited a 2004 decision in a case involving a USA Cable made-for-television movie called *A Case of Evil*, a ruling that stated that characters or elements of the Holmes' canon other than "the increments of expression" introduced in the ten stories still under copyright were in the public domain (*Pannonia Farms, Inc., v. USA Cable*; qtd. in *Klinger v. Conan Doyle Estate Complaint* n. 1).

In addition to arguing that the estate should have been aware that the characters and elements from the pre-1923 texts were in the public domain, Klinger's attorneys asserted that the estate had "threatened to wrongfully interfere with the publication" of the collection, quoting the following communication from the estate:

If you proceed [...] to bring out [the collection] unlicensed, do not expect to see it offered for sale by Amazon, Barnes & Noble, and similar retailers. We work with those company's [sic] routinely to weed out unlicensed uses of Sherlock Holmes from their offerings, and will not hesitate to do so with your book as well.

(*Klinger v. Conan Doyle Estate Complaint* 13)

Unlike Random House, Pegasus refused to back down—at least in theory. The publisher wrote to the estate that they had been "advised that no license is

necessary” and that they would “not be responding to any further communications on this matter” (13). However, Klinger’s attorneys observed that the publisher would not agree to publish the book “so long as the threat of a copyright infringement action by [the estate] is present” and that such an agreement would not be reached until Klinger had been “successful in adjudicating the public domain status of the Sherlock Holmes Story Elements” (14).

### Klinger’s Argument

In their filing, the attorneys for Klinger argued that it was *A Study in Scarlet*, published in 1887, that

introduced for the first time in 1887 many of the characters, character traits, dialogue, settings, artifacts, story lines and other story elements that appear throughout the Canon and were later used in countless adaptations, parodies, satires, pastiches, advertisements, commentaries, artwork, books, films and other works of authorship that were inspired by the Canon and that now pervade Western popular culture.

(*Klinger v. Conan Doyle Estate Complaint* 5)

The attorneys further observed that numerous “[o]ther characters, character traits, dialogue settings, artifacts, story lines and other story elements were introduced” in the remaining three novels in the public domain, as well as in the forty-six stories published before 1923. Attached to the filing was a document with examples of some of the characters and elements that had been introduced in the pre-1923 publications. Characters introduced before 1923 included Sherlock Holmes and John Watson themselves but also Mycroft Holmes, the Baker Street Irregulars and their leader Wiggins, Inspector Lestrade, Mrs. Hudson, Irene Adler, Colonial Sebastian Moran, and Professor Moriarty. Elements included Holmes’s physical appearance, his family and educational background, his Baker Street lodgings, his smoking habits and use of drugs, his facility with disguises, his athletic ability, and his skill in chemistry. A similar, albeit shorter list, was presented for Dr. Watson. All of the items in the attachment were, the attorneys stressed, characters and elements present in novels and stories that were no longer under copyright (*Klinger v. Conan Doyle Estate Complaint, Exhibit A*). As mentioned above, to support their position the attorneys pointed to an earlier case in which a court had ruled that

[s]torylines, dialogue, characters and character traits newly introduced by the [Ten] Stories are examples of added contributions susceptible to copyright protection. Plaintiff [...] does not claim infringement of any creative element particular exclusively and originally to the [Ten] Stories. Defendants' Movie therefore is not derived from any material that plaintiff's claimed copyrights could potentially encompass.

(*Pannonia Farms, Inc., v. USA Cable*; qtd. in *Klinger v. Conan Doyle Estate Complaint* n. 1)



The filing made it clear that Klinger was not seeking an injunction that would allow him to use, without licensing fees, any characters or elements that were introduced in stories published 1923 or later. However, it is also clear from the filing that Mr. Klinger's position was that the most iconic aspects of the Sherlock Holmes canon are in the public domain.

## District Court Ruling

Klinger prevailed on the district court level, although an element of confusion was introduced when the judge, Rubén Castillo, wrote that he was granting judgment in Klinger's favor with regard to the pre-1923 publications but not with regard to the ten stories still under copyright. Klinger had in fact never requested a ruling that would allow him to use elements from the latter without seeking a license from the estate. (This confusion was cleared up on the appellate level.)

Regarding the pre-1923 publications, Castillo accepted in full the arguments offered by Klinger's attorneys, writing that "[w]here an author has used the same character in a series of works, some of which are in the public domain, the public is free to copy story elements from the public domain works" (*Klinger v. Conan Doyle Estate Memorandum* 12). Castillo cited *Pannonia Farms, Inc., v. USA Cable* to support his ruling. In addition, he cited the "landmark case" of *Silverman v. CBS, Inc.*, a basis for the Pannonia Farms ruling. In that case, pre-1948 scripts for the *Amos 'n' Andy* radio show had entered the public domain because their creators had not renewed the copyrights. Subsequent radio, as well as television, scripts were, however, under copyright. When Stephen M. Silverman decided to write a musical based on the characters, he sought a license from the network that owned the copyright to the more recent scripts. When the network declined to license the characters, Silverman sued. Like Klinger, he sought a judgment that would clarify whether the pre-1948 *Amos 'n' Andy* scripts were in the public domain and whether he needed a license to make use of those scripts. Two concepts in the ruling were relevant both for the Pannonia Farms and the Klinger cases. First, the characters in *Amos 'n' Andy* scripts "had been sufficiently delineated in the pre-1948 radio scripts such that they entered the public domain along with the pre-1948 radio scripts" (12-13). Second, Castillo wrote

that the 'increments of expression' contained in the post-1948 radio scripts and television scripts that further delineated the characters and story were protected by CBS's copyright [...]  
Therefore, Silverman would only infringe upon CBS's copyright if he copied the character and story elements that were introduced in the post-1948 radio and television scripts. (13)

In reaching his decision, Castillo explicitly rejects arguments offered by the Conan Doyle estate. One argument was that allowing public domain status for characters even when some stories in which they figure remain under copyright would have the effect of "dismantle[ing] Sir Arthur Doyle's characters into a

public domain version and a copyrighted version” (13). Castillo replies to this argument by stating that

This is [...] precisely what prior courts have done. *Silverman* and *Pannonia Farms* instruct that characters and story elements first articulated in public domain works are free for public use, while further delineation of the characters and story elements in protected works retain their protected status. (13-14)

Castillo also rejects the assertion that the *Silverman* precedent should apply only “to two-dimensional, ‘flat’ characters and not to complex, three-dimensional characters such as Sherlock Holmes and Dr. Watson.” The judge writes that the Conan Doyle estate offered neither case law in support of its position nor a “bright line rule or workable legal standard for determining when characters are sufficiently developed to warrant copyright protection through an entire series” (14).

### Appeals Court Ruling

The Conan Doyle estate appealed Castillo’s ruling to the United States Court of Appeals for the Seventh Circuit but fared no better on the appellate level than it had before the district court. The decision was written for the three-judge panel by noted jurist Richard A. Posner, who summarizes the estate’s case, offered in oral argument, as follows:

[...] copyright on a “complex” character in a story, such as Sherlock Holmes or Dr. Watson, whose full complexity is not revealed until a later story, remains under copyright until the later story falls into the public domain. The estate argues that the fact that early stories in which Holmes or Watson appeared are already in the public domain does not permit their less than fully “complexified” characters in the early stories to be copied even though the stories themselves are in the public domain. (*Klinger v. Conan Doyle Estate*, No. 14-1128 4)

Posner identifies the issue as a question of “whether copyright protection of a fictional character can be extended beyond the expiration of the copyright on it because the author altered the character in a subsequent work.” If this were the case, “the original character cannot lawfully be copied without a license from the writer until the copyright on the later work, in which that character appears in a different form, expires” (8). Posner rapidly dispenses with this argument as being unsupported by the legislative or judicial record:

We cannot find any basis in statute or case law for extending a copyright beyond its expiration. When a story falls into the public domain, story elements—including characters covered by the expired copyright—become fair game for follow-on authors. (8)

As Judge Castillo had, Posner cited as a precedent the *Silverman v. CBS Inc.* decision on the status of the fictional characters Amos and Andy to argue that for “derivative works” copyright protection is afforded “only for the incremental additions of originality contributed by the authors of the derivative works”

(*Silverman v. CBS Inc.*; qtd. in *Klinger v. Conan Doyle Estate*, No. 14-1128 9). In this instance, Posner treated Conan Doyle's later stories as being themselves derivative works; the ten Sherlock Holmes stories not yet in the public domain "are derivative from the earlier stories" and only the elements of those stories that manifest originality are protected by copyright (9).

Another tack taken by the attorneys for the Conan Doyle estate was to argue that failing to offer copyright protection to characters and elements that appear in an author's early work would discourage creativity. Summarizing the argument, Posner writes

It may take a long time for an author to perfect a character or other expressive element that first appeared in his early work. If he loses copyright on the original character, his incentive to improve the character in future work may be diminished because he'll be competing with copiers, such as the authors whom Klinger wishes to anthologize. (9-10)

Posner telegraphs his skepticism toward this argument when he states that the attorneys raise it while "[l]acking any ground known to American law for asserting post-expiration copyright protection of Holmes and Watson in pre-1923 stories and novels going back to 1887" (9). In a tone that can only be described as acerbic, Posner goes on to observe that the argument from creativity is irrelevant: "Of course this point has no application to the present case, Arthur Conan Doyle having died 84 years ago" (10). In a more staid tone, Posner points out the flip side of the creativity argument, observing that

extending copyright protection is a two-edged sword from the standpoint of inducing creativity, as it would reduce the incentive of subsequent authors to create derivative works (such as new versions of popular fictional characters like Holmes and Watson) by shrinking the public domain. For the longer the copyright term is, the less public-domain material there will be and so the greater will be the cost of authorship, because authors will have to obtain licenses from copyright holders for more material—as illustrated by the estate's demand in this case for a license fee from Pegasus. (10)

Posner also argues that the authors who originate characters may themselves be discouraged from following a creative course because the estate's

proposed rule would [...] encourage authors to continue to write stories involving old characters in an effort to prolong copyright protection, rather than encouraging them to create stories with entirely new characters. (10)

Posner spends the largest proportion of his argument on the review and dismissal of the estate's arguments on the distinction its attorneys make between "flat" and "round" characters. He acknowledges that "the additional details about Holmes and Watson in the ten late stories do indeed make for a more 'rounded', in the sense of a fuller, portrayal of these characters" (11). Yet he also finds odd the estate's definition of "'flat' characters [...] as ones completely and finally described in the first works in which they appear" (12).

Posner focuses instead on the idea that flat characters evolve but round character do not but drily observes, “What this has to do with copyright law eludes us” (12). He then proceeds to hoist the Conan Doyle estate on its own petard:

Klinger wants just to copy the Holmes and the Watson of the early stores [sic], the stories no longer under copyright. The Doyle estate tells us that “no workable standard exists to protect the Ten Stories’ incremental character development apart from protecting the completed characters.” But that would be true only if the early and the late Holmes, and the early and the late Watson, were indistinguishable—and in that case there would be no incremental originality to justify copyright protection of the “rounded” characters (more precisely the features that makes them “rounder,” as distinct from the features they share with their earlier embodiments) in the later works. (12)

Posner is working out the implications of the principle that “[t]he more vague, the less ‘complete’ a character, the less likely it is to qualify for copyright protection” (13). He offers the example of a stock character, such as a wino whose situation belies his wisdom, versus a named character whose appearance and attributes, when combined, serve to make him a distinct fictional individual. From their introduction, the very distinctiveness of Sherlock Holmes and John Watson is what made the characters copyrightable, and thus at the same time, ‘complete’. Posner observes that they were “incomplete” only to the extent “that Doyle might want to (and later did) add additional features to their portrayals” but that “[t]he resulting somewhat altered characters were derivative works,” the features unique to those works protected by copyright but not triggering a renewal of the protection of the originals of Sherlock Holmes and Dr. Watson (13).

On some level, Posner may have found the estate’s novel arguments to have been amusing, as when he describes its lawyer during oral argument “[r]epeatedly [...] dramatiz[ing] the concept of a ‘round’ character by describing large circles with his arms” (11). However, in the concluding paragraph of his opinion, he rejects the arguments as not only “quixotic” but not in keeping with constitutional protections on copyright:

With the net effect on creativity of extending the copyright protection of literary characters to the extraordinary lengths urged by the estate so uncertain, and no legal grounds suggested for extending copyright protection beyond the limits fixed by Congress, the estate’s appeal borders on the quixotic. The spectre of perpetual, or at least nearly perpetual, copyright (perpetual copyright would violate the copyright clause of the Constitution [...] which authorizes copyright protection only for “limited Times”) looms, once one realizes that the Doyle estate is seeking 135 years (1887–2022) of copyright protection for the character of Sherlock Holmes as depicted in the first Sherlock Holmes story. (15)

## Implications

The outcome in this case was one that the Conan Doyle estate perhaps attempted to avoid by failing to answer Klinger's complaint on the district court level. Ben Allison, an attorney representing the estate, has stated that "we didn't feel that his book was worth a federal case" and that "[w]e were willing to give him a default judgment so he could do his book and it wouldn't apply elsewhere" (Laird). Klinger, however, was not satisfied with a default judgment and requested the declaratory judgment that would establish that the characters and elements from the pre-1923 narratives were in the public domain. As one commentator noted before the case was heard on the appellate level,

a lot could be at stake. Allison notes that courts have never before considered whether there's a distinction between copyrights for round literary characters and flat ones. If the court finds one, its ruling would make new law for long-standing literary characters that are partially in the public domain. (Laird)

However, the district court and the appellate court did not accept the distinction as legally meaningful. The upshot of this rejection of this argument can be illustrated via the long-running *Star Trek* narrative. The characters introduced in the original television series, which began airing in 1966, will enter the public domain in the 2060s despite the fact that the characters continue to be featured in new movies that will be under copyright well into the next century. Thus the most recent picture, the 2013 *Star Trek: Into Darkness*, will have no effect upon the date at which cartoonists and novelists and directors and fan fiction writers will be free to send the original Captain Kirk and Mr. Spock to explore strange new worlds, to seek out new life and new civilizations, to boldly go where no man has gone before.

In addition to having its arguments decisively rejected by both the district and the appeal court, the Conan Doyle estate is out of pocket not only for its costs but for at least some of its challenger's. Klinger requested and was awarded the costs of pursuing litigation on the appellate level. This sum, over \$30,000, was significantly larger than the \$5,000 that, in Klinger's words, the estate had tried to "bully" from him (Laird). (Separately, Klinger has requested that he be awarded costs of over \$39,000 for litigation on the district court level.) Posner makes clear in his order that his goal is to encourage those who would resist unwarranted demands by the copyright equivalent of 'patent trolls': companies that calculate that their targets will pay the fees they demand as a cost of doing business would be preferable to the expense of defending a lawsuit; and he writes that "[u]nless Klinger is awarded his attorney's fees, he will have lost money [...] in winning an appeal in which the defendant's only defense bordered on the frivolous" (*Klinger v. Conan Doyle Estate, Ltd., No. 14-1128 [7th Cir. 2014] Document 39 5*).

Not only does he describe the estate's defense as frivolous, but he also describes the behavior of the estate as that of the extortionist.

The Doyle estate's business strategy is plain: charge a modest license fee for which there is no legal basis, in the hope that the "rational" writer or publisher asked for the fee will pay it rather than incur a greater cost, in legal expenses, in challenging the legality of the demand. The strategy had worked with Random House; Pegasus was ready to knuckle under; only Klinger (so far as we know) resisted. In effect he was a private attorney general, combating a disreputable business practice—a form of extortion [...](6)

Posner also brought up the specter of antitrust laws in describing the estate's threat to stifle sales of the book if it were published without a license. The estate, he wrote, had been "playing with fire in asking Amazon and other booksellers to cooperate with it in enforcing its nonexistent copyright claims against Klinger." The result would have been "a boycott of a competitor of the estate, and boycotts of competitors violate the antitrust laws" (6). Posner concludes this section of the opinion by warning that "[i]t's time the estate, in its own self-interest, changed its business model" (7).

Klinger's behavior, on the other hand, Posner lauds, writing that he had "performed a public service—and with substantial risk to himself [...]" Klinger's decision to resist the estate's demands rather than hand over "a modest license fee," Posner writes, is significant because it had the effect of "inject[ing] risk into the estate's business model." Moreover, Klinger's decision to sue the estate had resulted in bringing to light "the estate's unlawful business strategy" (6).

It is no wonder that the estate initially ignored Klinger's suit, hoping that the outcome would be a default judgment, for the actual result must have been the one it feared: an unambiguous ruling, with financial teeth, intended to discourage the estate from making frivolous copyright claims. No longer can the estate—or any copyright holder similarly situated—pretend to have any claim to characters or elements as they exist in works released prior to 1923. Moreover, going forward, this ruling should make it clear that as texts enter the public domain, they may be reworked and re-envisioned even if their characters and elements appear in other works that are still under copyright.

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Mike Edwards

## How the Law Can Cost Composition Instructors a Lot of Money, and What You Can Do About It: The EFF's White Paper on Civil Penalties for Copyright Infringement

In July 2014, the Electronic Frontier Foundation (EFF) published a white paper by staff attorney Mitch Stoltz titled "Collateral Damages: Why Congress Needs to Fix Copyright Law's Civil Penalties." The white paper, available at [https://www.eff.org/files/2014/07/24/collateral\\_damages.pdf](https://www.eff.org/files/2014/07/24/collateral_damages.pdf), is brief (9 pages) and accessible, and if you use copyrighted materials in the classroom, you should read it. The white paper argues why current law is broken and spells out how statutory damages under copyright law can cost you a lot: up to \$150,000 per infringed work.

The EFF's white paper is straightforward in structure. It first summarizes how current copyright law applies to copyright holders and copyright infringers and the rationales offered for the law, and then offers three substantially-argued sections detailing the EFF's objections to the law: the penalties are excessive, the penalties are unpredictable, and the penalties undermine the purpose of copyright. The white paper concludes by offering some possible legislative remedies.

Whether or not you agree with the EFF's position, the account the white paper offers of current copyright law has important implications for composition instructors who use copyrighted materials. Copyright law says that "original works of authorship" are protected, and that protection exists for any work from "the moment it is created and fixed in a tangible form" (U.S. Copyright Office). However, the white paper explains that in the case of lawsuits for statutory damages, the copyright holder must register the work with the Copyright Office "before the infringement happens, or within three months of the work's first publication" (Stoltz 2), which many copyright holders do. Such registration allows copyright holders to sue people they see as infringing.

Many academics believe they are protected from such lawsuits by the claim that their use of copyrighted material for educative purposes is what copyright law calls "fair use" and therefore non-infringing. A good example would be the American University Washington College of Law guidance on copyright, which states that an educator might have to pay "only statutory damages even if the copying was not deemed fair use provided that the person . . . copying material reasonably believed that he or she was following fair use" (American University). But as the white paper demonstrates, the courts are often just as unpredictable when ascribing intent as they are when assigning penalties. Its opening thought experiment is vivid and merits quoting at length:

Imagine that you run a business, and one day you ask your lawyer whether selling one of your products could lead to a lawsuit. She tells you that the product is well-designed and responsibly



marketed, but there's still a chance that someone might get injured, and sue you. But then your lawyer says something crazy: she has no idea what you might have to pay if you lose. It could be \$100, and it could be \$10 million. And crazier still, the damages could have no relationship to the harm you caused; a person whose injuries cost \$100 to fix could still get \$10 million. (Stoltz 1)

The scenario is quite similar for instructors who distribute copyrighted materials in their classes. Two court cases in the 1990s relating to photocopied academic coursepacks established that the fair use defense is limited, and the recent Georgia State University legal dispute over fair use for non-commercial purposes in online reserves (documented by Jeffrey R. Galin in the *CCCC-IP Annuals* for 2010 on pages 6-11, 2012 on pages 22-25, and 2014 on pages 15-23) makes clear that the stakes are still high for us.

How high? That's part of the worry. A jury decides, with the initial amount being between \$750 and \$30,000 per infringed work, but according to copyright law, the amount can go beyond \$30,000 up to \$150,000 per infringed work if the court decides that the infringement is willful. The white paper offers numerous examples of exorbitant penalties, including that of the Boston University student who, for putting 30 songs on a peer-to-peer sharing service, was penalized \$675,000 (Stoltz 4). The EFF suggests such penalties may encourage many copyright holders to seek the often disproportionate damages offered by infringement lawsuits as a revenue stream.

Another part of the worry is that the penalties are not only high but also unpredictable, given that the copyright holder does not need to actually demonstrate economic injury from the infringement. The EFF again cites a number of cases to demonstrate wildly inconsistent penalties, including a variation of one thousand percent per infringed work for two different cases addressing materials copied for use in college courses, or \$5,000 per work versus \$50,000 per work (Stoltz 5). As the EFF puts it, "[f]or a person who uses ten copyrighted works, being found liable for \$7,500 in damages is very different from being penalized at \$1,000,000. Yet both are possible—and there's little or no way to tell beforehand what a court will do" (Stoltz 5). The unpredictability and inconsistency of such judgments, coupled with their sometimes disproportionate penalties, present enormous problems for educators who ask students to read and write about sources in the classroom.

Those problems for educators are a significant component of the third problem the EFF's white paper describes. Such apparently capricious penalties fundamentally work against the intended ends of copyright itself, as specified in the United States Constitution: "To promote the Progress of Science and useful Arts" (Art. I, Sec. 8). Education certainly promotes such progress. The EFF advocates for reforming copyright law, and offers four small changes that would make penalties for infringement less dangerous and less capricious. Their suggestions merit consideration, and the white paper merits attention. For instructors who wonder what more they might do to improve how intellectual property laws affect our teaching and research, and how our teaching and research might help improve the ways intellectual property law works, you

might check out the other articles in this year's *IP Annual*, and in those of previous years. Our work is affected in many ways by intellectual property concerns. Or you might come to the IP Caucus open meetings at each year's CCC: not only do we try to keep the organization's members and leadership informed about these topics, we try to do something about them. We'd welcome your help.

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Traci A. Zimmerman

## Review: *The Internet's Own Boy: The Story of Aaron Swartz* (2014)

Written, Directed, and Produced by Brian Knappenberger; 105 minutes

Having access to knowledge and being able to share ideas is fundamental to the work of scholars, teachers, students and citizens; indeed, it is “the bedrock upon which our entire educational and democratic enterprise depends” (Zimmerman). But for Aaron Swartz, open access wasn’t just a fundamental principle, it was a human right and a moral imperative. His aggressive, uncompromising approach to and fight for this access would ultimately lead to his tragic suicide at the age of 26.

Brian Knappenberger’s film, *The Internet's Own Boy*, tells the story of Aaron’s life as a way “not only to illustrate and advance the causes for which he lived but also to catalyze questions and inspire change as we understand and examine the circumstances of his death” (Zimmerman). Through intimate home movies, interviews with Aaron’s loved ones, mentors and colleagues, as well as news clips of Aaron’s activism, arrest, and eventual suicide, Knappenberger is able to “capture and contextualize Aaron’s influence and to create a kind of visual manifesto demanding justice for Aaron as a way of demanding justice for us all” (Zimmerman).

### Magic

Knappenberger’s rich mix of sources allows viewers to get the sense that we really *knew* Aaron, that we remember him as a precocious 3-year old, reading books to his brothers, that we were there when he was recognized for the *Ars Digita* prize for creating essentially the first Wikipedia (months before Wikipedia actually emerged) and for doing so at age 12. But in many ways, we did already know Aaron: if you’ve ever subscribed to an RSS feed, or visited reddit.com, you’ve come in contact with Aaron’s work. In fact, Knappenberger’s film is Creative Commons (CC) licensed, and it was Aaron who helped write the code for the first CC licenses when he was only 15.

The film makes it clear that, from a young age, Aaron understood that programming was “magic.” But he also understood that programming wasn’t limited to the technical: it was social, collaborative, political and powerful. Hacktivism could open up information on websites as much as it could open up Washington. “Secrecy,” Aaron muses in the film “serves those who are already in power.” To that end, Knappenberger offers up numerous examples of how Aaron participated in the liberation of information (openlibrary.org; Public.Resource.org) and in the reform of the systems that restricted information (demandprogress.org).

## *“The Very Bad Thing”*

Central to the film is Aaron’s battle with the federal government in the last two years of his life when he was aggressively prosecuted for downloading some 4.8 million academic articles from the JSTOR database at MIT – a prosecution that Cory Doctorow equates in the film to being punished for “taking too many books out of the library.” But the charges were nothing to laugh at: Aaron was facing 13 felonies, which meant he could spend up to 35 years in a federal prison and be ordered to pay a \$1 million fine. Eleven of the 13 charges were alleged violations of the Computer Fraud and Abuse Act of 1986 which, according to the film, was brought about by fears that proliferated after the movie *War Games* was released. In it, a teenage hacker inadvertently gains access to a military supercomputer and, thinking he’s accessed a computer game, nearly causes a global nuclear war.

No one really knew what Aaron actually intended to do with the articles he had downloaded; indeed, all he did was download them, and JSTOR ultimately dropped the charges against him. MIT wished to “remain neutral” and never took a side in the incident and the federal government pressed on perhaps in a fit of “prosecutorial zeal.” As Geoff Berkshire aptly notes,

whether or not Swartz’s crimes merited such intense scrutiny from the Justice Department is one of the film’s hot topics, and there’s no doubt where Knappenberger’s allegiances lie. His film builds a credible argument that the case against Swartz was more about deterrence than punishment. The goal was to send a message to hacktivists everywhere, who – at the time of WikiLeaks and the explosion of Anonymous – were becoming a growing concern for the government.

In an NPR interview, Knappenberger confirms this observation, saying that “the prosecutor did tell Aaron’s dad that they wanted to make an example out of him, that they made the case for deterrence. And it really makes you wonder, well, what were they deterring? Are there lots of people going around downloading articles from JSTOR? What kind of example were they trying to make? And I think the story becomes very dark when you start to ask those questions.”

## The Trial

Early in 2012 (in reviewing books he’d read the previous year), Aaron would write that he felt like the man in Franz Kafka’s *The Trial*, as it is “about a man caught in the cogs of a vast bureaucracy, facing charges and a system that defy logical explanation... it was precisely accurate—every single detail perfectly mirrored my own experience....This isn’t fiction, but documentary” (Peters). Sadly, the ending of *The Trial* mirrors the end of Knappenberger’s documentary: the protagonist has to die under strange and tragic circumstances. Kafka’s K. refuses to kill himself and is instead stabbed in the heart by his executioners.

Aaron takes his own life, though his father would say at his funeral, “Aaron did not commit suicide, but was killed by the government” (Hill).

## After Aaron

On January 11, 2013, Aaron Swartz hanged himself in the Brooklyn apartment he shared with his partner, Taren Stinebrickner-Kauffman. The question of whether “the government” was to blame is certainly a question in the film.

Knappenberger made clear that he didn’t want to portray Aaron’s suicide as a simple response to the legal troubles he faced. But he admits that the timing cannot simply be ignored either: “[Aaron] did this after a two-year legal nightmare that left him exhausted financially and emotionally, and he did commit suicide within a day or so of the two-year anniversary of his initial arrest. That’s not exactly a coincidence. It’s hard to discount this hell he was going through” (NPR). The response to his death was prolific and global, perhaps because he represented a future that we hoped to attain. Aaron’s first partner, Quinn Norton, contextualizes Aaron’s death this way:

If you look at 2011 to the present, there’s an incredible emotional rollercoaster about Internet freedom and the Arab revolutions. The Internet was going to change everything, and at the end of 2011 you had Occupy. And then everything just got destroyed. 2012 was the year, globally, for the heightening of censorship and the heightening of surveillance, and then Aaron killed himself. Aaron was so much the Internet’s boy, and that so much exemplified this machine crushing our hopes (qtd. In MacFarquhar 32).

## Coda

While some reviews criticize the “neatness” of the way Knappenberger presents Aaron, “as a true believer, beatifying and martyring Swartz instead of sitting with the contradictions of his life” (Zelenko), there is something very intimate and genuine about the way it harnesses Aaron’s story to motivate action and to demand change, something that seems very much in line with the way Aaron lived his life. To claim that because the film did not show Aaron “warts and all” – that is, to claim that, because it did not expose his contradictions and his demons, it is too “neat” of a portrait– is to miss the point of the film. Glass houses are not to be desired, and the last two years of Aaron’s life were already under the microscope and in the public eye. If anything, Knappenberger marshals the best of Aaron to bring out the best in us. In Aaron’s physical absence, he brings forth a presence that represents the things that Aaron struggled with and stood for – the kinds of things you might not always get right in life, but you can get right in art. One critic said that the film seemed more like an “authorized biography” than a documentary – but when you consider that Aaron’s life had already been spun out of proportion by a very aggressive and public

prosecution, you have to think that this film at least attempts to balance the picture.

In the months after his death, Representative Zoe Lofgren (among others) introduced "Aaron's Law," an act that was intended to amend certain provisions of the Computer Fraud and Abuse Act (CFAA) to limit penalties and to better clarify language so that the kind of charges that Aaron faced might not happen again. Unfortunately, this bill died with the 113th Congress. And in July of last year, *The Internet's Own Boy* was the victim of a copyright takedown on YouTube. Though the act appeared to be without malice and lasted only a few hours, the irony is certainly not lost (Collier).

But as I write this review, I do so with the news that the U.S. Federal Communications Commission (FCC) just voted in favor of strong net neutrality protections, which is a vote in favor of a robust, innovative and open Web. One of the people whom Aaron admired most was Tim Berners-Lee, the man who invented the World Wide Web and who gave it away for free. In some way, victories like these are proof that Aaron's spirit still endures.

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