8 RESPONSE TO PART I—"AN ACT FOR THE ENCOURAGEMENT OF LEARNING" VS. COPYRIGHT 2.0

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COPYRIGHT 1.0

On May 31, 1790, President George Washington signed into law an act passed by the first United States Congress in its second session. The title of the act reads as follows:

> An ACT for the ENCOURAGEMENT of LEARNING by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies during the Times therein mentioned. (p. xx)

This is, of course, the United States' first copyright law. Although the title's language, which describes the Act as "for the encouragement of learning," is taken directly from the title of the United Kingdom's 1710 copyright law, the Statute of Anne, the two laws are markedly different. The Statute of Anne addresses learning only briefly, within a larger discussion of the problems caused by unauthorized copying. Such copying was—according to the Statute—occurring "without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families" (p. xx). Against this backdrop, the Statute of Anne announced itself as a means "for the Encouragement of Learned Men to Compose and

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Write useful Books" (p. xx). By so doing, the Statute conflated "encouraging learning" with the protection of (and compensation for) copyrighted works.

But United States law does *not.*

The 1790 Copyright Act does not contain a rationale; it does not decry the depredations of unauthorized copying. Rather, it moves directly to the technical details of the law, specifying the rights of the author and outlining the penalties for violations of those rights. Because the Act itself does not articulate the motivating factors that led to its existence, we now understand it in tandem with the Constitutional clause stating that *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" (Art. I, sec. 8). Against this backdrop, the description of copyright as "an act for the encouragement of learning" takes on new meaning.

Unlike the Statute of Anne, the United States' first copyright law was directed at promoting *progress* in science. The specification of *limited* times for the copyright term strongly implied that this encouragement was directed not only at encouraging authors to avail themselves of this limited monopoly right, but also at those who could—at the end of the then-14-year copyright term—make fuller use of texts as they moved into the public domain. If we assume—as is the current fashion—that our founding fathers were both wise and serious-minded, this assumption necessarily implies that they were serious about hardwiring the promotion of *learning* into the first United States copyright law.

And, yet, this collection is filled with accounts of committed educators struggling to manage the complexities and apparent contradictions of copyright laws in the 21st century. In the preceding pages, Timothy Amidon recounts his experience of being vaulted down the rabbit hole when he asks, simply, whether he might employ a Creative Commons license (rather than the traditional, restrictive copyright notice) for his master's thesis. Rob Dornsife illuminates the degree to which the concept of the copy itself is a functional obstacle to student pursuit of the full range of possibilities within digital composing spaces. Barclay Barrios examines end user license agreements and concludes that "every EULA to which we assent is a contractual obligation and failure to pay attention to the terms of those contracts is akin to making a deal with the devil." As readers of this volume know all too well, those deals are made hundreds of thousands of times each day in our institutions of higher learning. Barrios is not exaggerating when he suggests that the souls of educators are at stake when we are placed in circumstances where language—like the impenetrable legalese of most "clickthrough" licenses—is deployed as a functional obstacle to clarity and understanding.

In perhaps the saddest of these engagements with current law, Tharon Howard surveys the copyright landscape with a particular eye toward the implications of copyright for educators and concludes (rightly) that:

> 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.

Which leads us to an important question ... Just what the hell happened?

Our forefathers, 220 years or so ago, spoke with clarity about the way copyright should work in our then-newborn nation. While directly considering the language of the Statute of Anne as a model, they rejected those sections that were situated as a response to the apparently pitiable circumstances of authors and publishers in the United Kingdom at the dawn of the 18th century. The first Congress wrote an act for the encouragement of education grounded not in a presumed "natural right" of authors to their words, but in a public grant (via elected representatives) of a limited monopoly right. Where the Statute of Anne presented authorial (or publisher) ownership as the default circumstance for any given text, the Copyright Act of 1790—when paired with the Constitution's language—points toward the public domain as the default status for texts. The limited monopoly granted by the law was an exception to the more general (and preferred) circumstance in which no monopoly right would inhere.

U.S. Copyright Law's bias toward learning was maintained for at least the nation's first two centuries. The 1976 Copyright Act—a comprehensive revision of copyright law *in toto*—codified the common law principle of fair use. The four-factor fair use "test" imposed by this Act begins with a determination as to whether the use is "of a commercial nature or is for nonprofit educational purposes," with non-profit educational uses pointing strongly toward a determination that the use in question is fair. Additionally, the initial paragraph describing fair use states "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" (p. xx). Thus, for most of our nation's history, the United States adhered to the

principle that the use of copyrighted material *for educational purposes* was likely not an infringement of copyright.

But that time is gone.

COPYRIGHT 2.0

Between 1997 and 2002, the United States Congress passed four acts that—taken together—effectively revised copyright law in ways that constituted a decisive break with the founders' "act to encourage education." Not *all* of the elements of these laws were problematic. Indeed, given the rise of the public Internet (in the form or the World Wide Web) in the early 1990s, the legislators were wise to revisit and reexamine copyright. But each of these four laws *did* contain egregious violations of the spirit and principles of laws prior to that point. Here are some of the lowlights:

- **The No Electronic Theft (NET) Act, November 1997—**After passage of this act, for the first time in U.S. history, copyright infringements could prompt criminal (rather than civil) penalties. Even non-commercial infringements could trigger criminal penalties of up to 5 years in prison and $250,000 in fines. The NET Act detached the calculus for mitigating infringements from the demonstrable or potential financial harm experienced by the copyright holder.
- **The Sonny Bono Copyright Term Extension Act, October 1998—**The CTEA added 20 years of additional copyright protection to existing terms (moving, for example, the base term for single-authored texts from the life of the author plus 50 years to the life of the author plus 70 years). Notably, the law was constructed to apply not just prospectively but retroactively. This had the effect of "freezing" the cut-off point for works entering the public domain at 1922, where it will remain until 2018, barring no further term extensions. As a result, research on materials from 1923 forward, which would have been freely available, has been delayed owing to the possibility of copyright entanglements.
- **The Digital Millennium Copyright Act, October 1998—**The DMCA criminalized circumvention of digital rights management (DRM) systems without significant attention to whether the use prompting that circumvention should qualify as a fair use of the underlying text. Putting the DMCA to test, Wendy Seltzer, lawyer, teacher, and founder of Chilling Effects, snipped the NFL copyright notice during the 2007 Super Bowl and posted it on YouTube. The television notice includes a voiceover: "This telecast is copyrighted by the NFL

for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL's consent, is prohibited." Within 5 days, Seltzer received a YouTube notice that the copyright notice clip had, ironically, been removed due to a DMCA copyright violation reported by the NFL. Seltzer sent a counter-notice and argued that the clip was being fairly used for teaching purposes. The clip was re-posted, but then removed again after the NFL sent YouTube a second takedown notice (see Cheng, 2007; Seltzer, 2007).

- **The Technology, Education, and Copyright Harmonization (TEACH) Act, November 2002—**While purportedly directed at expanding opportunities for use of copyrighted materials in distance learning environments, the TEACH Act offers a cumbersome and restrictive set of rules that place both instructors and their home institutions at considerable risk for practices once considered unremarkable in classroom settings. If, for example, an instructor in a face-to-face classroom chooses to screen the University library's copy of Charlie Chaplin's 1923 short *The Pilgrim* to prompt a discussion of Chaplin's depiction of the Mexican border at that time, that use is widely understood as acceptable, reasonable, and fair. Under the TEACH Act, screening the same film in a distance-learning classroom would be curtailed, as only "reasonable and limited portions" of dramatic, literary, or audiovisual works are allowed (p. xx).

The aggregate effect of these laws is the replacement of our founders' approach to copyright with a more restrictive copyright regime—a regime that might fairly be described as "Copyright 2.0" were it not for the implicit suggestion that version 2.0 of any given concept is an improvement upon what is retroactively thought of as version 1.0.

In 1994, in the early days of public access to the World Wide Web, John Perry Barlow famously wrote, "intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum." But Copyright 2.0 *is* a regime of patching and retrofitting. Copyright 2.0 stubbornly clings to print practices as the model for how we are to interact with and understand digital media. Meanwhile, in his classrooms, Rob Dornsife is working to help his students unthink the printed page and all of the baggage associated with it before they commence writing. Dornsife embraces the notion that in the 21st century, ideas are "born digital" and need not map onto the conventions and demands of print. Copyright 2.0 stubbornly demands print-based patterns of "ownership," where Dornsife calls for digital "stewardship."

COPYRIGHT 3.0?

Ironically, Copyright 2.0's restrictive and criminalizing policies were solidified and stabilized just prior to the recognition of a generational shift in the social use and functionality of the Internet's core applications, commonly referred to as "Web 2.0." While the Web was filled with people leveraging its potential for networking and publishing, the United States Congress was busy drafting laws that sharply curtailed the use, appropriation, and even critique of copyrighted materials in Internet spaces. In his article for this volume, Jeffrey Galin argues that "corporate interests have achieved a decided advantage" in a running debate over the limits of fair use. Galin also cites Carol Silberberg's assessment that restrictive trends now in place "will eventually eliminate fair use for schools, colleges, and universities" altogether. On a bad day, I might be persuaded that Silberberg is right.

I have long argued that academics are the canaries in the coal mine of copyright jurisprudence. In particular, teachers of writing and composition—given the nature of their work—develop a particularly keen sense of both the opportunities and obligations facing composers when they wish to build upon others' ideas. Like Russel Wiebe, many compositionists have had to struggle with the apparent tension between their endorsement of works like Sherrie Levine's allegedly "plagiaristic" appropriations of Edward Weston's photographs and institutional demands for the policing of plagiarism. And many of us have felt the air grow by turns thin and foul when we have engaged with the practical realities of 21st-century copyright laws.

But I have tired of the "canary in the coal mine" analogy, and here's why: My colleagues are *not* helpless little birdies in tiny cages, singing their little lungs out, blissfully unaware of the fact that their singing serves only to protect those who are carrying them into danger.

Although much of the work in this volume is diagnostic, much of it is also directed at action. Some of this action can be as personal as Bob Whipple's revisitation of the function and meaning of the commonplace book as the genre is ported to digital spaces. But some of it is overtly political, including many of the efforts of the Intellectual Property Caucus of the Conference on College Composition and Communication (CCCC-IP) and the work of Creative Commons to stabilize functional alternatives to copyright's business-as-usual approaches. These efforts are staving off the most egregious excesses of Copyright 2.0 and educating a generation of students to the range of possibilities inherent in the circulation, use, and appropriation of scholarly and creative work.

In the process of letting go of my analogy, I briefly considered (and quickly rejected) reinventing that metaphoric canary as a bird tough enough to con-

tend with the challenges of the current Copyright 2.0 landscape. My search for a "tough" canary eventually led me (perhaps inevitably) to the webpage for a Seattle band calling itself "Killer Canary" (http://www.killercanary.net). The band's site features an array of MP3 files freely distributed by the band for downloading if the visitor to the site so chooses. Among five tracks from a recent show, I recognized the title of one, "Aneurysm," and clicked on the band's cover of a well-known song from Nirvana. While Copyright 2.0 would demand that Killer Canary seek permissions and licensing from Nirvana, the practical realities of Web 2.0 have prompted Killer Canary to put the song online and to assume the risk of what will—at worst—probably be a cease-and-desist letter from legal counsel .

But is that what *should* happen in such a case? Here, a Seattle band posts a considerable amount of original music online, for free. Then, as a showcase of the band's skills, the band includes a cover of a song by perhaps the best-known Seattle band ever. This is, in addition to appropriation of Nirvana's song, a form of tribute. And Killer Canary, by making this song available via the Internet for free, will not receive any compensation for this use of Nirvana's composition. Do we, as a culture, want Killer Canary treated—even momentarily—as criminal? And if I, for my own purposes, take this unauthorized cover song and place it in my own digital commonplace book, what is the worst that should happen to me?

I wish the answers were clear and obvious, but in each of these cases Copyright 2.0 leaves a tiny measure of possible legal threat hovering over these banal acts of use and appropriation.

We don't yet know what "Web 3.0" will look and feel like, though it is a good bet that it will be faster and depend on greatly increased storage space. However Web 3.0 unfolds, I am confident that the use and circulation of appropriated works will be a big part of how the next generation of the Web is structured. And I worry (as do some of my colleagues herein) about the increasingly panoptic levels of surveillance that might be cheap and easy in the coming years.

So what ought we do?

Clearly, the Killer Canary approach is at odds with our various obligations. But we *do* have a special understanding of what it means to compose texts and of ways to plan for how those texts might circulate and in turn be used and appropriated to make new texts. So it falls to us, in part, to help craft the practices and policies that will ideally form the backbone of "Copyright 3.0." This volume's measured and insightful accounts of where we are, where we could be, and where we should be will help to point the way forward.

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