

1 THE FAIR USE BATTLE FOR SCHOLARLY WORKS

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“Lobbying by special interests would invariably ensure that copyright and patent law favors private interests over public ones. That is not to say that politicians are always corrupt or that democracies always fail; it means simply that politicians respond to the same incentives as the rest of us and that consequently, democracies tend toward predictably biased outcomes.”

Bell, 2002, p. 7

Writing faculty and administrators might be surprised to discover how much the focus on fair use has changed in the decade since several of us in the Conference on College Composition and Communication Intellectual Property Caucus (CCCC-IP, 2000) published a short piece in *College Composition and Communication* titled “Use Your Fair Use: Strategies toward Action.” In that piece, we presented an overview of fair use and identified application strategies for academic settings. That piece emerged in the wake of two highly publicized cases—*Basic Books, Inc. v. Kinko’s Graphics Corp.* (1991) and *Princeton University Press v. Michigan Documents Services* (1996)—which dramatically limited faculty rights to produce course packets for students. Around the same time, the Copyright Clearance Center established its online presence—in 1995, just as the Web was becoming commercially viable. The Center’s mission grew dramatically as blanket licensing practices became the norm for publishers who

eagerly sought new revenue streams and the means to hold greater copyright control. The Digital Millennium Copyright Act (DMCA) emerged in 1998, making it a crime to circumvent anti-piracy measures in digital works and to build, sell, or distribute code-cracking devices, and, more importantly to educators, made many previously fair uses no longer legal. Furthermore, in late 1997, the Conference on Fair Use (CONFU) sought to achieve consensus on a new set of copyright guidelines for clarifying fair use practices and to achieve more input and buy-in than the 1976 guidelines that emerged from the Commission on New Technology Uses of Copyrighted Works (CONTU). Neither report reached consensus or legal status, but both have been influential. Publishers, libraries, university policies, and even courts use these guidelines on fair use as if they were legal standards. The CCCC-IP caucus was eager to encourage faculty to resist the chilling effects of overly zealous legislation, increasing corporate control, and over-reliance on guidelines. We wanted faculty to explore and exploit the extent of their fair use rights.

Although we still support these goals, the complexities of fair use have grown significantly. Since 2000, fair use has been subjected to important legislative changes, tested in several high-profile cases, and supported by the formation of new organizations championing fair use causes; new statements of best practices have also emerged. Fair use has been directly attacked and narrowed in some contexts, while it has expanded in other contexts as a result of, for instance, peer-to-peer technologies, online reserve policies at universities, corporate copyright control, and, conversely, the emergence of new open-source and open-access practices and policies. Although the struggle has been waged from many sides, corporate interests have achieved a decided advantage; Carol Silberberg (2001) argued that such changes “have reduced the scope of fair use in the educational setting,” and that these trends “will eventually eliminate fair use for schools, colleges, and universities” altogether (p. 617). Whether fair use will be eliminated is difficult to assess, given the emergence of a strong open-source movement, legal professionals who champion fair use causes, and legislative and legal momentum, but there is little doubt we are moving in that direction and the impact on educators and scholars will intensify and likely fundamentally change how we conduct our work in higher education.

In the face of these changes, faculty must understand fair use and how it will continue to impact our scholarly work, particularly as more and more of us integrate a range of digital media into our teaching and research. To introduce the basic tenets of fair use and to explore the complexities posed by digital media, this chapter opens with the examples of Jane Caputi and Sut Jhally. These two cultural theorists are documentary filmmakers whose cultural critiques of corporate and commercial images expose the chilling effects of cor-

porate copyright controls. I then examine the heightened rhetoric of copyright controls fostered by high-profile file-sharing cases like those involving Napster and Grokster, which further lead to hyper-control of copyright through legislative action. I also consider the literary estates of T.S. Eliot, Marianne Moore, and James Joyce, which would, arguably, charge for each cited word in scholarly works if able to do so. To restore the constitutional balance on which copyright was formed and provide Caputi, Jhally, and those who wish to draw upon the work of Eliot, Moore, and Joyce a fighting chance against corporate and estate copyright control, I then turn to copyright advocacy organizations such as Harvard's Berkman Center for Internet and Society, the Chilling Effects Project, and the Electronic Frontier Foundation. I conclude by describing the most likely means by which faculty can reassert fair use rights and better control scholarly works with a discussion of the history, accelerated growth, and reception of the open-access movement, and by suggesting disciplinary open-access archives.

My aim is not to provide legal advice or a comprehensive history of fair use in higher education. Rather, as a scholar who has studied and written about intellectual property concerns for over a decade, served as co-chair of the CCC-IP, co-drafted IP policies at two different universities, and served as a member of the union bargaining team for IP at my current institution, I hope to provide a clear picture of the forces currently driving academic fair use and how we can play a significant role in averting the fate that Silberberg (2001) predicted.

SCHOLARLY PRODUCTION

Jane Caputi has been giving presentations on the pornography of everyday life for over 11 years. Her work examines about 130 images mostly drawn from contemporary advertising and other popular cultural images, including some drawn from ancient and contemporary art. These images often juxtapose imagery from mainstream media showing, for example, cropped torsos and images representing hierarchal gender roles with graphic depictions from actual pornography showing women's bodies in similar or nearly identical sexually explicit positions. Caputi (2004) uses the term pornography to signify a world view based in gendered ideas and practices of sexualized inequality and draws upon circulating imagery to support her claims. The impact of her insightful cultural critiques is magnified by the images she presents. Several years ago, Caputi received an unsolicited grant from a progressive foundation in New Mexico to make a documentary based on her illustrated lectures. Because of the funding structure, her contract with the filmmaker and her plans for the film had to be approved by her academic institution's legal counsel. She discussed issues with

the campus attorney off and on for 2 years as she struggled with the producer to begin the project. University council was concerned that she needed permission from the copyright holders of the popular press images she was discussing in the film, even though the uses were for educational purposes.

An earlier case inspired Caputi to contact a copyright specialist: In 1991, Sut Jhally, a communications professor at the University of Massachusetts, successfully thwarted MTV's (and its parent company, media giant Viacom's) attempts to prevent him from showing his documentary, which critiqued sexist images in music videos (Jhally, 1990, 1992, 1995, 2007). Attorneys for MTV threatened to sue him and the university for the use of their trademarked logo and copyrighted broadcasts if he did not stop distributing *Dreamworlds*. Kembrew McLeod (2001) detailed Jhally's game of legal chicken with the major media conglomerate, explaining that even though his "appropriations of the music network's intellectual property fit the very definition of 'fair use'" and his university's attorneys acknowledge as much, they still advised him to back down. When he didn't, they told him he was on his own because the legal liability for the university was too great. Jhally established the Media Education Foundation to distribute the film and to bear the brunt of any legal battle. He then managed to get press releases picked up by many major news outlets. (MTV never responded, presumably because MTV's lawyers knew his work qualified as fair use.)

With this important precedent in mind, Caputi knew she should be able to produce her documentary, but she had to convince legal counsel and her producer to allow her to do so. She sought external consultation and learned that the public is entitled to use copyrighted material without permission or payment in certain circumstances, particularly for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (Title 17 U.S.C., Section 107). Caputi also learned that if a copyright owner sues and wins in court, then the defendant may be responsible for damages and court fees. Although her copyright attorney explained that there was no precise "right way" to proceed, the fair use four-factor analysis favored her use of the material:

1. the purpose and character of the use, whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work, whether factual or creative;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. the effect of the use upon the potential market for or value of the copy-righted work.

The circumstances for fair use mentioned above, including educational use and teaching, do not guarantee fair use; however, such uses are favored, especially when there are cultural or social benefits involved. Kenneth Crews (2000) explained that although fair use “is intended to apply to teaching, research, and other such activities ... educational purpose alone does not make a use fair.” Purpose is only one of four factors, and each factor is subject to interpretation by courts and must be reviewed within the specific facts of each case. Some policy-makers have incorrectly concluded that if a work is commercial, then the factor dealing with the nature of the work weighs against fair use. If this were true, no clip from a video production or a trade book could ever prevail for that factor. Other commentators have argued that if a viable license is easily available, “the action will directly conflict with the market for licensing the original” (Crews) and thereby tip the effect factor against fair use. Neither of these simplistic constructions of fair use is a valid generalization, even though they are rooted in “some truths under certain circumstances” (Crews). A reasoned analysis of all four factors must be conducted for a reliable evaluation. Furthermore, not all factors must lean in one direction for a given finding. A fifth moral factor is also often applied: Judges have evaluated the four criteria to find against fair use if the user acted either in bad faith (i.e., not being able to demonstrate that s/he reasonably believed that the use was a fair use) or in an offensive manner.

Caputi’s and Jhally’s cases make good demonstrations of how the factors are applied:

Purpose: In both cases, the images and video clips are part of academic arguments for educational purposes, which weighs in favor of fair use. The courts also favor transformative uses that do not merely reproduce but transform the work into something new of new utility. Clearly both documentaries are transformative; the purpose factor weighs unambiguously in favor of fair use.

Nature: The nature of the work examines characteristics of the work being used. The more factual and less creative the original work is, the more likely courts find for fair use. Because commercial, audiovisual, creative works are more strongly protected than factual works in print, this factor may

weigh more in favor of copyright holders like MTV and commercial advertisers. Yet, the transformative purpose for scholarly critique may mitigate the focus on this factor.

Amount: The two cases differ on this factor. Caputi utilized entire print ads, photographic representations or etchings from online sources and archeological texts, and single frame comics. Jhally edited clips of music videos, removing the music and dubbing a lecture track over the music. For Caputi, the amount factor could weigh in favor of the copyright holder in certain instances, particularly if many of the images were taken from the same source. But the court also takes into consideration whether the entire work is necessary for the educational purpose. Because her images come from so many sources and are clearly necessary for her analysis, this factor is likely to weigh in favor of fair use. Few courts would consider Jhally's use excessive unless he drew upon a large percentage of individual videos or excerpted the "heart" of a particular video. The latter would be hard to claim since no music track was included.

Market effect: In neither case is there likely to be any confusion of the cultural critiques of the commercial images with the originals, nor is it likely that a court will find that a purchase of the original should have been necessary for the use. When the purpose is research or scholarship for non-commercial uses, market effect may be difficult to prove. Courts are unlikely to find in either case that the limited circulation of these documentaries for dramatically different audiences and purposes is likely to compete with the original advertisements or music videos.

Although copyright owners might object to their products being critiqued in these ways, the very purpose of the fair use exemption for critical commentary is to prevent copyright holders from silencing critical voices. In this way, the fair use defense is often aligned with freedom of speech. Although there is no guarantee that fair use would be determined for Caputi or Jhally, assessment suggests fair use. Furthermore, if both scholars could prove that they completed this four-factor assessment prior to the actual production of their work, both would likely to be deemed to have acted in good faith, which could help their cases.

Even if both Caputi and Jhally prevailed, however, they have both risked being sued and being held responsible for damages and court fees. Unlike Jhally, most professors do not have the resources or audacity to take on potential lawsuits. Caputi, for example, took into consideration questions of which images to use, whether to use video clips, whether to obscure corporate logos, and how best to distribute her work. Some faculty, given the potential consequences, would simply give up the project.

INFLAMMATORY RHETORIC SHIFTS COPYRIGHT BALANCE

The examples of Caputi and Jhally shed light on several additional issues that concern faculty research. These cases expose a much broader problem that impacts scholarly work: Inflammatory copyright rhetoric leads corporate copyright holders to assert greater pressure on all markets they can control. To understand how this market pressure impacts our work, we must understand the role of fair use in the copyright regime.

Few of us realize how recently (1999) Shawn Fanning first conceived of Napster, which initiated grand-scale peer-to-peer music sharing (Lessig, 2004). Within 9 months of its launch, the tool claimed 10 million users. In another 9 months, there were 80 million registered users. The cultural, technological, and legal terrains were poised to change dramatically, in large part due to Napster. Tolerance for fair use plummeted, cease and desist letters proliferated, and the Recording Industry Association of America (RIAA) prosecuted users who “shared” files across the spectrum of peer-to-peer services that emerged between 2000 and 2002—Kazaa, Aimster, Morpheus, Musiccity, and Grokster, to name a few. One need only visit Grokster’s Web site to find a permanent memorial to illegal peer-to-peer sharing of music files. The page, still emblazoned with the Grokster trademark, reads:

The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners.

There are legal services for downloading music and movies.
This service is not one of them.

YOUR IP ADDRESS IS <your ip address here> AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous.

Lawrence Lessig (2004) explained the various forms of trading files and the recording industry's understandable reaction to it and posed the fundamental question that lies at the core of copyright law: "While the recording industry understandably says, 'This is how much we've lost,' we must also ask, 'How much has society gained from p2p sharing?'"

Copyright law was designed to protect creative works and foster the creation of new culture. The U.S. Constitution provides the mandate for fair use by promoting "the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries" (U.S. Const., art. 1, sec. 8., cl. 8). This limited monopoly of rights was designed to balance the needs of creators to make a reasonable return on their works and inventions for a limited period of time, with the work then turning toward the public domain to serve as fodder for the development of future creative works. Thus, as Jessica Litman (2001) argued, "copyright was a bargain between the public and the author, whereby the public bribed the author to create new works in return for limited commercial control over the new expression the author brought to their works" (p. 78). The delicate balance on which this bargain was struck, however, has shifted in favor of copyright holders. Bell (2002) noted that "the influence of ... rough-and-tumble politics merely ensures that copyright and patent law put public and private interests into an *indelicate imbalance*" (p. 8).

We can see the impact of this imbalance in copyright legislation over the course of the past 220 years. The first federal copyright legislation of 1790 set the maximum copyright term of 14 years with one 14-year renewal available. Over the course of the next 110 years, both the initial and renewal terms doubled. In 1961, the maximum length of a copyright term was 56 years. From 1962 to the present, the term has changed three times, extending copyright protection to 70 years, then life of all authors plus 50 years, and now life plus 70 years or a total of 95 years for commercial owners (Bell, 2007).

Perhaps the escalation of copyright term extension encouraged Congress in 1976 to codify the common law concept of fair use from the 1909 Copyright Act. With a delay of about 100 years before works move into the public domain, the codification provides a loose framework to ensure that copyright holders do not have absolute monopolies on their works. Furthermore, the "Supreme Court has described fair use as 'the guarantee of breathing space for new expression within the confines of Copyright law'" (Electronic Frontier Foundation, 2002).

SCHOLARSHIP ON CREATIVE WORKS

As Caputi learned, creative works are more protected than factual works. We see the implications of such a practice in the miniscule word count limits and rigid standards that publishers and literary estates have placed on fair use citation of published materials. Boynton Cook/Heinemann/Greenwood Press, for example, set a 300-word maximum for the use of any text (excluding illustrations) before permission is required and fees are paid; Peter Lang follows the same standard for citing poetry. Literary estates vary widely in what they will allow to be published and how much permissions cost. There are several particularly notorious estates that so regularly threaten lawsuits for what amounts to fair use citation that publishers typically would rather consent to arbitrary and sometimes outlandish demands rather than risk a lawsuit based on a fair use defense.

Anyone who has sought to publish a biography on T.S. Eliot has been thwarted by his widow for the past 40 years. D. T. Max (2006) noted the distaste the Eliot estate has for academics, recalling Eliot's widow Valerie's "distaste for members of the 'Ph.D. industry' and her 'dry, formal, excessively polite notes giving them the least help possible.'" Max also mentioned the niece of Marianne Moore, who "has been unusually strict with permissions; in 1989, she demanded that a biographer remove all quotations from the poet's unpublished letters." By far, however, the most notorious estate executor is Stephen James Joyce, grandson of James Joyce. Nate Anderson (2006) noted that "Stephen James Joyce has proved himself extraordinarily unwilling to allow scholars access to Joyce's private letters and writings, and has even objected to their use of passages from his grandfather's works." The difficulties of dealing with Stephen Joyce became so notorious that a special panel was formed to help scholars deal with him: The International James Joyce Foundation Special Panel on Intellectual Property has developed a lengthy online FAQ for scholars seeking permission from the Joyce estate. The FAQ notes that, contrary to common practice by many publishers and estates, "fair use cannot be reduced to a certain quantity of words or number of lines." This outlook is aligned with the multi-factor analysis that I use to discuss Caputi's and Jhally's work, which is flexible and depends on case circumstances. Nonetheless, publishers can and typically do insist on extremely conservative rules to avoid any possibilities of litigation.

One of the only cases to ever challenge and prevail against the Joyce estate was settled in June 2007. Carol Loeb Shloss, a Stanford professor, had been working on a biography of Lucia Joyce, Stephen's mentally ill aunt, and was about to publish *Lucia Joyce: To Dance in the Wake*. Stephen Joyce wrote her

and implied that he might sue if she quoted from copyrighted material. According to D. T. Max (2006), “Stephen pressured her publisher, Farrar, Straus & Giroux, which asked Shloss to cut many quotations.” With great angst and frustration, she complied, cutting her use from 10,000 words to 7,000. When an attorney wrote to Stephen to explain the cuts and how they followed the provisions of fair use, Stephen responded, “this sounds like a bad joke.” Copyright, he wrote, was meant “to protect the author’s rights as well as those who inherited them, which is my case with respect to James Joyce.” He noted, “You should be aware of the fact that over the past decade the James Joyce Estate’s ‘record,’ in legal terms, is crystal clear and we have proven on a number of occasions that we are prepared to put our money where our mouth is.”

Such disregard for the balance of rights set forth in the U.S. Constitution is not uncommon. The shift in metaphors from bargain to incentive that Litman (2001) discussed has emboldened corporate and estate owners alike. Taking is taking from the owners’ perspective, a belief strengthened in the post-Napster era. Soon after the publication of her book, Shloss met the copyright lawyer Lawrence Lessig. After Shloss shared with him her correspondence with Stephen Joyce, Lessig decided to take her case pro bono. In March 2005, he suggested that she gather the material that she had purged from the book and post it on the Web “to aid scholars and researchers.” Although much of the material that Shloss sought to publish online was previously unpublished work, the fair use statute states specifically that unpublished work will not bar the finding of fair use if the case details warrant such a finding. Furthermore, when scholars or publishers ask permission to use material in ways that would normally be understood as fair use, they typically do so to avoid litigation or threats of legal action. Even if permission is denied, fair use is not negated under U.S. copyright law. With this knowledge in mind, Lessig crafted a letter to the Joyce estate and explained that even though Farrar, Strauss, & Giroux had asked Shloss to remove the material, the quotations did in fact fall under the fair use doctrine. Joyce’s lawyers responded, as one might imagine, with surprise and veiled threats. In response, Lessig joined forces with Robert Spoo, a Joyce scholar turned copyright lawyer, and David Olson, a Stanford associate, to prepare a lawsuit for a declaratory judgment and injunctive relief to allow Shloss to publish the materials online without the threat of being sued by the defendants. After additional posturing, the estate realized it would likely lose the case if it went to trial and settled out of court; Shloss was granted attorney fees in a separate settlement hearing. Although the estate’s attorney called the result “more of a nuisance settlement,” the Fair Use Project saw the “case more broadly, as part of its ongoing efforts to loosen the tightening grip of copyright holders’ intent on discouraging new creative works” (Cavanaugh, 2007). The

atmosphere of intimidation that Napster and Grokster spawned in the music world had already been brewing in estate permission practices, but finally came to a head in this example.

If the case had been litigated and decided in favor of Shloss, it would have had more legal impact. Also, had Stephen Joyce not pursued rights well beyond those made available in the U.S. copyright statute—including calls to librarians to prevent Shloss from viewing unpublished Joyce letters or publishing Lucia Joyce’s medical records (which he did not own)—the case would have had a wider impact. Although the settlement does not offer litigants great leverage for future cases, it does frame the set of issues that scholars who work primarily with creative works must face in order to publish their scholarly works. Furthermore, it sets an important precedent that literary estates and publishers need to heed.

EMERGENCE OF STRONG FAIR USE ADVOCATES

If no strong and vocal advocates had emerged to fight for fair use over the past 10 years, Silberberg’s (2001) proclamation that fair use was doomed for schools might have already come true. These issues are further represented in another recent, high-profile case. In October 2008, J. K. Rowling won a decision against RDR Books for copyright infringement for an encyclopedic work entitled *The Lexicon* that Steven Vander Ark wrote based on his comprehensive Web site of all things Harry Potter. For 10 years, the site had been growing and serving as a resource for fans and even J. K. Rowling, her publisher, Bloomsbury, and her film producer, Warner Bros. When Vander Ark began to pursue a book project, Rowling and Warner Bros. sued, claiming copyright violations (*Warner Bros. Entertainment Inc. and J. K. Rowling v. RDR Books et al.*, 2008). J. K. Rowling is known for her desire to control all aspects of productions concerning Harry Potter. Most of the materials for the book had been posted online for many years; thus the Stanford Law School and its affiliated Fair Use Project joined forces with RDR’s legal team to defend the case. Here was an opportunity to win a strategic case against both the movie industry and a huge publishing conglomerate—and to gain high-profile notoriety by taking on J. K. Rowling. The drama of the case was impressive. The popular press set up a battle between media giant Warner Bros. and famously wealthy J. K. Rowling, and the little publisher RDR Books and librarian Stephen Vander Ark.

The judge’s decision was, in the end, even-handed and significant for both copyright holders and creators who do scholarship on creative works. Judge Patterson found that *The Lexicon* used too much of Rowlings’ creative language

and descriptions, often without citation. He also found that although the encyclopedic text was transformative enough not to infringe upon the novels, it was not considered transformative enough of the two companion books Rowling has published, *Quidditch Through the Ages* and *Fantastic Beasts & Where to Find Them*, themselves encyclopedic in nature. The court also found that *The Lexicon* was not derivative because it was mostly transformative; the fact that Rowling planned to write her own encyclopedia thus had no bearing on the case.

Even though Vander Ark and RDR lost their fair use defense, the case was as much a win for creators as a win for fair use advocates. It set useful standards for future encyclopedic works and other non-creative works that faculty may produce if they follow a few clear rules: 1) use all copyrighted material carefully; 2) use only as much from the work as necessary—do not include full songs, poems, or creative language that could be rephrased or summarized; and 3) ensure the work is consistently transformative—include additional scholarly reflection that does not appear in the original works. The judge concluded that *The Lexicon* was not fair use “in its current state,” but he did leave the door open not only for a revision and resubmission of the work but also future works by stating that “reference works that share the Lexicon’s purpose of aiding readers of literature generally should be encouraged rather than stifled” (*Warner Bros. Entertainment Inc. and J. K. Rowling v. RDR Books et al.*, 2008). RDR Books withdrew its initial appeal when Vander Ark completed a substantial revision. *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials* has now been on sale since January 2009.

Both the Shloss and Vander Art cases demonstrate a dramatic shift in copyright litigation within the past few years. Prior to the emergence of strong advocate organizations like the Fair Use Project, the Berkman Center of the Harvard Law School, and the Electronic Frontier Foundation, publishers, authors, and professors like Caputi and Jhally were left to their own resources if challenged by a copyright holder. Almost no fair use cases have gone to court concerning faculty work because faculty typically have not been able to pay the legal costs. Furthermore, scholars usually agree to unreasonable and overly restrictive publishing contracts to get published, and without much reflection. Little attention is paid to increasing copyright restrictions, citation limitations, and the insistence by publishers to garner permissions for nearly all cited work. Faculty are not often aware of what Bell (1998) identified as *fared use*—the increased expectations of publishers that all uses of copyrighted work should be licensed. We see the impact of this thinking in the dramatic growth of the Copyright Clearance Center and the increased emphasis in the courts on the harm to existing markets in fair use cases concerning use of scholarly works. Most faculty do not realize that the courts recognize customary practices as evidence for shift-

ing markets and business models. Perhaps most important of all, faculty do not seem to realize that these chilling effects on scholarship, teaching, and creation are not inevitable, even though they are currently tipping the delicate balance on which copyright is constitutionally founded in the favor of copyright holders. This quiet acquiescence will lead to greater copyright restrictions unless faculty learn more about advocacy organizations, consciously assert their rights, and play an active role in advocating for alternative disciplinary practices.

Since 1998, when the Berkman Center for Internet and Society at Harvard Law School was officially named, increasing numbers of fair use advocacy groups have emerged to counter these chilling effects. Wendy Seltzer originally envisioned the Chilling Effects Project as a clearinghouse to vet cease and desist letters—like the ones that Sut Jhally received from MTV—which are often sent to intimidate scholars and other users. The Electronic Frontier Foundation, with which the Chilling Effects Project is affiliated, provides legal support to important fair use cases. But the Berkman Center for Internet and Society at Harvard Law School, the Electronic Frontier Foundation, the Future of Music Foundation, Digitalconsumers.org, Creative Commons, and Stanford’s Center for Internet and Society and the Fair Use Project, among others, have limited resources and must be selective in the cases they support.

Each new, high-profile copyright case and each piece of legislation that carves out exceptions and exemptions for corporate interests or further restricts educational or public use of copyrighted works (like the Copyright Term Extension Act and the Digital Millennium Copyright Act) inspires fair use advocates to explore new options. To pay for its litigation with J. K. Rowling and Warner Bros, RDR Books created the Right to Write Fund. The nonprofit Berkman Center’s Citizen Media Law Project pledged to work with the Right to Write Fund’s mission of serving as “an educational repository and clearinghouse for freedom of expression and ‘fair use’ issues that writers, filmmakers, professors, recording artists, and publishers encounter when moving among the worlds of print, Internet, film, the fine arts, and new media” (Reidy, 2008). As these resources continue to grow and proliferate, more faculty who find themselves in need of legal support or advice will benefit from them. In the interim, faculty must be aware of the ways in which affirmative fair use rights are shrinking and must become advocates for alternative management practices.

ADVOCATING FOR AFFIRMATIVE FAIR USE RIGHTS

Faculty have a range of ways to advocate for affirmative fair use rights for their scholarly works. Knowing and understanding rights is the first step to-

ward protecting them. There are many resources available for helping faculty better understand the nuances of copyright law and the role of fair use. In 2008, the *MLA Style Manual and Guide to Scholarly Publishing* published a chapter on copyright, providing a clear and concise summary of each facet of the U.S. copyright law. Although this chapter makes few recommendations on how to interpret the statute, it is easily accessible and provides a useful framework for understanding the complex copyright landscape. Stanford's Copyright and Fair Use Web site is an excellent resource; its FAQs for copyright and fair use pose the questions we need to ask, provide brief but accurate summaries of copyright principles, offer brief summaries of key case law examples, and address all forms of media. The Berkman Center for Internet and Society provides an extensive list of advocacy projects including the Center for Citizen Media, Chilling Effects, Citizen Media Law, Cooperation, Copyright for Librarians, Creative Commons, Cyberlaw Clinic, Freedom To Teach: an Educational Fair Use, and many others. Each of these projects provides its own unique set of resources, all worth exploring.

Faculty can also pay attention to the rhetorics of control and free access that drive most public debates over access to academic works. Understanding the impact of examples like those described earlier in this chapter provides important guidance. Furthermore, faculty can seek university copyright policies. In another collection, I (2009) provide a careful analysis of university intellectual property policies and strategies for faculty for reading these policies; in the appendix to that chapter, I offer fifteen recommendations that all faculty should consider when reading intellectual property policies at their institutions.

Among the possible strategies that faculty can pursue to extend public access to work and even the playing field with corporate interests that control copyright, the most significant are publishing in open-access journals and participating in university institutional repositories (IRs). The open-access (OA) movement has been building for about two decades, but has expanded dramatically in the past 5 years or so. Participation in OA practices provide faculty ways to resist over-control of scholarly work and to change the ways in which new knowledge is produced and disseminated. Institutional repositories proliferated beginning around 2003; although related to open-access initiatives, institutional repositories are typically university-based and have not been as successful as open-access initiatives as a whole. I close this chapter with a brief explanation and history of OA and IR initiatives, the reception these initiatives have had by faculty, and a set of strategies that faculty can use to guide their publishing practices.

THE OPEN-ACCESS MOVEMENT AND INSTITUTIONAL REPOSITORIES

Peter Suber (2007b) explained in his blog that open-access works are “digital, online, free of charge, and free of most copyright and licensing restrictions,” and are “compatible with copyright, peer review, revenue (even profit), print, preservation, prestige, career-advancement, indexing, and other features and supportive services associated with conventional scholarly literature.” There are two primary standards of OA publishing: gold and green. Gold OA journals are peer-reviewed, allow authors to retain copyrights, and typically provide open access to research titles without delay. The green standard represents non-peer-reviewed works in archives or repositories that are often pre- or postprint reproductions of journal articles. Faculty have a choice of where they publish and can influence journal editors to participate in open-access practices.

In 1991, Paul Ginsparg helped to develop what is now called the arXiv.org e-print archive while he was working for the Los Alamos National Laboratory. Since that time, he and Stevan Harnad, a cognitive scientist, have advocated for and written about the need for open-access electronic archives to subvert the time delays, access problems, and costs of scholarly publications. In a proposal, Harnad (1995) laid down the gauntlet for open-access archiving. He stated that if

every esoteric [non-trade, no-market] author in the world this very day established a globally accessible local ftp archive for every piece of esoteric writing from this day forward, the long-heralded transition from paper publication to purely electronic publication (of esoteric research) would follow suit almost immediately.

His proposal spawned a series of online discussions among physicists, chemists, publishers, librarians, developers of the Web, and others. (A valuable archive of these exchanges is available, along with the original proposal, by the Association of Research Libraries.) More importantly, this conversation launched over a decade of advocacy, partnerships, experiments, research, dramatic growth of the e-print arXiv, emergence of thousands of open-access journals, and a host of self-archiving initiatives.

Soon after Harnad (1995) posted his proposal online, he helped to craft several important initiatives. He played an important role in galvanizing an international group of colleagues with funding from the Open Society Institute that led to the 2002 Budapest Open Access Initiative, which became a major

turning point in the movement. Over 4,000 individuals signed the initiative; 380 organizations signed as well, including universities from all over the world, libraries, medical schools, non-profit organizations, journals, institutes, societies, councils, research centers, and other institutions (Chan, 2002).

Other declarations followed, including the 2003 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities and the 2003 Bethesda Statement on Open Access Publishing. The latter initiative established PubMed as a free digital archive of biomedical and life sciences journal literature at the U.S. National Institutes of Health (NIH). In July 2004, the U.S. House Appropriations Committee adopted a set of recommendations for the 2005 federal budget, which became the House Report 108-636. This bill expressed concern that insufficient public access was available for reports and data resulting from NIH-funded research. Citing the rising costs of scientific journal subscriptions, the report recommended that the NIH begin requiring a copy of any manuscript produced by or through NIH grant-funded work and that work be added to the National Library of Medicine's (NLM) PubMed directory. The report further stipulated that supplemental materials be "freely and continuously available six months after publication, or immediately in cases in which some or all of the publication costs are paid with NIH grant funds" (Wallace, 2004). In January 2008, the NIH announced a revision of its policy as a result of the Consolidated Appropriations Act, 2008. This law now stipulates that, when consistent with copyright law,

all investigators funded by the NIH [shall] submit or have submitted for them to the National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication.

At the same time that the NIH pursued its public-access initiative, the RoMEO (Rights Metadata for Open Archiving) and SHERPA (Securing a Hybrid Environment for Research Preservation and Access, an institutional repository partnership of over 30 universities) projects were developing in the U.K. The former project studies "issues relating to the open-archiving of research papers by UK academics," while the latter lists publishers and their associated copyright agreements concerning self-archiving. SHERPA also runs a service called OpenDOAR, which lists a number of subject-based institutional repositories for self-archiving world-wide. Not surprisingly, PubMed sponsors a comparable list (the Open Access List) of publishers willing to participate in NIH's open-access archive.

Concurrently in the U.S., a similar initiative took root under the auspices of the Coalition for Networked Information (CNI). Clifford Lynch and Joan Lippincott (2005) described a CNI survey of its academic member institutions to examine the current state of institutional repositories in the U.S. Their survey went out to U.S. research institutions and colleges, with a return rate of about 80%. They found that about 40% of the responding universities and 43% of responding colleges had developed institutional repositories; 88% of the institutions that did not yet have repositories were planning to develop them or become part of multi-institutional repositories. Lynch and Lippincott concluded that IRs in the U.S. “are being positioned decisively as general-purpose infrastructure within the context of changing scholarly practice, within e-research and cyberinfrastructure, and in visions of the university in the digital age.” The purposes of these repositories differ considerably, from dissertation or preprint archives to digitized music scores and campus blogs.

Based directly on the language of the open-access archive movement, the policies of the NIH, and the explosive growth of IR initiatives, the University of California system published white papers that directed faculty to participate in a mandatory state-wide archive. In December 2005 the University of California Academic Council’s Special Committee on Scholarly Communication published a set of white papers in which they argued that:

faculty shall routinely grant to The Regents of the University of California a limited, irrevocable, perpetual, worldwide, non-exclusive license to place the faculty member’s scholarly work in a non-commercial open-access repository for purposes of online dissemination and preservation on behalf of the author and the public.

This proposal was bold and direct and was the biggest of its kind in the U.S. It met much more resistance from faculty than administrators anticipated; terms like “irrevocable,” “perpetual,” and “worldwide” are not humanities-friendly. Faculty expressed their concerns in a 2007 attitude survey. Perhaps the most telling response stated that “scholars are aware of alternative forms of dissemination but are concerned about preserving their current publishing outlets” (University of California, 2007). Furthermore, faculty asserted that “the current tenure and promotion system impedes changes in faculty behavior.” As a result of faculty responses, the University of California Open Access Policy worked for 2 years to soften its mandate by qualifying which texts would be posted and by shifting its tone significantly. The 2007 revision sought to “increase authors’ influence in scholarly publishing by establishing a collective

practice of retaining a right to open access dissemination of certain scholarly works” (p. 2) and asserted that faculty would routinely grant the “Regents of the University of California a license to place in a non-commercial open-access online repository the faculty member’s scholarly work published in a scholarly journal or conference proceedings.” Although the tenor of the language shifted in useful ways from the initial white paper, the commitment from the universities dramatically increased. The new policy asserted that the Academic Senate, in collaboration with the President’s office, would “contact scholarly publishers and establish support mechanisms for the policy and the use of scholarly work which it covers.” The University would “support faculty in their efforts to retain open access dissemination rights, and to foster a broad spectrum of publication venues” and would not receive any money for doing so.

Faculty resistance outside of the sciences is disappointing, albeit not surprising; the economy of status that drives faculty work is fueled by tenure and promotion. As the work of Harnad (1995, 1997) and Ginsparg (1997) have demonstrated, faculty in the sciences have typically valued dissemination and first discovery in their scholarly work. Those of us in the humanities have typically valued scholarly achievement and production over immediacy and first ownership of ideas.

One might account for these differences in several ways: 1) scientific research often leads to time-sensitive medical or pharmaceutical developments; 2) scientific research may also lead to development of patents, licenses, or competitive grants; and 3) scientific culture is founded on a spirit of international cooperation and the desire for first recognition of discoveries. On the other hand, research in the humanities rarely leads to time-sensitive discoveries and does not foster a first-to-market ideology. Collaboration is typically based on personal relationships rather than teams of scholars striving to solve the same set of problems across international borders. Furthermore, although many humanities scholars lament the pace of production, few attempt to advocate for changes in the systems driving production practices. Perhaps most important of all, humanities faculty depend so much on peer-reviewed research for tenure and promotion that they are nervous about any changes that could jeopardize their chances for promotion. Ultimately, the sciences have proven that open access publication and institutional and professional association repositories have not negatively impacted tenure and promotion decisions. Physics, chemistry, and certain fields in math and computer science have been posting nearly all of their scholarly work as pre- and postprints since the 1980s in online archives. For humanities faculty to realize the benefits of disciplinary open-access archiving, the culture of publishing has to change, which involves shifting faculty attitudes and practices, participating in institutional promotion practices,

garnering university support for open-access initiatives, and fomenting change in relationships with publishers. This is no small set of changes.

In 1998, Joan Latchaw and I called for open-access publishing of work in the field of computers and composition. Change in academic culture occurs slowly but is often marked by precipitating events. Assertive initiatives are necessary to stimulate the shift of culture needed in the humanities. The California open-access repository and the NIH mandate set the stage for what would become, according to Suber (2007a), the first U.S. open-access, faculty-initiated, university-wide mandate. On February 18, 2008, the Harvard University faculty of Arts and Letters unanimously voted for what has become the first open-access mandate “to be adopted by faculty rather than administrators, the first adopted policy to focus on permissions rather than deposits, and the first to catch the worldwide attention of the press and blogosphere” (Suber, 2008). Suber, an open-access activist with Public Knowledge, a nonprofit group in Washington, D.C., explained the permissions focus of this mandate as opposed to a deposit mandate: Rather than requiring faculty to deposit copies of their articles after they publish postprints in an institutional repository, the Harvard mandate merely requires faculty “to give the university permission (non-exclusive permission) to host the postprints in the IR.” Harvard’s mandate required all faculty in the College of Arts and Letters to participate in this open-access repository or write for permission to opt out. Further, the university takes responsibility for depositing the work itself. Such a model “reduces the demands on faculty and increases the certainty about permissions. As long as the university is willing to pay people, usually librarians, to make the actual deposits, it could be a faster and more frictionless way to move the deposit rate toward 100%.” Suber cataloged the astounding range of reactions in the popular press, at universities worldwide, at open-access organizations, and on fair use advocacy sites.

Notwithstanding resistance to the California institutional repository, the California and Harvard initiatives mark an important turning point in IR and OA mandates, shifting the focus from the sciences to the humanities. Suber (2007a, 2007b, 2008), Harnad (1995), and Ginsparg (1997) continue to advocate strongly for the growth of the movement. Suber has consolidated recommendations from scholars into a comprehensive list of strategies that faculty can use to advocate for open-access publishing at all levels of our daily work. These recommendations include submitting research in the form of preprints, postprints, or simultaneous prints to open access journals; advocating for institutional repositories at our home institutions; asking publishers to release certain ownership rights so that scholars can post published work in an institutional repository; depositing research data with corresponding research in OA

archives; accepting invitations to join peer-review boards of OA journals but not journals that are not open-access; and numerous additional possibilities (Suber, 2007b).

CONCLUSION

Composition scholars have typically been more open to change than others in the humanities. We were among the first to theorize assessment and make assessment part of our scholarly mission. We led the way in integrating all forms of computer technologies into the classroom and theorizing their many strengths and recognizing their liabilities. We have been the first to form an intellectual property caucus to educate our scholarly communities of the significance of copyright concerns in our classes and research. We are in a unique position as a discipline to extend the purpose, promise, and value of fair use by advocating open-access publishing in the humanities. In 2001, the emergence of CompPile, a comprehensive online composition bibliography of scholarship ranging from 1939 to the present, marked the most significant contribution to the spirit of free research and scholarship in the field. Even with this extraordinary resource, however, and several open-access initiatives in composition studies like the WAC Clearinghouse, the Computers and Composition Digital Press, and a few open-access text books (including Flat World Knowledge and Writing Spaces: Readings on Writing), compositionists as a whole have not invested in open-access publishing.

When Joan and I (1998) first proposed the development of a disciplinary preprint archive for the field of computers and composition, we were imagining something more than a bibliography—even more than an open-access archive. We explored the development of a community-based preprint archive that would serve as the hub of research, conversation, and professional development for a dynamic online community whose work was tied to such a home base resembling Michel Foucault's heterotopic spaces. Foucault used this term to define cultural spaces that have "precise and determined functions" that may shift over time. Among other traits, heterotopias function in relation to all spaces that exist outside of them. At the same time that they mark a culturally definable space that is unlike any other space, they also act as microcosms reflecting larger cultural patterns or social orders.

We wrote:

If we developed a preprint archive system to which all members of the community contributed their pre-published texts,

we could create the most complex heterotopic virtual archive available to date. And because this community is so diverse and crosses so many disciplinary boundaries, this site could eventually house most new knowledge that concerned intellectual property, copyright, fair use, cross disciplinary concerns of integrating technology into teaching, and more generally the impacts of computer technology on culture at large. (Galín & Latchaw, 1998)

At that time, we were imagining a living archive that would serve as a place to meet, do research, house and present scholarly work, and build community relationships beginning within the burgeoning community of computers and composition. We realized then that such a radical shift in academic culture would have to begin small within a community that was already innovative, accepting of cultural change, and ready or willing to make such a shift. We imagined that “not-for-profit academics, professional organizations, and electronic journal editorial boards could build in value added resources that would encourage regular and repeated use of this professional working space.” In so doing, a crystallizing structure would emerge on which larger sectors of the discipline could build. We suggested that:

Spin-off publications would surely emerge as the archives continued to grow exponentially. Students in undergraduate and graduate classes would likely develop real-world writing projects that contribute to the review and linking systems of the raw materials available online. Libraries would develop reference systems to manage the dynamic body of resources and materials online as professional organizations developed LASE-like disciplinary search engines and electronic agents developed more advanced on-the-fly annotated meta-hyper-text engines. (Galín & Latchaw, 1998)

We offered this vision at the moment that the open-access movement had really just begun, building on Harnad’s (1995) and Ginsparg’s (1997) vision of preprint archives. The range of possibilities has grown exponentially since that time with the development of pre- and postprint open access archives, green and gold standard open-access journals, institutional repositories, open-access agreements and legislation, Creative Commons licensing, the emergence of advocacy organizations, and mandates for open-access publish-

ing. All of these changes have made it possible to envision online disciplinary heterotopic spaces that challenge the ways in which we have done our work for over 100 years.

Just a decade ago, few could see the way forward to such a disciplinary culture. There were too many obstacles, too little attention to fair use and its impact on scholarly work, and too much habitual thinking. Still, substantial obstacles remain; as Bell explained (2007), “lobbying by special interests ... invariably ensure[s] that copyright and patent law favors private interests over public ones” (p. 7). In February 2009, the Fair Copyright in Research Works Act (H.R. 801) was introduced to the Judiciary Committee in the House of Representatives to reverse the NIH open-access mandate. The act seeks to amend the U.S. Copyright Code to prohibit “federal agencies from requiring as a condition of funding agreements public access to the products of the research they fund” (DigitalKoans, 2009). Such legislation and continued corporate pressure in high-profile lawsuits (like those of Napster, Grokster, and RDR Books) can only be overcome by organized efforts at all levels. While the faculty in the University of California system remind us that no such models can work that do not take into consideration tenure and promotion practices, the slow process of disciplinary change occurs with moderate steps forward.

Fair use practices lay at the heart of this vision. Faculty have to assert their rights to pursue their research despite corporate attempts to shut them down. Jane Caputi, Sut Jhally, Carol Shloss, Steven Vander Ark, and the advocacy groups that support them remind us how important it is to push back. Paul Ginsparg, Stephen Harnad, and Peter Suber offer strategies for us to push forward. The CompPile database, Joan Latchaw, and I offer a starting place to imagine future possibilities. The CCCC Caucus on Intellectual Property is keeping an eye on these larger concerns and making steps to educate National Council for Teachers of English (NCTE) members as a whole. The organization will continue to publish summaries of important cases affecting NCTE constituents and present on issues of fair use, open-access, open-source, and copyright in the classroom and our scholarly works, but we as faculty need to advocate at our own institutions, promote change on our campuses, and participate in institutional repositories and other open-access initiatives. It may take 10 more years before we realize the kind of heterotopic community that Joan and I were imagining in 1998. Certainly, it will take more work to articulate what that digital community will look like and to negotiate the changes necessary to arrive there; to get there, however, faculty must assume greater control over their scholarly works.

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