

# 6 INTELLECTUAL PROPERTIES IN MULTIMODAL 21<sup>st</sup>- CENTURY COMPOSITION CLASSROOMS

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In “Who ‘Owns’ Electronic Texts,” first published in 1996 (and for which I wrote a reflection in 2004), I described the commonplace view in the United States that the ownership of writing, images, music, animations, or videos is a “natural right” of the person who created them. Although this natural right view is far less pervasive among educators and students in other countries such as China or even the United Kingdom, here in the U.S., students and teachers alike hold an unshakable, unimpeachable, and unexamined view that their creative works are, in actual fact, their “private property.” Because of popular metaphors like “giving birth” to an idea in their writing, many in the U.S. have been socialized to believe that they’re like the hero of an Ayn Rand novel, giving birth to works fathered by some kind of mysterious intercourse with their own inner genius. As a result, they don’t perceive that they owe anything in their creative process to the society that educated and nurtured them. So when the editors of the current collection asked me to reprise the often-anthologized “Who Owns Electronic Texts,” I was thrilled to do so, because I continue to find both students and colleagues laboring under some disabling ideas about who owns and, perhaps more importantly, who can make claims on the rights to copy and to use a created work. They lack an understanding of the history of copyright law; they lack an awareness of the intended purpose of the law; and—because they’ve only been exposed to metaphors about copyright—they lack the ability to distinguish between metaphor and actuality. As a result, they are ill-prepared to deal with intellectual property issues confronting them far

more frequently than in the past because of the demands for multimodal composing in the 21st-century classroom.

Today, as Pat Sullivan (1991) also observed, writers can no longer afford the luxury of just being a “good wordsmith” able to focus solely on the words on the page. The convergence of media in contemporary texts, particularly those of professional communicators in the workplace, requires that we teach students to integrate visual arguments, video demonstrations, and even audio illustrations into their verbal texts. The combination of media, our multimodal understanding of text, and students’ merely metaphorical understanding of copyrights has created an educational environment where students are dangerously vulnerable. Consider the following five scenarios—all of which are based on actual intellectual property questions my students have faced in the last 6 months:

Scenario 1: Imagine you’re a student in a technical writing class, and you’ve been assigned to write a manual on Web design for other students at your school. You’re using icons, screen captures, and other visual elements from Adobe Dreamweaver, Adobe Photoshop, and Microsoft Word. You know your university has severe penalties for students who steal other people’s intellectual property and plagiarize in a class, but you’re not sure if you’re in that situation here. Can you legally use the visual elements you copied from these interfaces?

Scenario 2: Assume you’ve posted email messages to a public email discussion group for a couple of years. You discover that a graduate student is using the messages posted to the email group as part of her dissertation research on political correctness in email; however, you’ve never been contacted about whether your messages could be used as part of the research. You’re not sure you want your messages used in what might be a potentially embarrassing way, but aren’t sure of your rights.

Scenario 3: You’ve given a conference presentation on user-support systems, and it catches the attention of a software manufacturing company looking to revamp its documentation systems. They offer to pay you for the time it would

take you to expand on the work you've already done and to conduct a more extensive review of current approaches to documentation and delivery systems. You'd like to do the review for them, but you also want to publish a journal article on the same subject; can you legally do both?

Scenario 4: You work for a Web design/consulting company, but on the side, you also maintain a personal blog where you publish tips and thoughts about the latest in Web design techniques. Your manager finds the blog and tells you to take the blog down or threatens to fire you.

Scenario 5: You're taking a class called "Creative 21st-Century Digital Publishing," and one of the assignments in the class is to create a "cyberpoem" in Adobe Flash that takes a poem like Robert Frost's "The Road Not Taken" and uses sound and animation to change its meaning. You want to use photos you found on Flickr.com and music from Nickelback to change the meaning, but you're not sure using these are legal.

As these scenarios hopefully illustrate, writers need a much richer and more complete understanding of copyright laws than the "natural right" metaphor provides, and because professional communicators are dealing with a much wider range of media in their texts, they need to be able to apply that understanding to more than alphabetic texts. As these scenarios from my technical writing classes and professional communication seminars reveal, I can no longer afford to depend solely on a grammar handbook explanation of plagiarism and on discussions of when to quote someone's work in an essay and when to summarize and cite it. Social media and other vast digital networks have complicated the intellectual property landscape in contemporary classrooms; writers must often have to differentiate plagiarism and copyright. As we know, the academically ethical citation of a source a student may have used doesn't protect him or her from being sent a cease and desist letter from the Recording Industry Association of America (RIAA) for violating a copyright. In the rest of this chapter, I describe some of the basic principles from the history of U.S. copyright laws I typically address in my classroom and then address how students and I use those principles to negotiate each of the scenarios introduced above.

## UNBALANCING THE NATURAL RIGHTS METAPHOR

### *Back to Medieval Publishing*

To get any traction with modern U.S. copyright and intellectual property law and the problems with the natural rights metaphor, it's best to begin with an examination of the origins of copyright law in the 16<sup>th</sup> century and the publishing revolution created by the introduction of the printing press. Many people are shocked to learn that modern copyright law didn't start from a desire to recognize and protect the natural rights of their authorial genius; instead, its origins lie in the "ignoble desire for censorship" and in the greedy lust to "protect profit by prohibiting unlicensed competition" (Beard, 1974, p. 383). Indeed, it took another 200 years after the first copyrights were granted to publishers before an author's rights were really even considered. As Martha Woodmansee (1984) pointed out, it wasn't until the 18<sup>th</sup> century that authors like Alexander Pope were able to begin to make claims on the right to profit from their work. In the 16<sup>th</sup> century, the purposes for granting copyrights were far more sordid and Machiavellian in nature than the protection of creative genius.

Prior to the introduction of the printing press, the technologies of medieval publishing were such that copyright laws really weren't needed. The cost of creating copies of what books were available virtually ensured that only the rich and powerful could afford to make copies. Peter Yu (2006) pointed out that "when Bishop Leofric took over Exeter Cathedral in 1050, he found only 5 books in its library" and in 1424, "the Library of Cambridge University had a remarkable collection of 122 books" (p. 7). The physical materials alone of medieval publishing were cost-prohibitive. Because vellum was a favorite choice for books of the highest quality, and because vellum is made from animal skins, a single volume could easily require harvesting 200 farm animals—or the equivalent of the entire annual output of a feudal lord's estate. And this is merely what's required to produce the raw material for the book. Extensive tanning and other labor-intensive processing was required to prepare the vellum for use in a book. As a result, ownership of a book of any sort was an extraordinary status symbol and a testimony to the wealth and power of the owner.

Yet, beyond the extraordinary costs of the raw material needed to produce a copy of a book, the literacies needed to physically copy a text also helped ensure that capricious copying of "unimportant" texts did not occur. Literacy was essentially controlled by the medieval church, and the scribes who did the laborious and painstaking work of hand-copying words on the page underwent an ideologically saturated disciplining process as an essential part of the education necessary for their work. Indeed, so thorough was the disciplining of the aco-

lyte that the penknife, nib, and other tools of the scribe's craft all carried metaphorical significance so that, when the scribe used his penknife, he believed that he was providing a service to the Church by cutting through the ignorance of heresy. It should come as no great surprise then that few texts challenging the authority of either the Church or the State were copied. Only those with sufficient wealth could afford to produce copies, and their wealth almost certainly came from the support of the State; it's thus unlikely the wealthy would wish to undermine the State by copying and disseminating "dangerous" ideas. Even if the wealthy were willing to do so, the disciplined copiers of the day would have censored the work (see Putnam, 1897, for a more thorough discussion of the education and role of medieval scribes in knowledge production).

### *The Publishing Revolution and the Stationers' Charter*

Just as Internet technologies are revolutionizing and reshaping our modern world, the technologies of paper and the printing press changed the 16<sup>th</sup> century. Even though books remained extraordinarily expensive by modern standards, the printing press did make book ownership possible for more than just the über-wealthy. The printing press made books affordable to new classes of people—people who wanted what had been status symbols for the super-rich and powerful. A new industry grew around the need for books. Enterprising publishers of the 16<sup>th</sup> century, called the "Stationers," used new technologies to rapidly produce books for this new class of consumers. However, unlike the monk-scribes, the limners (or illustrators), book binders, and editors who made up the Stationers Company had undergone a different disciplining process and were motivated by profit before religion. They were happy to satisfy the new consumer demand for books dealing with secular rather than religious topics (Putnam, 1897), books for consumers who were not indebted to the State and thus were far less concerned with supporting the State than their predecessors.

The convergence of these forces meant that books began to be produced that were no longer restricted by the interests of the State or the Church, and books that Mary Tudor and Phillip of Spain believed to be subversive appeared on the markets. So in 1556, Mary and Phillip granted the Stationers Company a royal charter that stated in its preamble that the charter was issued "to satisfy the desire of the Crown for an effective remedy against the publishing of seditious and heretical books" (Beard, 1974, p. 384). The Stationers' royal charter co-opted publishers by playing on their desire to "protect profit by prohibiting unlicensed competition" (Beard, p. 383). The charter "limited most printing to members of that company and empowered the stationers to search out and destroy unlawful books" (Patterson & Lindberg, 1991, p. 23). In so doing,

the Stationers' Charter effectively reestablished the State's control over what books could be published. It gave the Stationers exclusive rights to copy and to profit from sanctioned texts in exchange for policing the publishing industry in much the same way that scribes had previously done. It turned the Stationers into agents of the State, and, more importantly, it did nothing to recognize or establish the rights of authors.

## COPYRIGHT AND THE U.S. CONSTITUTION

Of course, when I teach students this history, they are rarely surprised to learn that 16<sup>th</sup>-century monarchs engaged in censorship or that the monarchs exploited the greed of the merchants around them to advance their interests. That's an old story we all have heard repeatedly in history classes. However, they are often stunned to learn that the U.S. Constitution is equally manipulative when it comes to copyright and that, just as Mary and Phillip used copyrights to exploit the greedy profit motive of individuals to advance the interests of the State, the first article of the U.S. Constitution does essentially the same thing. Article 1, Section 8 of the Constitution states that

The Congress shall have the power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Just as the Stationers' Charter made clear that the purpose of government giving copyright privileges to the Stationers was to prevent the publication of seditious and heretical books, the Constitution makes clear that it is giving the legislative branch of the government authority to grant copyright privileges in order to improve the science and technology in the State. It does not say that "Authors and Inventors" have a natural right to "their respective Writings and Discoveries;" instead, it says that *Congress* has the authority to secure copyrights for authors. Furthermore, it also makes that authority conditional upon promoting scientific and technological discoveries and inventions that will improve living and economic conditions in society. In other words, Congress doesn't have authority to grant copyrights or to create copyright legislation *unless the purpose of that legislation improves society*. Article 1, Section 8 doesn't say anything about protecting authors' rights for the sake of individual authors. Instead, it recognizes that, without a profit motive, authors and inventors will not have a reason to pursue new knowledge and new discoveries and thus publish

the sorts of books that the Founders wanted to see published. Consequently, just as the Stationers' Charter gave the Stationers exclusive rights to profit from books the Crown thought were in the best interests of the State, the U.S. Constitution gives Congress the authority to make the same deal with "Authors and Inventors."

## REPLACING NATURAL RIGHTS WITH THE LICENSE METAPHOR

Ownership of copyrights, as this brief history hopefully makes clear, is not a natural right. Copyrights are, instead, temporary privileges granted by the State to persons or organizations the State chooses, for purposes intended to benefit the people the government is supposed to serve. As members of a participatory democracy, we can argue about whether modern copyright legislation has, in fact, benefited the people of the U.S. and whether modern congresses have failed to promote creativity and discovery to benefit our whole society (as the Constitution originally charged them). However, it's important to observe here that U.S. copyright laws don't protect the natural rights of authors or the corporations who employ them; instead, they actually limit the rights of copyright holders to profit by imposing time restrictions on the copyrights and by creating other conditions under which it is possible for members of a society to copy texts without having to pay for the privilege. It could be argued, in other words, that copyright legislation exists to protect society from greedy speculation by copyright holders. As Pierre Leval (1990) stated, "fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of copyright law" (p. 1107).

However, once educators teach students that the U.S. Constitution doesn't recognize the absolute, natural property rights of authors, they need to fill the vacuum this creates, or we run the risk of allowing future citizens to fallaciously conclude that, because the Constitution doesn't recognize their natural rights, authors have no rights. The metaphor I have successfully used with college students is that of a driver's license. In a society where the ability to operate a motor vehicle is almost universally expected, the analogy works particularly well. People who own vehicles and who consider their cars to be their private property tend to believe that they ought to have the right to operate and use their property in pretty much the same way that copyright owners tend to feel they ought to have the right to use their copyrights. However, as we all know, even though it's conceivable that someone could own a car without a driver's license, it is not legal to operate a vehicle without having obtained a license

from the state in which you live. Operating a vehicle on public roads isn't a natural right of private property owners; rather, it is a limited privilege granted by the State for a temporary period and only under conditions established by the State. As citizens, we accept these licensing conditions and the limits imposed on our individual freedoms because they protect the public from abuse and because, in the long run, they ensure that society as a whole will benefit from the increased commerce and quality of life made possible by public roads (although, as I discuss later, many believe changes in copyright legislation since 1990 have broken faith with this principle).

Although U.S. Code doesn't require that authors take a test and obtain a license before they can benefit from copyright, many of the same rules of the road still apply so that copyright holders don't crash into each other. For example, copyrights do not give the creator of a text ownership of ideas in the text; it only protects the tangible expression of those ideas. This is critical—without it, someone could claim to own universal truths. Imagine the impact it would have on the pharmaceutical industry if, for example, every time during the course of a drug study, lab technicians had to calculate the value of  $2+3$ , they had to pay a royalty to some copyright holder who claimed to own the rights to the idea that  $2+3=5$ . The effect on our economy would be just as chaotic and debilitating as it would be if cars were no longer required to drive on the right side of the road and it was left up to individual drivers to decide where to take their half of the road. The effect of having to pay copyright owners for ideas rather than expressions would be analogous to the impact that increasing costs of energy has on an economy. As we saw when Hurricane Katrina shut down oil refineries on the gulf coast, sky-rocketing fuel prices threatened to plunge our economy into a catastrophic recession. And while energy costs are certainly pervasive in an economy, imagine the impact of having to pay for ideas like the effects of gravity every time you used gravity. Consequently, copyright laws don't give Sir Isaac Newton or his estate the right to profit from the discovery of gravity beyond initially protecting his expression of the idea. Copyright laws allow him to recover and profit from the sales of books in which he described the discovery of gravity; they also protect our society and economy from the predatory and debilitating practice of attempting to charge for ideas. Indeed, in this pay-per-use scenario, it could be argued that Newton would never have discovered gravity in the first place because doing so would have required that he use mathematical equations that might have been "owned" by other mathematicians whom Newton could not have afforded to pay.

Copyright laws also both work against and protect society from abuses of the natural right metaphor. It recognizes that inventors and creators owe a debt to the society that nurtured and educated them and thereby enabled the cre-



ation, discovery, or production of a new idea from which the creator seeks to profit. The fair use clause is another speed limit and rule of the road that the State uses to ensure public safety and to force copyright holders to recognize the debt which they owe to society. As discussed by other authors in this collection, Statute 17, Section 107 of the U.S. Code grants the public the right to copy a work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” without having to pay for the privilege. However, composition students need to understand that just because they are students in an educational environment and fair use does grant the right to copy works for educational purposes, that does not give them the right to copy everything. Statute 17 states that the four factors have to be taken into consideration when attempting to copy under the Doctrine of Fair Use:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

I have had writers create instructional videos in my technical writing classes and invariably several will attempt to use popular, copyrighted music as background audio with their digital videos to improve the quality of the production and to add interest to what would otherwise be a dry and uninteresting video clip. They mistakenly believe that because they are producing the video for a writing class, the fair use education clause gives them the right to copy all or most of, say, “Let It Be” by the Beatles. However, even though it meets the purpose and character test because it’s being used for a non-commercial, educational purpose, copying the whole song into the video clip fails to meet the other three tests because “Let It Be” is copyrighted and sold for entertainment purposes, because the entire song is used rather than just a portion, and because making the song available through a digital video that might be published on YouTube means that potential consumers of the song wouldn’t have to buy it from the publisher. In conclusion, fair use is very much like imposing speed limits on drivers: It seeks to achieve a balance between allowing copyright holders to use their property in an expeditious fashion in the same way that one can use a car to go to work or transport goods to market. The speed limit lets them drive fast enough so that they arrive at their destination in a timely manner, but it also protects other drivers on the road from people who want to drive too fast and operate their vehicle in a dangerous way. Fair use

seeks to protect the rights of the property of an individual and the reasonable expectation that the creator of a work should be able to profit from the labor expended, while at the same time protecting the rights of society and the good of the whole. It is important to replace the natural right metaphor many bring into our classrooms with the more balanced metaphor of a driver's license.

## COMPLEX COPYRIGHT SCENARIOS

### *Scenario 1: Screen Captures*

For teachers in technical writing classes, this scenario is probably familiar, because many of us ask students to produce instruction manuals from readily available products such as popular software packages. However, what many of my colleagues find surprising and disturbing is that they might be encouraging students to violate copyright laws when they ask them to use screen captures from software and Web applications to produce their manuals. The practice of making screen captures and using them in training and documentation materials is so commonplace and so easy to accomplish that many people never stop to consider whether it's legal or not. Most people don't realize that, from a legal perspective, screen captures are considered "derivative works." According to the U.S. Copyright Act of 1976, Section 101:

A derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

In this case, capturing a screen from a copyrighted piece of software is the same as taking a photograph of a famous work of art in a museum. It's essentially copying a protected work to produce a derivative. As such, copying an interface by making a screen capture would be a copyright infringement unless the production and use of the derivative work can be defended by fair use or some other legal precedent or defense. The idea of *defense* here is worth discussing before moving on to consider the possible legality of making and using screen captures. Copying a piece of copyright-protected work always exposes

the copyist to potential litigation. Fair use is a legal defense, but it doesn't mean that the copyright owner doesn't still have the right to sue in a civil case. In other words, it's important to understand that using a derivative work, like a screen capture, even if it's probably covered by fair use, doesn't protect you from being contacted by a copyright owner and eventually from being sued if the copyright owner isn't satisfied with your response once you've been contacted.

Copyright owners have the right to challenge copying of their property, so short of securing documented permission from the copyright holder before creating a derivative work, there's no absolute guarantee that you won't get sued and then have to defend your use of copyrighted material in court. An example of a copyright holder attempting to protect their property in the case of screen captures can be seen by Apple Corporation's attempt to protect its iPhone interface. In 1999, Apple sent cease and desist letters to webmasters who posted screen captures of Apple's iPhone interface on their Web sites ("Apple Uses Copyright to Silence"). According to Chilling Effects (a joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, and other universities), Apple attempted to protect the look and feel of their interface and the iPhone experience by preventing other software companies from using their icons and interface design. As a result, they contacted any Web site that posted screen captures of the interface regardless of whether they had positive things to say about the interface or were offering critiques of it. The question here is whether the iPhone screen captures were being used for non-commercial criticism, comment, or news reporting, because these uses would likely be defensible under fair use. Similarly, to return to our original scenario, if a student were to produce an instructional manual on how to use the iPhone interface to complete some task and if they were to post their instruction manual on an electronic portfolio or on their Web site, it's entirely possible that the student would be contacted by Apple and informed that they must stop using the screen captures in their work. In this case, the fact that Apple contacted the students does not, however, mean that students can't legally use the screen captures. What it does mean is that the webmasters who posted the screen captures and the students could potentially go to court and defend their use of the material or alternatively, they could comply with Apple's potentially inappropriate request that they remove the material. Even though copyright holders have a right to sue, the costs of doing so make it unlikely that they would unless they were reasonably sure that they would win and realize a profit for doing so. Consequently, even though there's never a guarantee that you won't be sued, having a strong defense makes it extremely unlikely that the average person will be sued unless the copyright holder can show that they suffered sufficient damages to warrant bringing the case to court and sees a financial gain by bringing the suit.

Because there are no guarantees and it's important to be able to be able to weigh the strengths of your defense for copying a piece, it's important for students to be able to understand if they do have a strong defense. There are a number of defenses students can provide. One of these is that many software companies actually do automatically grant their customers the right to use screen captures and visual elements in documentation. Apple Corporation, obviously, does not; however, Microsoft Corporation does allow the use of screen captures (but they do have requirements about the way their copyrighted visuals can be used). The following excerpt from Microsoft's Terms of Use Web site describes how screen captures may be used:

You may use screen shots in advertising, in documentation (including educational brochures), in tutorial books, in videotapes, or on Web sites, provided you adhere to the following guidelines:

1. Your use may not be obscene or pornographic, and you may not be disparaging, defamatory, or libelous to Microsoft, any of its products, or any other person or entity.
2. Your use may not directly or indirectly imply Microsoft sponsorship, affiliation, or endorsement of your product or service.
3. You may not use the screen shot in a comparative advertisement.
4. You may not alter the screen shot in any way except to resize the screen shot. You may not use portions of the screen shots, and you may not include portions of a screen shot in your product user interface.
5. You may not use screen shots from Microsoft beta products or other products that have not been commercially released by Microsoft.
6. You may not use screen shots that contain third-party content.

7. You must include the following copyright attribution statement: “Microsoft product screen shot(s) reprinted with permission from Microsoft Corporation.”
8. If your use includes references to a Microsoft product, you must use the full name of the product.
9. When referencing any Microsoft trademarks, follow the General Microsoft Trademark Guidelines.
10. You may not use a screen shot that contains an image of an identifiable individual.
11. For screen shots of Xbox and Games For Windows games, please visit our Game Content Usage Rules.

As item four above makes clear, students who wish to comply with Microsoft’s guidelines need to use the entire screen rather than a portion, and, as item seven makes clear, they need to give credit using the language provided. Other software vendors also provide similar permissions. And, naturally, students and educators who wish to avoid potential legal conflicts can choose to comply with the vendor’s guidelines.

Not following a software vendor’s screen capture guidelines to the letter still, however, doesn’t mean that using screen captures is necessarily illegal or inappropriate. It’s safer and would probably be the recommended course of action, but there are legal defenses that allow students to use screen captures in an instructional manual, or other works, produced for a course. Is the student making a profit? In this case, they’re not; they’re making it for a class. They’re not providing a copy of the entire software package; they’re only illustrating a portion of the software to help users complete tasks with it. In terms of the effect of the instruction manual on the software’s use or marketability, the manual is actually likely to increase the sales of the software, because an instruction manual that makes it easier to use is likely to encourage more people to purchase it. The use is potentially also defensible thanks to a precedent set by the U.S. Court of Appeals for the Second Circuit in the case of *Bill Graham Archives v. Dorling Kindersley Ltd.* In this case, as Martine Courant Rife (2009) observed, the court ruled that if the use of an entire image, not just a part of the image, is transformative, then its use is permissible. In this particular case, Dorling Kindersley was producing a history of the Grateful Dead and wished

to use posters of Grateful Dead concerts in the book. The publisher contacted Bill Graham Archives (which held the copyright on the posters) and requested permission to reproduce the posters in the book. The Archives requested what the publishers perceived as “an unreasonable licensing fee” and, consequently, “permission agreements were never reached” (Rife). When the history was published, the Archives sued the publisher for copyright infringement. The court ruled the publisher’s use of the visuals was fair use, even though they used the entire visual, and that “the use of the Grateful Dead images was transformative since the images were used in a time line and for historical purposes rather than for the poster’s original purposes of concert promotion” (Rife ). In our scenario it could be argued that, even though screen captures are considered derivative works and, therefore, are covered under copyright, a student using them in an instructional manual is a transformative, non-commercial use of the works for educational purposes that do not negatively impact the commercial viability of the product and is likely to be covered under fair use. Yet there’s no guarantee that a software company wouldn’t contact the student in spite of this defense, and thus it’s always best to check the software vendor’s Web sites to see if they give permission for screen captures and other uses.

### *Scenario 2: Public Email*

This scenario asks you to imagine that you have posted email messages to a public email discussion group and you discover that your messages are being used by a graduate student as part of her dissertation research without having contacted you. It’s tempting to think that this is a copyright issue, because U.S. Code does grant an author copyrights as soon as a work is created. Thus, as the author of the email messages, you might assume that you have rights to control the use of those messages. If we were dealing with hard-copy letters and print personal correspondence, the issue would be far more clear; the courts have determined that the person who receives a letter owns the physical property (i.e., the letter itself), but the author continues to own the tangible expression of ideas in the letters and thus can still make claims on its use.

Nevertheless, the lack of physical property and the situation of electronic messages on a system owned by another entity also complicates this scenario, as the 2005 case of *Marine Lance Cpl. Justin Ellsworth* illustrates. Ellsworth had a personal email account on Yahoo where copies of both his sent messages and received messages were stored. Ellsworth died attempting to defuse a bomb in Iraq, and his parents claimed that as next of kin they had right to his personal effects and thus sued Yahoo for access to Ellsworth’s account in a Michigan probate court. The terms of Yahoo’s service agreement, however,

made clear that individual accounts are non-transferable and are deleted if the account holder dies (Hsieh, 2006). The case was settled when the court ordered Yahoo to provide copies of Ellsworth's messages to the parents (Olsen, 2005). Although the Ellsworth case is not considered definitive and it is still Yahoo's corporate policy that they are obligated to protect the privacy of both the deceased and of those individuals who may have sent email to the deceased account holder, the case certainly suggests that an author or an author's estate can still assert some ownership claim over the expression of their texts.

In this scenario, however, as soon as the messages were posted to a public discussion group, the issue changes, because the information in the posts may be considered in the public domain and because the posting of the messages is somewhat analogous to surrendering copyright when you publish a book. Typically, and especially in academic publishing, once an author of a book signs a publishing contract with a book publisher, the author transfers the copyrights to that publisher and usually can no longer make claims on the copyright. This scenario is similar *if* the discussion group or forum where the messages were posted also treats the messages as publications and, to participate in the forum, the author has entered into a terms of use agreement granting the owners of the forum specific usage rights to the messages. An example of this would be, for example, messages posted to one of the online forums hosted by Adobe Corporation. By posting a message on one of these groups:

you grant Adobe a worldwide, royalty-free, nonexclusive, perpetual, irrevocable, and fully sublicensable license to use, distribute, reproduce, modify, adapt, publish, translate, publicly perform and publicly display Your Content (in whole or in part) and to incorporate Your Content into other Materials or works in any format or medium now known or later developed. (Adobe Systems Incorporated, 2008)

Consequently, even though Adobe doesn't claim ownership of messages posted to their forums, if the messages in the scenario were published elsewhere, the licensing agreement above would make it difficult for an author to complain about Adobe's uses of messages posted there.

In our scenarios, if a graduate student is merely using material deliberately posted to a public site, if the email discussion group makes clear that the postings are "publications," and if the student is not selling or profiting from the use of the material, then her use is probably defensible, and this question is probably not resolvable as a copyright issue. However, her use of the material might still be considered inappropriate (but most likely not) because of the

federal guidelines governing empirical research conducted with human subjects. Before any research project can be undertaken at a college or university, it must be approved by the school's institutional review board (IRB) to ensure that the research complies with federal guidelines regarding the use of human subjects in research studies. One critical component of empirical research IRBs take into consideration is the principle of "informed consent" that requires that researchers obtain the voluntary consent of people to participate in the study before collecting data from them. Because the graduate student had not contacted posters to the list and obtained consent and voluntary agreement to participate in the study, you would be within your rights to contact the IRB at the student's school to discover if the research study had been approved and to learn what (if any) precautions were being taken to protect your privacy and other rights (see Frankel & Siang, 2009).

### *Scenario 3: Work for Hire*

This scenario asks you to assume that you're a faculty member at a college and that you've been contacted by a company wishing to sponsor research you will conduct on their behalf to help them better understand the future of documentation. In other words, you're entering into a contract to write a report for the company in exchange for remuneration from the company. This is known as a work-for-hire agreement, and, typically, even though you may be the sole author of the report you are producing for the company, the agreement stipulates that you must surrender any claim you might make on the copyright to the company sponsoring the research. This means that you're transferring your rights to tangible expression of the ideas to the company and giving up the right to publish significant portions of the report in a trade magazine or journal. Even though you wrote the research report, you couldn't use the same expressions used in the research report in a future article because the company would own "your words" and those expressions at that point (see Amidon, this volume, for an extended discussion of work for hire).

Of course, because academics live in a publish-or-peril world, this arrangement usually isn't in our best interests. The long-term benefits obtained from the impact publication has on tenure and promotion are usually worth far more than the short-term remuneration a company might offer in a work-for-hire agreement. Consequently it's useful for academics to know that it's not necessary to accept the traditional work-for-hire agreement and to surrender all copyright privileges to a company. One can, for instance, stipulate in the contract the right to publish some or all of the material developed in a research report. Often companies will agree to this stipulation if you'll also compromise



by further stipulating that you won't publish the material in a peer-reviewed journal or other publication for 6 months or a year or some other period of time sufficient to allow them to develop a competitive advantage using the information you provide. Companies are also usually sensitive to revealing information about trade secrets, manufacturing processes, or other confidential and proprietary information its competitors might be able to use. Therefore, you may also have to negotiate a compromise that allows the company the right to review the article before it is submitted for publication to ensure that it doesn't reveal information the company feels is confidential or of a proprietary nature. If you have graduate students collaborating with you on the project, you also need to make sure that the work-for-hire agreement doesn't in any way prevent you or the graduate students from publishing in the future. Some work-for-hire agreements can be so rigid and exclusive that they can put entire subject areas off limits. This was the case for me when I was working on usability testing research on three-dimensional interfaces sponsored by a technology company I can't name in this article. Because I didn't specify a time limit in the contract that would allow me to publish on the topic, both the graduate students who worked on the project and I are still legally obligated not to publish or reveal information to which we were privy as part of that project without the expressed written consent of the company's legal department.

The point to be made here is that work-for-hire agreements don't necessarily preclude publication and don't necessarily mean the surrender of all copyright claims. If you're careful, and are able to successfully negotiate with the funder, it may be possible to publish sponsored research in public venues. That said, it's also your responsibility to make sure that when you do publish sponsored research in a public venue that you notify the editors, publishers, and peer reviewers of the fact that the work had been produced with sponsorship.

#### *Scenario 4: Non-disclosure Agreements*

In this scenario, the question is whether or not an employer has the right to terminate employment for maintaining a blog. Although it's repugnant and potentially scary to many, in fact, it may be the case that an employer does have the right to impose limits on the information you can make publicly accessible. Employment in a Web consulting company typically involves a work-for-hire agreement, and an employer probably required a signed contract outlining the scope of information you have the authority to reveal. As a condition of your employment, you probably also signed a non-disclosure agreement (commonly known as an NDA) that prevents you from publishing information the company considers proprietary in nature. Consequently, if we assume that you are

operating under this NDA, and if we assume that you revealed proprietary information about the processes or business practices of the consulting firm for which you work, then your employer does have the right to require that you remove that information from the blog. The information is copyrighted and proprietary, and you are only privy to it because of your employment; hence, your employers are perfectly within their rights to ask you to remove it. If you refuse to do so, they may terminate your employment and even bring suit against you.

However, your employer probably does not have the right to require that you completely take down your blog and cannot order you not to maintain a blog on your own time using your own computer equipment and network access. The company can prevent you from using equipment and Internet access they provide, but they don't have a right to tell you what to do with your own resources on your own time as long as you aren't violating your NDA or some other aspect of your contract with them. They have copyrights you need to respect, but you also have free speech rights they are also legally obligated to respect. As was the case with the work-for-hire agreements in the previous scenario, what is and is not permissible and copy-protected by an NDA depends largely on the nature of the agreement, and it's important that teachers help students understand that they have rights and that they need to carefully review and potentially even negotiate the limitations a potential employer may attempt to impose on them.

### *Scenario 5: Remixes*

In this scenario, a student is asked to change the meaning of Robert Frost's poem "A Road Not Taken" through the use of Flash animations and audio clips. The first question that needs to be addressed is whether or not the student can use Frost's poem without having to pay royalty to the copyright holder of Frost's poem. Because the assignment asks for the creation of a parody of and thus a transformation of the meaning of the poem, the student is actually creating a new work. Because the student's use of Frost's poem is deliberately transformative and because it is being used as an educational, not-for-profit exercise intended to teach the power of animation, this transformative use is defensible. Creating a parody or remix of the poem might cover the student's use of Frost's poem, but in this case the student is creating a multimodal composition and also wishes to use photos from Flickr and a song by Nickelback.

A key factor in determining use would depend, for example, on how much of the photograph the student was using and how much was being changed. In the case of the poem, because the meaning is deliberately being changed for parodic purposes, its use is covered (see Hall, Gossett, & Vincelette, this vol-

ume, for an extended discussion of parody). However, the student is probably using the images without significant transformation, so the copyrights for the photographs are still the property of the photographer—even though they were taken from Flickr, which is a social-networking site that encourages people to share their photos with other Flickr users. Unless the photographer gave permission for Flickr users to use the images royalty free, then the student should probably be advised to contact the photographer and request permission to use the photographs for the course assignment. Of course, even when they obtain permission to use the images, students should give credit to the photographers whose images they used (see the licensing structure of Flickr) by citing the works in the credits. As has been stated previously, citing sources isn't a condition of fair use, but it is the ethical thing to do and is nearly always required by an educational institution's anti-plagiarism policies.

Regarding the Nickelback songs, once again, the question is how much of the song is being used and for what purpose. It is typically the case when students complete this assignment in my class that the student uses all or a significant portion of the song without any audio editing (such as changing the tempo, adding reverb, or creating distortion of any kind), and the student is typically using the lyrics to convey the meaning as the artist intended. The use is often an attempt to give the audience the same experience of the music that they would hear on the radio; it's not transformative and may not be defensible under fair use. What's more, if the student is putting the unmediated music on the Web, where the audio can be copied by others in a way that might allow them not to have to purchase the song from the music publisher, and because the music industry has been aggressively and vociferously defending its copyrights, the student would be advised to find royalty-free music clips or to record music rather than ripping audio from a commercial CD. On the other hand, if the student is only using a short excerpt from the song and using it in a way that would be considered transformative and somehow changes the meaning of the work in the same ways that a parody would change the work, then its use would be covered by fair use.

## CONCLUSION

Obviously, as these scenarios show, the issues here are very complex and require a fairly sophisticated understanding of copyright laws and potential defenses for the acceptable uses of copyrighted works. We need to provide this understanding to students, because the consequences of copyright infringement are far more damaging than has ever been the case in the history of U.S.

copyright legislation. Unfortunately, since the 1990s, modern copyright law has changed more dramatically and more in favor of natural rights than it has since the Statutes of Queen Anne. Today, both educators and students are at greater risk of suffering from copyright infringement, litigation, and capital expenditure than ever in our history. The five scenarios are all based on actual situations encountered in a mere 6-month period, and what I hope they illustrate is that 21<sup>st</sup>-century composition students live in a far more dangerous world than they did in 1996. Today, teachers must prepare them for a world:

- where they can be attacked by Apple Corporation for using a screen capture in a manual intended to help other students use their iPhones;
- where they may not be able to conduct basic research on ethical email communication practices in public forums without prior permission from a federal oversight board;
- where they can be fired or be prosecuted for posting messages to their blogs or for publishing an article about an idea they learned while working as lab assistant in a university research lab; and
- where they may face criminal prosecution for using a song to enhance the meaning of a poem in a multimodal composition.

Writers of the future can't afford to learn about copyright by trial and error in the corporate world. The lesson that world teaches is that it is the natural right of Walt Disney's inheritors to continue to make us pay for pictures he drew over 75 years ago; the lesson is that the society that educated and nurtured Walt Disney and the economy that supported and enabled his company to grow and to become successful don't deserve some rights to use the cultural icons we helped create. The lesson this world wants to teach today's students is that using pictures of cultural icons like Mickey Mouse and King Kong without paying Disney and Paramount makes them criminals who deserve to have records of their federal offenses follow them for the rest of their lives. In 1996, a student violating a copyright in a class project like that in scenario 5 meant that her copyright infringements were limited to civil courts. Pretty much the worst that could happen was that the copyright owner could sue for damages. The risk to students and educators of infringing on a copyright was relatively small compared to today. But the introduction in 1997 of the No Electronic Theft (NET) Act changed all of that by making copyright infringement a criminal offense even for non-commercial infringement. Thus, the student in Scenario 5 who knowingly and "willfully" used a Nickelback song and who makes it available for copy "by the reproduction or distribution, including by electronic means, during any 180-day period" (17 USC Section 506a) can now be imprisoned for up to 5 years for the first offense and 10 years for a second (18 USC Section 2319b).

Those of us who teach composition owe it to students to make them aware of the copyright infringement risks they will encounter when they produce works for class and for future employers. We need to prepare them to work in a world where the incredible reproduction and distribution power of the Internet magnifies the impact of their actions in ways that may have significant financial consequences for them personally or for the companies employing them if they lack a sophisticated understanding of copyright laws and principles.

However, I would also argue that teachers and writers have a responsibility to do more than merely become aware of the risks and consequences of copyright infringements. Writers need to be more than good self-governing employees who won't get themselves or their companies in trouble. They also need to function as informed citizens in a participatory democracy. We need citizens who do not suffer from the foundationalist mythology that tells them truths are discovered by geniuses rather than socially constructed by a society—a mythology that tells them that copyrights are “natural rights” belonging to authors or inventors and their estates forever and for all time.

Citizens of a participatory democracy need to know that the original length of time a creator could benefit from a copyright was 7 years. The Statute of Queen Anne increased it to 14 years, and it has steadily increased in length. Thanks to the activities of corporate lobbyists in Congress throughout the 1990s, in the United States today, works created on or after January 1, 1978, have copyright protection for the life of the author plus 70 or 95 years from the date of publication for works produced under work-for-hire agreements. We need citizens who realize that congressional legislation of this sort runs counter to the purposes for copyright authorized by the U.S. Constitution. The Constitution gave legislators the authority to create copyright laws that stimulate creativity in the arts and that encourage originality in scientific investigation and technological inventions. We need educated citizens who can ask their legislators if allowing an artist and the inheritors of the author's estate to profit from a work for the entire life of the author plus 70 years is consistent with the kind of creativity the Constitution sought to stimulate. We need writers who question whether or not laws like the NET Act encourage creativity and protect society's right to use works for non-commercial purposes. We need students who, once they graduate and become future legislators and corporate executives, have had the kind of educational experiences that allow them to ask if it is really in the best interests of “Promoting the Progress of Science and useful Arts” in society to threaten students who create Web-based multimodal compositions or employees who maintain blogs with criminal prosecution.

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