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**The CCCC-IP Annual:
Top Intellectual Property Developments of 2009**



**A Publication of
The Intellectual Property Caucus
of the Conference on College Composition and Communication
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Introduction: Copyright and Intellectual Property in 2009

Clancy Ratliff, University of Louisiana at Lafayette

The 2009 *CCCC Intellectual Property Annual* is the fifth issue published and my third as editor. In it, the contributors continue filling a niche in the research area of the intersection between copyright, intellectual property, and rhetoric and composition studies: articles that combine journalism and scholarship. It is our hope to keep the rhetoric and composition community informed of the latest developments in copyright and intellectual property, as it truly is a global issue with high economic and political stakes, with activists who approach the policies from a variety of perspectives. Universities adopt open access policies, new technologies prompt revisiting of copyright laws, and copyright activists think of new approaches to licensing the uses of creative and intellectual work, more and more alternatives to "all rights reserved." We continually revisit these ideas in the classroom, too, as they pertain to definitions of authorship and plagiarism.

I have decided to keep the Creative Commons license we have been using for *The CCCC Intellectual Property Annual* in past years. One noteworthy difference between this issue and those past is that the 2009 issue contains nine articles, by far the highest number we have featured. I am pleased to see that the interest in copyright and intellectual property seems to be growing.

An Issue for Open Education: Interpreting the Non-Commercial Clause in Creative Commons Licensing

Charles Lowe, Grand Valley State University

Introduction

For those of us interested in creating and sharing open education resources such as course syllabi, assignments, or instructional readings, an important consideration is how to license the content for use by students and other teachers. Copyright, even with fair use determinations (which, as most teachers are aware, can be difficult to know when and how to apply), grants few rights to others for using a work. For most educators, the “flexible copyright” of Creative Commons (CC) licenses is undoubtedly the easiest way to extend copyright privileges. A CC license can allow the user to copy, to redistribute, and—if the content creator desires—to transform or modify the work. Interested in licensing something you have created? Visit the CC “License Your Work” web page, and it will ask you a series of questions about how you might like others to be able to use your work. CC then recommends one of a set of licenses they have created that gives those permissions.¹ Because a legal license can be difficult to read and understand, CC also provides a human-readable deed to attach with the work or provide a link to which clearly defines the usage rights.

Or, at least, that's the principle behind the deed. One of the most popular restrictions included with CC licenses is a Non-Commercial (NC) clause.² The deed vaguely defines non-commercial as, “You may not use this work for commercial purposes” (“Attribution-Noncommercial 3.0 Unported”). Does this mean that the character of the use cannot be commercial (e.g., selling the work for profit)? Or is it that a company or other commercial entity cannot use the work at all? Can a non-commercial organization, such as college or university, profit from the work? What about recovering costs of producing a copy of a work to redistribute it even when profit will not be made? While the legal code in the license itself is a little more specific, it does not assist much in defining what is a non-commercial use:

You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. (“Attribution-Noncommercial 3.0 Unported”)

Regardless of whether or not content users try to read the legal code (we can imagine that the average Internet user is unlikely to do so) or simply follow the deed, non-commercial can obviously be interpreted in many ways. In order to gain insight into what creators of NC licensed works and users of those works believe constitutes non-commercial use, CC commissioned an in-depth research study. They then reported their findings in September of 2009 in “Defining 'Noncommercial': A Study of How the Online Population Understands 'Noncommercial Use.’” Because many educators may want to choose the NC restriction when licensing content, the following will briefly provide some of the details of CC's study and discuss how those findings might influence how and when educators choose to use the CC NC clause.

¹ The various licenses are described at <http://creativecommons.org/about/licenses/>.

² CC explains that “approximately two-thirds of all Creative Commons licenses associated with works available on the Internet include the NC term” (17).

Highlights of the Study

In 2008, CC hired “Netpop Research, LLC, a market research firm” to conduct the study (20) using funding provided by the Andrew W. Mellon Foundation (8). CC had “two main goals” for this project:

1. “to undertake an empirical study that would survey variations in the online U.S. general population’s understanding of the terms 'commercial use' and 'noncommercial use,' when used in the context of the wide variety of copyrighted works and content made available on the Internet;
and
2. to provide information and analysis that would be useful to Creative Commons and to others in understanding the points of connection and potential disconnection between creators and users of works licensed under Creative Commons 'NC' or other public copyright licenses prohibiting commercial use” (18).

To achieve these goals, Netpop conducted an empirical study of a targeted sample of ninety content creators and content users in the U.S. using focus groups and surveys, and more informally, collected additional information through a self-selected public Internet poll of 3,337 creators and 437 users in the CC global community³ (23-27).

In the empirical study, the qualitative data collected in the focus groups was used to construct the surveys given to the target sample group and the CC global community. To do so, the focus groups created a list of factors by which they would evaluate whether or not a use was non-commercial. Focus groups of content creators came up with the following list, which was then discussed and approved in the content user focus groups without amendment:

- “Perceived economic value of the content
- The status of the user as an individual, an amateur or professional, a for profit or not-for-profit organization, etc.
- Whether the use makes money (and if so, whether revenues are profit or recovery of costs associated with use)
- Whether the use generates promotional value for the creator or the user
- Whether the use is personal or private
- Whether the use is for a charitable purpose or other social or public good
- Whether the use is supported by advertising or not
- Whether the content is used in part or in whole
- Whether the use has an impact on the market or is by a competitor” (31).

If one were to use this list of factors, determining whether a use is non-commercial would appear to be no easier than applying the four-factor fair use test for determining copyright infringement. To better understand how content creators and users would apply these factors of non-commercial use in specific “use scenarios,” participants in both the target sample group and the CC online community completed a survey in which they answered questions to provide profile data, evaluated “possible gatekeeping factor” statements, and completed anchor point exercises (52-55). While the surveys given to all participants were similar, some questions were changed to explore the different experiences of creators and users, as well as the depth of understanding of CC itself and the NC license text by the CC online community (27).

Surprisingly, the findings indicate many similarities between how creators and users understand

³ The report refers to the online community group as Creative Commons Friends and Family (CCFF) (27).

noncommercial use. For example, creators and users generally consider uses that earn users money or involve online advertising to be commercial, while uses by organizations, by individuals, or for charitable purposes are less commercial but not decidedly noncommercial. Similarly, uses by for-profit companies are typically considered more commercial. (11)

When money is not a factor, both groups had more trouble determining whether or not the use was noncommercial. Where the groups did differ is their particular leaning toward commercial or non-commercial. Content creators were more likely to view a use as non-commercial than users were. Except in the case of “uses by individuals that are personal or private in nature. Here, it is users (not creators) who believe such uses are less commercial” (11).

Implications for Using the Non-Commercial Clause

While intellectual property scholars will certainly find much more in the report to review—including a few specific results related to education⁴—what should the educator-as-content-creator/user take away from this study for her understanding of when and how to use the NC clause in CC licenses? CC suggests that, because the findings are inconclusive due to the sample sets, the best use of the results is as a “rule of thumb” (79). When licensing a text with the NC clause, be prepared that not all users will follow a strict “conservative definition of noncommercial,” and when it's not clear if using an NC licensed text will be used in a non-commercial way, “find a work to use that unambiguously allows commercial use (e.g., licensed under CC BY, CC BY-SA, or in the public domain), or ask the licensor for specific permission” (79).

That is reasonable advice, but something that probably could have been surmised prior to the study. And it does not address the potential consequences of the ambiguity of the term non-commercial. One of the most vocal critics of the NC clause is David Wiley, a leading expert on licensing educational content⁵. In his fictional history, “2005-2012: The Open CourseWars,”⁶ Wiley describes the major discrepancy in the license: is the use constraint defined by the character of the use or the user (248-249)? In Wiley's narrative, commercial publishers play upon this issue by anthologizing NC licensed educational content, and when sued in court, they counter sue and have the NC clause invalidated (249-250). As Wiley explains, CC licenses are written such that a ruling eliminating one clause would not invalidate the whole license; nevertheless, every NC licensed work would be instantaneously available for all types of commercial use (250).

Now, Wiley could potentially have a bias against the NC clause because of his executive position with Flat World Knowledge, a commercial organization specializing in the production of open textbooks (“Our Team”). But let's assume his prediction is possible. How should that influence our choices about selecting CC licenses? Wiley recommends that educators could best protect their content by using the Share-Alike (SA) clause (251). The SA CC licenses are a type of copyleft license. Copyleft allows derivative works, yet also require anyone that modifies and/or redistributes the work to include the same license. This is similar to the GNU General Public License used by many open source software projects, including the operating system Linux. With a copyleft license, the potential

4 For example, distribution of “free educational materials” by a “for-profit company” is seen as more commercial than a “public, not-for-profit school use for fund raising” (Appendix 5.6-61).

5 Wiley created an Open Content license in 1998 prior to the existence of Creative Commons (the license has since been “retired” by Wiley in favor of using Creative Commons licensing). The license can be viewed at <http://opencontent.org/opl.shtml>.

6 Wiley's chapter is freely available online at <http://mitpress.mit.edu/books/chapters/0262033712chap16.pdf>.

commercial exploitation of intellectual property is much less; anyone who legally obtains the software or text can modify or it or give it away themselves. Profit has to be made, then, off the services sold in association with the item, not the item itself, because the work can be given away for free by the first person that purchases it. Even with or without the inclusion of an NC clause, many open education advocates recommend SA over other CC licenses which forbid derivative works because re-purposing the content can be helpful to education. Selecting this license would, for instance, allow the content to be redesigned with different formatting or modes and/or translated into different languages.

Finally, one other consideration for NC license adoption could be for the content creator to provide written clarification. MIT's OpenCourseWare project includes an addendum to the CC license on their "Privacy and Terms of Use" web page. The document specifies that "determination . . . is based on the use, not the user;" it forbids users to "directly sell or profit;" and it allows for the "recover[y] of reasonable reproduction costs." Perhaps this is a good strategy for large projects sponsored by institutions and organizations. But most individual content creators—including educators—choose Creative Commons licenses because the licenses are easy to implement, and because they don't know how to write up clear—and legal—conditions of use.

One Final Consideration

Given the potential disparity between how a content creator might want non-commercial to be defined, and then how the user defines it and uses the work, it is worth considering CC's advice in their report that the creator evaluate "the potential societal costs of a decision to restrict commercial use" (79). The use of the NC clause may discourage people from using the work in a way that the creator had intended it to be used, resulting in what CC describes as "failed sharing" (79). And it is also worth noting that there are no open source software licenses with a non-commercial clause. One can argue that open source software projects are successful because they are maximally "open," and an NC clause with an open source license would reduce that. Linux certainly owes much of its success to commercial support from companies such as IBM, RedHat, and Novell, to name a few. Perhaps open education might enjoy similar success when the textbook publishers and other media providers are no longer our competitors, but our fellow collaborators.

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The Option Not to Act: The Dissertations of Boening and Meehan

Craig A. Meyer, Ohio University

Incidents of intellectual property seem to be becoming more common, especially in academic circles. For me, one event sticks out: the dissertations of Chuck Boening and William Meehan. In the first half of 2009, news broke about a plagiarism case involving a university president, Meehan of Jacksonville State University (JSU). The charge was brought by R. David Whetstone, who believes Meehan and JSU took unjustified control of “some 55,000 plant specimens” that he insists are his (Stripling). In bringing the accusation of plagiarism, Whetstone hoped to demonstrate Meehan’s propensity “of taking academic work done by others” to the courts and somehow get control of the plants (Associated Press).

Even though the court case about a bunch of plants was the primary story, it soon took a backseat to the charge of plagiarism against Meehan, who appears to have, at the least, improperly used Boening’s earlier dissertation. In short, Boening’s dissertation related to sabbatical leave at the University of Alabama. Meehan, using Boening’s dissertation as a “model,” also studied sabbatical leave but at JSU (Boening). The allegation by Whetstone, which was picked up by major media markets, created online buzz. Websites soon began showing highlighted verbatim portions of the two dissertations (still commonly found by searching online for “what does plagiarism look like”).

At this point, I heard about the story, and I figured instead of taking the media as fact, why not e-mail Meehan? So I did. Meehan responded quickly about the allegation against him; he writes, “I disagree with the allegation” (“Re: Inquiry”). (I highlight that he does not *deny* the allegation, merely that he *disagrees* with it, but perhaps I’m splitting hairs.) Meehan continues to point out how the allegation is merely “an attempt to receive financial benefit” from JSU, which seems reasonable if Whetstone was not getting the plants (5 Aug. 2009). Further, Meehan explained, “our attorneys have asked I be circumspect” about the case, and his dissertation committee also “disagree[s] with the allegation” (5 Aug. 2009). At this point, I let the matter rest.

Then a few months later, I got to wondering about the outcome and contacted Meehan again. In a follow-up e-mail (24 Jan. 2010), Meehan directed me to the Alabama Supreme Court’s decision about including the charge of plagiarism with that of the plant specimens case; the court concluded that the allegation of plagiarism is “irrelevant” to the original case and “would serve only to embarrass and annoy Meehan” (Whetstone). And thus, they did not entertain the plagiarism, and the case seems to fizzle out.

Now, I do not know if Meehan plagiarized his dissertation, but the visuals (and commentary) online make it look as though he did. Conversely, Boening, also an academic, has been mostly silent about Meehan and the charges related to his (Boening’s) dissertation. So, once again, I went to the source and e-mailed Boening. Like Meehan, Boening was kind enough to respond; he writes, “I have nothing terribly official or insightful to say” (Boening). But he does have some insightful comments about the comparison between the two dissertations: “when one pores over the actual writing, it gets troubling” (Boening). Further, he explains how he has compared the two, and if a student turned similar work in, he “would not hesitate to turn the matter over to our dean” because of the similarities (Boening). Like me, Boening admits he does not know “if the alleged plagiarism was intentional,” but

he does report, “[a]t the very best, it was very sloppy on his [Meehan’s] part, and certainly lazy.”

It would, however, be tragic if someone in a president’s position at a university did plagiarize because that sets a troubling example for today’s students and faculty. With the ability to *Google* words, phrases, and sentences, plagiarism has taken a rightfully heavy toll on those that have plagiarized, but even those that have made sloppy mistakes with no intent to use someone else’s work without proper acknowledgement have been caught up in such allegations. Moreover, the number of software programs available to uncover plagiarism (or similar concerns) continues to increase. Yet in my experience, I’ve noted a few students still want to take shortcuts, for whatever reason or reward, in producing work for classes. I believe we must acknowledge that some students do, in fact, want to pull the wool over our eyes, while others simply make mistakes. And then there are some that only care about getting to the next level, and once they are there, the ends justified the means. Although I do not like the potential of any one taking material from someone else without proper citation or acknowledgement, if the universities, chairs, and even those that have allegedly been plagiarized decide not to act, investigate, and follow up, I must also be acquiescent and do nothing either. There is, however, one final note that I find interesting: “Meehan turned in his dissertation on June 28, 1999, four days before he officially became president at JSU” (Jones).

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Copyright in the Hands of Creators: Australasia's Growing Creative Commons

Carol Mohrbacher, St. Cloud State University

In 2001, the Creative Commons (CC) officially began offering a free set of author-controlled copyright licenses. These licenses were and are available at the Creative Commons online site. The Creative Commons originated at Stanford University, although it is now established in Massachusetts.

Lawrence Lessig, one of CC's founders, describes its purpose as "to build a *reasonable* [author's italics] copyright on top of the extremes that now reign" (282). The "extremes" Lessig refers to resulted from the passage of the 1998 Digital Millennium Copyright Act, which added an additional 20 years to the term of copyright and tightened controls on works of digital production. Fair Use was no longer guaranteed under the newest copyright code, and the public commons was thus undermined.

CC licenses have spread worldwide, and by 2009, an estimated 130 million CC licenses had been issued ("About History"). One of the most vigorous examples of this growth comes out of Australia. The Australian Research Centre and Queensland University of Technology (QUT), under the direction of Professor Stuart Cunningham, began collecting case studies of institutions using CC licenses on the Creative Commons Case Studies Wiki. The book, *Building an Australasian Commons*, documents those case studies and is available in pdf format for download on the wiki. The work sorts case studies into seven areas: sound, democratic change, moving images, visual arts, governmental institutions, the written word, and education and research. Because my interest lies in the area of digital copyright and its effects on academic authorship I examine the area concerning education and research in determining the level of control the Creative Commons license exerts.

Layers for Analysis

Professor Yochai Benkler's communication theory of layers provides an effective approach to analysis because it addresses the physical infrastructure, the logical and the content layers in communication. Examining the three layers will provide insight into the flexibility of CC license with regard to academic authorship. Benkler describes the layers in the following:

The physical layer refers to the material things used to connect human beings to each other. These include the computers, phones, handhelds, wires, wireless links, and the like. The content layer . . . includes the actual utterances and the mechanisms, to the extent that they are based on human communication rather than mechanical processing for filtering, accreditation, and interpretation. The logical [or code] layer represents the algorithms, standards, ways of translating human meaning into something that machines can transmit. (392)

Take a presentation at a CCCC conference, for example. The physical layer would include the room in which that presentation takes place and the computer and screen on which information is projected that supports the presentation. The content layer is the presentation itself including the words, ideas, and images that communicate the ideas. The language spoken is the logical or code language, as is the binary system that is the language of the computer which projects the PowerPoint. Any one of the three layers may be controlled and may affect the other two layers. The following section uses the

layered approach to examine three cases studies in the section, “Beyond the Classroom: Education and Research Case Studies,” in *Building an Australasian Commons*. Each selected case study uses a different version of Creative Commons license.

Case 1

The first case concerns the licensing practice of Queensland University of Technology (QUT), specifically the Faculty of Law in Brisbane. QUT is the home of the ccClinic, the research arm of the Creative Commons in Australia. This organization acts as an information and research site for the campus community, as well as the Australian community at large. The Clinic also acts as a site that fosters “a more traditional research stream” (167). Two works produced by the facility are covered by different versions of the 2.5 Creative Commons license. The anthology titled, *Open Content Licensing: Cultivating the Creative Commons*, published online is covered by the CC Attribution-Noncommercial-No Derivative Works 2.5 Australian license. The CC Attribution 2.5 license protects the second work, the online report, *Unlocking the Potential through Creative Commons: an Industry Engagement and Action Agenda*.

For the online anthology, the CC Attribution, Noncommercial-No Derivative Works is restrictive at two layers. At the physical infrastructure layer, no restriction exists. Anyone who has a computer may access the online book. At the content level both commercial and non-commercial users have access to the content, but are restricted from altering the work in any way. For commercial users, content also may not be used for profit. Yochai Benkler explains that the logical or code layer “represents the algorithms, standards, ways of translating human meaning into something that machines can transmit, store or compute, and something that machines process into communications meaningful to human beings” (392). Therefore, one might also argue that that a derivation might include, for example, a translation into another computer language, with firewall or cut and paste prevention code added. The license restricts such derivation.

The online report is covered by the much less restrictive CC Attribution 2.5 license. This type of license allows both commercial and non-commercial users to use the works for profit or not, as long as the creator is credited. Users may also create derivations of the original work.

In other words, both the physical infrastructure and the logical layer are uncontrolled. However, the mandatory author attribution restricts the content area to a small degree.

Case 2

IMERSD (Intermedia, Music, Education, and Research) is a project of the Conservatorium of Music at Griffith University in Brisbane, Australia. IMERSD is wide ranging, including, but not limited to film school and music partnerships, broadcasting projects, CD and DVD recording, and other interdisciplinary and industry collaborations. The creative products of IMERSD are licensed under the Attribution–NonCommercial–NonDerivatives 2.5 Australian Creative Commons License. This means that the creative work protected by this license can be copied, distributed and transmitted, as long as the work is not altered or transformed in any way and as long as the work is attributed to the author. In addition the work can only be used for non-commercial purposes.

The license provides little control at the physical infrastructure level. Because the works are

limited to non-commercial purposes, some venues, like a neighborhood movie theater for example, are prevented from using the works for profit. At the content level, manipulation of the work is prohibited, so some control is also exercised. For example, creating a mash-up with bits of licensed IMERSD music or film, is not allowed. However, use of the whole and unmanipulated work is allowed, as long as authorship is attributed. At the logical layer, again the user may reproduce the code, as long as it is not changed, added to or manipulated. The license overall opens up access for free academic authorship, but the work cannot be altered in any way.

Case 3

Otago Polytechnic's CC licensing exerts even less control over the use of its creative products than IMERSD. Otago provides technical and vocational training to residents of New Zealand. Their goal in choosing a New Zealand Creative Commons 3.0 license was "to ensure maximum amount of freedom and flexibility to itself and to people and organisations sampling its content" (Cobcroft 177). Unlike IMERSD, Otago allows commercial use of creative products. Also, unlike other universities' work for hire policies, Otago's policy encourages faculty to own and license their original educational works. A New Zealand 3.0 CC license also allows the users to adapt or remix the work for their own use. The only rule is that the work be attributed to the original creator. This license is identical in its restrictions to the Australian Attribution 2.5 license.

This license provides no control at the physical infrastructure level. Users are welcome to profit from the borrowed work. At the content level, the work may be altered in any way, provided that the author is credited. At the logical or code level, no restrictions exist. All software is open and its code also maybe be altered for use, provided the creator is attributed.

Final Thoughts

Volume 1 of *Building an Australasian Commons: Creative Commons Case Studies* provides thumbnail sketches of licensing across professions and disciplines. Each case study provides an overview of each institution's creative products and the institution's motivation for choosing Creative Commons copyright protection. The Creative Commons wiki, from which the cases are taken, is a necessary companion to the volume because it supplies license descriptions and a Creative Commons history that enriches the reader's understanding of the Creative Commons movement. The book, edited by Rachel Cobcroft provides useful examples to any creator who wants a less restrictive and more flexible option to traditional copyright protection.

In 2001, the same year that the Creative Commons was born, Lawrence Lessig's book, *The Future of Ideas: the Fate of the Commons in a Connected World*, was published. In the book, Lessig made a strong case for copyright reform because of what he saw as a shrinking free public commons and increasingly regulated digital technology. He warned that "We move through this moment of an architecture of innovation to, once again, embrace an architecture of control—without noticing, without resistance, without so much as a question" (268). Thanks to Lawrence Lessig, Yochai Benkler, Australia's Brian Fitzgerald and others, we now notice, resist, and question traditional controls and this books illustrates that we have other options.

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Two Competing Copyright Curricula: The 2009 Release of Intellectual Property Curricula from the Recording Industry Association of America and the Electronic Frontier Foundation

Clancy Ratliff, *University of Louisiana at Lafayette*

Introduction

In 2009, both the Recording Industry Association of America (hereafter RIAA) and the Electronic Frontier Foundation (hereafter EFF) publicized curricula for teaching children about copyright and intellectual property. The RIAA's curriculum, intended for grades 3 through 8, was developed in 2006 but updated and re-released in 2009. The EFF's curriculum, released for the first time in 2009, is geared toward grades 9 through 12. In this report, I will describe both curricula and the perspective that each one employs in its presentation of copyright law and briefly analyze their rhetoric. I will be using terms from Jessica Reyman's book, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture*. Reyman examines the rhetorical workings of the content industries' argument (she terms this "the property stewardship narrative") and the copyright activists' argument (which she calls "the cultural conservancy narrative"). Reyman makes a convincing case for taking public messages about copyright and intellectual property seriously, and these curricula serve as compelling examples of such messages. Below is a side-by-side listing of each curriculum's objectives.

Objectives of the RIAA's Curriculum, "Music Rules!"	Objectives of the EFF's Curriculum, "Teaching Copyright"
<ul style="list-style-type: none"> • To introduce students to the concepts of copyright and intellectual property. • To help students recognize that taking music without paying for it ("songlifting") is illegal and unfair to others. • To help students, teachers, and parents set guidelines for using technology like computers and the Internet responsibly. • To strengthen academic skills in reading, writing, mathematics, citizenship, and computer technology. • To encourage musical and artistic creativity. 	<ul style="list-style-type: none"> • Reflect on what they already know about copyright law. • See the connection between the history of innovation and the history of copyright law. • Learn about fair use, free speech, and the public domain and how those concepts relate to using materials created by others. • Experience various stakeholders' interests and master the principles of fair use through a mock trial.

The objectives alone reveal the political, economic, and rhetorical agendas of each curriculum, but I will go into the differences between these in more detail.

The RIAA's Curriculum: "Music Rules!"

The RIAA's curriculum, as one would expect, centers on copyright as granted to works of music, and the title of the curriculum is "Music Rules!" Students engage in a variety of activities: writing their own songs, solving math problems based on numbers provided by the RIAA explaining how much money recording companies lose through illegal downloading, and learning about the music industry and its jobs. Curriculum materials such as worksheets and brochures for students, teachers, and parents explain the process of recording music and break it down into these roles, all of which, the RIAA argues, are compromised due to illegal downloading:

1. Talent Spotters: club owner, music scout, record company executives, mom.
2. Tune Crafters: music producer, songwriters, arrangers, singer.
3. Recording Artists: music producer, sound engineers, backup vocalists, instrumentalists, singer.
4. Buzz Builders: music producer, publicist, designer, photographer, magazine publishers, poster distributors, music critics, radio DJs, music video broadcasters, TV talk show hosts, singer.
5. Disc Wranglers: CD manufacturer, machine operators, printers, packagers, shipping manager, truck driver.
6. Hit Merchants: store managers, sales clerks, cashiers, online vendors, online order handlers, mail carriers.

Also affected by illegal downloading, or what the RIAA terms "songlifting" in the curriculum, are new, struggling, up-and-coming musicians. One handout makes the point that "[f]or every hit CD, there are nine more that never make it. But the hits actually help those other artists. With a hit, the record company can afford to give another group of newcomers their chance at stardom. So when hits get songlifted, lots of other artists lose out, too." This parsing of the economics of the music business and emphasis on copyright law as the linchpin makes the RIAA's agenda quite clear, but if it were not clear enough, they provide a list of "Brainstorming Ideas":

- Songlifters take millions of dollars of music each year.
- Songlifters hurt all kinds of music makers, not just the stars.
- Songlifters keep new artists from getting their chance at stardom.
- Songlifters are breaking the law.
- Songlifters can get other people in trouble by sharing illegal music.
- Songlifters can get computer viruses when they illegally download online.
- Songlifters don't respect other people's intellectual property.

I'm struck by how far this list is from how rhetoric and composition teachers think of "brainstorming," which suggests open-ended questions and heuristics designed to help students find their own views on issues and explore their complexities. In fact, I also think of the charges of "indoctrination" made against many teachers who use methods from critical pedagogy – accusations of presenting political issues (which shouldn't be in the curriculum at all, according to this view) in a one-sided manner. Apparently, though, a business organization is free to advance their agenda openly.

Teachers are even given a loyalty oath in the form of a "pledge sheet" and encouraged to have students sign it. For elementary school children, the document reads:

This is to certify that [student's name] has learned the rules against songlifting and pledges to:

- Respect all forms of intellectual property.

- Obey the copyright laws that protect intellectual property.
- Always use computer technology responsibly.
- Always use Internet technology safely.
- Never accept illegal copies of songs online or on disc.

(student signature)

(teacher signature) (parent signature)

For middle-school children, the curriculum offers a “check sheet” that instructs them to:

- Respect all forms of intellectual property that you find on the Internet – text, images, videos, software, and songs.
- Look for permission from the copyright holder before downloading any free music that you find on the Internet.
- Avoid using unauthorized file-sharing software so that you keep your computer safe from viruses and your personal information safe from snoops and spyware.
- Delete any music that you receive by email and remind the person who sent it that sending copies of copyrighted music is illegal.
- Never accept a homemade CD that contains copyrighted music and remind the person who made it that he or she is breaking the law.
- Never provide personal information online without a parent’s permission.

Reyman uses the label of “the property stewardship narrative” to refer to the content industries’ arguments about copyright law. In this narrative, property stewards are official distributors (record companies, for example) who disseminate recordings of creative and intellectual work. We pay the property stewards for these recordings, who in turn pay the authors and artists. All the emphasis in the RIAA’s curriculum on the behind-the-scenes work of producing music should make its status as a property stewardship narrative clear. Only rarely does the RIAA’s curriculum discuss copyright in a less absolute and more even-handed way.

The EFF’s Curriculum, “Teaching Copyright”

The EFF announced the release of their curriculum, “Teaching Copyright,” on May 27, 2009. The main activities involved in their curriculum are reading assignments, short videos, discussions, and writing prompts in which the student must adopt the position of a stakeholder affected by copyright law. The lessons culminate in the mock trial of *Disney v. Faden*, based on a video the students watch in which information about fair use is presented from the mouths of Disney characters using short clips from Disney movies. The EFF’s curriculum is much more concerned with copyright law’s history and intent, and the perspectives of musicians who support peer-to-peer file sharing and people who create remixes and mashups online, making fair use of copyrighted material, are better represented. The EFF also showcases the importance of the public domain. The first activity is called “Copy Quiz” and functions as both a diagnostic tool to discern students’ knowledge of copyright and a discussion-starter. The emphasis on the public domain can be observed in the quiz (emphasis in original):

Adam recorded a video for his YouTube channel about the upcoming Senate elections and includes an official photo taken by a government employee and four bills authored by the incumbent that Adam found on the Senate's website. That's copyright infringement.

False. *Works produced by the U.S. government, or any U.S. government agency, are in the public domain. The texts of legal cases and statutes produced by the federal government are also in the public domain.*

Justin downloaded the black-and-white horror classic *Night of the Living Dead* from the Internet Archive and decided to mix an audio sample from the film into one of his original songs. That's copyright infringement.

False. *The copyright for Night of the Living Dead is part of the wonderful wealth of the public domain. Justin is free to be as creative as he wants with public domain material.*

Perhaps my own bias as a reader is in play here, but while the EFF has an obvious counter-agenda (“the wonderful wealth of the public domain”), they at least represent copyright law as it affects groups of people other than those in the music industry. They attempt to show the balance between copyright holders and the public and to show that artists are in the best position to create new intellectual and creative work if they are able to use others’ content. Reyman refers to this line of argument, made by copyright activists, as “the cultural conservancy narrative.” Culture is conserved and enriched by maintaining and continually replenishing a commons, or a public domain of content. Copyright law gives artists and authors an economic incentive to create new work, but it does not exist only to prevent others’ use of that work; copyright law also decrees that after the specified time limit, the work must go into the public domain to be distributed freely and used in the creation of new work. The cultural conservancy narrative is less simple, and it does not have the heroes and villains (pirates) of the property stewardship narrative. The EFF’s teaching task is daunting, but the attempt to raise public awareness of copyright and break down the fear and mystery surrounding it is necessary.

Implications for Rhetoric and Composition

Reyman shows, in *The Rhetoric of Intellectual Property*, that the content industries put a great deal of effort and money into relaying their messages about copyright to the public. Many internet users are paranoid about downloading or using anything: worried that their Internet Service Providers will know if they download copyrighted material, and afraid that if they use peer-to-peer networks, they will end up with viruses and spyware on their computers. Rhetoric that plays on audiences’ fears, creates a false dichotomy of “pay for it, or don’t download or use it at all,” and repeats a narrative with oversimplified good guys and bad guys is registering more clearly with the public than the copyright activists’ rhetoric. This fact alone connects the development of these curricula to rhetoric and composition studies, as well as the fact that these curricula are intended for teachers, who I assume are the majority of readers of this report. I also want to point out that colleges and universities have become central scenes for copyright rhetoric; as Reyman discusses in one chapter of her book, under the 2008 Higher Education Opportunity Act, colleges and universities are required to teach students about “the unauthorized distribution of copyrighted material” and “suggests that institutions use technology-based deterrents” to ensure that students do not download copyrighted files without permission or payment (117). That law is tied to higher education funding, which is particularly tenuous as of this writing. But I believe that even in this rhetorical context, these curricula can prove useful; perhaps we can use them both to create a new copyright curriculum for the college level, one that not only educates students about copyright law but also helps them become keener critics of rhetoric.

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Creative Commons Plus: Increasing Options for Content Creators

Kyle Stedman, University of South Florida

Introduction: Assuaging the Fear

In his keynote address at the 2009 Educause Conference, Lawrence Lessig discussed the intersections of copyright and scholarship. His talk is summarized in a short *Inside Higher Ed* piece, where it predictably received online comments from both copylefters and copyright supporters (Kolowich). One commenter, writing with concern for underpaid junior faculty whose work is profited on by publishers, writes, "I'm delighted Dr. Lessig can afford to give away the results of his own labor; but it seems a misplaced priority for him to work so hard to assure the lowest paid members of his community have even less opportunity to make ends meet." In other words, loosening the reins of copyright from scholarship could mean less revenue for producers of academic work.

This comment can be read as one voice of a common fear felt by many content producers, whether of scholarship, fiction, music, or video: *I need to reserve all my rights to this content, not just some of them. What will happen if I lose control of my work, if people profit from my labor, and I don't?*

Though there is mounting research and anecdotal evidence to support the claim that distributing free books can actually increase sales (Neilan; Doctorow), the fears of those like the *Inside Higher Ed* commenter are understandable. But I believe that a recent development from the ever-growing nonprofit Creative Commons (CC) can speak to these fears by offering content producers more avenues for communicating their licensing decisions to (re)users. Creative Commons Plus (CC+) increases communication between composers and users about how content may be used and, importantly, can help composers bridge the gap between giving away content for free and earning money from it. By telling users in plain language exactly what they can and cannot do with content, including information about when and how to pay for a license, composers should be able to breathe easier, knowing that users who should pay for legitimate uses beyond those allowed by an existing CC license can now know exactly how to go about doing so.⁷

Basic Functionality

The heart of CC+ is simple. All CC licenses allow certain uses of content and forbid others--say, by allowing someone to remix content but forbidding commercial uses. Some doors are opened, and others are closed. By using CC+, a composer in effect says, "Sure I've licensed this content in a way that closes some doors, but I could give you the key under certain circumstances. If you're interested,

⁷ CC+ was actually announced in a December 2007 press release ("Creative Commons Launches"). Its inclusion in this collection of 2009's top developments is thus rather behind the times. However, its importance and relatively minor use justify its inclusion here, however awkwardly it may sit.

here's how you can get the key." In other words, CC+ provides a way for content creators who have licensed their work with any CC license to easily communicate with users how to get permission for uses beyond those allowed by the CC license.

CC+ is described on the CC Wiki as a "protocol" and an "architecture," not as a new license. Therefore, a composer's decision to use CC+ is communicated to users alongside her existing licensing language, not in place of it. When using creativecommons.org to license material, composers are asked a series of questions about what kinds of uses they choose to allow; with the advent of CC+, composers are now given the option of adding a link to a "more permissions URL." When they add a url in this field, the auto-generated html includes the same material as before--a clickable icon taking users to a plain-language description of the license--but this icon is followed by additional text stating, "Permissions beyond the scope of this license may be available at . . ." ("CCPlus").

The code for this link is also automatically given the RDFa attribute `rel=cc:morePermissions`, following the CC recommendation "for machine-readable expression of copyright licensing terms and related information" (Abelson et al). In other words, the composer's choice to make it easy for users to obtain more permissions is communicated both visually to users who see the extra link and technologically to other machines that can automatically understand that the link is one that takes users to an explanation of how to obtain more permissions. Because of this RDFa attribute, when users click through to the plain language description of the license, javascript on the license page recognizes the presence of CC+ and adds to the plain language page a + symbol and a link to the more permissions URL.

Three Examples

CC+ makes most sense when considered with some examples:

Example 1: The Musician

A musician hopes to make money from sales of her music, but she also loves sharing her work for free. She licenses her songs with a CC license that allows anyone to download her music and share it on whatever sites they wish, as long as users attribute the music to her, don't make money from it, and don't remix it in any way (a CC BY-NC-ND license). This way people will be exposed to her sound and return to her site to buy CDs, find a link to her work on iTunes, and donate.

When she hears about CC+, she returns to creativecommons.org to relicense her material, this time with a link added in the "more permissions url" field. The link takes users to a page of her site that explains the fees she charges for anyone wanting to use her music in a commercial context or to remix it. The html icon and link generated by CC now automatically includes a link to her "more permissions" page; she easily replaces the html on her site with this new code. And if she wants, she can easily design her own new icon to replace the "Permissions beyond the scope of this license" text with a second button that simply says "Looking to license? Looking to remix?" so that users will see two clean buttons on each page of her site: one that takes them to the plain-language description of her license, and one that takes them to her more permissions page.

Before CC+ she could license additional uses on her own, but the CC+ protocol gives her an easier way to communicate her additional license requirements, integrating her additional communication into her existing communication framework (simple new language on her site; a simple

new icon that appears on the plain language description of her license).

Example 2: The Scholar

A scholar publishes an article in *Kairos*, a refereed online journal on rhetoric and technology. Because he retains copyrights to his work, he also posts a copy of the article on his blog under a CC license that allows others to freely reprint and remix his work as long they attribute the work to him and use it only for noncommercial uses (a CC BY-NC license).

But he wants to make sure that readers know that they can request a license to use his work for commercial purposes; all anyone has to do is email him, and he'll decide whether or not to allow use on a case-by-case basis. To facilitate that conversation, he uses CC+ by inserting a link to a "more permissions" link when licensing the article--in this case, a link to the "contact" section of his professional website, which instructs people simply to email him with licensing questions. A commercial publisher finds this article on the scholar's blog and wants to anthologize it in a textbook on digital writing; the publisher follows the CC+ link to the page with instructions on how to proceed.

Example 3: The Journal

Molecular Systems Biology, an open access journal published by the Nature Publishing Group, allows its authors to decide between two CC licenses, neither of which allow readers to use the articles for commercial uses. Authors can choose a license that requires any alterations of the articles to be distributed under the same license (CC BY-NC-SA) or a license that doesn't allow any alterations at all (CC BY-NC-ND). The journal's site adds, "Any of the above conditions can be waived if users get permission from the copyright holder" ("Open Access").

If the journal decided to build CC+ into its site architecture, the journal could also ask submitting authors if they would like to manage permissions beyond the CC licenses or if they would prefer the journal to handle all requests (provided the journal has the resources, of course). Each article would then be accompanied with the existing text describing the authors' chosen license along with information about how to obtain extra permissions--either by contacting the authors or the journal, depending on the authors' choice.

In practice, use of CC+ can be implemented by the user as described above or by using a content management service like Ozmo, a site owned by the Copyright Clearance Center that helps composers implement CC+ by streamlining the licensing process, managing any licensing fees that users pay, and allowing users to search for content through their site. The musician or scholar in the above example could sign up with Ozmo and then direct users to their Ozmo pages to learn how to use content in ways that exceed their chosen CC license, and Ozmo would handle all the finances.

Implications

Implications for the CC Movement

One major implication of CC+ is its potential as a mediating tool between the rhetoric of the commons that pervades in open access and free culture communities and the rhetoric of fear that pervades in legal and corporate discourses. Let's return to the online comment I discussed at the beginning of this article:

the commenter sees the open education movement as suggesting that he happily work for free, giving away his work to anyone who wants it, leaving him penniless. Some feel that even using relatively restrictive Creative Commons licenses should be avoided, since doing so means releasing content into the wild of the Internet, where the ease of digital copying means giving up control to others who may want to "steal" his work. (Of course, copyrighted material online is often just as findable and copyable, but the rhetoric against Creative Commons sometimes forgets this.)

But CC+ addresses the needs of those who want to share but are afraid, potentially increasing the numbers of those who support and implement various CC licenses. CC+ implicitly says to these authors, "If you want to charge people who use your work for certain uses, that's great! We support you making money from your compositions! Let us help you communicate with users about how they should get in touch with you to pay you." And of course, it could be argued that the act of using any CC license, especially with the CC+ protocol, makes it less likely that content will be used outside of the scope of its license, given that its allowed uses are brought into the open with human-readable text that is harder to ignore than the silence of content that is posted online and automatically copyrighted but without any copyright notice.

Implications for Scholars

More practically, scholars could use CC+ to license drafts of essays they're working on. The CC license would encourage other scholars to share and distribute the essay without any fear of overstepping boundaries (say, by downloading the essay and hosting it on a course or department web site for others to comment on), but the + would clarify that any other uses beyond the CC license need to be cleared first with the author (say, if a publisher comes across the essay and wants to publish it commercially, or if a teacher wants to adapt an excerpt for a class handout).

Implications for Teaching Communities

On a larger scale, sites that host content with CC licenses could use CC+ to clarify what options users have when using their material, and perhaps even to profit from it. Sites like MIT's OpenCourseWare (ocw.mit.edu) and, on a smaller scale, the University of South Florida's CollegeWriting (collegewriting.us) collect content and pedagogical materials and share them using a CC BY-NC-SA license. If either of these sites adopted CC+, they could easily instruct users how to pay for other uses of these materials. For instance, they could make it easier for someone who wanted to adapt an essay assignment to post on another university's site that doesn't use a CC share-alike license, or if someone wanted to include a quiz found on one of these sites in a commercial publication.

Implications for Publishing

And at the publishing level, journals and publishing companies that allow authors to retain copyright to their work could help authors better understand their options by facilitating licensing choices, including CC+. For example, open access journals (like *Molecular Systems Biology* in example 3 above) could use CC+ to direct readers looking for additional licensing options to a page on the journal's site, on the author's personal site, or to an Ozmo page, depending on the choice of the contributor.

This mindset of clearly communicating licensing options could also be applied to the more informal publishing that constantly happens on the web, including statements and resolutions issued by scholarly organizations. For instance, Wendy Austin, a scholar in rhetoric and composition, wrote in 2006 to the Writing Program Administrators listserv about her issues licensing the official WPA statement on plagiarism ("Defining and Avoiding"), which at that time had the relatively restrictive CC BY-ND-NC license. (The statement's license has since been updated to the less restrictive CC BY-ND license.) Austin wanted to publish the statement, which she describes as a "foundation" for her book's argument, in whole as an appendix to her book on plagiarism, which was to be published by a commercial publisher (Austin). She asked for advice from Chris Anson, a major scholar in rhetoric and composition, and eventually paid the \$100 licensing fee to the WPA treasurer for the right to publish the statement in full in a commercial textbook. If CC+ had existed in 2006, it would have simplified this exchange, cutting out the need to ask around for advice about how to proceed, since at the bottom of the statement's web page and on the CC license page Austin would have been given clear directions for how to obtain the permissions--probably with a link to a page explaining how to pay fees.

Conclusion

In an email response to me, CC Web Engineer Nathan Kinkade wrote, "My sense is that the uptake of CC+ has been very small, at least from the tech. perspective of using ccREL (RDFa) to express CC+." Though his gut impression is obviously different than a detailed survey of CC implementation, it still suggests a need for further action. My impression is that as CC licenses become increasingly visible on popular sites like Flickr and Wikipedia, the added protocol of CC+ could do much to alleviate the fears of those who aren't yet ready to commit to alternatives to "all rights reserved."

Acknowledgements

Thanks to Wendy Austin and Nathan Kinkade for allowing me to quote their email messages in this piece, and to Nathan for his patience with me as I worked through the technical side of CC+ implementation.

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Breaking Free: The Fight for User Control and the Practices of Jailbreaking

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Though the practice of jailbreaking⁸, a process allowing users greater control and customization of tools like the iPhone, iPod Touch, and more recently Android phones and e-readers like the Nook, has been around since early 2007, it gained a great deal of momentum in 2009. The first jailbreaking methods, released in May 2007, were intended to provide users with a way to customize ringtones and play third-party games. Within months of each iPhone and iPod release, a jailbreak application is typically released.

In 2009, the Electronic Freedom Foundation filed a proposal with the Librarian of Congress and the Copyright Office for exceptions to the Digital Millennium Copyright Act (DMCA) which protects digital intellectual property like Apple's operating systems and software, making anyone who circumvents the software in violation of the DMCA and subject to penalties under the law. So while there is some confusion regarding whether or not jailbreaking is "illegal," it is clear that as of the writing of this report hackers and jailbreakers violate the DMCA. The EFF requested three exemptions to the DMCA: 1) an exemption for "amateur creators who use excerpts from DVD's to create new, non-commercial works" 2) exemption for jailbreaking phones 3) a renewal of a previously granted exemption for unlocking handsets to be used in recycle and refurbishing programs (<http://www.eff.org>). Apple claims that jailbreaking violates copyright and does not warrant an exception. A ruling was expected in October 2009, then postponed to December and further postponed for early 2010. A decision is expected any day.

Why Jailbreak?

Currently, the only way to add iPhone applications is to buy Apple-approved apps from iTunes. Applications such as GoogleVoice, available on Blackberry and Android phones have been rejected by Apple, leaving the users who want to use such technologies to either go without or jailbreak their phones and knowingly violate copyright. The EFF has called Apple's closed software policies anti-competitive.

Jailbreaking requires users to download a third-party program like Blackra1n and r3dsn0w in order to modify the iPhone's bootloader, allowing users access to the directories and other areas of technologies that users have been previously been prevented from modifying. This means that users are able to move beyond the closed propriety software with which the device ships and install third-party applications and open software including games, ringtones, backgrounds and icons as well as other functions currently missing from the iPhone software such as the cut and paste functionality. In addition, the iPhone is currently only available to those who belong to or agree to join the AT&T

⁸ The term "jailbreak" originates from the UNIX command "chroot" which alters a computer's operating directory and prevents the user from leaving that directory, commonly referred to as "chroot jail."

network⁹. Jailbreaking makes it easier to “unlock” devices so they can be used on any cellular network.

Recently, users of the Barnes and Noble e-reader the Nook have been “rooting” their devices in order to install programs like web browsers and an RSS reader in addition to being able to customize and configure the menu screen. The process is complex and requires users to re-register their devices. And like all jailbreaking it voids the original warranty.

Even Google’s Android OS, which is open-source and highly customizable is not immune to jailbreaking, though it seems as equally risky as jailbreaking the iPhone without as significant a payoff. Jailbreaking an Android phone allows tethering (meaning users can hook the phone to their computers and use the phone’s wireless capabilities to get online through their computers), running a full LINUX system, downloading Android software directly from developers instead of filtered through a service provider. Because Android users are already able to significantly customize their phones through wallpaper backgrounds, font choices free applications, screen unlock patterns, passwords and which icons appear on the opening screen. Thus, the desire for root directory access is less significant and less popular.

Is Jailbreaking illegal?

In brief, yes and no. While not explicitly illegal, jailbreaking one’s phone is a violation of the Digital Millenium Copyright Act (DMCA), which protects digital intellectual property like Apple’s operating systems and proprietary software. Thus, anyone who circumvents the software in violation of the DMCA and subject to penalties under the law. So while there is some confusion regarding whether or not jailbreaking is “illegal,” it is clear that as of the writing of this report hackers and jailbreakers violate the DMCA.

In 2009 Electronic Frontier Foundation filed a proposal with the Librarian of Congress and the Copyright Office for exceptions to the Digital Millenium Copyright Act. The EFF requested three exemptions to the DMCA: 1) an exemption for “amateur creators who use excerpts from DVD’s to create new, non-commercial works” 2) exemption for jailbreaking phones 3) a renewal of a previously granted exemption for unlocking handsets to be used in recycle and refurbishing programs (<http://www.eff.org>). Apple claims that jailbreaking violates copyright and does not warrant an exception. A ruling was expected in October 2009, then postponed to December and further postponed for early 2010. A decision is anticipated any day.

Implications for Rhetoric and Composition

The Copyright Office’s ruling could certainly impact the field of rhetoric and composition, particularly if it rules in favor of protecting closed, proprietary software which could potentially limit innovations and advancements in software technologies as well as limit user control and input. In the future this might have implications for the capabilities and choices of educational software and technologies.

Perhaps most significantly, the practice of jailbreaking itself points to a growing trend among

⁹ The US Department of Justice has reportedly begun investigating how mobile service carriers function under exclusivity deals with makers of handsets, a move that could alter and even prevent agreements like the Apple/AT&T deal.

technology users for control and customization options . There are customizable features on almost any technological tool one uses today and there has been for some time. Users can have a custom-made computer by choosing the hardware, software and in some cases, colors of their laptops. There are customizable templates for websites, blogs, content management systems like Drupal and Moodle and social media sites like Twitter. Today's users want what is popular but they want to exert their ownership of it in some way; they want to personalize technology so that it works specifically for them and for their lifestyles but also to represent their identities. It is not surprising, then, that many users want to exert control over the technologies they use most. . As colleges move more content and courses online and seek ways to stay competitive in the marketplace, these user trends will find their ways into our classrooms and curriculum.

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Apple App Store Arbitrates the Cellular Wireless Public Sphere, For Now.

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Apple Inc, the producer of the line of wildly popular iProducts including the iPod, iPhone and iPad is impacting the perception of the public sphere through their mediation of copyright and intellectual property as it relates to their “walled garden” cellular wireless internet devices. Why should the members of CCCC care about the line of iProducts? Well for one, there is the over 200 combined occurrences of these products in the Chronicle of Higher Education in the last year.¹⁰ Their prevalence in the Chronicle confirms their intimacy with and saturation of academic life. More importantly, the invisible differences between the wired and wireless cellular internets that they reify, compounded by Apples market dominance and reputation make these devices key arbitration points of digital culture and property. In short, the mediation of the internet on these devices is poised to have a substantive impact on how consumers assume the public sphere operates and what rights might eventually prevail on the growing cellular wireless web and beyond.

In order to understand how Apple became the arbiter of a whole class of software in 2009, it is important to understand how the experience of the device feels to the unaware user and the difference between the wired and cellular wireless internets. When a consumer uses an iProduct they may reach one of two internets at a time. They are each binary devices. They devices may be set on the wired internet. The “wired” internet includes wi-fi which is hooked to a wired router at some point by an individual consumer or business. In practical terms, this internet is the unmediated internet available by desktop, laptop or netbook. It is the internet we have at home and at work. The “wired” internet has been “open” for decades. Any user can download any software they want from the wired internet regardless of device. It would be unfathomable, for example, for any wired internet provider like Comcast, America Online, or Roadrunner to limit what you could and could not use on your computer. However, this is just what the so called “Walled Garden” approach of iProducts do. The Apple hardware and software on iProducts block the wired internet from downloading programs. Instead, the cellular “wireless” network, referring to the 3G&Edge networks controlled by AT&T, paired with the Apple hardware allows exclusively for the download of applications (“Apps”) from the Apple App Store. Wireless networks are federally unregulated and do not have to allow for competition in their model (Wireless Telecommunication Bureau). The company that owns the cellular wireless network has discretion over what data may pass. The devices smooth transition from one internet to the other obscures the difference in rules and laws between the two spheres. Apple boasts on their iPhone internet spec page that “whether you’re connecting via Wi-Fi, 3G, or EDGE iPhone always connects you to the fastest network available” (iPhone safari 3G) The important distinctions between the two types of networks remains obscured to the user in practice.

The App Store

The App Store is a division of the iTunes store. The iTunes store made history when on January

¹⁰Date delimited site search performed on February 24th, 2010 using the key words iPod, iPhone and iPad

6, 2009; Apple announced that it had reached an agreement with major record labels to sell all music on the iTunes Store free of DRM restrictions (Cohen). The landmark agreement meant that the heretofore problematic Fairplay™ DRM system was removed from the iTunes music store. (Movies and television shows are still encrypted with Fairplay™.) This tremendous concession by the music industry was spurred on by the oncoming App store, which began January 10th, 2009 to coincide with the launch of the iPhone 3G the next day. The music industry was understandably displeased by this circumstance, but eventually conceded that the loss of market share assured by not going with Apple and their loyal constituency of iProduct users would be intolerable.

However, music is not software. Musicians have long belonged to a label to distribute their music. It is only recently that more musical artists are publishing and profiting independently from their music. By contrast, the software industry has had few, if any, successful model of software publishing. The distribution patterns in the software industry have developed as they have because there was nothing between the software developers and the clients. The Apple App store changes that model (Betteridge). This has left Apple as the heir apparent to a whole class of copyright and intellectual property decisions in 2009.

I will review two recent events in this piece. The first event is the story of Google Voice. It illustrates the closed nature of the new wireless internet model and recent nudges toward opening it. The Next Bus Information System/Muni story which follows illustrates the type of intellectual property issues that may occur in this closed, cellular wireless model and the relevance of these decisions for those of us who teach writing and communication in the public sphere.

Google Voice

Google Voice is a digital switching station for landlines and cell lines with a web friendly interface. With Google Voice users “can access [their] voicemail online, read automatic transcriptions of [their] voicemail, create personalized greetings based on who is calling, make cheap international calls, and more”, claims Google Voice about their service on their about page. Google Voice, like many things from Google labs, has deep roots in Silicon Valley. In 2005 a company called Grand Central had started among industry insiders who had huge bandwidth at their disposal. They noted a rising cost in cell phone packages (before the phone itself became the object of decision instead of the plans) and wanted to develop inexpensive web-based call technology. Google bought Grand Central in July of 2007. In March, 2009, after some down time and quiet revamping, the service was much improved and rereleased under the name Google Voice (Malik).

By July, 2009 several apps using or extending the services of Google Voice including GV Dialer, GV Mobile, and Voice Dialer were already in the Apple App store. According to Sean Kovacks, Google had been working with the permission, approval and utmost courtesy of an Apple Senior Marketing Vice President, Phil Schiller (@seankovacks). On July 27th, the above mentioned Google Voice apps were pulled from the Apple App store and another Google Voice app supposedly rejected (Kinkaid). Spurred on by this decision, Google and many other activists quickly brought this matter to the FCC. Merely four days later, July 31st, 2009, the Wireless Telecommunications Bureau made an official inquiry into Apple Policy (Schlichting). The FCC asked six questions. The questions focused on the rejection of Google Voice, AT&T’s part in that decision, and the App Stores general inclusion and exclusions policies. The FCC also made a point of referencing an earlier charge to the closed, wireless model made by Skype (Ad Hoc Public Interest Spectrum Coalition) in the letter to Apple. Industry insiders read this move by the FCC as an attempt to open the App Store model to the same

type of competition available on the wired internet. On August 1st, 2009 Apple responded to the FCC largely claiming that they hadn't made any decisions about Google Voice and that AT&T had no undue influence in the decisions to remove the Google Voice related applications (Apple Answers). To put it tactfully, Apple's response letter to the FCC reads as a stall tactic and largely takes the position that they have no position.

In January of 2010, Wired Magazine announced that Google Voice released a web version of Goggle Voice that is accessible on any HTML5 platform, which includes the iPhone wired web interface (Buskirk). The article goes on to smartly suggest that because of the bookmarking feature, the cloud version is almost indistinguishable from the version intend to run on the native iPhone OS. Given this approach by Google it is conceivable that we may look back in a few years and see that this is where the tide turned away from the App Store model and to these cloud-based applications. It is equally conceivable, that given Apple's generally benevolent dictator approach other companies will not feel the need to follow in the HTML5 path that Google Voice blazed. The question ahead is if the Apple App store should act as the moderator of copyright, app distribution, and modification in the future. The next story will discuss one such complicated situation where Apple was the arbiter in the closed, wireless cellular model of the App Store and its impact for rhet/comp scholars.

NextBusIS/Muni

The San Francisco Municipals Transits Agency (Called "Muni" for short by locals) puts sensors on its buses in order to capture real-time travel data. From this collected data Muni is able to offer real-time predictions of when a bus will arrive at its next stop. The predictions are made publicly available on their website. Several app store developers have included a feature that skims this data in their apps. One such developer, Steven Peterson, included this in his "Routsey" app along with other local routing data options such as BART schedules, train schedules, and trolley data. In July, 2009 Peterson was contacted by the COO of a company calling itself "NextBus Information Systems" (NBIS) claiming that the Routsey app infringed upon their companies intellectual property rights. Alex Orloff, the COO, contended that NBIS (not affiliated with NextBus sensor products), owned the real time data and demanded a "straight revenue split" or a "data licensing agreement" from Peterson. Peterson, wary at the thought that a public, taxpayer-funded transportation system had sold off their data rights investigated NBIS and Orloff (Batey & Baume). After finding only the most tenuous connection, with NBIS as "the agent for the commercial use of predictive data," Peterson told Orloff that he would not make a licensing agreement (Eskenazi). Orloff then sent a cease and desist letter to Peterson. Peterson disregarded Orloff's letter and riled San Franciscans in support of their ownership of public transportation data.

Angered and fearful of attacks from impatient Muni users, Orloff wrote a letter to the Apple iPhone development team asking that Routsey be removed from the App store because it violated NBIS's copyrights and section 3.2d of Apples own developers license (Batey, Muni Arrival), which states to the developer the following:

“to the best of Your knowledge and belief, Your Application and Licensed Application Information do not and will not violate, misappropriate, or infringe any Apple or third party copyrights, trademarks, rights of privacy and publicity, trade secrets, patents, or other proprietary or legal rights (e.g. musical composition or performance rights, video rights, photography or image rights, logo rights, third party data rights, etc. for content and materials that may be included in Your Application).”

(Apple iPhone Developers License)

Apple, being zealous in the face of possible DMCA charges promptly removed the application from the App Store. In the mean time, Orloff had become a nuisance with other apps that used the NextBus data including Muni Time and iCommute. He sent various communications demanding a variety of rights not limited to revenue sharing, ad space on the app and full shutdown or rework of the app. Peterson, of the Routsey application, refused to be trampled by Orloff and enlisted a corporate lawyer to talk to Apple about returning Routsey to the App Store. In a “joint discovery effort,” Apple was unable to turn up any legitimate evidence that NBIS held any copyright claim to the Muni data and the Routsey application was returned to the App Store in August of 2009 (Batey, Muni APP). Since then, Orloff’s requests to Apple have been repeatedly rebuked. As a result of this turmoil, Muni has made significant strides in making their data public and routinely asks of collaborating enterprises to make this data more public (Raines).

Implications

The implications from the Google Voice story are evident enough. The differences between the wired web and the cellular wireless web forces teachers and students to reconcile a different rhetoric of the public sphere for different locales of the web. The perceived integration of the two webs on the iProducts is something that should prompt discussion about the roles digital technologies can play in both the freeing and obscuring of discourses in the digital realm.

For watchers of intellectual property, the ongoing negotiation of public space between the FCC and closed cellular wireless networks continues to change the digital landscape and we don’t where this change will lead yet. At the moment, Apple is clearly in charge of their “Walled Garden.” Their privatization of the AT&T cellular network and naturalization of the privatization has been enormously successful. However, the FCC is not a toothless bureaucracy because even Apple reacted promptly to complaints about possible DMCA violations. Apple pulls apps first and investigates next. This pull-first-research-later approach reveals a surprisingly cautious policy for such a closed model.

In order to justify the teaching of writing and rhetoric, teachers of composition assume that the public sphere must be amenable to a plurality of voices and opinions to function. In the public sphere, we expect that no individual or group will have the priority to censor out another. The openness of the wired web has been instrumental in identifying previously blocked paths among social networks and the contained cellular wireless model may threaten that balance. Yet, as Ballentine has pointed out we must recognize that the discourses of corporations are complex and not simply bad on their face. No one could deny that the Apple App Store has by chosen to make applications available more often than not and done much to foster innovation.

The future of app publishing and what constraints there are on intellectual property issues, especially, who has the right to arbitrate them in the cellular wireless model will need to be sorted out in the future. This past year merely table set for these questions. It also gives scholars a catalyst to have an important discussion about what public spheres we pay professional attention to and which don’t fall under our purview. Our disciplinary sense of digital property and adaptability continue to be challenged by innovation such as the Apple App store. It will be a delight to see what impacts these technologies will eventually have on the discourses that circulate within the public sphere.

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MIT Will Publish All Faculty Articles Free in Online Repository (2009 Decision)

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An important development in the open access arena occurred March 18, 2009, when MIT faculty voted unanimously to publish their scholarly articles free in an online repository. The complete policy, including key definitions and FAQs, is available from the university's library, <http://info-libraries.mit.edu/scholarly/faculty-and-researchers/mit-faculty-open-access-policy/>.

The policy states:

Each Faculty member grants to the Massachusetts Institute of Technology nonexclusive permission to make available his or her scholarly articles and to exercise the copyright in those articles for the purpose of open dissemination. In legal terms, each Faculty member grants to MIT a nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, provided that the articles are not sold for a profit, and to authorize others to do the same. The policy will apply to all scholarly articles written while the person is a member of the Faculty except for any articles completed before the adoption of this policy and any articles for which the Faculty member entered into an incompatible licensing or assignment agreement before the adoption of this policy. The Provost or Provost's designate will waive application of the policy for a particular article upon written notification by the author, who informs MIT of the reason. (MIT-Open Access Policy)

Similar to policies of other schools, MIT's policy grants the school "nonexclusive" rights, meaning faculty "retain ownership and complete control of the copyright in [their] writings, subject only to this prior license. [Faculty authors] can exercise [their] copyrights in any way [they] see fit, including transferring them to a publisher" (MIT-Open Access Policy). As noted in the *Library Journal*, this open access policy is but the latest attempt of MIT to increase knowledge sharing, much as the university has done with DSpace, which will be the locus for faculty publications, and the "OpenCourseWare (OCW) project, launched in 2001 with the goal of making all MIT course materials available, free of charge, to anyone on the web."

MIT faculty "is committed to disseminating the fruits of its research and scholarship as widely as possible" (MIT-Open Access Policy). Unlike open access policies of other institutions, namely Harvard's Arts and Sciences and Law Schools, MIT's policy involves all faculty at the university, making it the first to do so. Given the university's position in key technical and scientific fields, this action is significant and may indeed add some peer pressure on other universities to follow suit.

Faculty members can choose to "opt out" of the open access process by submitting their name, publication title and source, as well as reason for opting out. According to the FAQ on MIT's website, this option was preserved primarily for the protection of junior faculty members who may want (or need) to work with certain publishers that may view the open access policy unfavorably. What was not stated, but seems obvious, is simply that attempting to coerce faculty to comply with an open access policy would be counterproductive and counterintuitive. The idea is to share knowledge and to assist rather than harm faculty.

Knowledge sharing is important for faculty and for institutions of higher education. Faculty are

expected to produce knowledge and to publish. Indeed, the “publish or perish” paradigm continues to pervade colleges and universities, perhaps most extensively at R1 institutions. In addition to publishing, however, citations have become increasingly important in terms of earning and demonstrating prestige, yet citations can be limited when article distribution is limited to expensive subscriptions. MIT’s FAQs mention two important findings: (1) “Studies show a very large citation advantage for open access articles, ranging from 45% to over 500%,” and (2) “the 5 largest journal publishers now account for over half of total market revenues, and over the past 15 years, the price of scholarly journals has grown roughly three times as fast as the Consumer Price Index.”

It is easy to see that open access publications that are indexed by broad search engines, such as the very popular Google Scholar, will have many more potential hits and thus readers than those articles that are not indexed by these search engines. Even though many journal publishers now index through these search engines as a marketing tool, potential readers have to pay for access, and thus they often search for other sources that are available via open access. Publishers, therefore, may cry foul as they see threats to profits. Yet, moves toward open access continue.

Scholarly publishing is changing, and open access policies, such as MIT’s, are both pushing for change and reacting against change that has already occurred. As scholarly publishing moves away from small, discipline-specific, professional groups to commercial publishing firms, scholars and universities are developing new ways to share knowledge broadly.

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J.D. Salinger and *60 Years Later*: The Struggle between Copyright and the First Amendment

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Overview

J.D. Salinger died in January of 2010, but an intellectual property dispute centering on *The Catcher in the Rye* continues to wend its way through the federal court system. An unauthorized ‘sequel’ had been published in the United Kingdom in May of 2009 and was in the verge of being released in the United States when Salinger’s lawyers filed suit to stop its sale. A permanent injunction blocking publication in the United States was granted by the U.S. District Court for the Southern District of New York, but the author and publisher of the novel filed an appeal to the Second Circuit Court of Appeals. This appeal was supported in an amicus brief by four major news organizations: The New York Times, The Associated Press, the Gannett Company, and the Tribune Company. Oral arguments in the case were heard in September of 2009, but a decision has not yet been handed down.

Background

Mr. Salinger’s interest in defending his intellectual property rights is well known and may in the past have discouraged what would arguably be fair use of his writings. An illustrative example is found at a web site largely targeted at secondary-level teachers of English. The owner of this website, a *Catcher*-enthusiast, has restricted his use of quotations from the novel for fear of legal repercussions. Describing a section of the site devoted to “intrinsic aspects” of *The Catcher in the Rye*, the owner writes,

This includes material basically concerning aspects of the novel itself—what scholars might call internal or intrinsic approach/criticism. Since everybody knows that Mr Salinger is not exactly keen on having people quote from CR, this section suffers from a certain handicap—there are so many things I would like to quote....

(Wahlbrinck)

This same site maintains a list of Salinger-related links. Of interest is the description of this one: “The Holden Server a CR site which explains why it does not exist any more [sic] (i.e. for legal reasons)—yet definitely worth visiting.” (This link is in fact broken, as is the link to the site described as follows: “Salinger and copyright problems Recommended bananafish/Salinger.org subpage for anyone interested in Salinger's insistence on his copyright in connexion [sic] with the internet.”)

The characterization of Salinger as a defender of his copyright prerogatives is something that he himself does not dispute, as he is described in his own court filings as “fiercely protective of his intellectual property” and as someone who “has never allowed any derivative works to be made using either *The Catcher in the Rye* or his Holden Caulfield character” (Complaint against ABP, Inc, John Doe, Windupbird Publishing Ltd, Nicotext A.B., 2; see also pp. 10-11)

The Current Case

Given the reclusive author's reputation for maintaining tight control over the use of his writing, it is not surprising that Salinger should file suit to stop the publication of a book whose cover described it as a "sequel to one of our most beloved classics" (Complaint against ABP, 2). Written under the pseudonym J.D. California, the novel under dispute is entitled *60 Years Later: Coming through the Rye*. As the title suggests, the book's protagonist, Mr. C, is a septuagenarian. He has fled from his nursing home, and a portion of the book is devoted to his experiences and thoughts as he wanders through New York City. The book also shows him confronting the character of J.D. Salinger, who continually attempts to kill off his creation in various fashions. The complaint asks that distribution of this novel in the U.S. be enjoined, arguing that this is an "unauthorized sequel" that "infringes Salinger's copyright rights in both his novel and the character Holden Caulfield, who is the narrator and essence of that novel" (Complaint against ABP, 1). According to the brief,

The right to create a sequel to *The Catcher in the Rye* or to use the character of Holden Caulfield in any other work belongs to Salinger and Salinger alone, and he has decidedly chosen not to exercise that right.

(Complaint against ABP, 1)

Much of the brief is devoted to supporting the claim that the *60 Years Later* is indeed a sequel and rejecting the notion that it is a parody. The brief points out that, in addition to the use of the word 'sequel' on the front jacket, the back cover featured this blurb: "Sixty years after his debut as the great American antihero, Mr. C is yanked back onto the page without a goddamn clue why" (Complaint against ABP, 13). The filing also adduces numerous parallels in language and incident.

The Defendants Respond

The author, now revealed as Fredrik Colting, co-owner of a small press, responded to the complaint by arguing that he wrote *60 Years Later* "as a critical exploration of such themes as the relationship between J.D. Salinger, the famously reclusive author, and Holden Caulfield, his brash and ageless fictional creation" (Declaration of Fredrik Colting, 2). The character of Holden Caulfield, Colting stated, transcends the pages of the original book, and Salinger, like the character Colting bases on him, "has created a character that has become so culturally resonant that [Salinger] has lost control of him and cannot kill him off" (Declaration of Fredrik Colting, 3). Acknowledging that an early book cover and promotional materials refer to his novel as a 'sequel', Colting now characterizes "this description [a]s inaccurate" and reports that the U.S. edition will be free of such language (Declaration of Fredrik Colting, 8). His book, he writes,

is not designed to satisfy any interest the public might have in learning what happened next to Holden Caulfield or the other characters in Salinger's book. Rather, it is intended to stand on its own as a critical examination of the character Holden Caulfield, the relationship between author and his creation, and the life of a particular author as he grows old but seems imprisoned by the literary character he created.

(Declaration of Fredrik Colting, 8)

In support of his claim that the book is not a sequel, Colting asserts that he neither copied nor appropriated the language of the book, beyond the use of certain catchphrases necessary to characterize Mr. C; that, beside the main character, only three characters from *The Catcher in the Rye* reappear in *60 Years Later*; that the characters that do appear are reintroduced in order to further the critical

exploration that is his stated goal; that he has created numerous characters independent of those created by Salinger; and that, “[e]ven more importantly, [his] book includes J.D. Salinger himself as the narrator/puppet master of the Mr. C character” (Declaration of Fredrik Colting, 10). As one reads *60 Years Later*, he argues,

it becomes more and more clear that it is Salinger who is the most important character. His narrative starts and stops as he tries different ways to move the story forward. He even makes characters appear and disappear in front of Mr. C as the book progresses.

(Declaration of Fredrik Colting, 10).

In short, Mr. Colting is arguing that his is a transformative work, one that makes use of only that which is required for him to explore a premise that in large part centers upon Salinger himself. In additional filings this argument is explicitly supported by Robert Spoo, who had been asked to assist Colting’s attorneys in assessing the extent to which *60 Years Later* had made “creative and transformative” use of *The Catcher in the Rye* (Declaration of Robert Spoo, 1) and by Martha Woodmansee, who describes *60 Years Later* as a work of “meta-commentary” that

pursues critical reflection on J.D. Salinger and his masterpiece CR just as do the articles that literary scholars conventionally write and publish in literary journals, but[...]casts its commentary in an innovative “post-modern” form, specifically, that of a novel.

(Declaration of Martha Woodmansee, 3)

The Ruling of the Second District Court

In June of 2009 the Court issued a temporary restraining order to prevent the U.S. distribution of *60 Years Later*, which was followed in July by the issuance of a preliminary injunction. Central to the ruling was Judge Deborah Batts’ examination of the question of whether *60 Years Later* could be considered a parody or critique and therefore protected as fair use of material from Salinger’s copyrighted novel. With regard to Mr. Colting’s depiction of the septuagenarian version of Holden Caulfield, Judge Batts concluded that for most aspects of the character *60 Years Later* was simply “rehashing one of the critical extant themes of *Catcher*” (Memorandum & Order, 16). In reaching the conclusion that in that regard *60 Years Later* was neither parody nor a commentary, Judge Batts relied not only on the text of the novel but also the wording on the novel’s jacket and public statements by the Mr. Colting describing *60 Years Later* as a tribute and a sequel. It was only after the suit was filed, the Judge pointed out, that Mr. Colting and his lawyers adopted the argument that the novel was commentary upon *The Catcher in the Rye*, and she dismisses their claims as “post hoc rationalizations employed through vague generalizations about the alleged naivete of the original” (Memorandum & Order, 11; see pp. 16-17, n. 2). As for the claim that the novel is transformative via its use of the character of Salinger, Judge Batts acknowledged that this was a “novel” element but stated that it “is at most, a tool with which to criticize and comment upon the author, J.D. Salinger, and his supposed idiosyncracies” (Memorandum & Order, 19). For Judge Batts, the gold standard for determining that a text is a parody that satisfies the standards for fair use is that the commentary or critique be focused on the original work itself.

Appeal to the Second Circuit

Judge Batts' decision was immediately appealed to the Second Circuit Court of Appeals, and an amicus brief was filed on behalf of Mr. Colting by, collectively, the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, The Organization for Transformative Works and the Right to Write Fund (Falzone). In addition, an amicus brief was filed by four major news organizations: The New York Times, the Gannett Company, the Tribune Company, and The Associated Press. At first glance the involvement of the Associated Press in the filing of the amicus brief may seem ironic, given that organization's determined efforts to control the use of its own intellectual property, efforts that in 2008 led to a controversy in the blogosphere when the organization tried to enforce a policy that would have required the purchase of licenses for quotations of as few as five words (Doctorow). In fact, in the brief the Associated Press and its fellows are at pains to emphasize the importance they place upon the protection of copyright. They are in the business of publishing copyrighted material and depend upon copyright law to protect their interests, especially in these days when "digital technologies make it ever easier for third parties to seize and repurpose the fruits of their costly newsgathering efforts" (Brief for *Amicus Curiae* The New York Times Company, et al., 4). However, a second concern common to news organizations trumps other issues in the case and causes them to make common ground with the author of *60 Years Later*. That would be the issue of prior restraint, the practice of banning publication rather than seeking remedies after publication. This the brief describes as "the most offensive and least tolerable prohibition on speech" (Brief for *Amicus Curiae*, 5). The brief documents numerous instances of the courts coming down on the side of authors and publishers in opposition to prior restraint and argues that "[t]he Supreme Court's consistent rejection of prior restraint reflects the 'chief purpose' of the Constitution's free-speech clause: 'to prevent previous restraints upon publication'" (Brief for *Amicus Curiae*, 7). The brief uses the fact that the courts have not countenanced prior restraint in the face of libel or defamation or even, in the case of the Pentagon Papers, in the face of claims of national security, in order to argue that the injunction on the publication of *60 Years Later* is inappropriate:

[...]in this case, where the only harm appears to be to the pride of a reclusive author in not having his desires fulfilled barring commentary about his iconic book and character, without any actual financial harm, the lower court saw fit to ban publication of a new boo. Such a result defies common sense, and is not—and cannot be—the law.

(Brief for *Amicus Curiae*, 1-2).

In the view of The Associated Press and its companion news organizations, the prior restraint visited upon *60 Years Later* represented a radical remedy of last resort not justified by the facts of the case. The novel was arguably transformative, and it was premature to apply prior restraint at the stage of a preliminary injunction. There was, the brief argued, no evidence that publication of the novel would cause irreparable injury to the plaintiff. Moreover, should the novel be published and later be found to have infringed upon Salinger's copyright, there were other steps that the copyright holder could pursue, such as suing for monetary damages, that would not raise First Amendment issues. This line of reasoning, the brief argues, was neglected by the district court, which, "[d]espite the dangers inherent in prior restraint[...]completely subordinates free speech interests and simply presumed the new publication would cause irreparable harm" (Brief for *Amicus Curiae*, 31).

According to reports of the oral arguments before the court of appeals, the justices repeatedly asked whether the district court had thoroughly examined the issue of fair use before it blocked the publication of the novel (Shanahan). The justices seemed at least willing to entertain the notion that the

nature of the novel should be more thoroughly explored before an indefinite ban is placed upon its distribution in the U.S.

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