

14 RESPONSE TO PART II— BEING RHETORICAL WHEN WE TEACH INTELLECTUAL PROPERTY AND FAIR USE

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Let's start with the obvious: Language is a shared resource.

I wrote that five-word phrase—"language is a shared resource"—all by myself. I swear I did, or I thought I did. But then I did a phrase search in Google and discovered that the phrase is not original! It was said before, in a 2002 book by Tor Nørretranders called *The Generous Man*. Well, that's not quite true—actually, the phrase is the English translation by Jonathan Sydenham of a phrase Nørretranders expressed in Danish. The English phrase also appeared in a 2006 article by J.C. Spender in a business journal, so he must have plagiarized it from Nørretranders—or, rather, Sydenham. What a trail of deceit; it's all very dense and confusing.

Things get even worse. The more egregious act of plagiarism in paragraph one is actually the phrase "let's start with the obvious," a journalistic cliché of the first rank. Don't even bother to Google search that one—it's ubiquitous in sports and entertainment features, in editorials, in advertising.

I thought what I wrote as paragraph one was my own, but clearly it is not. I must have plagiarized it, the entire first two sentences of my paper. The textual evidence is conclusive, incontrovertible, damning. Am I to be charged with academic dishonesty, along with Steve Westbrook, who admits to stealing a phrase from Raymond Carver for the title of his chapter? Or else ...

Maybe I'm just unoriginal. Maybe I think in clichés. Maybe I am prone to ignorantly parroting phrases from my linguistic discourse community—like

Thomas Jefferson did when he wrote the Declaration of Independence, which repeated verbatim

traces from a First Continental Congress resolution, a Massachusetts Council declaration, George Mason's "Declaration of Rights for Virginia," a political pamphlet of James Otis, and a variety of other sources, including a colonial play. The overall form of the Declaration (theoretical argument followed by list of grievances) strongly resembles, ironically, the English Bill of Rights of 1689, in which Parliament lists the abuses of James II and declares new powers for itself. Several of the abuses in the Declaration seem to have been taken, more or less verbatim, from a *Pennsylvania Evening Post* article. And the most memorable phrases in the Declaration seem to be least Jefferson's: "That all men are created equal" is a sentiment from Euripides which Jefferson copied in his literary commonplace book as a boy; "Life, Liberty, and the pursuit of Happiness" was a cliché of the times, appearing in numerous political documents. (Porter, 1986, p. 36)

Thomas Jefferson is a plagiarist, too, and one of the worst ever! Or else...

Perhaps most of what we say, in speech and writing, is "plagiarized" in the sense that it echoes, it reproduces, verisimultudinosly, phrases that we have read, heard, or felt somewhere else before. But *plagiarism* is such a negative term. Let's call it *intertextuality*, as Steve Westbrook does: The texts we create, in speech or in writing, are always comprised of others' texts—because fundamentally language is a shared resource and because fundamentally we are always speaking and writing in conversation with others, which often entails reproducing their speech/writing, even when we do not always explicitly acknowledge those piracies.

We might go further, in fact, and say that reproducing other people's speaking and writing—without attribution—is the most effective kind of rhetoric, because echoing what others think, feel, believe, and say is a legitimate rhetorical strategy for establishing rhetorical common ground with an audience. The power of the Declaration of Independence came about precisely because it was an *assemblage*—to use a key term from TyAnna Herrington's chapter—of existing political phrases, beliefs, attitudes, and ideas of the time. Assemblage is not plagiarism, because it involves strategically collecting and organizing phrases into new configurations for a new context and audience—a process that in classical rhetoric was called *compilatio*. We might also call it *re-mixing*—and

this act is fundamental to how rhetoric works, not just in the digital age but in all ages (DeVoss & Porter, 2006).

The contributing authors to Part II of this collection recognize that intertextuality and assemblage, so fundamental to literacy production, raise important questions about intellectual property and fair use. It is impossible to write without doing some unattributed copying. We can't get through our day without it. We "plagiarize" all the time, in the sense that we are borrowing bits and pieces of language from other sources and repeating these fragments, echoing them, inserting them in new contexts, appropriating them, and redistributing them. And, of course, this is not always plagiarism.

And, of course, sometimes it is. Understanding that dividing line between "sharing" and "stealing"—to borrow Westbrook's language—is critical to ethical (as well as legal) composing.

The Part II essays address this all-important distinction between sharing and stealing and offer strategies for helping student writers understand the difference, make smart decisions, and become wise and ethical users of others' language—"language" defined broadly to include audio, video, and graphic, as well as textual language (speech and writing). These essays emphasize the importance of teaching intellectual property and fair use, and overall I could not agree with the authors more: We absolutely need to be teaching copyright issues as an integral part of all composition courses, but particularly in first-year composition. I agree with Ashley Hall, Kathie Gossett, and Elizabeth Vincelette that our focus as instructors should not be "lament[ing] ... the immoral and unconscionable actions of our students." Rather, our focus should be on teaching the ethics and politics of copyright and on teaching students to be advocates of fair use as well as of copyright. So, we all agree, we should be teaching students about intellectual property. The tougher question, though, is the how question: *How* should we teach intellectual property and fair use accurately, responsibly, effectively?

Thus far, we composition teachers haven't done a very good job teaching copyright accurately. Both Janice Walker and Steve Westbrook point out that many textbooks and style guides in our field still misrepresent copyright issues and/or do an inadequate job of explaining their intricacies and nuances (e.g., Walker's discussion of the 2009 *MLA Handbook*). TyAnna Herrington says that "misperceptions and inaccuracies regarding intellectual property law are both extreme and ubiquitous in this age of digital communication." Alas, especially among composition teachers, it seems.

Westbrook points to some confusions in our composition textbooks—including in some big-name, big-selling textbooks; textbooks often do not acknowledge that "the conditions for determining fair use are independent of

documentation.” This is a key distinction, and one that our field has not fully addressed. Citing the authors of a work may satisfy the conditions for academic integrity, but that is not the same as satisfying the conditions for fair use. Westbrook suggests that composition teachers themselves need to understand these realms better than they do.

Sometimes when we teach intellectual property and fair use, we slip into fallacies of oversimplification. One fallacy that Westbrook discusses errs on the side of excessive liberty—that is, the assumption that merely citing your sources is good enough. That fallacy confuses the realm of academic integrity and citation practices with the realm of copyright. But another fallacy exists in excessive constraint: The guideline that insists we should “always ask permission” is bad advice, too. As Westbrook says, “it oversimplifies the complexity” of how fair use operates and has the secondary effect of “obfuscat[ing] or even eras[ing] the concept of fair use.” “Always ask permission” is a bad guideline because it contributes to the erosion of the Fair Use doctrine—and this also can impede our First Amendment rights as well. Powerful interests have used the threat of copyright infringement as a way to block the exercise of free speech, as both Herrington and Westbrook discuss. Westbrook cites the example of how Diebold used the threat of copyright infringement to stifle journalistic information about the unreliability of Diebold voting machines. This is a great example, first, because it highlights the importance of protecting the Fair Use provision of U.S. Copyright Law as integral to First Amendment rights, but also because Judge Fogel’s decision in the case (*Online Policy Group v. Diebold, Inc.*, 2004) models the kind of step-by-step reasoning that is fundamental for writers making a fair use determination. As Westbrook says, it is that form of reasoning and analysis we should be teaching in composition.

So, first, we need to recognize that there are two different systems in play here: the realm of intellectual property/infringement and the realm of academic integrity/plagiarism. The first is a legal realm, the second an ethical realm. If a student buys a research paper from a term paper mill and submits it as his own, that is pretty clearly an act of academic dishonesty (plagiarism), but probably not a copyright infringement (if the paper purchased has been licensed for reuse). Conversely, if a student makes a YouTube video using music and images from copyrighted sources, she can uphold the standards of academic integrity (and avoid the charge of plagiarism) by citing those sources in her video. But that has nothing to do with the question of copyright: the student’s academically appropriate video could still infringe upon copyright. We need to be teaching both realms—explaining their differences and identifying their points of overlap.

Second, in talking about the realm of intellectual property, we need to make sure to teach that realm as having two sides—a fundamental tension be-



Figure 1: The ethics of using others' texts—the simplistic view.

tween “the property side” (the author’s or creator’s side) and “the use side” (the user’s side, the social good side):

Copyright law ... is essentially characterized by a *balance*: between (a) creating a system of incentive by rewarding the author’s labor and (b) encouraging benefits to society from the flow of information that can stimulate new ideas, inventions, and creations. (DeVoss & Porter, 2006, p. 185)

Questions of intellectual property always involve balancing the rights of the creator with the rights of the user (and the rights of society at large). So in talking about this realm, I believe we should refer to it not just one-sidedly as “intellectual property” or “copyright,”¹ but rather we should be sure to acknowledge the duality in our description: Let’s always label it “intellectual property and fair use”—a binary phrase that acknowledges the tension fundamental to the area. Give both sides their due.

Third, we need to teach that this realm is not a simple binary, black-and-white world of clear rights and wrongs (as Figure 1 represents).

Rather, the realm consists of some cases and practices that are clearly acceptable, others that are clearly not acceptable, and a whole host of practices and uses of others’ material where the decision is complicated, uncertain, unclear, and gray. In short, the realm is contextually complicated (as Figure 2 represents).

As writers, we face complicated decisions regularly—probably every day. For the really important stuff, we should seek expert advice. But because we can’t afford to email our IP lawyers about every decision, we typically answer

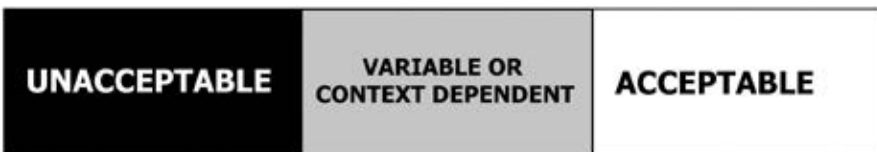


Figure 2: The ethics of using others’ texts—the rhetorically complicated view.

these questions on our own and decide upon some reasonable course of action. We assess the circumstances and make a judgment call. Hopefully, an informed call.

Jim Ridolfo and Martine Rife provide an interesting case that falls within the gray area, I would say: Michigan State University's appropriation of Maggie Ryan's image for their own marketing purposes. As Ridolfo and Rife say, "none of the legal/conceptual frameworks we have set forth ... fully address the 'right' and 'wrong' of the institution's appropriation." Exactly. What their detailed analysis shows is the complexity of copyright law *vis-à-vis* privacy considerations and the vital importance of context in determining right and wrong. Here is where rhetoric has much to contribute to copyright law: That is, rhetoric understands the complexity of language use *vis-à-vis* context, audience, and purpose. Rhetoric "as the productive art of creating effective discourse ... is highly attuned to audience and context—that is, to the particular circumstances of a scene or situation" (McKee & Porter, 2009, p. 25).

I understand that most people would prefer a world in which there are clear answers, clear villains and heroes, tried-and-true guidelines, and a world where sharing and stealing, and right and wrong are firmly determined. But that is not the world of intellectual property, and that is why I am worried about Janice Walker's list of "clear-cut guidelines." Yes, I can accept that list as *guidelines*, but I worry that they will be used as—and become—rules. And that would be dangerous.

For instance, Walker proposes: "For print, generally the rule of thumb has been that use of ten percent or less of a work constitutes fair use." The so-called "10% guideline" is an example of a copyright guideline that has been promulgated by publishers, has been widely adopted by libraries, and has received a kind of formal authorization through the CONFU (1996) process. Yes, it is an established *guideline*. But it does not have a basis in copyright law and it should not function as a legal standard. As the U.S. Copyright Office (2009) tells us:

There are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentage of a work. Whether a particular use qualifies as fair use depends on all the circumstances.

Although I understand the desire for clear-cut quantitative guidelines, they don't exist—particularly not in regards to quantity of copying. (As Westbrook points out, in these litigious days, even minimal sampling of a piece of copyrighted music can be considered infringement.) Likewise, for another guideline, Walker cites: "For work to be distributed outside the classroom (for instance,

to be published on the World Wide Web), it is imperative you at least make an attempt to acquire permission.” No, it is not required that you do so—and doing so may have the unintended consequence of eroding fair use, for the reasons Westbrook discusses. Another guideline from Walker: “graphics, audio, or video files should not be downloaded without permission.” Again, no, I disagree heartily with that advice: Always seeking permission is a practice that further contributes to the erosion of fair use. Publishers and content creators would like us to believe they have that level of control over their copyrighted works; in actual law, they don’t and they shouldn’t. Users (writers) have rights.

Ultimately, an algorithmic approach to copyright issues doesn’t help writers because (a) “the law” is not a clear or firmly established entity, but is rather a messy, moving target; and (b) every application of law requires understanding the circumstances of a particular composing context (involving the purpose of the use, the quantity of material used, etc.). Further, we need to recognize that U.S. Copyright Law is not the only or highest authority in this realm; we need to avoid being U.S.-centric in our approach to intellectual property. When students borrow material from the Internet and then post their own creations to the Internet, they may or may not be under the authority of U.S. Copyright Law. Their writing may be governed by the copyright policies of another nation, or may fall into the vastly gray area of international copyright treaties and policies (see McKee & Porter, 2010).

So don’t try to teach “the law.” What is needed, I would argue, is a rhetorical frame of thinking about context and a heuristic methodology—that is, a critical procedure for making ethical and legal judgments about the use of others’ intellectual property. This type of ethical reasoning is what Aristotle called *phronesis*, or the art of practical judgment. Such an approach would include some broad principles and guidelines, some heuristic questions, and some case examples—of clear-cut fair uses, clear-cut infringements, and the vast gray area in between.

In a sense, then, we have to teach students some basic legal reasoning—which is also a kind of rhetorical reasoning. We should teach not just (a) what the law says or what guidelines tell us, but also (b) how law has been or could be applied in particular cases, so that (c) students can learn a form of reasoning useful to making their own prudent judgments about intellectual property and fair use. We should resist the urge to promulgate publisher folklore or “clear-cut guidelines” such as “the 10% rule” or “always ask permission.”

A more promising pedagogical approach is to examine and discuss problematic cases, and in this regard I very much like Westbrook’s discussion of Judge Fogel’s legal reasoning in the *Diebold* case and Ridolfo and Rife’s analysis of the Maggie case (i.e., Michigan State University’s continued use of Mag-

gie's image for marketing purposes, without her permission). Cases can be elaborate, detailed, and lengthy—like the two just mentioned—or they can be short and simple examples. Here are several mini-cases I use to get students discussing and pondering the intellectual property implications of their writing practices, to help them understand the difference between the realms of academic integrity and intellectual property, and to help them think critically about context of use:

Heping, a graduating Miami University senior, pastes a version of the Miami University logo as a graphic on his resume (both the print version and the electronic version), which he sends out to potential employers. Is this an intellectual property infringement and/or an act of academic dishonesty?

Jim, a graduate student in English, recycles his senior undergraduate thesis paper for use in a graduate course. The original paper was his own work; Jim, however, submits the paper in nearly its original form, with only minor editorial revisions. Is this academic dishonesty?

A teacher asks students to create a web page of annotated sources on a given historical topic. Jane locates a web page with an interesting and distinctive layout and uses that web page as a template for her own assignment. She collects and annotates the historical sources on her own, but she “borrows” the HTML coding for the format and typography of the page. Is this plagiarism? What if she did the same thing in a web-authoring course?

In their chapter, Hall, Gossett, and Vincelette focus on YouTube videos—and that is a great example case because YouTube and similar sites represent an increasingly important venue for multimedia writing. Producing remixed multimedia writing and posting such creations to sites like YouTube is an activity rich with intellectual property implications. However, Hall, Gossett, and Vincelette focus on the genre of parody, which is one of the more highly protected forms of fair use, especially if the parody is political. Parody is more likely to represent a stronger transformative effect and, therefore, is more likely to be protected under fair use (see *Campbell v. Acuff Rose*, 1994, and *Suntrust Bank v. Houghton Mifflin*, 2001). For pedagogical purposes, I wish that Hall et al. had addressed a different genre, or a wider variety of genres.² What if, say, a

student uses video clips from a television show for a promotional video posted on YouTube for a non-profit organization?

As we contemplate how to teach issues of intellectual property and fair use, we also have to reflect humbly on our limitations. What credibility do we have—as rhetoricians and composition instructors—speculating about intellectual property and fair use? That’s a legal area; shouldn’t we leave it to IP lawyers? Of course some of us, like Rife and Herrington, have the requisite legal credentials, but the rest of us are, well, amateurs in this realm.

This activity—the act of making fundamental decisions about copyright ... literally, *the right to copy* something, to repeat it, to use it (with or without attribution)—is fundamental to literacy production and to composition. And so, like it or not, it falls to us, as writing teachers, to address the matter in our composition classes. However, we must take care to delineate our area of expertise. We should not be teaching intellectual property and fair use as if we were lawyers or law professors—even if we were capable of that. Our job is to teach copyright issues from the point of view of the writer who must make these decisions regularly, daily, and repeatedly in the ordinary course of composing—and without recourse to legal opinion. Our job is not to teach Fair Use (upper case), as if we were teaching law students. Rather, our job is to teach fair and ethical use (lower case) of others’ work to help student writers develop critical consciousness of the issues and a pragmatic heuristic inquiry procedure they can apply across different contexts to make prudent judgments. We should teach rhetorical, case-based reasoning as it applies to the practice of borrowing, reproducing, and redistributing others’ material. In this regard, the essays in Part II of this collection, indeed the entire collection, represent an important contribution to our pedagogical efforts.

NOTES

1. We need to recognize, too, that “intellectual property” and “copyright” are not synonymous. Copyright is one facet of the larger realm of intellectual property law, which also includes other matters (such as trademark and patent law).

2. The focus on YouTube does allow Hall, Gossett, and Vincelette to develop the argument—a compelling one—that YouTube exists primarily for social purposes, not for infringement purposes. Their argument is that YouTube falls into the category of Web 2.0 publication, where a “new and different cultural logic is at play.” This is a very interesting argument about genre and context that merits further consideration regarding intellectual property issues.

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