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Authors

Ratliff, Clancy

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**THE
2018
INTELLECTUAL
PROPERTY
ANNUAL**

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

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Clancy Ratliff

INTRODUCTION TO THE 2018 ANNUAL

IN MEMORIAM: TYANNA HERRINGTON

The rhetoric and composition community, and especially the close-knit group who studies copyright and intellectual property, experienced a sad loss in the summer of 2018: the passing of TyAnna Herrington, one of our leading lights. She was in the forefront of scholars who demonstrated the importance of copyright issues to rhetoric, composition studies, and technical communication. She was a kind and generous person who welcomed new scholars and teachers into our community and whose legacy will be remembered and treasured.



It was hard for me to think of something fitting to share about Ty. I searched my email and read all of her messages, and I found one that captures how I will remember Ty. It is from a conversation that we were having on the CCCC IP Caucus email list about the ruling against students as copyright holders in favor of Turnitin, citing the archiving of student work for plagiarism detection as transformative and a benefit to the public, thus falling under fair use, despite the huge profits made by the corporation, iParadigms. Ty wrote:

I'm totally an access person, so I find it kind of unusual to be standing on the "authors' rights" side of an argument. In this case, of course, because the rights in question are those of students who have relatively little power within the mix, I fall back on my "anti-bully" stance that pervades my work.

And this tracks: she did research to help faculty stand up to institutions that would treat their labor as work for hire. She was opposed to the war in Iraq, and she held up signs on a street in Atlanta in fall 2004 with my spouse, when he taught at Georgia Tech, urging passersby to vote for John Kerry in the presidential election. Jessica Reyman has spoken of how warm, kind, and thoughtful Ty was in her reviewing of one of Jessica's article manuscripts. These are only a few of many examples of her advocacy and strong sense of fairness and equity. She will be missed.

2018: THE YEAR IN COPYRIGHT AND IP

One major development in intellectual property was the EU Copyright Directive, which came up for discussion in 2018 but was passed in spring 2019. This is a controversial new set of policies, one of which has been called a "link tax": copyright holders would have the option to charge a fee for linking to their articles or other content. Presumably this would apply to aggregators such as Pocket, which I see with a few links algorithmically curated for me when I open Firefox. The other major flashpoint in the EU Directive has come to be known as "upload filters," which is like an automatic copyright-infringement detector: Turnitin on steroids, it would seem. The Intellectual Property Standing Group will continue to follow and discuss this policy, which has the potential to affect the global IP landscape.

T J Geiger writes about an unusual authorship case we saw this year: a church job advertisement for a new pastor, one who would be willing to preach famous sermons from celebrity preachers. The job ad was off-putting to many readers, but it raises interesting questions. To what extent is preaching a performance, and is it acceptable for a pastor to perform a cover of a famous person's sermon? Geiger mentions that some pastors post their sermons online, encouraging others to use them if they like. To what extent are sermons like teaching materials that we share and use freely, and to what extent are sermons like conference presentations of original research? How important is preaching compared to the rest of pastoring? I think about a quotation I saw recently about the work of being a pastor:



The Baptist church I attended in my childhood and adolescence called the sermon "the message," because it was a message from God, delivered to us by the pastor, the messenger. Theologically speaking, according to that simple logic, authorship would be irrelevant. Faith is very often shared through personal stories about life experiences, and by that reasoning, a congregation has the right to expect sermons to come from the pastors themselves, their own experiences and meditations. Geiger's insights are well worth reading.

Speaking of stories, another major 2018 flashpoint concerning authorship came from the poetry community. Lanette Cadle explores this case in her article about Ailey O'Toole, who plagiarized lines from around a dozen poets. This plagiarism was exposed on Twitter by Rachel McKibbens, one of the poets whose work O'Toole used. McKibbens is a woman of color writing about her experience in an abusive home in her childhood, specifically "spitting teeth into the sink," a line lifted by O'Toole. O'Toole, a white woman, was using it as a metaphor, and the poem ends with the lines "I gather my teeth from the sink and / wonder who I will be on the other side." McKibbens is writing about a memory, however. McKibbens was understandably angry and hurt, especially given that O'Toole was nominated for a prestigious award for the plagiarized poetry. Taking someone's personal story, it becomes clear, is worse than plagiarism; it is a form of gaslighting. O'Toole deleted her webpage, Twitter account, and other social media. She has vanished from the internet. The publication of her poetry collection was canceled. The case raises important questions and issues, including the ethics of

composing *after* poems, homage poems after the style of a famous poet. As both a rhetorician and a poet, Cadle is well equipped to analyze this case.

Kyle Stedman writes about a case involving retro Nintendo games on emulator websites; in 2018, Nintendo took legal action against one of these sites. Stedman highlights digital archives as they pertain to video games. Of the hundreds of games that Nintendo has released over the years, very few games are archived online. These games have value not only for the experience of nostalgia (as Stedman points out), but also for purposes of research.

Another rather remarkable authorship occurrence from 2018 was #Cockygate, which Devon Fitzgerald Ralston details. It was an abuse of cease-and-desist and trademarking, with a romance author attempting to trademark the word "cocky" and stop other authors from using it. Amazon was complicit in this abuse, and authors were affected, including coauthors who wrote a book titled *Cocky Fiancé*, which they ended up having to change to the far less appealing *Arrogant Fiancé*. #Cockygate resulted in a watchdog bot that tracks and tweets trademark applications so that authors can be alerted to the potential excesses of trademarking.

Finally, we have an excellent analysis of the CASE Act by Kim Gainer. This bill has, just as Gainer predicted in her article, been reintroduced as of May 1, 2019. This bill would establish a board of people who would review copyright infringement claims from those who may not have the means to pursue litigation in court. The board would provide a preliminary review and ruling, which the copyright holder could then take to a court. Depending on the composition of the board, this procedure could curtail due process for the party who used the copyrighted work. What's especially difficult about the CASE act, as well as much copyright legislation in general, is its bipartisanship. The CASE act is sponsored in Congress by, among others, hard-right Senator John Kennedy from my home state of Louisiana, but also such Resistance luminaries as Representative Ted Lieu and Senator Mazie Hirono. As fair use advocates, we must form wide-ranging bipartisan coalitions to challenge these kinds of efforts.

T J Geiger

"BLOCKBUSTER SERMONS" AND AUTHORSHIP ISSUES IN EVANGELICALISM

In 2018, Rocky Mountain Church in Woodland Park, Colorado posted a call for a new pastor to an online job board for church workers. This post, though, caused a quite a stir. It read in part:

Rocky Mountain Church is looking for a pastor who teaches like Craig Groeschel or Andy Stanley or even a bit like Steven Furtick. . . .

When you watch a sermon from Craig Groeschel, Andy Stanley, or Steven Furtick, you feel like you were fed. Why can't we have a church without playing videos from the above pastors?

Here is our concept. If a worship leader can take a song from Chris Tomlin and play it just like the album and that is 100% accepted in the church why can't you, as a pastor, copy or do word per word of a sermon from Craig Groeschel and add 10% of your own style to it just like the band does. This concept would work great mixed with your own sermons about 20% of the time.

Meaning let's give Blockbuster Sermons to the people. Proven messages or hit sermons then add 20% to 50% of your personal sermons based on a mutual agreement and or the congregation response. Test it out and see how it goes. (qtd in Aigner)

Though job descriptions may surely have percentages and workload distributions, this one reads like a curious "originality report" produced by a plagiarism detection service for predominantly white evangelicalism where more copying from highly esteemed figures means a better sermon.

Responses to this ad within the target community of U.S. evangelicalism were largely critical. Evangelical news and culture magazine *Relevant* reported on the posting, calling it a "controversial" program ("This Church"). The satirical site *Stuff Christian Culture Likes* shared a screen capture of the original posting, and commenters identified such an arrangement as "plagiarism" and "stealing" ("You should"). *Patheos* blogger Jonathan Aigner characterizes this situation as "Pastor-Poacher nonsense." Jelani Greenidge, Associate Pastor at Sunset Covenant Church in Portland, Oregon, grounds his extensive critique in essentially rhetorical concerns: "I believe that God calls both pastors and worship leaders to minister in accordance with their context." Using popular songs in worship is common. Diverse audiences surely find similar sermon topics relevant. However, Greenidge lists the many modifications required to make songs

devotionally powerful or appropriate for in-person worship, and he notes how context-sensitive audience analysis should inform sermon delivery. Given the highly charged reactions against this call for a pastor, where did the unusual idea come from, that a preacher of celebrities' sermons would be desirable?

Questions related to delivering others' sermons have received a fair amount of discussion, with many leaders positively advocating some version of sermon appropriation. Rick Warren, pastor and founder of the influential megachurch Saddleback Church, has long-urged pastors to buy and use his sermons and other resources, adopting a tone of encouragement and cultivating a sense of teamwork ("About"). Two past presidents of the Southern Baptist Convention (SBC) have actively promoted the use of their sermons. SBC President from 2000-2002, James Merritt supported pastors appropriating at least one of his Father's Day sermons, absolving them of any concern about "plagiarizing." Adrian Rogers, SBC President from 1979-1980 and 1986-1988, told pastors interested in using his sermons, "If my bullet fits your gun, shoot it, but use your own powder" (qtd. in Rogers). The specific metaphorical image of gunpowder may be unfamiliar, but the notion resonates with the familiar Romantic idea of authorship as connected to an organic, vital energy. But the energy here involves not the production of original text, but the intentional use of another's work after prayerful consultation with God.

Despite these more enthusiastic endorsements of preaching others' sermons, diverse responses to the general practice have appeared alongside technological, moral, and pedagogical anxieties that will be familiar to writing specialists. As with many authorship and intellectual property questions, questions about such sermon-giving practices were raised in connection with the growth of the Internet. Instead of "paper mills," the concern was "sermon resources" (MacPherson) and Google (Thronton). Negative evaluations of sermon appropriation have led to responses that included, on the one hand, moralistic polemics: "You got lazy. You foolishly thought that if you preached like a megapastor you could be a megapastor. You started borrowing, then stealing" (Thronton). On the other hand, some offer instructive correctives (Grear; Perman and Taylor; Piper; Stetzer).

Why is it important to examine the phenomenon of sermon appropriation generally and specifically in the context of evangelicalism? According to the Pew Research Center's *Religious Landscape Survey*, just over a third of the U.S. population, and 58% of the evangelical Protestant community, attends religious services at least once a week. So a significant percentage of the population encounters sermons on a regular basis, and this genre is one frequently encountered by smaller, yet highly motivated constituencies. Consequently, questions of sermon content, function, and provenance are important.

Research from rhetoric and literacy scholars brings into focus issues of individuality versus community as it regards sermonic activity, as well as gender and

racial dynamics. In *The Gendered Pulpit*, Roxanne Mountford describes the gendered ideology that codes sermon-giving as masculine. While mainline Protestant denominations have largely settled that the pulpit should be open to women, Mountford studied how some women adapt longstanding expectations of the “manly” art of sermon writing to their preaching purposes – purposes that often foreground community-building over exhortation of dogma. With its focus on the singular accomplishments of apparently remarkable *men* (the list of “Blockbuster Sermon” writers in the Rocky Mountain Church posting were all men), the job description seems to embody the connection Mountford draws between the traditional, masculine sermon tradition and theologies oriented toward individual salvation, rather than the regeneration of communities. Relational dynamics and issues of community proprietorship surface at the level of rhetorical production in Beverly Moss’s study of African-American preachers’ sermons. Of these sermons, Moss contends that “multiple participants must be present to ‘write’ in order for the text to exist” and that “the sermon belongs to the moment” (138, 143). Community involvement is central. The emphasis in white evangelicalism generally operates from a different theological and cultural stance, one that privileges a perceived individualism (e.g., the individual believer’s experience of and relationship to God is paramount). Whatever promotes a believer’s faith development has value.

How the target community perceives sermon appropriation is also bound up with group perceptions of another text: the Bible. The Bible exists not just as another text, but as an ur-text. The Bible, within evangelicalism, is the revealed Truth of God. This Platonic understanding of truth leads to an ideology that treats language as best when operating transparently. Given that Truth is already established, the pastor’s task, then, involves presenting received knowledge in a useful way. In light of this predicament, J. D. Greear, prior to his election as current SBC President, sympathized with pastors who might find it difficult to know exactly how to avoid source misuse in sermon development. He sympathizes because “[a]lmost everything we say has already been said elsewhere. If not, we have reason to worry! If you come up with ‘something no one has ever seen before,’ there might be a reason. The faith was committed ‘once for all’ to the saint” (Greear).

This episode and the background that informs it lead me to some questions that might be of interest to writing specialists concerned about intellectual property and authorship issues:

- 1) Operating on a logic that likens the role of musical efforts within a religious service to the role of the sermon, the Rocky Mountain Church posting claimed universal agreement (“100% accepted”) for an understanding of worship music as pure copying. While this is highly questionable, how might insights from studies of remix culture and musical sampling help scholars and teachers think through the intellectual property and authorship issues involved in this pastor search? How are appropriations of music and discourse different?

- 2) White evangelicals are the segment of the U.S. population to most consistently register support for President Trump. What might the intersection of church growth-oriented, consumerism-influenced, celebrity pastor culture at which this job posting exists contribute to our understanding about the interaction of religious, cultural, and textual ideologies within this highly motivated community?
- 3) Given that the example pastors and worship leader referenced in the posting are all white men, to what extent do celebrity pastor culture and sermon appropriation practices reinforce oppressive racial and gender ideologies?
- 4) What other literacy practices and rhetorical activities might be implicated in, or influenced by, sermon appropriation?

WORKS CITED

- "About." *Pastors.com*. 2019. www.pastors.com
- Aigner, Jonathan. "Rocky Mountain Church Seeks a New Plagiarizing Pastor." *Patheos*. 3 Aug. 2018. www.patheos.com
- Greear, J. D. "What Counts as Plagiarism in a Sermon?" *J. D. Greear Ministries*. 13 Apr. 2012. www.jdgreear.com
- Greenidge, Jelani. "An Open Letter to Blockbuster Sermon Church." *JelaniGreenidge.com*. 1 Aug. 2018. www.JelaniGreenidge.com
- MacPherson, Corey. "Plagiarism, Integrity, and Giving Our Best." *Christianity Today*. Feb. 2014. www.christianitytoday.com
- Merritt, James. "You Can Preach My Sermon." *SBC Voices*. 13 June 2007. sbcvoices.blogspot.com
- Moss, Beverly. *A Community Text Arises: A Literate Text and a Literacy Tradition in African-American Churches*. Cresskill: Hampton Press, 2003.
- Mountford, Roxanne. *The Gendered Pulpit: Preaching in American Protestant Spaces*. Carbondale: Southern Illinois UP, 2003.
- Perman, Matt, and Justin Taylor. "What is Plagiarism?" *DesiringGod*. 23 Jan. 2006. www.desiringgod.org
- Pew Research Center. *Religious Landscape Survey*. 2014. www.pewforum.org
- Piper, John. "My Pastor Uses Pre-Made Sermons – Should I Be Concerned?" *DesiringGod*. 4 Apr. 2016. www.desiringgod.org

Rogers, Steve. "Should We Borrow from Other Preachers?" *LogosTalk*. 23 June 2017.
www.logos.com

Stetzer, Ed. "Preaching, Plagiarism, and Sermon Central." *Christianity Today*. 21 May 2008. www.christianitytoday.com

Stuff Christian Culture Likes. "You should apply." *Facebook*. 2 Aug. 2018.

"This Church Is Looking for a Pastor Who Will Preach 'Word for Word' Sermons from Famous Pastors." *Relevant*. 1 Aug. 2018. www.relevantmagazine.com

Thronton, William. "Guaranteed to Put Fear in the Pastor's Heart." *SBC Plodder*. 26 Sept. 2013. sbcplodder.blogspot.com

PLAGIARIZING A PUSHCART PRIZE

What do you do when a poem from your first poetry book is plagiarized, then is nominated for a Pushcart Prize? Do you protest publicly like Rachel McKibbens did in a November 30, 2018 tweet, "I HOPE WE WIN!"? What do you do when the poem actually wins, but not for you? McKibbens found out fast when Ailey O'Toole plagiarized poems from McKibbens book *blud* (2017) in the most public way possible.

Rachel McKibbens is far from an obscure poet. She has a higher profile than most with bio pages in both the American Academy of Poets and the Poetry Foundation sites. The Poetry Foundation in particular is very high profile and the source for prestigious prizes including the Lannan Prize as well as being the publisher for *Poetry*, the journal founded in 1912 by poet Harriet Monroe that is a longtime benchmark for achievement. Where did T.S. Eliot first publish "The Love Song of J. Alfred Prufrock"? *Poetry*. Only the most notable poets have bio pages on the foundation site and McKibbens' page notes that "poet, activist, playwright and essayist Rachel McKibbens is the author of the poetry collections *Into the Dark and Emptying Field* (2013) and *Pink Elephant* (2009)." Her latest book, *blud* (2017), which contains the poems that O'Toole plagiarized, is published by Copper Canyon Press, one of the top poetry presses today, publishers of other well-known poets such as C.D. Wright, Jericho Brown, Bob Hicok, and Chase Twitchell. The Poetry Foundation bio goes on to note that "Her poems, short stories, essays and creative non-fiction have been featured in numerous journals and blogs, including *Her Kind*, *The Los Angeles Review*, *The Best American Poetry Blog*, *The Nervous Breakdown*, *The Rumpus*, *The London Magazine*, *The Acentos Review*, *World Literature Today*, *Radius*, and *The American Poetry Journal*." These are all journals that those in po-biz know and respect. She is also a past performer in the poetry slam circuit and it is easy to find her performances on YouTube. *The Huffington Post* is also a fan and has posted video of her performing her poetry more than once.

For those outside the creative writing world and not familiar with the Pushcart Prize, the Pushcart Prize is a well-known and prestigious award, possibly even more so because of its nomination system, which takes nominations from journals themselves and from past winners. Each past winner gets two nominations. This two-prong system ensures that the Pushcart doesn't devolve into a prize that is only awarded to work from certain privileged journals or presses. Having working writers who have shown their excellence nominate gives balance and also keeps the prize on the forefront of what is currently happening in literary fiction, poetry, and creative nonfiction.

So, how does a plagiarized poem end up nominated for a Pushcart Prize? The question more accurately should be, how can this happen now when online journals make poetry so easy to find? Plagiarism in literary publishing has been a dirty little not-

so-secret for centuries. What is so surprising is not that it happened but that it was found out. That is what's new.

The controversy became public, not because the journal editors or McKibbens noticed the poem and its similarity, but because of reasons that became clear later, Ailey O'Toole contacted McKibben herself. In the social media-intensive poetry world, O'Toole felt comfortable reaching out to McKibbens, presenting her poems as a tribute rather than plagiarism. *Bustle* details this in its December 3, 2018 article, writing that "O'Toole contacted McKibbens on Twitter to state that she "lift[ed an] image" from the *blud* poem "three strikes," and "paraphrased too closely for comfort" in her own poem, "Gun Metal." Perhaps the Pushcart nomination made O'Toole uncomfortably aware that McKibbens might actually read the poem. McKibbens' Twitterstream sequences her research into what happened and when; in it she notes that at the point that O'Toole contacted her via Twitter, she had already lost her book contract. At the same time, O'Toole's Twitter contact could be seen as a way to frame the similarity in a positive way and salvage her career as an emerging poet. Her defense was logical – tribute poems exist. It is also true that model poems are a common teaching device for workshop and equally true that poets often write poems "after the style of [famous poet and her/his equally famous poem]." It is also common to see published poems that riff off an epigraph from a well-known poem. However, the ethic behind such exercise poems is that the result needs to be new – a distinctive piece that is the poet's own, not a rendering of an old master in the same way art students copy paintings in museums. Those art students most definitely do not follow up by selling the copy under their name. Poets using the model poem technique then, would not use a model poem less than a year old since it needs to be recognizable to a large audience in order for the resonances to work.

After O'Toole's contact with McKibbens on Twitter, the story travelled quickly from Twitter to Facebook poet groups, more general interest news blogs, then to more traditional media, including *The Guardian*. Accelerating the story was McKibbens' social media savvy and the active creative writing community on Twitter. She openly tweeted about the situation and was not shy about sharing with other creative writers and to media.

The next step in the social media progression was the December 3, 2019 *Bustle* article, which expanded and promoted the readership of the Twitter thread by screenshotting many of McKibbens' tweets, essentially showing how the story developed through her side by side poem comparisons. For example, in the poem "three strikes," McKibbens' writes, "Hell-spangled girl / spitting teeth into the sink, / I'd trace the broken / landscape of my body / & find God / within myself." In comparison, O'Toole writes in the Pushcart-nominated poem "Gun Metal," "Ramshackle / girl spitting teeth / in the sink. I trace the / foreign topography of / my body, find God / in my skin." The shared "spitting teeth" image is telling, and in conjunction with the landscape/topography image and the finding God within

/self/skin trope, the overlap becomes much to close for comfort. Add to that the personal nature of the original poem, and the line between exercise and plagiarism is no longer in question. As McKibbens points out in a December 4, 2018 article for *Vulture*,

She [O’Toole] thought that teeth were a metaphor,” McKibbens tells me over the phone. She sounds incredulous, and for good reason: The phrase tattooed on O’Toole’s arm isn’t a metaphor but a memory — real teeth falling into a real sink, casualties of an abusive childhood that left McKibbens with a mouthful of orthodontia before she was even in second grade.

The book *blud* then is based on highly personal life experiences, a contemporary version of confessional poetry, only even more specific and revelatory. Besides the images then, O’Toole’s poem also lifts McKibbens’ own life experiences, her stories of trauma and abuse. McKibbens declares in a 11:34 PM 12/01/2018 tweet, “Tired of fools suggesting I respond to plagiarism w/more ‘compassion’ when we know damn well girl never thought twice about stealing from a working-class Xicana writer/mother of five living w/ chronic pain, PTSD, anxiety & bipolar disorders.”

As the story develops even further, it becomes clear that the plagiarism involved more than just one poem. O’Toole had a book contract for her first collection when she states in an interview for *The Rumpus*, that she views “Gun Metal” as the most representative poem for the collection. McKibbens cites this interview when she tweets the reason why she simply can’t accept O’Toole’s “apology,”:



When O'Toole asserts that "Gun Metal" is "the best representation of her "collection as a whole" without any mention of McKibbens or *blud*, it is clearly more than an oversight. The *Rumpus* interview was also brought up in *Vulture's* article "Poetry Twitter Erupts over a Plagiarist in Their Midst," which notes that the interview

reads now like a confession of guilt, as it turns out that "Gun Metal" is very much a collection of reassembled pieces: pieces of other poets. O'Toole's bizarrely brazen act of plagiarism – stealing lines, phrases, and structural elements from the work of at least three other writers – was uncovered last Friday, unraveling her career at the speed of Twitter, the medium by which her fledgling reputation lived and died. Within 24 hours, the literary press Rhythm & Bones had canceled her forthcoming book of poems, and the insular world of poetry Twitter had already gone through a cycle of blame, bafflement, and measured defense.

Yet, there's more. McKibbens searches and as the *Vulture* article notes, finds other poems, more similarities. Then another poet, Hieu Minh Nguyen, reaches out to McKibbens on Twitter November 30, 2018 to let her know that "I found the poem and she plagiarized me too! For 3 different poems. Lol. Group piece." McKibbens has strong support from the writing community also and they join the commentary on Twitter. For example, a 9:13 PM 11/30/2018 tweet from Sarah Freligh to McKibbens comments, "Gives new meaning to 'paraphrased.' Whoops. I paraphrased that six-pack from the 7-11." McKibbens' twitterstream from November 30, 2018 through December 1, 2018 tells the story cogently, logically, and with good corroborating links, such as the one to the cancellation notice for the Kickstarter that was supposed to fund O'Toole's first collection, *Grief and What Comes After*. McKibbens speculates in a 9:36 PM 11/30/2018 tweet, "and I can only guess that either the Pushcart peeps clocked the line snag or someone read that shit on Rumpus, because there's this cancellation: <https://kickstarter.com/projects/1659156625/preorders-grief-and-what-comes-after>." *Vulture* confirms the cascading aftereffects from the *Rumpus* interview and details another twist, also seen through McKibbens' Twitterstream, how an acquaintance of O'Toole's, Kristina Conrad, after seeing a line from "Gun Metal," tattooed on O'Toole's arm, googled it to find two mentions: one the *Rumpus* article quote, the other McKibbens' book *blud*:

Conrad was appalled: "[To say] that it was part of a trauma for her when it was clearly somebody else's trauma, that's what I found really egregious." Knowing that O'Toole was on the verge of releasing a poetry collection through a small literary press called Rhythm & Bones, Conrad sent an email to the publisher on November 29. "To whom it may concern," she wrote, "I wanted to inform you that poet Ailey O'Toole has plagiarized her poem 'gun metal.'"

The now viral news finally filters to more mainstream media, including *The Globe* and *The Guardian*. For the most part they reiterated what Twitter knew days before: there

was dirty work afoot but also that retribution was swift: the Pushcart Prize for “Gun Metal” was rescinded and O’Toole’s contract for her first poetry collection also pulled. The aftereffects linger still. For example, the social media site Goodreads has a page for *Not A Book: Grief, and What Comes After* by Not a Book, possibly a Goodreads user-created page with the purpose to amplify that O’Toole’s acts were not acceptable. The page has a series of one-star ratings with comments naming Ailey O’Toole and consistently mentioning plagiarism in what is identified as “Not a Book.”

If this were a “moral to the story” kind of situation, the swift retribution would be the point. However, as mentioned in the beginning, plagiarism is not new to the literary world. What is new is how the formerly powerless voices in this conversation, the authors, can now quickly raise support via social media and prompt publishers to do the right thing, not that publishers didn’t want to before, but that they were far less likely to know that a poem – or book – was plagiarized. This social media induced transparency is a powerful tool for the preservation of intellectual property. At the same time, the swift, possibly not always vetted calls for action typical of Twitter could also land a firestorm on the heads of the innocent. In the case of McKibbens and O’Toole, the case was clear. It may not always be so for others.

WORKS CITED

Copper Canyon Press. Poet Community page. www.coppercanyonpress.org

IP Annual 2017. cccc.ncte.org/cccc/committees/ip/2017-developments

Goodreads. “Not a Book: Grief and What Comes After.” Goodreads book page.
https://www.goodreads.com/book/show/42920720-not-a-book?fbclid=IwAR3AdcEeoHf-xt1rLRC_N2nGgr4_RPEy4xDiz1JVtaDiz2gnryBq58H0J6g

McKibbens, Rachel. “How I came to Embrace my Mental Illness.” Video performance.
Huffington Post. www.huffingtonpost.com/author/rachel-mckibbens

McKibbens, Rachel. Twitter Homepage. twitter.com/RachelMcKibbens

Poetry Foundation. Rachel McKibbens Bio page.
www.poetryfoundation.org/poets/rachel-mckibbens

Pushcart Prize. “The Pushcart Prize Nomination Process.” Pushcart Prize site.
www.pushcartprize.com/nomination.html

Rosenfield, Kat. “Poetry Twitter Erupts over a Plagiarist in Their Midst.” *Vulture*.
www.vulture.com/2018/12/poetry-twitter-erupts-over-plagiarist-ailey-

otoole.html?fbclid=IwAR0icoIXJhkRrZPkv2AmSX6GIN68jTuo4dTqxczBu-
10VzgrUIyfLr6SSt4

Wilson, Kristian. "A Pushcart Prize-Nominated Poet Has Been Accused of Plagiarism
By Numerous Poets. *Bustle*. [www.bustle.com/p/a-puschart-prize-nominated-
poet-has-been-accused-of-plagiarism-by-numerous-poets-13234488](http://www.bustle.com/p/a-puschart-prize-nominated-poet-has-been-accused-of-plagiarism-by-numerous-poets-13234488)

Kyle D. Stedman

SUE FOR MARIO BROS.: NINTENDO VS. EMULATION

INTRODUCTION: ACCESSING THE PAST

At the heart of many conversations about sharing copyrighted work is a question of access. That is, when there is no legal way to access a work, to what extent can users feel ethically free to download and distribute that work, even when sharing technically breaks copyright law?

To many, the answer is simple: if we can't find an easy-to-access, legal version of the book we're trying to read, or the article we're trying to cite, or the out-of-print software we're trying to test, or the movie we're trying to watch--we know we can find someone online who has digitized the content and is happy to share. Perhaps begrudgingly, perhaps with embarrassment, many of us nevertheless steal the things that are hard or impossible to buy in an updated, accessible format.

Of course, content owners know this is happening. And while these companies are within their rights to send cease-and-desist letters to try to stop infringement, another choice is simply to look the other way. After all, the argument goes, infringing users are often still fans who are worth keeping on your side.

Yes, I'm talking about Nintendo--a company that I suspect faces this tension between access and piracy often for two overlapping reasons: 1) they're one of the most beloved companies in the world, especially to nostalgia-loving children of the 80s and 90s, and 2) their early, popular content--the games released on the Nintendo Entertainment System (NES), Super Nintendo Entertainment System (SNES), Game Boy, and Nintendo 64--can be shared and played easily and accurately on computers. It's instant nostalgia, and all for free, as long as you're willing to download from ethically shady sites. All you need is a free emulator program and a collection of ROMs (which stands for read-only-memory, the term that has become the shortcut for "a single digital file that includes an entire game").

ROMs have been shared widely for years; I remember how in high school, circa 1997, I downloaded a fan-translated version of the SNES game *Final Fantasy V*--then released only in Japan!--and tried to play it on my very old, very slow family desktop computer. And Nintendo has of course known about ROM-sharing for years as well; according to archive.org, its page on "Legal Information (Copyrights, Emulators, ROMs, etc.)" has been up at its current web address since 2003, where amid other threats about the illegality of playing ROMs, we can read the unchanged-since-then warning that emulators and ROMs are "the greatest threat to date to the intellectual property rights of video game developers."

But in 2018, Nintendo powered up its warnings.

WHAT HAPPENED: BOWSER'S ATTACK

On July 17, 2018, Nintendo filed suit against two major sites that hosted ROMs for free: LoveROMs and LoveRetro. Their suit claims copyright infringement, trademark infringement, and unfair competition and requests up to \$150,000 for each copyright infringement plus another \$2,000,000 for each trademark infringement (United States District Court 23). Since the sites hosted, according to the suit, "thousands of games" (2), the sites' owners could be liable for literally *billions* of dollars, according to that metric. (If we assume that "thousands of games" means a minimum of 2,000 infringements, the owners would be facing \$300 million in copyright infringements plus another \$4 billion in trademark payments--ridiculous numbers that that bring to mind Mario jumping through seas of uncountable coins.)

The married couple who owned the sites chose to settle. According to a November 2018 article on *TorrentFreak*, they paid over \$12 million to Nintendo to avoid further litigation, and of course the content came down. The sites no longer function, though the Facebook page for LoveROMs is still up; it's headed by a November 8 post stating that the site "acknowledges that it caused harm to Nintendo, its partners, and customers by offering infringing copies of Nintendo games and has agreed to cease all such activities" (LoveROMs).

According to *Wired* (Onanuga) and *Ars Technica* (Machkovech), this move represented a clear escalation of Nintendo's previous attempts to shut down ROM sites: sending cease-and-desist letters. Apparently, those previous moves were just small-Koopa; they needed the spikes and hammers of Bowser to really shut down this infringement.

It's not entirely clear why Nintendo chose these sites from the many sites hosting ROMs they could have chosen, though an *Ars Technica* article speculates:

The lawsuit makes a point of describing the named defendants as "not casual gamers," but "sophisticated parties with extensive knowledge of Nintendo's intellectual property and the video game industry more generally." It is possible that the suit uses this language to explain why some ROM sites' operators may not draw the same legal fire. (Additional, alleged paths to revenue may not help matters for the named defendants, as Nintendo alleges that the operators "enrich themselves through, among other things, donation requests and the sale of advertising space.") (Machkovech)

Regardless of the reason, Nintendo won the legal victory. Fans disagree, however, on whether or not they won the moral victory as well.

CRITIQUES FROM THE MUSHROOM KINGDOM

As one might expect, this lawsuit has had a chilling effect on other sites hosting ROMs. The owner of popular site EmuParadise wrote, "I started EmuParadise 18 years ago because I never got to play many of these amazing retro games while growing up in India and I wanted other people to be able to experience them" (qtd. in Onanuga).

Another article interviews Serbian videogame developer Miodrag Kovačević, who also describes ROMs as the only way he could access top-quality games while growing up, a habit that later led to a successful career (Maiberg). The same article also makes the case for ROMs as an important archival tool, and as an important source for teaching students game history and development; it quotes NYU professor Bennett Foddy, who says, "If I was teaching poetry, I could send a student to read nearly any poem written since the invention of the printing press, but in games my legal options limit me to, I would guess, less than 1 percent of the important games from history." And *PCWorld* describes the ROM community as "a community that's almost singlehandedly kept game preservation efforts alive" (Dingman).

And in the bigger picture, there's mounting evidence that, as one article title puts it, "Online Piracy Can Be Good for Business" (Bode). Others are responding by praising creative approaches, like "an online lending library [that] temporarily loan[s] out copies of ROMs tied to individual original cartridges" (Orland). And of course, the fight isn't over: software engineer and game designer Brianna Wu even suggests that expanding copyright law at the federal level may be the answer; in January 2019, she tweeted, "If I am elected to Congress in 2020, I will draft a bill expanding fair use to games sold on digital services that have been discontinued" (@BriannaWu).

Still, all these articles include a common refrain, even from those most against Nintendo's lawsuit: Nintendo was of course acting within its legal rights. Even when its fans disagree, a company gets to protect its intellectual property, even when that protection can feel like a fireball cascading against a dungeon's bridge.

CONCLUSION: IT COMES DOWN TO ACCESS

One possible reason for Nintendo's decision to sue LoveROMs and LoveRetro might be its present and future plans to capitalize on its popular, retro intellectual property; in other words, perhaps the company is planning to give fans the access that they want. After all, their release of official mini-consoles, the NES and SNES Classic Editions--which update the playing experience for modern TVs with HDMI inputs, crisp displays, and the ability to save wherever you want--was marked by notorious shortages as fans rushed to buy official access to the games of their childhoods. And the current flagship Nintendo system, the Switch, is slowly giving Switch Online customers access to more and more original NES games, which it trickles out to great acclaim. (A journalist at

Motherboard asked Nintendo if the Switch Online releases affected Nintendo's decision to sue when it did, but at the time of his article, he hadn't heard a response [Maiberg].)

Yet consider the numbers, focusing for now just on NES games. The NES Classic comes with 30 built-in games (and no sanctioned, easy way to download or add more). The Switch Online service currently offers 35 NES games and will add more, but many of the games currently available are already available on the NES Classic. To be fair, there was more generosity in the past: the now-discontinued Wii Virtual Console did indeed make 94 NES games available ("List of Virtual")--but compare those numbers to the 680 officially licensed NES games released in North America ("List of Nintendo"). Or compare the 20 games on the SNES Classic to the 721 licensed North American games for the SNES ("List of Super"). That's a lot of unplayable, un-archived content. According to NYU professor Foddy, "they make their most popular titles available and let the rest disappear" (qtd. in Maiberg).

With such a small slice of Nintendo's retro offerings available legally (and the prices of physical cartridges soaring on eBay), it seems likely that despite Nintendo's legitimate efforts to protect its intellectual property, fans will continue to find ways to download and share ROMs. And perhaps they'll continue to love the Nintendo of the past, even as they live in fear of the Nintendo of the present.

WORKS CITED

Bode, Karl. "Online Piracy Can Be Good for Business, Researchers Find." *Motherboard*, 28 Jan. 2019, motherboard.vice.com/en_us/article/vbwedx/online-piracy-can-be-good-for-business-researchers-find.

@BriannaWu. "If I am elected to Congress in 2020, I will draft a bill expanding fair use to games sold on digital services that have been discontinued. We can balance the need to preserve classic works of art with the rights of game developers to profit from their work." *Twitter*, 29 Jan. 2019, 4:00 p.m., twitter.com/BriannaWu/status/1090369195626414080.

Dingman, Hayden. "Nintendo's Ridiculous War on ROMs Threatens Gaming History." *PCWorld*, 11 Aug. 2018, www.pcworld.com/article/3296479/nintendo-suit-rom-emulation-game-preservation.html.

"Legal Information (Copyrights, Emulators, ROMs, Etc.)." *Nintendo*, www.nintendo.com/corp/legal.jsp.

"List of Nintendo Entertainment System Games." *Wikipedia*, 20 Mar. 2019, en.wikipedia.org/wiki/List_of_Nintendo_Entertainment_System_games. Accessed 20 Mar. 2019.

- "List of Super Nintendo Entertainment System Games." *Wikipedia*, 3 Mar. 2019, en.wikipedia.org/wiki/List_of_Super_Nintendo_Entertainment_System_games. Accessed 20 Mar. 2019.
- "List of Virtual Console Games for Wii (North America)." *Wikipedia*, 11 Mar. 2019, [en.wikipedia.org/wiki/List_of_Virtual_Console_games_for_Wii_\(North_America\)](https://en.wikipedia.org/wiki/List_of_Virtual_Console_games_for_Wii_(North_America)). Accessed 20 Mar. 2019.
- LoveROMs. Admission of Guilt. *Facebook*, 8 Nov. 2018, 2:10 p.m., www.facebook.com/permalink.php?story_fbid=1192980144183691&id=304477189700662.
- Machkovech, Sam. "Nintendo to ROM Sites: Forget Cease-and-Desist, Now We're Suing." *Ars Technica*, 23 July 2018, arstechnica.com/gaming/2018/07/nintendo-to-rom-sites-forget-cess-and-desist-now-were-suing/.
- Maiberg, Emanuel. "Nintendo's Offensive, Tragic, and Totally Legal Erasure of ROM Sites." *Motherboard*, 10 Aug. 2018, motherboard.vice.com/en_us/article/bjbped/nintendos-offensive-tragic-and-totally-legal-erasure-of-rom-sites.
- Onanuga, Tola. "All That's Wrong with Nintendo's Heavy-Handed ROM Crackdown." *Wired*, 18 Aug. 2018, www.wired.co.uk/article/nintendo-roms-emulator-loveroms-loveretro-lawsuit.
- Orland, Kyle. "ROM Sites Are Falling, But a Legal Loophole Could Save Game Emulation." *Ars Technica*, 21 Aug. 2018, arstechnica.com/gaming/2018/08/can-a-digital-lending-library-solve-classic-gamings-piracy-problem/.
- United States District Court for the District of Arizona. *Nintendo of America Inc., a Washington Corporation, v. Jacob Mathias and Mathias Designs, L.L.C., d/b/a www.LoveROMs.com and www.LoveRETRO.co*. 19 July 2018. *TorrentFreak*, torrentfreak.com/images/nintendo-loveroms.pdf.

Devon Fitzgerald Ralston

“COCKYGATE”: TRADEMARK TROLLING, ROMANCE NOVELS, AND INTELLECTUAL PROPERTY

OVERVIEW

In 2018, 162 million e-books were sold. Almost 40% of that was in the romance genre. Readers of romance were early adopters of reading on electronic devices; the e-book market favored independent publishers and authors. Even traditional publishers like Harlequin, Macmillan and Penguin created digital only presses like Carina, Swoon Reads, and Flirt. Many popular romance authors began self-publishing through Amazon Kindle Unlimited and iBooks in addition to traditional presses offering novellas, prequels and exclusive digital content for their readers. Additionally, niche genres like supernatural romance, African-American romance, LGBT romance, and erotica may have remained underrepresented in print publishing but flourished in e-publishing forms. The rising popularity of romance novels, specifically in e-book form, has brought copyright and intellectual property challenges especially for self-published authors. The use and speed of information via social media increases public awareness of such challenges, like in the case of what has come to be known as Cockygate¹.

In the Summer of 2018, romance novelists Melissa Jane and T.L. Smith received a message from Audible, to whom they'd recently sold the rights to their book *Cocky Fiancé*, that informed them of a notice which alleged they were infringing on someone else's trademark. A few days later, they received notice from the author, Faleena Hopkins, explaining that she had trademarked the word "cocky," insisting Jane and Smith change their title. Further, Hopkins contacted Amazon directly and reported other romance novelists including popular author, Tara Crescent, who writes a series of menage romances that use "cocky" in some of its titles, for trademark violation. Amazon's policy (at the time) was to suspend sales of reported titles until receiving valid documentation to prove rights to the "trademarked" material. Amazon also began removing reviews for the suspended books, as well as others which used "cocky" in their titles. Tara Crescent's books were pulled from Amazon while other authors altered their titles or delayed release dates preemptively. Jane and Smith, for example, retitled their book to *Arrogant Fiancé* despite the thousands of dollars they had already spent on marketing and book swag with the previous title.

Authors who'd received letters from Amazon or directly from Hopkins herself took to social media in confusion and outrage using the hashtag "cockygate". They

¹ Author's Note: I first learned of this issue via tweets from two of my college friends (who remain unnamed for privacy purposes) who co-author romance novels. They knew many of the authors involved in the case, though themselves were not targeted nor sued. They declined to be publicly interviewed but provided much of the details and timeline of the case as it is laid out here.

posted emails from Amazon and copies of the cease and desist letters from Hopkins. For self-published authors who had no legal representation, the possibility of having to prove ownership of content they write felt overwhelming enough to agree to Hopkins' demands to change their titles, even if they thought trademark was invalid. In this case, in particular, many authors like Jane and Smith buckled under the pressure because due to Amazon's policy they felt like they had no recourse. In a matter of days, Romance Writers of America, the trade association for romance authors, intervened, which halted the removal of books that had been reported as violating Hopkins' trademark and reinstated those that were removed, though it took much longer to get the reviews reposted. But for authors like Jane and Smith, the damage had been done. While the authors worked to change their title, Amazon contacted the paperback distributor regarding the infringement claim and the authors had to not only prove their identities but also that they owned the work they were publishing.

SO YOU WANT TO LEARN TRADEMARKS

A trademark such as a brand, logo, or slogan identifies the source of a particular good or service to consumers and potential consumers. The purpose of the trademark is to protect consumers from being confused as to the source of a good bearing the mark. For example, the shape of the Coca-Cola bottle is trademarked and has been part of the company's trademarked logo throughout its history. This prevents any other soda company from using that particular bottle shape as part of their brand or logo and ensures that customers know that when they see that bottle shape, they're getting what they expect from the Coca-Cola brand. Trademarks identify particular goods you are *selling*. If you are not selling a specific good in association with the trademark, there would be no marketplace confusion and thus, no infringement. When a trademark is registered, a particular good with which it will be used must be identified.

A registered trademark is simply a trademark that has been registered with the United States Patent and Trademark Office. The process requires filling out a form, paying a fee, and completing registration. Once the process is complete, the filer receives a certificate that provides a presumption of validity and the right to sue alleged infringers. However, a registered trademark is not required to sue someone for trademark infringement. You only have to allege and prove that consumer confusion was caused or that the likelihood of confusion will occur. Registering a trademark does not mean you will automatically win a trademark case because a) trademarks can be attacked and b) infringement has to be proven (USPTO).

In the United States two kinds of marks can be registered: 1) standard character marks which are marks that constitute a word or words in one or more languages, an arbitrary string of characters or a made-up word as long as it is made up of standard characters. Legal experts suggest that made-up words are the best kind of trademarks. 2) Non-standard character marks or wordmarks including logos, pictograms, symbols,

colors, sounds, or even smells (Whipple). Faleena Hopkins registered both “ the wording ‘cocky’ in stylized form” as a non-standard character mark and a standard character mark (USPTO).

The word "cocky" is written in a fluid, cursive script. The letters are connected, with a prominent loop on the 'y' and a sharp hook on the 'c'. The overall style is elegant and handwritten.

The “stylized form” represented here uses a font Hopkins purchased from Creative Market, a community-generated design site, whose FAQs expressly state “you may not register as a trademark the item or the end product incorporating the item--not even logos. If you use the item to create a logo for yourself or a client, keep in mind that third parties can use the item too, even in another logo” (“Creative Market”). The creator of the font, Set Sail Studios, explained on Twitter that he had not given anyone permission to trademark a design using his font. This alone would seem to void Hopkins’ claims to trademark.



Furthermore, those seeking trademarks must identify the mark so particularly in order for competitors to know what they are to avoid and simply “do not use the word cocky” is insufficient. Remember, the point of trademark is to avoid marketplace confusion for consumers. As such, you typically cannot claim something as a trademark when others are already using it for similar goods because an association may very well have already formed between the goods and that mark. Hopkins’ registration of a trademark suggested that her “The Cocky Series” was the only association of consumer to good being offered; in this case, a romance novel with a cocky protagonist. As one can imagine, there are many romance novels using the word “cocky,” to describe such characters, Tara Crescent’s included, that were published before Hopkins’ first claimed use of the trademark. As such, the merit of Hopkins trademark is iffy at best, perhaps verging on deceptive, which is why Kevin Knuepper, a retired lawyer and romance novelist, filed a formal opposition to Hopkins’ trademark. He challenged the original trademark but also argued that Hopkins committed fraud on the United States Patent

and Trademark Office because Hopkins did not use the “cocky mark” on the published versions of the books in the Cocker Brother series, only the ebook versions. Kneupper alleges that this discrepancy was not disclosed during the registration process and thus constitutes fraud (King).

Hopkins filed a lawsuit against Kneupper and Tara Crescent and sought an injunction against Jennifer Watson for her *Cocktales Anthology*, the proceeds of which were earmarked for legal defense funds of authors accused of trademark infringement. Representing Kneupper, Crescent and Watson, the Authors Guild and Romance Writers of America filed a countersuit challenging Hopkins’ trademark. In their court filings, the organizations wrote “cockiness (in all its permutations) remains as prevalent in romance novels as the use of stunning, scantily-clad models on their covers” (Hopkins v. Kneupper, Crescent, Watson). The judge agreed and ruled in their favor, stating that Hopkins’ injunction was “unwarranted and unfounded” (Hopkins v. Kneupper, Crescent, Watson). Hopkins surrendered her trademark registrations and #cockygate essentially, ended. However, because of Amazon’s “suspend first, prove validity later” policy Hopkins was able to wreak havoc within the romance novel ebook publishing industry and cause significant issues for many authors over months that the cases were pending.

WHAT NOW?

In the wake of #cockygate, romance authors are thinking strategically about how to protect themselves from future accusations of infringement, but also how to protect their own creative work. Romance Writers of America hosted a series of talks on branding and copyright at their yearly conference and a series of webinars are planned throughout this year. A group of authors including Watson calling themselves “The Cocky Collective” continue to raise money for RWA’s legal advocacy efforts and contributed over \$100,000 of their royalties of *The Cocktales Anthology* to the fund in 2018. In a press release thanking the contributors and readers, RWA says they will continue “to fight against obstruction of creative expression” (“RWA Receives Donation from the Cocky Collective”).

In an attempt to prevent such cases from going as far as cockygate, a twitter bot called “cockybot” automatically finds and tweets fiction-related trademark applications filed with the US Trademark and Patent Office. The tweet includes the phrase being trademarked, the documents filed, and an Amazon search link of associated products. While inspired by #cockygate, the bot looks beyond romance novels and includes other genres as well. Notably, the bot’s twitter profile includes an image of a robot with the stylized font Hopkins initially trademarked reading “cocky” over it.



Cockybot is an attempt at a technological solution for trademark bullying. The sheer number of romance authors publishing today makes it challenging for one editor or one author to track trademarks related to their genres. Cockybot automates part of that process, though one still has to read through the linked documents to determine whether or not to oppose the trademark and then fill out paperwork to do so. Writing and publishing is becoming increasingly complex for independent authors. Because today's consumers have a significant range of choices when it comes to what and how to consume romance novels, in order to stay competitive, authors must be not only be well-versed in search engine optimization, Amazon policies, marketing, branding, and networking, but also understand trademark and copyright laws and practices.

Ultimately, Faleena Hopkins created a dangerous precedent even if her trademark did not hold up. It is clear that Hopkins used Amazon policies against the authors she targeted. While there is an appeals process in place, the texts in question were suspended or removed while an investigation was pending, at least until Romance Writers of America intervened. Thus, Amazon policies can be weaponized; the algorithms can be employed in such a way to return results for whoever has trademarked a particular term or series of terms to determine what titles are associated with that term and which might be a target for trademark bullying. While this kind of scam, or trolling (registering a trademark only for the purpose of reporting infringement to Amazon) would not hold up in court, it could potentially boost sales for a trademark holder while damaging the marketplace association of consumer to goods, the very thing trademark is meant to protect. There is an obvious weakness in Amazon practice and policy that seems easily exploited and manipulated and that should concern readers and authors of all genres.

WORKS CITED

- @Cockybot. "Who or What is Cockybot?" *Twitter*. 17 May 2018, 8:20 PM, <https://twitter.com/cockybot/status/997316071227994112>.
- Grady, Constance. "How an Author Trademarking the Word 'Cocky' Turned the Romance Novel Industry Inside Out." *Vox.com*, Vox, 24 July 2018, vox.com/culture/2018/5/15/17339578/cockygate-explained-romance-publishing-faleena-hopkins.
- King, Tyler. "A Trademark War Roils the Romance World: Who Owns Cocky?" *Slate Magazine*, Slate, 15 May 2018, slate.com/culture/2018/05/cockygate-and-the-romance-writing-trademark-war.html.
- "Licenses FAQ." *Creative Market*, creativemarket.com/licenses.
- "RWA Receives Donation from the Cocky Collective." RWA, Press Release. rwa.org/Online/News/2019/RWA_Receives_Donation_from_the_Cocky_Collective.aspx
- @SetSailStudios "Have not given anyone permission to trademark a design using my font and this is not permitted by any license I sell." *Twitter*. 5 May 2018, 12:25 PM, twitter.com/SetSailStudios/status/992847807722729473.
- United States District Court for the Southern District of New York. *Hopkins v. Kneupper, Crescent, Watson*. 31 May 2018.
- USPTO Office of Public Affairs. *United States Patent and Trademark Office - An Agency of the Department of Commerce*, April 16, 2018, www.uspto.gov.
- Whipple, Marc. "Romance Author Gets Unduly Cocky Over Trademark." *Legal Inspiration*, 7 May 2018, legalinspiration.com/?p=503#FN2.

Kim D. Gainer

A (ZOMBIE) LEGISLATIVE PROPOSAL WITH IMPLICATIONS FOR FAIR USE AND REMIX CULTURE

During 2018 a proposed bill was under consideration in the House of Representatives that had implications for fair use and remix culture because, however well-intentioned, it might have made it easier for copyright trolls to file frivolous claims that would have netted fair-users. Introduced in October of 2017, the Copyright Alternative in Small-Claims Enforcement (CASE) Act, H.R. 3945, would have created a Copyright Claims Board within the Copyright Office (House of Representatives). The CASE Act died at the conclusion of the 115th Congress but could – and probably will – be re-introduced.

An argument in favor of such a board is that, in the case of small claims, copyright holders “have legal rights, but not legal remedies” when their copyrights are infringed because litigating small claims is too costly (Samuelson and Hashimoto 689). The money lost because of infringement is substantial. Business analysts estimated that by 2015, losses worldwide would be as high as \$960 billion, and photographers would suffer losses of as much as \$10 billion because of unauthorized online use of their work (Dorrell 450). Presumably these numbers have not fallen in intervening years. At least in case of infringement in the United States, and in the case of small claims, the Copyright Claims Board might allow copyright holders to defend themselves against the loss of misappropriated income even if they do not possess the proverbial deep pockets. Looking at the example of photographers, with an annual median wage of a little over \$29,000, the argument is that they would be otherwise unable to litigate to protect their intellectual property when the median cost of doing so would be \$350,000 (Dorrell 450).

Given such factors, Kevin Madigan, columnist for the Center for the Protection of Intellectual Property, supports the creation of the board as a mean of “empowering a class of rights holders who have limited means and few opportunities for recourse.” Similarly, Tom Kennedy, executive director of the American Society of Media Photographers (ASMP), writes that the creation of the board would

correct an historic inequity in the copyright law: the failure of the law to provide individual creators with an effective and affordable means to combat infringements of their creative works – an especially vexing problem in a digital environment where piracy occurs at the click of a mouse.

The ASMP was joined in its support of the CASE Act by the American Photographic Artists, the Digital Media Licensing Association, the Graphic Artists Guild, the National Press Photographers Association, the North American Nature Photography Association, and the Professional Photographers of America (Copyright Defense).

Support was predicated on looking out for the ‘little guy’ (cf. Levine and “independent creators”).

The proposal would have created the following process for pursuing small claims:

- The copyright holder submits to the board written justification for a claim of infringement.
- Board staff review the claim.
- If the claim survives the initial review, the alleged infringer is sent a notice.
- The alleged infringer is given a deadline to notify the board if they wish to opt out. If the alleged infringer opts out, the copyright holder must pursue the case in federal court instead of the board.
- If the copyright holder does not opt out by the deadline, the board makes a determination as to whether infringement has taken place.
- Awards for infringement could range up to \$30,000 per claim (mix of statutory and actual damages).
- With board ruling in hand, copyright holders can ask federal courts to enforce awards and to order a halt to ongoing infringement.

Among groups taking a stand in opposition to the process specified in the CASE Act were the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, the Authors Alliance, the Center for Democracy & Technology, Engine, Public Knowledge, the R Street Institute, and Re:Create. Under the umbrella of the Library Copyright Alliance (LCA), these organizations submitted a letter to the sponsors of the CASE Act and to members of the House Committee on the Judiciary that sketched out concerns, including that alleged infringers would be

unsophisticated consumers who would not know to opt out or who would fail to respond altogether, leading to a default judgment. This would turn the Board into a default judgment mill, attractive to abusive litigants because of the lower costs of initiating an action compared to federal court. (Library Copyright Alliance)

In a nutshell, this passage captures one of the major concerns raised repeatedly by parties and organizations that objected to the CASE Act. Additionally, the LCA suggested that existing rules for civil procedures can be adapted to allow copyright holders to seek redress for infringement (Pietz).

Public Knowledge, mentioned above, and the Electronic Freedom Foundation (EFF) are two of the organizations that offer detailed objections to the proposed Copyright Claims Board. Writing for the EFF, Mitch Stoltz and Corynne McSherry raise objections that range from the constitutional to the procedural. Agreeing with the LCA,

Stoltz and McSherry argue that the process “would invite gamesmanship and abuse.” They stress that an opt-in rather than opt-out process would “help prevent copyright holders from abusing the system to obtain inexpensive default judgments that would be hard to appeal.” They also object to the automatic awarding of civil penalties without any requirement that copyright holders provide evidence that they have been harmed. Stoltz and McSherry also point out that under the CASE Act a vastly enlarged number of works would be “eligible for automatic, no-proof-required civil penalties” because the Act would eliminate the “timely registration rule” for creative works. Writing for Public Knowledge, Meredith Rose Filak likewise raises constitutional and procedural questions. She argues that the Copyright Claims Board would not be answerable to the courts in any meaningful way. Both Stoltz/McSherry and Filak point out that the financial awards could exceed what would typically be awarded by states in the cases of small claims, and both argue that the opt-out approach would lead to a high number of default judgments. As her overall assessment of the CASE Act, Filak poses and answers a question.

So what happens when you have a court that is (a) not answerable to the judiciary, (b) capable of assigning steep damages, and (c) capable of subjecting people to its jurisdiction by default? If you guessed “litigation mill,” you’d be right.

Consistent with the stands taken by the LCA, Public Knowledge, and the EFF were the concerns documented by Pamela Samuelson and Kathryn Hashimoto in their report on a one-day workshop devoted to the CASE Act held under the aegis of the Berkeley Center for Law & Technology and the UC Hastings Law School. Economists and experts in IP and civil law pointed to numerous issues, including those of constitutionality, procedural fairness, and potential for abuse (691). Samuelson and Hashimoto point to questions about due process in the context of the “assertion of nationwide personal jurisdiction,” including “service of process issues” that might result, even in the age of the internet, from the fact that board actions would be centered on one place, Washington, D.C. (694). Another concern was, again, that the board would rely on an opt-out by alleged infringers rather than an opt-in approach. Workshop participants were concerned “that the opt-out system would, in practice, not be as voluntary as necessary to pass constitutional muster” (696). Participants also expressed concern that failures to respond to notifications from the board would lead to a high proportion of default judgments against alleged infringers and resulting damage awards. Copyright holders could then ask for orders of enforcement from federal courts, and such orders would be difficult to overturn. These two due process and procedural concerns were only a few of the many raised during the workshop.

Another concern about potential abuses was the possibility that a board intended to serve the “individual, independent author who is struggling to make a living” would be attractive to corporate owners and copyright assignees as a way to sidestep the litigation costs required to pursue cases in federal court (703). As Samuelson and

Hashimoto observe, “Assignees of copyrights, whether individual or corporate, may abuse the Board procedure by buying up small claims and seeking excessive damages before Board panels” (703). The availability of statutory as well as actual damages would be an incentive for such trolling. Samuelson and Hashimoto predict that copyright owners would seek the maximum in statutory damages and that “[w]hile the total statutory damages risk would be less than in federal court, the risks of excessive and arbitrary awards” would still be “quite substantial” (703). Currently, the mix of statutory damages with corporate and assignee claimants “has given rise to opportunistic claims in federal court that are used to extract settlements from alleged infringers who choose to pay a few thousand dollars rather than having to undergo the expense of litigating a case in federal court” (704). Observes Samuelson and Hashimoto:

If corporate owners and assignees can demand maximum statutory damages in Board proceedings and obtain default judgments unless a person alleged to infringe affirmatively opts out, there will be a new venue in which this kind of opportunistic behavior will likely be manifest. There are at present insufficient mechanisms for deterring this opportunistic (and perhaps extortionate) conduct and possibly unfair settlements in the shadow of the risk of excessive statutory damages awards. (704)

In a separate article, Ben Depoorter, one of the participants in the workshop, likewise argues that the high potential that alleged infringers will fail to respond will encourage trolling. The troll has little to lose by filing frivolous claims and much to gain in instances where an alleged infringer fails to opt out:

...an opportunistic plaintiff could file dubious infringement claims and withdraw claims whenever a respondent reacts. The resulting default judgements might present a new income stream to copyright trolls and other malign enforcement intermediaries. (725)

As Filak argues, in the end “[s]ophisticated defendants – the kind of repeat infringers that artists express the most concern about” are not the ones most likely to be caught in the trawl net of a Copyright Claims Board. Such sophisticated defendants will opt out and benefit both from the procedural safeguards in federal court and the fact that the costs of litigation will deter claims against businesses and organizations savvy enough to refuse to submit to the judgment of the Copyright Claims Board.

Although the CASE Act died at the conclusion of the 115th Congress, there is every reason to believe that it will be reintroduced. The impetus for the bill itself dates back to 2013, with the release of *Copyright Small Claims: A Report of the Register of Copyrights*, which called for the establishment of a copyright small claims board. An earlier version of the Copyright Alternative in Small-Claims Enforcement was then introduced in 2016 during the 114th Congress. Like its successor, it died at the end of the term. A related bill, the Fairness for American Small Creators Act, also was introduced

during the 114th Congress and like its companion expired at the end of that Congress. Given the introduction of proposals in two successive Congresses, scholars and educators with an interest in IP should be on the lookout for a sequel to the CASE Act.

WORKS CITED

- Copyright Defense. "Visual Artists Applaud the Release of New Small Claims Legislation." Washington, D.C., 4 Oct. 2017, copyrightdefense.com/breakingnews. Accessed 2 March 2019.
- Depoorter, Ben. "If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process." *Berkeley Technology Law Journal*, vol. 33, no. 3, 2018, pp. 711-32. *Computers & Applied Sciences Complete*, doi:10.15779/Z38833MZ5B. Accessed 2 March 2019.
- Dorell, Virginia Knapp. "Picturing a Remedy for Small Claims of Copyright Infringement." *Administrative Law Review*, vol. 65, no. 2, Spring 2013, pp. 449-75. *HeinOnline*. Accessed 2 March 2019.
- Filak, Meredith Rose. "The CASE Act: Small Claims, Big Risks." *Public Knowledge*, 7 Nov. 2017, www.publicknowledge.org/news-blog/blogs/the-case-act-small-claims-big-risks. Accessed 2 March 2019.
- House of Representative. *Copyright Alternative in Small Claims Enforcement Act of 2017*. *Congress.gov.*, 2017, www.congress.gov/bill/115th-congress/house-bill/3945/text. Accessed 2 March 2019.
- Kennedy, Thomas. "ASMP Supports Introduction of CASE Act to Create Small Claims Board." *ASMP*, 4 Oct. 2017, www.asmp.org/small-claims-report/asmp-supports-introduction-case-act-create-small-claims-board. Accessed 2 March 2019.
- Levine, Robert. "Congressmen Introduce CASE Act Aimed at Helping Independent Creators with Copyright Claims." *Billboard*, 5 Oct. 2017, www.billboard.com/articles/business/7989394/congress-introduce-case-act-bill-aimed-helping-independent-creators. Accessed 2 March 2019.
- Library Copyright Alliance. [Letter to Representatives Hakeem Jeffries and Tom Marino], 18 Oct. 2017, www.librarycopyrightalliance.org/storage/documents/small-claims.pdf. Accessed 2 March 2019.

Madigan, Kevin. "Debunking Criticism of the Copyright Small Claims Act." *Center for the Protection of Intellectual Property*, 21 Nov. 2017, cpip.gmu.edu/2017/11/21/debunking-criticism-of-the-copyright-small-claims-act. Accessed 2 March 2019.

Pietz, Morgan E. "Copyright Court: A New Approach to Recapturing Revenue Lost to Infringement: How Existing Court Rules, Tactics from the Trolls, and Innovative Lawyering Can Immediately Create a Copyright Small Claims Procedure That Solves Bittorrent and Photo Piracy." *Journal of the Copyright Society of the U.S.A.*, vol. 64, no. 1, Winter 2017, pp. 1-46. *HeinOnline*. Accessed 2 March 2019.

Samuelson, Pamela, and Kathryn Hashimoto. "Scholarly Concerns about a Proposed Small Claims Board." *Berkeley Technology Law Journal*, vol. 33, no. 3, 2018, pp. 689-709. *Computers & Applied Sciences Complete*, doi:10.15779/Z38TQ5RF0G. Accessed 2 March 2019.

Stoltz, Mitch, and Corynne McSherry. "Congress Shouldn't Turn the Copyright Office into a Copyright Court." *Electronic Freedom Foundation*, 29 November 2017, www.eff.org/deeplinks/2017/11/creating-copyright-court-copyright-office-wrong-move. Accessed 2 March 2019.

United States Copyright Office. *Copyright Small Claims: A Report of the Register of Copyrights*. United States Copyright Office, Sept. 2013, www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf. Accessed 2 March 2019.

CONTRIBUTORS

Lanette Cadle teaches rhetoric and creative writing at Missouri State University. A long-time editor for *Computers and Composition Online*, she does scholarship in the area of computers and writing, including her *Kairos* article "Why I Still Blog." Her chapter entitled "Shadow or the Self: Neil Gaiman and Social Media," is in the edited collection, *The Artistry of Neil Gaiman* (2019) from University of Mississippi and "The Power of the Perky: The Feminist Rhetoric of Death." is in *Death, Desire, Fury, and Delirium: Feminism in the Worlds of Neil Gaiman*. An active poet, her poetry has appeared in a variety of literary journals, including *TAB: The Journal of Poetry and Poetics*, *Star*Line*, *Yellow Chair Review*, *Stirring*, *Menacing Hedge*, and *Flint Hills Review*. Her poetry collection, *The Tethered Ground*, is forthcoming from Woodley Press in Fall 2019.

Kim Gainer is Professor of English and Associate Dean of the College of Humanities and Behavioral Sciences at Radford University in Radford, Virginia. Professor Gainer became interested in the subject of intellectual property when she began writing fan fiction inspired by the stories of J.R.R. Tolkien and became aware of the fair-use issues related to that hobby.

T J Geiger II is Assistant Professor of English in the Department of English at Baylor University in Waco, TX. He teaches classes in writing studies, rhetoric, and technical writing. He has published on religious rhetoric, composition pedagogy, undergraduate writing majors, and feminist rhetoric. His publications include articles in *Rhetoric Society Quarterly*, *College English*, *Composition Studies*, *CCTE Studies*, and *Peitho*.

Devon Fitzgerald Ralston directs the Writing Center at Winthrop University where she also teaches composition, professional writing, and digital rhetoric courses. Much of her research focuses on the tensions between the private and the public, particularly in online spaces. Her recent co-authored article, "(Re) Locating Queerness: Techne, Identity, and the Hegemonic Fantasy," interrogating the impact of digital apps, websites, and the circulation of gifs on the visibility and invisibility of queer sexuality was published in a special issue of *Pre/Text: A Journal of Rhetorical Theory*. Her current research is an archival project, examining emotional labor through the history of what she calls "the expectation of care" in writing center directorship.

Kyle Stedman is Associate Professor of English at Rockford University, where he directs the Writing Center and teaches rhetoric and creative writing. His work on sound, intellectual property, and pedagogy has recently appeared in *Technoculture; The Routledge Companion on Media Education, Copyright, and Fair Use*; and his born-digital collection (co-edited with Courtney S. Danforth and Michael J. Faris) *Soundwriting Pedagogies* (Computers and Composition Digital Press / Utah State University Press). As a child, he played so much *Dr. Mario* that he wore out one of his original NES controllers.