

The CCCC-IP Annual: Top Intellectual Property Developments of 2011

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Clancy Ratliff

Introduction to the 2011 CCCC-IP Annual

This is the seventh year of publication for the Conference on College Composition Communication Intellectual Property Annual, published on behalf of the CCCC Intellectual Property Committee -- my fifth as editor. That this Annual has maintained this degree of longevity bespeaks the field's commitment to copyright, intellectual property, and authorship as key concerns. Throughout 2011, the battle between the content industries and the copyright activists continued, but other powerful internet industries have started lobbying for a free and open communication network: Facebook, Google, and more. This year's Annual engages this rhetorical situation as well as developments in the circulation of scholarly publications.

The Defeat of the Research Works Act and Its Implications

On 16 December 2011, Representatives Darrell Issa (R-CA) and Carolyn Maloney (D-NY) proposed the Research Works Act, a bill that would roll back free and open access to government-funded research and place that access under the control of publishers. On 27 February 2012, after the publishers who backed the bill met considerable public criticism, Issa and Maloney announced that they would no longer attempt to move forward with bringing the bill to a vote, and the Research Works Act died in committee. The abandonment of support for the Research Works Act is a significant victory for those in academia who support free and open access to research, especially research paid for by the American taxpayer.

Background

The Research Works Act was in large part a response to the United States Government's 2007 legislated requirement that published research funded by the National Institutes of Health (NIH) be made freely available within 12 months of publication in PubMed Central, a free online database of full-text scholarly and research articles in the biological and biomedical sciences. The legislation's logic was that because the NIH are funded by the American taxpayer, the research resulting from that funding was the rightful property of the American taxpayer, as well, and so should be made freely available and accessible, in the way that other government publications are not covered by copyright and exist in the public domain. However, the Association of American Publishers (AAP), a trade organization representing many commercial and scholarly presses, perceived a threat to its economic interests in that access, despite the 12-month gap established to allow journal publishers to make an initial profit on the research they published, and expressed concern about "serious unintended consequences of government mandated open access" (Biello). Despite the AAP's hiring of public relations specialist Eric Denzenhall, who advised that they take the rhetorical stance that "[p]ublic access equals government censorship" (Biello), most of their concerns seem clearly economic in nature: they were worried that free access in PubMed Central to research published in their journals would take away from their profits.

Legislation

To remedy those concerns, the AAP sought legislative assistance. They found that assistance in Representatives Darrell Issa and Carolyn Maloney, who in 2011 co-sponsored the Research Works Act (House Resolution 3699, 112th Congress),

which “would not only end the NIH’s Public Access Policy, but it would forbid any effort on the part of any agency to ensure taxpayer access to work funded by the federal government” (Eisen). According to the text of the bill,

No Federal agency may adopt, implement, maintain, continue, or otherwise engage in any policy, program, or other activity that--

(1) causes, permits, or authorizes network dissemination of any private-sector research work without the prior consent of the publisher of such work; or

(2) requires that any actual or prospective author, or the employer of such an actual or prospective author, assent to network dissemination of a private-sector research work. (United States)

UC Berkeley evolutionary biologist Michael Eisen notes that the use of the phrase “private-sector research” is “intentionally misleading” in its reference to “works funded by the government but carried out by a non-governmental agency,” since “the US Copyright Act specifically denies copyright protection to works carried out by federal agencies, and the authors of this bill did not want it to be seen as amending [the] Copyright Act, something that would have ensured its defeat.” In other words, the authors of the bill tried to obscure any connection between research performed by entities other than the federal government and federal government funding of that research.

Support

The AAP and its members have considerable interest in obscuring that connection. If the members are successful in obscuring that connection between federal funding of research and the publication of that research, they can rhetorically justify the significant fees they charge to libraries for subscriptions to journals that publish that research. A case in point is the academic publisher Elsevier, which describes itself as “a company whose reason for being is to serve the research community” (“A Message”). Elsevier has received widespread criticism for its bundling and pricing practices and for its support for the Research Works Act, as well as for other ethical controversies. On 6 February, Elsevier (which publishes the journal *Computers and Composition*) published a press release about its support for the Research Works Act, expressing a desire “to de-escalate from the constant cycle of legislation and lobbying that has marked the scholarly communication landscape for many years” (“A Message”). Such an expression seems difficult to reconcile with Elsevier’s lobbying practices, given that “Elsevier and its senior executives made 31 contributions to members of the House in 2011, of which 12 went to [co-sponsor of the Research Works Act] Representative [Carolyn] Maloney. This includes contributions from 11 senior executives or partners, only one of whom is a resident of her district” (Eisen). Certainly, passage of the Research Works Act would have resulted in reducing the need for Elsevier’s lobbying, as it would have offered Elsevier and other AAP members considerable economic benefit. Elsevier, however, argues that such economic benefit would be well-earned, existing as a direct result of the work “performed by Elsevier employees working for a vast global community of more than 7,000 journal editors, 70,000 editorial board members,

300,000 reviewers and 600,000 authors” (“A Message”). That argument conveniently ignores (or perhaps subsumes) the work performed by authors, editorial boards, and editorial staff members in producing valuable scholarship. The AAP echoes Elsevier’s position, arguing that “a lot happens between the time the government shells out money for research and the time that research appears in published, analyzed, copy-edited, peer-reviewed form. Federal money provides the impetus, but publishers’ investment of time and expertise creates the final product that everyone wants” (Howard, “Who Gets”). Elsevier and the AAP sought passage of the Research Works Act as a way to deny that government funding contributes anything to academic research and that the nexus of value for that research lies in its distributors: the publishers.

Opposition

The arguments made by Elsevier and the AAP in support of the Research Works Act met significant opposition from the academic community, both from the faculty authors of published scholarly research and from administrators. In a statement to *Inside Higher Ed*, eleven American research university provosts pointed out that some of the most significant contributors to the circulation of scholarly knowledge are neither publishers nor the government, but universities themselves, noting that

our universities have made substantial investments in the development of open institutional repositories, as well as adopting campus guidelines and procedures to ensure compliance with federally mandated requirements that funded research results be made accessible in open access repositories. As stated above, we believe that open access to such federally-funded research reports facilitates scholarly collaboration, accelerates progress, and reinforces our government’s accountability to taxpayers and commitment to promoting an informed citizenry essential to the enduring stability of our democracy. (Wheeler et al.)

Zillabyte co-founder and Chief Technology Officer Tyler Neylon, who holds a PhD from New York University’s Courant Institute of Mathematical Sciences, also found Elsevier’s arguments in support of the Research Works Act objectionable. Inspired by a remark from Fields Medalist Timothy Gowers, Neylon set up the anti-Elsevier Web site <http://thecostofknowledge.com> that allowed academics to add their names to the list of people who would not referee, publish in, or do editorial work for Elsevier journals because of Elsevier’s pricing and bundling practices and because of its legislative initiatives in support of SOPA, PIPA, and the Research Works Act. At the time of this writing, nearly 8,000 academics had signed the list.

Withdrawal

The list had an effect. Elsevier took notice of the list, admitting that “being criticized by even one researcher, let alone all the signatories of the petition, is

difficult” (“A Message”), and three weeks later, stated that “[w]hile we continue to oppose government mandates in this area, Elsevier is withdrawing support for the Research Work Act itself” (“Elsevier Withdraws”). Without Elsevier’s backing, congressional support collapsed as well: in a press release issued the same day as Elsevier’s announcement, Representatives Issa and Maloney performed a volte-face and declared that “[t]he American people deserve to have access to research for which they have paid. This conversation needs to continue, and we have come to the conclusion that the Research Works Act has exhausted the useful role it can play in the debate” (Howard, “Legislation”). At the same time, however, Elsevier affirmed its commitment to the privatization of knowledge, asserting that “different kinds of journals in different fields have different economics and models. Inflexible mandates that do not take those differences into account and do not involve the publisher in decision making can undermine the peer-reviewed journals” (“Elsevier Withdraws”). The implication from Elsevier in such a statement would seem to be that making research publicly available to taxpayers would result in an economic homogenizing effect, treating all the production of economically costly and valuable peer-reviewed academic knowledge as equivalent, and thereby place at risk the practice of academic peer review.

Economics

That argument is patently counterfactual. The desire of Elsevier and the AAP, as expressed in the Research Works Act, is to economically privatize public goods. The Research Works Act sought to give away the products of research undertaken with public funding to the private sphere, in effect freely donating the value of taxpayer dollars and academic labor to corporate profits. Elsevier’s press release performs an admirable piece of doublespeak in service of this intended giveaway, stating that while “Elsevier supports the principle that the public should have access to the output of publicly funded research,” they “are against unwarranted and potentially harmful government laws that could undermine the sustainability of the peer-review publishing system” (“A Message”), with the term “sustainability” apparently standing in for “profitability for Elsevier”: as the New York Times points out, “[f]or 2010, Elsevier reported a 36 percent profit on revenues of \$3.2 billion” (Lin). There are many ways to account for the value of the labor of refereeing, editing, and authoring peer-reviewed scholarship, but most of those involved in that labor agree that it is largely uncompensated, or at least directly uncompensated. As economist Theodore Bergstrom observes, “the supply of the academic labor that creates a successful journal depends on the goodwill of the scholarly community” (197). Furthermore, according to Bergstrom, the “high prices [charged by commercial publishers of academic journals] prevent the flow of scholarly information to teachers and researchers” (197). In other words, publishers like Elsevier whose pursuit of profits resulted in the sponsoring of the Research Works Act simultaneously attempted to profit from free or undercompensated academic labor and re-sell the valuable research that resulted from that labor at prices that would hinder its circulation.

Implications

Through legislation like the Research Works Act, Elsevier and the AAP are attempting to exploit scholars at both ends of the economic process; at the point of production of academic research and at the point of consumption of academic research. They're trying to get our research cheaply and sell it back to us dearly. If we are going to concern ourselves with the economics of institutional budgets, of class sizes, student aid, teaching loads, and job security, we need to be concerned about the economics of intellectual property, as well. My institution, the United States Military Academy at West Point, spends about \$100,000 on subscriptions to Elsevier journals each year, out of a total serials budget of about \$750,000. Those are your American tax dollars paying for those subscriptions. At the 2009 Conference on College Composition and Communication (CCCC), roughly one fifth of the exhibitors were members of the AAP, one of the primary sponsors of the Research Works Act, of which Elsevier is a member. At the 2010 CCCC, roughly one fourth of the exhibitors were members of the AAP. While the defeat of the Research Works Act is a victory for academics committed to the circulation of knowledge, we should keep in mind how the economics of our textbook choices and institutional affiliations and sponsorships shape the economic future of our field.

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Open Access Initiatives

In September 2011, the Princeton University Faculty Senate approved an “open access” policy for faculty research, adding the university’s name to a growing list of research institutions opting for such policies. Harvard University adopted a similar policy in 2005 (the first of such kind in the United States) and MIT did in 2008. Following the lead of these elite institutions, many others have adopted or are considering adopting open access policies, including University of Pittsburgh, Columbia University, and Emory University. These initiatives aren’t limited to the United States, either: University of Glasgow (Scotland), University of Latvia, and University of Khartoum (Sudan) all have participated in open access discussions and initiatives on campus (“Open Access Call”). A dramatic graph of the increased numbers in open access initiatives can be seen at the Registry of Open Access Repositories Mandatory Archiving Policies (<http://roarmap.eprints.org/>).

The move in “open access” from buzzword to policy affects the publication, circulation, and readership of our scholarship. These effects are largely positive for writing researchers: greater circulation for our work; enlarged rights and control over our scholarship; and new venues and formats for publication. This brief report outlines trends in open access initiatives, some of their recent precedents, and a few of the most salient implications for our scholarship.

What Is Open Access?

Open access (OA) literature is freely available online and has fewer restrictions on its use. According to Peter Suber, the Director of Harvard’s Open Access Project, “OA removes price barriers (subscriptions, licensing fees, pay-per-view fees) and permission barriers (most copyright and licensing restrictions).” OA policies are often explained in terms of the labor, funding, and distribution of scholarship: faculty contribute the bulk of labor for journals through their writing and editing; faculty work is generally funded by universities and public institutions; and free access to this work allows for greater distribution of scholarship as well as some return to the public for funding its production. OA scholarship is compatible with peer review: although scholars can make their research available on blogs or institutional repositories without peer review, the paradigm of OA policies is traditional, peer-reviewed scholarship.

Two major forces are currently moving scholarship towards OA. The first originates from faculty or universities, and Princeton’s, Harvard’s, and MIT’s open access policies for faculty research are examples. The second originates from publication venues such as journals; examples are Springer Open, and the journals *Kairos*, *Enculturation*, and *Digital Humanities Quarterly*, which publish

scholarship online without paywalls or logins. Working in concert with both of these forces are repositories for OA scholarship such as BioMed, ERIC, and Harvard's DASH.

Faculty OA Policies

The background copyright policy of most research universities assigns copyright ownership in scholarship to the faculty who produce it. This copyright ownership assignment distinguishes university faculty from most other kinds of employees, whose "work for hire" basis means that their employers own the copyright in their work. As copyright owners in their work, university faculty are then at liberty to assign their copyrights to whomever they choose. Through a Copyright Transfer Agreement, journal publishers often request copyright ownership in exchange for publication of scholarship. Publishers may then license back to the author limited distribution or reuse rights.

OA policies such as those at Harvard, MIT and Princeton are designed to help faculty either reclaim some of those rights from publishers or to better position them to bargain for retaining their copyright. Princeton's policy states: Each Faculty member hereby grants to The Trustees of Princeton University a nonexclusive, irrevocable, worldwide license to exercise any and all copyrights in his or her scholarly articles published in any medium, whether now known or later invented, provided the articles are not sold by the University for a profit, and to authorize others to do the same. [...]The University hereby authorizes each member of the faculty to exercise any and all copyrights in his or her scholarly articles [...]. ("Recommended open access policy"). Under this policy (which echoes Harvard's), the author and the university can both exercise copyrights; both have rights to distribute the work as long as they do so without making a profit from it.

Faculty-driven OA policies can be classified as "opt-in" or "opt-out." An "opt-out" policy (such as the one adopted by Harvard, MIT and Princeton) is more powerful—it is in force unless a faculty member requests to opt-out of it, whereas the "opt-in" policy (adopted by Nebraska, Emory, and Michigan) is only activated if a faculty member opts in. Because opting-out of the policy is made relatively easy for faculty—for instance, Harvard offers an online waiver request form—one might suspect the policy to be of less force in practice. However, as Princeton Faculty Committee explains, universities can use an "open-access policy of this kind (even with waivers) to lean on the journals to adjust their standard contracts so that waivers are not required, or with a limited waiver that simply delays open-access for a few months." Additionally, while faculty under an "opt-out" policy can assign their copyright to a publisher, they cannot sign away their university's right, which means that the university can still freely distribute that work, generally in an institutional repository.

Faculty OA policies also differ in terms of their deposit requirement—that is, where the scholarship must be deposited to comply with the OA policy. Harvard's policy requires that faculty deposit their work in their OA repository, DASH (<http://dash.harvard.edu/>). Princeton has no such repository (although the faculty recommended the development of one when they approved the OA

policy) and does not require deposit. At Princeton, faculty can elect to deposit their work in a repository specific to their field (e.g., PubMed or arXiv). Many universities who do not yet have an official OA policy for faculty provide online repositories for faculty to publish their work, for example: University of Pittsburgh's D-Scholarship@Pitt (<http://d-scholarship.pitt.edu/>), and University of Illinois' IDEALS (<http://www.ideals.illinois.edu/>).

OA Journals

Along with the trend in faculty-driven OA policies, a number of OA journals have cropped up in the last few years. Most prominent are the Public Library of Science journals (PLOS One, PLOS Biology, etc., <http://www.plos.org/>), which publish print articles alongside digital versions. To cover costs, PLOS charges authors' sponsoring institutions for publication. Recently-launched humanities journals such as the *International Journal of Learning and Media* (<http://ijlm.net/>) and the *International Journal of Communication* (<http://ijoc.org/>) are sponsored by hosting universities (MIT and USC, respectively) and grants. The rhetoric and technology journal *Kairos* (<http://www.technorhetoric.net/>), operating as an online open access journal since 1996, relies on grant support as well as support from editors' institutions.

The OA journals mentioned above are peer-reviewed and have editorial boards comprised of leading scholars in their fields, proving that OA publishing can be just as competitive and prestigious as publishing behind paywalls.

Why the Recent Trend in OA Initiatives?

OA has been driven by shrinking university budgets, better software platforms for distribution, and faculty's increasing recognition that wider distribution and publicity means higher citation counts and better reputation. As it has become easier and more accepted to do so, more and more faculty distribute their work on public archives, blogs, or personal websites, and OA initiatives echo that impulse.

While university budgets have been cut worldwide, the cost of journal subscriptions has risen. Libraries are forced to make difficult choices about what to cut, yet the major commercial journal publishers have relatively high profit margins. These financial concerns have become political concerns as well: why is university research, much of it publicly funded, not freely available to the public? University of Pittsburgh math professor Thomas Hales quips, "We researchers create the content of the journals. We conduct the research, write the articles, referee the papers and staff the editorial boards. We do this for free every morning and buy the publications back again in the evening" ("Protest Launched"). In a recent *Inside Higher Ed* editorial, provosts of eleven large, publicly-funded research universities wrote in support of OA scholarship: "we believe that open access to such federally-funded research reports facilitates scholarly collaboration, accelerates progress, and reinforces our government's accountability to taxpayers and commitment to promoting an informed citizenry essential to the enduring stability of our democracy." With shrinking public

funding, faculty researchers are realizing that we are not isolated from economics and politics. The push for OA scholarship is, in some ways, a response to the economic and political forces of corporatization and anti-intellectualism.

These economic and political concerns about scholarship are underscoring shifts in scholarship itself—moves toward digital scholarship in the humanities and full, published datasets in the sciences. The Internet allows for more complex scholarship to be published; slowly, that scholarship is being done, and journals are publishing it. A wave of books about the crisis of the book—notably Ted Striphas's *Late Age of Print*, and Kathleen Fitzpatrick's *Planned Obsolescence* (which specifically addresses the scholarly monograph)—have highlighted the fact that our traditional, print-based and commercially-outsourced publishing model is untenable. Recently developed institutions and technologies offer excellent support systems for OA publishing; these include Creative Commons Licensing (<http://creativecommons.org/>), Open Journal Systems (<http://pkp.sfu.ca/?q=ojs>), SPARC (<http://www.arl.org/sparc/>), and DSpace (<http://www.dspace.org/>).

Changes in publishing, politics, budgets, and technology have all contributed to this trend toward OA scholarship. However, recent OA initiatives have a rich lineage. The dominant repository for math, statistics and physics, arXiv (<http://arxiv.org/>) was started in 1991, and its first web interface was installed in 1994. While not peer-reviewed, this repository is the definitive record for those fields, due in part to its comprehensiveness and its affordance of rapid publication. The wide acceptance of the repository has enabled researchers in these fields to negotiate with publishers for distribution rights to their work. Out of a December, 2001 meeting of the Open Society Institute (OSI), the Budapest Open Access Initiative grew out. This influential initiative strove to accelerate progress in the international effort to make research articles in all academic fields freely available on the internet funded must be made publicly available within a year of publication. Because so much medical research is at least partially supported by the NIH, this mandate instantiated a de facto OA policy for the field of medicine.

More specific targeting of commercial publishing has put a finer—and more political—point on OA initiatives. In 2003, the Turing Award-winning computer scientist Donald Knuth led a widely-publicized revolt against Elsevier, the publisher for the *Journal of Algorithms*, which he had edited since 1980. In a comprehensively researched letter to the JoA board, he outlined the paradox of Elsevier's decrease in publication costs and its increasing price for the journal. Knuth, the originator of TeX, the popular typesetting system for math and computer science), notes that in 1980 the publisher performed the typesetting, keyboarding and proofreading, "[b]ut now, the authors have taken over most of that work, and software out the rising price of the journal. Moreover, he was skeptical of Elsevier's claim to need exclusive publication rights to avoid apocryphal publications and make the scientific record "clear and unambiguous" (Knuth 8). He called a straw poll for the editorial board to decide whether to stick with Elsevier. As a result, the Editorial Board resigned en masse in 2004 to found the journal *Transactions on Algorithms*, published by the professional organization ACM. Ironically, Knuth closed his letter by stating, "I'm

emphatically not a revolutionary. I just want to do the right thing."

Another accidental revolutionary, Fields Medal-winner Tim Gowers, launched a highly publicized action against Elsevier in early long held: he would no longer review for or publish in Elsevier journals. He cited their high prices, unorthodox practices of "bundling" journals and their support of the Research Works Act (H.R. 3699), which threatened to undo some of the work NIH's OA mandate had done. His post was a spark in dry tinder: a commentor to his blog responded by setting up a website, "The Cost of Knowledge" (<http://thecostofknowledge.com/>), to collect signatures for other scholars interested in taking a public stand against Elsevier. The successful protest drove Elsevier to drop its support of the Research Works Act and has raised awareness among faculty about the predatory business practices of Elsevier and other commercial publishers.

As a result of all of these forces encouraging OA scholarship, next year's IP annual report is likely to list quite a few more schools and journals committed to OA.

What Does "Open Access" Mean for Our Scholarship?

OA policies often allow for greater authorial control in publications, as they permit researchers to retain their copyright. With copyright ownership, researchers are free to distribute their work on personal websites, institutional and collective repositories where they are indexed by finding tools such as Google Scholar. Greater dissemination of scholarly work could lead to better, more well-informed research. A 2001 article in *Nature Debates* was the first to recognize that OA scholarship is more frequently cited (Lawrence), but this finding has been confirmed through subsequent studies (for a more complete list of articles charting dissemination of research in OA, see here: <http://opcit.eprints.org/oacitation-biblio.html>). Moreover, OA scholarship is available to independent researchers or those associated with less affluent institutions. As research institutions in developing countries are growing stronger, and as faculty positions associated with elite institutions with vast libraries become more rare, the greater availability of scholarship may help to erase some of the resource disparities between research institutions worldwide.

PLoS argues that the benefits of OA scholarship are:

Accelerated discovery. With open access, researchers can read and build on the findings of others without restriction.

Public enrichment. Much scientific and medical research is paid for with public funds. Open access allows taxpayers to see the results of their investment.

Improved education. Open access means that teachers and their students have access to the latest research findings throughout the world.

As the PLoS argument suggests, OA has implications for our teaching as well as our research. Students, under financial pressure from a retracting economy and tuition hikes, can access OA scholarship more easily and cheaply than work behind paywalls. Additionally, OA education initiatives such as free online

courses at MIT and Stanford are in line with the trend in OA scholarship. The OA repository Open.Michigan strives to make course materials available not only to members of their university community, but also to the public at large.

Although OA scholarship is clearly able to maintain high quality standards, it is unclear whether it is compatible with the commercial journal publishing system over the long run. Financing of journal publishing may be taken up more by public grants and universities, which may lead to some painful transitions in journal quality and budgets. Yet sanguine OA advocates claim these risks are worth taking because OA promises so much for democracy, education, and public knowledge.

Resources

- Sherpa/Romeo allows people to check the copyright policies of journals and rates them according to their policies on open access:
<http://www.sherpa.ac.uk/romeo/>
- DSpace is a turnkey, open source software platform for establishing institutional repositories: <http://www.dspace.org/>
- OJS (Open Journal System) is an open source journal management and publishing platform sponsored by the Public Knowledge Project:
<http://pkp.sfu.ca/?q=ojs>
- The Directory of Open Access Repositories registers OA repositories worldwide: <http://www.openoar.org/>
- SPARC (Scholarly Publishing and Academic Resources Coalition) provides an author addendum to add to copyright transfer agreements:
<http://www.arl.org/sparc/>
- Director of Harvard Open Access Project and SPARC Senior Researcher Peter Suber's Open Access Overview:
<http://www.earlham.edu/~peters/fos/overview.htm>
- Harvard's Model Open Access Policy for institutions:
http://osc.hul.harvard.edu/sites/default/files/model-policy-annotated_0.pdf
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One Step Forward, Two Steps Back: What *Golan v. Holder* means for the Future of the Public Domain

If there's one thing we can claim to know in the complex world of copyright law and IP regulations, it is this: once information passes into the public domain, it is free for all to use. But the recent decision by the Supreme Court casts even this knowledge into the realm of uncertainty.

At issue in the case of *Golan v. Holder* (No. 10-545) is whether Congress has the right to retroactively restore copyright to foreign works in the public domain, works that may have "slipped into" the public domain while still copyrighted abroad (Parry "Library Rights"). In some ways, this is an odd question to be asking now. Congress, whether they had the "right" or not, adopted a bill in 1994 to do just that: place foreign works back under the shield of copyright protection in order to align U.S. policy with the Berne Convention, an international copyright treaty whose aim "was to ensure that works copyrighted in one country get comparable protection elsewhere, 'since there is no such thing as international copyright'" (Parry "Library Rights").

It was this 1994 law that would inspire Lawrence Golan to begin his legal battle. For conductors like Mr. Golan, the removal of works from the public domain meant that he suddenly had limited access to pieces that he had been playing freely for years. "It was a shocking change," Mr. Golan says, "You used to be able to buy Prokofiev, Shostakovich, Stravinsky. All of a sudden, on one day, you couldn't anymore" (Parry "Library Rights").

This "now you see it, now you don't" scenario is what inspired Anthony Falzone, one of Golan's lawyers and the executive director of The Fair Use Project, to argue to the Supreme Court in October 2011 that Congress violated the First Amendment and Copyright Clause when it pulled works out of the public domain and essentially re-copyrighted them. Justice Ginsberg -- who wrote the majority opinion in *Eldred v. Ashcroft*, the controversial 2003 decision that extended copyright protection for an additional 20 years -- was (perhaps understandably) impatient with this argument. But Chief Justice Roberts found some merit in the claim saying: "There is something, at least at an intuitive level, appealing about Mr. Falzone's First Amendment argument. One day I can perform Shostakovich; Congress does something: The next day I can't. Doesn't that present a serious First Amendment problem?" (Parry "Equal Protection?").

Beyond the First Amendment concerns, Falzone stressed the argument of legal precedent. Because the 1994 copyright restoration was "unprecedented in American copyright law," it posed a new threat to the public domain:

If you can't rely on the status of something in the public domain today -- that is, if you never know whether Congress is going to act again and yank it out -- you're going to be more cautious about doing anything with these materials. You really destroy the

value and the usefulness of the public domain in a profound way if the rug can be pulled out from you at any time (Parry “Supreme Court”).

But *Golan v. Holder* is not merely a philosophical argument about the value of public domain or the interpretation of the Constitution. It is a case about real people whose creative lives have been limited by Congressional action. Mr. Golan’s University of Denver orchestra went from being able to purchase sheet music and perform that music ad infinitum, to having to rent the same (newly copyrighted) sheet music for one performance at a cost that quadrupled the earlier price. While this drastic change doesn’t really affect larger city orchestras like the Boston Pops or the New York City Philharmonic (since they have much larger budgets), it does affect smaller ensembles, like those at universities, who now report being “priced out” of performing pieces that were previously in the public domain (Parry “Supreme Court”).

Golan’s concerns extend beyond the realms of sheet music and scores. Because his fight is centered on the concept of the public domain – more to the point, how it is defined and defended -- it touches “a broad swath of academe for years to come, dictating what materials scholars can use in books and courses without jumping through legal hoops” (Parry “Supreme Court”). Golan’s concerns also extend to libraries and archives, since the 1994 law he seeks to overturn has “hobbled [their] efforts to digitize and share books, films, and music” (Parry “Supreme Court”). Beyond all of the people affected is the sheer volume of works that have been pulled from the public domain by the 1994 law. Though the exact number of works is unknown, Marybeth Peters (then U.S. Register of Copyrights) noted in 1996 that it would “probably number in the millions” (Liptak).

Despite these facts and far-reaching implications, the Supreme Court voted (6-2) to uphold the 1994 federal law, saying that “the public domain was not ‘a category of constitutional significance’” (Liptak). In writing the majority opinion, Justice Ginsberg said that the law merely leveled out the international playing field, putting “foreign works on an equal footing with their U.S. counterparts” (Liptak). Justice Breyer wrote the dissenting opinion for himself and for Justice Alito and argued that the law seriously threatened not only the spirit of the copyright clause but also the First Amendment Right to free expression. Justice Breyer asked:

Does the [copyright] clause empower Congress to enact a statute that withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly, educational, or cultural purposes – all without providing any additional incentive for the production of new material? (Liptak).

His answer to this rhetorical question is certainly a resounding “no.” Yet, the Supreme Court ultimately voted to uphold a law that makes it even more difficult to discern where the public domain begins and ends.

The public domain has been a moving target for most of the 20th and all of the 21st century. It is not coincidence that, had it not been for the *Eldred v. Ashcroft* decision in 2003, Mickey Mouse would have been in the public domain

that same year (Carnevale). And with the *Golan v. Holder* decision rendered in January 2012, we have lost the assurance that the works that do enter into the public domain will stay there. Without some clear sense of the boundaries, we may lose our ability (and perhaps our incentive) to create, which is what the copyright clause was originally designed to protect.

The Supreme Court decision marks the end of Mr. Golan's fight, but could signal the beginning of a new battle: "the only remedy now," according to Golan's lawyer, Anthony Falzone, "would be a change in U.S. law" though such a change would be "highly unlikely" (Young). It is both poignant and ironic that the *Golan v. Holder* decision was rendered on the same day that thousands of scholars and citizens across the globe joined together to protest the next generation of restrictive copyright laws: the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA). Yet even with one step forward and two steps back, we may still find a path toward balance for the future.

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“Sentence First—Verdict Afterwards”: The Protect IP and the Stop Online Piracy Acts

In 2011, two bills were introduced into Congress that had the potential to restrict the growth and development of web services. The intent of each bill was to prevent the use of the web to link to or transmit copyrighted material without the permission of or compensation to copyright holders. Both bills in particular targeted foreign “rogue websites,” but the nature of the web is such that numerous companies and organizations based in the United States would have been affected by the bills—including many that were not themselves copyright infringers. Less than a year after the introduction of the first of the two, both bills had been withdrawn, having been vigorously opposed by powerful corporations whose business models depend upon an open web, by organizations and individuals that raised questions about the impact of the bills on First Amendment rights, and by organizations and individuals concerned about the cultural and educational impact of the bills. There was, in addition, a mobilization via the web of consumers/creators of the content in question, a phenomenon that is dealt with in Laurie Cubbison's report in this issue of the *IP Annual*.

PIPA

The first of the two bills was introduced in May of 2011 by Vermont Senator Patrick Leahy and a bipartisan group of eleven co-sponsors (An amended version, introduced later that month with additional sponsors, will be referenced in this report.) Cited variously as the “Preventing Real Online Threats Economic Creativity and Theft of Intellectual Property Act of 2011” and the “Protect IP Act of 2011,” it became universally known by the acronym of PIPA. A major goal of PIPA was to combat the activities of internet sites that were supposedly “dedicated to infringing activities” (PIPA 33). In particular, the intent of the bill was to counter “rogue websites” in foreign territory. To achieve this goal, once such a website had been identified, operators of “domain name systems,” broadly defined, would be required by court order to

take the least burdensome technically feasible and reasonable measures designed to prevent the domain name described in the order from resolving to that domain name’s Internet protocol address. (PIPA 38)

Although not itself an infringer, a web-service provider would be responsible for enforcing the court order targeting the alleged rogue website by cutting off access to the site. The inclusion of the phrase “least burdensome technically feasible and reasonable measures” may have been intended to reassure service providers that the impact on their operations would be minimized, but the mitigating effect of that language may have been undercut by the subsequent

statement that a service provider “shall not be required *other than as directed under this subparagraph*, to modify its network, software, systems, or facilities” (PIPA 38-39; italics added). The implication of the italicized language was that a court or its agents might be empowered to make decisions that would have an impact on the development of hardware, software, and services, placing legal rather than technical limitations on growth and innovation. Also not reassuring: language stating that the Attorney General could take action against “any party [...] that knowingly and willfully fails to comply” with an order to block access to alleged rogue sites (PIPA 43). In sum, according to this bill, the service provider is responsible for cutting off access to the allegedly infringing site, the service provider potentially faces third-party oversight of what had hitherto been technical and business-model decisions, and the service provider risks legal action if its actions are perceived by the Attorney General as less than fully compliant with the terms of a court order.

The bill also placed a considerable onus upon each alleged infringing site. The bar for an injunction is set low, and the cost of fighting an injunction may in many cases have been prohibitive. A situation might have developed similar to that of the mass filings by the Recording Industry Association of America (RIAA) against music downloaders, most of whom did not have the resources to go up against a powerful and well-funded organization. Moreover, even if a site is ultimately able to refute claims of misappropriation of intellectual property, the bill incorporated no mechanism for recouping damages for the time during which a site is inaccessible or for the time it may take to rebuild traffic after removal of the virtual blockade. Furthermore, although the bill specified that action could be taken against a service provider who failed to fully comply with a court order, no provision was made for action to be taken against copyright claimants who make arguably frivolous claims. In order to encourage service providers to vigorously enforce court orders, the bill did grant those providers immunity against suits by sites that turned out to be non-infringing (PIPA 42-43); the flip side of that protection, however, is that those sites are left without recourse against any party at all, service providers explicitly and copyright claimants by omission.

SOPA

Taken as a whole, PIPA would have placed the interests of copyright holders above those of all other parties and would have placed a burden not only the alleged infringers but also upon web-service providers. The same could be said of the second bill, which was introduced into the House of Representatives in October of 2011 by Representative Lamar Smith of Texas. It had twelve co-sponsors, and as in the case of the Senate bill, support was bipartisan. The bill was titled the Stop Online Piracy Act, and it became known as SOPA. Like PIPA, it was intended to curtail the activities of “foreign infringing sites” (SOPA 10). Also like PIPA, the legislation would have mandated that a service provider, upon receipt of a court order, take action to block access to a site. Although particular steps are not specified in the bill, they were to be, in language echoing that of PIPA,

technically feasible and reasonable measures designed to prevent access by its subscribers located within the United States to the foreign infringing site (or portion thereof) that is subject to the order, including measures designed to prevent the domain name of the foreign infringing site (or portion thereof) from resolving to that domain name's Internet Protocol address. (SOPA 13-14). SOPA also includes the language that implies that a court or its agents may be given oversight over a service provider ("A service provider shall not be required *other than as directed under this subparagraph*, to modify its network, software, systems, or facilities" [SOPA 14; italics added]), as well as the language that states that action can be taken against a service provider "that knowingly and willfully fails to comply with the requirements" outlined in a court order (SOPA 18). A service provider could attempt to defend itself against such a charge "by showing that [it] does not have the technical means to comply [...] without incurring an unreasonable economic burden" (SOPA 19); however, the onus is placed upon the service provider to prove its case. Although not accused of infringement itself, the service provider may therefore be drawn into litigation, potentially at great cost.

As in the case of PIPA, a service provider is immune to suits that otherwise may be brought by sites that proved to be non-infringing but that have been injured by steps taken by a service provider attempting to apply with a court order (SOPA 21). Sites may attempt to have a virtual blockade lifted. As a result of such attempts, courts may find that "the foreign Internet site subject to the order is no longer, *or never was*, a foreign infringing site" (SOPA 23; italics added). The italicized phrase testifies to the fact that injunctions may be issued on little more than the representation of a copyright claimant. The harm to a site that is blocked is self-evident. Even though the service protector would never face the risk and expense of a lawsuit, the procedure outlined in the bill would mean that the provider may be forced to take steps, with accompanying expenses, that in the end are not warranted by facts. With apologies to the Queen in *Alice's Adventures in Wonderland*, this approach is a case of "Sentence first—verdict afterwards."

Reaction to the Two Bills

In the business community, reactions to PIPA/SOPA were divided along lines that represented different business models. Among the champions of each model were business behemoths with large war chests. Only one side, however, was able to mobilize the web in support of its viewpoint, and this is the side that eventually prevailed.

Supporting PIPA/SOPA were companies that publish copyrightable material in digital forms that are vulnerable to infringement; industry groups representing those companies; and organizations representing individuals, such as musicians and actors, who participate in the creation of that material and who might be subject to the loss of royalties and residuals as a result of its distribution without the sanction of the copyright holders. Marvel Entertainment, HarperCollins, and MCA Records, for example, represent the first category; the Motion Picture Association of America (MPAA) and the

International Trademark Association (INTA) represent the second; and the American Federation of Musicians (AFM) and the Screen Actors Guild (SAG) are examples of the third (“List of SOPA-PIPA Supporters”). Collectively, all of the above could be considered to be representative of the ‘old media’.

Prominent among opponents of PIPA/SOPA were companies whose business models depend upon serving as conduits for web-based content, a group sometimes designated as the ‘new media’. The list of new media opponents included well-known names such as Mozilla, creator of the web browser Firefox; Facebook, host of a hugely successful social network; Yahoo!, one of the first successful web portals; eBay, a major locus of web commerce; Reddit, a social network that functions as a link aggregator; and Google, originally a web search engine and now in effect a content aggregator that provides links to music, videos, and text. These companies were joined by others that design and market both the hardware and the software that allow the continued existence and the further development of web-based services (“List of Those Expressing Concern”).

A letter representing the interests of new media companies and allied businesses was sent to the House Judiciary Committee by Daniel A. Varroney, acting president and CEO of TechAmerica, whose website describes it as an “advocacy organization” that speaks on behalf of more than one thousand technology companies, among them such content conduits as Facebook, eBay, and Google, as well as hardware and software companies such as IBM, Dell, and Apple. In his letter, Varroney mentions the Senate bill, PIPA, but he has some especial concerns about SOPA. He argues that a fundamental flaw of the proposed legislation was that it represented “a wholesale shifting of costs and responsibilities of property owners onto technology companies” (Varroney 2). He also objects that web-service providers would no longer be certain of having a “safe harbor”: a guarantee that conduit companies (assuming they were “acting in good faith”) would not bear the financial burden of enforcement. According to the current model, in place since the passage of the Digital Millennium Copyright Act in 1998, companies serving as content conduits can “step out of the way of the costs and allow the rights holder to bring their claim directly against the alleged infringer” (Varroney 3). Under the proposed legislation, however, the onus would be on the content intermediaries to take steps against the infringers, and what those steps would be was not clear from the language of the bill, which merely mandated that content conduits take those “technically feasible and reasonable measures” without specifying what those measures would be. Potentially the conduits would be drawn into an indeterminable, and interminable, number of court cases as the nature of alleged infringements was hashed out on a case-by-case basis.

Lack of specificity was a problem at several points in the proposed legislation, Varroney argues. He found, for example, the definition of “service provider” to be so broad—covering both internet service providers (ISPs) and online service providers—that it might cast a net over “anyone with a website” (Varroney 3). Similarly, the definition of a “dedicated infringer” might be applied to the providers of the cloud-based services that are an emerging web phenomenon, potentially stifling innovation. Varroney also mentions the risks to

service providers that might arise from imprecise language in SOPA that addressed illegal streaming, objecting that

the proposal to impose felony criminal charges for the illegal streaming of copyrighted works potentially captures a number of parties who offer services or products that primarily are intended to allow consumers to consume legally-obtained content in a variety of different settings. (Varroney 3)

Varroney also raises due process issues—the “Sentence first—verdict afterwards” nature of the provisions for procuring court orders. The standards for “secondary liability,” he writes, were much too broad and likely would result in sites being judged “guilty until proven innocent”:

Under this proposed law, no court would be involved in the process until and unless a site operator filed counter-notice asserting that the site did not fit the broad definition of dedicated infringer. One is hard pressed to think of another place where lawmakers would be comfortable designing a system that allows a mere accusation without any court review to lead to potentially damaging actions against another. (Varroney 4)

Many of these accusations would be raised under a provision for “private right of actions.” Varroney finds this provision especially troublesome because a complainant would have the ability “to wreak havoc outside of the court system.” To those who might compare the procedure with a “DMCA-style notice-and-takedown process,” he replies that the DMCA “removes the intermediary from the conversation, allowing the rights holder to directly engage with the accused wrong doer.” SOPA, however, would “place intermediaries squarely in the middle of the action” so that new media would be left “holding the cost, liability and compliance bag” (Varroney 4). Varroney is of course writing as a representative of an industry group, and his letter is seconded both by other industry consortia and by individual companies, all fearful of the effect that the costs and uncertainties introduced by PIPA/SOPA would have upon their business models (see, e.g., “Internet and Technology Companies’ Opposition Letter.”)

However, the new media and their allies were not the only ones to weigh in on the proposed legislation. Varroney’s arguments regarding due process and the fettering of the web are echoed in letters submitted by groups with a deep interest in civil rights, including the right both to communicate one’s ideas and to access the communications of others. To give one example, the Electronic Freedom Foundation, the Human Rights Watch, and the American Library Association, along with ten other signatories, object that SOPA would discourage innovation and hamper freedom of expression (“Public Interest Organizations’ Opposition Letter”). These concerns were also foremost in the minds of educators, numerous of whom weighed in as individuals or banded together to express their concern over the potential for harm represented by the proposed legislation. One letter represents the collective opinion of 110 professors from throughout the United States with backgrounds in intellectual property and First Amendment issues (“Professors’ Letter in Opposition”). Although their letter initially addressed only PIPA, a copy of it was later

forwarded to the House of Representatives, the cover letter stating that SOPA, the House bill, was likewise flawed and was indeed in some respects “even worse” than the Senate version (“An Open Letter to the House of Representatives”). PIPA (and by extension SOPA) would result in the “[s]uppress[ion of] speech without notice and a proper hearing” (“Professors’ Letter in Opposition”). It would also destroy the infrastructure of the internet. Finally, it would “[u]ndermin[e] United States’ leadership in supporting and defending free speech and the free exchange of information on the Internet” (“Professors’ Letter in Opposition”).

The motives for opposition to PIPA/SOPA may have ranged from the self-interested to the altruistic. It is indisputable, however, that the two bills provoked resistance that was both intense and wide-ranging. Whether they were impressed by the arguments contained in the numerous letters that were submitted to Congress—or whether, like meteorologists, they had begun to see which way the wind was blowing—Senators and Representatives began to withdraw their support for their respective bills as January 18, 2012, the date for a web blackout in protest of the bill approached. By January 20, 2012, a little more than half a year since the introduction of PIPA, and barely three months since the introduction of SOPA, both bills had been withdrawn. Certainly other legislation will be introduced to address what PIPA/SOPA opponents acknowledged to be the very real problem of “rogue websites,” but for this round, the new media and other interested parties have succeeded in making it clear that their needs and concerns cannot be ignored in the course of addressing even the legitimate concerns of media operating under previous business models.

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A Dark Day on the Internet Leads to a Sea Change in Copyright Policy

On January 18, 2012 Wikipedia went black, and a black bar replaced the Google logo. In addition, many other Internet sites including Reddit, Boingboing.net, and Wired.com also went dark, all in order to protest consideration of two intellectual property bills by the United States Congress: Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA). These bills, promoted by the Record Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), would have placed serious restrictions on the ability of Internet companies to do business, and those companies struck back, arguing that the bills would, in effect, shut them down. In challenging these bills, the Internet companies changed the discourse around copyright and intellectual property law in the 21st century. At one time the major media conglomerates who run the movie, television and music industries dominated copyright policy, but in 2012 Internet companies and consumers challenged and defeated two bills championed by these media conglomerates, indicating that copyright policy will no longer be dominated by content owners.

Elsewhere in this annual, Kim Gainer reports on the content of the SOPA and PIPA bills, while this essay is intended to discuss the ways that key Internet companies and users mobilized to fight them. As the protest included sites commonly used by students for online research, teachers and students were made aware of copyright and intellectual property issues in a new and startling way. But that is not the only effect of these issues. Students often serve as producers of content for such sites and so are also affected by copyright legislation that seeks to restrict user-created content that incorporates copyrighted material, such as videos that include copyrighted music or images.

The resistance was led by major Internet companies worried that the bills' sweeping approach would shut down links to suspect sites without due process, thus damaging their business models. Google claimed that "Among other things, search engines could be forced to delete entire websites from their search results." In addition, "Law-abiding U.S. internet companies would have to monitor everything users link to or upload or face the risk of time-consuming litigation." Rob Beschizza, managing editor of BoingBoing.net, argued on CNN that the measures contained in SOPA/PIPA are "so wide-ranging and so open to abuse that sites like ours could be brought down by frivolous claims." The threat to the business models of the Internet companies was thus at the heart of the objections to the bills.

The resistance to SOPA and PIPA included not only the major Internet companies and organizations, but also their users, whose activities skirt copyright law in various ways. Sites such as Google's YouTube, Wikipedia, BoingBoing, and Reddit rely on user-created content, providing a venue for users to publish their own material. Among these users are gamer groups and

the budding musicians, as well as other fan communities. Often the content posted by these users lies in a gray area in relation to copyright, containing copyrighted material but in such a way that arguments for fair use can be made. Take Justin Bieber, for instance. Like many young musicians currently, he got his start by posting performances of cover songs to YouTube. Because the music is copyrighted, the posted videos violate copyright law, but the performances are original to the young musicians, and a global community has emerged as these musicians share their work with others. Sites like these serve a similar purpose for video game players, and players will post videos of themselves working through a difficult level in order to demonstrate their techniques to other users. While the RIAA and MPAA cast SOPA and PIPA as preventing the distribution of pirated copies of films, television shows, and music, user opposition came first from those who perceived that their own transformation of copyrighted material would be at risk.

Thus, resistance to current efforts to change copyright law began with the Commercial Felony Streaming Act portion of PIPA (the Senate bill), which "Makes unauthorized web streaming of copyrighted content a felony with a possible penalty of up to 5 years in prison. Illegal streaming of copyrighted content is defined in the bill as an offense that 'consists of 10 or more public performances by electronic means, during any 180-day period, of 1 or more copyrighted works'" (opencongress.org). Sponsored by Senator Amy Klobuchar of Minnesota, the bill seems to criminalize many YouTube videos created by musicians and gamers, and so early resistance came from those communities. According to sopastrike.com, a website devoted to the January 18th protest, gamers first became aware of the bill in June, 2011. By October, amateur musicians had become aware of the bill as well, and the website FreeBieber.org had been created, using singer Justin Bieber as their spokesman.

On November 16, 2011, the day the House Judiciary Committee began hearings on SOPA, Bloomberg reported that a number of Internet sites participated in "American Censorship Day" by darkening their logos with "censored" bars: Tumblr, Mozilla, Reddit, Techdirt, and the Center for Democracy and Technology, while others such as Google and Facebook supported the effort. The following day Congresswoman Nancy Pelosi tweeted: "Need to find a better solution than #SOPA #DontBreakTheInternet MT @jeffreyrodman: Where do you stand on Internet censoring and #SOPA?" Clearly a response to a tweeted question, Pelosi's message indicates that not only are politicians hearing from the bill's opponents, the messages are coming via the media at issue.

Meanwhile, Internet companies that had not yet lined up against the bills were under pressure. GoDaddy.com, a company that hosts and registers domains for websites, had come out in support of the bills. Their customers, who also used Reddit, began calling for a boycott of the service. According to Hayley Tsukayama of the Washington Post, Go Daddy's chief counsel, Christine Jones, had participated in the crafting revisions to the legislation, but faced with the loss of their customers, the company announced in a December 23 press release that it was "no longer supporting SOPA."

By mid-January, as SOPA was approaching the floor of the House of Representatives, online opposition to the bills had been organized into a plan of

attack. On January 10, 2012 the Reddit blog announced that “we will be blacking out reddit [sic] on January 18th from 8am-8pm EST[...]”. In addition to blacking out the site, Reddit announced that it would provide a video stream of the house hearings on the bills. On the same day, Media Matters' Eric Boehlert examined the lack of coverage of the bills in the mainstream media, even as the issue was being publicized extensively across the major Internet sites. On the 14th, the White House weighed in on the issue with a press release from Victoria Espinel, Intellectual Property Enforcement Coordinator, Howard Schmidt, cybersecurity coordinator, and Aneesh Chopra, the president's chief technology officer, stating that "Any effort to combat online piracy must guard against the risk of online censorship of lawful activity and must not inhibit innovation by our dynamic businesses large and small" (Phillips).

By January 18th, the day of the strike, Wikipedia, Amazon, Craigslist, and many other sites had also joined the planned black out. Members of Congress, hearing from their constituents, started to back away from their previous support of the bill. That same day a group of artists, authors, and musicians also came out against the bills, with Neil Gaiman and Trent Reznor leading 18 signers of “An Open Letter to Washington from Artists and Creators.” The statement acknowledged that copyright piracy does affect them but also stated, “We, along with the rest of society, have benefited immensely from a free and open Internet.” Asserting the importance of Internet media for their relationships with their fans, the group also noted that artists and creators could suffer collateral damage due to the bills: “Online piracy is harmful and it needs to be addressed, but not at the expense of censoring creativity, stifling innovation or preventing the creation of new, lawful digital distribution methods.” With the Internet in an uproar and Congressional support waning, both bills were withdrawn from consideration for further revision.

The mobilization of the Internet against the SOPA and PIPA bills so desired by the traditional media conglomerates reflects an alternate model of creation, production and distribution of content. Traditional media operates on a model in which the content is purchased from creators, produced as a product, and distributed to consumers, a model which is threatened by the ways that online piracy disrupts the distribution chain. In contrast, new media, social media in particular, use a model in which content is generated by the consumers themselves and circulated to other consumers via a company's technology. Existing copyright law, as constructed for the benefit of traditional media companies, does not recognize the nuances of creation, publication, and distribution within the new media model. The SOPA and PIPA bills, developed according to the copyright philosophies of traditional media were thus perceived by Internet companies and their users as extremely damaging within the context of the new media business model. By mobilizing Internet companies and users, the Internet strike of January 18, 2012 rejected those copyright philosophies in a power play that challenged and defeated the traditional media corporations and their supporters. That's not to say that the battle is over. Legislation similar to SOPA and PIPA is currently being considered in Europe in the form of the Anti-Counterfeiting Trade Agreement (ACTA), a multinational treaty with implications for copyright and intellectual property.

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Occupy Trademark: Branding a Political Movement

In this Intellectual Property report, I examine the emergence of trademark applications and disputes associated with the Occupy Wall Street (OWS) movement. I begin with a brief introduction to OWS, before moving to a detailed overview of the ongoing trademark disputes associated with the political movement. Specifically, I first trace the initial applications to register OWS as a trademark, paying specific attention to the claims forwarded by different parties which are simultaneously attempting to assert ownership of terms, slogans, and branding associated with OWS. I also outline an example where a member of the broader OWS movement has been subjected to threats of legal action for appropriating the trademark of another entity. Last, I briefly outline the potential implications these cases hold for the discipline of rhetoric and composition.

Background

In the Summer of 2011, Adbusters Media Foundation published a blog post which called for demonstrators to take up residence in the Wall Street area of Manhattan in order to protest corporate corruption in America. Using the tactics which originated in Arab Spring uprisings[[1]], demonstrators utilized social media tools to organize and sustain support for the “leaderless resistance with people of many colors, genders and political persuasions” (OccupyWallStreet).

For example, the hashtag Adbusters released into the Twitterverse, #occupywallstreet, morphed into a number of variants including #occupy, #occupywallst, #occupytogether, and #ows (“Over 100K”). By Fall, 2011 a number of variants of the hashtag trended on the Twitter sidebar which in turn fueled publicity for the movement.

Meanwhile, one supporter of the occupy movement created “We Are the 99 Percent,” a Tumblr blog which rapidly went viral and continued to grow—as of March 4, 2012 it had 225 unique pages.

Occupy demonstrations sprung up in major cities from coast to coast (e.g., Boston, Denver, Atlanta, Oakland, and San Francisco). OWS was garnering increasing mainstream attention: a brand had emerged, and its slogans and hashtags weren’t the only things proliferating. The US Patent and Trademark Office (USPTO) had received numerous applications to trademark derivatives of “occupy” and “99%” (USPTO, “Trademark Electronic Search System”).

The Race to Register: Profit or Protection Based Motives for Filing?

In the Fall of 2011, a flurry of news stories were published detailing competing claims to trademark. As these stories reported, the race to register a trademark for Occupy Wall Street began after demonstrators Robert and Diane Maresca had

made a number of tee-shirts and realized a need to protect the brand that was emerging (see Sgueglia, “New York Couple”; “Robert Maresca”; “Protesters Want to Trademark Name”). The Marescas were first to file, but as Sgueglia noted at least one “spokes[person]” for the larger movement argued against the move to trademark, because it might be read as a signal that the movement had capitalist aims—aims which would appear counterintuitive to the anti-corporate ethos of the movement (“New York Couple”).

Thereafter, competing applications to register the trademark were filed by a lawyer named Wylie Stecklow on behalf of the official Occupy Wall Street movement, as well as by Fer-Eng Investments LLC, which had “no affiliation movement and simply filed the application as a business proposition” (Victoria Slind-Flor, “Pfizer, Apple, Occupy Wall Street”). Then, Jay-Z’s Rocawear released an “Occupy All Streets” tee-shirt but a spokesperson for the company also announced that the company didn’t plan to share profits with the political movement (Nordyke, “No Plans to Share”). Two days later, another story broke which suggested that Jay-Z/Rocawear had put an end to the production of the line of tee-shirts after encountering heavy criticism for failing to direct profits from sales back to OWS (Ng, “Removed”).

At the heart of these examples four unique motivations for filing trademark registrations appear to exist: (1) The Marescas appear to have filed in order to generate/recoup monies they had spent helping an OWS brand emerge; (2) Stecklow seems to have filed on behalf of OWS, in order to protect the anti-corporate ethos of the OWS brand; (3) Rocawear does not appear to have filed for trademark, but nevertheless created and withdrew a product that arguably brandished the OWS content; (4) Fer-Eng Investments filed to generate profits as business endeavor with no relation to the movement. Regardless, these examples only scratch the surface of a highly contested “brand”: over 55 different trademark applications on variations of “occupy” have been filed. I will discuss these motivations in more depth in the implications section of this IP report.

OWS Supporter Receives Cease and Desist Letter for Purported Trademark Infringement

One characteristic of the larger OWS movement is that supporters have created satirical versions of print and online versions of mainstream newspapers where demonstrations are occurring (Cagle, “Occupying”) with the express aim of creating a “counter-narrative to mainstream media coverage” (Osborn, “Occupied Oakland Tribune Faces Lawsuit”). In New York, for example, demonstrators can be found reading the Occupied Wall Street Journal.

Following suite, Scott Johnson created the Occupied Oakland Tribune, a version of the “occupy” news syndicate appropriate for audiences in San Francisco on November 2 2011. Soon thereafter, Johnson received a cease and desist letter from the Bay Area News Group, owners of the Oakland Tribune, threatening to sue for infringing on the newsgroup’s trademark (Cagle, “Occupying”; “Occupied Oakland Tribune Faces Lawsuit”). It appears, however, that no lawsuit has been filed. And, as Osborn reported, the legal counsel for Johnson interprets the use of Occupied Oakland Tribune as a “‘fair use’ defense,

an exception in the law that allows the use of a trademark for certain First-Amendment-protected activities, such as parody and satire” (“Occupied Oakland Tribune Faces Lawsuit”).

Implications for Rhetoric and Composition

Foremost of the concerns members of the discipline of rhetoric and composition might take from these cases is the importance of understanding that economic, business-minded motivations compel and drive the structures through which ethos is legally protected in this country. “Trademarks, reputation, and goodwill,” as TyAnna Herrington has argued, “can be words or symbols used to distinguish goods and services of one company or of one individual business entity from another” (28). In this case it is a political entity, not a “business entity” which appears to have the strongest ethical claims to the ownership of the “occupy” brand. Still, it is important that we recognize that there are a number of ways that the USPTO reaches decisions about how trademarks are to be assigned, and these seem to include determining evidence of first date a product bearing the mark was available for purchase as well as which of the respective parties filed for the trademark first. Ethics, consequently, appears a less significant factor vis-à-vis the legal resolution of claims to branding, trademarks, and/or wordmarks. Furthermore, from an ethical perspective, the organization which perhaps has the greatest claim to “occupy” as a brand—since it coined the phrase #OccupyWallStreet—Adbusters, does not seem to have pursued an official application to claim to the slogan (Garcia, “Adbusters’ Branded”).

Another issue that seems relevant from an ethical perspective, is that it appears as problematic ethos for OWS to have to apply for formal ownership of this trademark in the first place, because it is a horizontal organization that formally eschews hierarchical leadership. No one person or version of the organization is larger than the group as whole, thus no one person has a greater claim to the OWS brand/mark than another. To carry this a bit further, this case has important implications for how the discipline understands public writing and civic rhetorics, because the tactics associated with social media assume a decentralized, participatory structure for citizens to participate within direct democracy. One aspect of that participation, then, posits that citizens have liberal access to the symbolic resources that are necessary to engage in political speech. This model of participatory politics assumes that a share-alike logos remains in-place so that citizens may, on a case-by-case basis, lay claim to the the cultural commonplaces, icons, and marks that enable the citizen to “identify” with the group in a Burkean sense. Put most simply, imagine a corporation applying to trademark phrases like “we the people”; “united we stand, divided we fall”; “don’t tread on me”; and “join or die.”

Scholars within the discipline such as Martine Courant Rife and TyAnna Herrington, and outside of the discipline such as Lawrence Lessig, have argued for a balance of protections and freedoms with respect to ownership of culture. For instance, Herrington argued that

In light of the influence of our work on students who may be dealing with intellectual property issues for the first time,

academicians should be aware of our treatment of trademarks, both in ensuring that we avoid violations and in that our attitudes to do not contribute to a chilling of free speech as a result of legal entanglement. (30)

The examples provided in this report remind us that there is often a fine line between what constitutes unethical and illegal intellectual property appropriation, and that what might be seen as appropriative behavior by many may be very well regarded as legal by others. Understanding that balance is important when claims to possession are very often a matter of perspective.

Furthermore, these examples demonstrate the need for members of the discipline to become educated about, and advocate for, fair use not just with respect to copyright law but also to trademark law. Copyright, Trademark, and Fair Use are legal structures which impact how the U.S. Government thinks about legal ownership, in this case I've focused especially on issues related to trademarking. But if scholars are neither aware of the fact that trademark law has a significant impact on who has access to use and lay claim to cultural commonplaces, nor aware that these structures also outline provisions for citizens to exercise agency, then it becomes likely that students will not become well informed of how, when, and in what ways they can exercise legal agency to utilize content that may be trademarked:

[F]air use provisions...do not apply directly to trademark law since they are a part of the 1976 Copyright Act. Nevertheless, trademark reference or parody for asserting free speech commentary still falls within a framework for protection provided by the Constitution. First Amendment arguments make clear that intellectual products are subject to political commentary. (Herrington 30)

In the case of the Rocawear example, it was likely within the legal rights of this company to make a parody tee-shirt arguing "occupy all streets," but it appears that position became an untenable ethically. It was likely within the legal rights of Scott Johnson to create the "Occupied Oakland Tribune," but had he been less informed of his rights perhaps he would have responded in a conservative fashion by ceasing and desisting from further publications of the satirical newspaper.

Within rhetoric and composition exists a rich history of responding to intellectual property issues, especially with respect to copyright issues (see for example, Walker; Lunsford and West; DeVoss and Porter); less rich are approaches which delve how into issues such as "fair use" and/or "chilling of free speech" apply to issues pertaining to trademark (see for example, Rife; Herrington). These examples associated with the trademarking of OWS make clear that *all IP matters*, or should matter, to the discipline—*not just copyrightable IP*.

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