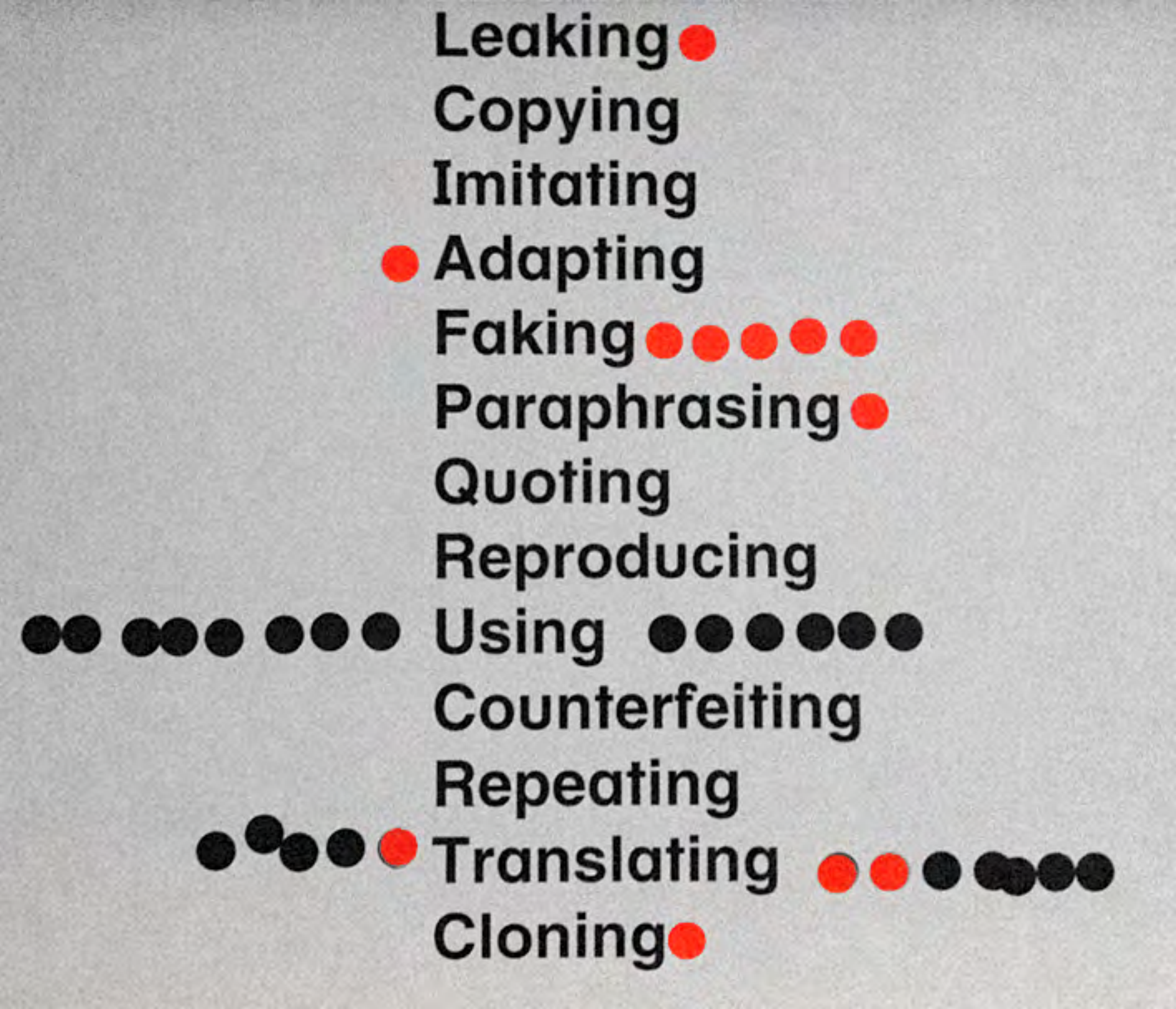
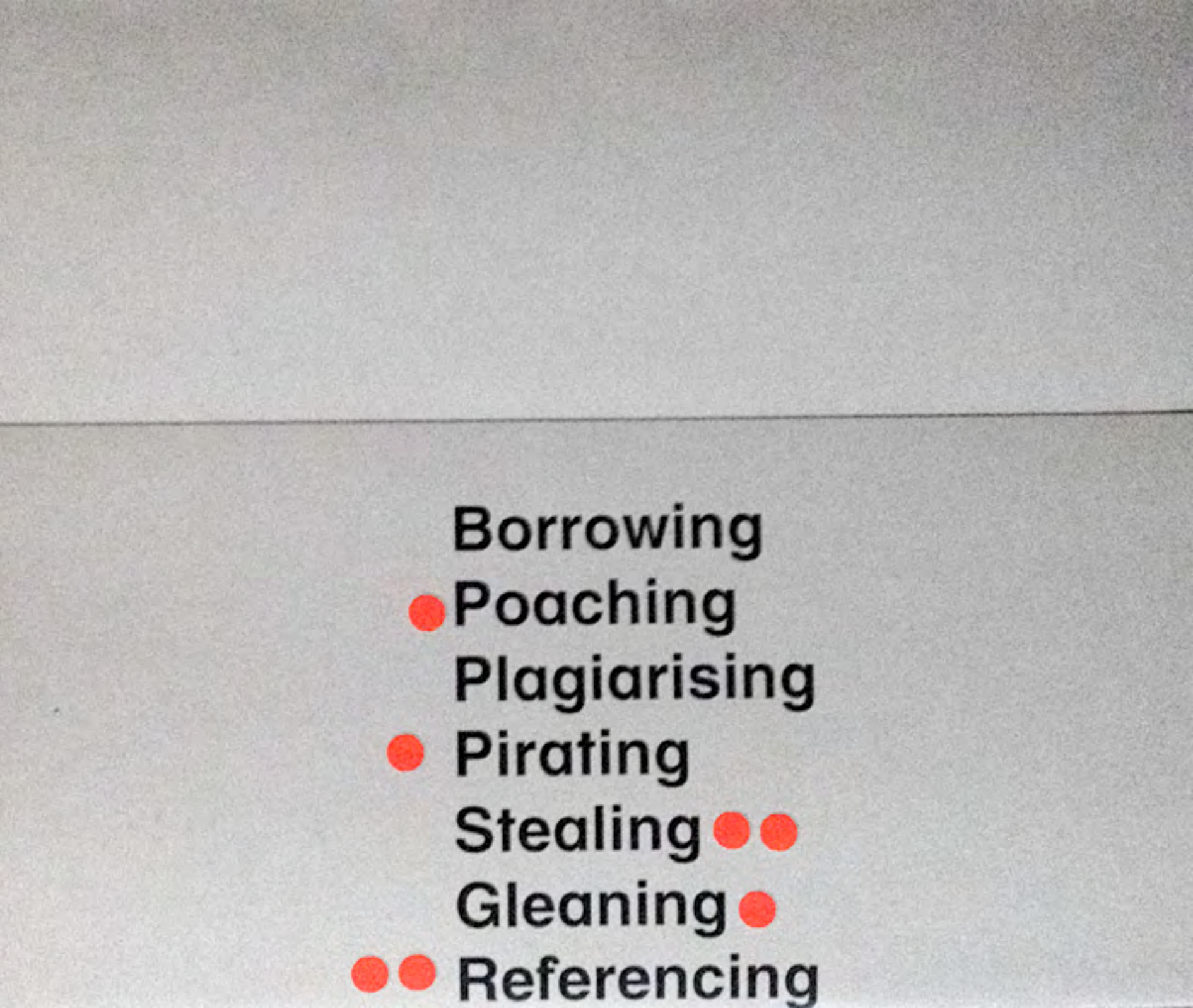

Leaking
Copying
Imitating
Adapting
Faking
Paraphrasing
Quoting
Reproducing
Using
Counterfeiting
Repeating
Translating
Cloning


Borrowing
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The Piracy Project

AND Publishing

Contents

copyright flattens stuff

Eva Weinmayr & Andrea Francke

About this book and about the Piracy Project

This book is not finished. It is the start of a dialogue that will grow as we go along. Normally when you publish a book it aims to be a resolved object, an end point of a process. Not this one.

> The thing is that there are two of us and that has become one of the key determinants on how the project evolves. There are always two voices and that allows us to always be open to different positions.

I guess that's what I call a dialogue.

> We have been working as the Piracy Project for quite a few years now. When we met, I was researching book piracy in Peru, following a small mention in an article by Daniel Alarcon noting that some pirated books in Peru have been modified. After traveling to Lima and comparing dozens of pirated books with originals, the first book of the Piracy Collection was found: a copy of *No se lo digas a nadie* by Jaime Bayly that contained two extra chapters. Eva was part of AND Publishing and based at Byam Shaw School of Art. She was involved with the movement fighting to keep the college library open by taking over its operations.

> It was a brilliant idea: what better way to keep a library alive than to make it a platform for art projects? What better way to populate a library and to make its closure visible that has no budget than to ask people to send us copies of books? And what better place can you imagine to test the limits of our faith in books than in an academic library were a pirated Rancière could live next to the original?

We called for submissions locally – in the art school – and internationally asking people to make a copy of a book that is important to them. We added the contributions to the library which became a sort of shadow library of copied and appropriated books. It was exciting to suddenly have several versions of John Berger's *Ways of Seeing* or Jacques Rancière's *The Ignorant Schoolmaster* next to the original. Exciting – because these versions make you think about the faith you have in books and the knowldege they distribute.

I'd also like to talk about the name "Piracy Project." We did not spend much time discussing the title. It just came through Andrea's research into book piracy and the finding of the of Jaime Bayly's pirated autobiographical novel with the anonymously added chapters at pirate book markets in Peru. For me it was really exciting that somebody just borrowed the authority of a celebrity's voice. So in a way I am much more interested in these interventions, which undermine not only property claims, but also claims of authorship, originality and authenticity.

We call it "an unsolicited collaboration."

> Pirates populate our imagination, easily alternating between the position of adventurers and thieves, tyrany and self-organised democracy, heros and villains. I like the complexity. They are proper trickster icons.

People's first reaction is often that they think the project is about internet piracy, streaming, bit torrents or similar, a debate that has become pretty binary. Open culture versus copyright advocates. But the discussion for me is much more complex and not as black and white as some people would love to make us believe. In a way, it's about finding your own moral stance through studying the cases in the Piracy Collection.

Is there morally accepted piracy (Aaron Swartz) and morally unacceptable piracy (Google)? We commonly define piracy as somebody appropriating somebody else's property – but that applies to objects, which you can carry away. Once we leave the world of objects questions of ownership get more tricky. Can ideas be owned? Is language for free use? What happens when you start to trademark names or register colours?

The island...produces a model, where...only visitors…what was it?

> It reminds me of the discussion on intellectual property in Brazil were the tribes kept puzzling copyright lawyers by wanting to keep their knowledge open – to the point that they oppose registering any of it as

their property. The government pressured them to claim their knowledge as intellectual property because it would fit the international legal framework. The tribes, however, made the point that there should be no need to claim ownership in order to then give permission or access. It's a really interesting example that shows how a property system that is promoted as the "logical" solution is really just a choice.

The Piracy Collection has been strongly inspired by Daniel Alarcon's piece in *Granta* magazine (*Granta109: Work*, 2009) about book pirates in Peru, who not only pirate literature books, but also do alterations to the source text – without crediting it or even revealing their intervention.

How many altered books are we reading?

And how about versions like Jonathan Franzen's *Freedom?* When a draft was published by mistake he tried to take the "wrong" version out of circulation. We managed to get one of them for the Piracy Collection and while reading it I couldn't avoid second-guessing every paragraph .

How many books actually circulate with small modifications and alterations without us readers realising or caring? Care is a very important word for me because I feel that we are at a moment were people are really searching for the authoritative voice of a text. Plagiarism has become a strong moral issue in the last few years. One popular theory is that the internet has made plagiarism so visible – so people are panicking about the realisation that they are surrounded by unstable discourse and unstable authorship.

Imagine a Byam Shaw student being sent to the library to pick up a copy of a book. Being aware of the pirated books in the library the student realises that the book he grabs from the bookshelf is not necessarily the authorative text. This unsettlement can be productive.

One thing we discussed a lot when thinking about plagiarism is that it's actually the reader who feels betrayed – even more than the plagiarised author – because of the reader's beliefs and expectations in concepts like originality and authorship.

We organised a series of lectures and discussions and increasingly found ourselves involved in more and more wide-ranging conversations. From book artists and art students to copyright lawyers, hackers, and feminist writers, the collection keeps touching people in completely different ways. Some people got quite angry at us. And those direct connections and conversations were key to how the project developed.

More and more interesting questions kept popping up, and many of those became the seeds of this book. At a conference on queer theory and non-reproduction, someone dropped the idea that the reason that cloning was such a moral issue had more to do obsessions around originality than with the classic idea of "playing God."

In China, a curator who was explaining Shanzai (a Chinese definition of piracy that is a bit different to ours) to us mentioned that someone should write about how even the Chinese political system was Shanzai. These encounters became the most interesting moments of the project. We transitioned to a reading-room format where we would travel with the books and organise events to discover these different perspectives on piracy. An idea mentioned in a round-table could point us towards a series of discussions, lead us to approach new guest speakers or affect the way we catalogued the collection.

That's what we'd like to do with this book. We want to keep the openness of this conversation and publish it as we go along. Digital print technology allows us to print in small runs. It's very immediate. It's interesting that print today almost has the qualities of oral culture. A book that is published in different layers, or versions, is a conversational piece by nature. The immediacy also brings a very different way to get the book around. Different from mainstream distribution, the book will only be printed, when somebody desires to read it – and also materially wise: each book might turn out slightly different through the imprecision of the production process.

I would like to say something about AND Publishing at this point. When the Piracy Project started, AND was run by Eva Weinmayr and Lynn Harris. The Piracy Project ran and still does under the umbrella of AND. This book feels like the perfect connection between those two and it makes sense that in the last few month Andrea has become part of AND. The possibilities that technology has brought to printed book production have always been part of AND's remit and the Piracy Project has always explored the instability of the book as a positive new development.

This book has been in development for a while and will probably take a few years to finish. It is another way to continue this conversation and to begin new ones. Hope you find some time to come and join us...

Borrowing

Lara Fresko

Poaching

(Stephen Wright)

Plagiarising

(James Bridle)

Daphne Plessner

Pirating

Dave Hickey

Pirates and Farmers[1]

I am going to explain this to you very simply. All human creatures are divided into two groups. There are pirates, and there are farmers. Farmers build fences and control territory. Pirates tear down fences and cross borders. There are good pirates and bad pirates, good farmers and bad farmers, but there are *only* pirates and farmers. They are very different kinds of creatures, and some pirates even recognize the importance of farmers. My late friend Roger Miller, a famous pirate, wrote this in a song after a visit with his tax attorney, "Squares make the world go round," he wrote, "Sounds profane sounds profound / But Government things can't be made do / By hipsters wearin' rope-soled shoes."

Farmers, on the other hand, *always* hate pirates. What's more, farmers always *recognize* pirates even when the pirate being recognized has yet to recognize him or herself as a pirate. One of the ways that pirates come to recognize themselves as pirates is through the experience of being recognized and persecuted by farmers. There are many unaware pirates, however, in workplaces around the world, who wonder why they are never invited to the weenie roast. They are pirates, but they just don't know, and you should know who you are before you turn forty-five, buy an assault weapon, and wipe out a nursing college.

So you should try some things out. Enter the territory of some farmer-friendly enterprise, like the Department of Motor Vehicles, or the student union at the University of Alabama, or the boardroom of AIG. If everyone glares at you sullenly and touches their wallet pocket, you may be a pirate. If you think you're a pirate, ablaze with exasperation, you probably are, but you should research further. Commit some petty offenses: park in a handicapped zone, jaywalk, refuse to return the attached form in triplicate, or just take an Incomplete in Hegel and His Times, and then never write the paper.

1 A previous version of this essay appeared in the following publications: "Stardumb, art by John Defazio", Michael Mack (ed.), Artspace Books, San Francisco, 2000. "Pirates and Farmers", Karsten Schubert and Doro Globus (ed.), Ridinghouse, London, 2013.

If these transgressions don't get your panties in a bunch, it's a pirate's life for you. Embrace your moment of self-awareness and get on with life. You are not the only pirate in the world, and remember this: *pirates are born and not made*. It's not something your mother did to you. It's not something the government did to you or any of those amazing things Counselor Rick did to you in the shower at summer camp. You were *born* a pirate! Raise that skull and crossbones! Sail away!

Never forget that one of the chief causes of personal unhappiness in the US of A, where farmer culture is all but hegemonic, is the denial of pirate identity, because farmers always know who's a pirate. Pirates don't always know what they are. Very often the children of pirates, who are in fact pirates themselves, seek to deny their piratical natures and pass as farmers in order to rebel against their pirate parents. This rarely works out well in the long run, but sometimes it does. Take the case of Melinda, an accidental recidivist. She grew up during the 1950s in a pirate family of hard-line communists. As a consequence, Melinda grew up hating Communism, which she associated with people smoking cigars and shouting about Fascism in the kitchen while Aunt Tilly played old 78s of Mahler symphonies at top volume on the phonograph. Melinda wanted to play Ruth Brown and The Clovers but there was no help for it. These circumstances led Melinda to associate being a pirate with being a communist.

So Melinda resolved to become a farmer. In her sophomore year at Berkeley, she met a young man from Wisconsin who had renamed himself Earth Free. He wanted to be a farmer, too, so they moved to Oregon to be farmers together. Fortunately, they almost immediately came upon a commune called Free Earth. They took this as a sign and joined forthwith. Here they lived happily in a derelict school bus. They smoked marijuana cigarettes, had group sex, and did very little farming at all. In this way, by virtual happenstance, Melinda's pirate nature was able to reassert itself. Things did not turn out so well, however, for Melinda's daughter J. L. (Janis Lives). Having grown up naked and dirty in a bus, sorting seeds and stems, and listening to Electric Flag and Canned Heat, J. L. came to associate being a pirate with being a hippie, and she really hated hippies.

Thus it was, when J. L. herself finally matriculated at Berkeley, she immediately became a communist. Unfortunately, the communists she fell in with were not *pirate* communists, they were *farmer* communists—tenured communists with an infrastructure of ideological imperatives and dietary laws that made an orthodox Shiite festival look like a Flaming Lips concert. Almost immediately J. L. was caught smoking. Then, not long thereafter, in rebellion against a childhood of tofu and sprouts, she was observed scarfing down a Big Mac. From there, it was only a short step to the ideological heresy that got her ostracized. This involved a sex act employing an object that could only serve to perpetuate the commodity fetishism of late-capitalist culture. Today, J. L. works as a dental assistant in Encinitas, where she is not a happy camper.

This demonstrates a common fallacy: that of associating the eternal distinction between pirates and farmers with the petty local fashions that define political and cultural ideologies in the twentieth century. We can't be any firmer on this point.

There are right-wing pirates and left-wing pirates; there are right-wing farmers and left-wing farmers, but there are only pirates and farmers. The good thing about farming is that it keeps you busy at home and pays steady subsidies. The good thing about piracy is that it is cosmopolitan; you get to move around, and when it pays at all it pays *very well* . This might seem a fair enough trade-off, but it often spells doom for extremely competent pirates who, having amassed mountain ranges of Spanish doubloons, gold bullion, jewelry, and brass cannons find themselves feeling peckish and down in the mouth from all the rushing about that is intrinsic to the pirate lifestyle. They find themselves, say, driving down US40 through Arkansas with their pirate crew. Glancing over to the side of the road, they see a beautiful horse farm with white fences and green pastures full of elegant thoroughbreds. The animals' sleek coats are gleaming in the sun. Pristine, white, colonial-style stables, with cupolas and weather vanes blaze like a dream of Monticello and, way back there among the trees, at the top of a circular drive, they glimpse an antebellum mansion.

Seeing all this, the successful pirate remarks to his pirate crew: "I've worked damned hard at piracy, you know, and worked damned long. I've raped, pillaged, plundered, and sent many a king's man to a watery grave. The wake behind my schooner has looped the world a hundred times. So why shouldn't I seek a bit of refuge and respite. Why shouldn't I retire to a horse farm just like this? I have enough hard capital to buy this damn farm with the rings on my right hand."

Herein resides the paradox of pirate retirement. You can't do it. Piracy is a genetic proclivity. You strap on your peg leg, don your eye patch, take a swig of rum, and die at the helm or by the blade, or you end up destitute in Port Royale, sitting on the dock of the bay. At this point in the captain's reverie, one hopes that the successful pirate's hearty comrades will speak up firmly. Honoring the tradition of pirate democracy, they will say:

Your pirates ain't your farmers, Cap'n Jack. Farmers *hate* pirates something fierce, and even if you buy a farm, consort with farm animals, and wear a farmer hat, they will know you for a pirate. They will mobilize and take action, and what do pirates know of farmer fighting—of farmer martial arts—of water districting, tax assessing, zoning, easements, and such? What pirate with a single *cojone* knows dick about subcontractors, plumbing contractors, or any other kind of contractor? About condemnations, imminent domain, and rights of way? To be honest, Cap'n, your forthright pirate way of fighting would be naught but child's play to them. They would run you down in the road, steal you blind, sue you till your toes hurt, and, worst of all, *you could not sail away*! You would just be there, becalmed on this farm in the middle of nowhere, and even if you overcame all these obstacles through the auspices of a corrupt farmer lawyer, you know what they would do? They would shoot your dog and burn your horses in their stalls.

Maria Guggenbichler

Anne Tallentire

Stealing

Printroom

Gleaning

Fabien Pinaroli

Marina Kampka

Referencing

Copying

Eva Hemmungs-Wirten

The Death of the Author and the Killing of Texts: Assault by Machine[1]

When it comes to intellectual property rights and copyright especially, the ability to reproduce, duplicate, and, of course, copy is a given, but far from uncontroversial, feature. Even translation, as we saw in the previous chapter, occupies the imagery of the derivative, a copy made from an original[2]. As something to be revered and later, feared, the act of copying is appropriately enough also part of the history of literature. Thus, material and immaterial changes go hand in hand: the meticulous transcription by hand taking place in convents and monasteries during the Middle Ages morphed into the mass production of the printing press. The praise once bestowed for centuries on those who were able to recast old traditions and legends into new forms, became overshadowed by a romantic author and a modernist aesthetic where search for innovation and novelty took centre stage and any hint of imitation was to be abhorred. Drawing on the complexities of copying, my primary goal in this chapter is to consider what happens to authorship and intellectual property rights as they *meet the machine*. The Internet is perhaps the most current example of how reproduction of content is facilitated on an unprec-

1 Originally published as chapter 3 in (2004) *No Trespassing: Authorship, Intellectual Property Rights and the Boundaries of Globalization* (Toronto, University of Toronto Press).

2 Venuti, *Scandals*, 31.

edented scale by technology. At the same time, intellectual property regimes put in place years before anyone could even consider the possibility of such a global network lag behind. Consequently, a number of ever-increasing volumes produced within widely disparate academic disciplines have addressed the possible fate of the book and the text, as well as the ramifications posed by the World Wide Web in respect to free speech, access to information, and ownership[3]. However, for reasons of obvious shortsightedness, it remains difficult to ascertain to what extent these predictions of dystopia or Utopia are realistic. Because of this, and because the fundamental importance of the technological impact in respect to intellectual property still remains to be considered, I have chosen to turn my attention to a technological revolution every bit as significant for intellectual property rights as the Internet, albeit one that offers the advantage of historic hindsight: the copier. Taken for granted in schools, offices, and even homes, we seldom consider that the photocopier once caused the same anxieties to surface in respect to print culture as the Internet gives rise to today. Controversial enough to be banned in the Soviet Union until 1989, the most problematic aspect of what is now a cheap and readily accessible piece of office equipment is perhaps its capacity to be a 'killer of books' - as the small ad on the back of French publisher La Decouverte's books suggests in the form of the portentous warning: *'DANGER. Le Photocopillage tue le livre.'* The Internet may be the most advanced device of reproduction the world has seen to date, but it was the copier that brought both author and text into the Information Age.

I

Perhaps it was to be expected that the man who invented the technology that later materialized as the copier, did so because of inconveniences he encountered as a patent attorney. Chester F. Carlson, whose grandparents emigrated from Sweden, was born in Seattle on 8 February 1906[4]. Both parents were sickly and the family moved around until they finally settled for a warmer climate in California. Ellen Carlson died of tuberculosis in 1923, leaving seventeen-year-old Chester to care for his father. While he managed to earn a Bachelor of Science degree in physics from the California Institute of Technology in 1930, this also landed him in debt during the Depression. Desperately trying to find work he sent out eighty-two job applications, none of which resulted in an offer. Carlson finally found employment at the laboratory of the Bell Telephone Company in New York, but was laid off as the Depression worsened. He went on to secure a position at the patents department of the electronics firm P.R. Mallory, attending night school at the New York Law School between 1936 and 1939 to become a patent attorney. When he ended up as head of the company's patent office, his dealings with the many documents and drawings needed for patent applications made him realize that there was always a shortage of copies. The process of making duplicates was laborious; either they were photographed, or

3 Nunberg, *The Future of the Book*, still gives a good introduction to many of these changes as they pertain to print culture.

4 For further accounts of Chester Carlson's early years and his struggles with the invention that was to become known as 'xerography,' see Hall and Hall, 'Chester F. Carlson'; Dinsdale, 'Chester F. Carlson, Inventor of Xerography'; Xerox Corporation, *The Story of Xerography*, available at http://al851.g.akamaitech.net/f/1851/2996/24h/cache.xerox.com/downloads/usa/en/s/Storyofxerography.pdf; Dessauer, *My Years With Xerox*; and Kearns and Nadler, *Prophets in the Dark*.

they had to be copied individually and then proofread carefully.

The need for facsimiles of correspondence and office documents was not recent; it had been filled by hand by copy clerks, copiers, or scribes until the mid-nineteenth century. Until the 1870s there were basically only two options available if you wanted to make numerous copies: either use the services of a commercial printer, or buy a small printing press. Nonetheless, there were several attempts to invent useful copying devices. James Watt patented a copying press in 1780, which could, either by roller or in a screw-down version, allow for reproduction of writing on a damp sheet of thin but durable tissue paper that was placed under pressure. Thomas Jefferson was known to have liked Watt's press and used it during his stay in Paris, but he favoured the polygraph. Today more associated with the lie-detector tests seen in movies, the polygraph was a sort of multi-pen apparatus, in which the writer would use one pen as a master pen, and then by a set of mechanical arms another pen would simultaneously copy the writing. Jefferson relied on it for many years but it was never successfully marketed and sold in the United States[5]. The stylograph with carbonated paper followed, rendering, as Jefferson wrote, a room 'pestiferous' with its smell[6]. Because it was both messy and unreliable, use of carbon paper did not really advance until the typewriter became a fixture in offices and carbon paper came coated on one side only. Stencil duplicating machines were launched towards the end of the nineteenth century; Gestetner introduced the first self-inking stencil duplicating press in 1890; rotary duplicators first came on the market in 1898[7]. Nevertheless, the question of how to make single copies that would be of use to corporations as well as individuals was still not solved by the 1930s.

Trying to come up with a solution to his copying problems, Chester Carlson began in 1935 to spend time at the New York Public Library, poring over scientific articles. He turned his attention to the field of photoconductivity, setting up his laboratory in the kitchen of his Jackson Heights, Queens, apartment. A number of failed experiments later, his wife suggested that he instead use an empty room in the back of a beauty parlour owned by his mother-in-law in Astoria, Queens. Together with an unemployed refugee physicist from Germany named Otto Kornei, Carlson managed in 1938 to successfully complete an experiment in what he would call 'electrophotography.' First he wrote the now famous date and address '10-22-38 ASTORIA' in ink on a glass slide; then a metal plate coated with sulfur was rubbed with a cloth to give it an electrical charge. He positioned the slide against the plate, placed both under a powerful lamp for a few seconds, removed the slide, and sprinkled powder on the plate. His inscription appeared. To finish off the experiment, waxed paper was pressed against the plate, and the image transferred to paper[8]. While the process would require many more years of ad-

5 See Silvio A. Bedini's account of the many futile efforts on the part of Charles Willson Peale - who furnished Jefferson with his polygraphs - to sell his various models in *Thomas Jefferson*.

6 Jefferson, quoted in Bedini, *Thomas Jefferson*, 160.

7 See The Early Office Museum's website www.officemuseum.com/copy_machines.htm for details on the copier in a historical perspective. Downloaded 28 May 2002.

8 'I went to the lab that day and Otto had a freshly-prepared sulfur coating on a zinc plate. We tried to see what we could do toward making a visible image. Otto took a glass microscope slide and printed on it in India ink the notation "10-22-38 ASTORIA." We pulled down the shade to make the room as dark as possible, then he rubbed the sulfur surface vigorously with a handkerchief to apply an electrostatic charge, lay the slide on the surface and placed the combination under a bright incandescent lamp for a few seconds. The slide was then removed and lycopodium powder was sprinkled on the sulfur surface. By gently blowing on the surface, all the loose powder was removed and there was left on the surface a near-perfect duplicate in powder of the notation which had been printed on the glass slide. Both of us repeated the experiment several times to convince ourselves that it was true, then we made some permanent copies by transferring the powder images to wax paper and heating the sheets to melt the wax. Then we went out to lunch and to celebrate.' Chester Carlson quoted in Xerox Corporation, *The Story of Xerography*, 5-6.

ditional refinement before it could be put to commercial use, the technique he perfected that day basically remains the same today in modern photocopying.

Between 1939 and 1944, more than twenty of the largest U.S. companies turned Carlson down when he approached them with his invention, including IBM, Kodak, General Electric, and RCA. Continuing to work for P.R. Mallory, Carlson finally succeeded in soliciting the interest of one investor: the Battelle Memorial Institute, a non-profit organization funding technological research. In 1944 Battelle agreed to help him develop his invention by extending $3,000 for research and the rights to 75 per cent of royalties[9]. Three years later, in 1947, Battelle signed a licensing agreement with a small Rochester company by the name of Haloid, giving them the rights to the basic patents in return for an 8 per cent royalty on the proceeds. From the same town as the betterknown Kodak, Haloid too dealt in photographic products, and their investment in xerography was a major gamble. In 1948, the name 'Xerox' was trademarked, and xerography - combining the Greek word *xeros* for 'dry' and *graphis* for 'writing' - replaced 'electrophotograhy' as a description of Carlson's process. The first of Haloid's copiers, the Model A, known as the 'Ox Box/ came on the market in 1949. Not particularly effective, it took a total of thirty-nine manual steps in order to perfect a copy[10], following instructions in a manual of painstaking detail:

> Dry the plate surface by striking it lightly and briskly with a clean, dry, UNTOUCHED portion of cotton ... With a spoon, carefully spread one-fourth of a teaspoon of Xerox Toner over the developer ... When mounted in the process tray, the four tabs of the electrode should protrude no more than approximately 1/64" above the level of the side gaskets, nor should they go below the side gasket.[11]

The Model A was a disaster. Fortunately but quite unexpectedly, it could still be used as a maker of paper masters for offset printing presses. Continuing to improve on xerography, Haloid realized that the 8 per cent Battelle share might in the future present a serious impediment to their chances of funding continued research. In return for stock that was to bring many millions to Battelle, effective from 1 January 1956, the Institute conferred all rights to the basic xerography patents to Haloid[12]. 11 In 1958 Haloid officially changed their name to Haloid Xerox; in 1959 all worldwide patents on xerography were purchased from Battelle, and in 1961 the company - inspired by the way in which the name Kodak was constructed around the same first and last letters - became Xerox. In the first ad presenting the new corporate name in *Fortune* in July 1961, Xerox emphasized that there was nothing ancient and Greek about the corporation, stressing instead its commitment to meet what already then was seen as 'the sheer mass of information.'[13]

Chester Carlson became a consultant to Xerox but was never involved in its

9 Initially, the agreement was set at 25 per cent. However, on the condition that Carlson could reimburse Battelle within five years for its research expenditures, approaching at that time $17,000, the share would go up to 40 per cent. He procured the funds by borrowing money from his wife and her relatives. John Dessauer writes that when Carlson became wealthy, he generously distributed Xerox shares to those who had helped him along the way, for instance, Otto Kornei. See Dessauer, *My Years with Xerox*, 36, 73, 186-7.

10 See Smith and Alexander, *Fumbling the Future*, 37.

11 The manual is quoted in Owen, 'Copies in Seconds,' 68.

12 Details of the agreement are found in Dessauer, *My Years with Xerox*, 92-4.

13 Xerox Corporation, 'Now X Marks the Spot.'

day-to-day business. His 40 per cent share of the Battelle royalty had made him a millionaire whose 1964 royalties amounted to 3 million dollars and increased by circa 1 million a year. Most of his substantial private fortune was however donated to charities and universities.[14] He died while watching a movie in a New York theatre on 19 September 1968.

• • •

Xerox's first major breakthrough came with the launch of the model 914 - so called because it could copy sheets as large as 9 by 14 inches - which was first shown to the public at the Sherry-Netherland Hotel in New York on 16 September 1959. Two copiers were on hand that day. One caught fire.[15] When the 914 was scheduled for its first live television appearance, the print proved so faint that it did not even register for the cameras. Since there was no toner to be found in New York, some had to be flown in from Rochester, arriving five minutes before the demonstration was to air.[16] The unfortunate tendency of Xerox copiers to ignite at inopportune moments forced the company to add fire extinguishers to the machines. Sales representatives declared that it amounted to corporate suicide suggesting to customers that the copiers could cause a fire in the office; they recoiled at the use of the word 'fire' under any circumstances. Hence, the fire extinguishers became known as 'scorch eliminators.'[17] One of those who publicly decried the unstable 914 was Ralph Nader, who claimed that his Washington office machine had caught fire three times in four months.[18] A later model, the 3600-3, would burst into flames in the White House.[19]

Although Xerox was doing well on the copying market with its Copyflo, a machine that enlarged prints on a continuous roll from microfilm originals introduced in 1955, there were also serious competitors in the field. 3M had their Thermo-Fax unit, Kodak the Verifax, and a number of other companies tried their hand at various copying processes. Although these machines were small enough to fit on a desk, and also modestly priced at around $500, they came with major drawbacks. Either they were somehow limited in function - the Thermo-fax did not reproduce all colours - or they involved time-consuming and careful handling of the documents. Neither machine made copies that were permanent, nor could they operate without specially treated and expensive paper.[20]

The 914 revolutionized copying for several reasons. Despite the fact that it was huge - in the beginning only five machines a day, each the size of a small truck weighing over 650 pounds, rolled off the assembly line - it was marketed as a machine anyone could handle. In a 1960 TV commercial promoting the 914, Xerox made their point by showing a businessman sitting at his desk. He asks his daughter Debbie to make a copy of a letter. When the little girl returns with two papers in her hand, he wants to know which one is the original, to which she replies, 'I forget!' One angry viewer demanded proof from Xerox that Debbie was

14 Dessauer, *My Years with Xerox*, 186-7.
15 Kearns and Nadler, *Prophets in the Dark*, 30.
16 Dessauer, *My Years with Xerox*, 129-30.
17 John Dessauer refers to a member of the public relations staff, who vehemently protested against the fire extinguisher, arguing that it would cost the company half its potential sales. See Dessauer, *My Years with Xerox*, 127.
18 Jacobson and Hillkirk, Xerox: *American Samurai*, 62.
19 Kearns and Nadler, *Prophets in the Dark*, 77.
20 Owen, 'Copies in Seconds,' 66. See a comparison chart of these various processes and companies in 'Out to Crack Copying Market,' 90.

not in fact a midget, since the idea of a small child operating such a complicated piece of machinery seemed out of the question. Fuelled by the Debbie success, Xerox relied on a trained chimpanzee to demonstrate the 914 in their next commercial. This time their strategy backfired. Calls poured in from irate customers the day after its premiere. Secretaries who normally operated the machine complained that they had found bananas on the copiers and were ridiculed by male employees who argued that since a monkey could do the job just as well, why did they have to pay the women salaries? The commercial was pulled and never reappeared.[21]

'Anyone is an *expert* the first time he uses the XeroX 914 Copier/ trumpeted the glossy, colour foldout advertisement introducing the 914 in *Fortune* in March 1960.[22] That the 'he' was somewhat of a misnomer is proven by the print ads, where all those working with the copier tended to be women. Confirming the secretary as the true mother of the machine, John Brooks wrote in a 1967 article for the *New Yorker*, after having spent a day in the company of a 914 and its female 'caretaker/ he could report that he had witnessed the closest relationship between a woman and a piece of office equipment he had ever encountered. He ruminated that the copier 'had distinct animal traits: it has to be fed and curried; it is intimidating but can be tamed; it is subject to unpredictable bursts of misbehavior; and, generally speaking, it responds in kind to its treatment.' The secretary Brooks interviewed went on to say that she had been warned by the Xerox technical representative not to be afraid of the 914 because the machine would sense her fear and, like a mischievous child, misbehave.[23] Portrayed in a 1963 Fortune ad as a costume-clad, crew-cut young man with a briefcase, the Xerox man was, according to the company, not only 'educated' but well prepared to change the toner, fix the so-called mispuff that tended to cause paper jams, and generally oversee the performance of the copier.[24] From the start, the copier had almost taken on a life of its own, and since many within the corporation took the view that it was a contraption 'mere mortals could not develop',[25] it needed to be treated like a living entity. In the movie *9 to 5,* the copier was used to make precisely this point of the unpredictable and unstable relationship that existed between humans and machines. Playing a divorcee employed outside the home for the first time, Jane Fonda is depicted in one scene in the 'Xerox room' about to oversee what looks like a simple process of copying. Without apparent reason, the machine goes berserk, sending copies flying across the room. Failing to end the chaos, the distraught woman is forced to watch her chauvinist boss turn the thing off with the confidence of one who knows the key to comporting oneself in the presence of technology: not to be scared. Perhaps she had her showdown with a Xerox 9200, a copier marketed in a highly successful series of TV commercials known as 'Brother Dominic.' These featured a monk - Brother Dominic - who, when Father Superior wants him to produce five hundred more sets of the illuminated manuscript he has been toiling with turns to the 9200 for help.[26]

21 Both commercials are described in Kearns and Nadler, Prophets in the Dark, 32-3.
22 Xerox Corporation, 'Now! Office Copying Enters the Age of Automation … Copying Costs Dramatically Cut!'
23 Brooks, 'Xerox, Xerox, Xerox, Xerox,' 57.
24 Xerox Corporation, 'What Xerox gives you for your nickel.'
25 The quote is attributed to Eddie Miller, who conducted the 1981 Xerox- McKinsey study of the corporation and who is interviewed in Jacobson and Hillkirk, *Xerox, American Samurai,* 178. 164 Notes to pages 63-8
26 The ad is regularly listed as one of the 100 best TV commercials; see, for instance, Kanner, *The 100 Best TV Commercials - and Why They Worked,* 169-71.

In addition to the fact that the 914 could be operated by almost anyone, causing unlimited copies to flow at the simple push of a button, these copies came on ordinary paper. For several years, the ease of use and the idea of making a copy so close to the original as to make it impossible to see the difference between them was an important advertising strategy. When the company in a September 1963 advertisement in *Fortune* displayed a Picasso original next to a Xerox copy of the same picture asking readers if they could spot the original, they promised anyone who guessed correctly a Xeroxed copy of the painting.[27] Drastic but effective, it was the culmination of a number of similar ads on the same theme. All stressed that the copier could manage important originals without destroying them, that the copies were almost as good as the originals, and that all of this wizardry was within the reach of everybody.

The second decisive element in the success of the 914 was the pricing policy. In fact, the 914 was so expensive that the company was in serious doubt that it could be sold in any numbers at all. Early versions reached $4,000 in production cost alone and in 1966, it came with a retail price tag of $27,500. In a stroke of genius, the company came up with a metred pricing-policy, based on the licensing, not the buying, of the machine. For $95 a month for the first 2,000 copies and 4 cents per copy thereafter, the idea was to charge for copies, not for the machine[28]. That way, not only did Xerox own the machine and therefore the depreciation and write-offs that came with ownership, they were secured a steady income long after it had paid back its initial cost. In large part, this became one of the reasons for the subsequent success of the copier, since no one could have anticipated that the number of copies made by those who rented the machine would explode in the years to come.

Answering the hitherto unknown needs of the market, the 914 was used to produce not 2,000 copies a month but rather 10,000, and some went as high as 50,000 copies a month.*29* People made not only copies from originals as Xerox had expected - and built much of its advertising on - they made copies of copies.*30* Such unexpected possibilities did the copier present in terms of dissemination of information, that when *Business Week* wrote about Xerox at the time of the 914 launch, they felt compelled to spell out to their readers what possibilities the copier really provided, listing a department store that copied invoices, an importer who copied letters written in foreign languages for further distribution to its banks, and a Detroit engineering firm, copying specifications sheets.*31*

The number of copies made annually in the U.S. went from some 20 million in the mid-1950s, to 9.5 billion in 1964, and 14 billion two years later.*32* Xerox, who had hoped to place 5,000 units of the expensive and cumbersome 914 within three years of the 1960 launch, had instead shipped 10,000 by 1962*33*.That same year, when production was up to forty machines a day, there was a twelve-week wait for delivery*34*. What Xerox had stumbled on was a licence to make

27 Xerox Corporation, 'Which is the $2,800 Picasso? Which is the 5tf Xerox 914 Copy?'
28 Kearns and Nadler, *Prophets in the Dark*, 34-5.
29 Hammer, 'There Isn't Any Profit Squeeze at Xerox,' 153.
30 Kearns and Nadler, *Prophets in the Dark*, 36.
31 'Out to Crack Copying Market/ 89.
32 Kearns and Nadler, *Prophets in the Dark*, 43.
33 Xerox Corporation, *The Story of Xerography*, 10.
34 Hammer, 'There Isn't Any Profit Squeeze at Xerox/ 153.

money, and the company went from sales of $32 million in 1959 to $1,125 billion in 1968[35]. Profits rose from $2.6 million in 1960 to $134 million in 1968. Staff were recruited at a pace of fifty to a hundred people a month.[36] What could possibly go wrong?

Things could and would go wrong. The many patent protections surrounding xerography benefited both Chester Carlson and Xerox, making it possible for the company not only to prosper during the 1960s, but basically to secure a monopoly on the copier market. However, at the beginning of the 1970s the old patents were beginning to expire and the following years would prove a 'lost decade/ every bit as disastrous as the preceding one was successful.

It began in 1972, when the Federal Trade Commission (FTC) sued Xerox for violating antitrust laws. The FTC claimed that Xerox had 60 per cent of the overall copier market, and 95 per cent of the plain-paper copier market, demanding among other things that the company start licensing off its patents. The FTC suit was not settled until 1975, when Xerox agreed to some of its demands and made an estimated 1,700 patents available to its competitors[37]. From 1976 to 1982, Xerox's share of American copier installations dropped from around 80 per cent to 13 per cent.[38] In the early 1980s margins plummeted from 70 per cent to 10 per cent.[39] So used to ruling the market, the company did not even include formal market share information in its reports. They had always amounted to 100 per cent.[40] Hubris reigned as some expected the metre on the back of the copiers to count, not copies, but money forever.

One stunning example of how far corporate complacency would lead was the widespread fear of Xerox engineers of damaging the original document in any way. Subsequently, they were convinced that it was impossible to build a copier in which the original could be fed *into* the machine. When, in the midst of Xerox's crisis Kodak introduced a recirculating document handler in 1976, the Xerox people were incredulous. They simply did not think it could be done.[41] The Japanese posed another threat, since they not only built better copiers, but did so more effectively and at half the cost. Moreover, the Japanese had targeted the small copier, a mushrooming market Xerox ignored and which proved an immense success.[42]

The instability created by these combining factors would also lead to what some consider the worst blunder of all, the missed opportunities of Xerox PARC (Palo Alto Research Park). When Steve Jobs, founder of Apple, was quoted as saying that Xerox could have owned the entire computer industry today, and that it could have been a company ten times its current size, he was no doubt thinking of PARC[43]. PARC researchers developed the Alto, the first personal computer; constructed the Ethernet; came up with the user-friendly interfaces of menus, popup windows, and desktops now so familiar to all computer users;

35 Kearns and Nadler, *Prophets in the Dark*, 44-5.
36 Jacobson and Hillkirk, Xerox, *American Samurai*, 63.
37 Ibid., 72.
38 Kearns and Nadler, *Prophets in the Dark*, 134-5.
39 Ibid., 113.
40 Jacobson and Hillkirk, *Xerox: American Samurai,* 179.
41 Jacobson and Hillkirk, *Xerox: American Samurai,* 75-6 and Kearns and Nadler, *Prophets in the Dark*, 83-4.
42 Kearns and Nadler, *Prophets in the Dark*, 121-2.
43 Steve Jobs, quoted in Hiltzik, *Dealers of Lightning*, 389.

designed the first word-processing programs; developed the laser printer; and even toyed with what was called a 'worm/ or what we more commonly refer to as a 'virus/ Xerox managed to capitalize on and turn only one of these into a successful product: the laser printer.[44] Because of a corporate bureaucracy sometimes referred to as 'Burox'[45] internal conflicts, clashes between east-coast and west-coast approaches to technology, Xerox never fully came to exploit the potential for inhouse innovations and was left behind when the time came for the copier to be surpassed in its capacity to circulate information by the personal computer and the World Wide Web.

II

In 1966, at the peak of Xerox's success, Marshall McLuhan stated that xerography was the most startling and upsetting electric innovation to date. In his rambling style he went on to describe why what he later would call 'every man's brain-picker'[46] posed such a tremendous challenge to the status quo:

> Xerography is bringing a reign of terror into the world of publishing because it means that every reader can become both author and publisher... Authorship and readership alike can become production-oriented under xerography. Anyone can take a book apart, insert parts of other books and other materials of his own interest, and make his own book in a relatively fast time. Any teacher can take any ten textbooks on any subject and custom-make a different one by simply xeroxing a chapter from this one and from that one ... [But] Xerography is electricity invading the world of typography, and it means a total revolution in this old sphere.[47]

If we are to understand the copier and photocopying, not only as a tremendous corporate success story during the 1960s, but also as a revolutionary invention promoting textual as well as legal interventions impacting on authorship and intellectual property rights alike, McLuhan's comment sends a revealing message from the past. However, before we look more closely at the copier, it must be said that any technological leap forward - and the copier did represent one such breakthrough - that enhances the possibility for reproduction, and places that capability in the hands of a larger and *different* audience has the potential to impact on *all* functions of print culture and is not only limited to the refinement of reproductive techniques alone. We know that the printing press acted as an agent of change that enabled not only a different and more effective way of manufacturing books, but spurred changes in ownership, authorship, reading habits, and distribution.[48] The copier, and now more recently the Internet, must be interpreted in the same light. The most basic of presuppositions regarding longstanding cultural relationships are questioned when we are forced to contend with the definitions of what

44 For a detailed and comprehensive account of PARC, see Hiltzik, *Dealers of Lightning*. Smith and Alexander, *Fumbling the Future*, is particularly focused on the fate of the Alto.

45 'Downfall' special issue of *Business Week* on Xerox, 5 March 2001.

46 McLuhan, Fiore, and Agel, *The Medium is the Massage*, 123.

47 McLuhan, 'Address at Vision 65,' 202. McLuhan first raised the problematics in *The Gutenberg Galaxy*.

48 On the imperative role of the printing press as such an agent of change, not only in terms of technology, but in respect to the very foundation of the circulation of texts, see Eisenstein, *The Printing Press as an Agent of Change*, and Febvre and Martin, *L'apparition du livre*.

a book really is, and what it means to be an author, a reader, or a publisher. Such questions are always present within print culture, but they insist on being addressed more directly at a time of drastic technological changes.

McLuhan is obviously concerned about the arrival of xerography and the copier because he expressly singles them out, but he is perhaps even more focused on the consequences of new technology per se, especially as it relates to print culture and authorship. He was not the first to worry. In 1935 with the world teetering on the brink of war, Walter Benjamin questioned the modern machine's ability to strip the work of art of its aura. Granted, Benjamin was more interested in the visual than the textual, but his argument did not hinge on that distinction alone. Just as Marshal McLuhan many years later would lament the upheaval of tradition so did Benjamin predict that the mass market and commodity capitalism would sever the ties between the author and the public, mapping out a new territory in which the reader was about to turn into writer at any moment.[49] This suggests a dramatic revolution in the ordering of intellectual property, as tumultuous and radical a change as when eighteenth-century writers went from primarily considering themselves craftsmen, to promoting and viewing themselves as authors.[50] Both McLuhan and Benjamin used the machine to suggest that such a reversal of roles was imminent; Xerox relied on commercials and print ads to illustrate the outcome of their prophecies. Since women, children, and chimpanzees could operate a machine that served the purpose of instantaneously reproducing texts, *anyone* could become author and publisher by bypassing the traditional functions of print culture. The copier and its new users collude to *demystify* and to question the roles previously assigned to producer, distributor, and consumer in print culture, roles that until the 1960s mostly had been occupied by men.

While the copier operates as a printing press of sorts, it is still a far cry from actually producing new *books*. The function of the copier is precisely the reverse: it negates the book; it takes it out of the equation. It does so because the technique of reproduction embodied in the copier 'detaches,' as Walter Benjamin writes, 'the reproduced object from the domain of tradition.'[51] This is a perfect description of a material and immaterial transformation - you need only visualize the process: place a book or a journal under the lid of a copier, press a button, the light turns on inside the machine, and a few seconds later out comes nothing remotely resembling what was placed there to begin with. Smudged and unintelligible at times, the papers containing the information you need can be, and often are, too dark or too light; with not enough or too much enlargement or reduction; or they are simply not forthcoming at all because the machine is broken, and so on. The copier is the perfect machine for its time because it emphasizes, not form, but content, and because it suggests that authorial power has been placed in the hands of the person using the machine. Both these critical elements in the understanding of the copier can be related to an upsurge in information and an increased emphasis on and awareness of education and knowledge as resources both in political and monetary terms. In his *New Yorker* article on Xerox from 1967, John Brooks succinctly raised

49 Benjamin, 'The Work of Art' 232.
50 Woodmansee, 'The Genius and the Copyright' 429.
51 Benjamin, 'The Work of Art' 221.

the complicated question of copyright, and the potential for the copier to effortlessly reproduce text for swift distribution.[52] He did so by noting that the copier had penetrated libraries and universities to the point where the technology was taken for granted, if not by publishers, then by the public. Therefore, at the time when Xerox's sales seemingly could only go up, and the photocopier became part of the corporate, educational, and public landscape, it was a lawsuit about to happen.

• • •

One of the first cases testing the subversive capacity of the copier was *Williams & Wilkins Co. v. United States*, involving on the one hand Williams and Wilkins - publisher of a number of medical journals - and on the other the United States government through the Department of Health, Education, and Welfare and its institutions the National Institutes of Health (NIH) and the National Library of Medicine (NLM)[53].

On 17 February 1968, Williams and Wilkins filed a complaint against NIH and NLM, arguing that the library's unauthorized photocopying of articles from journals published and copyrighted by Williams & Wilkins amounted to copyright infringement. The plaintiffs claimed that they faced loss of revenue because photocopying now substituted for subscriptions and they charged that the fair-use doctrine - allowing for the photocopying of certain parts or extracts from books and/or journals for scholarly purposes - never was intended to cover complete works, which was the case in this instance. The defence argued that NIH and NLM as non-profit agencies was well within the bounds of fair use when they assisted individual researchers with photocopying and that the amount copied was not a decisive factor against the practice. They also stated that the copyright was not, in fact, the publisher's but the author's, authors who had received no financial compensation from Williams & Wilkins, and who furthermore did not object to being photocopied, since they knew how vital it was to gain access to new information themselves. Nonetheless, the 1972 district court decision went in favour of Williams & Wilkins. With the least possible majority of 4-3, the appellate court reversed the decision in favour of the defendants the following year, concluding that the case had failed to prove significant economic detriment to Williams & Wilkins, but that it did demonstrate 'injury to medical and scientific research if photocopying of this kind is held unlawful.'[54] Once again appealed, this time to the Supreme Court, an equally divided court of 4-4 meant that the previous ruling would stand.[55]

Williams & Wilkins Co. v. United States had made it abundantly clear that the copier would need to be contended with in legislation. As we have seen from Xerox sales and advertising, the criticism of xerography by McLuhan, John Brooks's long essay on Xerox in the *New Yorker*, and even from the very basis of the *Williams & Wilkins Co. v. United States* case, the impact of the copier and the phenomenal success of Xerox were not in dispute. If the decision in *Williams & Wilkins Co. v. United States* favoured the defendant's interpretation of fair use

52 Brooks, 'Xerox, Xerox, Xerox, Xerox/ 62-3. In his overview of the many possible scenarios that the future had in store for the printed word, Brooks sketched out the possibility of tiny chips of computer film replacing the book.

53 For a detailed discussion of *Williams & Wilkins Co. v. United States,* see Goldstein, Copyright's Highway, esp. chapter 3, 'Fifty Dollars to Collect Ten/ 78-128.

54 Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), at 1345.

55 The verdict was left standing because Justice Blackmun took no part in the decision. For a longer discussion on the possible reasons why, see Goldstein, *Copyright's Highway*, chapter 3, 'Fifty Dollars to Collect Ten' 78-128.

and sided with the NIH and NLM, part of the reason behind this was that the U.S. Congress for many years had been trying to pass a revision to the 1909 Copyright Act.[56] At the time of *Williams & Wilkins Co. v. United States* there were simply no provisions in the Copyright Act for accommodating the new possibilities of reproduction provided by the copier, which undoubtedly prompted the court of claims's comment that there was a pressing need for Congress to treat the problems of photocopying.[57] The same call for a rejuvenation of intellectual property regimes suited to a new digital environment both nationally, regionally, and globally would be brought on by the arrival of the Internet and the information society.[58]

When the new Copyright Act from 1976 became law, section 107 codified fair use based on four factors: the purpose and character of the use (if for commercial or non-profit reasons); the nature of the copyrighted work (factual or non-factual with more leniency for the factual); the amount of the work copied in relation to the whole work (less or more); and the effect of the use upon the potential market for, or the value of, the copyrighted work.[59] When, in 1985, another case - *American Geophysical Union v. Texaco Inc.* - provided the battleground for a new confrontation involving the copier and fair use, the legal framework and the mechanisms ensuring intellectual property rights enforcement were therefore radically different from what had been the case during *Williams & Wilkins Co. v. United States.*

American Geophysical Union v. Texaco Inc. involved six scientific and technical publishers who sued Texaco because its in-house researchers had photocopied articles without paying licence fees to the publishers in question. The case came to rest on the example of one such researcher, Dr Donald Chickering, and his copying of four articles, two letters to the editor and two notes, from the *Journal of Catalysis*. While AGU claimed that he was violating fair use, Texaco and several other amid would argue that as a researcher who used the articles for his own research, laboratory work, or even for future reference rather than for profit, he was not in breach of fair use. One of the authors of an article Chickering had copied, Professor Schwarz, testified for Texaco, saying that both his colleagues and his students viewed photocopying as an important and essential part of their education, 'a natural [act] much like breathing.'[60] As in *Williams & Wilkins Co. v. United States*, the publishers vehemently disputed this 'natural act,' and insisted that photocopying hurt business. Two cases, of which *Williams & Wilkins Co. v. United States* was the first, seemed to add support to Texaco's position on fair use. The second, the famous *Sony Corp. v. Universal City Studios,Inc.*, had on similar grounds ruled that 'time-shifting/ that

56 See Litman, 'Copyright Legislation and Technological Change/ for a detailed analysis of some of these changes leading up to the new Copyright Act in 1976.

57 *Williams & Wilkins Co. v. United States,* 487 F.2d 1345 (Ct. Cl. 1973), at 1360.

58 Such change is, of course, the general impetus behind the Information Infrastructure Task Force White Paper: Intellectual Property and the National Information Infrastructure. The Report of the Working Group on Intellectual Property Rights (1995), available from http:/www.uspto.gov/ web/offices/com/doc/ipnii/, and the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, available at http://europa.eu.int/smartapi/cgi/sga_doc? smartapilcelexapi! prod!CELEXnumdoc&lg=EN&numdoc =32001L0029& model=guichett. Downloaded 29 May 2002.

59 For an argument that explores the possibility of fair use in order to ensure a better legal status for translations, see Venuti, *Scandals*, 63-5. For a comprehensive discussion on the U.S. 'fair use' principle in relation to international conventions such as the Berne Convention and TRIPS, see Gana Okediji, Toward an International Fair Use Doctrine.'

60 Quoted in original Texaco Brief, March 1993, at 3; see http://fairuse. stanford.edu/primary/cases/texaco/brief.html. Downloaded 16 January 2002. Most legal documents pertaining to *American Geophysical Union v. Texaco, Inc.*, can be accessed through Stanford University Libraries excellent web page 'Copyright and Fair Use,' http://fainise.stanford.edu/ primary/index.html#caselaw

is, private home video recordings of copyrighted material shown on television, taped for later viewing, was to be considered fair use.[61]

Despite these forerunners, the 1992 decision by the United States District Court for the Southern District of New York held that Dr Chickering was in violation of fair use when he copied the articles.[62] From the four criteria set down in section 107 the judgment was weighed as follows; the for-profit motive of the company paired with the fact that the articles were placed in an archive rather than used directly went in favour of the plaintiff; the second criteria, where the nature of the copyrighted material is deliberated, found in favour of Texaco since the texts were factual; on the third count, which considered the amount copied, the court found for the plaintiff since entire articles were copied, and fourth and perhaps primarily, since prior cases had signalled the importance of this last of the four considerations, the court found that the publisher had indeed suffered financial loss because of lost subscriptions. The decision was appealed to the 2nd circuit court of appeals, where the ruling, despite many interventions on the part of organizations in the library community, prevailed in October 1994. In his dissenting opinion, Judge Jacobs insisted that he viewed Dr Chickering's copying reasonable and well within what fair use was intended to allow for. The fact that the articles were placed in Dr Chickering's file did not contradict their intended purpose of research. Drawing on findings in Bruno Latour's study *Laboratory Life: The Social Construction of Scientific Facts* from 1979, Judge Jacobs argued that 'photocopying of journal articles, and the use of them, is customary and integral to the creative process of science.'[63]

The publisher's claim of lost revenue due to photocopying was not such a relevant factor as the plaintiff would have it sound, because as he pointed out, the publishers charged a much higher subscription rate for the institutional subscribers, of which Texaco was one. The most interesting contention in his opinion can, however, be read as a blow against the very underpinnings of intellectual property rights. Judge Jacobs noted that the reward from writing for these journals was miniscule, if any. Like the authors involved in *Williams & Wilkins Co. v. United States*, the researchers who published in the *Journal of Catalysis* did not receive a fee or any royalty. Instead, their contribution awarded them another form of capital: tenure, research grants, graduate students, and peer appreciation, a form of remuneration primarily sought not for reasons of economic profit. If it was true that, as Judge Jacobs argued, *'the level of copyright revenue is not among the incentives that drive the authors to the creative acts that the copyright laws are intended to foster'* (emphasis mine), then his statement meant a serious blow to one of the fundamental building blocks of copyright, namely that it exists to protect and reward authors in order for them to keep producing.[64]

Stressing that copyright law is supposed to uphold a balance between a fair return for the author while permitting creative uses of that author's work, Judge Jacobs expressed his fear that what the future would hold was a bloated ap-

61 *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). For an interesting comparison between these cases, especially in relation to filesharing and the Internet, see Das, 'The Availability of the Fair Use Defense in Music Piracy and Internet Technology.'

62 *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.N.D.Y).

63 *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, Judge Jacobs, dissenting opinion, at 935.

64 Ibid., Jacobs, dissenting opinion, at 939-40. See also Paul Edward Geller's 166 Notes to pages 71-6 argument that market incentives in copyright seem only partially successful, not able to 'incite more than incremental creation' ('Must Copyright/ 177).

paratus of intellectual property protection, something that would only hinder, not ensure further research by putting 'a transactional scheme' in place that 'would seem to require that an intellectual property lawyer be posted at each copymachine.'[65] Before the case could continue to the Supreme Court, Texaco settled with the publishers, agreeing to pay a seven-figure settlement, plus a retroactive licensing fee to the Copyright Clearance Center, signing also an agreement with the CCC for future licensing.[66] The Copyright Clearance Center, founded in 1978 to secure and oversee licensing agreements primarily in regard to photocopying, did not exist at the time of *Williams & Wilkins Co. v. United States*, and was now used against Texaco to demonstrate that there was a forum in place by which obtaining a licence for the kind of copying Texaco had engaged in would only be a formality. Judge Jacobs disagreed in his opinion, holding that while these licensing fees undoubtedly benefited the copyright holder (i.e., the publishers), they did not necessarily stimulate creativity.[67]

The third and final case pursuant to the copier is *Basic Books, Inc. v. Kinko's Graphics Corp.*, where eight publishers sued the photocopying shop chain Kinko's for printing so-called course packs for use at universities. Since the mid-1980s Kinko's had been offering a program they called 'Professor Publishing' which involved copying excerpts from books and making course packs without acquiring permission from the publishers involved. These packs were then sold to students for a profit. Although Kinko's relied on a fair-use defence, the court found for the plaintiff, and Kinko's was enjoined from selling the packs and ordered to pay statutory damages in the order of $510,000 as well as attorney's fees and costs[68].

III

The differences between these three cases are evident. *Williams & Wilkins Co. v. United States* as well as *American Geophysical Union v. Texaco Inc.* revolved around the copying of specific, individual articles for use in a research or educational environment. While also intended for educational purposes, the copying at issue in *Basic Books, Inc. v. Kinko's Graphics Corp*. instead involved the multiple copying of chapters and articles for subsequent 'course-packaging' and resale for profit. The cases were also judged differently, partly on the basis of the for-profit motives of Texaco and Kinko's as opposed to the non-profit agencies of NIH and MM.

What is most striking about all three is, of course, the common denominator setting off the complaints to begin with: the copier. Furthermore, all of them implicate research institutions, libraries, and universities, thus squarely setting the problematics within an expanding and increasingly important realm of information and knowledge. All three cases consequently problematize the relationship between the uses of content and the owning of it, establishing a gap

65 *American Geophysical Union v. Texaco*, Inc., 60 F.3d 913, Judge Jacobs, dissenting opinion, at 937.
66 See http://fairuse.stanford.edu/primary/cases/texaco/tex.html. Downloaded 16 January 2002.
67 *American Geophysical Union v. Texaco*, Inc., 60 F.3d 913, Judge Jacobs, dissenting opinion, at 940.
68 *Basic Books Inc. v. Kinko's Graphics Corp.,* 758 F. Supp. 1522 (S.D.N.Y. 1991) at 1526.

between the interests of two major players in print culture, publishers on one side, and libraries and universities on the other.[69]

I want, however, to stress one shared characteristic that I think is the most crucial: the power of the copier to act as an instrument of selection and sampling. In *Williams & Wilkins Co. v. United States* as well as in *American Geophysical Union v. Texaco Inc.*, the publishers emphasized strongly that a loss of revenue occurred because instead of first subscribing to a journal and then reading it, researchers were photocopying articles from journals in-house and then reading them (or not). The court did not find evidence of financial detriment in the first case, but in the second the majority did. However, the most important aspect of Dr Chickering's behaviour was that he proved how essential it had become to select within the 'mass of information' Xerox so aptly had identified many years earlier and that faced him daily as a researcher. He needed the *Journal of Catalysis*, not in its entirety, but in bits and pieces. The Kinko's case only takes this particular characteristic to the next level. Making the course-packs under the 'Professor Publishing' program constituted precisely the kind of activity McLuhan predicted in the quote above when he stressed: *'Any teacher can take any ten textbooks on any subject and custom-make a different one by simply xeroxing a chapter from this one and from that one.'*

The copier enables the swift compiling of information; the collecting of one chapter here, another one there, not only in order to simply redistribute them to a class of expectant students, but to recombine them and make a new, more useful tool. In one stroke, the copier makes the old author extinct, while at the same time laying the foundation for another to appear. To compile, to combine, to accumulate, to 'sample' is a new form of authorship that proved to be the copier's most transgressive function. Not only did it make copies, it reproduced authors. The capacity of 'sampling,' was identified by Roland Barthes in 1968 when he spoke of the ability to 'mix [mele] writings' as the only true power that the modern author possessed.[70] Although the consequences of the 'author '-compiler are clearly present in *Basic Books, Inc. v. Kinko's Graphics Corp.* to a much larger extent than in the other cases, it is equally clear that while poststructuralist thought might allow and even give the author-compiler a justification for existence, the legal framework does not condone such forms of authorship, a problematics I will return to in chapter 5 when discussing intellectual property rights in relation to traditional knowledge and folklore. That a new value is created by the recombination of existing material is not self-evident in any way.[71] Sampling is at the base of hip-hop music, the file-sharing activities on the Internet, and the downloading and subsequent burning of new, individually selected and compiled CDs, all of which are driven by the same logic as we see enabled by the copier.[72] It makes sense that devices such as the copier and the MP3-player emerge in a knowledge-based society, not only because technology makes them possible, but because they are directed at the selection and reconstruction of information.

69 For a very interesting discussion problematizing these issues in regard to academia and the idea of the university as a public domain, see McSherry, *Who Owns Academic Work?*

70 Barthes, 'The Death of the Author,' 146.

71 Jaszi, 'On the Author Effect,' 49.

72 For an overview of music sampling and the creative and financial consequences in regard to copyright, see McLeod, *Owning Culture*, 83-108, and Sanjek, 'Don't Have to DJ No More.'

As the copier made the exchange of information possible in a radically new way and opened the floodgates for its dissemination, it became increasingly obvious that such a lucrative commodity would necessitate some form of control. As soon as we see new technological modes enabling access, we will see a direct response on all levels to delimit and police that possibility. Such strategies include not only revisions to most treaties and national laws, but also the emergence of new agencies, in this particular case so-called Reproduction Rights Organizations (RROs), that licenses reproduction of copyrighted material on a collective, rather than individual basis. RROs were specifically constructed to meet the problems of photocopying, but the principle of collective administration of rights is much older and generally credited to the difficulties involved in ensuring proper control of music performances. While the International Federation of Reproduction Rights Organizations (IFRRO) is the international umbrella organization for RROs, the French Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM) is generally regarded as the first example of such a collective *administration organization*.[73] Reproduction rights were not secured as a minimum Berne Convention right until the 1967 Stockholm Revision Conference,[74] and different nation-states have treated the dilemma of photocopying differently. In Germany, a statutory levy based on reproduction capacity is imposed on the sale of all reprographic equipment and another levy, based on the number of pages reproduced, is imposed on the operator. [75] In Sweden, the Swedish Writer's Union uses the revenues collected from licences by the RRO BONUS to administer a special fund called 'Fotokopieringsfonden' (The Photocopying Fund), from which any author and translator may apply for grants once a year.[76]

Thus, the copier gave us more than the possibility to distribute, to sample, and to create new texts, and more than the possibility to make copies of copies; it also gave us new instruments of control. In 2000 Xerox, the company that once saw itself in the vanguard of building the 'architecture of information'[77] launched a company called Content- Guard, Inc. in cooperation with Microsoft. Developed at Xerox PARC, ContentGuard has designed a Digital Rights Language, XrML (extensible rights Markup Language), or, as the company puts it 'a universal method for specifying and managing rights and conditions associated with digital content as well as services.'[78] Allowing you to access copyrighted material such as music, images, or text on the Internet, ContentGuard epitomizes Marshal McLuhan's 1966 conjecture that 'there is no possible protection from technology except by technology.'[79] Paradoxically, with the launch of ContentGuard, the company that forty years earlier had produced a machine revolutionizing the diffusion of content, now focused, not on wider dissemination, but on the enhanced protection of the same resource it once helped distribute in an unparalleled manner.

73 For a thorough overview of what is also referred to as 'collecting societies,' see Sinacore-Guinn, *Collective Administration of Copyrights and Neighboring Rights*.

74 Goldstein, International Copyright, 249.

75 Sinacore-Guinn, Collective Administration of Copyright and Neighboring Rights, 807.

76 For further information on this fund, see Sveriges Forfattarforbund/The Swedish Writer's Union website http://www.forfattarforbundet.se

77 'Architecture of information' was to become a lead slogan during the turbulent years. The expression is, in most accounts of Xerox, attributed to a speech given by then CEO Peter McColough to the New York Society of Security Analysts in March of 1970 (see Smith and Alexander, *Fumbling the Future*, 48-50).

78 See ContentGuard, Inc. website http://www.contentguard.com/xrml.asp

79 McLuhan, 'Address at Vision 65,' 202.

Imitating

Janis Jeffries

Adapting

Rosalie Schweiker

Robin Kirkham

The Judy Collection

Faking

Joanne McNeil

Faking

Some days the internet feels like a never-ending stream punctured with white text boxes and drop down menus. What is your name? What is your birthday? What is your post code? Check this box if you agree to our Terms of Service and enter the CAPTCHA here. You can put anything in those boxes. Make up a new name and fake your age. There is no fine or prison time for signing up for a new web service with a false name or the wrong birthday. The internet is filled with fake characters, and on the internet, these creations might be vessels for deeper truths.

All human beings splinter some contradictory opinions, beliefs, and ideas. You can never cast a linear narrative out of a person's lived experiences without gluing together disjointed periods with question marks. Identity is elastic. We grow and learn while we try new things. Here is why the internet is so valuable: it lets us live out questions and exist comfortably within life's grey areas. Free of the baggage of personal history, the internet can be a place for escape. To play a fake character online seems to, if anything, reinforce a person's authenticity. That New Yorker cartoon, now almost twenty years old, "On the Internet, nobody knows you're a dog," is the internet's golden rule. Because what if you really don't know what you want or who you are? You have got to keep moving even if it means wandering in the wrong direction sometimes.

Oscar Wilde once said, "Man is least himself when he talks in his own person. Give him a mask, and he will tell you the truth." Literary fiction has long served as a junk drawer to express the truth that lies outside reality's mirror image. Some of the finest works of literature appear to be fact-based like Roberto Bolaño's *Nazi Literature in the Americas*, a fake reference text, which walks readers through short biographies of imagined South American fascist authors and critics. It is so close to reality, it fulfills what culture already expects from history. J. G. Ballard's short story *The Index* provides only the final pages of the "unpublished and perhaps suppressed autobiography" of Henry Rhodes Hamilton. Under "D," alone there are references to John F. Kennedy's assassination and the Normandy landings.

Philip José Farmer's *Tarzan Alive: A Definitive Biography of Lord Greystoke* adds another skip, the premise is that Tarzan was indeed a real person and Edgar Rice Burroughs was merely writing his fictionalized memoirs. Farmer reveals how staged — how fake — so many biographies seem. So much of a biographer's job is to heighten drama and complicate its subject, but we know from our own lives, that a great deal of personal development comes in quiet moments that cannot be documented — staring out the window, going for a walk on your own, fixing dinner. Yet another skip, the version of Tarzan Alive that is included in The Piracy Project's library is Phillip Edward Johnson's appropriation of Farmer's novel extending the story to connect with writers who lived in the author's neighborhood of Stoke Newington in London.

Then there is fiction that is roman à clef, a freedom some authors abuse to settle scores with little remorse. There's no mistaking that Siri Hustvedt's *What I Loved* was inspired by the wife and child the author's husband had before meeting her. The book airs all the dirty laundry of her stepson's involvement with the New York City club kid Michael Alig, who bludgeoned his friend Angel Melendez to death, with names changed and details slightly rearranged so the book is filled under "fiction" rather than "autobiography" in bookstores, meanwhile demonstrating the genre binary is rarely useful.

What are the ethics of mining real life for "fiction" anyway? Is it like a credit report where everything after several years is forgiven? Maybe I am wrong to dismiss Hustvedt so quickly. This is her truth. Her husband's ex-wife and her stepson are part of her life story as well. How many surface level details would have to change to make this book seem less vindictive? Would it make a difference if the stepson were a stepdaughter and the setting wasn't New York but Kiev or Kuala Lumpur?

Like characters always say in reality TV — the fakest television of all — "I didn't come here to make friends." Literature isn't here to make friends. The truth isn't always nice. Literature should tell the truth somehow, and pass through whatever vectors of protection the heart needs to get it out. What is fake fiction? Something written without conviction — and how could anyone be the judge of this besides the author himself?

It is a privilege to tell the truth this way. Writing a novel takes time. Who has that much time? Just the physical effort of typing 80,000 or more words might take more than a day to hammer out. The skill to write beautiful sentences, refine the structure of a piece, develop characters, and dream up plot twists could take a lifetime to develop. Filmmaking requires time and money and labor. You need actors, set designers, sound mixers, editors, and expensive equipment. What happens when the desire to tell a story is stifled by circumstances like time and money? Character creation online is the product of a storytelling drive that might otherwise go into the creation of scripts or novels. It is truth telling through a funhouse mirror.

Problems arise whenever a relationship is a project rather than a connection with another human being. Lying about facts is deception in real life, a hostile act of disrespect toward another person. Lying on the internet might be a creative practice, but this is where things get slippery. In the age of pervasive computing, there's no internet to get "on" anymore, it's everywhere.

#

Chayson Basinio was two years old. The boy's great-aunt reported to authorities in Allier, Auvergne that the toddler hadn't been seen in a week, and was likely kidnapped. French police surveyed the area. Divers searched a nearby lake. Someone created a Facebook page with a photo of the child with his 20-year-old father, Rayane Basinio. The child wasn't found and the police attempted to find his parents, who were also missing. Speaking to the Guardian, the public prosecutor, said, "Sadly, this is a very modern-day story. Someone decided to create false Facebook accounts and took pictures from real accounts to feed the false accounts and make these people seem real." The woman who posed as the imaginary child's great-aunt is now in custody. Profiles for the Basinio family were created several months earlier. The whole scenario seems like a familiar trope — the author of a story loses his mind and believes his characters are real — but in this case, the characters have identities on the screen no different than a real person's online presence.

Recently a friend of mine sent along a Facebook profile of someone she believes might be an undercover cop. It was a simple glossy image of a young blond woman who listed Rihanna as a favorite singer and says she works at the fast fashion retailer Forever 21. She has few friends and only a handful of public updates. "Silvia" has some interesting "likes" — Occupy affiliates, labor activists, and other communities in left politics. Plenty of Occupy activists were attractive young women interested in pop culture. If this is the work of an undercover officer, his lack of creativity reinforces stereotypes of who is or isn't politically active. I keep meaning to drop that possibly fake woman on Facebook a line. I would ask her about music and activism. If there is a reason I haven't yet it is because I don't think she would have much to say. As a story, she is one that is badly written. Perhaps some unwise activists get "catfished" this way — who knows? It isn't a likable character but an assemblage of the worst stereotypes about women.

The most famous case of an online unmasking is "A Gay Girl in Damascus," a blog that was later revealed to be the work of a white American man. Amina Arraf appeared to be a quite beautiful young woman. The author of this character Tom

MacMaster said he created her in order to participate in online discussions about the Middle East. That seems fair enough, and at the same time ironic that a white man used the internet under the false identity of a woman of color to be taken seriously — a more typical online experience is just the reverse of that.

Blogging as "Amina," MacMaster created profiles for her on a number of social media websites including an online community called "Lez Get Real." Her blog became widely read and MacMaster pushed the experiment to the limits concocting the character's abduction. Creating a new character, "Rania Ismail," Amina's cousin, MacMaster wrote she was kidnapped by three armed men on her way to a protest meeting. What followed was a flurry of media attention. Things started to unravel when Jelena Lecic, the woman in the photos that were said to be of Amina, a Croatian medical assistant living in London, saw her picture in the Guardian.

Critics took issue with what later appeared between the lines as orientalism and misogyny. "The faked lesbian sex scenes turn my stomach. The narcissistic writing, the sprinkling of quotations from the Koran and tidbits from Syrian history, the stock stories compiled from a thousand news clippings — it all seems painfully obvious," said Minal Hajratwala, quoted in *The New York Times*. MacMaster once contacted her as Amina, sending along a manuscript of what was later found to be a fake autobiography. It is unfortunate how far this story escalated. As a consequence, the media is less trusting of anonymous activists and writers in conflict areas.

In the fallout, people discovered the person running "Lez Get Real" also presents as male in the real world. He and MacMaster had a flirtatious exchange both unaware the other was also in character. What if we should later learn that MacMaster, or the person who ran "Lez Get Real" experiences gender dysphoria and wishes to transition? People might take back a few unkind words said. But we should be open to this kind of experimentation anyway. Gender is needlessly policed in the physical world, society demands its legibility and forces us to define ourselves into categories that do not always correspond with how one thinks or feels. Yes, MacMaster did a number of cruel things as "Amina," but playing a woman online was not one of them. I think every man and every woman might benefit from playing across gender on the internet once in a while. It is an exercise in empathy.

The internet is a space to play out these question marks. It is a tool for curiosity and mystery, the culmination of human desire and imagination, a measurement of the mind's frontiers. Without face to face meeting, every online interaction exist somewhere on the spectrum of the imaginary. Fake characters like Amina and Chayson Basinio are exaggerations of what already often feels like gigantic interactive fiction experiment.

It might be we are coming to the end of a golden age of online faking. It is harder to invent a character online from thin air when even babies have Facebook pages now. In the meantime, you are free to use the internet to stretch your identity to the limits. Go on, make up a fake name. Maybe that form will pass through a series of databases and arrive as junk mail. A magazine or coupon book for a person who never existed, except as words on the network.

Forging

Anna Dale

Leaking

Mark Chavez-Dawson

Paraphrasing

Quoting

(Christopher Rountree & Rupert Ackroyd)

Reproducing

Using

Counterfeiting

Repeating

Chiara Figone

Laurent Sauerwein

Jean Denis Frater

Translating

Neil Cummings

Cloning

Cataloguing the Piracy Collection

Searched term: Piracy

ID: 300312103
Record Type: concept
piracies (forgeries) (forgeries (derivative objects), derivative objects, ...
Object Genres (Hierarchy Name))

Note: The unauthorized reproduction or use of an invention or work of another, as a book, recording, computer software, intellectual property, etc., esp. as constituting an infringement of patent or copyright; plagiarism; an instance of this.

Terms:

piracies (forgeries) (preferred,C,V,English-P,D,U,PN)
piracy (forgery) (C,U,English,AD,U,SN)
pirated editions (C,V,British English,UF,U,N)

Facet/Hierarchy Code: V.PE

Hierarchical Position:
Hierarchy of Objects Facet
Objects Facet
Hierarchy of Object Genres (Hierarchy Name)
.... Object Genres (Hierarchy Name) (G)
Hierarchy of object genres (object classifications)
..... object genres (object classifications) (G)
Hierarchy of <originals and derivative objects>
..... <originals and derivative objects> (G)
Hierarchy of derivative objects
..... derivative objects (G)
Hierarchy of forgeries (derivative objects)
..... forgeries (derivative objects) (G)
Hierarchy of piracies (forgeries)
..... piracies (forgeries) (G,U)

Terms taken from the Getty AAT (Art & Architecture Thesaurus). The vocabulary is described on it's website as "The Art & Architecture Thesaurus ® (AAT), the Getty Thesaurus of Geographic Names ® (TGN), the Union List of Artist Names ® (ULAN), and the Cultural Objects Name Authority ® (CONA) are structured vocabularies that can be used to improve access to information about art, architecture, and material culture."

Karen Di Franco

The Library Medium

Keywords are the place

"Transition," "transmission" and "movement" are words that spring to mind when thinking of the difficulty of capturing, of understanding, the intricacies of the material in the Piracy Collection. This is a collection that has accumulated its own narrative, sitting alongside the individual stories gathered by each submission, adding a curious layer of interpretation to anyone interested in organising the material. It is also subject to the various conditions imposed by the situation of its installation as a travelling collection. An encounter with the collection installed as a Reading Room at Grand Union, Birmingham presented a situation where, with an assembled audience, the process of producing descriptive terms to categorise items in the collection were discussed in the format of a workshop. Together the participants explored the possibilities for standard and non-standard vocabularies to create alternative or supplementary ways to organise and understand items. A selection of books were used as examples and a group of terms was generated.

The transit of materials, the alterations, edits and transformations that occur for items to enter the collection have to be taken into account when generating or selecting terms. This provides the starting point for various considerations in regards to the structure of catalogues, the relationship between library indexes and the "memory places" constructed by the scholars of antiquity prior to the written inventory. Frameworks provided by categorisation open out the possibility of exploring the relationship between print, memory and selection. The library, archive and photographic collection at the Warburg Institute, London, is an example of such an organisation, where these ideas synthesise in a unique research architecture that reflects the interests of the institute's founder and its consequent curators and librarians.

As an example of a set of specialised or interpretive collections, and therefore of interest to the Piracy Collection, the Warburg Institute looks not to follow standards but to set them, testing the fixed nature of standardisation with material that moves across art historical boundaries. The notions of move- ment, circulation and orientation provide a counterpoint to the traditional meth- ods of fixing understanding, whether through shelf reference, subject index or categorising term.

Motion is also encountered with the institute's description of the library's layout: "The categories of Image, Word, Orientation and Action constitute the main divisions of the Warburg Institute Library and encapsulate its aim: to study the tenacity of symbols and images in European art and architecture (Image, 1st floor); the persistence of motifs and forms in Western languages and literatures (Word, 2nd floor); the gradual transition, in Western thought, from magical beliefs to religion, science and philosophy (Orientation, 3rd & 4th floor); and the survival and transformation of ancient patterns in social customs and political institutions (Action, 4th floor)."

The emblem for the institute is taken from a woodcut in the edition of the *De natura rerum* of Isidore of Seville (560-636) printed at Augsburg in 1472.

In other words, the library was to lead from the visual image, as the first stage in human's awareness (Image), to language (Word) and then to religion, science and philosophy, all of them products of humanity's search for Orientation, which influences patterns of behaviour and action, the subject matter of history (Action).[1]

We are on a journey, moving towards an understanding of what is gestural, symbolic or descriptive within our task of categorising the Piracy Collection. Like our transit through the institute's library, our understanding and navigation of collections as interpreted by the library catalogue, index card system or computer database is situated in various moments of technological or conceptual development in the fields of organisation. These progressions are entwined with the formations of the earliest bureaucratic archives of ancient civilisations, through to the development of taxonomies in the early antiquarian collections that are the foundation of national collections such as the British Library.The creation of taxonomies are reflected in the development of indexing and reference systems in the private libraries of rich European aristocrats in the seventeenth century, which are latterly reflected in the Dewey Decimal Classification System and the establishment of the Libraries Association in the twentieth century.

The open shelves with a subject category marker at the Warburg Institute Library

With every type of establishment comes the desire to create "standards" – a sequence of operational actions or behaviours that maintain and classify activity, generally imposed for clarity, universality and in some cases, perhaps most importantly, to save time and money. Intrinsic to the standardised system of cataloguing is the reflected order of the library shelf.

> There is no living library that does not harbour a number of book-like creations from fringe areas. They need not be stick-in albums or family albums, autograph books or portfolios containing pamphlets or religious tracts; some people become attached to leaflets and prospectuses, others to handwriting facsimiles or typewritten copies of unobtainable books; and certainly periodicals can form the prismatic fringes of a library.[2]

The Piracy Collection's lack of "prismatic fringe" in comparison to the unpacked material of Benjamin's library is a possible concern for a collection in a near permanent space of becoming – packed or unpacked – in motion and above

all, stateless. The peripatetic de/construction of the Piracy Collection requires a categorising scheme that reflects its itinerant nature. Terms are needed to describe the transit, transmission and the conditions of the original as well as acknowledging the changes made to produce the pirate. These words should be a conductive medium – transmitting the modes and methods of production across space and time.

It is time to consider the catalogue as equally peripatetic. The proposed vocabulary should have the potential to evoke a method of memory architecture – a way of employing images as scholars and students in the ancient world would – to produce vivid ideas that, when memorised in a system, provide the user with the mnemonic to understand and order the collection within the artificial "memory place"[3] of the imaginary library.

As the order of the Piracy Collection is constantly subject to the considerations and interests of its users and custodians, it seems useful to look at other collections such as those at the Warburg Institute that have been transitory, are enlivened or enriched by their re-ordering and follow a structure that is inherent to their construct, with catalogues and indexes that echo the interests of the persons that inhabit the library space. It is the relationship between the library shelf and the reflected construct of the catalogue that provides the connection to these itinerant collections, with the development of the index card and latterly the catalogue database as the memory device, enabling research and ordering collections.

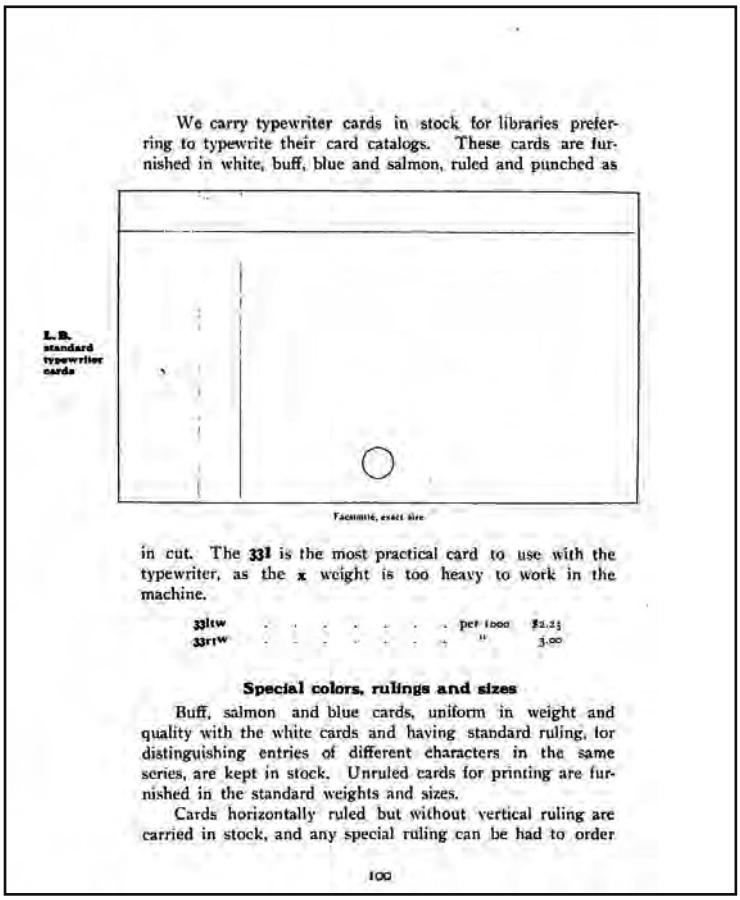
Loci Communes

With the invention and spread of printing using movable type in the sixteenth century, private libraries and collections struggled to deal with the sudden influx of books – described as a "book flood"[4] by academics at the time. The permanency and growth of static collections marks the development of bibliographic ddata collection and recording. The publication of Bibliotheca Universalis by Konrad Gessner in 1545 is in part an attempt to deal with this increase in the flow of information and the demand made on the repositories that stored them. Gessner was to break with previous inventory-style systems in an attempt to describe books in terms of content and form, offering textual excerpts. Gessner's experiments with referencing mark the beginnings of library science – and the moment where cataloguing can be seen to be a repository of information in and of itself – providing visitors with a way to orientate themselves in a collection.

When developing *Pandectarum sive Partitionum universalium libri*, the subject index volume that accompanies the Bibliotheca Universalis, Gessner generated a list of keywords ordered thematically rather than in reference to

authors' names. Other such innovations included an "aggregation of commonplaces," an overview of topics arranged in various fields to complement the researchers' needs. Gessner advises users to compile their own indexes: lists of references and notes to be cut up and arranged in clusters and placed into boxes or fixed in a device with clips. This can be seen as one of the earliest examples of a systematic external method for the storage of indexes, to be arranged in different ways and thematically retrievable.

Like the scholars of antiquity, the academics of the sixteenth century organised complex ideas through a series of descriptive terms, the modern equivalent of the architecture of memory. Gottfried Wilhelm Leibniz, in his occupation as librarian of the baroque library at Wolfenbüttel, adopted the technique developed by Gessner across the holdings: "Between 1691 and 1699, again following Gessner's procedures, he lists the extensive holdings of the Wolfenbüttel library with the aid of two secretaries writing, an assistant cutting, sorting, and gluing, and two theology students copying: a directory was to remain, into the twentieth century, the only general author catalogue of the Duke August Library."[5]



We carry typewriter cards in stock for libraries preferring to typewrite their card catalogs. These cards are furnished in white, buff, blue and salmon, ruled and punched as

L. B. standard typewriter cards

Facsimile, exact size

in cut. The **331** is the most practical card to use with the typewriter, as the **x** weight is too heavy to work in the machine.

331tw	per 1000	$2.25
331rw	"	3.00

Special colors, rulings and sizes

Buff, salmon and blue cards, uniform in weight and quality with the white cards and having standard ruling, for distinguishing entries of different characters in the same series, are kept in stock. Unruled cards for printing are furnished in the standard weights and sizes.

Cards horizontally ruled but without vertical ruling are carried in stock, and any special ruling can be had to order

100

Library Catalogue; a descriptive list with prices of the various articles of furniture and equipment for libraries and museums furnished by the Library Bureau (1902) p.100 (from Google Books).

The usefulness of the slip as a mobile representation of the actual copy is seen in the simultaneous development of the visiting card as the representation or substitute for meetings: paper slips operate as gestures for objects or behaviours.

The increase in stock and demand for books required this mobile procedure to be developed – a reference system that took the user to the record or catalogue rather than directly to the shelf. The implication of what can be perceived as tem- porary or permanent within cataloguing is pivotal in the relationship between the index and the book. The development of the paper slip – latterly the index card – allows for not only a temporal displacement from the continuous, sequential list within the system of cataloguing, but for endless reconfigurations within a myriad of schema. This change in the search procedure, from the level of books on the shelf to the level of order in a catalogue in its early stages, is still at the mercy or whim of the director or manager of the library – schemas are overwritten, overlaid or restructured.

Now agreed to have first been formatted by Abbé Rozier in Paris in approximately 1775 using the back of a deck of playing cards, by the time of Melvil Dewey the index card had experienced many iterations. By 1877, with his particular zeal for reform, Dewey had not only produced his universally accepted decimal system of library organisation, but also, through the formation of the American Library Association, the correct measurements for a standard catalogue card. The endorsed card was to be contained within a standardised Library Bureau box produced by the American Library Association Supply Department, also founded by Dewey. The development of the index card can be viewed in tandem with a movement from private book collections to the establishment of public libraries and the rise of the librarian (as apposed to the learned academic) as the custodian of order within an educationally standardised environment.

One of the categories in the Stancioff archive.

Non standards, or, The Lost Language of Symbols by Carolyn Marion Mitchell Stancioff (1903-1994)

> Marion Stancioff believed that ancient visual symbols encoded the cosmological and religious preconceptions of early man. She was very aware of the differences between words and images, and felt that there was unlikely to be a simple single 'meaning' to any visual symbol, but she was nevertheless of the view that an accurate taxonomy of symbols would help us to appreciate the philosophical sophistication of the pre-civilized mind.[6]

Situated in a stand-alone card index cabinet in the room that houses the Photographic Collection at the Warburg Institute, the unfinished project "Lost Language" manifested as a collection of 20,000 index cards compiled by Stancioff over approximately 50 years. The principle purpose of the research was to organise and explore the uses of symbolic images in early societies, looking at the foundations and connections within disciplines such as astronomy and astrology to compile a basic language of visual symbols. Living a peripatetic life as the wife of a diplomat, Stancioff spoke six languages and had a strong interest in the arts, moving in intellectual circles that explored progressive cultural theories such as those of C G Jung. Her enthusiasm for Jungian symbolism can be read through the selection and organisation of the accumulated material. It was intended that this extensive and ambitious research would eventually become a book, which unfortunately was never realised. Stancioff's interests were presumably the motivation for the bequest to the Warburg institute, although she never had any contact with Aby Warburg directly. There are many correlations between their interests, not least the singular fact that their individual projects to connect images and ideas across time were never completed. Similarly, Stancioff's process of using the index card to order and arrange the many sub-categories of her research were personally esoteric, reflecting not only the subject matter but her particular method of investigating subjects as demonstrated by the following section, with its category sub-divisions:

> **BOX 7 Section I (= 07.01.)**
> **Main heading: Man and monster of death/ initiation/ rebirth/ eclipse**
> Monster devouring/spewing human figures – general texts
> Lion monster devouring human figures
> Other monsters, including serpent/dragon, devouring human figure
> Lion monster spewing or protecting human or animal figure
> Other monsters, including serpent/ dragon/ makara spewing or protecting human figure
> Griffin or bird monster spewing or protecting human figure
> Monster spewing/devouring man, moon or sun; planet as rebirth of light/spirit
> Monster as vehicle of resurrection
> Monster as deities' acolyte spewing human figures

A photograph of one of the index cards from Stancioff's archive and the digi- tised companion version from the CD version that was produced by the Warburg Institute. It took eight years to complete the migratory project, producing a 50-volume computerised work consisting of 8481 pages (PDFs).

07.01.04.00. (037) No. German mid 13th c

Monster (lion) dev ? man (peaceful)

V & A Mus. 4054 - 1856. Ewer (aquamanile). Bronze. A lion with a hole in the head and a spout in the mouth. The latter is in the shape of a man seated on the lion's tongue, his feet are in the lion's jaws, his hands peacefully laid on the lion's maw. The handle is composed of a female figure arching her back over the lion's. She holds a sword across her middle with both hands. A small creature (bird ? beast ?) stands on lion's tail. The little beast has a bird body & tail, a doggy" head & 2 paws and looks (faces) back.

[See in"Lion. devouring man" in Card Index.]

'semmurv

07.01.04.00. (038) So. Italy 1050 AD

Lion spews - brings forth - human face

There are 4 circumambulating lions w. human heads

07.01.04.00. (039) Peru ca. 550 - 350 BC

Monster protecting man

Hentze Symbolon 1 1960: 48, figs 12 & 13. Viru culture pot. Jaguar holds human fig.

07.01.04.00. (038) cont.

Hentze Symbolon 1 1960: fig. 41. Capital adapted ? to baptismal font, Abbazia della Trinità, Venosa (Potenza) Puglie.
Crowned lion mask spews a male & a female figure who rest on a (large) lion's back. The female has 7 breasts. A serpent crawls over her. Hentze thinks it is Adam & Even w. tree (she holds a leaf) & Snake.
Fig. 40 A Chinese parallel with 2 females wrapped in snakes emerging from a tiger mask (Tao Tieh).
The scene is repeated on (2 other sides ? not shown) but they are damaged or altered. (Also in Decker 1958: fig. 173).
[It is man reborn, an initiation scene, therefore both Christian and pagan. Dixit Hentze. And M.]

Memory arrangements

Aby Warburg's unfinished final project sought to connect and explore the relationship between object and image with the concept of gesture as the unifying feature. The Mnemosyne Project was named after the Greek personification of memory, although this was memory that lived not in the mind of a person but across the elements that were remembered. Warburg's method was to amass many images of paintings, frescos, statuary, prints, as well as newspaper cuttings – political rallies, sporting events, fashion advertisements – and pin them to a series of large cloth-covered boards in his library or study, moving them around, placing them in new configurations – as he had previously with his index cards – the better to entice their correspondences and affinities, no matter how distant the works themselves in either time or place. For Warburg the purpose of the art historian was to act as a "necromancer,"[7] divining connections between images, through the spiraling concept of the "pathos-formula," a specific allure that attaches itself to images that represented movement or gesture, transmitted across disciplines and throughout visual history to create a new arrangement of meanings linked by the "conductive medium" of the series of black panels on which the image reproductions were pinned. This approach was described as designating "an indissoluble intertwining of an emotional charge and an iconographic formula in which it is impossible to distinguish between form and content."[8] Warburg described the project as "a ghost story for truly adult people."[9] The charge of recognition is described as an engram,[10] a "mnemic trace" denoting a permanently inscribed footnote or mark on memory.

Warburg's unfinished project can be understood through the internal architecture of the institute as it is now – incorporated, like the individual images from the Mnemosyne Project, into a larger synthesis.

All that remains of the Mnemosyne Atlas are photographs of the panels assembled in Warburg's library in Hamburg, reproduced here in *Aby Warburg: Der Bilderatlas Mnemosyne*, Martin Warnke (ed.), Berlin 2003. (panel 32: The Grotesque).

The Imaginary Collection

The Photographic Collection at the Warburg, like Marion Stancioff's archive, has generated its own subject index, produced after the collection moved to London. At the time of Warburg's death in 1929 it contained around 15,000 photographs, including the ones originally used on the Mnemosyne panels, which were dismantled, the photographs forming the basis for the current collection. At present there are about 300,000 photographs divided into more than 17,000 categories. Unlike Stancioff's project the photographic collection is comprised of the interests of multiple devisers. For example, early on, photographs were ordered by medium and topography, with a few iconographic subsections that mirrored the interests of Warburg or Fritz Saxl,[11] who were accumulating the collection. Once the institute moved to London in 1933, the structure was adapted away from Warburg's original themes (which followed those of the *Mnemosyne Atlas*) into an iconographic collection, with a new system designed by Rudolf Wittkower and Edgar Wind that, according to the institute, has allowed for the growth of the collection and the necessity of more categories and sub-divisions. Each section, divides up in its own way: some are arranged alphabetically, others follow narrative sequences and others are linked together by adjacent themes or concepts.

When a categorisation system is based, like those of the Warburg or the Piracy Collection, on the understanding of an actual collection, it is easy to see how terms will deviate from a thesaurus of standards. Vocabularies such as the Getty AAT (Art & Architecture Thesaurus) are based on actual collections, from which the terms have been generated, but the span of their descriptive terms exceeds any one collection. By offering their classification systems to collections for adoption, to affect standardisation in descriptions within other collections, the Getty is producing an imaginary framework of empty shelves for an unrealised collection.

The table on the next page describes the terms generated from the "Putting the Piracy Collection on the Shelf" workshop at Grand Union in Birmingham. If the terms on the right-hand column are read without knowing the works to which they are referring, it is not so difficult to imagine the types of publications they might be – political, marginal – definitely works from the "prismatic fringes of a library." When applied to an example, the terms start to clarify. For example, *No Se Lo Digas a Nadie*, (*Do Not Tell Anyone*) at first glance appears to be an average-looking, cheaply-produced book by the popular Peruvian writer, journalist and TV presenter Jaime Bayly. It is, in fact, of course, a pirate copy. Due to the high cost of books produced through traditional means, pirated material is quite commonplace in Peru, from novels to medical textbooks. However, this version has two entirely original (and unattributed) additional chapters that would only be recognised by those who have read the original.

The terms generated through the workshop to be attached to the publication along with the standard fields were:

Workshop generated terms that match Getty AAT terms	Equivalent Terms Workshop	Workshop Terms - no AAT equivalent
Commercial	Art Market	Unauthorised
Parasite		Impersonated
Facsimile		Hijacked
Interference		Blackmarket/Illegal
Revising	Edited/Modification	Invisible/Ghost
Assemblages		Altruistic
Reprints		Esoteric
Censorship		Subversion
Collaboration	Compilations	Accidental
Translation		Credited/Signed
Originals		Communal
Duration	Networks	Recontextualised

Publication Title: No se lo digas a nadie
Date: 2010
Publisher: Not known
Format: 21 X 15 cm, 278 pages
Printing: Offset, black and white, perfect binding
ISBN: None
Source: Jaime Bayly, No se lo digas a nadie, 1994
Terms: Black Market; Commercial; Hijacked; Impersonated; Facsimile; Modification

The circumstances of that particular pirate edition demonstrate the problems for the collection: the items are produced in such singular circumstances that it is difficult to produce terms that can be attributed to other items. Such singularities are a concern for specialised collections, yet with a small selection of books, a number of terms were generated that could be transferred across the collection. The method was not so dissimilar to that of the aforementioned "aggregation of commonplaces" suggested by Gessner.

For, as it is the position of this collection to always be in motion, hosted by other organisations, it is useful to conclude with the definition of the term "parasite/parasitic," which was included to test the limit of the word within the confines of the AAT definition. The Piracy Collection began as a self-organised student and staff occupation at the library of the Byam Shaw School of Art, London, which was scheduled for closure. The occupation lasted for two years as the host organisation was restructured and eventually absorbed into Central St Martins School of Arts. This physical situation is interesting, as is reflected by the definition of the

term “parasite.” Getty confines the description to “living organisms: that live in or on another, from which they obtain nutrients and, frequently, shelter at the expense of the host organism, which it may directly or indirectly harm.” Perhaps this is the definitive term for describing the Piracy Collection: “parasitic, sheltered, hosted: may cause direct or indirect harm.”

Putting the Piracy Collection on the Shelf, workshop to catalogue the Piracy Collection at Grand Union, Birmingham, January 2014.

Notes

1 I have been working as an archivist since 2010, generally with the production of digital archives, and in particular, the collection of Book Works, the arts commissioning and publishing organisation. Using Drupal (an open source content management software) I have established an online archive that connects archival material to Book Works published collection, using a classification schema that describes the content and context of the published works, a way for users to order and understand works outside of standard categorisations.

2 Walter Benjamin, *Unpacking my Library,* taken from *Illuminations,* Schocken Books, New York, 2007

3 The art of memory' has long been considered a powerful medium for transporting and recalling information and was utilised due to the obvious shortage of paper in the ancient world. It was not easy to take notes of lectures, or of any subjects of which it was easy to remember – artificial memory was the student's notebook. Through it one wrote down, in images on the places of memory, long, long streets of memory places, the material which one needed to hold in mind. The academic and magician Giordano Bruno was still using this method in the sixteenth century; he speaks of adding Parisian places to Roman places, adding places memorised in Paris to places memorised in Rome. The production of memory images – an ancient science – can be seen to be at the centre of developments in medieval art and architecture, using building design (such as churches and cathedrals) to convey ideas and teaching to the wider population. Giulio Camillo's Memory Theatre is the most useful secular example of the realisation of artificial memory.

4 There is a quote from an Italian bibliographer Anton Francesco Doni in 1550 that points towards an increased reading of titles and footnotes as a principal reaction to too many texts. Taken from the chapter, 'Temporary Indexing' in Paper Machines: About Cards & Catalogs, 1548-1929, Krajewski, Markus, MIT Press: 2011. P. 9

5 ibid. p.21

6 Taken from the introduction by Paul Taylor to the CD 'Lost Language: Early Culture expressed through visual symbols' produced by the Marion Stancioff Archive at the Warburg Institute, London (2001)

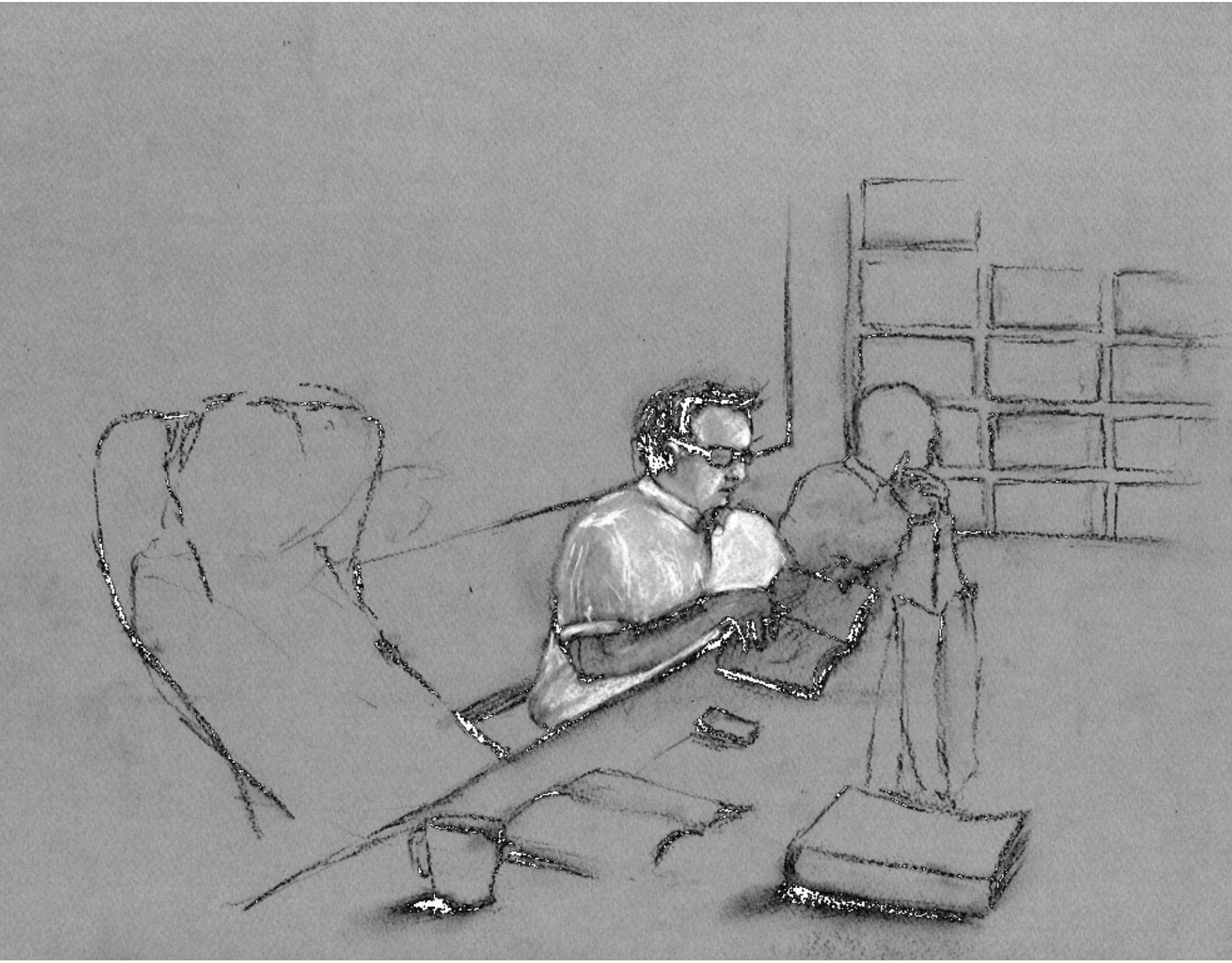
7 This term is quoted from Brian Dillon, 'Collected Works: Aby Warburg's Mnemosyne Atlas', Frieze, Issue 80, (January 2004). Taken from Giorgio Agamben, Aby Warburg and the Nameless Science', Potentialities: Collected Essays in Philosophy, California: Stanford University Press (1999), p.94

8 Giorgio Agamben, Aby Warburg and the Nameless Science', Potentialities: Collected Essays in Philosophy, California: Stanford University Press (1999), p.90

9 ibid, p.95

10 A term generated in the early part of the 20th century by Richard Semon, a German zoologist and evolutionary biologist, who believed in the inheritance of acquired characters and applied this to social evolution.

11 Fritz Saxl (1890-1948) was an academic who worked with Warburg and his collection in Hamburg, turning it into an institute in 1921. The development of the Institute, especially after Warburg's death in 1929, was guided by Saxl. Like Warburg, Saxl taught at the University of Hamburg where Erwin Panofsky and Ernst Cassirer, were his colleagues. After Warburg's death and the rise of the Nazi régime, Saxl accepted the invitation of an adhoc committee to transfer the Institute to London.



BAD WORD

Side notes contextualise some of the legal issues that arose during the discussions and were collected in August 2014.

Discussion with Sergio Muñoz Sarmiento, Lionel Bently and Prodromos Tsiavos at The Showroom, London

A Day at the Courtroom

Eva

Welcome to The Showroom today for The Piracy Project's Day at the Courtroom. The Piracy Collection has been hosted here at The Showroom for almost a year now, displayed here on the red bookshelves. It has gathered in the last two years about two hundred books – books which were produced, copied, modified, appropriated. They all sit more or less uncomfortably with the law. They all developed interesting relationships with copyright law, but most of them have been made for a specific reason, some of them to recirculate texts – texts that are hard to find or out of print – so it's about giving access. Some books have been modified, creatively improved, commented on – so it's very much about the engagement with the book and others collate materials drawn from different sources. When we started the project, most of the books were submitted in response to an open call. The other part of the collection came together through our research and through our travels to China, Peru and Istanbul, where we investigated instances of book piracy in real markets.

Courtroom drawings by Stephanie Thandiwe Johnstone

Today we want to test where these works stand in the eyes of the law. Not that we are too much bothered by the law on the Piracy Project, but we get more and more aware that we are in this grey zone, where we can't really build on other peoples work without encountering this specter of copyright which is haunting us. Copyright is so complicated and it starts to permeate more and more aspects of our lives without us actually knowing or being able to identify it.

For example: Did you know that somebody owns the copyright for *Happy Birthday to You*? I read from a *Guardian* article published yesterday: "New York-based documentary maker Jennifer Nelson is filing a lawsuit against Warner Brothers for owning the copyright of the *Happy Birthday* song, which she wanted to use in her documentary about the song. Its melody can be traced back to 1893 when Sisters Patty and Mildred Hill published a piece of music called *Good Morning to All*. Nobody is certain how or when new lyrics where appended to the tune, but the Hill sisters' copyright was passed from company to company until eventually landing at Warner/Chappell in 1988. 120 years after the melody was first published, this lawsuit is an attempt to release the song into the public domain, as at the moment it would be illegal to use it without paying a license fee, which, in the filmaker's case, was $1500."

It's quite hard to understand what we can use and what we can't. And this is why we invited today, three leading experts from different legal backgrounds to discuss selected projects from the Piracy Collection, which are here on this table. We have as UK representative Lionel Bently, Professor of Intellectual Property at the University of Cambridge. He has written several books about intellectual property, history of copyright and piracy. In the middle we have Prodromos Tsiavos. He is legal project lead for the Creative Commons, England and Wales (CC-EW) and Greece (CC-Greece) projects. And on the left, just arrived from New York, is Sergio Muñoz Sarmiento. He represents today the US view on the matter. He is an artist and a lawyer based in New York, who explores the relationship between contemporary art and law with a primary focus on copyright. He is a practicing author and teaches contemporary art and law at Fordham Law School and also runs the highly recommendable blog, Clancco.

Andrea

The format we are going to use today is that Eva and I will present the cases we pre-selected for today. The lawyers will debate them for about ten to fifteen minutes and the people in the audience that volunteer to be a jury will have this big "question mark" sign which they can use to raise a question. Because it's a debate among lawyers we will try to clarify the technical terms they'll be using in their discourse. After they have a discussion, they will choose together a place in our colour scale, from illegal to legal and then the members of the jury can discuss amongst themselves and decide if they agree with the lawyers. The jury can agree or disagree with the legal position and they will actually have the final say of where the book is to be placed. After that we will move to the next case.

WHÄIS OFF ßIEJING

DSCHON BÖRGA

Ä Tränsläischen bei Sarah Lüdemann

ßiejing kams bifoa Whôads. Sô Tscheïld lucks änt räkocknaises bifoa it kän ßpiek.

Bat sâa iss ooßou ennasa flänns in whitsch ßiejing kams bifoa Whôads. It iss ßiejing whitsch eståblisches aua Pläiß in sô ßöraunding Whôalt; whi ekspläin sätt Whôalt whiß Whôads, bat Whôads kän newwa anndu sô Fäkt sätt whi aa ßörraundet bei it. Sô Riläischen bitwien whoat whi ßie änt whoat whi nou iss newwa fättelt.

Sô ßürrealist Päinta Magrit kommentet on siß oolwäis-present Gäp bitwien Whôads änt ßiejing in à Painting koolt Sô Kie off Driems.

Sô Whäi whi ßie ßings iss effäkktet bei whoat whi

Author: Sarah Lüdemann, UK

Whäis off ßiejing

Date: 2011
Format: 20 x 13 cm, 156 pages
ISBN: None
Source: John Berger, Ways of Seeing
Publisher: Self-published
Printing: Blurb.com, perfect binding

John Berger's *Ways of Seeing* rewritten as if transcribed phonetically from a reading by a German or possibly a Finn, creating what looks like a nonsensical new language on the page.

WHÄIS OFF SSIEJING

Andrea

This is a project that was made especially for the Piracy Project by Sarah Lüdeman. She is an artist and what she did was she translated the whole book *Ways of Seeing* by John Berger into a phonetic language that will make sense only if read out loud by a German speaker and listened by an English speaker. Alongside the act of translation she copied the layout of the book, the typography, the images – basically all of its content. This book is not being sold in bookstores. That might be a factor to consider? Is there anything else?

A short recap: It's a reproduction of the graphic design. The content is copied but translated. All the images are copied as well and it is being sold on a very small scale. Any other aspects which might be relevant?

Sergio

Can you clarify what you mean by translation?

Eva

How does the translation work? It's a phonetic language. It is an invented phonetic language that if read out loud by a German person will sound like the correct text in English with a German accent. I'm German.

Andrea

Can you read a bit?

Eva reads from the book. Laughter.

Andrea

She said she did it manually. It was quite intuitive, so it does not follow any specific rule. She kind of made up this language.

Eva

OK. Where does this stand in the eyes of copyright law and what would be the criteria to talk about it?

Prodromos

How many copies has she sold? And how much is she selling them for?

Eva

It's just the printing costs. She does not make any profit. I think she sold maybe ten through us this year.

Lionel

This is very interesting. First of all, can I thank you for inviting us? I think it's a fantastic project and very, very interesting, so thank you. To me the question here is whether this particular act falls within the acts restricted by copyright, that is, the acts that are made exclusively the preserve of the copyright holder of the

book. In British law,[1] these acts are defined rather specifically as reproduction, distribution, rental and public lending, public performance, communication to the public and adaptation.

The classic act that would infringe copyright is reproduction. A person would infringe copyright by reproducing a work, irrespective of whether that was done for a commercial purpose or a non-commercial one. Reproduction just means making a copy of a part of the work. Now, another of the exclusive rights that British law confers on the copyright owner is the right to make adaptations. This is defined specifically as including the making of translations. The technical question that would arise here for a lawyer is: Is this a translation? If it is a translation, then the person making the translation would need the permission of the copyright holder in order to do this, irrespective of whether they are, or intend, to sell copies of the translation for money.

Is this a translation? The only cases that define translation are late nineteenth century cases, so were decided in quite a different context. These cases talk about a translation as conversion of text from one language into another in a way that is faithful to the original text. The question here is: Is this a conversion into another language? A court would probably answer that by trying to find some definition of language and then identifying whether this had the characteristics of a language. A normal conception of language would involve communicating systems of words in grammatical forms and syntax shared by people to allow them to communicate within those language communities. Here the text into which the work is converted is not a language that is shared by people already. This is something different. It is an invented kind of language and for that reason I don't know whether it would be regarded as a language for the purposes of copyright law.

I think that, at a technical level, that's how some of the analysis would go. On top of that, the courts will always interpret words, not just for their technical meaning but also for their purpose. The problem here then is it is in the way you read this; it fulfills the purpose of a language in that it allows the work itself to be communicated to others when it is spoken. I think seen in that perspective, the court will probably say this is a translation and therefore an infringement.

Prodromos

To add to that you have a reproduction of the pictures that actually come with the book. Anyway you would have to reproduce, you would infringe anyway the copyright of the pictures. I'm not sure about reproduction of the typesets or…

Eva

It is the same. She used the same type.

Prodromos

Probably you would have issues with that. In some jurisdictions, that would be copyright infringement. In some other jurisdictions, that would be a neighboring right infringement. I'm not sure whether you can say that with any type of exception or limitation. There are cases where copyright law author's rights actually allow some kind of acts, a series of acts that actually could take place without requiring you to get the permission from the rights holders. I'm not sure whether you can find any defence, any possible defence here, so you could say this is a parody.

1 The Copyright, Designs and Patents Act 1988, as amended.

Possibly, that would be a defence I would try. But again, it would end up with the question, how did you relate that to the original author in terms of the normal commercial exploitation of the work and whether it actually… It would anyhow require some kind of permission from the original author or rights holder. And plus you have the moral rights issue. Whether this kind of deflation equals a detrimental use of the original work and whether it infringes the integrity rights of the author. I would say it wouldn't but that's my very quick response

– precisely because it is a form of parody. I don't think it would also necessarily conflict with the normal exploitation of the work.

Jury Member

Is parody a legally recognised exception?

Prodromos

Yes.

Lionel

Yes and no.

Prodromos

I would say yes.

Lionel

Prodromos and I represent different jurisdictions (the UK and Greece). In the United Kingdom, there is no exception relating to parody at the moment.[2] There are ways you can try and shoehorn a parody into some existing exceptions. The government has draft legislation and proposes to introduce a fair dealing for the purposes of parody defence. It may well soon be an exception here but it's not at the moment.

Prodromos

But it is within the European Union…

Lionel

European Union law allows member states to operate a parody exception if they choose to do so, but the UK has yet to do so.

Prodromos

On the continent yes.

Jury Member

Could I just ask, just in terms of the parody discussion, why is the book a parody? Is it just general humour?

Andrea

The reason why she chose this book is that she came to Britain to do an MA and she discovered that everyone in Britain seemed to have read this book. She was coming from Germany and she had never heard of this author. She said there

Parody - Copyright Issues

United States

Although a parody can be considered a derivative work under United States Copyright Law, it can be protected from claims by the copyright owner of the original work under the fair use doctrine, which is codified in 17 U.S.C. § 107. The Supreme Court of the United States stated that parody "is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works." That commentary function provides some justification for use of the older work. See *Campbell v. Acuff-Rose Music, Inc.*

United Kingdom

Under existing copyright legislation (principally the Copyright, Designs and Patents Act 1988), "There is currently no exception which covers the creation of parodies, caricatures or pastiches." Parodies of works protected by copyright require the consent or permission of the copyright owner, unless they fall under existing fair use/fair dealing exceptions:

• The part of the underlying work is not "substantial"

• The use of the underlying work falls within the fair dealing exception for "criticism, review and news reporting"

• Enforcement of copyright is contrary to the public interest.

In 2006 the Gowers Review of Intellectual Property recommended that the UK should "create an exception to copyright for the purpose of caricature, parody or pastiche by 2008." Following the first stage of a two-part public consultation, the Intellectual Property Office reported that the information received "was not sufficient to persuade us that the advantages of a new parody exception were sufficient to override the disadvantages to the creators and owners of the underlying work. There is therefore no proposal to change the current approach to parody, caricature and pastiche in the UK."

However, following the Hargreaves Review in May 2011 (which made similar proposals to the Gowers Review) the Government has accepted these proposals broadly. A draft bill implementing, among other things, a Parody exception, is currently undergoing its second reading in the House of Commons.

http://en.wikipedia.org/wiki/Parody#Copyright_issues

2 However, a defence of fair dealing for purposes of parody, caricature and pastiche will be introduced on October 1, 2014 by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/0000

was something quite interesting about this difference. That's the reason behind choosing specifically this book and not another. It's not making fun of it. There's a reason why it's this book and not any other book.

Prodromos

I would say that parody doesn't necessarily have to be addressed to the original work. The reason why this is made, is making fun of German students reading that particular book or even generally reading.

Sergio

Although in the US it does. What's interesting to me about this project is that it touches on… This was meant in translation but also the reading out loud of it. I think in the US, this would clearly fall under parody defence – as long as the parody is referencing Berger's book. If it is referencing anything outside of it the courts would look at it as being satire, and they may or may not allow for that under the fair use doctrine of US Copyright Law. As far as I know, there is no American case that grants satire as a defence to infringement but there is to parody. Then the question is whether the parody is reasonably observable, reasonably apparent to the reader.

The reason I think this is clearly a parody is because translation here would either have a function or non-function. It doesn't really serve a purpose. But that refers to the text. The question of the images is still an issue as to how important are the images in the book to the parody? Does that make sense?

Just one last thing, in the US, there is no moral right granted to the author so there is no moral rights issue in the US.

Lionel

Do you not think there is a joke there: ways of seeing and ways of speaking?

Sergio

Yes.

Prodromos

It does, right.

Sergio

But there is no function. If a German person is reading it… You have a German person who knows English, so they wouldn't use this book. On the other hand a German person who doesn't understand English in which case, it's still not functional.

Jury Member 2

But if there is a function. Could maybe her intention be to criticise the fact that in Germany no one knows about this book. This would be another message, out of what's written there. What about criticism or something like that? I mean non-literal criticism.

Sergio

To me under copyright, the role of the lawyers – it's always very important but especially in copyright. I would not advise my client to make that argument because it gets you away from the book. A judge could say, "Why not use other books? Why did you pick this specific book?" then it becomes satire. Satire is

using X to make fun of Y, which is what you're talking about. In parodies, X to make fun of X. The judge would say, "Why did you pick this book? Why not just pick other books? Why not use samples of books?" Do you see what I'm saying?

Jury Member 2
Yeah, but maybe this is relevant that this book actually exists and that she compared her experience to that in Germany, where no one ever knew about it.

Sergio
Right, but now you're referencing the book. You're saying, "I need to use this book."

Jury Member 2
We are discussing the act of translation, but what I notice about the book is that the Penguin trademark is missing. So, let's say that she reproduced the book exactly as it is…

Eva
You mean a facsimile of the original?

Jury Member 2
Yes, would this be copyright infringement? Would there be an issue?

Lionel
The main issue then would be trademark infringement. The point you are making is that she omitted the trademark. The trademark holder, Penguin, might say that if the trademark had been used in the course of trade, then that would infringe the trademark holders rights because the book had not in fact been published by Penguin. However, if the trademark is omitted, Penguin has no basis to complain.

Prodromos
Plus the normal copyright itself. If you just make a copy, you plainly, clearly infringe the copyright.

Sergio
If you just photocopy the book, the original book and just make multiple copies of that? That is clearly copyright infringement.

Jury Member 2
Is the translation relevant to win the case?

Sergio
The translation? Of course it's relevant. In the US, that would be the whole defence.

Jury Member 2
But it would still be copyright infringement?

Prodromos
Copyright or author's right consists of different rights that the author has. One is the reproduction. The author is entitled to stop reproduction. Another one is to stop any kind of transformative uses of the work or derivative works. Translation would fall under the derivative work. In both cases, you would infringe copyright.

It's just that in the case of derivative work, if you use as a defence that this isn't a parody, you may get away with it. So it is very relevant whereas if you just photocopy the book, it's much clearer that you are actually infringing copyright.

Eva

If we recap what you said, all three of you in a way said it's infringing for a variety of reasons. If we asked you to place the book on this scale between legal to illegal, where would you place it?

Prodromos

Is the question whether it's infringing or whether she is going to get away with it?

Sergio

Here is the other interesting thing that you're bringing up: Penguin has a trademark protection over their logo and probably over the look. It's called trade dress in the US. It's the way the product looks.

Copyright-wise, I would place it somewhere here. Trademark-wise, I would probably place it on the red. It's a tough… It's a tough pick.

Eva

Even if she removed the Penguin logo it doesn't matter?

Sergio

Here is the other interesting thing that you're bringing up: Penguin has a trademark protection over the look. It's called trade dress in the US, it's the way the product looks.

Lionel

That's slightly different here in the UK.

Prodromos

I would think also in civil law jurisdiction, it would classify as parody. I think it falls under the exception, because it does not interfere with the normal exploitation of the work as it's not really prejudicing the legal interests of the author. I think even the moral rights survive that test, so I would put it somewhere here.

Lionel

I would put it a bit more to the red side. Not because I want it, I want it to be right down there in the non-infringing section.

Prodromos

Shall we say that's a compromise?

Eva

OK, now is the jury's job to accept this location. We haven't really defined a jury for this case but I'm looking at you two…

Jury Member 3

Me?

Eva

Yeah, you and Shama behind you, if you'd like…

Jury Member 3
I think it's a parody. But I wonder, why is there an exception for parody and not for artwork?

Sergio
There is no distinction. The US courts of law won't make that distinction between an artwork and a parody. The reason parody is protected is a free-speech issue. It's the First Amendment in the US, where the freedom of expression matches up against property rights. If you think about it, if you wrote a book and I wanted to review it and I said, "I think this is a horrible book. I'm going to slam it in *The Guardian* next Sunday. Can I borrow some paragraphs from it so I can quote you?" You would probably say, "No." This is one reason that criticism is allowed. Parody: I want to make fun of your work. Maybe you wouldn't grant me permission to do it.

Sergio
The translation doesn't have a function. Now, if it was a functional translation from English to German, then we'd have a different discussion.

Jury Member 4
Does satire have a function?

Sergio
It has a function, but in the US courts don't see that. It doesn't get the same kind of defence protection that parody does. The question under satire is going to be, why are you using this book to make fun of Germans as some deployment? You could use any item, book, clothing, music, etc.

Andrea
Does anybody disagree violently with this decision? Because we have a lot more on the table.

Eva
Are you happy with the compromise in the middle? OK.

NEW YORK TIMES SPECIAL EDITION

Eva
Next one is a fake of *The New York Times* newspaper. It's an exact imitation of the layout, typography, size and paper. It is authored by The Yes Men, a US artist and activist collective based in the States in collaboration with The Anti-Advertising Agency. This fake edition shows their ideas for a better future, featuring only good news. So in the whole newspaper you read only good news. *The New York Times* motto "All the news that's fit to print" is here replaced by "All the news we hope to print." The articles in the paper announce lots of new initiatives including, for example, the establishing of a national health care system (which is now actually happening, but this is a project from 2008), a maximum pay rate for CEOs and an article where George Bush accuses himself of treason for his actions during

his years as president (Remember the paper was published during George W Bush's presidency). On November 12th 2008, approximately 80,000 copies of this fake *New York Times* edition were handed out to passers-by on the streets in New York and Los Angeles.

Infopaq International A/S v Danske Dagblades Forening

Infopaq International A/S v Danske Dagblades Forening (2009) [1] was a decision of the European Court of Justice concerning the interpretation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright, and the conditions for exemption of temporary acts of reproduction. It established that (1) an act occurring during a data capture process is within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements reproduced are the expression of the intellectual creation of their author, and (2) the act of printing out an extract of words during a data capture process does not fulfill the condition of being transient in nature as required by Article 5(1) of Directive 2001/29.

http://en.wikipedia.org/wiki/Infopaq_International_A/S_v_Danske_Dagblades_Forening

Lionel

I would say here that there are four matters that we need to consider. One is a special British copyright that exists in what is called the typographical arrangement of a published edition. This refers to the way in which a published work, irrespective of its content, is laid out and presented. There is this special copyright right that's given to the publisher. If somebody publishes a version of the complete works of Shakespeare in a particular format that would get a protection for the typographical arrangement.

The right that's given by the typographical arrangement copyright is limited to the making of facsimile copies. If you bought a copy of *The New York Times* and you reproduced the whole thing in a facsimile fashion, you would infringe that copyright. This isn't that. The stories are different and so the typographical arrangement copyright is not infringed. That would be the first issue.

The second issue would be some of the individual items like this logo or "All the News That's Fit to Print." Could these items, in themselves, be copyright works? British law has historically showed itself rather unwilling to protect small works, such as titles and slogans. It required works to be substantial as well as original. The question about whether "All the News That's Fit to Print" would be protected by copyright in itself is blurred. Until recently, the position would have been that the slogan would have been refused protection but recently we've had some European influences on the UK copyright law and some decisions on the European Court of Justice (most notably the *Infopaq* decision). These decisions point towards small works, such as slogans and titles, possibly being protectable. Consequently, there might be an infringement. If so, we would again come to the parody question. There is a wordplay, in that that they changed it from "All the News That's Fit to Print" to "All the News We Hope to Print." I don't know whether that's a parody.

The third question would be whether it's an infringement of the newspaper's composition as a compilation. Copyright law recognises that if you select a number of existing works and you combine them in a particular way, you can sometimes get protection as a "compilation" (or database). If a person selected poems they liked and created a book of poetry, and the selection and arrangement of the components involved some sort of individual effort and creativity, then that would be protected by copyright. There might be a question about whether the way the newspaper appears could be protected by compilation copyright. Then you would need to find some evidence of how much is being copied. We need to look at some old editions of *The New York Times* to know whether that was the case.

So far, on the British principles, I would say there are no infringements at all (even without confronting the parody question and whether there is a defence there). Nevertheless, there is a little problem which has been raised already in relation to John Berger's book of non-copyright issues. If people mistook this for a genuine copy of *The New York Times* because of the way it is presented and because of the use of the title, then there could be what we call "passing off."

Passing off is a form of trademark protection that doesn't require registration of trademark. Rather passing off requires that consumers have become familiar with the trademark and then that they mistake somebody else's use of a


"All the News We Hope to Print"
The New York Times
Special Edition
Nation Sets Its Sights on Building Sane Economy
True Cost Tax, Salary Caps, Trust-Busting Top List
IRAQ WAR ENDS
Troops to Return Immediately
Maximum Wage Law Succeeds
Salary Caps Will Help Stabilize Economy
TREASURY ANNOUNCES "TRUE COST" TAX PLAN
Ex-Secretary Apologizes for W.M.D. Scare

Author: The Yes Men in collaboration with the Anti-Advertising Agency, CODEPINK, United for Peace and Justice, Not An Alternative, May First/People Link, Improv Everywhere, Evil Twin, and Cultures of Resistance

New York Times Special Edition

Date: 2008
Format: Broadshet, newsprint
ISBN: N/A
Source: New York Times
Publisher: N/A
Printing: offset

A fake edition of the New York Times imagining a liberal utopia of national health care, a rebuilt economy, progressive taxation, a national oil fund to study climate change, and other goals of progressive politics. Volunteers handed out 1.2 million papers for free on the streets of Manhattan.

similar sign as use of the earlier mark with which they are familiar. The consumer then assumes an unauthorised use of a trademark as something that has been authorised by the person they are familiar with. I think there's a real danger of passing off here. Indeed, such issues have often arisen in parody type cases because the whole point is to remind the viewer of an earlier, more familiar instance. Whether there is passing off depends on whether it is likely that consumers would be deceived into buying the parody in the mistaken belief that it was *The New York Times*. In practice, it is surprising how often people are confused. There are a lot of people out there who get confused very easily.

Passing off is concerned with the perceptions of the public. It is really difficult to lay down any a priori type rules, you just have to ask: Does the public normally recognise this layout as that of *The New York Times* and are they, from the way that it is being sold or handed out, likely to be deceived? If they are confused when it's handed out, that may be enough, even if two hours later they realise that this is something else because all the stories are good news.

Jury Member 3

So you would have to research the reception?

Lionel

That would be one way of assessing whether there is confusion, yes.

Jury Member 4

In terms of what you said about passing off, the method of distribution does seem crucial, doesn't it? If that was in an art gallery, you would be much more inclined to accept that it was an artwork, wouldn't you? Rather than 80,000 being thrown out on the street.

Lionel

That's absolutely right. If it was in an art gallery, I think the chances of it being classified as passing off would be very, very slim. There is a doctrine that English law steals (as it were) from the United States called "post-sale confusion." This suggests that there may be passing off if, although there was no confusion at the point of sale, there might be confusion at some later point. Thus, for example, if purchasers of the paper were not confused when they bought the paper in an art gallery, but others might be if the paper were to be taken out of the art gallery and left on the underground, there might be "post-sale confusion." It is not yet clear whether this would be passing off in the UK.

Prodromos

Just to add a few things: The typographical arrangement in the civil law jurisdictions is normally a neighbouring right or related right. It does exist, but is slightly different in the sense of the scope and ambit of rights with regards to the rights holders. But you would still have the rights. *The New York Times* would still have rights on the arrangements, on how this is arranged. I think that would definitely be an infringement in the first place.

There is also a question whether the typeset itself, the fonts and the artwork there constitute a work of art, whether it's still within copyright and, again, whether the reproduction of it constitutes a reproduction of the art or the artistic work. Then in terms of the slogan and whatever is copied there, I think we have a lot of cases… We don't have a lot of cases, but we have some cases where we actually have even short phrases being protected under copyright. The issue

Neighbouring Rights

Related rights is a term in copyright law, used in opposition to the term "authors' rights." The term neighbour- ing rights is exactly equivalent, and is a more literal translation of the original French *droits voisins*. Related rights in civil law are similar to authors' rights, but are not connected with the work's actual author. Both authors' rights and related rights are copyrights in the sense of English or U.S. law. There is no single definition of related rights, which vary much more widely in scope between different countries than au- thors' rights. The rights of performers, phonogram producers and broadcast- ing organisations are certainly covered, and are internationally protected by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in 1961.

Within the European Union, the rights of film producers (as opposed to directors) and database creators are also protected by related rights, and the term is sometimes extended to include the *sui generis* rights in semiconductor topologies and other industrial design rights. A practical definition is that re- lated rights are copyright-type rights that are not covered by the Berne Con- vention.

http://en.wikipedia.org/wiki/Related_rights

under civil law jurisdictions would be, again, the originality and whether such a short sentence would actually qualify as an original – original enough to be granted copyrights and also whether it's so short that it would actually amount to…how much expression is out there. Here I'm not really sure what is the… Were you referring to the phrase itself or…?

Lionel

Yes, "All the News That's Fit to Print."

Prodromos

That would possibly attract protection. I would be, however, more inclined to say that this short phrase could possibly be some form of trademark depending on whether it has been registered or not. I would say that trademark infringement is for me the obvious case here more than copyright infringement. It's also related to the potential damages that *The New York Times* could actually claim out of this transformative use.

Again, the circumstances under which this work is made available to the public are crucial. It really depends whether it's actually been sold or distributed through a gallery or whether it's sold through a newsagent. Finally there is an issue of the…again, of the pictures included in the newspaper or if there is any other text or any other content in that particular edition that actually are taken from a third source or whether they infringe copyright anyway. In terms of copyright, I would say that there is an infringement of the neighbouring rights. Most probably, again, it would fall under the exception of the parody or it could be… I'm not sure about criticism.

It really depends what the criticism is on. I don't think it's on the newspaper itself. If there was any defence I would use, that would be that of the parody but I don't think this would anyhow survive the trademark infringement, so I would put it towards the red zone.

Sergio

It's funny, I would say that it is about being indoctrinated by this institution and that on this very basis, especially recently with having *The Guardian* reveal information that US newspapers failed to reveal, I think the parody defence is stronger about referencing *The New York Times*.

Although, I see what you're saying, that maybe it could just be a satire about newspapers rather than *The New York Times*. To the person that brought the question of art, this is interesting. I think courts up until very recently don't want to make an exception for art. You have got to look at it in terms of context. Whether the newspapers were released by the underground, the subway, the newspaper stand, or in a space called an art gallery or an art museum, or a student art space, a school and so forth. One thing we look at is the commercial/non-commercial aspect of the work. One, was this sold? I don't think it was sold, it was free.

My interpretation was that these "newspapers" were also stuck in stacks of the actual *New York Times* in newsstands. You didn't know if you were buying a real one or you were purchasing this one. That's a problem to some extent. Is there a disclaimer or is there any of the Yes Men mentioned in this?

Eva

One hint could be the date, which was fictitious. It was handed out on November 2008, but another date was shown in the paper.

Sergio

One of the things that… The main factor is going to be the commercial asset but another thing that I tell my clients that are doing this type of work is to put a disclaimer somewhere in the work: This is a parody by so and so. That would help the context issue as to where the viewer, or reader appropriated the work from or accessed the work.

Actually the chamber of commerce this week, I think it was yesterday or Tuesday, dismissed their own lawsuit against the Yes Men based on trademark infringement. That kind of thing I think would also help them. It's sort of like Weird Al Yankovic, someone who is known for doing nothing but parody. The problem with someone like Weird Al Yankovic though is, I believe, that even he licenses the music he wants to parody. If he wants to make fun of someone he will ask. And if the original singer does not grant Weird Al Yankovic a license, he will not make a parody of their work. That's kind of scary because it sets a prec- edent of wanting to get permission and having to get permission before criticising someone.

Prodromos

That's really a problem.

Eva

There isn't a disclaimer, to answer your question. It just says: "Give feedback online. Visit our website to comment on any article in this newspaper or come write a new one," followed by the website address. The website will probably clarify.

Jury Member

Sorry, can I just ask: Were there genuine articles taken from *The New York Times*, or maybe they got in touch with journalists and collaborated on it, or were the articles written by the artists themselves?

Eva

They were written by the artist collective and collaborators.

Jury Member

What about the adverts?

Eva

They're all made up…I think.

Jury Member

But I can see an HSBC ad there.

Andrea

I think the adverts are not fictitious and they copy, for example, the column by Thomas Friedman. It has his name, his face and a text that is not by Thomas Friedman.

Jury Member

As you can see, HSBC might get a bit of a…might get their tail up because obviously they're using their logo and their company name against possibly a fictitious advert.

Eva
They are all fictitious but they use the logo.

Sergio
With the Thomas Friedman, you also have the US right of publicity issue because you are using his face, his name, which is protected under a right of publicity which is considered a subset of intellectual property. But again, you're not using his name to sell real news, you're using it to help sell the parody. So then we go back to commercialism.

Eva
Where would you place it Sergio?

Lionel
I would put it – if somewhere – here again.

Prodromos
I think in relation to copyright it will be up there and in relation to trademark around here.

Andrea
How does the jury feel about it?

Jury Member 1
Do we have to restrict it to copyright?

Jury Member 2
I just have one question now, is there any copyright on the fonts, *The New York Times* font?

Lionel
Yes, there should be.

Sergio
Not in the US.

Prodromos
It wouldn't be artistic work?

Sergio
No, it's a font.

Prodromos
Is that not a design?

Sergio
Trademark, and the fonts probably protected by patents.

Prodromos
OK.

Sergio
The same with "All the News That's Fit to Print." It's trademark. In the US, you

don't have to register it to get trademark protection. There is a case, interestingly against *The Wall Street Journal*…

Jury Member 2
Isn't there any copyright on the fonts here?

Lionel
There could be copyright on the fonts but usually such copyright is not infringed by using a font as long as you purchased it or obtained it legitimately. Here it is an old font, I think. I think that font is "Times." That could be very old. It could be one of the few things that's out of copyright.

Prodromos
It's also what Lionel said that you don't infringe it when you purchase it. By buying the newspaper, it's a question of what happens when you… You are using it without the permission to make money. Again I agree that this font is out of copyright.

Jury Member
I want to ask something as a follow up. If we accept that this is an artwork since it was intended in that way, what happens then on the Yes Men's copyright as an artwork? Other people in the art, who might want to act like this?

Lionel
You're asking what rights the Yes Men would have?

Jury Member
Yes.

Lionel
British law has a strange approach, certainly not an intuitive approach, to copyright. You may class something as an artwork but that does not mean that copyright law will regard it as such. British copyright law operates with an exhaustive list of eight categories of subject matter that can be protected by copyright: literary works, musical works, dramatic works, artistic works, films, sound recordings, broadcasts and published editions. The category of "artistic work" has itself a bunch of boxes defining sub-categories: graphic works (including paintings, drawings, engravings), sculptures, photographs, works of architecture, works of artistic craftsmanship, and so on. It's actually pretty difficult to fit this into one of these sub-categories of "artistic work." That is not to say there is no copyright. Probably UK law would regard there as being copyright in the stories as "literary works" and maybe in the compilation and arrangements of those stories (as sub- categories of "literary works"). Then there would be copyright protection for all their efforts but not as artistic works.

Sergio
In the US the only copyright protection the Yes Men would have would be to the text that they have written, the fictional text.

Prodromos
It would be particularly difficult in civil law jurisdictions to get copyright on the text and the compilation. These are the obvious ones. They could not get any

Castle Rock Entertainment Inc. v. Carol Publishing Group

Castle Rock Entertainment Inc. v. Carol Publishing Group, 150 F.3d 132 (2nd Cir. 1998), was a U.S. copyright infringement case involving the popular American sitcom *Seinfeld*. Some U.S. copyright law courses use the case to illustrate modern application of the fair use doctrine. The United States Court of Appeals for the Second Circuit upheld a lower court's summary judgment that the defendant had committed copyright infringement. The decision is noteworthy for classifying *Seinfeld* trivia not as unprotected facts, but as protectable expression. The court also rejected the defendant's fair use defence finding that any transformative purpose possessed in the derivative work was "slight to non-existent" under the Supreme Court ruling in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

http://en.wikipedia.org/wiki/Castle_Rock_Entertainment,_Inc._v._Carol_Publishing_Group

of the neighbouring rights because anyway they are copyrights of *The New York Times* and also I don't think there would be anything in terms of artistic… in terms of the visual aspects of this, because again, it's copied. It's not really theirs. It's not the fact that they have copied this, but it's the fact that there is nothing that has been added.

If any of it actually has a copyright, in terms of other artistic elements, that would be *The New York Times*. In terms of the conceptual art, the thing that would be copied would be basically the idea if they don't copy the literary elements. In that sense, it could not stop someone else from taking *The Wall Street Journal* and doing the same thing, if that's what you asking.

Andrea

Does the jury agree?

Prodromos

It's a nice place there…

SUITCASE BODY IS MISSING WOMAN

Andrea

The next case is *Suitcase Body is Missing Woman* by Eva Weinmayr. As she is here she can answer lots of questions. The book was published by Book Works in 2005 here in the UK and it used as a source *The Evening Standard* news stand posters. *The Evening Standard* made posters that they put on the streets three times a day, with each edition. They use very catchy slogans about something which is in the newspaper that day in order to push the sales. In this book, the artist collates these headline posters, takes them out of context of the news by erasing the header and footer. They are collected in the book, sorted by the alphabet. The master poster is hand-written by an *Evening Standard* employee and then printed, distributed and displayed to the public on the streets in London. This book is published and distributed by an artist publisher and is for sale in bookshops and galleries. So what we have inside is a collection of reproduced photographs of these posters without *The Evening Standard* logo, header or footer.

US Copyright Act of 1976

Subject matter of copyright

Under section 102 of the Act, copyright protection extends to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

http://en.wikipedia.org/wiki/Copyright_Act_of_1976#Subject_matter_of_copyright

Sergio

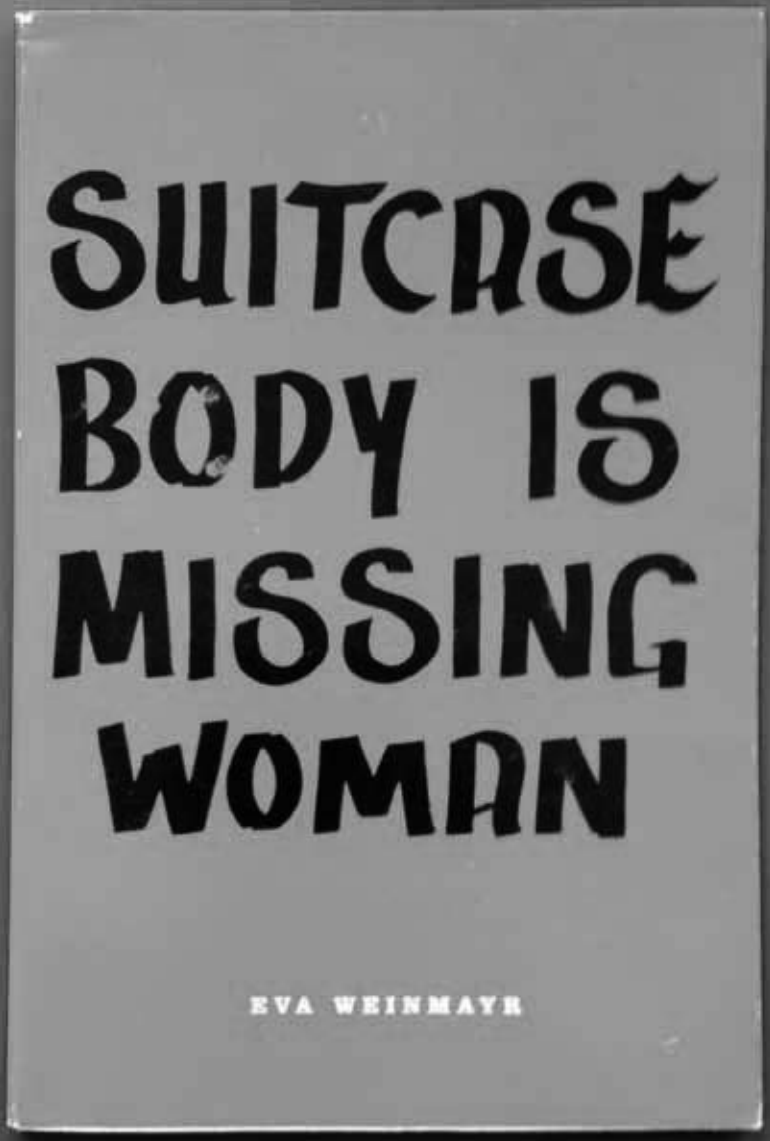
How did you… How did you get these images in the book?

Eva

I collected the original posters from the newsstand and took photographs. The question would be, are headlines protected? Are headlines that are displayed in the public realm protected? And there is handwriting. Is handwriting as a graphic expression protected?

Sergio

Yeah, but that's not going to make you a happy witness. I would actually


SUITCASE
BODY IS
MISSING
WOMAN
EVA WEINMAYR

Author: Eva Weinmayr,

Suitcase Body Is Missing Woman

Date: 2005
Publisher: Book Works
Format: 210x140 cm, 40 pages, soft cover;
Printing: offset, color, perfect binding
ISBN: 978 1 870699 77 8
Source: Evening Standard newsstand posters

This book presents a collection of newsstand posters – capitalized handwritten legends that condense complex realities into three or four-line news splashes. Isolated from the context of the newsstand and arranged in alphabetical sequence these legends now operate as soul ballads, popular romance, cautionary children stories or science fiction.

put this straight on the registry of infringement. I'll tell you why. It's interesting because as a first thought you think: short phrases in the US, no copyright. But I would argue these are drawings. As drawings they're art. They have copyright ability to the person who is writing this every night and as you were saying, early morning. The fact is that they're compiled as something that probably the newspaper would want to do – so this is the fourth factor. It's something that's foreseeable for them to do, to promote this as a book or their posters. Your book is for sale in bookstores and it doesn't matter that it's an art gallery or art museum, it's for sale.

Jury Member
Gilbert and George have used that extensively in their work as well and presumably they sell that work for a lot more than what you get from that book. That's an interesting question. Once an artist had successfully made his work…

Sergio
It doesn't mean that it's lawful.

Andrea
I think the point is that they have never been taken to court. In *The New York Times* case, for example, the next night *The New York Times* published an endorsement ad said that they found it really funny, they wouldn't take them to court.

Sergio
I'm trying to play the devil's advocate but that is the way I would look at this primarily because of the commercial aspect. This is similar to the *Seinfeld* case in the US [*Castle Rock Entertainment, Inc. v. Carol Publishing Group*]. A fan of *Seinfeld*, the TV show, took snippets of things that the characters would say and made a *Seinfeld* encyclopedia and the courts here found that that would be a derivative work. That is a sole right that NBC could likely exploit because that's a market that they could potentially move into.

Jury Member
I just want to clarify: is every mark on paper a drawing?

Sergio
No. Originality under US copyright is a very low threshold so the notes that you're presumably taking today are copyrightable to you. It's not looked at as a drawing; I'm calling it that colloquially but it is a form of expression.

Eva
Is it a graphic expression or is it the content, the wording?

Sergio
The graphic expression. The way it looks, the overall image.

Jury Member
In that case would it belong to *The Evening Standard* or the person who actually makes the signs?

Lionel
There is a very impressive story that Eva knows about how he came to do this. It might change your mind about it.

Fair use under United States Law

Copyright Act of 1976, 17 U.S.C. § 107

Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. §106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for pur- poses such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be con- sidered shall include:

1-the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2-the nature of the copyrighted work;

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 copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

http://en.wikipedia.org/wiki/Fair_use

Eva

Yes, Jane Rolo (Book Works' director) and I went to *The Evening Standard* to meet the person who is writing these headlines. As a Londoner you are so familiar with his handwriting that I wanted to meet the face that comes with it. We run a short interview where he was saying that he and five other colleagues – who were drivers who distributed the newspaper to the newsstands – were called to a table and all of them should write down something in handwriting. He had the nicest or most interesting handwriting and that is how he got this job. He isn't driving anymore he's just writing these posters. He writes one poster with a black felt pen as a master copy, which then is reproduced, printed and distributed with the newspaper.

Sergio

That makes me think it probably is protected.

Lionel

Well, I don't know…

Sergio

Because the word that's been kicked around over here is the word artwork. One of the things you're looking for here is originality and creativity. If I was the newspapers lawyer, I'd say, "Put the guy (the artist-draftsman) on the stand. Talk about this story, about how you brought in five employees and you're picking this guy." He was picked because it's an original expression. That is a problem for the appropriationist.

Prodromos

Firstly there is clearly originality here in terms of how this person writes. The whole selection process makes that clear. The second thing is that you are making a copy of this, just taking a picture. You're not transcribing, you're not mimicking. There is not a lot of originality there, but since you're copying it, you are just definitely violating it. I would say to me is quite clear that that's an artwork and its artistic work and you're infringing.

Jury Member

She's not actually reproducing the original artwork is she? She's reproducing a poster of the original artwork. Already there is a slight difference isn't there?

Prodromos

No.

Jury Member I

If you think about Richard Prince re-photographing the Marlboro man. He photographed the artwork in a magazine; he didn't photograph the original photograph, so I think one needs to actually pinpoint what she's doing.

Prodromos

Even the reproductions of the original artwork are artistic works. They're pictures, they're photographs and they are made under the license or permission of the same entity that actually own the copyright over the original artistic work. She's infringing the artistic work, but it belongs to someone else. It's not saved by the fact that she uses a copy, because it's an authorised copy.

Jury Member 2
Also, another layer is that the expression, as you call it, has nothing to do with the expression of what it says. That person did not come up with those slogans. It is the legibility of his writing.

Sergio
You gave a perfect example. This wouldn't be any different if they were Basquiat drawings.

Jury Member 2
But they're not. I would imagine that the employee probably is under some contractual obligation to deliver this under some condition which have nothing to do with his expression.

Sergio
No. To me it's the opposite. This employee was selected because of his unique expression.

Jury Member 3
It's about the act. It makes no difference if it's a driver or Lawrence Weiner.

Sergio
Well, ironically, Lawrence Weiner probably doesn't have copyright protection to the slogans; maybe the design of the wall drawings. This does.

Lionel
It's almost like he's created a font.

Sergio
A drawing.

Jury Member 2
I would put that book on blue.

Sergio
Wait, why would you do that?

Jury Member 2
Because I think as an artist you shouldn't be restricted by anything.

Sergio
The problem with that…

Jury Member 2
...because as soon as she starts – and I'm speaking from own experience – as soon as you start thinking, "Oh my God, what am I going to do if this...?" Then you just might pack up and do nothing.

Sergio
The problem with you saying you're an artist and artists getting special treatment or exempt from copyright law is simply that anyone could be an artist.

Jury Member 2
What if anybody can be an artist? I think that goes back to freedom of speech because then we might all start "What do we say? What can we say?." Again, I would like to know how many boxes of this book you have sold, how much money have you made?

Eva
It is out of print. It sold about one thousand copies – very cheaply – for £5.

Jury Member 2
How much money did you make?

Eva
I personally received £500 artist fee from the publisher.

Jury Member 3
How much does *The Evening Standard* employee get for his work? Do you know what's his wage?

Eva
I don't know.

Jury Member 3
Did you give him a free copy of the book?

Eva
We met him before we had the book ready and sent *The Evening Standard* a copy – I think two copies. One for him and one for newspaper.

Jury Member 2
And he never got back.

Eva
No.

Sergio
To make one thing clear – and you're right, if you have an internal employee at the newspaper or there is a work for hire agreement, an agreement between them saying that whatever the artist does belongs to the newspaper that means the newspaper itself is drawing, is the author of the phrases – so the newspaper owns the copyright.

Jury Member 1
It will depend on what arrangement they have because surely if you were the person who draws cartoons for *The Guardian*, for example, Steve Bell, he owns copyright of his cartoons and *The Guardian* pays him a licensing fee. If one would compare that, if she would have made a book of Steve Bell cartoons, then obviously Steve Bell would have had a grind with her.

Eva
What's strikes me… I do understand the graphic aspect of the drawing. But what in terms of literature, the wording, the headlines themselves? Is there no issue at all?

Lionel

There is a division in the analysis between the literary work and the graphic work. The reason why I disagree with the other experts about the issue of the graphic work is that it seems to me that this is of minimal originality. We'll need probably to investigate the story a bit more but it seems to me that the reason why he has been chosen is because of the functional presentation and the clarity of his style.

Functional goals are not really ones that give rise to originality. They're the ones in fact that constrain originality. I would say that these as graphic works would not be protected. As literary works, I think it's the same issue as slogans that I mentioned earlier. I think we agree that fifteen years ago, because the law was a bit different, you would have been able to use those literary works. But something has happened in those fifteen years that has changed the way in which the newspaper headlines are seen. That's the rise of news aggregation services on the web. News aggregation services take the titles and supply them, often for profit, sometimes not for profit. That has changed they way titles are valued, and led to the argument that news headlines should be protected as commercially valuable. I think they wouldn't have been regarded as original literary works when you were doing this. Now they might be.

Sergio

Do you think that the fact matters that these – I'm going to call them drawings – were re-photographed rather than re-expressed? Let's say that Eva instead of re-photographing them had actually said, "Oh look, this is a great poster." She gets a sheet of paper and she rewrites one of the headlines.

Prodromos

Or she makes a font.

Sergio

Right, rather than re-photographing.

Lionel

If, instead of photographing the newsstand poster ("Suitcase Body is Missing Woman"), Eva simply makes such posters herself in the same style so they look similar but not the same, then she may not infringe. Much depends on where the originality lies in these graphic works. To me, that originality is mini- mal so if Eva produces something that's a variant and that doesn't reproduce what was original in *The Evening Standard*'s poster, then it's not infringing. This analysis requires that we identify precisely where the originality is in *The Evening Standard*'s poster.

I want to go back to the work for hire point. When you (Eva) told me the story, you didn't mention that he no longer worked as a driver. I'm a bit surprised by that because making those posters would take about thirty seconds so I'm surprised he'd get let off his job as a delivery guy for doing that. Anyway, on the assumption that he still is a delivery man (or was when he made the "Suitcase Body" poster), I would have said he created the poster outside the course of his employment. He's a delivery guy, and, though he's been asked to write this, it is not in his normal duties or something *The Evening Standard* can require of him, and so he is the owner of it. On the assumption that the poster is protected by copyright as an artistic work, he, rather than *The Evening Standard*, would be the owner of that copyright.

Prodromos

Apparently the reason why he is not doing the other job is precisely because they see that very close link between his handwriting and *The Evening Standard*. When you see this type of writing, you think about *The Evening Standard* and that adds to the originality.

Eva

Could it be seen as a trademark? Because the writing is such a strong authority for *The Evening Standard* that everybody who…

Lionel

If somebody started selling other newspapers using that handwriting for the headline and people going by, seeing the handwriting, thought the paper being sold was *The Evening Standard* and they bought the paper – then yes, there would likely be passing off. But that would not be a problem in context of your book, because no-one would think your book was *The Evening Standard*.

Jury Member

I want to ask if instead of asking a driver to write they had asked a designer to make a font because basically they could make one from scanning the handwriting. Would it be the same problem?

Sergio

I would argue that in those posters, and I would call them posters, there is still a minimum level of originality and there's a minimal level of copyright ability.

Jury Member

Before the computer it would be a designer handwriting…

Sergio

Maybe the thing to clarify here is that it doesn't matter who the person is. The only things they are looking at are, is it original, is it authored and is it fixed? This meets all three criteria. Even if it has a low level of originality, it's met. It's authored, it's a human being writing this and even if it was on computer. It's fixed, meaning it's an idea that has been fixed on paper. If you have those three factors, you have copyright protection.

Prodromos

Shall I add something else with the originality question because I think this is something which is different from jurisdiction to jurisdiction? One of the criteria in civil law jurisdiction is what we call the statistical uniqueness. If you were to take people in the same room and ask them to do the same thing under the same circumstances, will they end up with the same result?

The illustration in the case actually says no, they wouldn't, because they chose this particular guy. That's why, when I heard the story, I said even under civil law you'll get originality. And the threshold for originality is much higher than under US law, but precisely because of those circumstances, it seems to me very obvious that this matches the threshold of originality that you should have in order to be granted copyright.

Sergio
Just to follow up on that point… It's a good point. If everyone in this room was told to write down the following sentence: "The dog ran over the fence," each one of you will have a copyright over that expression that you've put on that piece of paper, but not over the phrase. It's that low a threshold in the US.

Jury Member 4
Because there were three different terms that you used. Now you're using originality and earlier, Sergio, you said "expression" and "factual." When you use the term "expression," is it the same as when you say "originality?" Because for me these are different things. For example, the handwriting is as unique as a fingerprint, but a fingerprint you cannot argue in terms of expression because is factual.

Sergio
They break it down to writing as the alphabet, so each letter A, B, C, D, E, is not protected by copyright but what you create with those words, if you're in the US, if it's long enough, longer than a short phrase, it's protected by copyright. Unless it's a true fact like "New York City is located in New York State of the United States of America." That's a fact, I can copy that even if you wrote it and there is no infringement.

Jury Member 4
Now you talking about the content of the sentence. That is a different thing.

Sergio
No, I'm making the distinction between fact and fiction that you're talking about.

Lionel
It's usually said that facts are not protectable. Sergio said that facts are unprotectable. Then he said the originality must lie in the expression of those facts, either graphic expression or the literary expression.

Jury Member 4
Is there expression in a fingerprint, for example?

Lionel
Is there expression in a fingerprint? No. There is no "intellectual creation."

Sergio
Yeah you could…

Jury Member 4
There is originality but he said "expression."

Sergio
I would probably say if you did a fingerprint because you've been brought into a Police station, that would probably be factual. But if you used your fingerprints in an art piece, that gesture of putting them on paper would be an expression. It would also be an expression in the police station but the difference is that it's been used for government purposes.

Prodromos
We will be going to another area entirely.

Sergio
It's interesting. Then it wouldn't have copyright ability. If I saw it online, your fingerprint, you've been arrested for whatever reason, I could probably photocopy that and make books, only in the US because it's probably a government work. But I'm not sure. This is interesting.

Prodromos
In Europe you couldn't, because it's personal data.

Sergio
That's actually interesting. That's a big issue right now in the US because when you get arrested there are public records and now they're online. There are artists that are grabbing these images with the text of what you've been arrested for, and making books and posters.

Andrea
So you are disagreeing, you two think it should be here?

Sergio
No.

Jury Member
A short question that I've been wanting to ask about the Weiner example. Did you mean that if he used handwriting in his work he would be protected?

Sergio
No, I meant the fonts that Weiner uses. His short phrases would probably not get copyright protection. As I said before, maybe the layout of the phrase, the look, kind of like logos.

Jury Member
If he wrote his words in handwriting, would it be ironic that they might get protection through that rather than the conceptual essence of the work?

Sergio
Remember the concept doesn't get protection. It's the expression, how it's materialised.

Andrea
Where does it fit with our scale? You were saying orange, like here?

Prodromos
Orangey-red.

Jury Member 2
Blue.

Andrea
Who is for blue? Who is for orange? OK, blue. We've got a very liberal jury…

Sergio
How did that get in the blue?

Andrea
With a vote…

OCTOBER

Andrea
Are we ready for the next case? It's a complicated story. The Piracy Project went to Printed Matter in New York last year, where we were invited to host a workshop as part of Helpless, an exhibition about books that use or copy other books. We invited a panel to select two books that we would then copy for the Piracy Collection. One of the selected works was by Canadian artist Steve Kado from 2010. He made a facsimile of an *October* magazine [a peer-review journal on contemporary art and theory published by MIT since 1976], called *October Jr.*, that is only three quarters of the size of the regular *October* magazine. Basically he decided that *October* magazine was a bit big, it wasn't a nice magazine to carry around and reduced his version in size. It's exactly the same content, exactly the same layout. And it is sold at Printed Matter for $50. The panel in New York selected this work to be added to the Piracy Collection. We photocopied it and added the photocopies to The Piracy Collection. In this context the work is shown at book fairs or galleries. We don't sell it but we make it available so people who visit can browse through it.

What we want to present as a case is firstly having a photocopy of this artwork and secondly if the Piracy Collection can be considered a library or an educational project. In this case I suspect we would not infringe, when we show it. That's an issue we usually don't raise…

Jury Member
Whose copyright are you worrying about infringing? The artist or the publisher?

Andrea
We weren't really worrying about it, but I guess both? MIT would be a much more powerful adversary I think…

Prodromos
To track the rights: there is a magazine and then the artist made a copy and then you made a copy of the copy, which is an infringement in copying in the first place. You're infringing in the sense of the copy but you are also infringing the original work. Because there are no real alterations to the work so the infringement is an infringement of the original. The question is, after you've done the infringement in the sense of the copying, if you are actually carrying it in a library whether this could constitute a legitimate defence. But at this moment in time the exceptions and limitations that have to do with holding a copy in the library assume that you have purchased legally the copy.

You actually have a legal copy of the work in the first place. It also assumes that

you're actually a library, which would depend on the specific jurisdiction you're in. It's different from case to case but there are certain aspects about how you keep the books, whether they are made publicly available, whether you have a scheme for loaning the books, etcetera. It also could be that you are allowed to make copies for preservation, you can make copies for extra visual copies in order to serve the library, in order to actually loan books.

If you take all these cases, I don't think you fit any of them because you haven't even made a copy in order to serve the public in the library. You haven't locally purchased a copy. It's doubtful whether you can fit the definition of a library and it's a copy infringement in the first place. For all these reasons, I think it is as red as it can get.

Laughter.

Lionel

Yeah, I think it's red. The UK's library exceptions are in an appalling state.[3] Libraries benefit from a bunch of very narrowly defined exceptions that require the library to have an original copy in the first place and then to be copying parts, perhaps for replacement or perhaps to be supplied to somebody for purposes of their own research and private study. You don't fall into any of these.

Eva

So the fact is that the works are on public display in our collection. But could it be claimed as a research project?

Lionel

That would be one place I would go, to consider whether you might have a fair dealing for research or private study defence because you are collecting this as part of your research project and it's a non-commercial research project. Maybe if it was regarded as fair for that purpose…

I don't think it falls within any of the teaching exemptions because they're also extremely narrow in scope.[4]

Sergio

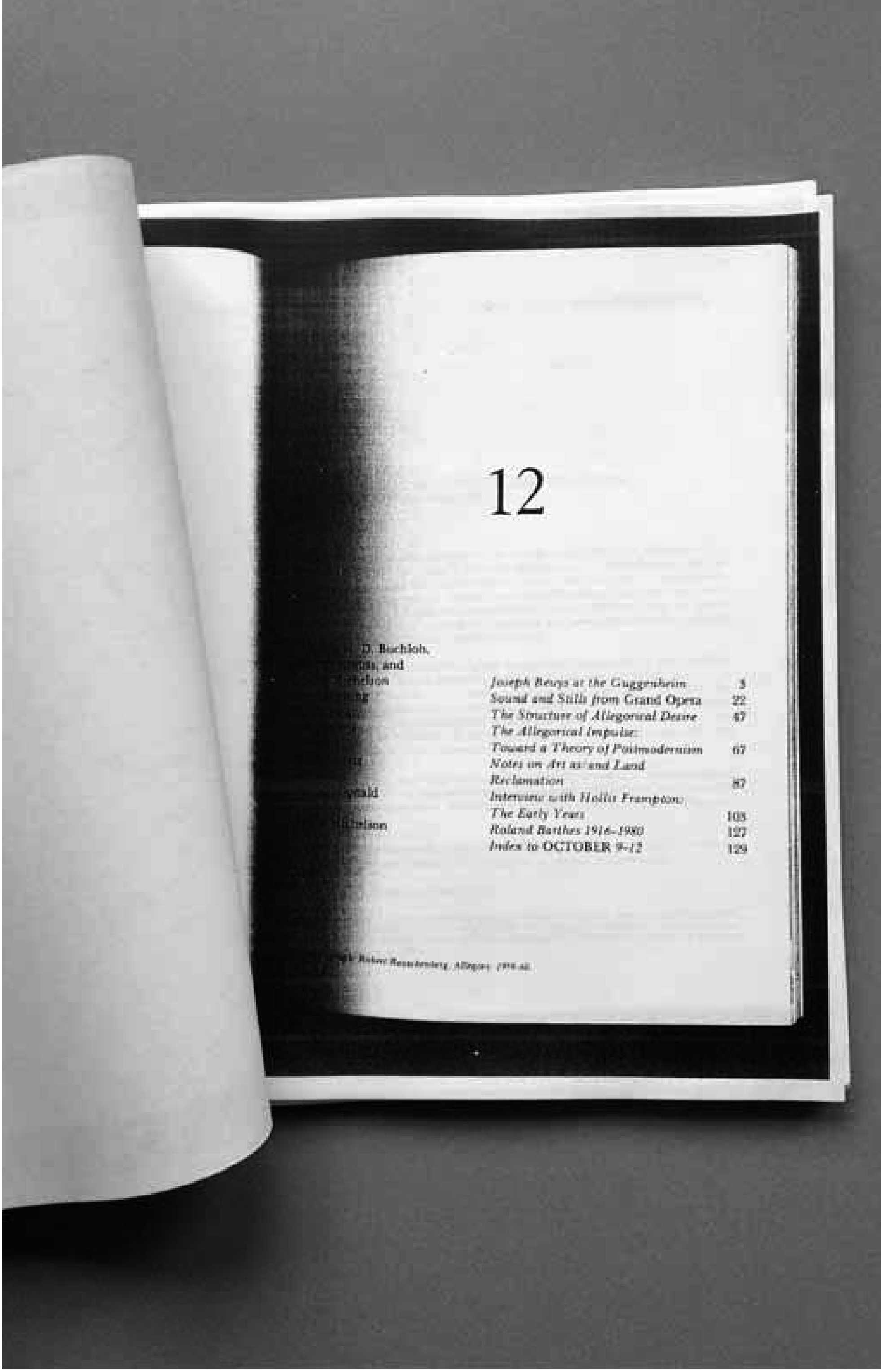
The only thing – and just because I would want you to pay me lots of money for a one percent chance – would be the size. You have the original *October* and then there is the 3/4 version and then there is your photocopy of the 3/4 version. In the recent *Cariou v. Prince* case the judges overwhelmingly highlighted the issue of size and that is a plus for this piece. The problem of that is that you can see MIT going: e foreseeably have a market for a pocket-sized version of *October*, just like a pocket-sized version of *The Communist Manifesto*.

Sergio

It's probably as red as it can get…

3 They have since been significantly amended by the Copyright and Rights in Performances (Research, Education, Libraries and Archives Regulations 2014, SI 2014/1372), in force from June 1, 2014. It is not obvious that the amendments offer anything that might legitimate the copying of *October* for the collection.

4 They have since been significantly amended by the Copyright and Rights in Performances (Research, Education, Libraries and Archives Regulations 2014, SI 2014/1372), in force from June 1, 2014. At the time of this event, CDPA section 32, which permitted acts for the purposes of instruction, did not apply to anything done by a "reprographic process." After the reforms, any "fair dealing with a work for the sole purpose of illustration for instruction" does not infringe copyright in the work provided that the dealing is non-commercial, by a person giving or receiving instruction, and accompanied by sufficient acknowledgment. Today, then, the critical questions would be whether the copy of the small version of *October* could be said to be an "illustration", and whether Eva and Andrea made it for the purposes of "instruction."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Author: Steven Kado

October Jr.

Date: 2010
Format: 19 x 14 cm, 132pp
ISBN: N/A
Source: October Magazine 12, MIT

Publisher: self-published
Printing:

A faithful 3/4 scale reprint of the Spring 1980 issue of October 12 (spring 1980). All contents, images, advertisements and articles are precisely rendered, just a little smaller.

Andrea
Does it make a difference that we were so bad with the copy machine that it is unusable?

Prodromos
Well, how does that aid your research? Making a photocopy?

Sergio
We should go back to function. Why did you do this?

Eva
The research would be the wider context, that we produce these books in order to study and reflect on these issues, to raise awareness. Testing by doing.

Prodromos
What is the necessity of doing that? Why this book?

Eva
This book specifically? Because Sergio chose it in New York!

Laughter.

Sergio
I just thought it was fun.

Eva
Yes, there is no necessity, why this specific book.

Prodromos
There is also the issue that is available to the public. It would be different if you had made a copy for yourself. We have methodologically somehow to substantiate that this was the only way to do it.

Lionel
It's quite interesting because this research project is not about the content of the book. The research project is just about the existence of it and the original would not do. But collecting things for research… I don't recall any authority that came close to this question.

Sergio
It's interesting that the fact that the copy is unreadable ruins or at least affects the academic argument. How can it serve any function when I can't read it? But I see what you are saying, Lionel. It is not about the content. What if we look at this bookcase as a sculpture, a three dimensional sculpture? That is created from photocopies of books, pirated books, like a found object, like a larger version of a Joseph Cornell?

Eva
Would that work?

Laughter.

Cariou v. Prince

In 2000 photographer Patrick Cariou published *Yes, Rasta*, a book of photographs of the Rastafarian community in Jamaica. Richard Prince in 2008 created *Canal Zone*, a series of art works incorporating Cariou's photographs. Prince's works involved copying the original photographs, and engaging in a variety of transformations. These included printing them, and then increasing them in size, blurring or sharpening, adding content (sometimes in color), and sometimes compositing multiple photographs or photographs with other works. Prince exhibited his collection at Gagosian Gallery.

In 2009, Cariou filed a copyright infringement suit against Richard Prince, as well as Gagosian Gallery, Larry Gagosian (the founder and owner of the gallery), and Rizzoli (which printed the exhibit catalog).

The Southern District of New York (SDNY), in March 2011, held that Prince's works were infringing. At that point, the *Cariou v. Prince* case received significant attention, because the SDNY ordered that Prince's unsold works, and Rizzoli's catalogs, be impounded and destroyed. The SDNY in found that the works were not transformative, in part because Richard Prince did not claim to be "commenting upon" the original works.

Prince, whose works often sell in galleries for many thousands of dollars, appealed to the Second Circuit. The case was of high interest to the art world, which largely favored Prince's position, and to the photographic community, which largely favored Cariou's position.

In April 2013, the Second Circuit reversed the SDNY's decision, finding that most of Prince's works were indeed "transformative" to a "reasonable observer" and therefore fair use. In particular, the Court found that the lower court erred in requiring that the appropriating artist claim to be commenting on the original work, and found works to be transformative if they presented a new aesthetic. The court found 25 of 30 works to be transformative fair use under its standard, and remanded the case to the lower court for reconsideration of 5 of the works under the Second Circuit's new standard.

On March 18, 2014, Cariou and Prince announced that they had settled the case.

http://en.wikipedia.org/wiki/Cariou_v._Prince

Sergio
I don't know if it would work…

Andrea
So red?

Jury Member
Just one question: What if they didn't copy the whole book but only a third of it? Because under new regulation in the UK I can now copy for my own purposes no matter what they are (artistic work or personal research) a particular percentage. In that case if you wanted to have the example, but didn't needed the whole book…

Lionel
There are two questions: One is whether the copying is a dealing "for research" in a meaningful way and we are struggling in categorising it as such. The second is whether it's "fair" to make the copy for that research. There is no rule that a certain percentage is "fair." The percentages you see about photocopies at universities have been negotiated between the universities and the publishers. If there is no such agreement, the question is just fairness for the purpose of research. It may be that if there were only two copies of this book and they were in Australia, and you desperately needed it for your research, and the content mattered, that it could be fair to copy even the whole of it for the purposes of that research.

Andrea
So, does everybody agree on red?

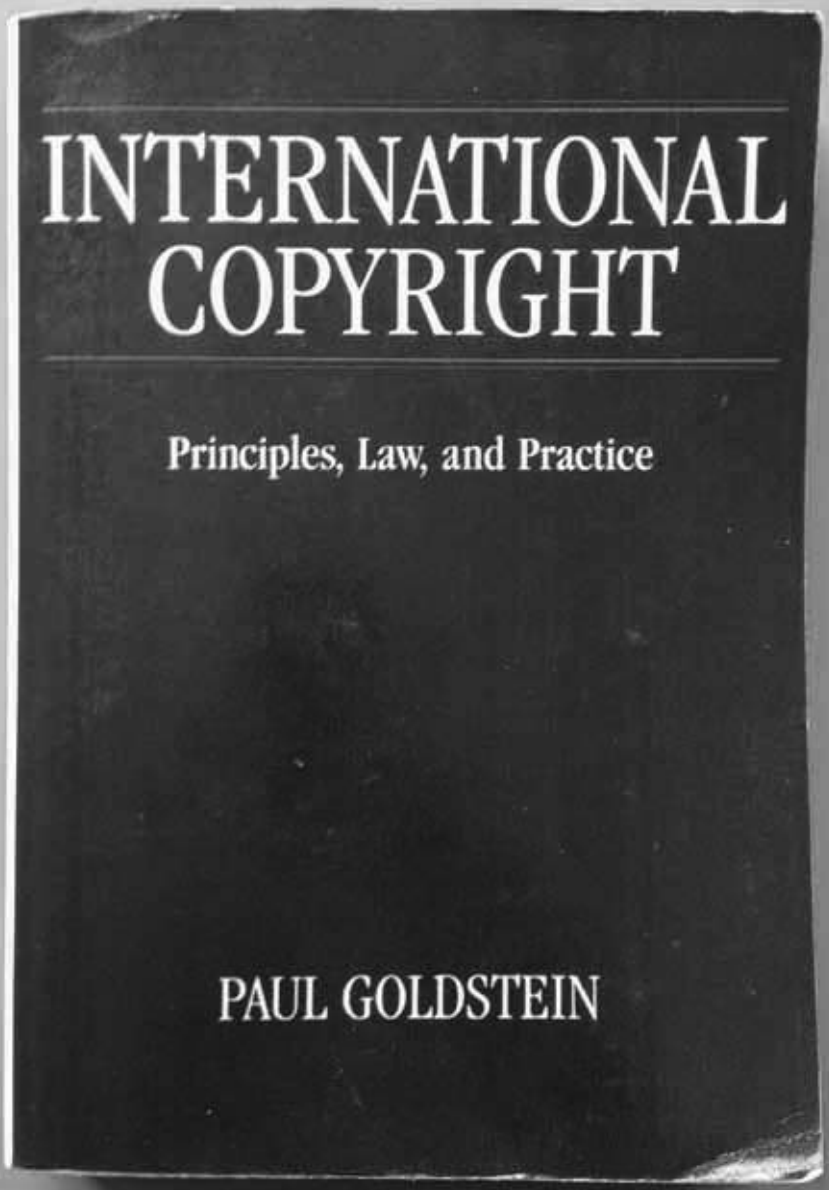
Eva
Yes.

Lionel
And you did it.

Laughter.

INTERNATIONAL COPYRIGHT

Eva
Next is the *International Copyright*. The original book is a classic on copyright by Paul Goldstein. It has been screen captured from Google Books and reconstituted as a physical book by Canadian artist Hester Barnard. Also reproduced are the limits Google places on preview pages, the pages we are all familiar with saying, "Page 328 is not shown in this preview," for example. The


INTERNATIONAL
COPYRIGHT
Principles, Law, and Practice
PAUL GOLDSTEIN

Author: Hester Barnard, Canada

Copied Right

Date: 2011

Publisher: Self-published

Format: 23 x 16 cm, 622 pages

Printing: Lulu.com, perfect binding

ISBN: None

Source: Paul Goldstein, International Copyright: Principles, Law and Practice, 2001

Paul Goldstein's text on copyright is screen-captured from Google Books and reconstituted as a physical book. Unfortunately, also reproduced are the limits Google places on previewing pages, with the (nearly) blank pages stating ‘not shown in this preview’, taking up most of the book. The would-be exhaustive survey thus falls victim to its own principles, or, to put it another way, the law is adhered to by being erased.

"not shown on this preview" pages take most of the book, around 90%. And only about 10% of the pages show content, which is quite blurry because of the screen capture. How does this sit? It was published in 2011 as print-on-demand with Lulu and it's on sale on Lulu's shopfront.

Lionel

In the UK, this would clearly be an infringement. Barnard has reproduced a substantial part of the literary work because 10% is a substantial part. Google can reproduce that because Google has a license from the publisher. So the publisher has given a license to make that work available online, but it's copyright infringement for Barnard to make a book from it. There is no defence. We could consider whether it might fall within the defence of fair dealing for the purposes of criticism or review, but the problem is that there must be criticism or review of a work/book. In this case, Barnard is not criticising or reviewing the Goldstein book. Rather any criticism implicit seems to be of Google's practices of making things available in this way. And that is not criticism of "a work" but a commercial practice. So I'm afraid this one is a clear infringement for me.

Prodromos

I would totally agree. I think the interesting point is that it actually exposes the problem with the Google settlements, the Google agreements. If we wanted to be precise we would have to see the terms of the agreement and whether in the agreement Google would have a license to allow people to print the whole thing and to do whatever they want with that. Or we would have to go to the terms and conditions of the Google Books service and see if Google allow us to do that as part of the license they have received from the Author's Association or Author's Guild. The point is that under the fair use doctrine or under the limitations and exceptions doctrine I would definitely agree with Lionel, you don't have the right to actually take this. The question is if as part of this license and the end-user agreement that you have with Google when you use Google Books you are allowed to make prints. I would also be curious to see if as part of the service you can actually press a print button. For me this would be equal to license.

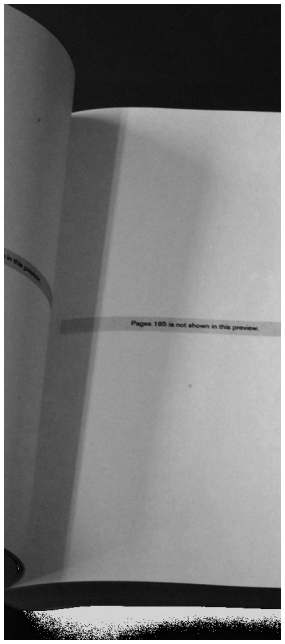
If it's clear that I can do this not through my browser but through the services then I would assume I have received a license from Google that has obtained a license from the authors and that would be the only defence I could see – that I got a license from Google to do so. But if I were to print it using my browser then this is definitely a case of infringement. I'll check this now.

Sergio

This is fair use in the US. If you look at the first category, it's about the purpose: Why are you using it? Even though it's been done in a book format its mostly factual information, it is not a literary work. Although you talk about 10%, it's interesting that there are quite a few pages that are blank within those 10%. They rupture the narrative. It's useless. No one in their right mind would buy this book if they are interested in reading about international copyright. I would go and buy the actual book. For me this is pretty clearly in the blue.

Prodromos

In civil law the list of exception and limitations is very limited. Either it is inside the boxes or it is not. We don't have fair use doctrine. You can't just say that it doesn't interfere with the normal exploitation of the work. This comes in addition. In Europe, you have to fall within the limitations and exceptions and pass the



three-step test so that is why I think it would be very difficult to accept it. I could only accept it in the case of the sublicense.

Eva
Can you please explain what the three-step test is?

Prodromos
It shouldn't interfere with the normal exploitation of the work. It should be an exceptional case. It should be without unreasonable prejudice to the interest of the author.

Sergio
You don't think it meets those three?

Prodromos
Yes, but I cannot fit it easily in one of the boxes. And the problem I have with criticism is that, is it criticism of *International Copyright* by Paul Goldstein or is it about Google's agreements?

Lionel
That is exactly the problem here, as well as the difference between the EU and the US.

The discussion was interrupted because of the noise of rain and we returned 20 minutes later to continue.

Andrea
So we will resume our discussion. It seems we are off to an exciting start because Prodromos just found out something that changes everything in this case. Before we took a break Prodromos and Lionel had put the book in the red and Sergio in the opposite side. But now things have changed.

Prodromos
The defence we were trying to construct would be that through the license you automatically get the terms of use from Google, which has obtained the license to display the book on its digital platform.

As an end user I get the terms and conditions from Google so I don't need to rely on fair use or limitations and exceptions but on whatever Google tells me I can do. So Google has a clause in its terms of use saying that nothing in the terms of service shall prohibit any uses of digital content that would otherwise be permitted under the United States Copyright Act. So one interpretation – favourable to our cause – says that since under the US Copyright Act you are allowed to make use of that book in that form under the fair use doctrine and since there is this agreement between me as an end user and Google, therefore I could do whatever I could do subjected to US Copyright Act. So that is one way to see it and…

Lionel
…the other way to see it is, that clause only allows you do things that are al- lowed under the US Copyright Act and the only things that are permitted under the US Copyright Act are acts that are carried out in the United States. The US Copyright Act does not apply outside of the US. That means that the

clause does not have worldwide effect of extending the fair use doctrine outside of the US, so that copiers are still constrained by their own laws.

Sergio
I think you would win. I think that is badly drafted language. It should say fair use standards. Not the Copyright Act.

Andrea
So would you put this towards red or blue?

Sergio
Blue.

Prodromos
We'll take our chances.

UNREALISED PROJECTS

Eva

This is *Unrealised Projects* from 2011. It's published by Betascript Publish- ing, a publishing house that draws content from Wikipedia articles and collates them in books. The criteria for editing is a mere link system related to Wikipedia tags, what is in the neighbourhood of something else. For this case we can get evidence from Lynn Harris who is here. Lynn runs Unrealised Projects and she found the book on the Foyles bookstore website. It cost her at least £35, so it is sold for a lot of money. The content is generated from Wikipedia and there is a disclaimer at the beginning and a license at the end.

Prodromos
This is quite interesting and it poses a number of issues. The content on Wikipedia used to be distributed under the GNU Free Documentation License (GFDL) but at a certain moment it has been re-licensed. It s distributed now under the Creative Commons Attribution-ShareAlike License. This license allows me to make any copies and to compile the material in any way I want and even make changes and derivative works as long as I distribute the end product of my work under the same terms and conditions.

That's exactly what this book does. There is a question whether the licensing only covers the contents or also the specific way I have compiled the whole thing: the projects I have chosen, the typeset and the cover. That's interesting because these are "copyleft" licenses. Copyleft licenses basically tell you that if you make any changes or produce derivative works they should be licensed under the same terms and conditions.

The first question is, if I make a compilation of works that are under a copyleft license would the compilation itself be covered by copyleft? For sure I can take and copy individual articles, but there is a question whether I could copy the whole thing.

Copyright law of the European Union permitted limitations are:

• paper reproductions by photocopying or similar methods, except of sheet music, if there is compensation for rightsholders;

• reproductions made for private and non-commercial use if there is compensation for rightholders;

• reproductions by public libraries, educational institutions or archives for non-commercial use;

• preservation of recordings of broadcasts in official archives;

• reproductions of broadcasts by social, non-commercial institutions such as hospitals and prisons, if there is compensation to rightholders;

• use for illustration for teaching or scientific research, to the extent justified by the non-commercial purpose;

• uses directly related to a disability, to the extent justified by the disability;

• press reviews and news reporting;

• quotations for the purposes of criticism or review;

• uses for the purposes of public security or in administrative, parliamentary or judicial proceedings;

• uses of political speeches and extracts of public lectures, to the extent justified by public information;

• uses during religious or official celebrations;

• uses of works, such as architecture or sculpture, which are located permanently in public places;

• incidental inclusion in another work;

• use for the advertisement of the public exhibition or sale of art;

• caricature, parody or pastiche;

• use in connection with the demonstration or repair of equipment;

• use of a protected work (e.g., plans) for the reconstruction of a building;

• communication of works to the public within the premises of public libraries, educational institutions, museums or archives.

http://en.wikipedia.org/wiki/Copyright_law_of_the_European_Union#Limitations

Andrea
Just to clarify, this is not a copy of a Betascript book. This is a Betascript book.

Prodromos
Yes, but what I'm saying is that the Betascript book has been copied from sources under these licenses. It actually says at the beginning that this whole book is licensed under the GFDL, which is compatible with the Creative Commons Attribution-ShareAlike. So this is perfectly legal and you can do whatever you want with it as long as you release whatever you do under one of these licenses. What I find very interesting about this one is that people would actually buy it.

Lynn
The way it's advertised is really misleading. It gives you the impression it's all about Unrealised Projects when is actually a compilation of things that are similar. If you wanted to know more about the project you may be tempted to buy this book, but you wouldn't find that information there.

Prodromos
OK. But in terms of copyright, this is the bluest one. They've done everything right.

Lynn
The Wikipedia entry that describes the project is very very short. So it's not like they're talking about the work. They've just included the project in this book. It's really unusual to find it and then have it discussed in relation to the other things that are included. And also the way in which it is advertised.

Jury Member
So what is it? Is it a description of an artistic project?

Lynn
It's just a whole bunch of Wikipedia descriptions of things. For instance, Unrealised Projects is tagged as a conceptual art project, so there is the Wikipedia entry for Conceptual Art. It goes off on funny tangents. It ends up with all sorts of unusual associations.

Lionel
Do you mind being associated with any of the…?

Lynn
I'm not offended by those associations. It's just that they don't make that much sense.

Eva
What would happen if she was offended?

Lionel
Well, she might be able to produce an argument based on her moral rights. The copyright laws of many European countries give authors so called "moral rights," that is, specific rights that are supposed to reflect their personal rela-

βetascript publishing

Unrealised Projects

Sam Ely and Lynn Harris, Hans-Ulrich Obrist, Publish And Be Damned, The Centre of Attention, Per Hüttner, Markus Vater

High Quality Content by WIKIPEDIA articles!

Lambert M. Surhone, Mariam T. Tennoe, Susan F. Henssonow (Ed.)

Author: Betascript Publishing,

Unrealised Projects by Betascript Publishing

Date: 2011
Publisher:
Format: 23 x 13 cm, 64 pages
Printing: POD, perfect bound
ISBN: 978-613-5-22491-7
Source: Wikipedia

A seemingly legitimate art book using Lynn Harris and Sam Ely's own title, *Unrealised Projects*, this is, in fact, merely an unauthorised reprint of various Wikipedia articles, starting with the one for Harris and Ely and then taking direction on further content from the articles it links to. Harris, who found it for sale at Foyles.com, says, 'The book is rife with conflicting disclaimers about authenticity, quality, authorship, and is legitimately sold on many online shops as an academic resource. It is a disjointed cultural artifact that reflects the problematic side of reproduction and distribution in our networked digital ecosystem...'

tionship with the work rather than an economical investment in the work.

In the UK we have two of these rights: the right to be named when a work is published or circulated (the "right of attribution") and the right not to have the work subjected to derogatory treatment (the "integrity right"). The integrity right is the right to prevent your work from being modified, added to, or subtracted from, in a way that is "prejudicial" to you, the author of that work. The language is: prejudicial to your "honour or reputation." And no one really know what "dishonour" is. So the British Courts, when they've dealt with this – and they've rarely dealt with this – have tended to say you would have to show that the changes that have been made to your work affect your reputation. And that depends on whether you can show you had a reputation and the modification of the work has an impact of the views of you held by your peers.

Lynn

Prodromos said something really pertinent: exactly who would buy this book? They make hundreds of books in such a weird amalgamation, Prodromos. And they also have "High quality content by Wikipedia" on the cover, but this is a contradiction in terms. (*Laughter.)* Is it misleading because it has the title *Unrealised Projects* and then you see a compilation of other things?

Jury Member

It does seems to imply that you endorse it.

Prodromos

Because your project is called Unrealised Projects, the book is called *Unrealised Projects* and the book contains other things than what your project contains and also because of the quality of the things that are in there, you feel first of all that your work is associated with something that is not your work?

Eva

Wait a minute, we are not talking about the work we are talking about Wikipedia content. So, Lionel, this is a comment to you: How can she be upset about a Wikipedia entry about her work?

Lionel

If it does not contain any of your work at all then there is no reason why it could be a moral rights infringement. I misunderstood.

Prodromos

It's just the title of your work, right? So the title of the project is given to the book and the title cannot get copyright?

Jury Member

Couldn't that be a trademark infringement?

Prodromos

It depends, but I don't see how "Unrealised Projects" could get a trademark. It would have to be associated with something and precisely because of the generic nature of the title it would have to be at least a registered trademark. And you'd have to pass a process to actually register the trademark and to be granted a trademark for those particular areas of activity or products or services. I find it very difficult to establish a link that would actually...

Sergio

Yes, in the US "Unrealised Projects" is the second type of trademark, which is descriptive and you have to attain secondary meaning. In other words, consumers connect "Unrealised Projects" to a product or a service that you've been selling in commerce actively under the title Unrealised Projects.

You might have in the US a "right of publicity" claim because you didn't endorse the book and you didn't give it permission to use your name. Right of publicity or right of privacy in the US is a law that is by state so there are different versions of it, but the general rule is that it protects your name, image likeness and voice. Obviously they are using your name without your permission for commercial purposes. They are selling a book, regardless of what it is. Truthful, untruthful, fact or fiction. I can see that being a viable claim.

Lynn

It is really a worthless object. It costs a lot of money.

Sergio

And this actually helps you because if the book was truthful, if I bought it and I found projects that have been unrealised and they were using your name in passing as a artist that does this type of projects, then you would probably lose the right of publicity claim.

Lionel

There might be some consumer protection-based claim, if the use misleads consumers. Those are largely criminal provisions that are enforced by Trading Standard officers.

Lynn

Not much hope there.

Lionel

The hope is that the world will shun it.

Laughter.

Jury Member

Do you know how many copies were sold of this book?

Lynn

No, but they do hundreds of these. So obviously people are buying them. And they are print-on-demand, so it's easy for them just to have a PDF waiting in case someone orders one.

Prodromos

So basically what I'm buying when I'm buying this copy… Apparently I'm not buying the license because I could get the license from another source if I know that someone else has it already, this compilation of Wikipedia entries. What I'm buying is the convenience of getting them together and the paper. The reason why I'm paying a price which does not correspond to that... I've always claimed you could make money out of a Creative Commons Attribution-ShareAlike work. This would be the way to do it.

Sergio
Have you been working under Unrealised Projects since 2002? Using that term?

Lynn
Yeah.

Lionel
So there could be a reputational interest in the title.

Andrea
So do you all agree it goes here? Total blue?

Prodromos
Yes, they've done it the way they should have done it. They don't claim they are the artist. They stated their sources. They have the licenses. You could always ask them to disassociate you under the term of Creative Commons Licenses because explicitly you have this right under these licenses. So in the next edition is made clear that you don't endorse this book.

Sergio
You could write a demand letter saying that at least in the jurisdictions that would grant you a right of publicity claim and under Creative Commons that you want your name removed.

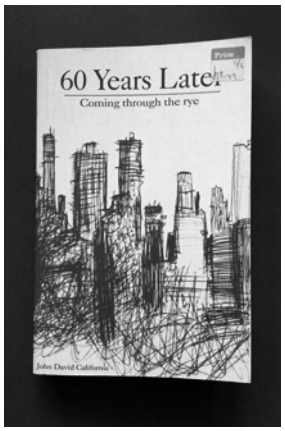
Andrea
Blue then.

CATCHER IN THE RYE BY RICHARD PRINCE

Andrea

The next one is really complicated. It is an exception. We tried to have all the objects that we are discussing present today, but this object is very expensive so we couldn't actually have it here. This is *The Catcher in the Rye* by Richard Prince. In 2011 Prince made a copy of this edition of *The Catcher in the Rye* by Salinger and replaced the author's name, Salinger, with Richard Prince. On this page for example where Salinger's other titles are listed, you find now a list of book titles by Richard Prince. The rest of the novel is exactly the same. It's a facsimile of all the inside pages of the novel. He sold a few and then distributed some for free and now it's sold out. It's become a collector item.

Eva
He launched it at the New York Arts Book Fair in 2011 and allegedly sold them in the streets for $40. Quite cheap. By now it has become a collector's item and Printed Matter has a couple of copies left that they are selling for $1500.



Sergio

Do you know if he had this printed or did he purchase the books and insert his own pages?

Andrea

He changed this page which is bound in the book so I guess it would be hard to buy the books and take them apart just to change an inside page. Another fact to be considered is that the judge in charge of the Cariou case, a copyright case brought against Richard Prince,5 was the same judge in this case here: *60 Years Later, Coming Through the Rye*.

This book is a sequel to *The Catcher in the Rye* called *60 Years Later, Coming through the Rye* and it's the story of Holden Caulfield, the main protagonist in Salinger's novel, aged 60 years. Salinger was still alive when this book came out and he sued the author for copyright infringement and won. This book circulates in Europe, but it doesn't in the US. So the same judge that ruled on that case also ruled on the Richard Prince case. There is some kind of a joke in his choice.

Eva

Apparently Richard Prince had a specific reason to use this very book. And what is also interesting to mention is that in his facsimile Richard Prince added a disclaimer to the colophon which says: "This is an artwork by Richard Prince, any similarity to a book is coincidental and it is not intended by the artist." And the colophon also states: "copyright Richard Prince." So he makes this not a book but an artwork. Does that make a difference?

Sergio

I think that fair use in US law is the antithesis of this book. Especially if he just re-published the book with his name on it and just changed one page. It is probably not enough. It may not be transformative enough under the four factors.

What is the purpose? Again, if it's criticism it would have to be criticism of the book. In the Second Circuit this rule is no longer binding, but if you are looking at it visually, has the work changed enough? Probably 5%, so the other 95% remain the same. I could still buy this book and read *Catcher in the Rye*. The problem is that I'm not going to buy it – and that is the fourth factor – for $1500 if I can buy it on Amazon for 99 cents. I would probably put it somewhere in the middle of the scale. In one hand there is probably no commercial impact on the other hand he did copy 95% of the text. And it is fiction.

Eva

What about fair use and criticism? What about the fact that he had to use this specific book, because of his history with the judge?

Sergio

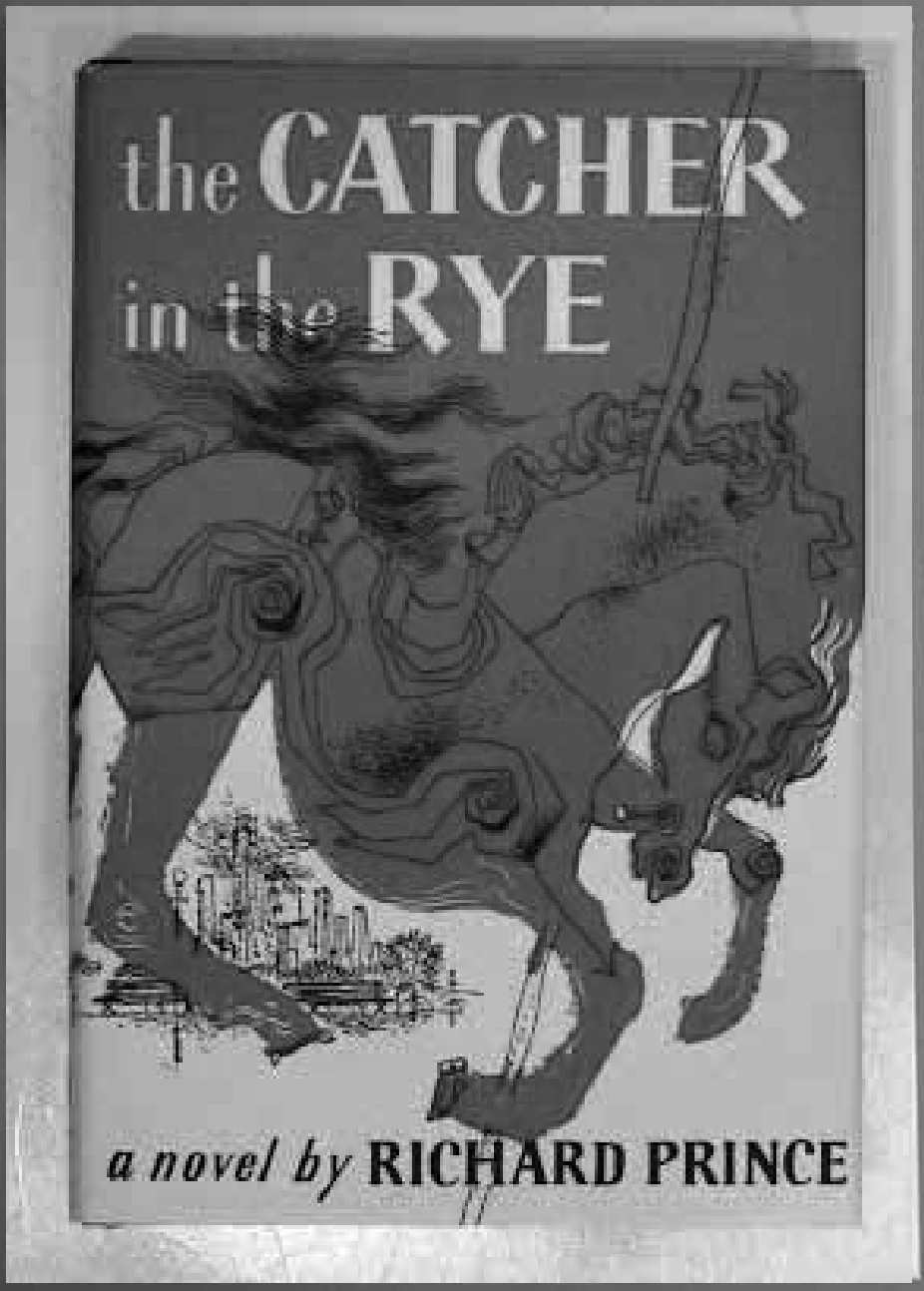
But his criticism doesn't go to this book it goes to 60 years Later. Or it goes to the court case. He is not criticising this book.

Eva

And then it is not valid.

Sergio

It's not that it is not valid, especially after the Cariou decision against Prince,


the CATCHER
in the RYE
a novel by RICHARD PRINCE

Author: Richard Prince

A Catcher in the Rye

Date: 2012 **Publisher: N/A**
Format: A4 **Printing: laser**
ISBN: N/A
Source: A Catcher in the Rye, Little Brown and Company, First edition (1951)

A photocopy of the cover of Richard Prince's The Catcher In the Rye book, which is a faithful facsimile of the first edition of Salinger's novel. Prince replaces Salingers name with his own and list his own book titles on the "more books by the author" page. The book was originally distributed in front of the Metropolitan Art Museum in New York and is now priced 1500$.

which says the second work doesn't have to be critical of the original work.[5] So we are left with looking at the visuals. Has the second work transformed the original enough? Not really. The cover isn't altered, the content is one hundred percent not altered, just the author's name is changed and the side flap and the page were he lists it as an artwork. But the fact that it is an artwork doesn't matter.

Lionel

Do you think that the misattribution speaks against it being a fair use exception? He is not acknowledging the author and – even worse – he is appropriating authorship.

Prodromos

It depends on the jurisdiction, but if you were to go under the exception of criticism in some jurisdictions you explicitly have to state the source and differentiate the source from the criticism. Either opinion and criticism has to make reference to the original work and it has to be very clear. Of course someone may say that *The Catcher in the Rye* is so well-known that you don't really need to do so.

Sergio

But what is the criticism of it?

Prodromos

That's why I'm a bit lost with that. Is it the same thing as the discussion about the three-step test? I would say that this most probably passes the three-step test...

Lionel

No, because of the legitimate interest of the author.

Prodromos

Yeah, it wouldn't pass because it is not only economic rights. It is also the moral rights.

Lionel

To me this is in red.

Jury Member

Sorry, I read somewhere that *The Catcher in the Rye* is an iconic book in America. I see this as similar to re-appropriating the Marlboro Man, an iconic American figure, and by doing so he is asking quite new questions about why is it that certain books arrive at certain positions in the history of literature. By putting his name on the cover he is being pretentious and putting himself in exactly that arena, but in the art world. It does change it fundamentally.

Sergio

I think you are conflating the idea with the expression of the idea. He could be critical of the idea of youth in angst in American culture or the lonely cowboy figure in the West in the US, but that is very different than re-photographing a copyrighted work such as the Marlboro Man or re-printing the actual text of *The Catcher in the Rye*, which are fixed. They are an actual book and an actual photo,

United States Court of Appeals for the Second Circuit

The United States Court of Appeals for the Second Circuit (in case citations, 2d Cir.) is one of the thirteen United States Courts of Appeals. Its territory comprises the states of Connecticut, New York, and Vermont, and the court has appellate jurisdiction over the district courts in the following districts:

- District of Connecticut
- Eastern District of New York
- Northern District of New York
- Southern District of New York
- Western District of New York
- District of Vermont

(refer to Cariou vs Prince previous footnote for more information)

http://en.wikipedia.org/wiki/Second_Circuit

5 In the appeal in April 2013, the judge decided in favour of Richard Prince and declared it fair use. Attorney Virginia Rutledge comments "This decision absolutely clarifies that the law does not require that a new work of art comment on any of its source material to qualify as fair use."

not their ideas.

Lionel

Is it Sherry Levine that does the complete replicas of artworks? You could ask if this is in the same sort of category as that and for me it's not. I'm struggling to articulate why, but it seems to me that when visual artists take a visual work and re-contextualise it as a replica they are asking interesting questions about the relationship between the original and its iconic status. Think of Walter Benjamin's idea of the "aura" of works in *The Artwork in the Age of Mechanical Reproduction.* Seems to me that you don't do that when you are using a printed, massproduced work like *The Catcher in the Rye*. Putting Prince's rather than Salinger's name on it simply doesn't ask any of the same interesting questions about the importance of the unique object.

Sergio

To add on to that, let's look at Sherrie Levine versus Lawler. Louise Lawler – many times re-photographing the work or a fragment of the work – is obviously looking at the context. That to me is stronger fair use than Levine, which to me is, generally speaking, and certainly her rephotographs, outright copyright infringement. There is no transformation at all. We are looking at the visuals, you put them side-by-side: it's the same thing.

Lionel

But she changes the meaning.

Sergio

But what is interesting about the Cariou case now is the judges said we are not interested in what an artist has to say about why she or he appropriated, but rather, just the way the work looks. After Cariou an artist's explanation of his/her intentions is not necessary. What counts is the aesthetic reading of the judges, or jury, and in this case it was based purely on visual difference between the two works. How would we know that Levine changes the meaning? Who would decide this? An art historian, an art critic, or a layperson who rarely, if ever, goes to an art museum?

Lionel

Doesn't it matter what the Supreme Court says?

Sergio

Are you referencing the *Campbell v. Acuff-Rose Music, Inc.*? But that was for parody.

Lionel

Transformative use talks about changing the content or meaning of the work.

Sergio

Sure, but again, how would we know that in a Levine re-photograph there is different meaning or content than a Weston? This is where art and law collide. I'm not sure a change of context is enough, or just because it's an artist, or art. This opens up a huge can of worms. As for parody, yes, content and meaning do change. I believe that, parody was the argument originally for the *Cariou v. Prince* case. The point Cariou's lawyer was making was that Prince had to use the Rastafarian images in order to comment on them, on that style of pho-

Roger v. Koons

Art Rogers, a professional photographer, took a black-and-white photo of a man and a woman with their arms full of puppies. The photograph was simply entitled, Puppies, and was used on greeting cards and other generic merchandise.

Jeff Koons, an internationally known artist, found the picture on a postcard and wanted to make a sculpture based on the photograph for an art show on the theme of the banality of everyday items. After removing the copyright label from the postcard, he gave it to his assistants with instructions on how to model the sculpture. He asked that as much detail be copied as possible, though the puppies were to be made blue, their noses exaggerated and flowers to be added to the hair of the man and woman.

The sculpture, entitled, *String of Puppies*, became a success. Koons sold three of them for a total of $367,000.

Upon discovering that his picture had been copied, Rogers sued Koons and the Sonnabend Gallery for copyright infringement. Koons admitted to having copied the image intentionally, but attempted to claim fair use by parody.

The Court found both "substantial simi- larity" and that Koons had access to the picture. The similarity was so close that the average layperson would recog- nise the copying, a measure for evalu- ation. Thus the sculpture was found to be a copy of the work by Rogers.

On the issue of fair use, the court rejected the parody argument, as Koons could have constructed his parody of that general type of art without copying Rogers' specific work. That is, Koons was not commenting on Rogers' work specifically, and so his copying of that work did not fall under the fair use exception.

http://en.wikipedia.org/wiki/Rogers_v._ Koons

tography, on this genre of photography. And the court said no, as long as they visually look different... In a sense they turned back the clock because under that rationale, the "side-by-side look," Levine is now infringing the underlying works, even though there is arguably a more rigorous conceptual reason for why Levine was appropriating them.

Jury member
Could there be something in the fact that at its very essence this artwork is trying to transform a literary work into an artistic work?

Sergio
No. If what you mean is that it was "changed" from a book to a sculpture. The *Rogers v. Koons* case – the one with the puppies – establishes that change of medium itself is not transformative.

Jury member 2
How about the case of ticking the different category boxes of types of artworks? Because everybody needs to agree on what are you talking about before you can make judgements on the objects.

Sergio
Those boxes are not under US Copyright Law.

Jury member 2
So it would be only under the EU law? You would first have to establish what are you talking about: this is a literary or is an artwork and then you can pose an argument?

Prodromos
You have to first of all see what kind of work it is, also whether the type of use you are subjecting the work to fits under the categories of exceptions and limitations and then to what kind of right it is an exception: whether it is reproduction rights or any of the other rights. Very broadly speaking, these are the boxes you have to check. The difference with the US is that they work more in the basis of a doctrine. We have the doctrine, but we also have a limited set of exceptions and limitations. Either you are in the list or you are not.

Andrea
Everybody agrees? Richard Prince on the red?

Lionel
I would put him even further.

Andrea
Let's move on to 15 minutes open discussion. Does anybody have a general question?

Jury Member
I have a question about why the collection is not defined as a library. Could it be defined as a research facility and would that impact on how we consider the legality of each of these books it is holding? The question is what do you consider The Piracy Project to be?

Campbell v. Acuff-Rose Music, Inc.

Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) was a United States Supreme Court copyright law case that established that a commercial parody can qualify as fair use. That money is made does not make it impossible for a use to be fair; it is merely one of the components of a fair use analysis.

The members of the rap music group 2 Live Crew—Luke, Fresh Kid Ice, Mr. Mixx and Brother Marquis—composed a song called "Pretty Woman," a parody based on Roy Orbison's rock ballad, "Oh, Pretty Woman." The group's manager asked Acuff-Rose Music if they could get a license to use Orbison's tune for the ballad to be used as a parody. Acuff-Rose Music refused to grant the band a license but 2 Live Crew nonetheless produced and released the parody.

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement. The District Court granted summary judgment for 2 Live Crew, holding that their song was a parody that made fair use of the original song under § 107 of the Copyright Act of 1976 (17 U.S.C. § 107). The Court of Appeals reversed and remanded, holding that the commercial nature of the parody rendered it presumptively unfair under the first of four factors relevant under § 107; that, by taking the "heart" of the original and making it the "heart" of a new work, 2 Live Crew had taken too much under the third § 107 factor; and that market harm for purposes of the fourth §107 factor had been established by a presumption attaching to commercial uses.

http://en.wikipedia.org/wiki/Campbell_vs._Acuff-Rose_Music

Lionel

In the UK, some of the defences are limited to particular types of user (e.g. "libraries", "educational establishments"), others to particular type of uses (replacing parts, supplying copies). A library might be able to benefit from its relation to an educational establishment or an individual, for example, if it's for the purposes of that individual's own research. Looking at the collection, it looks a bit like a library. In so far as it is a collection of books, the problem is that none of the library defences is going to be of much help. Very few of the library defences are designed to facilitate the making of a collection. Rather the library defences are primarily concerned with stopping librarians being sued for authorising other people who come in to make copies for their uses. Or, when part of a book is falling apart, to make a copy of that part to replace so they can maintain it at the library. The Piracy Project roughly looks like a library but unfortunately a library of piracies isn't going to benefit from any exception.

Jury member 3

A collection of works for educational purposes?

Lionel

The educational exceptions are, as I said, also rather narrow. One of the problems in the UK is that our defences are out of date. They are from the past-century. Some were drafted in 1911, some in 1956, others in 1988 and there has been little updating since then.[6] They are now going through a process of updating, but projects like this are not things that anybody has got in mind when they are formulating the updated exceptions. They are updating educational exceptions so that academics can use whiteboards and use reproductions of works on whiteboards when necessary, and they are creating a parody defence and a quotation defence, but none of that is going to bail you out.

Jury Member

The fact that is difficult to categorise the collection as a whole, does that have a bearing on the legality or illegality of the individual works at all?

Lionel

Not really. The categorisation of the collection may have a bearing on the copies that are created specifically for this collection, but in relation to many of the other items the legality or illegality goes back to the moment when these items were created and distributed. One weird feature of British law is that you may be infringing copyright even if you didn't create infringing copies yourself, because there are some circumstances in which you are not permitted even to possess infringing copies. You are not allowed to possess an infringing copy or exhibit an infringing copy "in the course of business." And the course of business is defined as in the course of "any trade or profession."

Jury member 5

Would money have to exchange hands?

Lionel

As far as I am aware there is no case law on this. On the one hand, this is a non-commercial activity rather than a business. On the other hand, business is

6 Since the event, a number of statutory instruments have amended the exceptions in the CDPA 1988 with respect to uses by libraries, uses in education, uses for the purposes of research, uses by way of quotation or parody, as well as uses by people with disabilities (or for the benefit of such people).

defined as including a profession, and we as academics feel we are a profession. If Eva and Andrea are collecting these piracies as part of their professional work and showing them here at the Showroom, they might easily be said to be exhibiting copies in the course of their profession and hence in the course of business.

Sergio

There is an interesting issue about morality because I remember talking to someone from the US Copyright Office about this and I asked: When a work is found to be infringing (like a knock-off) does the Copyright Office destroy it? They responded: Well, we archive many of the infringing works. So in a sense, if what you are saying applies to the US, the Copyright Office is infringing. So there is a subtle, underground argument for not wanting to destroy literature, art... You hear this in the Cariou case. Even if Prince was infringing.

Eva

But this here is the idea of a study collection, that you can study Piracy while looking at and collecting these cases. I remember the Italian artist Mark Lombardi who used to live in New York. He made drawings, maps where he was mapping links for example between the Vatican and the CIA. At some point the FBI got in touch with his gallery wanting to study his drawings because they thought they could actually learn something from them. I think there is potential that if we carry on building the Piracy Collection with all these interesting cases – that it become an educational resource of some value not only for the producers but for the litigators?

Prodromos

But Lionel made a very important point, which is, when actually is the moment of infringement? There are two distinct sets of acts. The first one is the moment when each individual artist here has actually constructed the work. This is the first moment of infringement.

And then there is the second moment, when you actually bring the works here and by displaying them it doesn't mean you can actually rectify the infringement that has happened in the first place. The question is how much you are infringing the law by displaying these works. The question here is, would you be able, according to the EU law system at least, to be under any of these set of exceptions we have. And in most of the cases you couldn't. And again I would say that this is because the works are already infringing. The limitations and exceptions we have describe particular types of institutions that do things that are pretty much outdated. Or they have to do with functions that you don't perform. They have to do with preservation, to ensure that when you give legitimate copies you are not violating the law by doing your job, which is what librarians do. In terms of research, you may find it as a defence for yourselves being in possession or doing something with them, but it is not going to solve the problems with the works themselves.

Jury member

Does harm have any influence on whether it is legitimate or not? Damages? The fact that this library sits here – what harms does it cause?

Lionel

Questions of harm really go to remedies rather than whether you are infringing. If there is no significant harm that means the court would probably not order certain remedies. For example, there wouldn't be an interim injunction to stop the exhibition continuing. It means that the financial damages that any of these

particular copyright owners could claim would be minimal. And that is good, because that really is no good remedy to enforce this against you two.

Relieved laughter.

Sergio

It's obviously an art project and it is larger than the bookshelves. I would include the type of engagement, the grants that you receive as well as the residencies as part of the project. And to look at the whole thing more as a collage because once you start to look at the project as a collage then – if you visualise a collage being made of multiple appropriated images – the courts are more likely to say you should not look at any individual image, but instead you have to look at the whole and at the specific role this or that image plays in the whole.

Eva

It's funny that you mention the grant because actually is funded by the Arts Council of England.

Jury Member

We are here to discuss the law but also the in-between space where law resides. For example if I went home and made a copy, because the law is in- visible but is always looming and protecting the things that we create, it would straight away protect the infringement as such. So until the moment it is challenged by somebody else, my expression will be protected by copyright. This project remains in this silent expression. Law never just comes, it has to be initiated by a force that is human. I would think such kind of projects in that kind of threshold or liminality, which the law is not capable to grasp, will always be able to escape.

Lionel

I don't know if I'm responding to your comment, but if you think about this kind of project and you imagine the question of the legality of the project being raised, it is absolutely unforeseeable that anything would happen negatively. First because of fundamental rights of freedom of expression which should enable us to debate and have the means to debate what is an infringement and what isn't and your collection facilitates that debate in a way that if we could only have the legitimate things and debate how close you got you would not be able to debate it with that clarity. If everything that was infringing had to be destroyed and couldn't be collected or archived that kind of debate couldn't go on. If somebody ever came to examine the legality of this sort of thing they would always have to lean in favour of construing whatever it would be to permitting it.

Prodromos

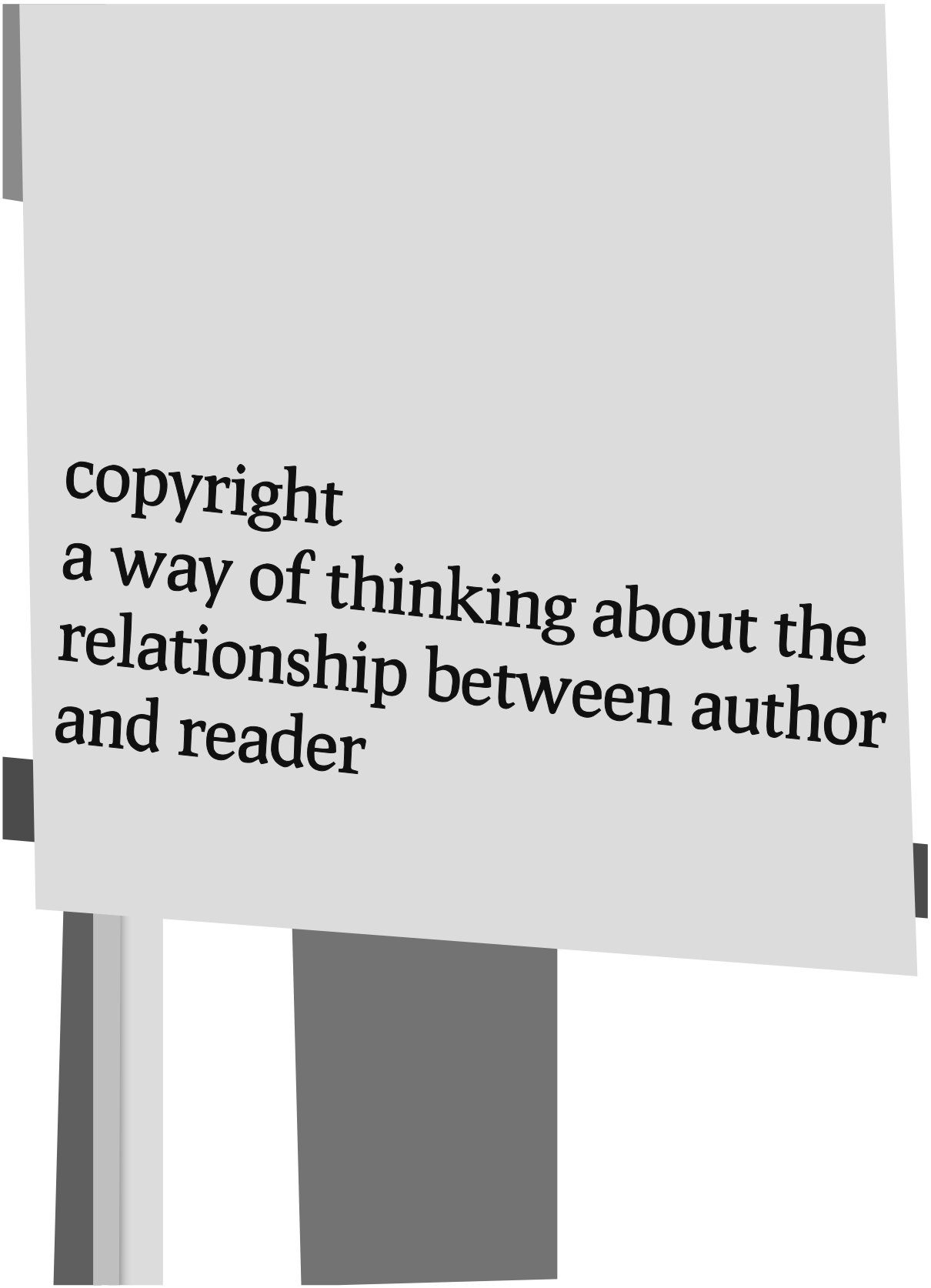
With regards to the question of what this project is, it depends whom you are asking. Are you asking the lawyers, or are you asking what is protected out of this project, which is another interesting question. What happens to the talk we just gave and discussion we had? What happens to all the meta data that is here and on the website? What happens with the pictures? What happens with the compilation of the works as they stand there in categories? In terms of copyright itself this project contains several elements of methodology which could be potentially copyrightable and that is an interesting issue in itself.

It is a very different question in terms of what this project is in artistic terms.

Or what this project is in terms of legality. Or what this project is in terms of how it fits in existing categories that the law defines such a library, a cultural institution, memory institution, educational establishment. It is a very important question, but it depends on whom you are asking.

Andrea

Thank you all so much for coming. Tom for helping with the set up. Thanks to The Showroom for hosting us and to Stephanie Thandiwe Johnstone for making the courtroom drawings.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Thanks to all, who contributed to the Piracy Collection – deliberately or not...

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This book is not finished.

It begins an exploration of a set of terms that have proved relevant to the Piracy Project, a project exploring the limits and significance of originality, ownership and authorship in culture.

We chose 23 terms and set up a funding campaign (which is still open): anyone can become a patron of a chapter in the book and help commission an essay showing these terms in a new light.

But that's a glimpse into the future of this book.

In the present version, alongside the published essays, you'll meet some of the prospective authors whose essays will be included in the next version. You can look them up, ask us what they'll write about, you can even drop them a line and give them a nudge to get on with it.

In other words, this book is a platform that creates conversations: Essays in one version may be re-written in a later one. Passages may disappear completely as new discoveries, possibilities and ideas come to light or as the landscape we're exploring simply shifts beneath our feet.

This book is not finished – or maybe it's just a different kind of book.