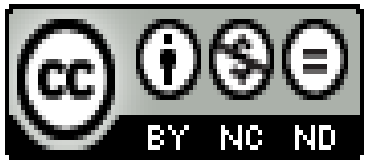
The CCCC-IP Annual:

Top Intellectual Property Developments of 2008



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Copyright Statement

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Introduction

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I am happy to announce the fourth CCCC Intellectual Property Annual and my second Annual as editor, and I hope that you, the readers, will find that the articles help to achieve our committee's first charge, to keep the rhetoric and composition community informed about developments related to intellectual property that affect our work as teachers and scholars.

While the CCCC Intellectual Property Caucus has studied many issues related to copyright and intellectual property, access to a public domain of scholarship, teaching materials, art, literature, music, science, and more, especially for students and teachers at small, underfunded universities, is at the heart of the Caucus' activity. The topic, for example, of most of the articles in the past four years of annuals is fair use and access, and this year's edition is no different; you will find articles about fair use, open access, and orphan works.

Like last year, I have licensed the 2009 Annual under a Creative Commons Attribution, No Derivative Works, Noncommercial Use license to facilitate the publication of this collection on other sites. Also, as I wrote in the introduction for the last collection, I want to emphasize that derivative works are permitted for purposes of accessibility (creating an audio recording for the visually impaired, for example). Also, I am making the collection available for download in Open Document Format as well as a PDF file.

Writing teachers are fortunate that more content than ever is available for potential use in classrooms. Old films and television shows are released on DVD every day. Archives are available in public institutional repositories set up by universities and government organizations. New content

released under Creative Commons licenses is uploaded constantly. The IP Caucus will continue to chart this effort and contribute to it.

Settlement of Suit against Google Book Search Leaves Fair Use Issue Unresolved

Kim Dian Gainer, Radford University

Overview

The out-of-court settlement of two suits against a Google book indexing project is an example of the negotiations underway between copyright owners and new media in the absence of clearly defined legislative standards and judicial precedents. Google claims that the indexing project did not violate provisions of fair use; copyright holders claim that the project did. With the settlement, the question of whether such indexing was or was not fair use has been left unresolved.

Background

Google's own account of its book indexing project traces the idea back to 1996, when, as graduate students, Google's co-founders worked on a project funded by the Stanford Digital Library Technologies Project. The first concrete steps toward the project's realization, however, date to 2002, when Google staff experimented with digitizing books and visited libraries where scanning projects were underway. Work on technical issues continued throughout 2003. Then, in 2004, Google entered into an agreement with Oxford University's Bodleian library to digitize its collection of nineteenth-century books. These volumes were of course in the public domain. Subsequent to this agreement, which was the foundation of the "Library Project", Google entered into arrangements with research libraries at four additional institutions: Harvard University, the University of Michigan, Stanford University, and the

New York Public Library. Collectively, they offered access to fifteen million books (History of Google Book Search, 2009). Significantly, not all these volumes were in the public domain. While Harvard made available for scanning only out-of-copyright books, other libraries provided access to their entire collections (Hafner, 2005).

While negotiating with libraries, Google had also been working with publishers in order to offer a book indexing service called "Google Print". By the end of 2004, Google had reached agreements with such publishers as Blackwell, Houghton Mifflin, Hyperion, McGraw-Hill, Pearson, Penguin, and Perseus, as well as with Cambridge University Press, Oxford University Press, the University of Chicago Press, and Princeton University Press (History of Google Book Search, 2009). However, in spite of the willingness of these publishers to participate in Google Print, the separate Library Project drew protests from authors and publishers who objected to the scanning of copyrighted books without permission from the copyright holders. In the case of books not in the public domain, searches would result in the display of "snippets", the verbal equivalent of the thumbnails returned by Google image searches. To generate these snippets, however, Google was scanning entire texts. Although Google maintained that digitizing entire texts for the purpose of indexing was a fair use under copyright law, in the face of protests in 2005 it did briefly suspend the scanning of copyrighted books in order to allow for an opt-out procedure: for the space of three months, publishers could submit lists of books that were not to be scanned. Absent notification that the opt-out was being invoked, the book would be digitized (Band, 2006, p. 2). Some copyright holders felt that this opt-out provision was inadequate to protect their rights, and in September and October of 2005, the Authors Guild and the Association of American Publishers filed separate suits against Google in an attempt to bring the Library

Project to a halt on the grounds that the digitization of entire books was inconsistent with the principle of fair use.

Settlement

Settlement of all litigation was announced in October of 2008, and the terms of the settlement were made public in a lengthy document (*Google Book Settlement*, 2008) that specifies the conditions under which Google may continue to scan and provide access, in full or in part, to three categories of books published before January 5, 2009: (1) in-copyright and in-print, (2) in-copyright but out-of-print, and (3) out-of-copyright. For the first category, the settlement protects the ownership rights of copyright holders by blocking access to the texts while providing a mechanism for purchasing electronic access ("No Preview Available"). For the second category, the settlement protects the ownership rights of copyright holders by allowing the reader to view short passages while also permitting the purchase of electronic access to the full text ("Snippet View"). For the last category, that of books in the public domain, Google will provide free online access to entire books, as it had been doing before the lawsuits were filed ("Full View") (The Future of Google Book Search, 2009; Google Books Library Project, 2009; New Chapter for Google Book Search, 2008).

The settlement requires Google to pay $ 125 million for copyrighted books it has already scanned. Google is also required to bear that cost of establishing and maintaining a Book Rights Registry that will receive and distribute future payments. These costs, however, might have been dwarfed by the penalties that Google could have faced if a court had ruled against Google and adjudged it to have infringed authors' and publishers' copyrights. Moreover, the payments presumably will be offset by the fact that Google will henceforth be entitled to thirty-seven percent of the fees that consumers will be charged for digital access to

copyrighted books. In addition, Google may charge publishers for listing these books. Google may also profit from subscriptions purchased by libraries for access to the entire database of scanned books, including books under copyright. Expenses may also be recouped by the placement of advertisements on preview pages, a revenue stream that is already part of Google's business model (Helft & Rich, 2008; Quint, 2008; Rich, 2009; Snyder, 2008).

Implications for Authors and Publishers

With the settlement, Google is authorized to display more substantial portions of books that are under copyright but out of print. These books make up the majority of the books that will be searchable via Google Book search. Of the first seven million books that Google scanned, five million were under copyright yet out of print (Rich, 2009). Previously, Google could display three snippets of each such book. Under the settlement, if a copyrighted book is out of print, Google may display, cumulatively, up to twenty percent of the entire text. Additional restrictions apply depending on the nature of the text. For example, Google will block the display of the final pages of a work of fiction (Band, 2008, pp. 4-5).

Even though Google will be displaying larger portions of books that are under copyright but out of print, the copyright holders will have little cause to complain. Previously, such orphan books generated no revenue for the copyright holders. Now, whenever a reader pays to access online the full text of an orphaned book, a portion of that payment will be deposited in the Book Rights Registry, and those payments will be passed on to the author or publisher who holds the copyright via a mechanism similar to that by which songwriters are recompensed when their melodies are played on the radio. In effect, Google will advertise and market these books. Google will take its thirty-seven percent cut, but no

money would have been forthcoming at all had it not been for the inclusion of the out-of-print book in Google's database.

The situation is somewhat different in the case of copyrighted books that are in print. As in the case of orphan works, Google had previously provided snippets. Now readers will no longer see portions of the pages that contain their search terms. Instead, they will be able to view title pages and other sections, such as the index and table of contents, that may help them determine whether to seek further access—either online or bricks and mortar—to the books in which their search terms appear (Band, 2008, p. 5). It remains to be seen whether any significant sales will accrue to publishers as a result of these displays. If readers do elect to pay for online access, Google will, again, receive thirty-seven percent of the payment.

Implications for the Public

Even before the settlement, via Google's Library Project readers were able to locate and access, without charge,the full texts of books in the public domain. With the settlement, readers can also be sure of locating copyrighted books that may be relevant to their search. In the case of books that are under copyright but out of print, readers will have access, at no charge, to a limited number of pages that contain or are adjacent to their search term. They may also purchase full online access to these orphaned books. The iPod generation, accustomed to accessing media online, may in this fashion give a 'second life' to some books whose sales were not sufficient to warrant shelf space in bricks and mortar bookstores. In the case of copyrighted books that are in print, readers may also purchase online access, but without first sampling any of the pages of the book.

Implications for Educators and Students

A provision in the settlement mandates that Google provide upon request free "Public Access Service" to one terminal in each separate building in each and every public library system in the United States. This Public Access Service will allow patrons to read books that are under copyright but not in print. Patrons may not electronically copy or annotate these books, but they may print pages for a per sheet fee (Band, 2008, pgs. 7-8). Educators may wish to make certain that the public libraries in their communities are aware of this provision, as Google is not required to notify libraries of this service. In addition, colleges and universities—but not primary, middle, or high schools—may request Public Access Service: one access point per 4,000 students at institutions classified as Associate Colleges and one access point per 10,000 students at other institutions of higher education (Band, 2008, pgs. 7-8). For both public libraries and institutions of higher education, additional Institutional Subscriptions are available for a fee. Such subscriptions allow patrons to electronically annotate books, to print up to twenty pages of a book at a time, as well as to copy and paste up to four consecutive pages at a time. Moreover, books in the Institutional Subscription Database can be made available via e-reserves or as part of course management systems, providing that the intended users would be authorized to use the Institutional Subscription itself (Band, 2008, pgs. 8-9).

Reactions to the Settlement

Reactions to the settlement ranged widely. Barbara Quint, columnist for *Information Today*, lauded the settlement for, among other achievements, addressing the problem of orphan works (Quint, 2008). Lawrence Lessig, author of *Free Culture*, also was pleased with the settlement's approach to orphan works, which he felt was likely to be a better solution to that

problem than the Orphan Works legislationproposed in Congress. Overall, he felt that the settlement was better than a win would have been:

> The Authors Guild and the American Association of Publishers have settled for terms that will assure greater access to these materials than would have been the case had Google prevailed. Under the agreement, 20% of any work not opting out will be available freely; full access can be purchased for a fee. That secures more access for this class of out-of-print but presumptively-under-copyright works than Google was initially proposing. And as this constitutes up to 75% of the books in the libraries to be scanned, that is hugely important and good. (Lessig, 2008)

Lessig was also pleased that no court attempted to determine fair use in this case. The former plaintiffs, he wrote,

> are clear that they still don't agree with Google's views about "fair use." But this agreement gives the public (and authors) more than what "fair use" would have permitted. That leaves "fair use" as it is, and gives the spread of knowledge more that it would have had. (Lessig, 2008)

Other analysts were not as sanguine as Lessig. Even before the settlement, some libraries had refused to partner with Google because of the conditions that the giant company had placed upon the project (Hafner, 2007). Now, in the wake of the settlement, some critics wondered whether such a powerful player as Google might come to monopolize a potentially important new system for the delivery of virtual books (Cohen, 2009). Microsoft had tried to start its own program of book digitization but, unable to complete with Google, had abandoned its

effort in May of 2008 (Helft, 2008). Wrote Robert Darnton, head librarian at Harvard, one of the early participants in the Library Project,

> … Google will enjoy what can only be called a monopoly—a monopoly of a new kind, not of railroads or steel but of access to information. Google has no serious competitors… Google alone has the wealth to digitize on a massive scale. And having settled with the authors and publishers, it can exploit its financial power from within a protective legal barrier; for the class action suit covers the entire class of authors and publishers. No new entrepreneurs will be able to digitize books within that fenced-off territory, even if they could afford it, because they would have to fight the copyright battles all over again. (Darnton, 2009)

There is a non-exclusivity proviso included in the settlement so that libraries (there are now many more than the original five) may make their collections available for scanning to other companies or entities (Band, 2008, p. 19). Moreover, Google may have benign intentionsunder its current leadership. Nevertheless, it has cornered the market on book digitization, and this concerns some onlookers. On the other hand, Google has succeeded in negotiating a space within which new products can be brought to the market while respecting copyright, and it is arguable that only a gorilla the size of Google would have had the pocketbooks and the savvy to force media conglomerates to accommodate its view of "fair use."

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Warner Brothers and J. K. Rowling v. RDR Books: Fair Use and the Publication of Fan Guides

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Overview of the case

J. K. Rowling's Harry Potter series has generated an active, global fan community eager to purchase not only the novels and films but also products associated with the series. To that end, Rowling has also published books mentioned in the novels – Quidditch Through the Ages and Fantastic Beasts and Where to Find Them—with proceeds going to charity. The series' popularity has led fans to create websites on which they share ideas, information, and their own creative work inspired by the series with scant regard to issues of copyright infringement. Fans' high interest in generating their own materials and their willingness to buy associated products has resulted in the Harry Potter series becoming the focal point of the copyright issues connected to fan communities populated` by both children and adults . After licensing the Harry Potter films, Warner Brothers sent cease-and-notices in 2000 to websites whose domain names featured some aspect of the series . The resulting fan backlash convinced Warner Brothers to back away from enforcing copyright against amateur websites so as not alienate the built-in audience for its films and other Harry Potter products.

One popular fan-generated website was The Harry Potter Lexicon created by Stephen Vander Ark with the eventual aid of nine other fans . The website is typical of encyclopedias generated in relation to fantasy and science fiction series. Such series engage in world-building: the construction of a setting with its own history, geography, literature, and sciences. Encyclopedias, whether fan-generated or licensed by the author, help readers keep

track of the "fictional facts" that provide the context for the narrative. In 2007, with anticipation for the final Harry Potter novel running high, Roger Rapoport of RDR Books approached Vander Ark to develop the website into a print publication that would incorporate information from Harry Potter and the Deathly Hallows, as well as the other novels. The book was to be limited to the website's encyclopedia sections, with entries organized alphabetically, and to be published by October 2007. Rapoport began marketing the proposed book. While Rowling's attorneys had been willing to ignore the fan-generated websites, a published book that might compete with an encyclopedia prepared by Rowling was a different story; therefore, they sent a series of cease-and-desist letters and then filed suit

.

Weighing the Criteria of Fair Use

The case hinged on whether the manuscript for the proposed book qualified as a fair use of Rowling's work, including not only the seven novels, but also the two companion books, as well as other products (Famous Wizard cards and The Daily Prophet newsletters). An important point to be made is that the lawsuit did not address the website, which is still available online; it only covered the book to be published for profit. Thus, the legal status of online fan-generated materials remains murky.

As Judge Patterson balanced the fair use criteria against each other, he asserted that in its function a reference guide to a creative work qualifies as fair use. However, the status of this particular manuscript involved more than its intended purpose; it also involved the extent to which Vander Ark and his co-authors used Rowling's language in creating The Lexicon. Patterson ruled that the manuscript drew not only "fictional facts" but also Rowling's own

language from the source texts through extensive quotation, sloppy paraphrasing, and inconsistent citation. Information from the two companion books was judged to be particularly problematic, as those two books served a similar reference function to The Lexicon, and the high quantity of information drawn from them could harm the market for them. In his ruling Patterson did not consider the potential market harm to an encyclopedia prepared by Rowling herself to be a sufficient argument against The Lexicon, stating that "Notwithstanding Rowling's public statement of her intention to publish her own encyclopedia, the market for reference guides to the Harry Potter works is not exclusively hers to exploit or license, no matter the commercial success attributable to the popularity of the original works." He added that "While the Lexicon, in its current state, is not a fair use of the Harry Potter works, reference works that share the Lexicon's purpose of aiding readers of literature generally be encouraged rather than stifled" .

Publication of the manuscript was thus enjoined. However, that was not the end of the story. Although the defendants' attorneys appealed the verdict, they later withdrew the appeal. Anthony Falzone, who aided the defense as a representative of the Stanford Law School's Center for Internet and Society, reported on his blog that following the trial, Vander Ark created a new manuscript that "addressed some of the concerns expressed by J.K. Rowling at trial, and those expressed by Judge Patterson in his thorough and detailed decision," leaving both plaintiffs and defendants satisfied . The Lexicon: An Unauthorized Guide to the Harry Potter Fiction and Related Materials was published in January 2009. In a follow-up to the trial, Robert S. Want has published an overview of the case, complete with court documents and an extensive discussion of fair use , a book that could serve as a

textbook in a course with fair use as its theme.

Rewriting The Lexicon

In the introduction and acknowledgements, Vander Ark called it "a new, different book with a new focus and purpose, mindful of the guidelines of the court" . The published book demonstrates that the project changed from one that gathered information and wording indiscriminately from Rowling's oeuvre to a much more systematic and focused document. Rather than slavishly relying on Rowling's language as the website does (and as the trial transcript indicates that the original manuscript did), The Lexicon provides a straightforward identification of the term, with comments, allusions, and clarifications placed in italics at the end of some entries. In the process the text moves from being dominated by fannish enthusiasm to becoming professional, even scholarly, in its tone.

And that perhaps is the crux of the issue when it comes to the difference between fan-generated encyclopedias and professionally published reference guides. Fan-generated materials are acts of love requiring many hours of work, prepared according to fan community standards that value a comprehensive supply of information over scholastic citation practices and legal standards of fair use. The remuneration for such work comes in the form of the adulation and appreciation of other fans. But when the work passes from the fan community into the broader arena of commercial products associated with a particular fandom, the rules appear to change. Or perhaps, it is rather that the rules begin to be applied. In my opinion, two significant facets of this case are 1) that only the book project and not the website was included in the case; and 2) that the defendants withdrew their appeal and wrote a new version of the book that met the guidelines established in the trial.

Thus, a lesson that can be gleaned from the case is that the legal process of establishing fair use in relation to particular texts can in fact guide the revision of those texts into ones that are able to serve the same purpose more effectively while still meeting a legal standard. In the process of transforming a fan-oriented text into a professional version, the fan grows as a writer, producing a text that surpasses in quality the earlier copyright-infringing version.

A significant implication for teachers of writing is the role that plagiarism in the form of sloppy quotation and citation played in the determination of fair use in this case, but also how Vander Ark as a writer made the material his own through the production of the published book. Thus, the website, the lawsuit, and the published book become a valuable case study of source use, fair use, and revision.

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Open Access in 2008: The Harvard Policy and the APA's Attempt to Profit from the NIH Open Access Mandate

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Two significant events occurred on the open access front in 2008. First, Harvard's Faculty of Arts and Sciences and Harvard Law School voted to put an open access policy into effect. Second, the American Psychological Association attempted to collect a $2,500 fee per article from authors required by the NIH Open Access Mandate of 2007 to make their article available in PubMed Central. In this report, I will describe both of these developments.

Harvard Goes Open Access

This policy, voted into effect by the Faculty of Arts and Sciences on February 12, 2008 and by Harvard Law School on May 1, 2008, requires faculty to deposit their articles into DASH (Digital Access to Scholarship at Harvard), Harvard's institutional repository. While faculty still own the copyright to articles they write, the open access policy grants the university a nonexclusive, automatic license to publish faculty members' articles in their repository. Faculty members are required to deposit the author's final version or the published version of the article (Office for Scholarly Communication, 2008a).

Open Access and the American Psychological Association

The open access community cheered when, in 2007, a law went into effect stating that any articles coming out of research funded by the National Institutes of Health must be made open access through PubMed Central, an open-access repository. Although the final version of the mandate allows for the publishers a six-month waiting period to provide a continued

incentive to pay to subscribe to the journal for immediate access to the articles, and thus a profit for the publishers, the mandate was a gain for open access advocates.

However, in July of 2008, the American Psychological Association attempted to charge a "deposit fee" to any author required to deposit his or her article into PubMed Central. Within one day, the APA had pulled the policy. Librarian Dorothea Salo (2008b) preserved the language of the policy on her weblog, Caveat Lector:

> Authors publishing in APA or EPF journals should NOT deposit, personally and directly, Word documents of APA-accepted manuscripts or APA-published articles in PubMed Central (PMC) or any other depository. As the copyright holder, APA will make necessary deposits after formal acceptance by the journal editor and APA.
>
> [. . .]
>
> In compliance with NOT-OD-08-033, APA will deposit the final peer-reviewed manuscript of NIH-funded research to PMC upon acceptance for publication. The deposit fee of $2,500 per manuscript for 2008 will be billed to the author's university per NIH policy. Deposit fees are an authorized grant expense. The article will also be available via PsycARTICLES.

For an author to deposit an article into PubMed Central, it is free. The APA, however, declared that for the privilege of being published in one of its journals or those of the Educational Publishing Foundation, the author must agree not to deposit the article himself or herself (for free), but must instead give the APA $2,500 to deposit the manuscript. The authors, or their universities, would have had to buy the right to make the article open access,

which is required by law anyway. In addition, as PubMed Central mainly covers biology, public health, and medicine, articles in psychology only make up a tiny fraction of the articles in the repository. The APA, apparently, did not want to make even a small number of articles available on PubMed Central without a hefty fee.

Open-access bloggers and librarians, including Peter Suber, Dorothea Salo, and Stevan Harnad, immediately began posting about the story and emailing faculty members, and the APA experienced pressure from a variety of parties. Suber summarized the absurdity of the APA's policy thus: "Even after collecting the fee, the APA will not deposit the published version of the article, will not allow [open access] release for 12 months, will not allow authors to deposit in [PubMed Central] themselves (and bypass the fee), will not allow authors to deposit in any other [open access] repository, and will not allow authors to retain copyright" (2008). The next day, the APA removed the language from its site and posted a notice saying that they would post articles of NIH-funded research in PubMed Central in compliance with the open access mandate (Salo, 2008c). Though there is not an easy way to tell which articles in APA journals have been funded by NIH, I strongly suspect that those articles – available free of charge on PubMed Central – still cost $11.95 each as do all articles on APA's site for their journals, PsycARTICLES.

They are still, however, charging any author whose research was funded by the Wellcome Trust, a charity that funds medical research, a fee of $4,000 per article to make the article open access. The Wellcome Trust has a policy that any articles based on research it funds must be made freely available to the public in PubMed Central or UK PubMed Central. If an article in an APA journal is based on research funded by the Wellcome Trust, APA

charges the author and/or the author's university $4,000 for the right to put that article in PubMed Central, which the Wellcome Trust will reimburse (American Psychological Association, 2008). The APA will also make those Wellcome Trust articles available open-access on PsycARTICLES, the APA's site for their journals. Whether the APA's loss for publishing one journal article in PubMed Central and UK PubMed Central equals to $4,000 I leave as an exercise for the reader.

Conclusion: Implications for Rhetoric and Composition

When I first heard about the Harvard Open Access Policy, and the MIT university-wide policy that followed in early 2009, I wondered: what happens if a journal publisher says it won't publish a paper if an early draft or author's final version is already published online? This practice, which open access conversationalists call the Ingelfinger Rule, carries no legal weight, as the author owns the copyright at the time the paper is put into an institutional repository, but a publisher's policy can be quite forceful for professors who are expected to publish to keep their jobs. I thought Harvard and MIT might be effectively forcing their faculty members to play chicken with the publishers: "If you won't let me publish this paper in my repository, I'll be forced to send the paper elsewhere – and you'll no longer have the opportunity to publish a paper by a Harvard professor."

On further thought, though, and after I read some material about the policy on Harvard's Office of Scholarly Communication site, I understood the policy's power. If a journal refuses to publish an article previously made available via open access, a Harvard faculty member has a few options: she can withdraw the submission and try to publish the

paper elsewhere, she can petition for a waiver from Harvard's Open Access Policy, or she can try to get the publisher to change the contract to allow the repository publication – with the full support of Harvard and its Office of Scholarly Communication, which will help professors negotiate with publishers. Salo offers the following analysis of the policy (2008a):

> The Harvard policy puts publishers in an extraordinarily weak position. They *can't* denounce it; that's tantamount to denouncing faculty, which would be utterly suicidal. (Publishers can and do slag librarians. They can and do slag government. They *can't* slag faculty, and they know it.) I don't think they can sue; even if they could win in court (which I rather doubt, though standard not-a-lawyer disclaimers apply), the hideous publicity from suing Harvard would stick like tar. They can't prevent eager librarians at Harvard from setting up and filling a repository. Even their standard lines of FUD won't work—they can't seriously spin this as "a vote against peer review," because really, is *Harvard* going to do anything that damages peer review? Of course not! All the publishers can realistically do is plead poverty, and a look at their lobbying budgets and profit margins scotches that argument.

As faculty members, we have more power than we think in negotiating with publishers. I will reiterate here, as I often do, the importance of trying the Scholarly Publishing and Academic Resources Coalition's Author's Addendum when asked to sign a publishing contract, even if the publisher is likely to say no. In 2005, members of the Intellectual Property Caucus called this the "Just Ask!" campaign, with the idea that even if the publisher does not allow the

author to retain copyright, regain copyright a year after publication, self-archive the paper, or whatever the author is requesting, the publisher will be on notice that faculty members want to do things like this. When an Author's Addendum is backed by an institution, the message is even stronger. Perhaps 2009 will bring more institutional open access policies, but because we cannot always depend on our institutions to support our desire to self-archive our publications, I argue that as composition and rhetoric scholars, we should organize and write a statement directed specifically to publishers of journals in our field, answering specific language of their copyright contracts and advocating open access of our work.

Appendix: An Open Access Glossary

The first three terms can be found at Harvard's DASH Repository: Rights and License FAQ:

Author's draft: a paper that you or I might write – this paper might not have gone through a peer review process yet, or it might have gone through informal review by colleagues you ask for feedback, or you might have gone through blind review and revised it, but not gotten it accepted yet. "Author's draft" simply means a paper in some stage of revision for which you, the author, still own copyright.

Author's final version: a paper that's been accepted by a journal after you've revised for peer review comments. You still own the copyright, but you're probably about to sign it away to a journal publisher.

Published version: a paper in-press. It's like the author's final version, except with the copyediting, formatting, and typesetting done by the journal publisher. You probably don't

own the copyright to this version.

Green road to open access: a term referring to authors' self-archiving, and more specifically to journal publishers that allow these rights (Harnad et al, 2004).

Gold road to open access: scholarship that is open access by default, particularly journals that are open access (Harnad et al, 2004). In rhetoric and composition, we have several of these: *Kairos: A Journal of Rhetoric, Technology, and Pedagogy; Enculturation; The Writing Instructor; Composition Forum; Computers and Composition Online; KB Journal; Across the Disciplines*; and more.

The Ingelfinger Rule: the policy of some publishers that they do not publish work that has been posted anywhere in the past, even in draft form. The term comes from Franz Ingelfinger, a past editor of *The New England Journal of Medicine* (Suber, 2004).

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"It's A Hard Knock Life": The Plight of Orphan Works and the Possibility of Reform

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Writing with any measure of clarity (or certainty) about current copyright law presents quite a challenge because it is a moving target. Copyright terms have gone up eleven times in the past 40 years: existing copyrights were extended by 19 years in 1976 (The Copyright Act), and both existing and future copyrights were extended by 20 years in 1998 (The Sonny Bono Copyright Act). What is interesting is that copyright regulation has grown stronger in an age where digital technology would challenge and radically redefine what a "copy" can mean. I think it appropriate that Shakespeare would write his famous line "What's past is prologue…" in a play focused on the "tempest" of the New World. Our copyright past is only a prologue to the digital frontier, and the degree to which it foretells plight or possibility may lie in our own hands.

What is an Orphan Work?

An "Orphan Work" is a copyrighted work (book, film, photograph, music, record, etc) whose author/owner is unknown. The Orphan Work problem is the logical product of an "opt-out" system of copyright. Lawrence Lessig, in his Google video posting "Against the Current 'Orphan Works' Proposals"[i] explains the orphan works problem as one that necessarily occurs in the "radical" shift from the "opt in" system of copyright first articulated in 1790 to the "opt-out" system that was ushered in with the 1976 Copyright Act. Before 1976,

copyright was an "opt in" system: if you wanted copyright protection, you registered for it. With the 1976 Copyright Act, the law was changed to an "opt-out" system: as soon as you create an "original, fixed" work, you get copyright protection automatically, even if you don't necessarily need or want it, which lasts (effectively) "forever." This is more than just a change in law, it is a change in the way we understand the Public Domain: the 1976 act "flipped us from an environment in which most works defaulted to the public domain to one in which all [works] were born copyrighted."[ii]

The Orphan Works Problem and Its Implications

On March 13, 2008, Marybeth Peters, the Register of Copyrights, appeared before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property to identify the scope of the Orphan Works problem. Her information came from a comprehensive investigation conducted by the Copyright Office in 2005; this investigation invited feedback from "average citizens" to "scholars" and was compiled in a study entitled *Report on Orphan* Works published in 2006. This report "documents the nature of the Orphan Works problem as synthesized from the more than 850 written comments…and the various accounts brought to [the attention of the Copyright office] during three public roundtables and numerous other meetings and discussions."[iii]

What is striking about the findings of the Copyright Office reports how far the Orphan Works problem extends. Peters notes that the Copyright Office heard from "average citizens who wished to have old photos retouched or repaired, but were denied service by photo shops [because]…under the current law, the photographer, not the customer, holds the

copyright in the photograph [and] of course the customer has no idea who the photographer at his parents' wedding was."[iv] This very localized problem becomes nationalized when "museums who want to use images in their archival collections [or] documentary filmmakers who want to use old footage" are denied access on similar grounds. But the problem of Orphan Works extends even into projects that do not yet exist:

> When a copyright owner cannot be identified or is unlocatable, potential users abandon important, productive projects, many of which would be beneficial to our national heritage. Scholars cannot use the important letters, images, and manuscripts they search out in archives or private homes….Publishers cannot recirculate works or publish obscure materials that have been all but lost to the world. Museums are stymied in their creation of exhibitions, books, websites, and other educational programs, particularly when the project would include the use of multiple works. Archives cannot make rare footage available to wider audiences. Documentary filmmakers must exclude certain manuscripts, images, sound recordings, and other important source material from their films.[v]

What is lost here is completely antithetical to the original aims of copyright. Lawrence Lessig reminds us (as he so often and aptly does) that the framers of the Constitution advocated that by "securing for limited times to authors and inventors the exclusive right to their respective writings and inventions" we could "promote the progress of science and useful arts."[vi] The ultimate goal of copyright protection is to encourage innovation to promote progress; that is, by giving creators "exclusive rights" for a "limited time," both the creator and the country

would benefit from their labors. The Orphan Works problem illuminates the problems that come with a copyright system that has grown far beyond its original "limited time, exclusive right" protection and now serves to protect the millions of copyright ownerswho may never have wanted protection in the first place. As Peters emphatically notes in her report to the House subcommittee, "if there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous waste."[vii]

Possible Solutions?

The problem of Orphan Works is not a new problem, it just gained a new sense of urgency. The Copyright Office's request for feedback about Orphan Works in 2005 catalyzed many detailed reports from those most affected by the problem, such as the College Art Association, the Library Copyright Alliance, and the Duke Center for the Study of the Public Domain (who wrote a report about the problem of access to Orphan Films).[viii] But other reports emerged as well. From NPR stories, and Op-Eds in the *New York Times,* to blog postings and YouTube rants; there was no shortage of opinions about what should (and shouldn't) be done to solve the problem. And after the *Report on Orphan Works* was published in January of 2006, the debate about possible solutions to this problem was well underway.

Part of the reason for the urgency is that on September 27, 2008, the Senate unanimously passed S. 2913 -- The Shawn Bentley Orphan Works Act of 2008 -- a bill designed to "provide a limitation on judicial remedies in copyright infringement cases involving orphan works."[ix] In brief, the bill "attempts to create a system where new creators can use old works without fear of massive lawsuits, provided that a good faith effort has been

made to find out if the work in question is copyrighted [and, if so, to obtain permission to use the work].[x]

To some, the solutions contained in this bill were important first steps to solving the problem of orphan works; to others, the bill represented a more sinister purpose. The fact that the bill was named after a former aide to Senator Orrin Hatch who helped write major IP bills (like the Digital Millennium Copyright Act) and then left to become Time Warner's Vice President of Intellectual Property and Global Public Policy can seem a salient fact when coupled with the observation that the bill seems to shift the "burden" of proving copyright to the owner, instead of the infringer (not a problem for large corporations, to be sure, but a real problem for everyone else).

But aside from symbolic conspiracy theories and devil-in-the details wrangling with the mess that is our current copyright law, there are some profound philosophical questions that need to be addressed. How much of our current (mis)understanding of Intellectual Property comes from "our cultural shift from an understanding of creativity as something indelibly individual…to the post-modern sense of a more collective creativity"?[xi] Can we solve the Orphan Works problem the same way it was created: with additional government regulations?

Mark Dery sums up the practical problems of the Orphan Works Act in an end of the year article for *Print* magazine:

> As written, the OWA won't solve anything. With its impossibly vague talk of "reasonable compensation" and "diligent" searches, its fundamentalist faith in the private sector (commercial registries) and technological quick-fixes (image-

> search technologies), the OWA is, as Lessig argued on his blog, a bill that both "goes too far, and not far enough." Too far because the weasel phrase "reasonably diligent search" will provide legal cover for unwitting—as well as willful—infringers of copyrighted works that have washed up on the web without identifying information, yet are not listed in commercial registries. Not far enough because the line the OWA draws in the sand between a good-faith effort to determine the copyright status of a putatively orphaned work and intentional infringement is, in Lessig's wonderfully pungent phrase, "just mush."[xii]

And "mush" it is. The Orphan Works act was referred to the House on September 27, 2008, but because the House had much bigger, much more urgent National problems to address, no action was taken on H.R. 5889. It has effectively become an orphan work of the 110thCongress. In many ways, the Orphan Works Act of 2008 is a true Intellectual Property "development", not in the sense of coming to any conclusions, but as a prologue to a much larger conversation, one that we should be inclined to join.

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vii Peters. Page 2.

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