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RHETORICAL INVENTION IN COPYRIGHT IMBUED ENVIRONMENTS

By

Martine Courant Rife

A DISSERTATION

**Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of**

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ABSTRACT

RHETORICAL INVENTION IN COPYRIGHT IMBUED ENVIRONMENTS

By

Martine Courant Rife

This empirical mixed methods study explores copyright law's mediational influence on digital composing using a sequential transformative mixed methods research design. The author executed a digital survey (N=334) of students and teachers in US technical and professional writing programs. She also conducted discourse-based interviews with digital (student) writers regarding how they factored in copyright law and fair use in their composing decisions. The discourse-based interviews were supported as well by examining a wide variety of web texts supplied by research participant interviewees. Drawing particularly upon the work of Janice Lauer, Carolyn Miller, Cynthia Haller, Lev Vygotsky, and Chaim Perelman, the author synthesizes these scholars' work and uses that synthesis to frame her study with activity theory (AT) and rhetoric theory while simultaneously drawing upon the work of Michel Foucault especially as it relates to his concept of the "author-function." Three main areas of inquiry in the study are: 1) examining the status of knowledge and understanding of copyright law in the field of technical and professional writing (TPW) as well as with professional writers; 2) investigating the creative thinking processes, or rhetorical invention, of writers in these programs composing webtexts in light of copyright law; and 3) examining what happens to mediational means as writers leverage them in digital contexts. When synthesizing the data for this third research goal the author as

well draws upon actor network theory, particularly the work of John Law and Bruno Latour.

The study's six major findings are web spaces are sites of cultural collision, or commonplaces, where students occupy sometimes conflicting positions; The intertextuality of web-space-writing provides support for Foucault's theory that the single author is an ideological production representing the opposite of its historical function, i.e. the "author-function," in the larger culture. No support is found for a human culture existing without an "author-function," whether it is a workplace culture or even a more community-knowledge-focused culture as exists in India; Contrary to assertions by a number of scholars, for digital writers speech is not chilled. Copyright law as a system of invention organized by rhetoric instead *produces* speech; Rhetorical topics congeal as a heuristic mediating the digital composing process of writers. Copyright law is just one topic in this heuristic, and not the most important topic; For this group of writers, ethics trumped the law in importance when considering digital composing choices; Whether copyright law serves as a "rule" or "tool" on the AT triangle is influenced by levels of writers' knowledge and understanding of the law.

Implications for teaching, learning and research include suggestions for changing TPW curriculum and pedagogical approaches, continued disciplinary theory building in the area of composing process theories as well as research design, and additional research with respect to a number of complexities and contradictions that emerged from this study.

DEDICATION

I dedicate this to Mike for his patience, Ansel for his tolerance, and Olivia for picking up all the slack when I disappeared into the text.

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INTRODUCTION

I'm going to briefly summarize each chapter here.

In Chapter One I first outline my research questions and then discuss the law and define both copyright and fair use and their intersections with digital composing. My basic research questions explore whether and how copyright law (and fair use by implication) is influencing digital composing processes and whether (how) copyright law, rhetorical invention, and digital writing intersect? Next, I point to the particular issues raised in educational-digital writing contexts, followed by a review of the literature on intellectual property (IP) related topics in the five areas of history, pedagogy, general field-based stances, authorship, and finally empirical studies. I end Chapter One by leading into Chapter Two which discusses my theoretical frame as I designed and entered this research.

In Chapter Two I provide a theoretical framework for understanding both the nature of my inquiry as well as the study design. In the chapter, I blend together rhetoric theory and activity theory as it pertains to my inquiry. I discuss the webtext as a site for rhetorical invention, a space where copyright issues are raised, and a practice that challenges our current understandings of authorship. I also explain rhetoric theory's connection to the copyright problem, followed by a justification for my use of activity theory and how I've blended that with a rhetoric-based notion of heuristics.

In Chapter Three I explain the research design as a mixed methods study that includes a survey and interviews of students and teachers in technical and

professional writing programs, and writing majors, in the US. I explain the three larger research goals. One, I want to examine the status of knowledge and understanding about fair use and copyright law across the field of technical and professional writing as well as in individual writers. Two, I want to investigate the creative thinking processes, or rhetorical invention, of writers in these programs composing web compositions in light of copyright law. Three, I want to examine what happens to mediational means as writers leverage them in digital contexts. I also give a detailed overview of specific research questions. I outline in detail the rationale for the choices I made in the study design, survey administration, and selection of student interviewees. I also describe data collection and analysis methods, the April 2006 pilot study, as well as research design limitations (generalizability, reliability, validity).

Chapter Four first provides a broad overview of the study's six major findings followed by a global perspective on the survey data and subsequent findings. The study's six major findings are 1) web spaces are sites of cultural collision; 2) the intertextuality of web-space-writing provides support for Foucault's theory that the single author is an ideological production representing the opposite of its historical function; 3) For this group of writers, digital speech was is chilled; 4) Rhetorical topics congeal as a heuristic mediating the digital composing process of writers; 5) When we consider the hierarchical and embedded nature of rhetorical topics that mediate digital composing choices, for this group of writers, ethics trumps the law; 6) While the study supports the idea

that laws have agency, as knowledge and understanding increase, that agency is increasingly diminished by the human actor.

In Chapter Five I discuss a theory of authorship that came out of the data collection. I describe how my theoretical framework going into the study shifted during data collected. Thus, I turn to Foucault since he wrote about the author-function.

In Chapter Six, I argue that we might further explore the connection between heuristics, *metis*, and rhetorical invention in copyright imbued environments. In order to accomplish a start to this exploration, I pick up from Chapter Five and continue discussing the study's findings. I also discuss implications for teaching, learning, and research.

CHAPTER 1

PERSPECTIVES ON THE COPYRIGHT PROBLEM WHEN COMPOSING FOR THE WEB

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (Article 1, Section 8, US Constitution)

In this chapter I first outline the nature of my inquiry. I then discuss the law and define both copyright and fair use and their intersections with digital composing. Next, I point to the particular issues raised in educational-digital writing contexts, followed by a review of the literature on intellectual property (IP) related topics in the five areas of history, pedagogy, general field-based stances, authorship, and finally empirical studies. I end the chapter by leading into my next chapter which discusses my theoretical frame as I designed and entered this research.

An overarching question for our field is whether and how copyright law (and fair use by implication) is influencing digital composing processes? Since composing processes rely on rhetorical invention, the question becomes how do copyright law, rhetorical invention, and digital writing intersect? These questions are explored in this study. Specifically, I examine whether copyright and fair use are considered by writers as they compose for the web. The writers I examine are those in US writing majors including technical and professional writing programs. Some of my inquiries entering this study include the following:

- Does the US fair use doctrine play a part in the composing decisions of professional technical student writers and their teachers?
- Does it influence students in technical communication programs as they construct websites or other texts that are remixed?
- What is the link between understanding fair use and certainty in that understanding in the writing process?

These inquires relate to other questions I have. It's been a decade since Tharon W. Howard (2004) originally published his piece urging the field to attend to copyright/fair use issues as they intersect with technical communication. I wonder if his call been heeded?

- Are technical communication teachers understanding, relying on, and/or teaching fair use/copyright to their students?
- Are they doing so in a way that maps onto the eventual workplace environments that technical writing students will enter?
- Are fear and a lack of understanding/knowledge about fair use circumscribing digital speech (web writing) in educational settings? In other words, is digital speech chilled? (Hobbs, Jaszi, & Aufderheide, 2007; Fisher & McGeveran, 2006; Heins & Beckles, 2005; Herrington, 2001; Lessig, 1999, 2002, 2004; Logie, 2006b; Porter, 2005; Westbrook, 2006)?

This project aims to answer these questions and provide insights that can guide programmatic/pedagogical decisions regarding the preparation of students as technical and professional writers. However we can also learn something about digital writers' and their ability to express themselves in the current political

climate. As I explain in later chapters, in this study I explore these questions with a survey and interviews of writers in the professional writing community.

The Law: Copyright and Fair Use's Relevance to Digital Composing

US copyright law (Copyright Law, Title 17, USC), enacted through Congress's constitutionally granted power under Article 1, Section 8, US Constitution, is applicable to digital composing because this law provides automatic protection to any work that is *fixed* and *original* at the moment of its fixation. Any original text, visual, sound, etc. published to the web is copyright protected. Because of copyright law's broad application, virtually all digital publishing whether or not it incorporates another's text, visuals, sounds, or movies, is going to invoke copyright law. Protected works include notes, webpages, software, computer code, emails, reports, patterns, tutorials, instructions, manuals, visuals, video, audio, and all other "fixed" media. Under current law, a copyright holder has the exclusive right to copy, distribute, perform/display, and create derivative works. Fortunately, relief from the copyright holder's monopoly is provided via the fair use doctrine as codified in Section 107 of the US Copyright Act (Copyright Law). This doctrine provides an exception to the copyright holder's exclusive rights (see also Howard, 2004, p.403) and is heavily relied on in educational environments as students and teachers complete remixes, critical analysis, research, and mash-ups for purposes of teaching and learning (Rife, 2007).

Section 107 (Section 107 as well as Section 106 are reprinted verbatim in Appendix 1.1) defines fair use as "reproduction in copies . . . or by any other

means . . . [for uses] such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (Copyright Law). The four factors that courts use to make legal determinations regarding infringement are listed in the statute, and function as a legal heuristic guiding not only judges, but also attorneys, users, authors, and others who attempt to make everyday composing decisions. Those four factors ask that one consider:

- 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 (nonfiction has less protection than “creative” 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.

While not acknowledged often, reliance on fair use is alive and well in the business sector. Since technical and professional writing (TPW) cares about workplace writing, this is relevant. The everyday activities of the internet rely on fair use. Search engines send out “spiders” that crawl the web, copying increasingly vast amounts of data that is stored in the search engines’ databases (Band, 2005). This copying is completed without direct permission of website owners. “In other words, the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine” (Band, 2005, p.5). Another example of for-profit reliance on fair use is the invention and

sales of software that records screens or captures images on the web (TechSmith products come to mind). If such uses were not deemed potentially fair, this software could be outlawed similar to peer-to-peer software due to its potential to “induce” users to infringe.

Once technical writers leave the academy, how, if at all, do they apply their knowledge and understanding of copyright/fair use? This question is critically important as most technical writers with degrees and/or formal education enter workplaces where they are experts. In other words, such technical communicators may easily become leaders among their peers; therefore, we might hope the information and ways of knowing they bring with them from academia are accurate and useful. In the educational setting of school, in some ways the risks are great for inaccurate knowledge, but in other ways the risks are low. The risks are great because the average cost of defending a copyright infringement lawsuit is just under one million dollars, but the risks are low in the academy because at least back in 2006, educators weren't being sued (Fisher & McGeeveran, 2006). This may be changing (See Rife, 2008a).

Since the four elements of fair use analysis consider the nature of the use (commercial versus educational), and whether the use of a copyrighted work negatively impacts the potential market for the copyright holder, “fair use” applies much differently to technical writers in for-profit environments than it does to technical writing students at the academic institution. To understand copyright/fair use connections between workplace writing and academic writing, the current status of technical communicators' knowledge and practices must be

examined. As Sarah,¹ one of the research participants and a recent TPW graduate working in her own web publishing business notes: “I would love to know, like what a small web design company . . . three or four people does when they need pictures and graphics, you know.”

The Copyright Problem in Educational-Digital Writing Contexts

A growing body of scholarship emphasizes the need to teach writers basic copyright law and fair use (DeVoss & Porter 2006b; Herrington, 2003; Howard, 2004; Juillet, 2004; Logie, 2005, 2006b; Reyman, 2006; Rife, 2006, 2007; Rife & Hart-Davidson, 2006; Waller, 2006a). Since most writing and research is done via the computer and in networked environments, reliance on the fair use doctrine has become crucial for the educational community: we live in a cut-and-paste world where remix is commonplace (Grabill & Hicks, 2005; Lessig, 2004; Rife & DeVoss, 200X; Westbrook, 2006); however, it is unknown whether “fair use” is properly understood (and taught) by either teachers or their writing students. Findings from a pilot study in our field indicate it is not (Rife & Hart-Davidson, 2006). Further, in September 2007 the Center for Social Media at the School of Communication at American University released a report “The cost of copyright confusion for media literacy,” explaining the results of a study regarding the understanding of fair use and copyright by individuals in educational-media literacy contexts. The main inquiry explored the relationship between copyright beliefs and teaching practice; the study found the key goals of teaching media literacy were “compromised by unnecessary copyright restrictions and lack of understanding about copyright law” (Hobbs, Jaszi, & Aufderheide, 2007, p. 1).

“Will fair use survive?”, an older fair use research study (Heins & Beckles, 2005) found artists and scholars have only a vague sense of what fair use means and this uncertain knowledge circumscribes composing practices: “There is an urgent need for accurate information” (p.54). An additional study, “The digital learning challenge” released August 2006, states undue fear about copyright infringement liability has constricted exchanges of valuable information across social network spaces (Fisher & McGeveran, 2006). This same study found because of Digital Rights Management technologies, the only way certain media can be accessed, even for purely educational uses, is for teachers and individuals to knowingly violate copyright law by circumventing anti-access measures. It turns out such circumvention is a common practice (Fisher & McGeveran, 2006). Other than my pilot study (Rife & Hart-Davidson, 2006), the other studies I list here are not in our field. But together these studies say there is lack of knowledge about fair use, and this misunderstanding is chilling or circumscribing speech. Both Rife and Hart-Davidson (2006) and Fisher and McGeveran (2006) found people break the law in some circumstances in order to accomplish goals. What the present study intends to do is further explore and test these combined assertions.

Within the field of TPW, there are conflicting viewpoints on how to handle the copyright problem. In a recent *Intercom* ethics case problem (Waller, 2006a,b) on applying fair use to workplace writing processes, a case study presented a newly hired technical writer needing to create a resource publication for her organization based on lesson plans supplied by 20 teachers who had

themselves cut-and-pasted others' materials from various existing webspaces. The teachers subsequently supplied the cut-and-pasted lesson plans along with the URLs to "Erin" who then considered the implications of using such materials in a resource guide. The case study was interesting because it plunged directly into a very complicated area where workplace and school legalities and ethics of use converge. *Intercom* readers expressed interest in resolving the questions posed in Waller's fair use scenario, but reader responses varied greatly (Waller, 2006b). Readers argued "Erin" should walk away from things, "stick with copyright law," consider quitting her new job, take the position: "It's not my job, boss," and finally, provide suggestions to her supervisor. I surmise the wide variety of responses, which in general oversimplified the case study's variables, reflect a wide variety understandings about fair use. The inquiry on fair use and ethics, along with the wide variety of reader responses, points to the need for my study for the field of technical communication, and even for the larger field of composition studies. The question remains: At this moment in time, how does fair use influence writing processes and pedagogical decisions in educational (and other) settings? Before I explain the research design (Chapter Three) and the framing theory (Chapter Two), I further describe what others in our field have said about intellectual property and writing.

Research on Intellectual Property Related Topics

Five categories of rhetoric and writing (R&W) research (or closely related disciplines) in the area of IP exist. In order to assure I am not duplicating someone else's effort, as well as for reasons discussed in the next chapter, I

looked outside our field at IP related research and briefly summarize here what I found. The five IP research areas, although not exhaustive, are worth noting because they inform my study:

- 1) Historical studies that examine certain cases in the context of IP and rhetoric,
- 2) Pedagogical arguments framed in IP contexts,
- 3) Field arguments or scholarly stances/position papers in IP contexts,
- 4) Discussions of authorship and copyright, and
- 5) Empirical studies in IP contexts.

Historical Studies in IP and Rhetoric Contexts

Researchers in this category exam historical documents in IP contexts through a rhetorical lens, and from those examinations write interpretations on how these histories might inform current practices and theory building. Some researchers in this category explore the history of IP generally. Brockmann (1988, 1998, 1999) studied how inventors used technical communication and rhetoric to accomplish recognition in the US patent system. He examined historical patent records, looking for rhetorical strategies used by communicators seeking patent protection. Brockmann notes how inventors such as Oliver Evans had to construct, in writing, their ideas as both novel and their own in order to meet the legal requirements for patent protection.

Like Brockmann, Bazerman (1999) examined historical documents, in this case Edison's notebooks and drawings, through genre theory. Bazerman argues Edison's patent-process drawings are speech acts and legal objects – and are

marked and shaped by requirements of patentability. Gradually, over time, Edison's notebooks were increasingly inscribed with "the law." "[N]otebooks also contained documentary traces of inventive activity with legal implications, certain legal features rapidly emerged . . ." (p.64). For example, early notebooks featured invention drawings, but over the years, first one signature, and then many witness' signatures appeared in the upper right-hand corner of each drawing. Eventually notebooks were formally organized rather than strewn all over the workshop. Finally, official seals were pressed into the upper right-hand corner of the drawings, providing further documentation of the drawings' legitimacy. By examining historic records Bazerman shows how laws shaped the generation of knowledge and invention via Edison's writings. Like Oliver Evans, Edison had to protect ownership in "his" ideas by documenting novelty (since novelty is a requirement for patent protection) (p.85). Bazerman connects his research on Edison to "theories of rhetoric, social organization, and technology studies" (p.5).

Similarly, Kathleen Durack's (2001, 2004) research connects rhetorically-focused historical research with IP issues, but with a slightly different focus than Bazerman. She argues that the patent record is an important place where women inventors and users of technology might be written into the history of technical communication. Durack argues that technical communication researchers might study the patent record in order to trace the history of discovery and development of their field. All of these researchers looked at

historical records in the context of IP and rhetoric and argued that legal systems of invention shaped “invention” in a very material way.

Outside our field, in legal studies a number of scholars have written pieces on the history of IP. Here I only scratch the surface. In Gellar’s (2000) piece “Copyright history and the future: what’s culture got to do with it?” the author relies on a number of familiar sources, including work by Rose, Levi-Straus, Havelock, Eisenstein, Foucault, and McLuhan, among others. Gellar discusses the most ancient aspects of copyright law and the emergence of individual authorship. Mandich (1948), May (2002), and Prager (1944) all present fascinating histories of the first codified intellectual property statutes of Venice. Ricketson’s (1986) piece is historically oriented and tells of global events and international figures surrounding the Berne Convention. Okediji’s (2000) classic piece “Toward an international fair use doctrine,” provides a comprehensive examination of history and international perspective on the US fair use doctrine. Her argument is that some kind of international standard should be developed to shape and preserve fair use. All of these authors, both in legal studies and in R&W, explicitly write about either the history of IP, or how IP shaped the construction of history through its impact on texts.

My discussion here reflects how I thought about the literature entering my study. However, after conducting data analysis, I think that other authors writing about history, or even current events, are sometimes writing about cultural practices that strongly connect to the goals of intellectual property laws although

such practices aren't/weren't called "copyright law" or "patent." I discuss this insight in later chapters.

Pedagogical Arguments Framed in IP contexts

The work in this category argues because of the changed nature of writing in digital environments, teachers need to recalculate what they teach and include IP issues. On a broad level the argument in favor of teaching intellectual property derives from the growing body of scholarship arguing in favor of teaching students informational literacy, multiliteracies, and digital literacies (ALA, 2004; New London Group, 1996; Sorapure, Inglesby, & Yatchisin, 1998). The teaching of digital literacies imbricates the teaching of copyright because it relates to how one might legally use others' materials, and vice versa (See also Digital Rhetoric Collective, 2006; Grabill & Hicks, 2005; Henning, 2003; Selber, 2004; WIDE Research Center Collective, 2005). The American Library Association's (ALA) fifth standard is particularly relevant, and encompasses interests of digital and multi literacies: "The information literate student understands many of the economic, legal, and social issues surrounding the use of information and accesses and uses information ethically and legally" (ALA, 2004). Measurable outcomes for such students include having an understanding of "intellectual property, copyright, and fair use of copyrighted material." The arguments that support teaching digital, informational, and multi literacies also support the argument that teaching copyright law is important.

More specifically, within R&W, there's been a recent upsurge in scholarly attention to how copyright law might shape or inform the teaching of writing in

digital writing environments. Back in 1997-98, special issues of *Kairos* and *Computers and Composition* focused on copyright and composition pedagogy. Even before that, Lunsford and Ede (1994) explored collaborative authorship and the teaching of writing, laying groundwork for further copyright discussions in the context of teaching writing. The conversation was continued in the 1997 special Intellectual Property issue of *Kairos* wherein TyAnna Herrington explains the fair use doctrine and its importance to the teaching of writing in online environments. In her article Herrington argues contrary to popular belief, copyright laws *do* apply to digital communication, the public *does* have fair use rights, and fair use *is* necessary in order to protect freedom of speech. In the same issue of *Kairos*, in an interview Johndan Johnson-Eilola (1997) characterizes intellectual property as a social and economic construct existing to maximize profits for capitalists. Johnson-Eilola was asked during the interview where fair use should begin on the web, since everything is “published.” The question was as interesting to the field in 1997 as it is still, and yet the question remains without a clear answer, even by legal scholars.

Interest and inquiry within composition studies on fair use, copyright, and the relevance of these doctrines to the teaching of writing was further expanded in a special issue of *Computers and Composition* (1998), edited by Gurak and Johnson-Eilola. In this issue Herrington, Shirk and Howard, Logie, and Walker discuss – take positions on copyright, fair use and their implications for the teaching of writing. Herrington connects free speech to fair use, Shirk and Howard discuss the implications of CONFU (conference on fair use) fair use

guidelines on writing pedagogy, Logie reminds us of IP law's history and connection to developing technologies, calling for teaching of copyright issues, and Walker argues because the internet changes what writing teachers do in the classroom, they should develop theories that show differences and similarities between plagiarism and copyright.

Recent media coverage of the peer-to-peer filesharing cases along with the fact 100's of schools, individuals (including students), and peer-to-peer software distributors have been sued, has understandably kindled disciplinary interest. In the context of P2P filesharing and teaching, writing-pedagogy-pieces have appeared by Porter and Rife (2005), DeVoss and Porter (2006a,b), and Rife (2006). Addressing R&W teachers, when the US Supreme Court found *Grokster* secondarily liable for the copyright infringing behaviors of users of its software, Porter and Rife (2005) published a short working paper noting case outcomes and their implications for the teaching of writing. They argue writing teachers should not show blatant disregard for the law, or look the other way in the event their students are engaging in obvious copyright infringing activities since such teacher attitude could be deemed "inducement." Following Porter and Rife's (2005) short position paper, the CCCC-IP Caucus began a yearly publication "Top IP Events," published on the NCTE website. Porter and Rife's (2005) *Grokster* piece was one of the first included in this collection.

DeVoss and Porter (2006b) continue the conversation, noting how digital writing and the P2P filesharing cases have changed the nature of writing and impacted how to teach use of other's materials. They urge the development in

composition pedagogy for a theory of digital ethics. Consideration of authorship, origin, and giving credit where credit is due are what DeVoss and Porter consider the core values of digital ethics. “Our role then, is to provide students—and each other—with scaffolding so that they understand fair use practice and engage in ethical relationships with the work from which they are borrowing” (p. 199). Note in an earlier piece, Porter (1997) argues if the law is unethical to follow, we can break it. Logie (2005) addresses Porter’s argument, stating that if we are going to engage in civil disobedience it needs to be organized and public so our behaviors aren’t mistaken for ignorance, or even worse, active theft.

Also in the context of P2P filesharing, Rife (2006) reviews major P2P cases occurring over the last ten years and their implications for writing instruction, arguing that R&W teachers should continue their scholarly work in the area of IP and pedagogy. Wakefield (2006) reminds readers of the need to attend to issues of ethical and legal use of other’s materials in her instructional note on using music sampling in the classroom. She reviews basic copyright law with respect to musical recordings, and unpacks the ways in which such texts can be protected (and thus infringed) by copyright.

Westbrook (2006) recently made an important move by connecting visual rhetoric and copyright in a very pragmatic context – a student whose multimedia piece was unable to be published since the requisite permissions were denied by the copyright holder. Pointing to the missing student piece in his article, Westbrook writes that copyright affects composition teachers and students “on the level of daily practice”; copyright law threatens to silence both teachers and

students (pp. 477-478). The author suggests using Lessig's Creative Commons licensing as an immediate practical solution to the copyright problem. Westbrook is currently working on an edited collection, *Composition & Copyright*, to be published in May 2009 by Suny Press.

Another argument regarding pedagogy appears in Logie's (2005) work, where he provides a broad overview of copyright laws (including a bit of history), and argues for the importance of teaching copyright in technical communication. Lunsford (1999) and Robbins (2003) combine feminist-rhetorical theory with discussions of intellectual property. Lunsford's concern is with corporate authorship; Robbins argues as we try to understand intellectual property, we should look at cases and issues of authorship involving women's ways of making knowledge particularly via collaboration. Her example is the origination of Americanized versions of British writer Anna Barbauld's 1778 primers, *Lessons for Children*.

Reyman (2006) argues for teacher awareness and even activism, but with respect to the TEACH Act. She notes the Technology, Education, and Copyright Harmonization (TEACH) Act of 2002 was developed to update copyright law to accommodate the uses of copyrighted materials in distance-education environments. And yet, pursuant to her analysis of the TEACH Act and its implications for teaching writing, the act fails to offer the same protections for online teaching as it offers in face-to-face environments. She argues the TEACH Act provides an opportunity for faculty and their institutions to become more

involved in the conversations about copyright, and even to influence law and policies.

In Logie's (2006b) short position paper, he argues copyright instruction should have a central place in the writing classroom. He states a 1790's US view of copyright explicitly stated the "importance of scholarly access" (p. 1). Copyright law was originally invented to assist learning : "And we, as educators, have failed in our obligation to embed this simple fact in the public's consciousness" (p.1). To address this problem, Logie urges us to make "copyright a point of focus within [our] pedagogy" (p. 2).

In *A legal primer for the digital age* (2003), Herrington offers a short textbook covering a wide range of laws as relevant for technical communicators in everyday practice. The text contains a section on intellectual property issues, where Herrington notes copyright law is applied in conjunction with other laws, formal registration is not needed, and she discusses basic work-for-hire issues. In *Controlling voices: intellectual property, humanistic studies, and the Internet*, Herrington (2001) focuses on how intellectual property law impacts educators including those in rhetoric and technical communication. Finally, this area of scholarship is expanding. Danielle Nicole DeVoss, Shaun Slattery, and I are working on an edited collection: *Copy(write): Intellectual Property in the Writing Classroom*. Shaun's involvement here is key because at DePaul University he's developed a graduate level course on copyright for students of new media. Our collection focuses specifically on pedagogy and copyright, and builds upon Westbrook's forthcoming collection. All of the authors listed in this section argue

copyright law should cause writing teachers to reflect on and revise their curricular decisions and pedagogies.

Field-specific Arguments in IP Contexts

Researchers in this category explore IP issues and how those issues shape the construction of knowledge. They might also conduct rhetorical analysis in an IP context (but without doing history per se) or simply take a position, other than a pedagogical stance, on an IP related issue. These researchers also provide information for the field generally, but not necessarily tied to pedagogical concerns. In 2000, for example, the CCCC IP Caucus published its three page fair use statement, "Use your fair use: Strategies toward action," in *College Composition and Communication*. This wasn't so much research, as a call for awareness in the field.

As early as 1977 an entire issue of *IEEE Transactions on Professional Communication* was devoted to exploring copyright and the possible impact of the new 1976 copyright act on professional communication. Numerous articles in the journal discussed implications of the new copyright law on dissemination of scientific journals, library copying, computer use, and educational use of copyrighted materials. A section in the journal was devoted exclusively to fair use (pp. 190-194). In 1978, the same journal provided an article on "How to apply for copyright registration" under the new law. In the following year, *IEEE Transactions on Professional Communication* (1979) devoted an entire issue to patents and their relevance to scientific and technical communication practices.

Durack's (2006) recent piece discusses the relationship between patent systems and the peer review process in order to illustrate how university patent activity influences the production of scientific knowledge. She points out as current trends continue, the researcher must acknowledge the presence and role of the patent system on the creation of scientific knowledge; her research signals directly to the increased need for technical communication scholars to attend to these issues. In Selber's (2006) short position paper, "Beyond Napster: institutional policies and digital economics," using the context of Penn State's contract with Napster for use of commercial, legal music file sharing applications, the author encourages ambitious examination of institutional policies on academic computing.

Another recent publication in this category is Logie's (2006a) book, *Peers, pirates, and persuasion*. Logie uses rhetorical theories of Mailloux and Burke (among others) to examine the criminalization, theft, piracy, sharing, and combat metaphors in the P2P filesharing controversies. Like Westbrook, he makes connections to visual rhetoric but does so with a different focus. Rather than focusing on implications for teachers and students, Logie conducts a rhetorical analysis, illustrating how rhetoric is useful in understanding these events. He discusses rhetorical turns taken by P2P filesharing services and other stakeholders as they developed ethos in part through the visual.

On the topic of law, ethics, and technical communication, Gurak (2005) gives a broad overview of ethical considerations for technical communicators as such considerations overlap with legal issues. In her overview of issues such as

protection of privacy, technical accuracy, and whistle blowing, she also briefly discusses copyright and fair use as sometimes raising issues of ethics as well as law. Hennig and Tjarks-Sobhani's (2004) collection of writings from representative technical communicators worldwide, makes clear laws and legal liabilities are a concern for technical communication, globally. Juillet (2004), a practicing attorney, recently published a piece in *Intercom* touching on legal liabilities that might crop up by web publishing. Domain names, trademarks, notices and terms of use, privacy policies, and copyright are all discussed. Porter (2005) focuses on intellectual property issues as he calls for technical writing teachers to address their roles in public advocacy.

Looking briefly outside our field to work often cited by R&W scholars, in *Code and other laws of cyberspace* (1999), Lessig discusses architectures made of code, regulated by law, and shaping human behavior. The telephone network and AOL are two (of many) examples Lessig uses. In *The future of ideas* (2002), Lessig argues the battles being waged over information and the internet are battles between the old and the new. Creativity and invention build upon the past. The past always tries to control the present, but in free societies, the power of the past to control is limited. If information is locked down, then one can't incorporate that information into a collage, a remediated text, a parody, a story, or any other form of invention. In *Free culture* (2004), Lessig argues fair use is overburdened because post 1978, all fixed works are automatically copyright protected, and fair use wasn't designed to withstand such a burden (since almost every use is regulated, any use is either copyright infringing, or rarely "fair use"). Litman's

book (2001) traces the recent history of our current copyright controversies. She discusses events leading up to the enactment of the DMCA. In *Copyrights and copywrongs* Vaidhyathan (2001) provides broad background and histories regarding the current copyright debates. In his second book (2004), Vaidhyathan takes the position anarchy (as in defying authority) in the context of copyright law might be a good thing.

Legal scholars Scassa (2004), Tabatabai (2005), Vaver (2004), and Gervais (2004, 2005) all write on comparison issues of copyright law, fair dealing, and fair use between Canada and the US (although they often refer to other countries' laws as well). These pieces provide particularly helpful points of contrast to facilitate a better understanding of the US fair use doctrine. A number of legal scholars focus on educational fair use. Silberberg (2001) discusses educational fair use generally, and argues educational fair use should be preserved and be given breadth in court interpretation. Bartow (1998) and Brandfonbrener (1986) discuss educational fair use and photocopying. Duhl (2004) focuses in on the fourth factor, market impact, of the fair use analysis, arguing the fourth factor is likely the most important factor in court interpretations. Barker (2005) covers fair use in light of the DMCA. Balkin's (2004) piece, "Digital speech and democratic culture," discusses fair use and preservation of free speech – his argument connects well to Herrington's (1997, 1998) focus. Katz (2006) notes the huge impact Creative Commons licenses might have on our culture. He takes a critical view of CC licensing, noting how when an author selects a license for her work, conditioning future uses on certain specificity, as

time passes and others use and license, use and license, certain conflicts can develop in the licensing scheme.

David Nimmer (2003), a leading intellectual property scholar, conducted a study on copyright cases decided between 1994 and 2002, and found 90% of the time, if three of the four factors are found in favor of fair use, fair use is affirmed. One cannot generalize his findings though, because he did not randomly select the 60 cases he examined, nor did he analyze all reported decisions. Overall, of the 60 cases he examined, 24 upheld fair use and 36 denied it (pp. 269-277). Nimmer also analyzed percentage correspondences between each of the four factors and a favorable determination with correspondences ranging from 42% correspondence to factor two, and 57% correspondence to factor four, in the context of overall favorable findings. He states across all four factors, there is a 51% correspondence to a favorable legal outcome. It would be useful to replicate his study using more controlled methods and a concrete coding scheme that is repeatable.

Discussions of Authorship and Copyright

In addition to scholarship directly addressing the copyright problem, scholarship focused on *authorship* has interesting intersections with copyright discussions. One key argument is that legal studies and “literary” studies should unite (Bowrey, 2005; Woodmansee & Jaszi, 1994). Translating “literary” studies to include TPW (often situated within English Departments) arguments supporting intersections between writing studies and legal studies provide a space for my study. The two disciplines fit well together because writing studies

cares about authorship, and copyright law provides a legal definition of “author” and legally assigns rights to that entity. For example, in order for an artifact to be copyrightable under US law, it must be “original” (Copyright Law, Section 106). “Originality” is at the essence of our concept of “author” and his sole creative genius. Ultimately, if I am studying intersections of copyright law and writing, then I am in fact studying authorship, and asking: “What is an author”?

Of course, a discussion on authorship would be incomplete without referring to Foucault’s (1984) classic piece, “What is an author?” I’ve seen this piece cited widely in both legal studies and R&W. Upon entering my study, I briefly referred to Foucault and cited this piece in my initial literature review, especially because it laid the foundation for work by Woodmansee and Jaszi (1994). However, as my data analysis progressed I found Foucault’s theories about law and authorship become increasingly important to my work. Foucault, after all, is *The Theorist* who wrote about *both law and authorship* (yet he did not fully connect these two domains) – and it turns out his work became central to mine. As the chapters unfold, I return to Foucault again and again. Here, I briefly summarize his work in the area of “authorship” via his classic piece referenced above.

Foucault (1984) argued the “author” was an ideological production, a function of discourse. Since I examine authorship (this *naturally* happens when one *simultaneously* examines copyright law and writing processes) in this study, I draw upon Foucault’s theory of the author-function. I examine authorship in the sense copyright laws and even licensing schemes like creative commons, look to

protect a form of authorship. True, it might not be the original author that is protected, it might instead be someone the original author has assigned or who has somehow inherited authorship. In the survey I examine aspects of authorship like “chilled speech,” and interest in copyright law, etc. I also look at authorship from the point of view of interviewees who authored web compositions. And I examine how these interviewee-writers have drawn upon, appropriated, or synthesized the work of other authors, outside themselves. Therefore authorship, what it represents, and the sociocultural functions that produce it are a central theme in this study thus my need to draw upon Foucault (even though he was neither an R&W scholar nor a scholar in legal studies).

While Foucault (1984) argued the author was a function of discourse, Rose claims the author is a proprietor and originator as well. Rose (1988) points to the lack of scholarly exploration as to how legal-economic and aesthetic levels of discourse interact or impact each other. Woodmansee and Jaszi's (1994) collection, *The construction of authorship: textual appropriation in law and literature*, brought together legal scholars and literary scholars to examine the issues raised by Rose with respect to authorship, collaboration, originality, and copyright. In 1995, Martha Woodmansee, an English professor, and Peter Jaszi, a law professor wrote an article published in *College English*, “The law of texts: Copyright in the academy.” Here the authors argue for reunification of legal and literary studies, and for opening of conversations (that they state were present in the 19th century). They discuss the author-function via Foucault along with current notions of fair use and its interpretation. Similarly, Bowrey's (2005) book

Law & internet cultures, makes connections between literary and legal discourses, in the spirit of work by Woodmansee and Jaszi as well as Rosemary Coombe (2002, 2005). Bowrey, an Australian law professor, examines the law in the context of legal culture, and especially looks at how US law, practice, and culture has influenced technology law on the global level.

Like fair use and copyright, the doctrine of *plagiarism* is concerned with how another's materials might be used and a discussion of scholarship on authorship would not be complete without mentioning work on plagiarism. Discussions complicating the teaching of anti-plagiarism often intersect with copyright issues. DeVoss and Rosati (2002), Howard (1995, 2000), Klausman (1999), Domsrife (2006), DeVoss and Porter, (2006a), and Rife and DeVoss (200X) all provide examples where plagiarism and copyright intersect in one conversation. DeVoss and Rosati (2002) provide a framework for discussions of plagiarism and copyright as they share teaching stories illustrating how students today are unable to understand "plagiarism" without having the term contextualized in the framework of larger intellectual property issues. Howard (1995) reviews various theories of authorship and positions on plagiarism, dividing plagiarism into three categories, cheating, patch writing, and non-attribution. In a later piece, Howard (2000) argues plagiarism is a complicated concept defying definition. She asserts that perhaps the term should be discarded altogether. She also states plagiarism operates without an ethic but under a moral basis that is a function of community membership and reading comprehension. Klausman (1999) continues this conversation by noting the

internet changes how anti-plagiarism should be taught. He states plagiarism is of three types: direct, paragraph, and patchwork. Klausman notes most students are not aware cutting-and-pasting is considered plagiarism. Domsrife (2006) notes how the internet and digital copying has changed the meaning of “copy” since every copy now has the same quality as the original. He argues we should stop focusing on plagiarism and instead focus on encouraging synthesis. DeVoss and Porter’s (2006a) recent position paper follows-up on the argument the internet changes how we might teach and perceive anti-plagiarism in light of remix culture. They argue in favor of teaching an ethic of fair use, a thread which is built upon by Rife and DeVoss (200X). In Rife and DeVoss (200X), the authors first discuss how remix culture complicates traditional understandings of plagiarism, and also adds copyright considerations into the mix of pedagogical considerations. They then compare and contrast plagiarism and copyright. Rife and DeVoss (200X) create a very clear opening in composition studies for further discussions of how copyright and plagiarism intersect as relevant for writing teachers. These kinds of scholarly conversations have also been present in legal studies for quite some time (See Billings, 2004; Dursht, 1996; Green, 2003; Stearns, 1992).

Empirical Studies in IP Contexts

Researchers in this category do their work by systematically gathering data in a way that can be replicated and have written it up as such. Empiricism is a complex and contested concept, but my use of the term is defined simply by James Kinney (1979):

Empiricism is the way of knowing through the senses, through direct, physical experience. As a mode of inquiry, it goes back to Aristotle's concept that we come to know essences by the process of abstraction, inductively moving from particular sense data to a knowledge of the form within the object. (p. 352)

Since only two known R&W empirical studies on IP exist, we need to glance elsewhere in R&W for ideas on what this might look like, had it been done. The first empirical study, while not focused exclusively on IP, culminated in a recent book published by tecom, *Technical communication international* (Hennig & Tjarks-Sobhani, 2004). The researchers sent out a questionnaire to technical communicators across the world. One of the questions asked technical communicators about their legal-writing concerns. The results found the intersection of law and technical communication is a general concern for both practitioners and academics. Technical communicators voice concern for law related issues such as the increasing amount and complexity of laws, repercussions for not understanding laws, quality and usability of technical documentation versus legality, and laws not applying uniformly. In the second instance my pilot study, "Is there a chilling digital communication?" used survey and interview methods to examine how understandings of copyright law and fair use shape student and teacher web writing in a professional writing program (Rife & Hart-Davidson, 2006). We found certain gaps in knowledge existed among both students and faculty, but that both thought knowledge of copyright and fair use was important. The study also used interviews and collected student web compositions, exploring rhetorical invention in copyright-imbued digital

environments. From the interviews, we found copyright law functioned as a sort of design heuristic.

Five additional studies were conducted exploring issues closely related to IP and composing (Hobbs, Jaszi, & Aufderheide, 2007; Fisher & McGeeveran, 2006; Heins & Beckles, 2005; Renner, 2002; Sweeney, 2004). Three of these studies (Heins & Beckles, Renner, and Sweeney) used survey instruments. However, none of the survey instruments or the studies use a rhetorical lens, and all of the surveys could be improved to be more valid and reliable. Additionally, while all of these studies inform inquiry into IP and composing, all of them left certain gaps in the research and/or used loosely constructed methodologies, disallowing generalizations to a larger population. In “The cost of copyright confusion,” Hobbs, Jaszi, and Aufderheide (2007) found copyright law, particularly fair use, provides broad protection for folks working in education. However, due to participants’ lack of knowledge and understanding about the law’s protections, their ability to share, teach, and have students produce media-rich texts was severely circumscribed. Not only that, but the researchers found teachers’ lack of knowledge was passed on to students as well as colleagues, perpetuating “copyright folklore” that often sees the law as much more restrictive than it is.² In Heins and Beckles’ (2005) study, “Will fair use survive,” they examined whether the fair use doctrine is facilitating artists’ “speech” via their creations (or whether their speech is chilled due to fear of copyright liability). Heins and Beckles explicitly admit their study is not scientific. Survey methods were included in the overall design, but the survey was maintained by being

posted to a webspace for a year and was advertised through artists' organizations (possibly skewing the results).³

Both the Renner (2002) and Sweeney (2004) dissertations examined knowledge levels of educators for purposes of discerning what basis teachers used to construct online course materials. Both used surveys and appear to have carefully thought-out "scientific" methodologies. Yet, neither of these studies examined certainty of knowledge, and neither examined the understandings of a key population – students of technical communication who will enter and impact wider communication audiences. Neither study examined how and whether fair use and/or copyright is taught and understood in the classroom in web composing contexts, and neither study used a rhetorical lens.⁴ The Fisher and McGeveran (2006) study "The digital learning challenge," gathered data from informal case studies, and a two day workshop where numerous representatives of major universities and organizations in the US gathered to discuss the impact of copyright restrictions on educational settings. The study found publishing companies are currently pressuring research one universities to constrict the dissemination and production of digital materials, and that 80% of universities have adopted copyright policies are more restrictive than what "fair use" allows (See Cornell University's [2006] new copyright guidelines for electronic content). How fair use is used or not used in educational contexts likely impacts the communication practices of larger populations, and yet none of the existing studies have explored these issues.⁵

Of course, the more general PEW (2005) research is ongoing, and provides helpful reports and data that generally informs further inquiry into connections between copyright and writing practices. The PEW Internet and American Life Project reports are numerous and provide recent trends in online usage, and how online use has changed over time. The project site contains 15 pages of reports, including reports on certain user activities (pod casting, taking a virtual tour), and reports on the status of certain online uses (E-government, gathering health information, using the web community to get through major life events). A recent report dated November, 2005 states by age 17, most teens have created content for the web such as web pages and blogs, and most think obtaining free music online is easy (Teen Content, 2005). In addition to finding while most teens who downloaded music knew the music was copyrighted but did not care, the reverse was true for bloggers. Bloggers were more concerned about the copyrighted nature of materials they used, and the majority tried to stay within the law.⁶

Renner (2002) and Sweeney's (2004) dissertations both examined faculty levels of copyright knowledge, but they did not examine this in the context of writing instruction, and they did not examine student knowledge, nor the impact of copyright issues on student composing practices. The PEW study (2005) explored attitudes about using infringing material but not in an educational setting nor with respect to teaching. Researchers connected to "The cost of copyright confusion" study interviewed 62 teachers or others about their understanding and practice regarding fair use, but the important student population was not

included. “The cost of copyright confusion” did not focus on writing processes and so is less helpful to folks in R&W than it might be otherwise. The Berkman research (2006), “The digital learning challenge,” examined negative effects of current copyright law, while the Heins and Beckles (2005) study looked at whether fair use and other intellectual property laws were protecting creativity and speech.

All of these studies provide useful information and inform my inquiry, but none of them speak directly to the issue I wish to explore. If, as the PEW teen study indicates, most teens are creating content for the web before age 17, then copyright law is implicated. These same kinds of students are often in technical writing courses, where they are required to create content. None of these studies explore the level of knowledge or meta-awareness student-authors have when writing. None of the studies particularly focused on the writing *process* in digital environments, which is what I do in my study. While composition studies and technical communication provide a long history of scholarship urging the field to tend to issues of copyright and fair use in the writing classroom, no empirical study has yet emerged within the field addressing our current state of affairs. Because of gaps in the research, I was compelled to conduct this study.

In addition to examining empirical IP studies, it’s also useful to look at other types of studies in R&W that relate to mine, but are not necessarily about IP. Since I examine writing processes, rhetorical invention is germane. Yet, rhetorical invention as Haller (2000) points out, is erased in a final written product. Haller (2000) studied rhetorical invention’s interactions with *design*

heuristics in a study of 29 upper-level computer science majors at a mid-size technological university, although this work was not about IP. However, recall in the introductory paragraphs to this chapter, as I described the four factor fair use test I stated this test functioned like a *legal heuristic*. I discuss the role of heuristics in decision making-processes, like web writing, in the next chapter. Haller (2000) acted as a non-participant observer of one student team as they designed a resume system and accompanying documentation. Some of her methods and theory might inform empirical IP research in R&W, as might any R&W research on composing processes. Examples that might be useful are studies on composing processes by O'Dell, Gosawami, and Herrington (1983) and their use of discourse-based interviews or studies by Flower and Hayes (2003) who employed the talk-aloud protocol.

Using Rhetoric Theory to Design an Empirical Study on Copyright and Digital Writing

In this chapter I've outlined my research questions, defined the applicable law, pointed to problems raised in educational-writing contexts, and reviewed the relevant literature that already exists in the area of intellectual property and (digital) writing. In Chapter Two I discuss in detail the theoretical frame for my inquiry. I rely on rhetoric theory and activity theory. I briefly justify my use of rhetoric theory here but develop this justification in Chapter Two as well as Chapter Three, Research Design. IP issues are especially appropriate to examine with rhetoric because IP laws are formal systems of invention, and McKeon (1987) and Haller (2000) suggest "all systems of invention . . . are ultimately organized by rhetoric . . . Aristotle's art of forethought governs both

[rhetorical invention and design] processes” (Haller, 2000, p. 356). The US “legal” system of invention exists in codified laws governing copyright, patent, trademark, and trade secret, and as such is organized by rhetoric. This system of invention embeds itself into rhetorical invention and the texts subsequently produced (as suggested by Bazerman and Brockmann): “invention . . . requires not only the generation of ideas but also their selection” (Haller, 2000, p. 367). Depending on the findings of this study, implications might include creating curricular recommendations for R&W professional writing programs and pedagogies. The study hopes to add something to our understandings of rhetorical invention as it intersects with copyright issues. Pragmatically, I hope the survey instrument might be useful to other disciplines for other, comparative measures, in that the survey results may provide a point of initial comparison for other populations. This study extends the work of Durack (2006) by making another small start towards connecting how systems of law shape the production of knowledge via writing. What are the connections between formal systems of invention, like copyright law, and informal systems of invention, like design heuristics?

While the existing R&W IP research uses rhetoric to examine history in IP contexts, looks for use of rhetoric in historic documents, connects issues of copyright to the teaching of writing in digital environments, has touched on how IP systems shape knowledge production, has examined connections between authorship and copyright, and generally informs the field of relevant IP happenings and issues, almost none of this work provides empirical IP related

research relevant to R&W. Empirical research at the intersection of IP, rhetoric, and composition is needed in R&W. Examining a finished text alone (by way of hermeneutics, for example), will not yield results that might explore these inquires, because as Haller points out, the rhetorical arguments informing composing choices that take place before the finished product emerges, are “stripped” out, “lending the text an apparent objectivity that obscured its rhetorical origins” (2000, p. 354). As rhetorical considerations and design heuristics overlap (Haller, 2000), so do rhetorical considerations and copyright law because like design heuristics, copyright is a system of invention “organized by rhetoric.” A body of scholarship in R&W has focused on IP; but little, or none, has focused on connecting IP and rhetorical invention, and no R&W research has gathered empirical data in the realm of IP, to inform theory building in R&W, or to inform our writing pedagogy discussions.

CHAPTER 2

“100 DIFFERENT PIECES” AND RHETORICAL INVENTION: UNDERSTANDING THE LAW’S INTERSECTION WITH DIGITAL COMPOSING

*“The source for a metatheory of rhetoric cannot be found in rhetoric itself.”
(Janice Lauer, 1970, p. 397)*

In the previous chapter I established and discussed the problem of digital composing in copyright imbued environments and examined studies that have raised certain issues and generated various findings with respect to the copyright problem. I outlined my research questions as well. In this chapter I provide a theoretical framework for understanding both the nature of my inquiry as well as the study design. In the next chapter (Chapter Three) I carefully outline the study design and provide the reader with my rationale. Chapters Four, Five, and Six provide data analysis and implications for digital writing, teaching, and learning.

As I discuss in the next chapter, I use a survey, collection of webtexts, and interviews with digital writers (students and teachers in TPW) in order to probe writers’ thoughts, reasoning, and motivations for their own composing choices in light of copyright law’s implications in webspace. These thoughts, reasonings, and motivations can also be characterized as *rhetorical invention*, and that’s the conceptual frame I use in this study. I also explore writers’ knowledge and understanding of copyright law in the context of digital writing. Before I launch into a discussion of my blending of rhetoric theory and activity theory as it pertains to my inquiry, I discuss the webtext as a site for rhetorical invention, a space where copyright issues are raised, and a practice that challenges our

current understandings of authorship. Next, I explain rhetoric theory's connection to the copyright problem, followed by a justification for my use of activity theory and how I've blended that with a rhetoric-based notion of heuristics.

The Webspaces as Commonplace: Rip, Mix, Burn

How might we connect traditional discussions of rhetorical invention to web composing contexts? I'm going to discuss this briefly here as a justification for my use of theories on rhetorical invention in the context of digital writing. Rhetorical invention is theorized as central to *traditional* composing processes. Looking to rhetorical invention's roots in classical rhetoric and importance in composition studies, according to Young (1978) classical invention is the "first in importance and the first art used in the composing process" (p. 36). But how might contemporary theories of remix (digital writing) culture intersect with more traditional notions of rhetorical invention? The common digital composing processes of cutting, pasting, and remixing hold both the novelty and discovery senses of rhetorical invention as discussed by Miller (2000). A location where the new and existing, the past, present, and future come together might be called a commonplace in rhetoric studies. The commonplace is a site of rhetorical invention. McKeon (1998) sees commonplaces as places where the familiar and the unfamiliar can be brought together, where exploratory combinations of the new and the existing can take place. Figure 2.1 is an example of the digital commonplace, a screen capture taken from a research participant's web composition. Let's call her Leslie.

Leslie was one of the student writers selected for an interview. As I explain in detail in Chapter Three, my research design includes the collection of webtexts from digital writers in my population, followed by interviews. I limit these writers to self-defined students because I believe they'd be creating lots of different kinds of web compositions compared to professors who might be more bogged down writing traditional peer reviewed journal articles and book chapters. Prior to Leslie's interview I collected from her a web composition which then framed my questions. My purpose here is simply to illustrate how the webspace lends itself to remix writing, serves as a commonplace (a location of rhetorical invention), and often triggers copyright issues.

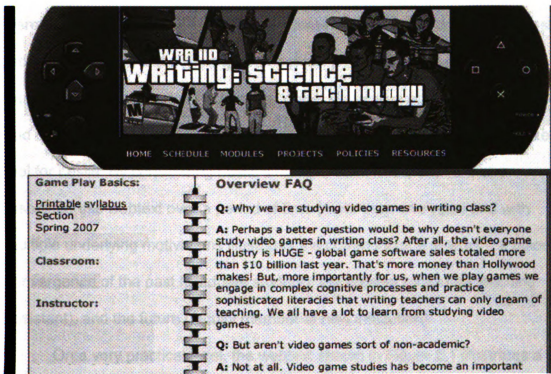


FIGURE 2.1. Screen Capture from Leslie's Interview.

Leslie is a PhD candidate teaching first year writing at a doctoral university as she completes her degree requirements and enters the job market. The webtext depicted in Figure 2.1 is the course web page Leslie creates for her first year writing students. She's interested in using a theme for her writing course that might draw upon her students' interests while simultaneously involving the study of digital writing. Leslie said, "I wanted to have a cool site for them, when they first signed up." In her web writing, Leslie plays the roles of graduate student, teacher, and potential employee-job seeker. This webspace serves the pragmatic function of housing teaching materials, incorporating work Leslie did as a graduate student, and also showcases Leslie's web design abilities and innovative pedagogies for potential employers. The gaming control and visuals were blended together by Leslie in a graduate visual rhetoric course, where she received feedback and even a grade from her professor. By the time Leslie taught this course though, the gaming control visual as a graduate course project had detached from its origins and was acting simply as a teaching and marketing tool for Leslie. By considering Leslie's multiple audiences, and how she fashioned this webtext over a period of time (more than one year) and with multiple underlying motivations illustrates the commonplace at work – a place of convergence of the past (graduate student), the present (graduate teaching assistant), and the future (faculty member at new institution).

On a very practical level, the webtext shown in Figure 2.1 illustrates a commonplace from the point of view of remix writing, by bringing together the familiar with the unfamiliar. Leslie explains the complexity of the visual:

We'd just learned Photoshop that semester and I was playing with my new knowledge of Photoshop and doing cool things. So, it's made up of like 100 different pieces. The major part of it is a play station portable; the console there, and then what I did was I took the part where you'd normally see the video game, and I replaced it with this composite image of my own, the name of the class, and the font used where it says the name of the course there, is actually a font developed for a particular game, grand theft auto. It's called price down. It's a font they made for that. So I replicated that and did my course title with that name, and then it's divided up into different pieces. I got that idea from, I saw it somewhere else. Somebody had a book cover that had like little pieces divided up into little frames, sort of almost like stained glass, and I wanted to do something similar. And so what I decided to do for that was, the emphasis in my class was going to be not on games themselves but on how people use games, so, all but the final corner image down here, all those images, the rest of the images, were actually people's photos I found on flickr.com, I searched for video games, and I got pictures of real people playing video games, and then I cut out just the people that I wanted. I mean just the parts that I wanted. I traced, cut out the people, and I ran them through some kind of filter to make it look funky like they do. They look kind of stylized, almost like video games, and then I assembled them into these little frames, and put them in there, the ah, like, I said the only image here, that is not of real people is the lower left hand corner.

Leslie had taken things familiar to the students, a game control, game fonts, a look of "stained glass," people playing games, a portable play station, typical web page navigation elements, an image of notebook paper, a posting of office hours, and then blended that together with the newness of a new college course, an unfamiliar medium for a syllabus, unfamiliar connections of games to formal education, an unfamiliar combination of game control and web page navigation links, and brought all of these images and allusions into a new light. This is the commonplace, the digital remix. And it triggers all kinds of copyright issues.

Fonts can be copyrightable and usually are in the context of gaming and branding; gaming control designs are copyrightable. All the visuals Leslie took

from flickr.com may well have copyrights owned by others. Leslie did all this without permission. She was far less worried about copyright than about protecting peoples' privacy, especially the younger individuals featured playing games. That was one of her main motivations for applying the filters in Photoshop. She said, "I wasn't really worried about copyright. I didn't think anyone would come after me for taking their flickr pictures." She did say she'd be more careful about using these materials to make her remix if she was going to sell this image for a profit. But in the context of educational use, "I think for not for profit, for educational purposes I think that would be pretty low on anyone's list of priorities for anyone to come after me about it." What this interview combined with Figure 2.1 show are how the webspace as commonplace triggers rhetorical invention and begs for an examination of whether copyright is influencing writerly decisions.

Leslie was one participant who was least concerned about copyright – the law did not stop her from inventing and being creative. She'd concern herself with copyright only if it was easy to do so and still accomplish her pedagogical and creative goals. For example, when asked about the possibility of posting copyright protected articles and teaching materials in an open webspace as opposed to a password protected one, Leslie explained:

I probably would, if that was the easiest thing to do. I would worry a little bit about copyright violations, but you know I would weigh that against what my options were. If I had an easy option to make it password protected I would do that but if I don't have an easy option . . .

Here we can say that Leslie is exercising prudence. “Prudence is the virtue that makes us choose the surest and least onerous means of arriving at our ends” (Perelman, 1967, p. 18). In this case, Leslie made this web composition her own by cutting, pasting, applying filters, adding text, synthesizing her own interpretations and ideas with others’ materials. In Leslie’s case, it turned out her inventional decisions were made to protect peoples’ privacy, for design reasons – to intrigue her students, rather than to abide by copyright law. Leslie takes the old, and turns it into the new.

Lawrence Lessig (2004) characterizes the legal battles over copyright law’s reach to webspaces to be a battle between old and new. He acknowledges the internet facilitates remix culture, where creativity and invention build upon the past. If information is locked down, he argues, creativity is stifled: “Free cultures are cultures that leave a great deal open for others to build upon; unfree, or permission, cultures leave much less. Ours was a free culture. It is becoming much less so” (p. 30). Lessig lists 17 movies where Disney, Inc. took stories in the public domain and “retold them in a way that carried them into a new age” (p. 23): “In all of these cases, Disney (or Disney, Inc.) ripped creativity from the culture around him, mixed that creativity with his own extraordinary talent, and then burned that mix into the soul of his culture. Rip, mix, and burn” (p. 24). And Disney did this of course with the assistance of emerging technologies. Lessig’s description of technology’s ability to allow us to rip, mix, and burn is in the abstract, the same ability enabled by the commonplace. (You will find this easier to understand if you imagine the “commonplace” as a technology or technique,

an art of doing). Remixing in digital environments illustrates a commonplace at work. A commonplace is a *common place* because it is: rip, mix, burn. A digital writer like Leslie, working in a commonplace, brings together and synthesizes the familiar, creating something new or unfamiliar.

Remix and Authorship

Examining writing processes in the context of digital writing, ultimately involves examining the webspace as a commonplace where “the author” emerges as a representation of activities which converge a number of other texts – via the digital remix for example.⁷ Recall that in the previous chapter, I referred to Foucault’s discussion of author which also informs my theoretical frame going into this study. Note that in “What is an author,” Foucault (1984) discusses the author in a very limited sense – that of the sole creative genius of literary studies. Even in this narrow context, Foucault makes the point that the same types of texts have not always required authors; “there was a time when those texts . . . were accepted, circulated and valorized without any questions about the identity of their author” (1984, p. 109). This notion influenced my understanding of authorship as I interviewed digital writers. Foucault’s theory might help us understand Leslie’s decision not to attribute the sources for all the images, the “100 different pieces” that became part of her visual. She did not even remember exact locations where some of the gaming visuals originated – although she knew she herself had not created them. How might such digital composing practices revise our understanding of “common knowledge”? Where might “common knowledge” and “commonplace” intersect?

The process of selecting and developing content for one's web composition is rhetorical invention and also, upon examination, points to the origins of a text, although as Foucault (1972) states, the absolute origins of anything is an ever receding point. Yet, we can gain some knowledge by trying to trace "where texts come from" (Prior, 2004). Prior (2004) explicitly connects rhetorical invention to the tracing of authorship: "When we see that tracing the composing of a text, what classical rhetoric termed invention, involved the contributions of multiple people, it becomes clear that tracing the writing process also implicates tracing authorship" (Prior, 2004, pp. 169-170). While I imagined my study as one examining rhetorical invention because invention is so germane to the remixed nature of digital compositions (germane to an examination of the deliberations and arguments that underlie writing choices), I didn't realize until after I collected data how examining rhetorical invention necessitated the tracing of authorship, as Prior points out. The lengthy "100 different pieces" quote from Leslie, provided above, was in response to my question: "Where did you get this"? In later chapters, I discuss how I came to rely on Foucault for analysis of authorship which is by Prior's (2004) definition, always already an analysis of rhetorical invention.

Another important point Foucault (1984) made is that the author is not a single person, but is a "certain functional principle which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction" (1984, p. 119). You should be able to see clearly the

connections between Lessig’s problematization of copyright law and Foucault’s description of the author-function as a “functional principle” which “impedes the free circulation” of information (although as stated, Foucault discusses this in the narrow sense of “fiction” rather than the broad sense of “information”). When the author is represented as a solitary genius and a “perpetual surging of innovation,” according to Foucault it means the author-function in that culture works in exactly the opposite manner: “(When a historically given function is represented in a figure that inverts it, one has an ideological production.) The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning” (p. 119). Again, I revisit this issue of authorship in Chapters Five and Six in light of my data. Leave it to say at this point that Foucault’s description of author and author-function influenced my understanding of digital composing as I approached each interview. How might his theory of author-function help us understand writers’ decisions to attribute, take freely others’ materials, or request permission before using? I also note for future reference, that because Foucault’s discussion of author-function takes place in such a narrow literary context, and because of what I saw in the data, the remix, “rip, mix, and burn” nature of digital compositions, I later turn to actor network theory (ANT) to develop this idea of author-function more robustly – post-data collection.

My Theoretical Assumptions Framing This Study

Recall that in the previous chapter I pointed out some have posited lack of understanding of fair use and copyright are chilling speech (Fisher & McGeeveran,

2006; Heins & Beckles, 2005; Hobbs, Jaszi, & Aufderheide, 2007; Porter, 2005; Westbrook, 2006). Yet, this assertion has not been examined empirically within the field of technical and professional writing (TPW), although TPW holds itself out as a container for digital writing experts (Carliner, 2003; Hart-Davidson, 2001) including in the area of copyright law (Bazerman, 1999; Brockman, 1988, 1998, 1999; Durack, 2004, 2001, 2006; Howard, 2004, IEEE, 1977, 1979; Porter, 2005). Both legal studies and TPW have examined the copyright-and-digital-writing problem from within their respective methodological habitats. But so far no one has attempted to connect the two fields in order to locate a broader and deeper perspective on this problem. *No one has studied the copyright problem as a problem of invention rather than a problem of law.*

Connecting these two fields might be helpful because there is some commonality between legal studies and TPW beyond a simple interest in the copyright problem. As Haller (2000) points out, rhetorical considerations and design heuristics overlap. Similarly I posit that rhetorical considerations and copyright law overlap because like design heuristics, *copyright law is a system of invention organized by rhetoric*. In this chapter I set forth my assumptions, based on theoretical justifications discussed henceforth, going into this study. Those assumptions are as follows:

1. **Assumption #1 Rhetorical Invention:** Theories of rhetorical invention support the idea that rhetorical invention is not limited to providing strategies for how to arrange, draw from, or discover existing information, but rhetorical invention can also be used to

create new, even novel information and generate new knowledge (Enos & Lauer, 1992, Haller, 2000; Lauer, 1970, 1972, 1979, 2004; McKeon, 1998; Miller, 2000; Scott, 1967; Young, 1978). Thus, rhetorical invention is central to composing processes (DeJoy, 2005; Haller, 2000; Lauer, 1970, 1972, 1979, 2004; Young, 1978).

2. **Assumption #2 Heuristics:** Heuristics can be rhetorical topics (Haller, 2000). Heuristics/rhetorical topics generate rhetorical invention (Haller, 2000; Lauer, 1970, 1972, 1979). Copyright law like design guidelines, ethical considerations, etc., may function as heuristics. Since as stated, heuristics can be rhetorical topics, it follows that copyright-law-as-heuristics can act as rhetorical topics generating rhetorical invention in the composing process.
3. **Assumption #3 Mediation:** Heuristics/rhetorical topics “mediate” the composing process, and as mediational, act as objects that stimulate rhetorical invention (Haller, 2000). Therefore, items which act as heuristics with respect to writing (such as copyright law) are relevant to discussions of rhetorical invention.

Conducting the study helps me explore the validity of these assumptions and develop theory that might add to our understandings in this area. As I explain these assumptions I also provide context for them. Thus, I bring together ideas from rhetoric theory and activity theory to develop a theory of heuristics, including knowledge and understanding of copyright law as mediational means in the

digital composing processes of writers in copyright imbued environments. First, in Part One: Rhetoric Theory, I discuss rhetorical invention's relationship to heuristics. I then talk about rhetorical topics as heuristics. I end part one by connecting Lauer's idea of heuristical thinking to more traditional discussions of "legal reasoning." Second, in Part Two: Activity Theory I give a brief historical overview of AT. I then situate AT in the study of writing in our field. I end this section by connecting Vygotskian AT to a rhetoric and writing version of heuristical thinking. I end this chapter with a conclusion where I summarize how these theories blend together to shape my inquiry.

Part One: Rhetoric Theory

In part one I discuss rhetorical invention's relationship to heuristics, rhetorical topics as heuristics, and I end this section by connecting Lauer's idea of heuristical thinking to more traditional discussions of "legal reasoning."

Rhetorical Invention and Heuristics

In this section I am going to discuss how theories of rhetorical invention support the idea that rhetorical invention is not limited to providing strategies for how to arrange, draw from, or discover existing information, but rhetorical invention can also be used to create new, even novel information and generate new knowledge (Enos & Lauer, 1992, Haller, 2000; Lauer, 1970, 1972, 1979, 2004; McKeon, 1998; Miller, 2000; Scott, 1967; Young, 1978). Thus, rhetorical invention is central to composing processes (DeJoy, 2005; Haller, 2000; Lauer, 1970, 1972, 1979, 2004; Young, 1978). I am also going to discuss how heuristics can be rhetorical topics (Haller, 2000), and that heuristics/rhetorical topics

generate rhetorical invention (Haller, 2000; Lauer, 1970, 1972, 1979). I then connect this to copyright law considerations in digital composing contexts.

Heuristics and theories of rhetorical invention have been connected for a long time in our field. Recall that invention is one of the five well known canons of rhetoric along with arrangement, style, memory, and delivery. There is a centuries old discussion in rhetoric regarding the import and meaning of any of these canons (See Howell, 1956 and Kennedy, 1963). Lauer's connection between heuristics and rhetorical invention is used to make the argument that invention serves not just to draw from existing information, but also to create new knowledge. Young (1978) encourages research in order to extend, test, and explain existing theories of rhetorical invention as theory rather than as simply a pedagogical tool. A theory of rhetorical invention could speak to many disciplines and have transcendancy, as Lauer might say, rather than simply being tied to first-year writing or writing curriculum – as is DeJoy's (2005) focus. Lauer (1970) provocatively states this position as follows: "Freshman English will never reach the status of a responsible intellectual discipline unless both its theorizers and its practitioners break out of the ghetto" (p. 396).⁸ Young suggests that theories of rhetorical invention could inform our understandings of writing in many contexts, including workplace writing, traditional law school writing, community activist writing, and so on. According to Lauer (1970), a metatheory of rhetorical invention might be developed through heuristics. The goal of heuristics or heuristical thinking is to solve problems and provide methods to examine discovery processes. She connects Aristotle's classical rhetoric to the notion that

heuristics can be employed not just to select available means of persuasion, but also epistemically to generate probable knowledge (Enos & Lauer, 1992; See also Miller, 2000; Scott, 1967). Lauer's discussion of heuristics is important to my study, because her definition of heuristics maps onto my understanding of copyright law.

Lauer argues that we should develop theories to evaluate the adequacy of heuristics, and offers an model for doing so based on whether the heuristics under examination have:

1. transcendency,
2. flexible direction (provide a "clear sequence of operations"), and
3. generative power (Lauer, 1979, p. 268).

As stated, whether heuristics-as-methods-of-rhetorical invention provide both strategies to generate new knowledge *and* select persuasive arguments has been a matter of dispute. In the 1970's Janice Lauer and Ann Bertoff engaged in a scholarly debate on the issue of problem solving, heuristics, and the teaching of composition. Two decades later, Enos and Lauer (1992) acknowledged that "although there is no doubt that the meaning of heuristic has grown in sophistication and importance, its centrality to rhetoric and composition comes as no new phenomenon" (p. 79). Janice Lauer (2004) documents the debates among rhetoric scholars regarding the nature of rhetorical invention, its purpose and epistemology. Her listing of the differing theoretical views on the purpose of rhetorical invention ("to lead to judgments, reach new insights, locate arguments to support existing theses, solve problems, achieve identification . . . locate

subject matter for texts" [p.3]) fits neatly into the two senses of rhetorical invention discussed by Carolyn Miller (2000): invention-as-novelty and invention-as-discovery.

Although Miller's discussion of novelty and discovery takes place in a different context, the context of *the hunt*, as I will enumerate her argument is very pertinent to this study for two reasons. One reason is that the issue of novelty and discovery maps on to like discussions in legal studies regarding patent law and copyright law. Patent and copyright law overlap in the same way as do novelty and discovery. Patent law explicitly requires novelty for an item to be patentable, while copyright law does not. Copyright law privileges "transformative" use (as producing something new enough to be copyrightable). In order for a use to be "transformative" it must derive from an artifact that preceded it; thus the "discovery" element of copyright law. Yet, there is always overlap and difficulty in defining novelty and discovery. The fact that Miller discusses ancient rhetorical concepts, and these concepts connect to patent and copyright law in a very fundamental way, is worth noting for reasons I explain in my data analysis chapters.

The second reason Miller's (2000) argument is pertinent is because of our developing notions of remix in digital composing contexts. What is a digital composition? What arguments, decisions, and origins underlie the typical webtext? For example, in Leslie's webtext depicted in Figure 2.1, she considers a number of factors as she composes, one of which is copyright law. She states that her webtext is composed of "100 different pieces." These pieces were cut

and pasted from multiple sources. Leslie could not exactly recall where each image came from, or where every idea derived. In the context of webspace as commonplace, how might our understandings of authorship change due the changed nature of writing in the 21st century? These are huge questions that I hope to speak to in my data analysis chapters. In other words, it appears that our most ancient theories of rhetorical invention might provide understandings of contemporary “remix.” Miller’s discussion of discovery and novelty reminds me, in the abstract, of Lessig’s discussions of remix culture. In rhetoric theory, the question is whether rhetorical invention includes the discovery of existing information, or is it a generative act of insight, originality, and novelty? My position here, deriving from conceptions far before Lauer’s, is that it can be both.

The Latin and Greek verb “invent” originally held the sense of both novelty and discovery; The Aristotelian concepts of topos or topics and commonplaces as interpreted by Richard McKeon (1998) and Miller (2000) left space for both managerial (discovery) and generative (invention) functions; With origins in “place” literally, the Aristotelian concept of topos serves as a spatial metaphor, and connects to Aristotle’s term ethos, “its early sense being ‘haunts’ or ‘the places where animals are usually found’” (Miller, 2000, p.139). The conjectural paradigm “may be the oldest act in the intellectual history of the human race: the hunter squatting on the ground, studying the tracks of his quarry” (Carlo Ginzberg cited in Miller, 2000, p.138). Carolyn Miller (2000) carefully links the use of hunting imagery to Renaissance vocabulary of invention (relying in part on Ong). She connects the hunt to the venatic or conjectural worldview and the quality of

metis, “a quality frequently attributed to Odysseus, the polymetic, or many-skilled, the paragon of craftiness and cunning” (p. 138). I think perhaps as we examine the inventional strategies of digital composers in copyright imbued environments, this concept of *metis*, the qualities of craftiness and cunning, might prove useful.

Venatic imagery persists in Cicero, Quintilian, and Aristotle’s work (p. 139). The hunting imagery reminds us that in the original concept of invention, it was conceptualized as a habit of mind that brought together both the familiar and the unfamiliar – one hunts in a familiar location for something one expects to find—but has not yet found. Yet, sometimes when hunting for thing A, a person instead finds thing B. However, the finding of thing B is not totally unexpected, although it might be surprising. The act of hunting, like the act of researching, like the act of digital composing, is an act of *discovery in context*. As Carolyn Miller (2000) argues, “To be rhetorically useful, then, as well as comprehensible, novelty must be situated. Rather than offering the radically new, it must occupy the border between the known and the unknown” (p.141). Miller’s careful argument makes visible that “invention [as in novelty] and discovery are not so different . . . what the hunter finds is never completely unexpected but may often be startling or surprising” (Miller, 2000, p.143).

That discovery and novelty are not so different is present in McKeon’s (1998) observation of the paradox in commonplaces. Richard McKeon refutes the traditional notion that commonplaces serve only as catalogs of “prior knowledge and fixed clichés” (cited in Miller, 2000, p.132). Instead, as Miller, he sees the *topos* as places potentially leading to insights and novelty.

Commonplaces are “literally” places where the familiar and unfamiliar can be brought together – through an exploratory combining of the new with the existing, McKeon argues that the commonplaces’ concept contains a paradox where the *topoi* can be both generative and managerial, novel and serving decorum, inventing and rediscovering, simultaneously (Miller, 2000, p. 132). We saw a good example of the digital commonplace in Leslie’s webtext.

Haller (2000) refers to invention as the “generation, evaluation, and selection of verbal arguments” (p. 354) and therefore supports a broader meaning of the heuristic function beyond “a formulaic system for communicating existing knowledge” (Enos & Lauer, 1992, p. 82-83). As Enos and Lauer point out, “from this perspective, rhetoric can not only be a way of arguing but can also generate its own way of knowledge, its own kind of epistemic processes” (p. 83). Our theories of rhetorical invention are our epistemologies, or the core of our methodologies as researchers in TPW and/or R&W. This connection is easy to see through Miller’s (2000) discussion of *the hunt*. On the pragmatic level of institutional writing instruction, if our theories of rhetorical invention serve as methodologies, and we wish to teach writing students to generate new knowledge, rhetorical invention is at the very center of our curriculum and pedagogical approaches as Young (1978) states.⁹

Rhetorical Topics as Heuristics

Remember that my second assumption going into this study is that heuristics, which I established above as an element in our understanding of rhetorical invention, can be rhetorical topics (Haller, 2000). In this section I want

to support my assertion that rhetorical topics and heuristics can be the same thing and as such are relevant to the writing process. I am going to support my assertion by describing in more detail what Lauer (1979) might call the “flexible direction” of heuristics, i.e. heuristics as a sequence of operations or a list of elements under consideration during the composing process.

In setting forth my analytical framework (heuristic) for the understanding of digital composing processes, I ask the reader to recall that Flower and Hayes’ (2003) cognitive process theory rests in part of the notion that writing processes “have a hierarchical, highly embedded organization in which any given process can be embedded within any other” (p. 274). They characterize writing processes in very general terms of planning, translating, and reviewing. Planning, translating, and reviewing have flexible direction and as such compose the heuristic used by Flower and Hayes to research and understand composing processes. This is their heuristic for invention. For Flower and Hayes planning, translating, and reviewing are recursive actions that writers use to accomplish their overriding goals of producing a completed text.

Instead of focusing on planning, translating, and reviewing, I focus on writers’ motivations and considerations as they select content for their web compositions. My heuristic for invention looks different than Flower and Hayes’. While I do not use Burke’s (1966) analytical framework per se for understanding composing processes, i.e. his dramatisic pentad of heuristic probes: “act, scene, agent, agency, and purpose” (p. 37), his method does provide a foundation for my study in that like Burke, I examine human behaviors and motivations in

writing decisions. The work of Odell, Goswami, and Herrington (1983) also provides a foundation for my focus in this study since they too looked at motivations for writerly decisions.

To understand my heuristic probe in this study, it is helpful to think of rhetorical invention as a subset of rhetoric (since it is one of the five canons), and of rhetorical topics as a subset of rhetorical invention. Like heuristics, rhetorical topics serve both to find persuasive arguments and to generate new knowledge. Having an analytical framework that includes rhetorical topics helps me conduct data analysis of participant interviews by facilitating the ability to break a whole into parts.

Cynthia Haller (2000) is the researcher who connected rhetorical topics and heuristics in the context of rhetorical invention and composing. She pursued a line of inquiry similar to mine by exploring the intersection of rhetorical invention and heuristics in her study of design heuristics as mediational in the composing decisions of a team of four computer science students. In her study, using nonparticipatory observation methods, Haller (2000) examines the influence of information system cliché design heuristics on the composing choices of four students in a Software Design and Documentation course. She maps *design heuristics* onto rhetorical topics, finding that both are systems of invention, and I would like to do the same type of exploration instead mapping *copyright heuristics* onto rhetorical topics.

Recall that my second assumption states that copyright law like design guidelines, ethical considerations, etc., may function as a heuristic. Since as

stated, heuristics can be rhetorical topics, it follows that copyright-law-as-heuristics can act as rhetorical topics generating rhetorical invention in the composing process. Bizell and Herzberg (1990) say that Chaim Perelman, a Belgium lawyer, and his collaborator Lucie Olbrechts-Tyteca found that actual arguments made by judges, philosophers, politicians, and others were “strikingly similar to classical topics” (p. 1066). Haller (2000) sets forth a similar argument with respect to design heuristics. I use her argument and map that onto copyright heuristics. Haller points out that design heuristics are similar to rhetorical topics because like topics, design heuristics generate invention, are applicable across a number of situations, and like special topics as described by Aristotle, are bound to certain audiences. The same is true with copyright law. Copyright law is a heuristic or list of considerations at work if one wishes to know the legality of a use. Copyright law is an abstract concept but is applicable across a number of situations. And like Aristotle’s special topics, copyright law is bound to a special audience, usually in the purview of copyright lawyers, but is increasingly in sight of digital composers. To further connect Haller’s discussion to my discussion here, two of Haller’s observations can be mapped onto Lauer’s (1979) metatheory for heuristics: generative power (Haller asserted that design heuristics generate invention) and transcendency (Haller said that design heuristics are applicable across a number of situations) leaving Lauer’s concept of heuristics as a series of steps or a sequence of operations (flexible direction) as an addition to Haller’s description.

Based on the pilot study I conducted (discussed in Chapter Three), I also add that a heuristic might be evaluated by its ability to provoke legal reasoning, or highly analytical and systematic weighing and balancing of elements, especially when composing in copyright imbued digital environments. Legal reasoning at its best, is informed by *metis*, craftiness and cunning. I explain legal reasoning a bit more later in this chapter. For now, I need to have some kind of framework for what a heuristic might look like if I see it when conducting this research – this is why rhetorical topics are useful because they provide a framework. So, taking Haller’s description of rhetorical topics as heuristic together with Lauer’s, plus my assertion due to the pilot study, I enter this research with a working definition of heuristics mediating rhetorical invention or heuristical thinking as drawing upon rhetorical topics, and as such serving as concepts that when invoked by digital writers include these qualities:

1. transcendency
2. flexible direction (has steps, sequencing, or a hierarchy)
3. generative power
4. provokes weighing and balancing of a number of variables (we might consider *metis* here—I will need to further explore this in data analysis)
5. for special topics, are tied to special audience

I summarize my theory of heuristics by stating that a heuristic is a system of invention organized by rhetoric. My heuristic probe of digital composing processes in this study then, has these five qualities. Based on the pilot study, I developed a detailed list of rhetorical topics that mediate digital choices, including

elements like copyright law, design, and ethical considerations. I discuss this in Chapter Three.

Connecting Lauer's Heuristical Thinking to "Legal Reasoning"

Lauer's theory and explanation of rhetorical invention as heuristical thinking echoes in many ways the systematic analytical thinking, or legal reasoning taught in law schools. This should not be surprising since rhetoric has deep and complicated connections with the law (Bizell & Herzberg, 1990; Howell, 1956; Kennedy, 1963; Perelman, 1980, 1963, 1967). Chaim Perelman (1980) in his chapter "Legal reasoning" writes: "Legal reasoning is thus a very elaborated individual case of practical reasoning, which is not a formal demonstration, but an argumentation aiming to persuade and convince those whom it addresses, that such a choice, decision or attitude is preferable to concurrent choices, decisions and attitudes" (p. 129). Lauer (2008) might say legal reasoning is based in rhetoric because it concerns itself with probable knowledge. Not much recent scholarship exists exploring the relationship between legal reasoning and rhetoric, but as stated the connection is very deep. When discussing the three principle types of speech, deliberative, judicial, and demonstrative, Kennedy (1963) states "Since judicial oratory could more easily be reduced to rules than the other two, most treatments of rhetoric concentrate on speeches delivered in courts of law" (p. 10).

The concept of legal reasoning is important to this study because I examine how copyright influences digital writing among a group of writers. If these writers are making composing decisions based on their understanding of

copyright law, than they might be doing something similar to what attorneys do – what I call legal reasoning or thinking like a lawyer. Recall that by blending together Lauer’s characterization of heuristical thinking with points made by Miller (2000), I came up with a list of defining elements for a heuristic that includes transcendency, flexible direction, generative power, qualities of *metis*, and for special topics, is tied to special audience. Tiersma (2008) states that legal reasoning is conceptual rather than textual (although it relies on texts), and involves the analytical process of examining several texts for evidence of certain salient features, and then finding connections among the issues thus formulating principles that can be applicable across a number of situations (Lauer would call this transcendency). What Tiersma describes as the garnering of salient features across texts, is referred to as “issue spotting” in first year law school curriculum. The importance of determining issues has very deep connections with *stasis* theory in traditional rhetoric which in turn is closely tied to invention: “Invention . . . comes first and is concerned with the subject matter, and finding out the question at issue, which is called the *stasis* or *status*, and the appropriate arguments to use in proof or refutation” (Kennedy, 1963, p. 10; See also Lanham, 1991 and Howell, 1956).

The law relies on precedent and in order to extract a precedent from judicial opinions, “The rule or principle of the case must be synthesized by analyzing all the opinions, and it is therefore relatively abstract and somewhat malleable” (Tiersma, 2008, p. 137). The Carnegie Foundation for the Advancement of Teaching extracted certain characteristics defining “thinking like

a lawyer” that include “habits of mind” such as understanding the law as rational, setting aside personal views of justice and compassion, and categorization and discussion of persons in highly generalized, abstract terms. In law school we talked about “plaintiffs” and “defendants,” using the Greek symbol pi π for plaintiff, and the delta symbol Δ for defendant. “Legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem” (Williams, 1991, p. 6).¹⁰ Such habits of mind also include deferring to the rule of law rather than personal ethics (Sullivan et al., 2007). Apparently this mode of thought among lawyers has been an issue of rhetoric for a very long time. I think it has to do with what Kennedy might call the seductive powers of rhetoric:

No rhetoric can be better than the character of its orator, and sometimes it seduces him. A serious lack of moral responsibility becomes evident in some later Attic orators and persists in most of Latin oratory so that even Cicero could boast with some satisfaction of throwing dust in the eyes of a jury in defense of an unworthy client. (Kennedy citing Quintilian p. 24)

Cicero’s reference to “throwing dust in the eyes of a jury” brings to the surface possible connections between legal reasoning and its subsequent performance (the legal-rhetorical performance based on but inseparable from this reasoning): a performance informed by *metis* – where one makes things appear other than what they are – i.e. “throwing dust.” The quality of *metis* can be used to seduce. The abilities to successfully argue any point or any position regardless of your personal beliefs must draw on *metis*.

Legal reasoning then has all the elements of heuristical thinking in that it has generative power, transcends particular contexts, has a sequence or

hierarchy of thinking processes, involves the weighing and balancing of issues (potentially informed by *metis*), and is tied to special “expert” audiences.

Both legal reasoning and heuristical thinking rely on frames of reference that mediate a digital writer’s composing behavior. Figure 2.2 illustrates what it might look like in a first-generation activity theory triangle (explained later in this chapter), for legal reasoning and rhetorical invention to be positioned as types of heuristical thinking where the heuristics are acting as mediational means. If professional writers are considering copyright law as they

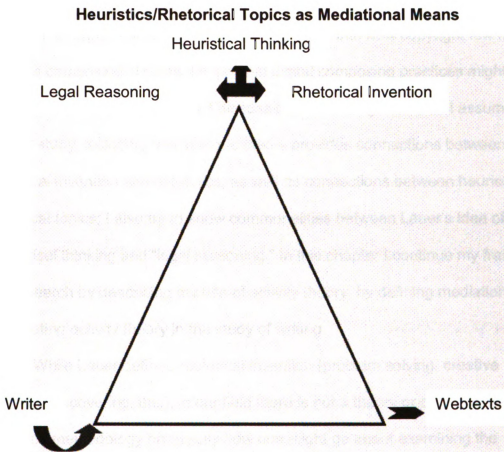


FIGURE 2.2. Heuristics as Mediational Means.

compose, they are either doing something similar to “thinking like a lawyer” or they are doing something different (or both). Since my main research question in this study is to examine how the law influences digital composing, it is important to understand how professional writers think about and consider the law as they compose. Reflecting on what it means to “think like a lawyer” provides a point of comparison.

Part Two: Activity Theory

So far in this chapter I explain my theory of the webspace as commonplace, and connect the idea of remix to theories of authorship, thus arguing that digital composing begs for an inquiry into how copyright law might mediate composing choices. I imply that digital composing practices might also require we redefine authorship. I discuss the underlying theoretical assumptions for this study, including how rhetoric theory provides connections between rhetorical invention and heuristics, as well as connections between heuristics and rhetorical topics; I also try to show commonalities between Lauer’s idea of heuristical thinking and “legal reasoning.” In this chapter I continue my framing of the research by describing my use of activity theory, by defining mediation, and by situating activity theory in the study of writing.

While Lauer defined rhetorical invention (problem solving, creative thinking, discovering, etc.), in our field there is not a theory or clearly stated research methodology on exactly *how* one might go about examining the processes of rhetorical invention – at least using the terminology of rhetoric. We have theories on how to do or teach rhetorical invention and how to define it (See

Lauer, 2004, for an exhaustive list of examples), but we lack a theory or method for separating out rhetorical invention in the activity of writing in order to research invention – this is where activity theory proves useful.¹¹ I use activity theory as an analytical framework (Foucault might call this a dividing method), a method of separating out and mapping elements in the activity of digital composing, and also as a community building method, to view the activity of writing in a system.

Ultimately I use activity theory for two reasons. One, it provides the theory of mediation and a useful method for mapping mediational means in the activity system of writing. The concept of mediation in turn is useful for explaining behavior, cultural movement, cultural change, even individual change and learning that is unexplainable in the traditional behavior or social science stimulus-response model. Explanations grounded in activity theory can assist understandings of digital writers' lawfulness-unlawfulness (why won't digital writers obey copyright law?). Activity theory can also help us understand political action in the area of copyright restraints on free expression, and changes or proposed changes in the copyright law itself. Two, Lauer's theory of rhetorical invention as epistemic and Vygotsky's theory of the activity of higher intellectual processes share some features creating a good match between activity theory and the desire to research rhetorical invention. In this section I attempt to make the commonalities between Lauer and Vygotsky visible in order to work toward a theory of how one might approach researching invention in the context of writing activity.

I realize that some might find it abrupt for me to discuss Janice Lauer and Lev Vygotsky in the same sentence. But the connection here should on the surface at least, be crystal clear. Lauer (1970) encourages us to develop a transcendent, generative theory of rhetorical invention, but informs us that in order to do so we must look outside rhetoric. To help us along this endeavor, she suggests an especially appropriate field to examine in order to develop our metatheory of rhetorical invention might be psychology. She thus supplies almost 200 bibliography entries from psychology scholarship especially with respect to creativity and heuristics. Among these bibliography entries are articles between the dates of 1931-1968. None of them are attributable to Vygotsky although he died in 1934. However, “many of his publication dates both in Russian and in English, are contemporary” (Glick, 1997, p. v). *Mind in Society* wasn’t published until 1978. Therefore he was unlikely to be expressly referenced in Lauer’s bibliography because she would not have had access to his work at the time she wrote her dissertation or the CCC’s article, “Heuristics and Composition.” It has taken many years for us to discover Vygotsky’s work and find its relevance to our inquiries in rhetoric. In fact, Vygotsky’s relevance is revisited in my data analysis chapters.¹² That stated, in this section I begin by providing a brief history of activity theory and then spend a bit of time defining mediation since the concept of mediation is central to my study.

Overview of Activity Theory History

I’m going to briefly review the history of activity theory in order to provide context and introduce you to the different triangle-figures that I use. Lev S.

Vygotsky's proposals are considered to be the foundation of what we now call activity theory (Roth & Lee, 2007). While I frequently refer to "activity theory," this theory is commonly referred to as sociocultural activity theory or cultural historic activity theory (CHAT). Because one of the basic propositions of activity theory is that behavior cannot be understood without understanding the history of behavior, and likewise culture cannot be understood without understanding the history of culture, it is fitting that I employ the tenets of this theory by providing the reader a brief historical context. Vygotsky developed the concepts of mediation and internalization. His two students, A. N. Leont'ev (1978) and Aleksandr Luria continued developing Vygotsky's theories after his death. Vygotsky was mainly interested in the development of individuals, and that was what he studied – often individual children and sometimes adults. Vygotsky's theory is often referred to as first-generation activity theory. His students Leont'ev and Luria continued his work and added the cultural, societal, and historical dimensions to Vygotsky's theories – thus emerged what is sometimes referred to as second-generation activity theory (Roth & Lee, 2007).

Yrjö Engeström is the major proponent of second-generation activity theory. His work has contributed greatly to the spread of activity theory across disciplines; however, Roth and Lee (2007) report that historians likely attribute Michael Cole (1984, 1988) as one of the most influential persons who brought activity theory to Western scholars.¹³ Contemporary scholars in R&W as well as scholars in other disciplines have continued to revise and remediate the activity theory triangle (See Witte, 2005 and Spinuzzi, 2003 for recent examples). As I

introduce the triangle-figures in this chapter, I note how they are situated in the history of activity theory.

What is Mediation?

A key element of activity theory is the idea of mediation. The idea of mediation breaks down the barriers between the individual mind and culture/society (Engestrom,1999). “This expansive potential is evident if we look at the notion of *control*” (p. 29). The traditional framework existing in the social sciences and psychology sees humans as either controlled from the outside by social structures or controlled from the inside by biological urges or genetic makeup. In a framework that sees humans as controlled from the outside, transformations of a system which emanate from the bottom of the social hierarchy remain a mystery (Engestrom uses the examples of the Berlin Wall's fall and the release of Nelson Mandela). In Figure 2.3, the traditional social psychology model for understanding human behavior appears showing the two components that influence behavior – one the person, or two, the environment.

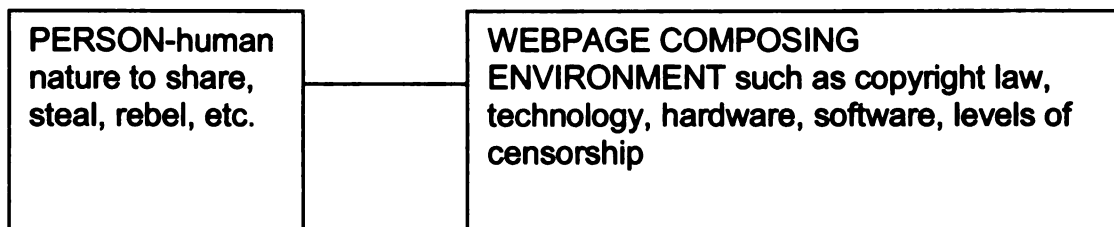


FIGURE 2.3. A Traditional Social Science Stimulus-Response Model. In a traditional social psychology framework, the person (as a container of variables) coordinates a task with the environment. Copyright law is part of the environment, just one part that the actor takes into account when composing for the web.

In the framework that sees humans as controlled from within (for example legal scholar Jessica Litman [2004] argues that individuals violate copyright law because it is *human nature* to “share”), biology or “inherent free will” are the only explanations offered (Engestrom, 1999, p. 29).

Mediation is a particular mode of organizing behavior that coordinates between the behavior and a mediating structure that is not necessarily part of the inherent task domain (Hutchins, 1997, p.338). So for example knowledge and understanding of copyright law as a mediating structure (or a heuristic) might be coordinated through mediation when a human actor is composing a webpage. The copyright law heuristic is not part of the inherent domain of composing webpages. It doesn't necessarily show up in the finished product. In Figure 2.4 below I have expanded the simple stimulus-response model shown in Figure 2.3, in order to illustrate how copyright law might function as a mediating structure. Figure 2.4 is based on Leont'ev's (1978) first-generation activity theory triangle.

Copyright Law as Mediation Means

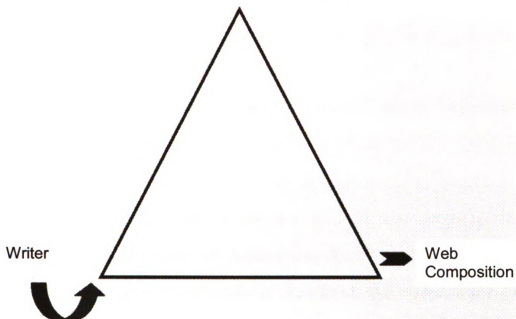


FIGURE 2.4. Copyright Law in a Generation-One Activity Theory Triangle.

Although copyright is a *law* its mediational role depends on the logical affect the human actor allows it to have in her digital composing processes.

If copyright law is mediational it is a tool (Engestrom, 1990). If the writer is unaware of the law, for that actor the doctrine is neither a mediating structure or part of mediational performance (although it might be a rule). In Figure 2.5 I provide a widely disseminated generation-two activity theory triangle which adds cultural, societal, and historical dimensions to earlier theories. Bracewell and Witte (2003) point out some problems with activity theory, including that Engestrom's second-generation expanded triangle has no place for examination

of the relationship between the different non-mediational positions and each other. Likewise, Engestrom's triangle does not provide a method to examine the relationship between mediational positions and non-mediational positions (i.e. the relationships between rules and tools).

While Engestrom (1990) spends time explaining tools as mediational, he does not robustly discuss differences between rules and tools. His triangle offers an interesting platform to theorize how copyright law might shift its position on the triangle from rule to tool. If copyright law is a rule, while it isn't mediational it might impact the human actor with legal consequences at a time after the webpage is composed. The writer who is unaware of legal restraints loses the freedom to chose what if any impact copyright law might have on him. But in a mediated performance, "the actor does not simply coordinate with the task environment instead, the actor coordinates with something else as well"

Copyright Law as Mediation Means

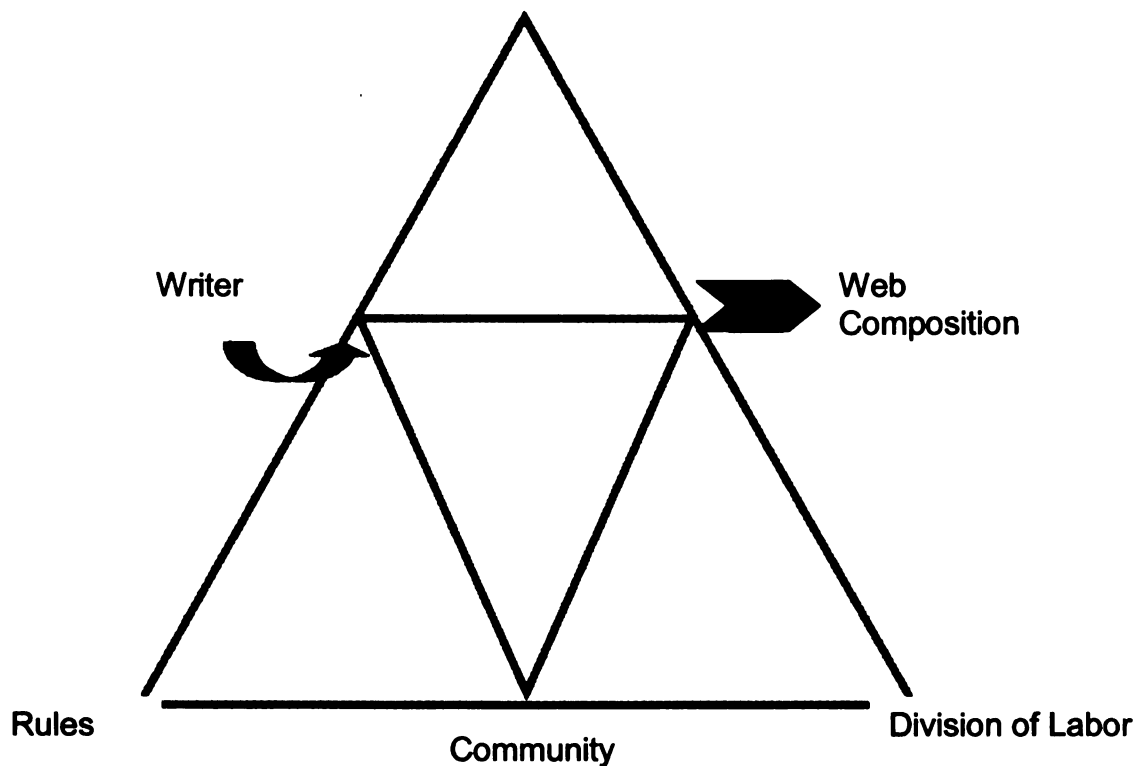


FIGURE 2.5. A Generation-Two Activity Theory Triangle. Above is a second-generation activity theory triangle showing the additional cultural, social, and history dimensions added to Vygotsky's original proposals.

(Hutchins, 1997, p.338). For example, Leslie is aware of copyright law as she selects content for her web composition. However, she weighs and balances her risk of being held accountable for her educational use, and decides design and ethics trump copyright law. She uses filters on the images not to evade copyright holders, but to protect individuals' privacy. For Leslie, her knowledge and understanding of copyright law is mediational – is a tool, not a rule dictating her composing choices.

As Haller (2000) points out, the arguments facilitated by the mediating heuristic (in her study a design heuristic) are erased in the finished text. So when one examines the deliberations that go into composing decisions, instead of analyzing digital writers as controlled by either biological urges/natures or the environment, Vygotsky's formulation of mediation allows humans to control their own behavior from the outside "using and creating artifacts . . . Activity theory has the conceptual and methodological potential to be a pathbreaker in studies that help humans gain control over their own artifacts and thus over their future" (Engestrom, 1999, p. 29). In Leslie's case, there is a heuristic at work mediating her choices. But that heuristic is complex and is created at least in part by Leslie, not legislators. Copyright law is just one rhetorical topic at work in the heuristic mediating Leslie's composing behavior.

The concept of mediation is particularly helpful because the functioning of copyright law in the composing process maps closely onto the functioning of Vygotsky's notion of mediational means. In his experiments Vygotsky uses three key methods with subjects in order to observe the functioning of mediational means in problem solving activity. He disrupts routine methods, provides more than one route to solve a problem, and poses tasks that exceed the subject's knowledge and abilities. Vygotsky (1999) describes his methods as follows:

Wishing to study the internal structure of higher mental processes, we usually do not limit ourselves to presenting the subject with simple stimuli (regardless of whether the stimuli are elementary or the tasks complex) to which we expect a direct response. We simultaneously present the subject another series of stimuli that functionally must play a special role – must serve as means for organizing his own behavior. In this way, we study the process of solving the problem with the use of certain ancillary means, and the

whole psychological structure of the act becomes assessable to us over the whole course of its development and in all the uniqueness of each of its phases. (p. 59)

By questioning participants about their composing choices in light of copyright law, I find that copyright law's existence and potential imposition in the composing process provides a method to test participants' problem solving strategies. First, like one of Vygotsky's key methods, writers' copyright law considerations disrupt routine methods of problem solving. Instead of only considering design heuristics when composing, writers also find themselves considering copyright law separately from design. Examining writers' thinking here provides a view into rhetorical inventive processes.

Second, because of the probability calculations that are usually made when considering the application of copyright law or the chances of being held accountable for its violation, the law's imposition into the composing process also provides a variety of methods or routes to solve a single problem. This problem of choice provides a view into the use of probability considerations (and its relationship to *metis*) by digital writers. These probability considerations may or may not be informed by *metis*, but they are related to *metis* because *metis* involves conjecture. For example, Leslie would chose to password protect copyrighted materials only if it was easy to do so. This was her logical decision based on what she perceived to be low chances of getting caught.

Third, since I examine writers' knowledge and certainty of knowledge regarding copyright law in the context of digital composing, I am able to examine what occurs when a writer needs to accomplish a task that exceeds that writer's

knowledge and abilities. For example, in the pilot study one writer who scores low on copyright knowledge via the survey, spends many hours creating every word and image from scratch so as not to face what she perceives as copyright liability. Another writer who scores low defers to a course assignment sheet rather than try to navigate copyright law and fair use on her own. The research methods I use to make invention visible fit neatly into Vygotsky's methods of measuring and observing mediated activity and are informative to theories of researching rhetorical invention as well as our understandings of how heuristics function.

Connecting Activity Theory to the Study of Writing in Rhetoric & Writing

Activity theory is increasingly used in rhetoric and composition as a framework to study composing processes since composing processes are activity (See Geisler & Slattery, 2007 and Hart-Davidson, 2007 for recent examples). Hart-Davidson justifies his use of activity theory to study writing by pointing to four methodological problems that arise in the research of composing processes:

1. Composition unfolds in an improvisational way in response to a rhetorical situation, social and organization setting, and immediate physical surroundings the writer finds herself within;
2. Composition can take place over relatively long periods of time and in a variety of locations;
3. Composition is typically influenced by or directly involves the efforts of many people, even when a writer is working "alone" or is perceived to be the sole author; and
4. **Composition is mediated by multiple technologies, some of which work in concert with the writer's goals and are therefore fairly seamlessly integrated into composing activity, and some of which profoundly alter or conflict with the writer's goals. (p. 156)**

In my study I examine if and how digital “composition unfolds in an improvisational way in response to a rhetorical situation.” I also approach the research wanting to explore the extent to which knowledge and understanding of copyright law is one of the multiple technologies (mentioned by Hart-Davidson) mediated digital composing.¹⁴ In the beginning of this chapter I stated that one of my assumptions is that heuristics/rhetorical topics “mediate” the composing process, and as mediational, act as objects that stimulate rhetorical invention (Haller, 2000). Recall that I spent some time earlier in this chapter developing my idea of heuristic, and argued copyright law can function like heuristics in the writing process in the same way Haller (2000) found design heuristics to be mediational. Remember that I discussed the webspace as commonplace and asked you to imagine the commonplace as a technology or technique. The same kind of abstract thought is needed to understand heuristics as a structure in the activity theory triangle. And in the case of copyright law, the writers’ knowledge and understanding of the law serves as a part of that hierarchical, generative process at work in the minds of digital composers, according to the way I envision writing processes via activity theory.

However, to problematize this discussion, as explained above, Engestrom’s second-generation triangle provides different spaces for *tools*, which are mediational, and *rules*, which are not. So, under Engestrom’s lens, whether or not copyright law is mediational is going to depend on where it ends up on the triangle – as *tools* represented by some internalized idea of itself (i.e. *knowledge and understanding*), or as *rules* – unmovable words on the page, or

directives, dictating one's writing behavior. My (as well as Lauer's) characterization of heuristics maps onto what I define as tools, while a list of directives, perhaps like the ten commandments (Thou shalt not . . .), are more like rules rather than heuristics. I develop this more in the data analysis section. But going into the research, I ask to what extent does copyright law integrate "seamlessly" into writing activity, and to what extent does it "profoundly alter or conflict with the writer's goals"? *Knowledge and understanding of copyright law* thus potentially serve as one of the mediating "multiple technologies" for the writer, one that assists, hinders, problematizes, blends seamlessly into the improvisation that occurs during composing processes. For Leslie, copyright law presented a problem but one that she overcame by prioritizing design and by weighing her use in an educational context against the risk of getting caught. Because Leslie sees her work as non-threatening to potential copyright holders, for her copyright law blends seamlessly into her composing processes. The heuristic mediating Leslie's composing behavior quashed the law.

Connecting Vygotsky's Activity Theory to Heuristical Thinking in Rhetoric & Writing

Lauer (1970, 2004, 1972, 1979), Miller (2000), and Haller's (2000) discussions of rhetorical invention as epistemic and Vygotsky's theory of the activity of higher intellectual processes share some features making Vygotsky's vision of activity an especially good fit with the desire to research rhetorical invention. The activities Vygotsky studied were what we would call invention: *Vygotsky studied and developed a theory of invention.* The rhetoric-based

theories of invention described by Lauer (2004), Miller (2000), and Haller (2000) include the very Vygotskian notions of problem solving, creativity, the weighing and balancing of differing options, and even concepts similar to Vygotsky's theories of internalization and mediation. What Lauer calls creativity and problem solving, Vygotsky calls the "higher mental functioning." Haller explicitly discusses heuristics as mediational, while Lauer implies that heuristics structure the writer's ability to generate new ideas or think creatively, similar to Vygotsky's notion of a mediating structure. Vygotsky (1997) states that his research has "heuristic significance" because it supports the idea of "the correctness of the structural law of memory in contrast to the law of association" (p. 181). Vygotsky acknowledges although it appears he studies memory, what he really studies is "the active creation of structures" (p. 182). Heuristics are structures.

Lauer called for us to develop a transcendental metatheory of rhetorical invention and invites us to look outside rhetoric to do this. Vygotsky's work certainly seems relevant. Remember much of Vygotsky's theory derived not from studying a large system, community, or organization, but from simply observing individual children or adults attempting to achieve tasks.¹⁵ He notes "for the child, mastery of written language represents a special and exceptionally complex symbolic system of signs" (1997, p. 132), and that the development of written language "presents great difficulties for research" (p. 132) similarly as did Hart-Davidson (2007). Vygotsky went on to state:

The development of written language belongs to the first, most obvious line of cultural development because it is connected with the mastery of an external system of means developed and created in the process of cultural development of humanity. However, for

the external system of means to become a mental function of the child himself, a special form of his behavior, for the written language of the child, complex processes of development are required which we will try to investigate . . . (1997, p. 133)

Echoing Vygotsky in a contemporary voice, Hart-Davidson tells us how helpful AT might be in research on writing. Activity theory lends itself to study how certain heuristics might mediate invention in writing.¹⁶ Lauer states how we might evaluate inventional heuristics, but she did not show us how such inventional heuristics might mediate writing.

Conclusion

In this chapter I have tried to connect ideas from rhetoric theory and activity theory in order to present a theoretical framework for my inquiry. These theoretical tools have framed my research with respect to three main areas of inquiry. One of my research goals is to examine the status of knowledge and understanding of copyright law in the field of TPW as well as in professional writers. Rhetoric theory helps me understand the way individuals consider the law as they compose for the web. Activity theory provides an analytical framework to map out elements in the writing process, and to view writing from various system levels. A second research goal is to investigate the creative thinking processes, or rhetorical invention, of writers in these programs composing webtexts in light of copyright law. The blending of the theories I have discussed in this chapter, especially the concepts of heuristics, heuristical thinking, rhetorical topics, and mediation assist with exploration of this inquiry. A third research goal is to examine what happens to mediational means as writers

leverage them in digital contexts. Here, the activity theory triangle provides a structure that maps out possible movement between mediational and non-mediational means.

CHAPTER 3

RESEARCH DESIGN

In the previous chapter I outlined my theoretical framework for my inquiry as well as my study design. I drew on aspects of rhetoric theory and activity theory as well as Foucault's work. In this chapter I outline the design of my research, and in Chapter Four I begin analyzing the data and discussing findings.

The research goals of this study are threefold. One, I want to examine the status of knowledge and understanding about fair use and copyright law across the field of technical and professional writing as well as in individual writers. Two, I want to investigate the creative thinking processes, or rhetorical invention, of writers in these programs composing web compositions in light of copyright law. Three, I want to examine what happens to mediational means as writers leverage them in digital contexts. Part of my investigation includes probing writers' thoughts, reasoning, and motivations for their own composing choices. This thought process is rhetorical invention and it is also "where texts come from" (Prior, 2004). "When we see that tracing the composing of a text, what classical rhetoric termed **invention**, involved the contributions of multiple people, it becomes clear that tracing the writing process also implicates tracing authorship" (Prior, 2004, pp. 169-170). As I explore digital writers' reasoning for the choices that they made, I also inevitably trace the authorship of their web compositions. As stated in Chapter Two, tracing authorship is always-already an exploration of rhetorical invention.

The larger question in my study is how does law mediate human creativity as expressed in writing? On an even more abstract level, the question is how do objects on the outside, get inside (us), and when they get inside, what happens to them (and us)? This last question was really what Vygotsky (1962, 1978) was looking at. Foucault (1977) looked more at *why* do these objects gets inside us. For what ends. I look at that as well in the data analysis. Further, in my study I look at: if copyright law is not a visible mediator, what other rhetorical topics are? To investigate how writers' knowledge and understanding of fair use is mediating the activity of their composing processes on both an external and internal level, I chose to conduct a mixed methods study (a large-scale digital survey and a small set of interviews) of a group of writers. Since I am also interested in teaching and learning aspects of fair use and digital writing, I selected a group of educational-context writers focused on web-authoring as my population. I chose to study the writers, the students and teachers, in technical and professional writing programs in the US from one view, and from the other view I chose to study an array of student writers from within a single writing program. This chapter describes the research design, including data collection methods, April 2006 pilot study, and data analysis plan, as well as research design limitations (generalizability, reliability, validity).

Research Questions

1. What do writers know and understand about copyright and fair use?
2. How confident are writers in this knowledge?

3. Are writers unable to express themselves fully because of fear of copyright liability, i.e., is their digital “speech” chilled?
4. How important do writers think knowledge of copyright and fair use is to their work?
5. What is the relationship, if any, between knowledge of copyright/fair use, confidence in that knowledge, and levels of “chilled speech” in digital environments?
6. When writers create web texts or write for the web, does their understanding of copyright law and fair use influence the choices that they make?
7. How do writers understand copyright law and fair use as they do rhetorical invention in digital writing?
8. How do writers reshape the law-as-written via their understanding (what happens as the external law becomes internalized)?
9. What other rhetorical topics are at work in writers’ minds as they compose for the web, other than copyright and fair use?
10. What kinds of things do professional writing students need to know in order to be experts after they graduate or when they are writing outside of the educational setting?

Questions 1-5, and to a small degree 9 were investigated in the survey. All of the questions were explored in the interviews, but in the interviews the main focus of inquiry was on questions 6-10.

Research Sites

The research was conducted primarily in two spaces: 1) cyberspace via the online survey; 2) a conference room at a mid-west university where participants attended as students. Reasons are discussed below.

Population Sampling Methods for Survey and Interviews

This section includes a discussion of population sampling methods for the survey and the interviews.

A. Step One: The Survey

The population surveyed was a stratified, random selection of 155 professional and technical writing programs and NCTE writing majors on STC and ATTW membership, and NCTE writing major lists as of September 2, 2007. The lists are maintained by the Conference on College Composition and Communication – National Council Teachers of English (NCTE), the Association of Teachers of Technical Writing (ATTW), and the Society for Technical Communicators (STC). Using these three lists permits population breadth. Technical and professional writing does not have a definitive publication listing member programs. Therefore in order to gather a full-view of such programs it was necessary to piece together a master list based on the membership lists of three lists. Using three lists guards against biases that might arise from using only one list.

Programs were divided into five categories: PhD Programs, MA Programs, Four-Year Programs, Two-Year Programs, and Certificate Programs. A master list was created containing the entire population (N=232). For stratification of the entire population, see Table 3.1.

TABLE 3.1: Stratification of Programs in Entire Population before Random Selection

| N=232 | PhD Programs | MA Programs | Four-Year Programs | Two-Year Programs | Certificate Programs |
|----------------------|--------------|-------------|--------------------|-------------------|----------------------|
| Number | 29 | 61 | 99 | 37 | 6 |
| Total Percent | 13% | 26% | 43% | 16% | 2% |

Ultimately, this was segmented into four lists, with three lists used for the survey in three phases. The stratification was created by taking approximately 20% of the population in each of the five categories in three phases. 20% was not necessarily my goal, but as it turned out if I took 20% (50 programs) I had a chance of obtaining over 400 participants based on my formulation of possible participation. I thought that by requesting participation from 50 programs, I might get about 10 participants per program, thus giving me an N of 500. However, just in case this plan did not work, which in fact it did not, I made space for problems in recruitment by creating insurance samples to be taken in a total of three phases. The reason for three phases was that each phase was successively conducted until I received an initial response to the survey (before attrition) of over 400 participants. The reason for a desired survey sample population of over 400 was to obtain a level of certainty of plus or minus 5% (Babbie, 2001; Lauer & Asher, 1988). However, that number of survey participants was not achieved considering survey attrition. Since the online survey experienced attrition as participants progressed, the reported results on all questions will vary within the tables discussed in Chapter Four. Four-hundred and forty-six (446) began the survey, while 334 finished the entire survey.

I chose to use these membership lists because they efficiently (in few locations) included such programs. Limitations to using this method of population selection are that it only included programs whose representative had voluntarily inputted the required information. When creating the final list I eliminated programs from countries outside the US, programs with no web presence, and members that did not have a program, but instead had a single class in technical communication listed only.¹⁷ Therefore, the population is biased in favor of writing programs that are involved in membership lists and have a web presence – indicating perhaps a bias towards more involved, tech-savvy programs.

B. Step Two: The Interviews

Criterion-based sampling was used for selecting seven interviewees.

Interviewees were selected based on five main criteria, as follows:

1. Students had all taken the survey and indicated there that they were willing to be interviewed regarding their web authoring and that they were or had very recently been students.
2. Students were all from one university, but spanned a broad range of student-subject positions from undergraduate, to recent alum, to a PhD candidate on the job market (See Figure 3.1).
3. Students were all individuals that I knew had an interest in copyright law, either because they had previously asked me a copyright question in a context unrelated to this study, or because we had discussed copyright at a previous time. Even so, one of the students I met for the first time at the interview because we'd only corresponded virtually.

4. Students were all individuals that I had high esteem for as people – for unquantifiable reasons such as their work ethic, their professional ethos, how others' respected them in general, or because I thought them particularly honest and smart.
5. Students were all individuals who, based on the above, I thought would be willing to be generous during the interview, and reliable (they would show up for their interview on time and prepared), and would make good research subjects. On this prediction I was 100% correct.

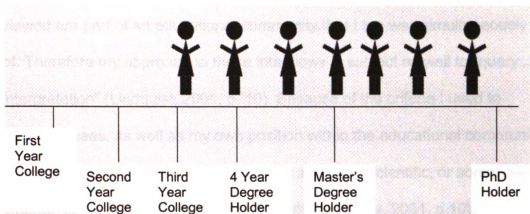


FIGURE 3.1. Studentness of Interview Participants.

In Figure 3.1 appears the “studentness” of interview participants. The term studentness is an allusion to Nancy DeJoy’s (2005) book, *Process This* where DeJoy focuses on how students and their writing have been “othered” in

composition studies. The concept of “studentness” connects to Foucault’s discussion of the ranking and dividing done in disciplines, and will be discussed further in the interview analysis sections. Everyone I recruited for an interview agreed and participated fully. Therefore, the interviewees’ data is biased in favor of students who have some interest in copyright, do web writing, and are reliable. All of the interviewees had taken the survey and knew that this was my area of interest, and so they all knew I was looking for information about copyright and fair use when I talked with them. Since some of these criteria are subjective, though this is not an ethnography, I do not posit that the interviews as I contextualize them offer an objective portrayal of reality. The individuals interviewed are part of an educational community that I too was simultaneously a part of. Therefore my approach to these interviews is subject as well to “query and interpretation” (Lindquist, 2001, p. 10). Because of the criteria I used to select interviewees, as well as my own position within the educational community they too were a part of, “I do not claim to offer a neutral, scientific, or somehow ‘unauthored’ account’ ” of their writerly accounts (Lindquist, 2001, p.10). Nonetheless I run the risk of writing a true and accurate report of these interviews.

I decided to interview only students because I thought they’d be easier to recruit (see Sun, 2004). One reason I thought some of them might be easier to recruit is because of reciprocity and learning issues. Some of the student interviewees are also conducting research, and may have developed a *quid pro quo* attitude. Since they are also beginning researchers, I sensed a greater

willingness to participate due to the desire to gather information and learn about research models. I also believed that they were more likely to be regularly completing a wide variety of web compositions due to course work and part-time employment. Teachers in contrast I thought would be generally creating less diverse kinds of web texts because they would need to be spending time writing journal articles, books, and reports since this is still part of the tenure and promotion process. Therefore, I thought I'd get more variety of perspective and web writing by concentrating on student writers in the interviews.

I did not collect gender, age, race, disability status, sexual orientation, etc. of participants and in fact I changed the gender of interviewees in the write-up. Potential differences based on these subjectivities were not explored in this study. My main reason for this purposeful stance is because I tested knowledge; I wanted to avoid making inferences that one group knew more than another based on such subjectivities. The practice in the social sciences of asking survey questions based on race, gender, ethnicity, and religion requires the operationalization of such "variables" and every metric reinscribes these institutionally sanctioned categories of "difference" again and again. I wanted to avoid doing that in order to sever existing connections between race, gender, ethnicity, etc., and "knowledge." I wanted to avoid having to see any of these categories as independent or dependent variables. I was able to avoid making generalizations in data analysis based on these categories, and instead was able to see other categories of difference emerge. I was able to see four unorthodox categories of difference or cultural positionalities emerge: workplace culture, the

culture of the educational institution, law school culture, and culture involving laws/norms outside mainstream US. I found empirical evidence that a writer's web space serves as a place of colliding and sometimes competing cultures that writers occupy simultaneously.

The reason that I selected seven interviewees was because of time and funding, and to avoid data overload. Conducting just these seven 30 minute interviews yielded 97 pages of single-spaced, 12 point font transcriptions. I also had 57 pages of transcripts from the pilot interviews. After gathering this much data, transcribing it and reviewing it, I felt I had a very good view into the writing process of these digital writers in the context of my research questions.

For purposes of constructing interview questions I collected participant-authored web compositions. In addition to providing the IRB approved interview recruitment language via an email attachment (See Appendix 3.1), I did not otherwise give restrictions on what interviewees provided me. I asked them in an email with the following language:

As soon as you have a minute, I need a URL of some sort of something you've published to the web, or composed for the web - a digital portfolio, teaching materials, Facebook profile, webpage, or something of that nature. I need this before the interview so I can look it over and make up a few questions.

The reason I left open the exact type of web writing requested is because I wanted to see what kind of texts students had written across roles rather than just in the classroom. I thought this might give more insight into student subjectivities. As discussed below, interviewees supplied me with a wide variety of web writing.

Survey and Interview Data Collection Methods

This section includes the data collection methods for the survey and the interviews.

A. Step One: The Survey

Students and teachers in these programs were contacted directly with a recruitment and reminder email. All emails included a link to the online survey. Between September 17, 2007 and November 2, 2007 I sent out a total of 1,935 recruitment emails, with a total response rate before survey attrition of 446, for an overall response rate of 23%. Note that in the first phase I initially attempted to contact program directors and ask them to forward the email to teachers and students in their program with almost no success. In this initial effort the recruitment email did not include a link to the survey. Therefore, that fact along with the disconnect between myself as the survey administrator and the potential participants at the other end of the network, means the response rate can only be an estimate since I didn't have complete control over who received the online survey. While 446 participants began the survey, 334 finished the entire survey. Stratification for the population that finished the entire survey is shown in Table 3.2 in the gray shaded area. The final email reminder was sent out November 19, 2007, and the survey closed November 30, 2007. Therefore, survey data was collected over 11 weeks. 155 programs were contacted via student/teachers, with 64 TPW programs and/or writing majors confirming response, for a programmatic response rate of 41%. 334 students (41%), teachers (47%), and "others" (12%) from 64 TPW programs and/or writing majors completed the entire

survey (See Appendix 3.2 for a list of participating institutions). Differences in the stratification of the entire population and the randomly selected population can be seen below in Table 3.2.

TABLE 3.2: Comparison of Stratified Populations

| | PhD Programs | MA Programs | Four-Year Programs | Two Year Programs | Certificate Programs |
|---|--------------|-------------|--------------------|-------------------|----------------------|
| Entire Population # | 29 | 61 | 99 | 37 | 6 |
| Entire Population % | 13% | 26% | 43% | 16% | 2% |
| Survey Population # | 17 | 19 | 26 | 1 | 1 |
| Survey Population % | 27% | 30% | 41% | 1% | 1% |
| DIFFERENCE% in Survey Population | +14% | +4% | -2% | -15% | -1% |

The main variation between the actual population and the participating population is that PhD programs participated on a significantly higher level than how they appear in the entire population, while two-year programs participated at a significantly lower level. This difference might be expected, since in general individuals in PhD programs are going to value and participate in research more, while the opposite is true for two-year programs. So the explanation could be cultural. Other reasons might explain this as well. Perhaps PhD programs have more technology available, or more technology integrated into the curriculum – making the survey more accessible and more relevant. The reasons for the difference between the actual population and the respondents ultimately remains unexplained but must be taken into account for purposes of generalizability. The study population subsequently is biased in favor of PhD programs and does not have adequate representation of two-year programs.

To collect data, emails were gathered via writing program web sites. If student emails were unavailable, students from those particular programs were not contacted. If a program website did not include student contact information, which was the norm, college/university directories were examined for the possibility of directory information. If student names but not email were provided on program web sites, online college directories were used to locate student emails where available. Therefore, the survey population also contains a bias in favor of web sites that make student contact information visible or available. The survey itself screened out anyone who had not created and published to the web a composition such as a “web page, web space, wiki, blog, page on facebook/myspace or other social networking software application” (See Appendix 3.3 for a copy of the survey).

The survey had six parts and 29 questions total, 15 one part and 14 two part questions. The first part contained three questions and screened the individuals noting whether they accepted the terms and whether they had ever composed and published to the web. The second part asked one question on whether it was more important to obey the law or follow one's conscience (exploring the possibility of a third variable at work in some of my hypotheses). The third part asked a single question on educational level. The fourth part contained six questions measuring whether or not one's digital speech was chilled. In the fifth section of the survey, participants were asked a total of 14 substantive questions on basic copyright law and the fair use four factor test. These questions also explored participants' knowledge of the differences

between unauthorized use via fair use, and authorized use per permission and licensing. For example, a question that tested participant's knowledge of how fair use applies only in the case of unauthorized use was as follows:

If you ask a copyright holder for permission to use their material in your own original web composition, and they say no, this means you absolutely cannot use the copyright holder's material under fair use.

Note that the best answer was false, because fair use does not require permission and is often relied upon when permission is not given, as in the case of the requester's desire to create a parody (See *Bill Graham Archives* [2006] and *Campbell v. Acuff* [1994] for examples). Copyright holders are unlikely to agree to permit someone to use their materials in order to make fun. Some questions in this part were based on existing online quizzes but many also echoed Waller (2006a, 2006b) and Howard's (2004) fair use inquiries. In formulating the questionnaire, I also used my training as a lawyer specializing in intellectual property (particularly fair use), as I am admitted to practice in two states with an active license in one. After each content question, participants were asked how certain they were about their answer, with 1 being "very certain" and 5 being "not certain at all." The idea here was to examine whether a correlation existed between understanding and confidence levels. I was also exploring whether there was some empirical data available to support the general statement that individuals are confused and uncertain about copyright law and/or fair use, an argument used to support the assertion that such individuals are thus

fearful of fully expressing themselves when composing for the web (i.e. “chilled speech”).

In the final four question section of the survey, participants were asked how important they thought knowledge and understanding of copyright law was to their work as digital writers. They were also asked how they primarily described themselves, as students, teachers, or others; they were asked to specify their institution, and finally students were asked if they were willing to participate in an interview. Survey responses were anonymous unless participants volunteered identities

Mainly as a mode to organize my survey questions, I created hypotheses to test. Each variable in the hypothesis had to be operationalized and necessitated the creation of survey questions as indicators. This was incredibly helpful because I was able to scrutinize each survey question to assure it was relevant to my inquiry. I cannot argue that hypotheses testing is a superior method to create truth than any other method. However, it is valued in certain discourse communities such as the social sciences.

HYPOTHESES (see Appendix 3.4 for detailed definition and explanation of each hypothesis):

H1: The more knowledge one has about fair use, the less one’s speech is chilled.

H2: The higher the educational level, the higher the knowledge about fair use.

H3: The higher the knowledge of fair use, the more likely one is willing to see exceptions to obeying the law.

H4: The higher the knowledge of fair use, the higher the certainty one’s knowledge is correct.

H5: The more certain one is in their knowledge, the less one’s speech is chilled.

H6: Persons who believe in exceptions to obeying the law will have lower levels of chilled speech.

Causal Process Model Re: Survey

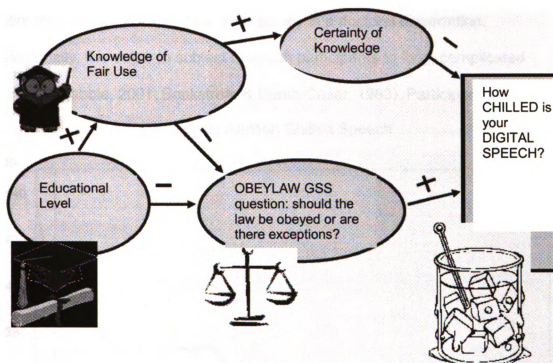


FIGURE 3.2. Causal Process Model Regarding Survey

In Figure 3.2, a causal process model is illustrated that outlines the goals of the survey. This causal process model was created in order to contain and organize survey questions, and in order to reduce problems of data overload. Independent variables are those that cause the dependent variables to change. Generally the independent variables must be read in context with other variables

because, for example, educational level is an independent variable with respect to knowledge of fair use. But knowledge of fair use is an independent variable to certainty of knowledge. So as one reads along the causal chain, the independent variable will change. However, in all cases, chilled speech is a dependent variable.

The scope of the survey was limited because it is unrealistic to explore more than four or five variables via a survey in a doctoral dissertation. Additionally, it is unfair to subject research participants to long, complicated surveys (Babbie, 2001; Backstrom & Hursh-Cesar, 1963). Participant attrition in

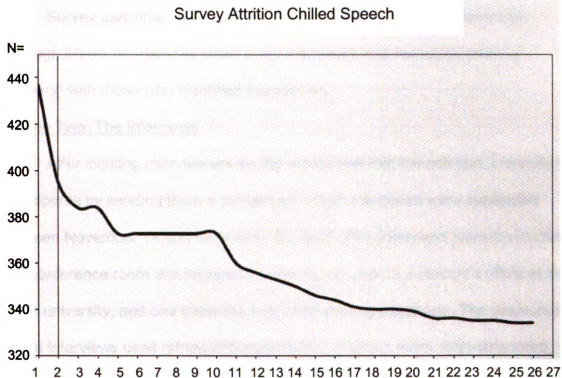


FIGURE 3.3. Survey Attrition. The vertical line above question two indicates the end of the first two screening questions on web composing.

my survey was fairly dramatic (15%), and would likely have been even more dramatic if the survey was longer. Figure 3.3 shows the attrition that occurred after the first two screening questions when N=395, and the last multiple choice question, when N=334. Finally, the scope of the survey was limited because in many respects this study explores unknown territory, and the survey results will hopefully provide evidence of trends and correlations ripe for further explorations. Because of the limitations inherent in using the survey method (eliminates context, details, richness of data), I was unable to explore all of my research questions by the survey alone.

Survey participants were offered no payment nor other remuneration although I have promised to share research results and resources (survey answers) with those who identified themselves.

B. Step Two: The Interviews

After locating interviewees on the survey that met the criterion, I recruited participants by sending them a recruitment email. Interviews were conducted between November 14 and November 30, 2007. Five interviews were conducted in a conference room at a mid-west university, another in a student's office at this same university, and one interview was conducted by telephone. The discourse-based interviews used retrospective accounts of writing, were semi-structured, and used strategies of stimulated elicitation (Prior, 2004). Discourse-based interviews (Odell, Goswami & Herrington, 1983) were used in hopes of eliciting tacit¹⁸ knowledge and better understanding writerly motivations behind specific choices made during the digital projects. For example pilot study participant

Shauna (pseudonym) especially focused on design issues for her composing decisions, even expressly denying early in the interview that copyright influenced her decisions in any manner. But when asked about alternative choices, she acknowledged that copyright was a consideration. Shauna had chosen visuals of generic media, a visual of a generic jump drive, for one of her web compositions, and when asked if she would choose something with a trademark or branding instead, she responded that she'd carefully chosen the jump drive and other images because they were generic in order to avoid copyright liability.

Retrospective accounts of writing have limitations in that they rely on people's memories. Prior (2004) reports that people may forget the moment-to-moment details that went into their writing decisions. He states that the farther between the act of composing and the account, the greater the chance that details will drop out and new details will be added to suit the "social situation and time in which they are produced" (p. 185). While I could have used observation or talk-aloud protocol, I instead opted to use retrospective accounts in order to apply discourse-based strategies. Further, both observation and talk-aloud protocols, as well as screen capturing and diary studies have their limitations especially with respect to time and data-overload (sheer size of data on one's hard drive). One of my interviewees reported having at least 150 production hours in one of her compositions, not including all the times she'd presented and further revised this particular piece. As my interviewees noted and as Prior (2004) argues, texts often contain a multiplicity of authorship not observable by watching a single writer in a single context. It was common for the interviewees

to have pieces that were previously authored by unknown persons, and then taken over by them at a given time (organizational web pages lend themselves to this). It was common for the interviewees to present for consideration in this study web writings that had been revised over a period of years, and had transformed in purpose. Leslie, for example, created a digital-visual composition for a graduate course that was later integrated into a FYW course she taught. Jessie, a soon-to-be PhD student, created a digitally-remixed movie for a course assignment that ended up being a showcase piece for her digital portfolio and the center of many conference presentations as well as a journal article. It was not uncommon for interviewees to be at least partially supplied with content by others, and complete only the arrangement and style aspects of authorship. Heather, an undergraduate student working across the university in different fields, was always supplied with content by others for her organizational web writing. Amanda, a recent four-year graduate working for a national health organization as an online communication specialist, was supplied by her organization and its constituents with content for web compositions.

One special strength I found when using the retrospective account was the ability to learn when web authors had forgotten where they had obtained materials that appeared in their own web compositions. These interviewees, such as Leslie and Amanda, knew they had not created certain visuals in their own digital texts but could not remember where these items had been obtained. The fact that this phenomena occurred is noteworthy since it challenges attribution traditions as we understand them in alphabetic text contexts, and would not have

been discovered without use of a retrospective account. Such composing practices inform our understanding of “common knowledge.” Stephen Weil (2001), Emeritus Senior Scholar in the Smithsonian Institution’s Center for Education and Museum Studies agrees that our current fair use doctrine is inadequate for visual artists because visuals cannot be quoted, paraphrased, or adequately summarized with alphabetic text. Other’s visuals must be used in their entirety in order to critique or analyze. Before the internet presented a vast array of “the visual,” artists incorporated into their work “nature” because that’s the material they had to work with (See Rife, 2009 for a detailed discussion). Nowadays, one’s original visual art often incorporates other’s copyrighted materials. Weil lists numerous examples including Andy Warhol’s work, NamJune Paik’s Video Flag, and Jeff Koons’ sculpture Kiepenkerl, cast directly from a nineteenth century bronze sculpture that once stood in a square in Munster, Germany. Ultimately, we may have to view a web composition as “a visual” – as far as what that means for copyright, the limits of fair use, and anti-plagiarism practices I will comment on in upcoming chapters when I discuss intersections between common knowledge and commonplace. In further defense of retrospective accounts, in other discourse communities particularly the legal community, retrospective accounts like confessions, testimony, and accounts via deposition are all considered legitimate in even the most high stakes situations of life and death.

Prior to their interviews, students (Leslie, Carey, Jessie, Rob, Heather, Amanda, and Sarah) sent me an email containing a link to at least one self-

authored web space. Since I did not explicitly require students supply websites/web spaces that were completed in class, I was supplied with an array of web compositions that included what I call gift writing (web-writing done for a family member or friend at no or low cost), course project writing, professional portfolios, writing completed as an employee while also a student, writing that had transformed from student-writing to teacher-writing, social network spaces, and (limited) access to a national teacher database of digital teaching material. This wide array of digital compositions that were so readily supplied and the ensuing implications for defining “studentness,” “composition,” “authorship,” “originality,” as well as the way these texts challenge ideas of “beginnings” and “ends” to writing projects, will be discussed later. I reviewed these web compositions in order to formulate interview questions, and subsequently used the compositions as reference points during interviews. I referred interviewees to their web texts as we talked – thus the “stimulated elicitation” aspect of these interviews.

The web compositions were analyzed to generate questions regarding potential tacit knowledge of copyright issues. Questions were also formulated to explore the notion that the finished product hides the rhetorical nature of decisions that went into the text (Haller, 2000). These kinds of questions ultimately examine where web texts come from (Prior, 2004). I examined each web composition or web portfolio, that might contain web pages with or without visuals, videos, flash movies, and power points, looking for presences of copyright law. In other words, *I looked for materials in student web writing that*

were written by someone other than the student. I was to some extent tracing authorship. But this tracing was only a guess until I collected student-accounts.

As web texts were examined, questions asked of each text were:

- 1) What is the context for this web space?
- 2) Who authored the components of this web space?
- 3) Is there material present that might be copyrighted by others – text, visuals, sound?
- 4) If not why not?
- 5) If so, how has the student synthesized these multimedia materials with other material?
- 6) Were strategies used to avoid negative copyright implications?

Examples might be generic representations of name brand items, low pixel or smaller-than-normal visuals, partial and/or short quotations, collages, visuals/sound files that have been modified from what might have been their original form, digital materials that appear to have been constructed from “scratch,” attributions, copyright or use information (creative commons licensing, copyright symbol, terms of use, etc.).

Figure 3.4 is a screen capture from a student web text that was part of the pilot study (Shauna). These visuals were situated on a web page that included the student’s picture and student written text. I do not provide a screen capture of the entire web page in order to protect the student’s identity. I show this in order to walk-through how I derived the questions based on the above protocol. Before

meeting with the student I collected a web text and reviewed it with the above-questions in mind. With respect to Figure 3.4, I knew that the web text was a part of this student's professional-digital portfolio. Upon examining the web text, I deduced the student had not created from scratch any of the visuals depicting media (the floppy disc, jump drive, and so on). Since the "evolution of man" sequence looked familiar, I decided the student had not created that either, but that the sequence had been created by someone else and the student had matched together the media visuals and the evolution of man depiction. As I continued to construct questions for my anticipated interview with the student, I developed questions regarding the student choices. This is how I formulated the questions in each case.

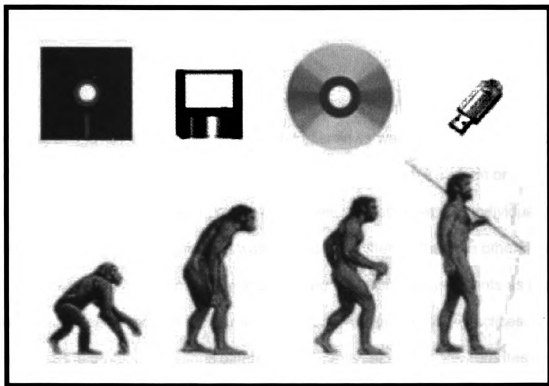


FIGURE 3.4. A Screen Capture from a Student Web Text Used to Formulate Interview Questions before Meeting with the Student Interviewee.

The interviews also hoped to answer research questions six through nine, as described earlier in this chapter. Since I wanted to avoid biasing my interview analysis I did not examine student survey scores until I finished analyzing their interviews.

Student interviews were digitally recorded and transcribed. During the 30 minute interviews, each interviewee's web composition was referenced as participants were asked to revisit specific choices made during writing that involved copyright/fair use issues (e.g. use of images, videos, text), and were offered alternative choices meant to explore how that factored in making composing decisions. Elements of the four factor fair use analysis of section 107 organized my inquiry. Although sets of questions were tailored to particular web compositions, samples of interview questions are provided in Appendix 3.5, Interview Protocols.

As Sun (2004) notes, qualitative interviews often use main questions, probes, and follow-up questions. Since the interviews were semi-structured, parts of the discussions between myself and the interviewee were free form or naturalistic, especially when I probed certain issues that arose with individual participants. Since each interview was significantly different than the other, I used the interview to gather information to create vignettes of the participants as digital writers, in order to make a marker in time of current digital writing practices. Because the probing questions differed significantly, each interview creates a kind of portrait of a single digital writer at a single moment in time. For example, one student, Rob, is an international student and so issues of international law

and culture arose during our discussion. Another student, Sarah, had recently graduated and was working as an independent contractor writing web sites for non-profit organizations and was also completing gift writing – copyright issues in this work arose. Another student, Amanda, was working as an employee for a non-profit health organization and so work-for-hire and corporate authorship issues arose. Probe questions were used to explore these various details in the lives of individual writers, creating a wide breath of interview data.

Interviewees were offered no payment nor other remuneration although I have promised to share research results and resources (survey answers).

Site and Population Selection

I chose to conduct the research at the sites with this population for four reasons.

- 1. Familiarity with and Interest in the Population:** I have been teaching writing for nine years, and working in digital writing for about five years. I intend on staying in this field and therefore have a vested interest in this population, of which I am a member. Because I have been actively writing for scholarly publications, presenting at disciplinary conferences, as well as teaching and being a student in this field, I felt some familiarity with the participants and the issues they face as digital writers.
- 2. Population Identity as Experts in Digital Writing:** A number of scholars have positioned field members as experts in writing, particularly digital writing (Carliner, 2003; Hart-Davidson, 2001), while others have argued for the importance of teaching and engaging in digital writing (Digital

Rhetoric Collective, 2006; Grabill & Hicks, 2005; Selber, 2004; WIDE Research Center Collective, 2006). Still others have argued for the importance of teaching fair use and copyright in the writing classroom (DeVoss & Porter, 2006; Herrington, 2001, 1998, 1997; Howard, 2004; Logie, 1998, 2005; Porter, 2005; Rife, 2007; Walker, 1998). Therefore, I thought it relevant to create a marker on where the field is with respect to its expertise on fair use and copyright, and how important it thinks such issues are to its mission.

3. **Curiosity:** While I have a lot of experience interviewing people going back two decades to the time I practiced law, I had almost no experience administering an online survey. I have never designed a survey.

Therefore, I wanted to attempt learning a research method that was new to me, but might prove a useful skill in the future.

4. **Time and Funding Constraints:** I had tried to unsuccessfully obtain funding for this study from many venues. Because of limited funding along with limited time (my target time expenditure for collecting data was one semester), I chose to administer an online survey and conduct interviews in a location that would not require undue travel time and expenditures. However, I add that I have a continuing goal to do everything in the most time and cost efficient manner, so it is difficult for me to say whether I would have designed the study differently if I had received funding. I did not feel overly constrained by this reason.

Mixed Methods Approach

In this study I employ sequential transformative mixed methods to find information about my research questions. The study is sequential because first I did the survey, and then I completed the interviews.¹⁹ It is transformative because instead of focusing on the quantitative data, I focus more on integrating the results of these two methods in my interpretation. The study's theory, its conceptual framework in activity theory, guides my analysis rather than the study's methods:

The purpose of a sequential transformative strategy is to employ the methods that will best serve the theoretical perspective of the researcher. By using two phases, a sequential transformative researcher may be able to give voice to diverse perspectives, to better advocate for participants, or to better understand a phenomenon or process that is changing as a result of being studied. (Creswell, 2003, p. 216)

Activity theory is a good fit for this research design because activity theory tries to provide a research paradigm that bridges the problem in research between "macro" and "micro" units of analysis. In this study I have both a macro level of analysis (the survey), and a micro level (the interviews). Yet, both levels look at systems – the field as a system and the individual as a system. The two levels are different views – global and local, of writing systems.

The study is mixed methods because it uses both quantitative and qualitative approaches. Quantitative and qualitative approaches might be seen on a continuum, with quantitative methods often involving experiments or surveys, and often involving counting. Qualitative approaches on the other hand, often don't involve counting and depend more on interpretation. Case studies,

narratives, and ethnographies are examples of qualitative approaches (Creswell, 2003).

My study design is empirical in that it is based on observations that can be replicated, and it hopes to yield empirically relevant (Kinney, 1972; Reynolds, 1971) findings. For purposes of justifying the nature of my design aside from the excellent fit with my theoretical lens, I adopt Johaneke's (2000) "Contextualist Research Paradigm" (p. 112) and I am also informed by Creswell's (2003) characterization of mixed methods research. Decisions about research design are rhetorical decisions (Grabill, 2007a; Kamberelis & Dimitriadis, 2005). By implementing Grabill's guideline within the framework of Johaneke's research paradigm (Johaneke includes the rhetorical decision as well), my design decisions have been made for three reasons: pragmatics,²⁰ rhetorical issues, and researcher's positionality and motivations.

The first reason, pragmatics, is supported because mixed methods has a number of benefits in that it tries to address biases in any one method, and it also is more concerned with the problem rather than the method (Creswell, 2003). As a researcher I think it is most important to use methods that will answer the question. The second reason, rhetorical issues, is supported because since I would like this study to be useful and acceptable to the maximum number of persons, I wanted to use multiple approaches emanating from more than one knowledge claim.

The third reason, researcher's positionality and motivations, is supported since I use mixed methods to suit my theoretical perspective. Since I have used

the frame of activity theory and the idea of multiple perspectives, system and individual-as-system, or external and internal, I thought it practical to use more quantitative methods to view the system from above, and more qualitative methods to view the individual and internalization. If I wanted to know what the major US newspapers were saying about Hillary Clinton, I'd think it unwise to look at two newspapers, although looking at two newspapers would tell you something. But I should look at them all, or if strapped for time, I should look at a random selection of major US newspapers. If I wanted to know the status of knowledge and understanding about fair use and copyright law in the field of technical communication, I do not think the best choice would be to ask one or two people. Instead, if I want to know what the field thinks, then I should ask the field.

Making a decision on what to write or refrain from writing (and all the shades in between) is an act of rhetorical invention. Choosing how to select certain content through one's understandings of copyright is a rhetorical decision. Because it's been asserted that copyright law and lack of fair use rights and/or knowledge about these doctrines are chilling speech, I employed quantitative methods via a survey to test hypotheses regarding whether or not this assertion can be supported with empirical findings regarding a relatively large population. The large population is necessary in order to have reasonable certainty in the results. Since I have an interest in examining what's happening at the individual level, and in gathering details and painting vignettes (see Appendix 3.6 for the digital writers' visual and textual vignettes), I also used a qualitative approach by

personally interviewing some digital writers regarding their decision making processes with respect to web composing.

Pilot Study

In this section I first give an overview of the pilot study methods. I then give an overview of the pilot results, first for the survey and then for the interviews.

Overview of Pilot

To test the design for this study, in April 2006 I conducted a sequential mixed methods pilot study that included a paper survey and discourse-based interviews. As in the full-study, the interview methods were criterion-based, retrospective, semi-structured, and used strategies of stimulated elicitation (i.e. used collected web pages as talking points). Another purpose of the pilot study was to generate some preliminary findings that could be tested further in the full study.

This initial pilot study examined knowledge and understanding of copyright law and fair use, as well as certainty in that knowledge, of 26 students and teachers at a high level research university in the mid-west that has undergraduate and graduate level professional writing programs (Rife & Hart-Davidson, 2006). The study also explored how students used their knowledge and understandings of copyright law when composing in digital environments. In this sense, the inquiry was whether law functioned as mediational means during the composing process. The survey served to illustrate if copyright law was a problem, while the interviews served to examine how this problem might be

addressed in the rhetorical inventive sense. A survey was administered, web compositions were collected, and four students were interviewed.

Twenty-two students and four faculty participated in the pilot study. None of the participants were offered payment or other rewards. They were selected because they were contemporaneously (or in the case of one faculty member, had in the previous semester) engaged in web authoring/teaching of same for a course in a professional/technical writing program at the university. I recruited students from courses within a TPW program that expressly had a component that included web authoring. I completed classroom visits and read from a script in order to recruit the participants. Twenty-six participants took the questionnaire. In this pilot, I did not keep track of response rates (number asked to participate versus number who agreed to participate).

The paper questionnaire was similar to the online survey used in the full study, but less organized and much lengthier. It contained 69 questions. The survey helped form a baseline for understanding how participants' knowledge might influence their web authoring choices and whether copyright law was acting as a mediational heuristic. The criteria for selecting interview participants was different in this pilot than in the full study. In the pilot I selected interviewees by first placing all 26 participant questionnaire scores into categories/quadrants (see Figure 3.5) based on whether they were high-knowledge/high-certainty, high-knowledge/low-certainty, low-knowledge/high-certainty, or low-knowledge/low-certainty.

Fair Use Graph

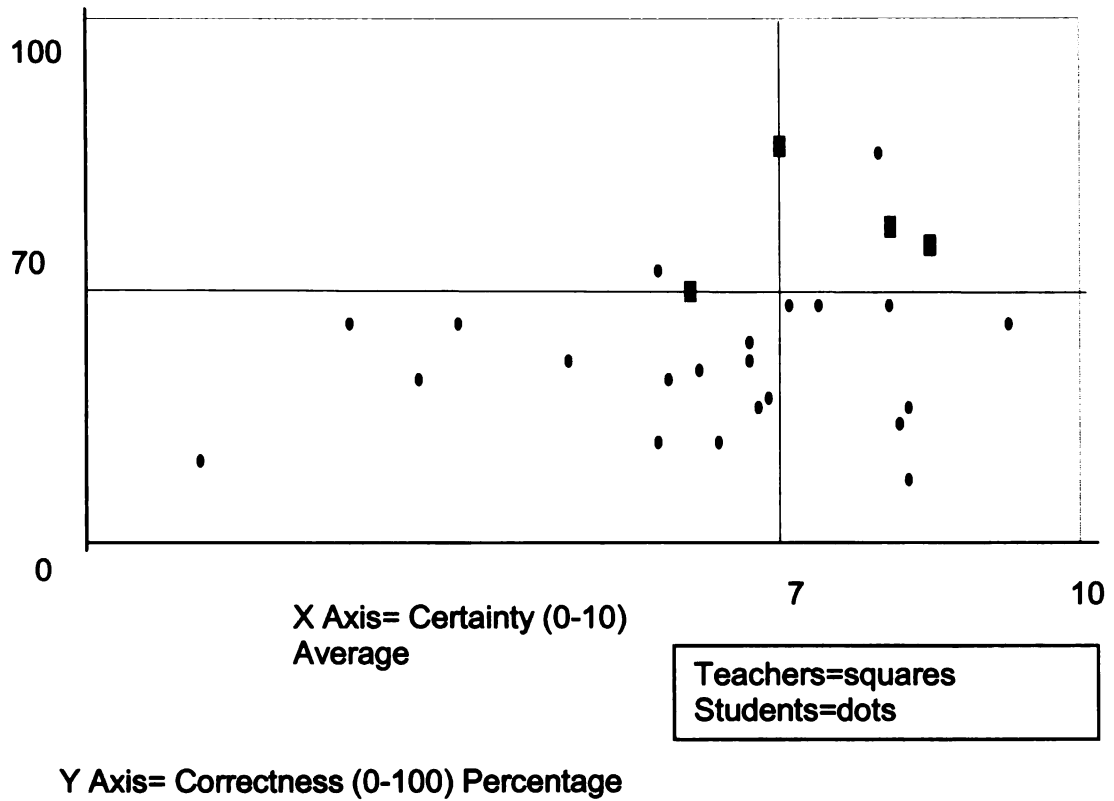


FIGURE 3.5. Pilot Study Participants in Quadrants (N=26)

I used 70% as the dividing line between high and low categories because 70% is often a “passing” or 2.0 level on many grading rubrics. An answer key to the questionnaire was developed as were robust answers to each question. Answers to the questions were delivered to the participants post-study in order to add to the beneficial outcomes.

I used the same interview strategies with minor adjustments as were used in the full study.

A. Pilot Survey Results

The results of the pilot survey cannot be generalized beyond the population of 26 students and teachers examined because they were not randomly selected from a larger population of technical and professional writers. However, in later chapters, I draw some comparisons between pilot survey results and full study results.

From the survey content questions on copyright and fair use, general conclusions can be drawn for this pilot population:

- 1) All participants are aware of copyright and fair use issues.
- 2) Technical writing students might have more knowledge of copyright law and fair use in some cases than their teachers.
- 3) Technical writing students think copyright/fair use instruction should be part of their education.
- 4) There is substantial confusion about the difference between the ethic of anti-plagiarism and copyright/fair use.

- 5) There might be misunderstanding about the nature and coverage of the fair use doctrine.
- 6) There may be misunderstandings about the differences between unauthorized use via the fair use doctrine, and use by way of licensing such as creative commons, or permissions granted by the copyright holder.
- 7) There may be misunderstanding about the government document exception to copyright in the US.

Because of the small number of participants, tests for statistical significance were not conducted. However, the anticipated results of the survey were that those with high knowledge would also have high certainty in that knowledge, and that those with low knowledge would have low confidence. Of the 26 participants, 13 had low knowledge and low certainty, four had high knowledge and corresponding high certainty, seven were in the unexpected category of low knowledge but high certainty that they were correct, and two participants had high knowledge but low confidence in that knowledge. In a utopian world, all the technical writing teachers and students would be in the high knowledge, high confidence category.

The only conclusions we can draw from these results are that they support the notion of a possible correlation between confidence levels in knowledge and actual knowledge – but the results also point to potential problems for those participants, especially, who scored less than 70% on the questionnaire, but have higher than expected levels of confidence that they understand copyright

law and fair use. In our current political-legal climate, thinking you are correct about copyright law when you are actually incorrect, could bring unforeseen liabilities.

B. Pilot Interview Results

From the survey scores, participants were sorted and one Master's student from each survey quadrant was selected for an interview in order to measure the survey's accuracy, and also in order to see what kind of, if any, heuristical thinking or reasoning was taking place as students made decisions on content selection and composing in digital environments.

Kayla (low knowledge, low certainty), Beth (low knowledge, high certainty), Sam (high knowledge, low certainty), and Shauna (high knowledge, high certainty) were each interviewed with reference to their web compositions, and with use of discourse-based interview strategies. Again, because of the small number of interviewees, we cannot generalize to a larger population.

Generally, the interview data supported the placement of participants in the survey-quadrants, thus verifying that the survey was testing what it sought to test – knowledge levels and levels of confidence. In general, Shauna (high knowledge, high certainty) spoke in a sophisticated fashion about fair use and copyright issues, and felt less constrained by the law's effect. For example, in response to the question of whether or not Shauna would consider selling a portion of her web composition that included a power point featuring movie posters, Shauna replied:

That gets to be a little bit more difficult because there are copyrighted images in there and it would depend on if I could get

some sort of authoritative response as to whether or not that constitutes fair use. If it were fair use then I wouldn't hesitate to market it in some way if there was a market for it um, but that's what would stop me is that consideration of whether or not it was legal to use images in that way.

When pushed further on this issue with respect to a movie Shauna had created out of popular movie clips when I asked simply "Do you think you could [use this material legally]"? Shauna responded:

It's my guess that it could because it's for scholarly work and it comes with analysis, it's not just repurposing this so that, well from my understanding of fair use it's not really hurting the market value for the films that I cut from I mean it could in the fact that I'm criticizing them it might prevent people from going to see them but they're not going to watch this instead of watching the movie . . . like a critique and it's of multiple movies. The clip is 7 minutes long I think and there are small bits and pieces, like 5 second pieces from 8 films I think.

The sophistication and reasoning in Shauna's response can be contrasted with the Beth's (low knowledge, high certainty) response to the same type of question regarding her digital composition. I asked Beth if she'd gotten paid to complete her website, would she have done anything differently. She stated: "Umm... Well, I think I would definitely think about the pictures, more... and making sure that they weren't copyrighted, 'cause if I was gonna' make a profit, I think that would violate the copyright rules I'm serving right now." While Beth was aware of copyright law, she is not conducting the kind of analysis and using the vocabulary that Shauna did.

Some broad conclusions that can be drawn from the pilot interviews are as follows:

- 1) Understandings of fair use and copyright law mediate the writing practices of technical writing students.
- 2) Technical writing students know that composing choices would be different in for-profit environments.
- 3) With more knowledge comes more sophisticated heuristical thinking.
- 4) While fair use considerations functioned as a heuristic, so did the assignment sheet, design considerations, and ethical/political considerations. Students were drawing upon all of these areas when writing for the WWW.
- 5) Student reflection may be the most appropriate mode to assess invention.

The pilot interviews offered an automatic method to view what happens when students are posed with certain problems during a writing exercise. Students with low knowledge levels of copyright tended to defer to the assignment for explanations of their reasoning, discuss ethical/political reasons, and just show frustration. Students with high knowledge levels had more self-awareness of their own limitations, and were also able to articulate their reasons with reference to copyright/fair use in a more sophisticated fashion. Because of their ability to do this, they arguably have more control over the texts they were creating.

Data Analysis

In this section I discuss general plans of data analysis for the survey, the interviews, and connecting the survey and interviews. The research questions

are as posed in the introduction to this chapter however I repeat them here for your convenience.

Research Questions

- | | | |
|-----------|---|--|
| survey | { | <ol style="list-style-type: none">1. What do writers know and understand about copyright and fair use?2. How confident are writers in this knowledge?3. Are writers unable to express themselves fully because of fear of copyright liability, i.e., is their digital “speech” chilled?4. How important do writers think knowledge of copyright and fair use is to their work?5. What is the relationship, if any, between knowledge of copyright/fair use, confidence in that knowledge, and levels of “chilled speech” in digital environments? |
| interview | { | <ol style="list-style-type: none">6. When writers create web texts or write for the web, does their understanding of copyright law and fair use influence the choices that they make?7. How do writers understand copyright law and fair use as they do rhetorical invention in digital writing?8. How do writers reshape the law-as-written via their understanding (what happens as the external law becomes internalized)?9. What other rhetorical topics are at work in writers’ minds as they compose for the web, other than copyright and fair use?10. What kinds of things do professional writing students need to know in order to be experts after they graduate or when they are writing outside of the educational setting? |

Questions 1-5, and to a small degree 9 were investigated in the survey. All of the questions were explored in the interviews, but in the interviews the main focus of inquiry was on questions 6-10.

Overview

The unit of analysis is two fold. The first unit of analysis is the system(s) as provided by activity theory. Remember that activity theory goes by both the terms sociocultural activity theory and cultural-historic activity theory. Another way of understanding the system is to think of the broader system view as a view

of cultural practices. For my purposes, I define culture as a group of individuals who have agreed both implicitly and explicitly on the meaning-making rules for their community. Lawyers, for example, exist in culture-of-the-law (Bowrey, 2005) where the group has agreed that the law is rational, and that for the most part we should abide by it, strategize our behavior in light of the law (as mediation), and also perhaps strategize activities that might take place in spaces in-between the law (tax avoidance strategies are one example).

Three levels of systems/cultures are identifiable in this study (See Figure 3.6). On the outermost level is the culture-of-the-law and the infrastructure that supports it. On the next innermost level is the field of technical communication and its cultural practices as represented in the survey data. On the very innermost level are the individual interviewee-writers. Individual writers can also be viewed in a sociocultural activity system where the creation of an artifact, in this case a web text, is mediated by another artifact, in this case knowledge and understanding of copyright law.

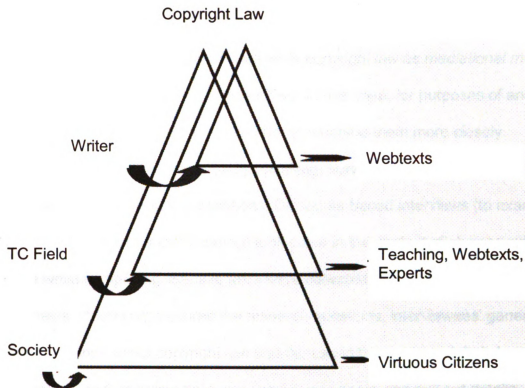


FIGURE 3.6. Three Systems

I use the term “virtuous citizen” in Figure 3.6 in the sense that Foucault argues that the law functions to discipline and create citizens – those who are either virtuous or criminal. Foucault notes the nature of using the law to penalize requires that the penalty be impermanent:

A penalty that had no end would be contradictory: all the constraints that it imposes on the convict and of which, having become virtuous once more, he would never be able to take advantage, would be little better than torture . . . if incorrigibles there be, one must be determined to eliminate them. But, for all the others, punishment can function only if it comes to an end. (1977, p. 107)

As the product or goal in the outer system pictured in Figure 3.6, I imagine the law-as-culture configured in order to ideally produce virtuous citizens rather than incorrigibles. The second unit of analysis is *copyright law as mediational means and heuristic* as discussed in Chapter Two. In this case, for purposes of analysis I magnify the mediational means in order to examine them more closely.

For the data analysis broadly speaking, surveys were scored and analyzed for patterns and correlations. Discourse-based interviews (to examine tacit knowledge and understanding) took place in the context of choices writers made while composing. Sample texts were collected to provide a focus for the interviews. Interviews explored the research questions, interviewees' general understandings about copyright law and fair use in the context of digital composing, and interview data was used to add depth and pull out details. Interviews were interpreted for relationships to survey results and connections to existing research on rhetorical invention such as Haller's (2000). Because I am examining how law functions as mediational means, I also draw upon Foucault's theory of discourse as it pertains to knowledge/power.

A. Survey-Broad External Global Level Views

The survey data was analyzed in a four step process. First, it was analyzed on the global level for findings on the variables such as chilled speech, knowledge of fair use, confidence levels, interest in copyright and fair use – minimal demographic data was collected, and that was analyzed as well. The degree of difference between some scores and the differing categories of either “students” or “teachers” as self-identified, was examined using an F test, rather

than a T test or a Z test. A T test would be appropriate for N's under 30, while a Z test is more appropriate for looking at differences between two samples (student and teachers only for instance). An F test is appropriate when looking at differences between more than two samples (student, teachers, and others), although an F test and a Z test will accomplish the same results. Second, patterns and correlations between the variables were also analyzed to learn if the hypotheses listed above were supported. In this step I calculated the correlation coefficient and then compared that to the verbal labels provided by Rowntree (2004) in order to learn the strength of the relationship (weak, moderate, etc.). For example, I looked at whether there was a relationship between level of knowledge and level of certainty (in that knowledge) and found only a weak relationship. In the pilot, I created a "high knowledge" and "low knowledge" binary, forcing the sample into two categories. I did not run any test to examine the strength of the relationship between knowledge and certainty in the pilot. For the full-study I instead conducted a more sophisticated analysis of difference and relationships by measuring variance along the entire trajectory of data points.

In the third phase of analyzing the survey data, I looked at the first step data analysis through a different lens to see how copyright law transformed from its actual text based form into something else, due to participants' understandings. This portion of my data analysis relies more heavily on interpretation. For example, in the survey when participants were asked the true or false question: "The single most important thing U.S. courts look at when deciding whether or not a particular use is a fair use, is whether or not the

original author has been attributed and/or credited,” 49% selected true, while 51% selected false, with the best answer being false (N=340). Instead of simply interpreting this result as a significant misunderstanding on the part of participants, I analyze this from the perspective of how copyright law is actually performing for a significant number of individuals. Regardless of what the law actual says or how it’s been interpreted in case law, in practice, half of these particularly educated digital writers think that attribution is important due at least in part to copyright law. *Therefore, for a significant number of individuals, copyright law is standing in for the ethical doctrine of plagiarism.*

Such particularly focused misunderstanding also supports Foucault’s concept of the “author-function.” Copyright law supports the author-function because it says who can and cannot speak and in what context. Plagiarism also does the same – citation practices reinscribe the idea of a single author by reminding us of him forever and ever. Under Foucault’s theory, both copyright law and the attribution requirement of anti-plagiarism serve the author-function. The fact that a significant number of participants are confusing the two seems justified and predictable when you realize that both concepts are attempting to remind us that somewhere along the way, there has been a single “author, ” although each concept uses a slightly different method to do so. The confusion between copyright and plagiarism might also indicate that for these participants, the ethical doctrine of plagiarism trumps that of copyright law, simply because even though copyright law doesn’t require attribution – it might as well since for about one-half the population, that’s how it’s functioning. Finally, most of the

participants are at universities or colleges and many are deeply invested in an economy of symbolic capital via attribution. The importance of attribution cannot be overestimated for this particular population.

In the fourth stage, survey data was analyzed on an individual level with respect to the interviewees only, in order to learn their scores and examine any correspondences between their interview data and their survey scores.

B. Interviews-Local Level Context and Detail Building

Interviews were analyzed in a four stage process also.

Stage One: Drawing upon preliminary findings from the pilot study, in the first stage analysis interviews were transcribed and subsequently read holistically for evidence of emergent patterns or themes. “Theorists in qualitative study and discourse analysis stress the identification of salient patterns through holistic reading and inductive analysis, which requires repeated examination of the texts until features and their patterns emerge” (Ding, 2007, p. 146, Barton & Stygall, 2002; Huckin, 1992). Interview data was transcribed line-by-line, read holistically, and then reviewed line-by-line for salient features. For purposes of analyzing the interviews, I adopted three of Bogdan and Biklen’s (1992) mid-range accounting “etic” categories: 1) “ways of thinking about people or objects”; 2) strategies: “ways of accomplishing things: people’s tactics, methods, techniques for meeting their needs”; 3) methods: “problems, joys, dilemmas of the research process—often in relation to comments by observers” (Miles & Huberman, p. 61). On a more “emic” level, based on these general categories and after the holistic readings, I derived smaller sub-themes that included evidence of heuristical

thinking or otherwise spoke to the issue of problem solving (or failing to solve the problem) in digital copyright contexts. Based on the pilot studies, I came up with these themes, or rhetorical topics:

1. **Probability Thinking (raises the concept of *metis*):** Thinking/calculating of probabilities, risk, weighing consequences, strategizing that isn't fitting in the other categories.
2. **Copyright Considerations:** Using, applying, referencing copyright law such as asking permission, originality, etc.
3. **Fair Use Considerations:** Referencing fair use or the four factor fair use test of section 107 (fair use elements such as educational use, amount used, size, etc.).
4. **Ethical Considerations:** Ethical/ political considerations including considerations of attribution.
5. **Design Considerations:** Issues of design/content rather than issues of copyright as influencing composing choices.

After the full study interviews however, I also added these categories:

6. **Faith/religion:** Reasoning based on one's cultural background, religious beliefs, or faith.
7. **Employer Demands or Requirements:** Reasoning based on the demands or requirements of one's employer.

Additionally, I found patterns in the interview data evidencing self-reflective thinking where writers reflected on their own knowledge or lack of knowledge. I also found patterns around the events of frustration with educational experience

or law, and deferring agency, as in when writers had an unknowing or nonreflective attitude about composition choices or they deferred to the requirements of a class assignment.

An example of interview data portraying the theme of “copyright” depicted in Figure 3.4 above is Shauna's choice of a particular “evolution of man” image (a monkey gradually and linearly standing upright and turning into a man) because the user would find these images very familiar. Because the evolution of man images were so commonplace, Shauna felt they were not original enough to be copyright protected. That these images were widely available on the web also informed Shauna's content selection process. In the event Shauna's use of the images was challenged, she could argue that the “exclusive” rights of the copyright owner, if any, were in vain. It was her view that this composition did not infringe on other's copyrights, and although she used existing material, it was in a way that created something “original” and fixed such that Shauna herself would now own the copyrights in the remix. As an example of probability thinking informed by *metis*, Shauna had carefully considered the use of others' work in her site, and had made sophisticated decisions on what kind of author or owner of copyright would be more or less likely to attempt to enforce copyrights against her educational use.

As an example of interview data portraying the “ethics” category above, web writer Shauna applied her own ethics by cracking the anti-circumvention code on film discs in order to take the clips and incorporate them into her digital remix. She said:

Like with the movies it is supposed to be illegal to circumvent the copyright protection on the discs but I circumvented that because the law prevents fair use which I don't agree with so I sort of use my own judgment about breaking that and that is the policy that I follow.

Shauna carefully conducted a complex fair use analysis, then considered which laws it was ethical to follow, and which laws she would break for ethical reasons.

When further analyzing this data, I decided to use a thematic-rhetorical analysis, drawing upon my former training as a lawyer and my experience conducting *legal reasoning* (Tiersma, 2008). Tiersma defines legal reasoning accurately as an analytical process that requires looking across texts for evidence of certain salient features, pulling these features out and from this technique, formulating some kind of rule(s) or principle(s). As Tiersma points out, legal reasoning tends to be more conceptual than textual. This might be understood in the context of my study by thinking of the rhetorical topics or patterns I have listed above as concepts rather than textual artifacts. How the concepts interact together, and any conclusion that might be drawn across interviews, is analyzed with legal reasoning. Legal reasoning is very similar, if not the same, to what Janice Lauer (1970, 1979, 2004) describes as heuristical thinking, that is having some frame of reference that one draws upon as one conducts analysis or problem-solves, or in the reverse, heuristical thinking can be examining a text or texts, and extracting its/their rule(s) or principle(s) (see Rife, 2009 for a discussion of this latter technique). This same kind of thinking was at work when I conducted the study interviews, as in that case I used my former experiences interviewing clients (or witnesses) as a frame of reference. When

interviewing clients, I had a certain heuristic in mind of which they were unaware. This heuristic might include, depending on the circumstances, the strength of the client's case based on the elements required to meet a certain legal concept. In the personal injury setting, if an injured client visited me, this legal concept might include negligence and causation on the part of the opposing party. Part of this heuristical thinking also included a cost-benefit analysis – even if negligence and causation were present, was the potential monetary award substantially greater than the costs of proving the case? Practicing law is usually a for-profit business, and so this kind of evaluation has to occur when one is interviewing clients in for-profit environments. Similarly, when I interviewed study participants, I had a heuristic in mind that included the elements of fair use, and the elements of copyright. In the full study, I also had a heuristic in mind that included the themes or rhetorical topics writers referenced in the pilot study. I attempted to categorize and fit the interview data into these heuristics.²¹

Legal reasoning is a huge factor in every aspect of this study for three reasons. For the first reason, legal reasoning is very close to the kind of thinking I'm looking for in the interviews since in the interviews I was looking for heuristical thinking. For the second reason, I cannot help but use legal reasoning in almost everything I analyze, including the rhetorical decisions I've made when writing this dissertation, and that comes from the law school experience and my experiences practicing law. For the third reason, legal reasoning is a valid way to generate knowledge. It's used to create arguments in very high stakes, even life and death contexts, in courts, before judges, in legal opinions. Other than

disciplinary boundaries, there isn't any reason why I should not be able to conduct analyses similar to that used in legal reasoning with respect to the interview data. And so, drawing upon what might be called legal reasoning, heuristical thinking, or simply rhetorical analysis, I interpret and draw some tentative conclusions from the interview data.

Stage Two: In the second stage of the interview data analysis, I paint small portraits or vignettes of each interviewee, and portray how they did or did not think about copyright law as it intersected composing choices. I include all of these vignettes together for you in Appendix 3.6. I have chosen to use vignettes for five reasons. The first reason is that I want to create a small historic record or archive of what writing was like in 2007 for this handful of digital composers. I want to create this marker because I think that in five years, things will be different. I'd also like to repeat this study in the future and see how things changed. The second reason is that creating these vignettes will also allow me additional opportunity to look across cases for principles. Vignettes help the researcher formulate key issues towards the researcher's theory of what is happening (Miles & Huberman, 1994, p. 81). The third reason is that in this study, there were a small amount of interviews, but each one I felt was important and portrayed key but diverse issues of digital writing in the 21st century. Vignettes are a solution to an analysis problem where small pockets of data might be ignored. I might have selected the case studies approach instead but then I would have to focus on just two or three interviewees. Instead, "vignettes offer a way to mine such pockets fairly easily" (Miles & Huberman, 1994). The

fourth reason I chose vignettes is because they are similar to longer profiles (Miles & Huberman, 1994; see also Seidman, 1991), and I have experience writing newspaper profiles from interviews I conducted and I can thus draw on this experience. And finally, the fifth reason is that while the literature discusses vignettes with the assumption that vignettes are produced with alphabetic text, I decided to also incorporate visual vignettes of student web texts for the purposes of offering an interpretation and also protecting participant privacy. Such visual vignettes simply offer a brief impression of student identity that might enhance the reader's understanding.

Vignettes are "vivid, compelling, and persuasive" (Miles & Huberman, 1994, p. 83), usually narrative and storylike, and the researcher must use caution in order to avoid misleading. Because, as Erickson (1986) points out, a single vignette cannot provide interpretive validity within the vignette itself, "multiple vignettes and accompanying commentary are needed" (cited in Miles & Huberman, 1994, p. 83). I therefore decided to create vignettes for all seven interviewees, along with commentary (see Appendix 3.6). As is important in this approach, the researcher must make sure not to pull out only the most sensational or unique events, and should not hide data that is inconclusive or contradictory. For example, Sarah expressed dissatisfaction with how copyright law was covered in her education but Amanda was mainly content. Sarah went to great pains to abide by copyright law, but prudent Leslie said she'd comply only if it was easy to do so.

In addition to the frame provided by the rhetorical topics listed in stage one data analysis, an outline provided a guideline and structure for the vignettes:

- Context for the digital writing
- Writers' motivations
- Multiple roles of writer
- Description of writer's digital composition, its purpose, audience, and complexities
- Writer's aspirations or works in progress
- Writer's general attitude about copyright law as it intersects digital writing
- Information writer wanted study-reader to know about copyright and fair use in the context of teaching, learning, and working

In this area of the analysis I examine each interviewee as a writer, their motivations and purposes in writing. This allowed me to draw some conclusions about how digital writing might change our notion of "writing," and how those changes might impact teaching and learning.

Stage Three: As in the data analysis for the survey, in this stage I examine how copyright law changes due to interviewees using it as they compose for the web.

Stage Four: In the final stage of data analysis, I incorporate the survey results for each participant into their interview data, and look for patterns and correspondences.

Transforming the Survey and Interview Data

In this part of the data analysis I take the interview results and map those onto the survey results within the activity theory frame, in order to discuss and develop two areas: one a remixed theory of authorship, and two rhetorical invention and the law.

Limitations

In this section first I am going to discuss the limitations of the survey, the interviews, and using mixed methods research designs. I end the section by discussing issues of generalizability, reliability, and validity.

A. Survey Limitations

Surveys are good at measuring characteristics in large populations, providing flexibility in what you ask, and accommodating large populations. The online survey in this case was inexpensive – just \$20.00 per month for a subscription to surveymonkey.com. But surveys can be superficial in their coverage of complex topics; they cannot deal well with contexts. In some ways surveys are inflexible because once launched must remain unchanged (or risk complicating your results). They are artificial, like experiments. According to Babbie (2005), surveys are generally weak on validity (as in testing what it is you want to test) and strong on reliability (as in being replicable)(p. 278). As Babbie points out, online surveys are good because they are cheap and easy, but they are less likely to represent a more general population because of lack of control. I don't really know what happened on the other end of the survey, because I was not there to witness this. I also had the problem with this survey due to a low response rate of 23% (at least from the social science perspective, where at least

50% is the norm for publishable studies). Although, relatively speaking and in the context of R&W, the N of 334 that finished the entire survey is high and rather remarkable – possibly offering us a unique view of the field.

B. Interview Limitations

The interview data is limited for reasons already discussed such as the small number of participants, and my involvement in the conversations and community where the interviewees were situated.

C. Mixed Methods Limitations

Mixed methods approaches try to overcome some of the limitations with any one approach to research. Even so, mixed methods research has limitations because the researcher has to know a number of research methods, and because of time constraints, data analysis will not go as deeply into one area or another as might be true with a design that featured only a survey, or only interviews.

D. Generalizability, Reliability, Validity

The issue of generalizability asks how far we might extend the conclusions derived from the data in the context of this study. For example, to what extent do the results of the survey really apply to the entire field of technical and professional writing? Similarly, to what extent do the findings from the interviews apply to students-as-digital-writers, or digital writers in general, or even to writers in general? Reliability, on the other hand, is a question of to what extent would we produce the same results on the same population? For the survey, I feel fairly confident that the same results would be produced for the same population at

this time. However, as time passes and an increasing number of individuals gain digital literacies and/or knowledge of fair use/copyright, the results could shift. The results could also shift due to cultural changes, legal events, international issues, and so on.

The issue of validity with respect to study findings explores whether the data matches up to our research questions. The validity of findings in this study depends on the extent to which the measures and methods used in this study actually examine what they were supposed to. For example, a question of validity might ask whether the six point scale I developed to measure chilled speech properly operationalizes and measures “chilled speech.” I consider the crucial questions of generalizability, reliability, and validity to be part of my data analysis and part of the qualifications and contextualization I make with respect to study findings. Therefore, as part of my analysis in the following chapters I carefully discuss these issues. In Chapter Four I discuss the survey data, drawing some conclusions. In Chapter Five and Six I focus more on the interviews, but blend in findings from the survey. Chapter Five looks at authorship, while Chapter Six examines rhetorical invention and the law.

CHAPTER 4

BROAD GLOBAL OVERVIEW: THE SURVEY

“Here is the argument. If we want to understand the mechanics of power and organisation it is important not to start out assuming whatever we wish to explain.” (Law, 1992, p. 2)

In the previous chapter I described in detail the study design. In this chapter I first give a broad overview of the study’s six major findings. I then provide a global perspective on the survey data and subsequent findings. In Chapter Three I described the study as a sequential, transformative mixed methods study consisting of a survey and interviews. In this chapter, after providing a broad overview of the study’s six major findings, I then give a more detailed description of the study’s first part, the survey, as well as survey results. In Chapter Five, “A Remixed Theory of Authorship” I discussed the first two findings as listed below and provide detailed glimpses into the digital writers’ interviews via textual and visual vignettes (see also Appendix 3.6). Chapter Five also contains implications for teaching, learning, and research. In the final Chapter, I talk about the data in the context of “Rhetorical Invention and the Law” by discussing the last four findings listed below. As in Chapter Five, I conclude Chapter Six by discussing the implications for teaching, learning, and research.

The study’s six major findings are as follows:

1. Web spaces are sites of cultural collision, or commonplaces, where students occupy sometimes conflicting positions such that the very notion of “studentness” is inverted. Web spaces as commonplace challenge existing concepts such as “author” and “originality.”
2. The intertextuality of web-space-writing provides support for Foucault’s theory that the single author is an ideological production representing

the opposite of its historical function, i.e. the “author-function,” in the larger culture. “When a historically given function is represented in a figure that inverts it, one has an ideological production” (Foucault, 1984, p. 119). No support was found for a human culture existing without an “author-function,” whether it is a workplace culture or even a more community-knowledge-focused culture as exists in India. Yet, “the author” switches in and out of a subject position in relationship to human and non-human actors.

3. For this group of writers, digital speech was not chilled. Copyright law as a system of invention organized by rhetoric, produces knowledge.
4. Rhetorical topics congeal as a heuristic mediating the digital composing process of writers. This study provides a small and incomplete snapshot of this heuristic structure.
5. When we consider the hierarchical and embedded nature of rhetorical topics that mediate digital composing choices, for this group of writers, ethics trumped the law.
6. While the study supports the idea that laws have agency, as knowledge and understanding increase, that agency is increasingly diminished by the human actor. The agency of the law is connected to where the law ends up on the AT triangle.

I also found that digital writers have some awareness of their lack of understanding in this area and want to increase their knowledge and understanding of the law. I discuss this result throughout the next three chapters. Since I need to discuss the details of these findings by synthesizing both the interviews and the survey, as well as outside materials, in this chapter I merely summarize the findings of the survey in order to build a foundation for the more robust discussion in following chapters where all data from this mixed methods study is synthesized for the reader in order to extract implications for teaching and learning.

Overview

The study seeks to examine how copyright law influences digital composing processes (rhetorical invention). The larger question is: How does law

influence writing? Further, the study hopes to examine relationships between knowledge of copyright/fair use, confidence in that knowledge, and levels of “chilled speech” in digital environments. A digital survey was administered to provide a global snapshot of the field of technical and professional writing (TPW), while interviews were used to explore how/if digital writers think about copyright/fair use as they create web texts.

This chapter focuses on the survey data. Here, I do five things. One, I analyze the presence of certain variables such as chilled speech, number of student participants, knowledge levels. Two, I examine any possible differences between the presences or absences of certain variables in particular populations --the difference between knowledge levels among students and faculty, for example. Three, I analyze the relationships, if any, between the occurrences of certain variables. In this last instance, I discuss whether or not my stated hypotheses can be supported. Four, I discuss whether or not my research questions have been answered. Five, I give an overview of the implications for teaching, learning, and research as these arise across the entire study results and findings.

As explained in Chapter Three, a digital survey was used for the first part of my study. The population surveyed was a random selection of 155 professional and technical writing programs and NCTE writing majors on STC and ATTW membership lists, and NCTE writing major lists as of September 2, 2007. Students and teachers in these programs were contacted directly with recruitment and reminder emails. The survey screened out anyone who had not

created and published to the web a composition such as a “web page, web space, wiki, blog, page on facebook/myspace or other social networking software application.”

In the survey phase I sent an email with a link to the digital survey to 1,935 individuals in TPW programs throughout the US. These five research questions were explored in the survey:

1. What do writers know and understand about copyright and fair use?
2. How confident are writers in this knowledge?
3. Are writers unable to express themselves fully because of fear of copyright liability, i.e., is their digital “speech” chilled?
4. How important do writers think knowledge of copyright and fair use is to their work?
5. What is the relationship, if any, between knowledge of copyright/fair use, confidence in that knowledge, and levels of “chilled speech” in digital environments?

But before I begin this analysis, I report the answer to the first two screening questions in Table 4.1:

| TABLE 4.1: Two Screening Questions | yes | no | N |
|---|------------|-----------|----------|
| 1. Have you ever completed a web composition such as a web page, web space, wiki, blog, page on facebook/myspace or other social networking software application? | 91% | 9% | 437 |
| 2. Has the web composition been posted to the web such that it's available to at least some people (other than yourself or your teacher) with internet access and a computer? | 98% | 2% | 395 |

As illustrated in Table 4.1, throughout this chapter the reported results show a changing N due to survey attrition. When the N changes, the level of confidence also changes. The greater the N, the greater the level of confidence. This is why larger populations are desirable, because they give more certainty in the results. Remember that as Rowntree (2004) insightfully writes, "There is no such thing as absolute 100% proof in science (or out of it). All we have is probability and levels of confidence. People with a claim to be scientists are simply more honest about it than others – at least when they are acting scientifically. The risk of error is quantified and stated" (Rowntree, 2004, p. 121). With reference to Table 4.1, an N of 437 yields a confidence level of plus or minus 4.9%, while an N of 395 yields a slightly lower confidence level (Lauer & Asher, 1988). For example, if 91% of the respondents had completed a web composition, we can be confident that 91% of the entire population also completed a web composition, plus or minus 4.9% (95.9%-86.1% in the entire population thus created a web composition). By the end of the survey, the N fell to 334, yielding a confidence level of about 5.6%. Therefore, throughout the survey the confidence level is between 5.6% and 4.9%.

However, the confidence level assumes that 100% of the sample responded to the survey. We know this was not the case since 1,935 individuals were contacted, but only 437 initially responded to the survey, and only 334 completed the entire survey. However, the low response rate alone should not cause the findings to be discarded, especially because in this case the population that did respond closely mirrored the entire population with respect to

the type of TPW program, i.e. PhD, Master's, undergraduate, and so on. This mirroring (shown in Table 3.2 in Chapter 3, Research Design) should make us a little confident that the survey findings might tell us something about a particular population in TPW. Yet, the findings have to be viewed guardedly when considering generalizing to the entire population of TPW programs, all students and teachers included.

Certain biases occur when using online data collection methods since at the present moment, offline and online populations are not equivalent due to the digital divide. Research has shown that online survey respondents are younger, more confident about their abilities to navigate the WWW, and online more often (Zhang, 2000). While some research indicates that the content results from postal and digital surveys are becoming similar, "to infer for a general population based on a sample drawn from an online population is not as yet possible and will not be possible until the online and offline populations reflect each other" (Andrews, Nonnecke, & Preece, 2003). And so, to infer from the answer to the first question, for example, that only 9% of everyone in TPW has not completed a web composition would be dangerous. This number is probably much higher if we also take into account the offline population which never received the recruitment email, or rarely uses email. However, to the extent that the population that initially responded to the digital survey reflects the "online" TPW population, then 9% have not completed a web composition, with a level of confidence of plus or minus 4.9%. So 13.9%-4.1% have not completed a web composition but apparently use email. Of those who have, 2% have never

actually published it to the web. (It is theoretically possible to create a web page in Dreamweaver or FrontPage, etc. and not publish it).

So we must understand the survey results that I report in the context of a response rate of 23% or less. The reported results and ensuing analysis are thus tentative. However, it is important to frame the data with an understanding of the nature of digital survey methods. According to Andrews, Nonnecke, and Preece (2003), for digital surveys “email response rates of 20% or lower are not uncommon . . . and, although rates exceeding 70% have been recorded, they are attributed to respondent cohesiveness (e.g. an existing workgroup) as often occurs in organizational studies” (p.11). (See also Walsh et al, 1992; Witmer et al, 1999). Numerous reasons are theorized for this including:

1. **Lack of a cohesive community in online settings.** When comparing paper and electronic survey response rates, it's been found that those who return online surveys had a higher connectedness to their profession and increased contact with colleagues compared to those who returned paper surveys (Groves, Cialdini, & Couper, 1992; Yun & Trumbo, 2000).
2. **The fact that emailed surveys might be perceived as a harassment.** Studies have indicated that survey emails felt like an invasion of the potential participant's computer space and were viewed as rude (Schillewaert, Langerak, & Duhamel, 1998; Swoboda et al., 1997). Note however these studies are dated and may reflect the newness of online survey methods.

3. **Lack of technological savviness or technology focused self-confidence** on the part of digital survey recipients (Yun & Trumbo, 2000).

The low response rate and its relationship to the issue of “community” may point to larger issues with TPW. This will be discussed in Part Four of this chapter.

Part One: Analyzing the Variables

Generally, a survey can gather information about individuals, and take measurements of their attitudes, cognition, and behavior (Babbie, 2004, Backstrom & Hursh-Cesar, 1981/1963). The variables measured in the digital survey were:

A. Demographics

- 1) Educational level
- 2) Student/teacher/other
- 3) Institutional affiliation

B. Attitude

- 1) Attitude towards importance of knowledge of copyright/fair use

C. Cognitive

- 1) Knowledge of copyright/fair use (14 point index)
- 2) Confidence in one's knowledge of fair use/copyright (5 point scale)
- 3) Attitude towards obeying one's conscience versus obeying the law

D. Behavior

- 1) Chilled speech (6 point index)

A. Demographics

1) *Educational level*

As Table 4.2 illustrates, the survey data shows that 20% of the respondents were undergraduate, 13% were master's students, 25% were PhD students, 1% were undergraduate/degree or certificate holders, 40% were graduate or professional degree holders, and 4% were "other." This question asked for the highest educational level and appeared early in the questionnaire. Based on this data, 59% were students of some sort, and 40% were graduate degree/professional degree holders. We might say that 59% were self-identifying as students, while the 40% degree holders were self-identifying as non-students.

| Please pick the choice that best describes your *highest* educational level: | | | | | | |
|--|-----------------|-------------|-------------------------------|-----------------------------|--------------------|-----|
| under-graduate student | masters student | PhD student | undergrad degree/cert. holder | graduate/prof degree holder | other/can't answer | N |
| 20% | 13% | 25% | 1% | 40% | 4% | 384 |
| 59% | | | | 40% | | |

2) *Student/teacher/other*

Near the end of the survey, participants were asked to self-identify as either students, teachers, or others as shown in Table 4.3. Three-hundred and thirty-four (334) students (41%), teachers (47%), and "others" (12%) from 64 TPW programs and/or writing majors completed the entire survey.

| | student | teacher | other | N |
|--|---------|---------|-------|-----|
| How would you primarily describe yourself: | 41% | 47% | 12% | 334 |

Between the beginning of the survey and the end, students went from 59% to 41% of the respondents, indicating that the attrition rate was higher for students than for teachers. The reasons for this cannot be known, but it could be because

the content questions were a little long and complicated, and students may have been involved in other kinds of coursework that had priority over the survey. It could be that only the more savvy students decided to stay in the survey for the endurance. It could be that teachers better understood the benefits of taking the entire survey as far as generating knowledge for the field and simultaneously helping at least one student complete a dissertation. Ultimately though, by the end of the survey the population of students to teachers was almost equal – providing a good measure of how the population as a whole understood copyright. In the “other” category were likely recent alums who were still using their college email addresses – I personally knew of several alums who fit in this category and had taken the survey.

3) Institutional affiliation

155 programs were contacted via students/teachers, with 64 TPW programs and/or writing majors confirming response, for a programmatic response rate of 41%. A list of participating institutions is attached in Appendix 3.2.

B. Attitude

1) Attitude towards obeying one’s conscience versus obeying the law

Table 4.4 shows data on the question of whether participants would follow their conscience even if it means breaking the law on exceptional occasions. I inserted this question in the survey to examine whether a variable might be at work outside the law. If ethical considerations influence digital writers more than legal considerations, that will influence the lawfulness of digital writers. A single question is not adequate to truly measure how lawful a respondent might act in a

given situation, but the response might indicate the need for further investigation or provide support for interview data. The question was taken directly from the GSS Social Science 1972 - 2000 Cumulative Codebook. Using a question from the Codebook means that this question has been tried and tested thousands of times, and that other data sets might be available to compare. The question is also available through an International Social Survey Program ISSP (“a continuing annual programme of cross-national collaboration on surveys covering topics important for social science research”)(Collins, 2007). According to Collins, many countries use these survey questions to make local and international comparisons. The Codebook questions are also used in social science and statistics classes because free datasets are available.

| TABLE 4.4: Obeying the Law | obey | follow conscience | can't answer | N |
|--|-------------|--------------------------|---------------------|----------|
| In general, would you say that people should obey the law without exception, or are there exceptional occasions on which people should follow their consciences even if it means breaking the law? | 14% | 73% | 13% | 384 |

According to the results, in our TPW population 73% would follow their conscience, 14% would obey the law, and 13% could not answer. This might be compared to a 1983-84 British survey that compared weekly church goers with those of no religion. In that survey, 57% of the weekly churchgoers said they would obey the law, while 44% of the no religion participants selected that same answer (Gill, 1999). Robin Collins (2007) reports using this question in a comparison between US and Canada in the context of deference to authority,

free speech, and democracy. He reports at one time he administered the question by blind ballot to an audience of 20 “humanists” where 100% selected that one should “follow their conscience.” Collins has administered this survey to the international community and has results from countries across the globe. Some examples of results include the US, where 42.7% would obey the law without exception, while 57.3% would follow their conscience. In Canada, 25.1% would obey the law while 74.9% would follow their conscience. In France, 15.2% would obey the law, while 84.8% would follow their conscience (Collins, 2007). We might draw the conclusion here that folks in TPW are more humanist than the general US population. However, Collins (2007) also has data that shows as educational level in the US increases, so does the willingness to follow one’s conscience over the law on occasion. The results in this study then might support Collins’ findings since a significant number of individuals taking the questionnaire had advanced degrees, and all had at least some formal education – and were situated in a field often associated with the humanities. The results here then should not surprise us.

2) Attitude towards importance of knowledge of copyright/fair use

This attitude question appeared near the end of the survey. It asked the respondents how important they thought knowledge and understanding of copyright and fair use was to their work. As illustrated in Table 4.5, only 1% thought that such knowledge was not important. 98% believe that such knowledge is at least somewhat important, with 79% stating that knowledge of copyright was either important or very important. Almost half of those

participating thought that knowledge and understanding of copyright was very important.

| TABLE 4.5: How Important is Knowledge of Copyright? | | | | | |
|--|---------------------------|-----------------------------|------------------|-----------------------|----------|
| How important do you think it is, as a digital writer, that you have some knowledge and understanding of copyright and fair use laws in the United States? | | | | | |
| not very important | somewhat important | neutral/can't answer | important | very important | N |
| 1% | 19% | 1% | 31% | 48% | 334 |

C. Cognitive

- 1) *Knowledge of copyright/fair use (14 point index)*
- 2) *Confidence in one's knowledge of fair use/copyright (5 point scale)*
- 3) *Areas of concern*

First I give an overview of knowledge and confidence levels for the entire population; I then break down results according to the three main areas of cognitive inquiry. Finally, I focus on areas of concern based on survey results where knowledge was tested. Although “confidence” might be considered an attitude rather than a cognitive question, I discuss the data on confidence here because it was measured with respect to the cognitive questions.

The 14 cognitive survey questions were organized to test three areas. Eight questions were devoted to whether the writer understood the basic elements and protections of fair use per section 107 of the statute (Table 4.6 in Appendix 4.1). Five questions examined writers' understanding of the differences between the right to use someone else's materials in context of authorized versus unauthorized use (Table 4.7 in Appendix 4.2). For example, the questions explored whether writers knew the difference between using with express

permission, using under a license like creative commons, using things that are not copyright protected, and using under the fair use doctrine. One question explored writers' understanding of the difference between the ethic of anti-plagiarism and the considerations of the fair use doctrine (Table 4.8).

For global views of this populations' scores on the knowledge portions, I only included those who finished the entire survey (N=334). The average score for the entire 14 question set on copyright/fair use knowledge was 63%. Based on a traditional grading rubric where 70% is around a 2.0, or adequate, the average score for the entire population falls short of "passing." On the other hand, considering the complexity of the subject matter and the questions themselves, and considering I was testing professional writers on an area some see as the exclusive domain of \$300.00 per hour intellectual property lawyers, I think 63% is a remarkable accomplishment. The average certainty score for the entire population was 2.3 – i.e. somewhere in-between "somewhat certain" and "not too certain" indicating that as a whole, the population has awareness of its lack of knowledge (if the average certainty score was closer to 1 [very certain] with an average test score of 63%, we would have much more cause for concern). In a utopian world 100% of the survey respondents would have received 100% on the knowledge scores and a 1 on the certainty score. That is they'd have high knowledge and lots of confidence. But for 100% of each of the 14 questions, the majority of respondents answered "somewhat certain" (a 2 on the 5 point scale) regarding their confidence level. Unlike a number of claims made in recent scholarship that individuals are extremely uncertain about

copyright and fair use (Hobbs, Jaszi, & Aufderheide, 2007; Westbrook, 2006), the data here indicates the opposite. If respondents were in fact extremely unsure, we would have seen a lower average certainty score – perhaps closer to 5: “not certain at all.” If respondents felt extremely lost and confused, we would have seen the majority selecting “not too certain” rather than “somewhat certain” in at least some locations of the survey. However, we do have to take into account the potential biases in the responding population. These individuals probably are more tech savvy and knowledgeable about copyright and fair use, and so that as well could explain the relatively high and stable confidence level of the respondents. Participants who were very uncertain about their knowledge may have been the ones who dropped out of the survey. We cannot know this for sure.

The average score for the 5 questions on licensing versus fair use, or authorized versus unauthorized use was 51%. As will be discussed in later chapters, this is one area that interviewees noted was of concern for them. The average score for the 8 fair use questions was 71%, indicating greater understanding in this area. On the other hand, in question 9, “The Plagiarism Question,” (Table 4.8) less understanding was expressed about differences between the ethical doctrine of anti-plagiarism and its requirement of attribution, versus fair use which does not require attribution. On The Plagiarism Question, 49% of respondents were wrong, yet 60% felt at least somewhat certain that their answer was correct.

| TABLE 4.8: Knowledge and Understanding—The Plagiarism Question | | | | | | |
|---|--------------|------------------|------------------------|-----------------|--------------------|----------|
| The single most important thing US courts look at when deciding whether or not a particular use is a fair use, is whether or not the original author has been attributed and/or credited. | | | True | False | Best Answer | N |
| | | | 49% | 51% | FALSE | 340 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | |
| | 14% | 46% | 14% | 21% | 5% | |

3) *Areas of Concern*

For the people by the people

One area of clear misunderstanding that surfaced in the survey, is a misunderstanding of the government document exception to copyright (See Section 105, Title 17 USC for details). The survey question read as follows:

Mary, a law abiding citizen, decides to use five pages of a seven page ninth circuit court decision in her website. She legally obtains this unedited opinion directly from the court's website. She wants to cut and paste all five pages directly onto the html page she is composing. She will not edit or comment on the court opinion, nor does her webpage allow commenting by others. Before using the text in her website, as a conscientious, law abiding person she should be sure she is within fair use. (See Table 4.6 in Appendix 4.1)

While the amount used is normally an issue in a fair use determination (“five pages of a seven page opinion”) in this case that shouldn't matter because an unedited ninth circuit court decision is a government document and thus in the public domain.²² In a fair use determination, normally it would matter how much synthesis the new author conducts, and whether the use was for research or critique. While it's pointed out in the question that Mary isn't doing any of that, it should be irrelevant because a judicial opinion is in the public domain. Therefore,

the best answer in this case is false, because Mary doesn't need to do a fair use analysis even if she is a law abiding citizen. In fact, a law abiding citizen would know about the government document exception to copyright in the US.

Yet, 68% of the respondents said that Mary should do a fair use analysis, and 67% were very or somewhat certain that they were correct in their answer. Pragmatically, it might not be that important to professional writers that they can use most government authored materials without concerning themselves with copyright and fair use. But on a more political level, I think this misperception is important. In the US, as distinct from other democracies or other forms of government (monarchies for example), federal government documents generally aren't copyright protected. The fact that the savvy and educated participants taking the survey aren't hearing the words of Lincoln's Gettysburg Address: "government of the people, by the people, for the people" as they consider authorship of government documents is troubling since the authorship status of government documents in the US is one of the clear markers that separates us. A copyright information website sponsored by York University points this out:

In the United States, documents prepared by the government are generally considered to be in the public domain, and thus have no copyright protection. In Canada, however, the Crown owns copyright in government documents. (Copyright and You)

One wonders whether the implications for living in a democracy have been minimized due to the current political climate—i.e. government sanctioned wiretapping, Guantanamo bay, government sanctioned "torture," the Patriot Act, and so on. In the current political climate some of us, especially the humanists,

feel very detached from government-authored actions. One wonders whether this sense of detachment has also seeped into our perceptions of who owns the government (and the knowledge it produces).

We should also consider here how to factor in the participant responses to the question that asked whether one should obey the law without exception or follow one's conscience. As discussed above, the survey results showed that 73% would follow their conscience rather than obey the law on exceptional occasions. From a humanist perspective, one's conscience is ideally under the individual's ownership, while the law is a product of the government. If this is a theoretical separation for these participants, it again makes sense that something authored by the government is not seen as something authored by oneself, and thus it would be logical that a digital writer in this context would need to either have permission or be within fair use. Of course, since government documents are in the public domain, fair use is inapplicable because fair use only applies to unauthorized uses. Items in the public domain can be used without considering fair use or permission.

The misunderstanding evidenced by the answer to this question provides clear contrast to a question on the ability to create derivative works from another's copyrighted materials. The question asked:

The owner of a copyrighted novel has failed to make this novel into a play. You decide to do so without the copyright holder's permission. Your derivative work, the play, closely follows the plot and characters in the novel, but is likely to be a fair use because it is different than a novel.

The best answer here was false, since a play is obviously a derivative work based on the novel, and would impair the original author's future market. A novel is also a creative work and so has more protection than something like a factual report. The participants overall had a very clear understanding of these issues, as 95% out of 350 selected the best answer. The clear understanding perhaps emphasizes the academic economy of symbolic capital via attribution and the ability to control the destiny of one's creative works. It might be that the survey respondents feel that they are stakeholders along with the novelist, but removed from items authored by our government (since in a sense as US citizens we are co-authors of government documents).

Here we can reconsider Foucault's theory of the author-function. While US copyright law as author-function (i.e. a function that deploys certain strategies which organize information) does not prohibit the dissemination of government documents (i.e. government documents are not owned by the Crown and thus can be more easily disseminated), it privileges and reinscribes the creative genius, the individual novel writer (by providing more protection to creative works). This makes sense when we remember Foucault's discussion of the economy of discipline in a culture that no longer allows public torture, hangings, and death by guillotine. Copyright law serves an economy of discipline because when internalized by subjects, it hopes to control from the inside without "torture, hangings, and death by guillotine." A government that provides and performs copyright law like the US government would need and want its texts to be freely disseminated within the culture in order that such texts can be more easily

internalized by subjects in hopes of producing virtuous citizens rather than incorrigibles. Perhaps it is the humanist impulse in technical and professional writing that resists the unimpeded flow of government authored texts by seeing the need for permission or fair use to use such documents when under the law no such need exists.

What I am saying here is that copyright law in the US serves in a government sanctioned economy of discipline that results in the government having a potentially more ubiquitous presence than it might have if it locked down its own textual productions via copyright law. Instead, it sets these textual productions free. Some of us professional writers resist this “discipline” in its present form. We may not want to internalize government generated discourse even though we can do so unimpeded since copyright law holds no bar.

What is “creative” work?

If any group would challenge traditional notions of “creative” writing, I would think it would be technical and professional writers. While the master narrative defining creativity might label it as producing items like poetry, paintings, short stories, sculpture, novels, and so on (poetry and fiction is the exclusive domain of the “creative writing” course at my institution), anyone who has either produced or critiqued an instruction manual appreciates the vast creativity involved in constructing a text that appeals and is understandable to a broad audience. Yet, in the US the more traditional definition of creativity is imbricated in determinations for purposes of copyright protection and fair use. Fair use is less likely to cover a use of someone else’s creative work. One of the

fair use four factors looks at the nature of the copyrighted work. Courts generally do not find factual material as creative material. For example in *Stewart v. Abend* (1990), the court focused on copyright protection of the owner's exclusive right to create derivative works and did not find fair use. Cornell Woolrich is the author of the story "It Had to be Murder" and *Rear Window* is based largely on Woolrich's story. When MCA re-released the film, suit was brought. The court held that the film was not a "new work" falling under the protection of fair use. The four factors were taken into account by the court: the infringing work was commercial (factor one, purpose of the use), the original work was creative rather than factual (factor two, nature of the copyrighted work), and the re-release harmed the copyright holder's ability to find new markets (factor four, effect on market). In this case, the creativeness of the infringed work was one of the factors that, added with the others, caused the court to find this use was not fair.

When asked about the issue of creative versus factual work, the survey participants overall were not aware of the differences, with 58% answering that creative and factual work were equally protected by copyright, while only 42% thought that creative work would have different protection than factual work (See Table 4.6, question 2, in Appendix 4.1). The misunderstanding could derive from the field's tendency to deconstruct concepts like "creative" and "factual." It could also derive from the field's more sophisticated understanding of genre.

D. Behavior

- 1) *Chilled speech (6 point index)*

As stated in the beginning of this chapter, one of the major findings in the overall study (survey and interviews) was that while digital writers' speech may have been influenced, informed, and mediated by copyright law, their speech was not chilled. In this chapter I am going to briefly discuss the outcomes of the survey with respect to chilled speech. In Chapter Six on rhetorical invention and the law, I will provide details on the overall finding that these digital writers' speech was not chilled. The survey found that for the majority of this population, digital speech was not chilled. As illustrated in Table 4.9 in Appendix 4.3, "Chilled speech" was measured by a 6 point question set exploring whether the writer had been asked to take others' copyrighted material down from the web, had voluntarily done so, or had reflected on using copyrighted materials and decided not to even though the web composition may have been improved. The 6 questions further asked whether the writer in general felt unable to express him/herself due to restraints of copyright law.

On a 6 point scale with a score of 0-2 being "not chilled," 3-4 being "somewhat chilled," and 5-6 being "very chilled," only 2.42% of the population had very chilled digital speech. In contrast 80.38% of the population did not have chilled speech. 17.2% had "somewhat chilled" speech. Notably, only 6% of the population (N=373) had been asked to remove web materials by a copyright holder or alleged copyright holder.

Survey participants were influenced by copyright law, but it did not prohibit them from expressing themselves. While 58% felt that "the purpose or message of a web composition [they] were creating would be better, clearer, or more

aesthetically pleasing to the audience if [they] could use others' copyrighted materials without fear of legal liability," only 14% felt they "weren't really able to say what they wanted in a web composition because [they] were afraid if [they] said it the way [they] wanted, someone might sue [them] for copyright infringement." As I will discuss in later chapters, what was happening here was that digital writers were considering and addressing copyright and fair use in their writing processes, something which may have been time consuming and frustrating, but ultimately they were able to express themselves although perhaps not in a way that was as aesthetically pleasing as they would have liked. Later I discuss in detail the rhetorical topics that mediated composing processes for digital writers as they made choices for their web texts. These rhetorical topics reach beyond copyright law and fair use, and so it therefore makes sense that copyright law alone did not chill speech. Copyright law did not have as much agency as some claim (See Hobbs, Jaszi, & Aufderheide, 2007; Westbrook, 2006).

Part Two: Differences Between Populations

In this section I discuss the differences in scores between self-identifying students, teachers, and others with respect to the variables of knowledge of copyright, attitude towards the importance of copyright law, and obeying the law. In this area I am looking at differences, and therefore using inferential statistics provides additional understanding. When examining differences between populations using inferential statistics, the inquiry is framed with the question of whether the null hypothesis should be rejected. The null hypothesis means

different things in different contexts, but it proposes the presumptive is true – in this case that there is no real difference between the averages in two populations (students and teachers for example). When you are looking at differences between the averages or means between two populations, each population will have a dispersion of data points that create the average. So the question is whether the differences between the averages is a real difference or is due to random variation that exists in the different distribution of means. For comparison, you could think of the null hypothesis as a kind a skepticism that any honest researcher has, especially one that goes into a research project with some expectations. A qualitative researcher who enters a research project with little expectations or predictions is kind of accomplishing the same ends as the null hypothesis, which is to resist the bias one inserts into the data – that secret desire to find that the thing you thought you would find. The alternative hypothesis proposes the relationship between variables that the researcher is trying to test. If enough support is not available to reject the null hypothesis, then the alternative hypothesis instead must be rejected. Inferential statistics provides parameters that guide the decision on whether to reject the null hypothesis. My discussion here will not go into the details of disciplines that heavily rely on inferential statistics, such as education and psychology, but within these fields there are serious scholarly debates on the validity of various statistical tests. Due to time and space constraints, my discussion here will only touch the surface of these issues. My overriding argument though is that claims to knowledge within inferential statistics, like claims to knowledge in any other discipline, are

rhetorically constructed. My analysis of the survey data therefore must be understood from this viewpoint.

Rowntree (2004) discusses the two risks encountered as the researcher decides whether to reject the null hypothesis. The risks are the Type I and Type II varieties. A Type I error is rejecting the null hypothesis when it shouldn't have been rejected, and a Type II variety is not rejecting even though you should have. Rowntree (2004) makes a useful comparison between these types of statistical errors and errors that might occur in a court of law. In court, if weak evidence is accepted to convict then the risk is that an innocent person ends up serving time. On the other hand, if only the strongest evidence is used to convict, a guilty person could go free. To guard against the Type I error, one can require a higher level of significance (say that there is only a 1 in 100 chance that the difference is random rather than a 5 in 100 chance – .1 to .5). But when the level of significance is increased, the chances of making the Type II error also increase (not rejecting the null hypothesis when you should have).

Rowntree (2004) points out the difficulty here because “since there is no way of knowing whether the null hypothesis is ‘really’ true or false, we can never tell which” type of error we are making (p. 120). I'd add to this an analogy based on differing theories or burdens of proof that are at work in legal determinations (some which can be life and death decisions, just like the decisions made in science). While inferential statistics uses terminology like “significant,” “highly significant,” and “very highly significant,” burdens of proof in law are described by words such as:

- **beyond a reasonable doubt:** “Fully satisfied, entirely convinced, satisfied to a moral certainty” (*Black’s Law*, p. 147).
- **clear and convincing:** “More than a preponderance but less than is required in a criminal case” (*Black’s Law*, p. 227).
- **preponderance of the evidence:** “Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be provide is more probable than not” (*Black’s Law*, p. 1064).
- **scintilla of evidence:** “A spark of evidence . . . used in the statement of the common-law rule that if there is any evidence at all in a case, even a mere *scintilla*, tending to support a material issue, the case cannot be taken from the jury, but must be left to their decision” (*Black’s Law*, p. 1207).

The law employs different burdens in different contexts just like inferential statistics, but Rowntree would probably argue that science is more conservative: “they demand significance levels that ensure we are far more likely to *fail* to claim a result that (unknown to us) would have been justified, than to *claim* a result that is illusory . . . The emphasis is on avoiding Type I errors” (Rowntree, p. 121). The law, I think, takes the context into account to a greater extent than inferential statistics, since the burden of proof depends on the type of case or issue at hand (criminal, civil, etc.). Below is Rowntree’s summary of significance levels from inferential statistics.

- **5% significant:** 5 in 100 chance that the difference is random (arising merely because of sampling variation)
- **1% highly significant:** 1 in 100 chance that the difference is random/by chance
- **.1% very highly significant**

You can imagine how crucial it might be whether the differences are significant or not -- If a life saving vaccine was tested, not to be released unless the differences between the population who received the vaccine and those who did not was significant enough to justify producing and marketing the vaccine, etc. The legal burdens as well become crucial, because decisions based on them could mean the difference between an innocent person being executed or a serial killer walking free. In statistics, the bigger the difference between the means of two populations, the more confident one can be in rejecting the null hypothesis. But to place the descriptors of significance in context, Rowntree reminds us that they are only verbal labels and ultimately only mean what we want them to. The labels of significant or not significant "really add nothing to what is shown in the figures -- though they may make the researcher feel happier that he has produced something worth while" (Rowntree, p. 118).

In order to determine whether there was statistical significance I used an F test, rather than a T test or a Z test. A T test would be appropriate for N's under 30, while a Z test is more appropriate for looking at differences between 2 samples (student and teachers only for instance). An F test is appropriate when looking at differences between more than two samples (student, teachers, and

others for example), although an F test and a Z test will accomplish the same results. In the pilot, I created a “high knowledge” and “low knowledge” binary, forcing the sample into two categories. For the full-study I instead conducted a more sophisticated analysis of difference by measuring variance along the entire trajectory of data points.

Knowledge of Copyright Law

As shown in Figure 4.1, teachers’ average score for knowledge of copyright and fair use was 68%, while students was 57%. Those who self-identified as “other” had knowledge levels between teachers and students at 62%.

Knowledge levels Students, Teachers, Others

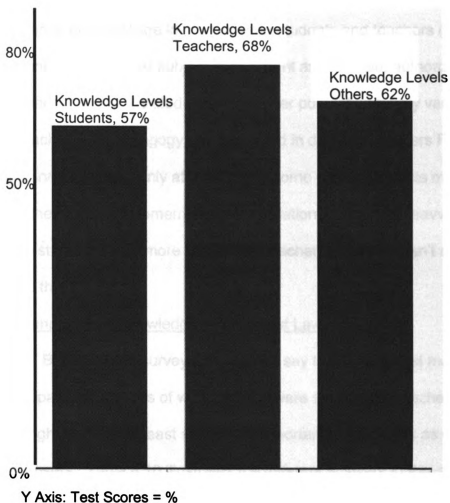


FIGURE 4.1. Knowledge Levels for Students, Teachers and Others

Looking at only the differences between the students and teachers, the F is .017, indicating a significant difference between their knowledge levels. The difference between the student scores and the others' scores yielded an F of .87, indicating little difference, and the F of .09 between the teachers and the others yields more significant difference. The key point here though is that there was only a small difference in knowledge levels between students and teachers (9%). On the extremely complicated subject of copyright and fair use, authorized use and unauthorized use, the student and teacher population hardly varied. Implications for teaching and pedagogy are discussed in detail in Chapters Five and Six, but the survey data certainly affirms that in some cases, students might know more than their teachers (remember this population is likely tech savvy). In the pilot, some students knew more than some teachers, and there isn't anything here to refute that.

How Important is Knowledge of Copyright Law?

Based on the survey data we can say that for the vast majority of survey participants regardless of whether they were students or teachers, knowledge of copyright law was at least somewhat important to their work as digital composers. Table 4.10 illustrates the different answers to this survey question based on whether the respondent was a student, teacher, or other.

| TABLE 4.10: How Important is Copyright? | | | |
|---|------------------|------------------|----------------|
| How important | students% | teachers% | others% |
| not very | 0 | .64 | 4.76 |
| somewhat | 19.85% | 20.51 | 11.90 |
| neutral | .73 | .64 | 2.38 |
| important | 31.61 | 29.48 | 35.71 |
| very important | 47.79 | 48.71 | 45.23 |
| note: numbers shown only to 2 nd decimal | | | |

Running an F test on this tells us that the differences between these populations is not significant (F between students and teachers is .99 and between students and teachers and teachers and others is .91). Interestingly, the highest percentage of folks who believe copyright knowledge is not very important is among “others.” Based on interview data this makes sense since “others” were likely alum who were working, in the case of one interviewee, for an organization that provided scripts and forms to handle the copyright problem.

Obeying the Law

In the survey, participants were asked “In general, would you say that people should obey the law without exception, or are there exceptional occasions on which people should follow their consciences even if it means breaking the law?” For purposes of analyzing differences I only look at students and teachers in the categories of “obey the law” and “follow your conscience.” 14% of students and 16% of teachers stated they would obey they law, while 86% of students and 84% of teachers said they would follow their conscience. There was no statistical difference between these populations selections (F=.62). Students and teachers alike trend toward the humanist perspective on this issue.

Part Three: Analyzing Relationships

In this section of the survey data analysis, I examine the strength of relationships between variables, or the correlations. I also discuss regression, or the nature of that relationship, positive or negative (Rowntree, 2004). There are three kinds of correlations: positive, negative, and zero. A “zero” correlation means the number approaches zero but it is almost impossible to find two variables that have no relationship. Also, it is noteworthy that just because a correlation exists, it does not mean there is causation. A correlation between two variables could be coincidental. (While it might seem like washing your car causes it to rain, when this occurs it is simply coincidental).

Some examples of correlations (taken from Rowntree, 2004) are:

- rainfall and attendance at football games (a negative correlation – the more rainfall, the less attendance at games)
- age of a car and its value (a negative correlation – the greater the age of the car, the less its value)
- length of education and annual earnings (a positive correlation – the greater years of education, the higher the earnings)
- ability to see in the dark and quantity of carrots eaten (no correlation!)

The following diagrams in Figure 4.2 show what one would expect to see representing the three basic types of correlations:

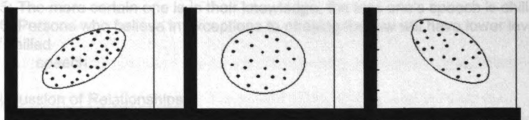


FIGURE 4.2. From Left; Positive Correlation, Zero Correlation, Negative Correlation

Rowntree (2004) notes that the correlation between two variables is a fact, but it is a matter of interpretation whether that relationship is good, bad, weak, or strong. The verbal labels that have been assigned to the various correlation coefficients are:

| <u>Correlation Coefficient</u> | |
|--------------------------------|------------------------|
| 0.0 to 0.2 | very weak, negligible |
| 0.2 to 0.4 | weak, low |
| 0.4 to 0.7 | moderate |
| 0.7 to 0.9 | strong, high, marked |
| 0.9 to 1.0 | very strong, very high |

While Rowntree does provide these descriptors, he notes that they are not used consistently, and that ultimately one must make their own interpretation based on the data.

The hypotheses tested in the survey were as follows (see Appendix 3.4 for detailed definition and explanation of each hypothesis):

H1: The more knowledge one has about fair use, the less one's speech is chilled.

H2: The higher the educational level, the higher the knowledge about fair use.

H3: The higher the knowledge of fair use, the more likely one is willing to see exceptions to obeying the law.

H4: The higher the knowledge of fair use, the higher the certainty one's knowledge is correct.

H5: The more certain one is in their knowledge, the less one's speech is chilled.

H6: Persons who believe in exceptions to obeying the law will have lower levels of chilled speech.

Discussion of Relationships

H1 posited that the more fair use knowledge one had, the less their speech was chilled. This could not be supported by the data because the

correlation was very low (-.075) showing a “very weak” or negligible relationship between the variables. This weak relationship might be because over 80% of the population did not have chilled speech. H2 asserted that the higher educational level, the higher would be the participant’s knowledge of fair use. This hypothesis is already indirectly supported by the higher scores teachers received compared to students on the copyright and fair use knowledge test. However, as for a statistically strong relationship, that was not supported in the data, although the relationship (.28) was stronger than that in H1.

In H3 it was hypothesized that the higher one’s knowledge of fair use, the more likely one would follow their conscience. The data again showed a very weak relationship between these variables (.042). This may have been because more than one half of the population would follow their conscience. H4 posited that the higher the knowledge of fair use, the higher would be the participant’s certainty that they were correct. The correlation coefficient between these two variables showed a stronger relationship than that in H3, but still a weak relationship (-.223). The correlation is negative because higher certainty received a lower score (a 1 was very certain). Therefore, the higher the test score, the lower the certainty score – the more one knew, the more confident they were. The correlation is better than “very weak” or “negligible” but not as great as “moderate.” None of the relationships allow us to reject the null hypothesis. Figure 4.3 shows the dispersion of scores of knowledge and certainty for participants. Also included is a trend line showing the weak nature of the

relationship. If the relationship was strong, the trend line would be more vertically slanted.

Is there a Chilling of Digital Communication?: Knowledge & Certainty Trends (N=334)

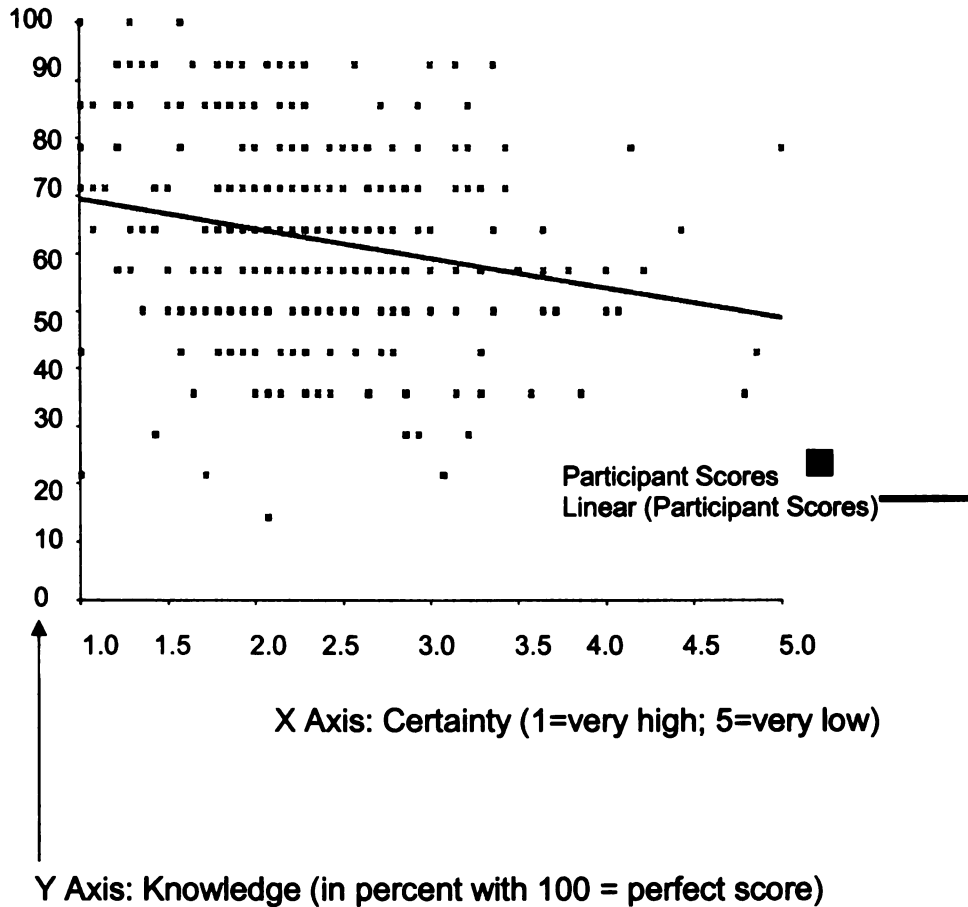


FIGURE 4.3. Showing the Relationship Between Knowledge and Certainty in that Knowledge

H5 and H6 also showed very weak relationships. H5 looked for a relationship between certainty and chilled speech (-.081). H6 posited that

persons who believed in following their conscience would have lower levels of chilled speech (.097). However, it would be difficult to find correlations in these variables because this population was very homogeneous both on its low level of chilled speech and on its willingness to follow its conscience. Because of this, trends are difficult to establish based on the measures provided by this data. So the kind of differences imaged in these questions was not present and as stated the null hypothesis cannot be rejected. However, we do know that Collins (2007) found with a different population and a different survey, a 30% increase in willingness to follow their conscience for US degree receivers. The data here has not provided anything to negate Collins' findings.

Part Four: Answering the Research Questions

In this section I am going to give a brief overview of how the survey data answers the research questions that were geared to the survey. I am also going to discuss how the issue of community in TPW arises due to low response rates, and I end this part by reporting on how the survey supported the tentative findings from the pilot study. Although I have covered how the research questions were answered throughout this chapter, I am going to summarize it here again. With respect to what writers know and understand about copyright and fair use and how confident they are, we can say that on this complicated topic, professional and technical writers have a decent understanding (63%) of the issues, more understanding in the area of fair use compared to understanding in the area of licensed use. The population has self-awareness of the limits of its knowledge. The differences in knowledge levels between students

and teachers was minimal pointing to the ways that cyberspace possibly challenges those subject positions.

With respect to whether copyright law is causing such fear that writers cannot fully express themselves (Porter, 2005; Westbrook, 2006), our data does not support that. Less than 3% of writers had very chilled speech, only 6% had been asked to take anything down from the web, and only 14% felt unable to express themselves due to fear. Although, writers acknowledged that their web creations may have been more aesthetically pleasing if they didn't have to worry about copyright. Note that it is possible that speech was not chilled for two reasons, one that digital writers weren't fully aware of some of the legal risks they were taking (with an overall score of 63%), and second that copyright stakeholders are not coming after the educational community, yet. This second aspect was found in a recent study by the Berkman Center for Internet and Society at Harvard Law School (Fisher & McGeeveran, 2006). The Berkman finding was supported in my study as well.

As far as how important writers think knowledge of copyright and fair use is to their work, we can say that hands-down, the vast majority of students and teachers think it is at least somewhat important, with almost half indicating they think it is very important. As far as the research questions that asked what the possible relationships were between knowledge of copyright/fair use, confidence in that knowledge, and levels of "chilled speech" in digital environments, the survey data was unable to find any relationships between these variables

possibly for the reasons discussed above – mainly that the population was very homogenous.

Culture and Community

In addition to exploring the research questions as discussed above, some issues with the survey administration itself might inform us.²³ The overall response rate was 23%, low by social science standards. Based on my earlier discussion of possible reasons for low response rates, we need to raise the issue of cohesiveness or community in TPW. My experience administering this survey supports the idea that TPW lacks cohesiveness or community in three ways. One, as I constructed the study population, in order to obtain the master list of programs I had to create a bricolage between three membership lists, and I realize those lists are not exclusive. The lack of a definitive publication on our programs is significant. Two, the problem I encountered in simply trying to locate contact information for faculty, and especially students, also points to what I argue is a serious problem with the “community” and who is allowed representational space in the field (See Knight et al., 2008 for a detailed discussion of this). And three, as noted above there is some evidence that response rates are low when a sense of cohesion is low among the community studied (Yun & Trumbo, 2000). I had a low response rate so this third point is supported.

Grabill (2001) defines community as a group that has shared values, networks, relationships, shared meanings, and socially constructed boundaries created by shared norms. But in the field of TPW are debates on whether or not

such shared norms and values exist. For example Connors (1992), Dobrin (1983), Durack (2004), Lay (1991), and Rutter (1991)(among others), outline debates within the field of TPW regarding how we define ourselves as a profession, what matters, and what we study, while writers such as Charney (2004, 1998), Haswell (2005), Johaneck (2000), North (1987), and Phelps (1988) document debates on appropriate methodologies and resistance to the use of typical “social science” and/or “empirical” research design in TPW or composition studies.

From my view, the low response rate I received at least tentatively supports the notion that we are not cohesive as a field, that there is little sense of community, and that, perhaps, “social science” methods are not supported. Perhaps we share few cultural practices as far as teaching, pedagogy, use of technology, research methodologies, and curriculum.

Simultaneously, I think Grabill (2001) at least implies that a researcher may facilitate the construction of community. Perhaps as the 11 weeks went by when I was collecting data, the act of researching the “community” created ad hoc networks, connecting individuals – responses to my survey did snowball and then taper off near the final weeks. By selecting sociocultural activity theory to frame my exploration of the field, I did impose a certain shape on TPW – thus creating a community where perhaps there was none. In Chapter Two I explained that I selected activity theory in part as a community building activity, in order to see the activity of writing in a system. Whether the community I

examined exists only on my triangle, or as well in some other more external space remains something to be explored.

Grabill's definition of community easily maps onto my definition of culture as I stated in Chapter Three: "a group of individuals who have agreed both implicitly and explicitly on the meaning-making rules for their community." The scholarly debates about methodologies as referenced above point to what might be a serious problem with the culture/community I am examining, since *methodology* is in my opinion *the very essence of a culture's identity and sovereignty*. Recall that in Chapter Three I described the three levels of systems/cultures that I examine in this study: 1) the culture-of-the-law and the infrastructure that supports it; 2) the field of technical communication and its cultural practices; 3) the individual interviewee-writers. The survey data provides a view of technical communication as a field – but because of the low response rate we have only a glimpse of some members. Ultimately, learning about our field as a collective will prove difficult from a research perspective if we do not participate in studies that examine our own collective practices.

I end this part by reporting that all tentative conclusions from the pilot study as listed in Chapter Three, were further supported in this survey. That is:

- participants were aware of copyright and fair use issues
- some students had more copyright knowledge than some teachers (but overall teachers had slightly more knowledge)
- TPW students (and teachers) think copyright/fair use instruction should be part of their education

- There is substantial confusion about the difference between the ethic of anti-plagiarism and copyright/fair use
- There are some misunderstandings about the differences between authorized and unauthorized use, i.e. the nature and coverage of the fair use doctrine.
- There is misunderstanding about the government document exception to copyright.

The survey findings here then have been supported in two studies that took place about two years apart. Therefore we can feel fairly confident that these findings are accurate.

Part Five: Overall Implications for Teaching, Learning, and Research

Chapters Five and Six contain lengthy explications of the implications for teaching, learning and research emanating from this study. However, here I am going to reach across all of my data analysis and synthesize those implications which fall into three main categories: 1) suggestions for changing TPW curriculum and pedagogical approaches; 2) continued disciplinary theory building in the area of composing process theories as well as research design; and 3) additional research with respect to a number of complexities and contradictions that emerged from this study.

Implications for Changing TPW Curriculum and Pedagogical Approaches

The findings of this study show that the vast majority of teachers and students believe that knowledge of copyright law is important to their work as digital writers. Yet, they scored only 63% overall on this knowledge portion of the

survey. We should explore the idea that explicitly teaching copyright law in TPW should become the norm. In the interviews it was found that students (and recent alums) wanted to learn and experience *all* the various laws that impact professional writing, such as privacy law, defamation law, and contract law. Teaching copyright might be folded into a core course where the laws of public writing in general are taught, but taught under the lens of rhetoric.

Because there is a lot of interest in this area which will not quell in the digital writing environment, some programs might be very smart to explore developing a concentration within, for example, a four year undergraduate professional writing major specifically in “Law, Rhetoric, and Community” or “Law, Culture, and Community.” Such a concentration could be very helpful for students who want to continue in a legal career, work as journalists, work as consultants, or become legal experts in their organizations, including non-profits. Such a concentration would be very helpful for students who want to advocate for others via their writing, as many professional students do desire.

At Michigan State University for example, the James Madison School of Public Policy (very distinct from MSU's professional writing program), an undergraduate residential college, has constructed an identity for itself as a feeder to law schools. However, the students there are generally indoctrinated into conservative leaning political views and heavily quantitative social science methodologies. But if we reflect on how professional writing degree holders can best suit our mission of civic participation and “making the world a better place,” if there's anywhere a liberally educated professional writer could create change, it

would certainly be in the legal/political field. A concentration in professional writing that specifically focused on connections between law and rhetoric seems absolutely invaluable and very much within our mission of service-to-community.

In this study I found that students sometimes know more than their teachers about copyright, and also that students are doing very complicated digital writing outside of the classroom. We have empirical evidence of this now. I think that these findings should shape our writing pedagogies and I would certainly welcome explorations in this area by other scholars in our field.

Since as writing teachers we care deeply about “The Author” and what that means, we need continued examination of authorship in the 21st century. My study only complicates our existing scholarship in that I found the “single author” and his “creative genius” to be as honest as what the US flag represents (unity, freedom, harmony, bravery, etc.). I found the single author, like the US flag, is an ideological production. And if the author is not working in solitude even though he is “alone,” if digital writing travels through space and time and collapses the past, present, and future all in a 10” x 15” space, then we have to consider cross-cultural issues, issues of attribution and plagiarism, and issues of collaborative work in an entirely new light. We have to consider what it means for writing programs who insist on clinging to “the essay” – what I am suggesting here is that “the essay” in its paper form, is functioning as a site of resistance for some writing programs, and for students is becoming a “performance of authorship” rather than anything even partially analogous to the “authorship” students are

experiencing in “real life” outside of school. I’m not sure how helpful, if at all, the rendering of such performances is to students.

Further, based on the exploration I venture into in Chapter Five, spurred by Rob, the interviewee from India, I am very, very skeptical about any community that claims its knowledge is “community-owned.” Every community/culture has methods that organize meaning, that say who is and is not permitted to have or grow certain types of information. I seriously call into question the label “community-owned” knowledge which tends to be regularly applied to more marginalized peoples. We need a much more critical view here. The impact of a changed understanding of authorship, one where perhaps it does not matter who is speaking, the impact for teaching writing in the 21st century, especially in digital, networked environments, is overwhelming. We need to work together to unpack and organize this.

Finally, my ideas as expressed in Chapter Five regarding other cultural practices in cross-cultural contexts producing the same end result as US copyright law, might provide additional methods for situating a study of copyright law in TPW. Based on my study findings, at the pragmatic level it cannot be supported that students are living in a “culture of fear” although some in our field have claimed so. This idea of students in US college classrooms living in a culture of fear and uncertainty becomes even more tentative when one considers the other kinds of cultural practices that organize meaning. Situating US copyright law restrictions in a cross-cultural, international context may deeply

impact how copyright law is taught. We know that because of digital writing, intercultural issues have become more important than ever to TPW.

Implications for Additional Disciplinary Theory Building in the Area of Composing Process Theories as Well as Research Design

The mediational heuristic I describe in Chapter Six, one that serves as guide-marks for students as they compose for the web, really complicates other writing process theories such as that espoused by Flower and Hayes (2003). As a field we really need more empirically based studies on writing processes, studies that will inform our curriculums and pedagogies. My interest is digital writing, but studies of analogue writing would also be very useful and provide points of comparison.

We need additional theories that help us understand why inventional heuristics work sometimes but not others. I am interested in the connection between power and invention, as well as *metis* and invention. One place I see potential for exploration here is gaming theory and its intersection with rhetoric studies, since both successful gamers and successful rhetoricians use *metis* to win by deception. But this is not my research trajectory so I invite others to pick up some of the many research trajectories suggested by my study. Exploring connections between legal reasoning and performances based on legal reasoning, and our rhetoric-based concept of *metis* also might help develop our theories of invention. Studies involving the exploration of cross-cultural inventional strategies for organizing meaning and creating “truth” are also

needed as well as studies involving authorship in the workplace and how that might differ from authorship in the classroom.

With respect to implications for research design in rhetoric and writing, the one take away I try to offer in Chapter Five is that claims to truth and knowledge, even in statistics, are rhetorically constructed, organized by rhetoric, and are in the realm of probable knowledge. Thus, as Patricia Sullivan suggested in her 2008 CCCC's presentation in New Orleans, mixed methods research designs might be very promising for researchers in our field. Quantitative methods render rhetorically constructed probable knowledge just as do classic hermeneutical interpretations. Thus, our field should not fear using quantitative methods such as my survey, because we have the understanding and skill to unpack their rhetorical nature. Yet, we also do not want to let go of our qualitative traditions. Mixed methods allows us to do both. Because we can do both, I think we need to exercise much more caution in claims that we make unless those claims can be backed up by empirical evidence or otherwise substantiated. In my study I found digital speech was not chilled and students and teachers were definitely not living in a "culture of fear," contrary to the claims of other scholars in our field. Overall regarding the use of mixed methods though, I think as a field we could really triumph in this area.

Implications for Additional Research with Respect to a Number of Complexities and Contradictions that Emerged from this Study

This study, in the abstract, focused on writing as a tool/technology-mediated activity and is grounded firmly in an understanding and implementation

of the rhetorical canon of invention. To study copyright in light of theories of invention is a unique approach to the “copyright problem.” Using inventional theory as a backdrop, I was able to leverage the tools and history of rhetoric theory in order to shed new light and new understanding on the copyright problem. Notably, in the first chapter of this dissertation, I review scholarship within rhetoric and composition as well as legal studies with respect to examining the copyright problem as one of law. As Danielle Nicole DeVoss has pointed out to me in casual conversation, one curious aspect of this literature review is the lull that occurred between 1998 and 2008 in rhetoric and composition where disciplinary interest about copyright seemed to cool.

I theorize that perhaps it is because within rhetoric studies the initial scholarship developed around the idea of simply defining copyright law and its implications for digital writing, and subsequently arguing that since it is relevant for writers, especially digital writers, it should be taught. For some reason, empirical studies were not generated by this initial coverage of the topic within rhetoric and composition studies. I think that if an area of scholarship is important to our field, as copyright and its attendant concept of authorship are, we really need to continue initial indications of interest with empirical studies in order to test our developing ideas. Back in the late 1990's, we failed to explore the copyright problem as a problem of invention rather than a problem of law which may have contributed to the lack of developing a sustainable research trajectory within rhetoric studies.

What I mean to say is that the implications of my study and the robust discussion here, are that empirical studies can be very, very generative when one uses a concept from rhetoric, like invention, to study writing. All kinds of research could develop from this simple idea.

As will be explored in Chapter Six, there is not a clear link via my data to knowledge and understanding *and* certainty in that knowledge. The findings are contradictory. Somehow I believe a predictable link of some sort lies in exploring the “toolness” of any mediational heuristic. Additional studies are needed here as well.

Finally, I think the kind of contributions researchers in rhetoric and composition studies could make to legal studies and practice is immeasurable and almost completely unrealized. I think we could inform theories of law school pedagogies, of legal methodologies, of the rhetorical moves made to achieve justice, of legal writing including judicial opinion writing. I would certainly welcome any work in our field that picked up where Chaim Perelman left off, and explored the connections between law and rhetoric which are very deep and complicated. This is where my research career begins, and I welcome all assistance.

CHAPTER 5

A REMIXED THEORY OF AUTHORSHIP

So far I outlined the copyright problem with respect to digital composing. I've explained my theoretical framework going into the study and justified my study design. I also provided an overview of the survey findings as well as an overview of implications for teaching, learning, and research. In this chapter I discuss a theory of authorship that came out of the data collection. As I've mentioned before, my theoretical framework going into the study shifted during data collected. It proved inadequate as interviews were conducted and the need arose for further assistance in analyzing the webspace as commonplace and remix-authorship's intersection with copyright law. As stated in Chapter Two, Prior (2004) implies tracing the writing process is simultaneously a study of rhetorical invention and authorship. I've used activity theory (AT) to theorize and explore the digital composing practices of web writers since Vygotsky's AT in some respects is a theory of invention – rhetorical invention and the law are discussed in the next chapter. Yet AT has not been previously used to explore authorship. Thus, I turn to Foucault since he wrote about the author-function. As mentioned in Chapters One and Two, Foucault for the most part discusses the author in the very limited sense of a literary figure. I believe that when subsequent writers interpret Foucault, they accept the limited sense of author that Foucault presents on the surface, but which in fact is much more complex

and very connected to Foucault's other theoretical outlooks on law and institutions.

In the piece I mentioned in Chapter One by Mark Rose (1988), he outlines the events leading up to *Donaldson v. Becket*, (1774) where Scottish bookseller Donaldson published *The Seasons*, a book whose copyrights were owned by Becket and several other London publishers. In 1774 Great Britain, the House of Lords (as an appellate court) decided the issue of whether copyright was a common law right that lasted in perpetuity, or a statutory right with a fixed term. The final decision was that copyright should be limited in time. Framing the outcome of this case with Foucault's "What is an Author?", Rose argues that the author is a proprietor and originator. Like Foucault (on the surface), Rose discusses the author in the limited sense of literary figure who expresses himself in books. In a very recent collection, Amit Ray and Erhardt Graeff (2008) come very close to perceiving a broadened concept of Foucault's author-function in their piece "Reviewing the Author-Function in the Age of Wikipedia" (2008). They explain how in Foucault's "What is an Author":

Much of the essay involves a careful explication of how we might conceive of the author-function. Importantly, Foucault is careful to note its variability. Authorship exists within different discourses, defining characteristics such as originality, authority, and property that vary according to the particular discourse. (p. 42)

While Ray and Graeff note that Foucault did not want to replace "author" with "author-function," this is ultimately how they use the concept "author-function" in their chapter. "Foucault's aim in undertaking this critique of the author . . . is to query naturalized conceptions relating author to work" (p. 42). However, when

reading this single essay by Foucault in light of his other work on law and institutions, and in light of Foucault's deep connection to actor network theory (ANT), although subsequent interpreters of Foucault take literally his discussion of author-function only in the context of literary "author," it's clear Foucault was talking about something much more transcendent and ubiquitous than a literary figure. By drawing upon ANT's concepts of radical symmetry and actor networks, perhaps I can provide a more robust discussion of Foucault's author-function that might help a small bit in our understandings of digital composing authorship in copyright contexts.

To provide a context for Foucault's discussion of author-function (a context I draw upon as well in the next chapter when I talk about rhetorical invention and the law), Foucault (1977) writes about power and institutions including law and education. Remember as I said earlier, US copyright law is an author-function because it counters our fear of the proliferation of meaning by deploying certain strategies that organize information. Copyright law attempts to organize knowledge production by dictating who is and is not allowed to speak. Foucault focuses on mechanisms of power such as (copyright) law and the discourses it produces. He specifically talks about educational institutions and the law as mechanisms for punishment and control. Remember my study examines writers in the *educational* setting as well as *law's* mediation power. Therefore, the context for my study fits well with Foucault's foci. According to Foucault, both education and law contain mechanisms that create and reinscribe

the “individual” by classifying, separating, and endlessly dividing (both through discourse and through physical space).

Copyright law is an author-function in that it classifies and divides by assigning exclusive rights to copy, perform/display, create derivative works, and distribute to the creator of an original, fixed work. These rights also facilitate the construction of “individual.” Foucault’s theories on authors, laws, and institutions intersect in this study because my view is that the “author” is a creation of practices both in education and in law – and my study is about writing in an educational community and the influences of law on writing processes. Underneath these practices though, upon examination, the “author” disappears because he is actually an inversion of the practices that produce him. The author is a node in the network, is a product, is produced by a complicated set of practices that attempt to organize meaning (US copyright law and MLA citation practices for example). The author comes after the text emerges, not before. A number of restraints and facilitators are in place that allow a text to emerge, that allow one text to emerge and not another. These restraints and facilitators are “author-functions” as is US copyright law.

The author derives in part from any practice that produces the individual, and as Foucault states, both education and law reinscribe the individual. The self-defined student-authors in my study are to some extent products of the educational institution. As for the legal nature of these writers’ existence, the US constitution and other US laws define, protect, and thus reinscribe the “individual.”²⁴ As Chaim Perelman (1963) cleverly points out, “the authority of the

law is derived from the individual's prior autonomy – that is, from his capacity to take on commitments and from the correlative obligation to honor them” (p.11). The law's prose reflects an image back upon us of an individual capable of being virtuous and law abiding, or of being an incorrigible. The law's prose is one of many artifacts that constitute us as individuals.

In copyright contexts, Foucault offers a new lens to understand how copyright law and events like stakeholder “anti-stealing” media blitzes function. Foucault offers two examples on how power works to produce discourses. His two examples are the communities or colonies created by leprosy, and the separating and dividing caused by the plague:

The leper gave rise to rituals of exclusion . . . the plague gave rise to disciplinary projects . . . the exile of the leper and the arrest of the plague do not bring with them the same political dream. The first is that of a pure community, the second that of a disciplined society . . . underlying disciplinary projects the image of the plague stands for all forms of confusion and disorder, just as the image of the leper, cut off from all human contact, underlies projects of exclusion. (Foucault, 1977, p. 198-199)

In the 21st century, the “binary branding and exile of the leper” is applied as in branding individuals as copyright violators, (copyright) terrorists, (copyright) criminals, and hackers (see Logie, 2006 for a discussion of this branding in the language of rhetoric). And the disciplinary mechanisms as products of fear of plague, are the same kinds of mechanisms that arise via stakeholders' fear of copyright violators. The “existence of a whole set of techniques and institutions for measuring, supervising and correcting the abnormal brings into play the disciplinary mechanisms to which the fear of the plague gave rise” (Foucault,

1977, p. 199). The increasingly potent disciplinary mechanisms of US copyright law have arisen from the fear that one's property will be unjustly appropriated in such a fashion as to deprive stakeholders from what they perceive as due profit. Notice that the fear here producing more and more copyright restrictions is on the side of copyright holders, rather than student writers as Westbrook (2006) characterizes. Fear is powerful on either side of the copyright debate.

The dividing techniques that Foucault refers to are seen in copyright laws' categorizing of behavior (the four factor fair use test for example) and enumerated set of punishments (higher damages for willful and wanton infringement). This is true with all formal US laws, not just copyright. In a less negative context, the co-existing community building and individual sustaining nature of our US law is easy to locate. The US Constitution preamble begins: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense . . ." (1991, p.1). The "people" are a union, a community like those isolated in leper colonies,²⁵ but comprising the union are individuals – like those with the plague, marked, separated, and counted each night. The 14th amendment is an easy place to find a reference to the individual: "nor shall any State deprive any person of life, liberty, or property, without due process of law" (1991, p. 26). The US courts and legislatures thus spend much time balancing the interests of common good against individuals' rights.

Foucault's discussions of how power produces discourses that serve to regulate human behavior are useful when examining the law's influence on digital

composing because Foucault flattens the connotations and disconnects existing relationships that might cloud a researcher's observations (that Foucault does this should remind you of ANT). But Foucault does not clearly connect the law-function and the author-function. If he had done so, we might have been able to derive a more robust understanding of the cultural practices that produce the "author." ANT's concepts of radical symmetry and actor networks are useful for making some connections and conducting analysis in this area.

Actor Network Theory (ANT)

While Foucault provides some very useful lenses with which to examine the function of the law and the author-function, there are some shortcomings in his work as far as connecting the two, and as far as broadening our understanding of the author-function. Fortunately, actor network theory (ANT) helps us out here because there are a number of similarities between Foucault's theories and ANT. Blending Foucault and ANT together in the context of an authorship discussion is helped by ANT's concept of radical symmetry – the flattening of existing relationships and contexts, and the idea that non-human actors have agency. The concept of radical symmetry is needed in order to "see" the author-function in places we might not expect. Recall that in Chapter One when I was discussing the five categories of existing research on intellectual property related topics, to wit, "Historical Studies in IP and Rhetoric Contexts," I ended that section by noting how writing on history, or even current events "are sometimes writing about cultural practices that strongly connect to the goals of intellectual property laws although such practices aren't/weren't called 'copyright

law' or 'patent.'" What I meant was that intellectual property laws, discourses of plagiarism, ethics, discussions of authorship, and a whole bevy of other cultural practices I'll get to, are all supporters of that ideological production we call the "author." In this chapter I give you some specific examples of what I mean. For the next chapter on rhetorical invention, radical symmetry is a useful tool to examine the agency of the law compared to the agency of the writer. ANT is useful as well because it offers the idea of actor networks – a concept allowing the dissection of an object such as copyright law as a node²⁶ in the network.

John Law (2003) explains the qualities of ANT that I find useful (notice how he directly references Foucault):

It is a method (or better, a sensibility) that has to do with and explores relations, relationality . . . ANT (and other post-structuralist semiotics of materiality such as that developed by Michel Foucault) extends this beyond language to all entities. All entities, it says, achieve their significance by being in relation to other entities. This means that in ANT entities, things, people, are not fixed. Nothing that enters into relations has fixed significance or attributes in and of itself. Instead, the attributes of any particular element in the system, any particular node in the network, are entirely defined in relation to other elements in the system, to other nodes in the network. And it is the analyst's job, at least in part, to explore how those relations – and so the entities that they constitute – are brought into being. (p. 4)

Like Law explains here, Foucault (1977) also sees bodies (what Law calls entities, things, people) as individualizable (Law refers to significance and nodes in the same way Foucault refers to individualizability), in positions that are not fixed, and distributed and circulated "in a network of relations" (Foucault, 1977, p. 146). Like Law, Foucault emphasizes the importance of hunting for origins. Under both Law and Foucault's lenses then, the "author," or any "entities, things,

people,” are not fixed, but are representations that come out of certain “relations,” networks, cultural practices, or “author-functions” that produce them.

The Data

As you recall, in the previous chapter I outlined the study’s six major findings. In this chapter I discuss the two major findings that relate to authorship. Those findings are:

1. Web spaces are sites of cultural collision, or commonplaces, where students occupy sometimes conflicting positions such that the very notion of “studentness” is inverted. Web spaces as commonplace challenge existing concepts such as “author” and “originality.”
2. The intertextuality of web-space-writing provides support for Foucault’s theory that the single author is an ideological production representing the opposite of its historical function, i.e. the “author-function,” in the larger culture. “When a historically given function is represented in a figure that inverts it, one has an ideological production” (Foucault, 1984, p. 119). No support was found for a human culture existing without an “author-function,” whether it is a workplace culture or even a more community-knowledge-focused culture as exists in India. Yet, “the author” switches in and out of a subject position in relationship to human and non-human actors.

Colliding Cultures

Colliding cultures in cyberspace are revealed in this study since I found that webspaces are sites of cultural collision, or commonplaces, where students occupy sometimes conflicting positions such that the very notion of “studentness” is inverted. Additionally, webspaces as commonplaces challenge existing concepts such as “author” and “originality.” In this section, first I reiterate my theory of webspace as commonplace as supported by the data. Next I describe the problem of the writerly category of “student,” and then I’ll explain why this is relevant to a discussion of authorship and originality.

Recall that in Chapter Two I provided a rationale for my examination of copyright law in digital composing because the webspace provides opportunities to rip, mix, and burn, bring the familiar and unfamiliar together, to converge the past, the present, and the future. I provided you a screen capture of Leslie's webtext, illustrating how she used images from game playing and mixed those in with course syllabi information, synthesizing her own design ideas into the remix, creating something she hoped was intriguing to students. This kind of convergence of the past, the present, and the future within a web composition occurred for all seven writer-interviewees. Leslie anticipated multiple audiences, and therefore had multiple underlying motivations for her writerly decisions. Her work merged the past (graduate student), the present (graduate teaching assistant), and the future (faculty member at new institution). Her work also evidenced the passage of time that was underneath web content. Leslie's main thematic image had been developed over a year prior to its implementation in the course website Leslie designed for her FYW students.

Another writer provides a clear example of webspace as commonplace, a text that travels through time and space, converging the past, present, and future. Below is Figure 5.1, a visual vignette I create of Jessie's web writing.

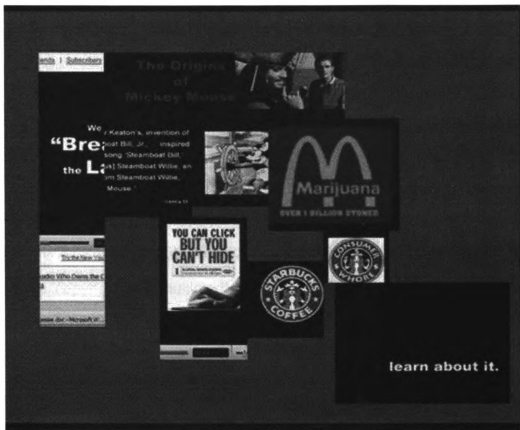


FIGURE 5.1 Visual Vignette of Jessie's Web Writing

Jessie is transitioning from MA student to PhD student. At the time of our interview she is finishing up her MA in professional writing, and applying to PhD rhetoric and writing programs. At the time I write this, several months later, Jessie's been accepted into a PhD program and will continue her studies in this area. As a digital writer, Jessie maintains web identities as graduate student, graduate teaching assistant, teacher (having taught at other institutions), and applicant to PhD programs. Again I see the past, the present, and the future converging in Jessie's commonplace, her digital portfolio. The digital portfolio she shares with me contains all the basic elements like CV, teaching philosophy,

classes taught, and so on. Jessie has taught web design and multimedia writing, even her first year writing course curriculum contains a major multimedia component. She always discusses and teaches fair use and copyright issues in her courses.

Jessie might be called a copyright activist, in that she has a great deal of interest in preserving and expanding fair use, and by the time I write this she's done at least two conference presentations, many informal classroom presentations, and had a publication in a major journal in our field on the issue of fair use, copyright, and multimedia writing. All of these activities are reflected in her portfolio. Aspects of this portfolio are maintained for students in the courses she teaches; other aspects are for career-related evaluations by outside audiences, still other aspects are for copyright holders. Our talk centers around a movie she's created that argues for activism in the area of fair use and argues for changes in the law. She explains the genesis and development of her web composition, which she estimates took about 100-150 hours for the single movie.

OK, um, [name of movie] started to be a book report about Larry Lessig's book *Free Culture*. I was just supposed to present on that information, and um, kind of interesting my son had made a power point that ah, was an automatic, you click it one time and it played all the way through and it played to when "Wake me when September ends," and I'm inspired by this. I'm thinking how did he do that? I want to do something like that. So that's really where [name of movie] came about, was the idea of, oh I could present Lessig's material in a moving power point movie, and do a sound track with it, um, that's basically the context for me making it. Now once I started making it, it was, it became more interesting because I'm like, oh wow, I remember an old song called "Breakin' the Law." This is about breaking the law. It's about appropriation. That really fits. I'll put those together, and um, it just kind of grew from there. It ah, ended up being ten minutes, three songs in the background.

When asked about where she obtained the materials for her webtext (the movie), she answered:

Google.com. I mean I knew that ah, one of Lessig's examples was when Walt Disney remixed Steamboat Bill into Steamboat Willie, or got his idea for Steamboat Willie, Mickey Mouse's first cartoon from a movie that was called Steamboat Bill. So that's kind of where that started, but it certainly was easy enough to go to google and do an image search and find images to highlight when I was talking about in the written, in the text portions of the report. And it didn't stop there. There's a picture of *Pirates of the Caribbean* in the piece.

And um, and many a logo, where I talk about remix and how it's not necessarily needed in society but it's part of our freedom of expression. So I show a logo of star bucks and someone's remixed it to consumer where logo. I show a logo of coca cola and someone remixed it into a enjoy capitalism logo, and so, the star bucks, the coca cola, what else did I use, McDonalds, eBay, these logos were um, "right click," "save file," "save image as," and I had them. They were just. They're available on the internet.

Yes, Jessie is a student. Sometimes. But at other times she is a teacher, and at others a graduate program applicant, a job seeker, a mom, an appropriator of others' materials. She switches in and out of these subject positions, and her webtext helps her maintain all these identities simultaneously. Jessie is indeed much more than a student. She is a webwriter.

Another student-interviewee who provides a wonderful example of the webspace as commonplace is Amanda. Amanda is a recent graduate with an undergraduate degree in professional writing. At the time of the interview,

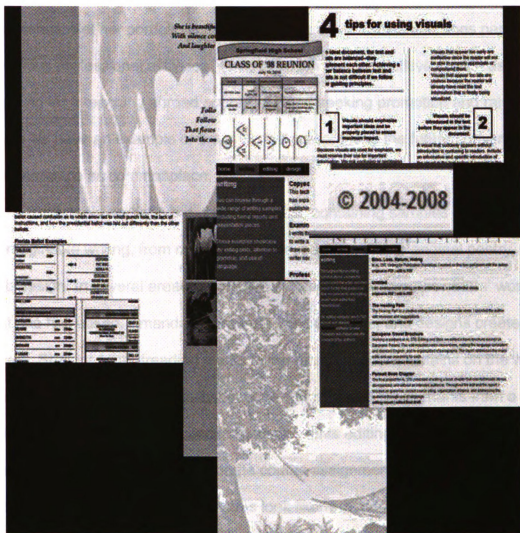


FIGURE 5.2: Visual Vignette of Amanda's Web Writing

it's been about two years since she graduated and she is in her second full-time position. She is working for a national non-profit health organization as an online communication specialist. She regularly maintains their website and uses the organization's intranet. The visual vignette I provide for you in Figure 5.2 contains pieces of Amanda's professional portfolio. She is involved as an alum with her

undergraduate program, and generally finds it beneficial to stay marketable and keep her web portfolio up to date and reflective of her current position and past experience. Yet her portfolio is forward looking as well since she does participate in various professional activities, some of which are competitive – such as applying for a teaching abroad opportunity and seeking promotion and raises. Again we have an example of the past, the present, and the future converging in the webspace as commonplace.

Amanda's portfolio is extremely robust, containing samples of every kind of imaginable writing, from memos, to book chapter edits, to original poetry, to web design. In several areas of Amanda's portfolio, she features others' work that she has edited. Amanda incorporates texts, visuals, and designs created by others. She uses proofreading marks in her design that she obtains on the web and considers a fair use partially because she retrieved these marks from a university website that was used to teach students editing marks. She has a knack for incorporating undergraduate course assignments into her portfolio in such a fashion as to make these items look like work completed in for-profit environments. Part of this knack comes from her ability to keep everything clean and professional. As far as copyright, Amanda is not terribly concerned about it. In her job, the employer provides forms that others must sign to release their rights to donated materials, pictures, and texts. With the advent of user generated content, such releases are crucial for Amanda to perform her job. She is well aware that she is not the author of material she completes as an employee and also feels a sense of responsibility as a representative of the

organization to make sure the organization is presenting a uniform identity, and is using others' materials fairly:

We have a -- it's a publicity [form] and something else, and it's just like a legal document, and the person can sign it for interviewing and if it's a kid then the parents have to sign it . . . it has all the same sort of language that like our websites have when people want to share their story, or talk about their experiences, and they say that you can publish this in any way that you see fit, and they trust us, our organization, to use it, in a way that's not disrespectful, or judgmental about their character, or anything.

This is basically to protect the organization, and the people who we are getting the stories from, so I think it's more a legal issue. . . and when you're writing stories for the newsletter, for the external newsletter, and anybody we interview, I give them the option to review it first before I publish it . . so that they can see what we are saying. To make sure that they are comfortable with it being published, and I give them an option to say yes or no. It's just a courtesy.

Clearly, Amanda navigates the web with a sophisticated understanding of authorship. For her, she switches in and out of "author" position depending on whether she is working on her own or for her company. As an employee, it is the organization not Amanda who stands in the author position.

This switching in and out of author positions was true for my three other interviewees as well, Heather, Sarah, and Carey. Below in Figure 5.3 are visual vignettes of Heather and Sarah's web compositions. Heather is a third year undergraduate, and Sarah is a recent PW Master's graduate working as an independent contractor especially for family members. Like Rob, discussed below, Sarah is writing for the web in for-profit environments but not getting paid, or getting paid only a under-cost amount.

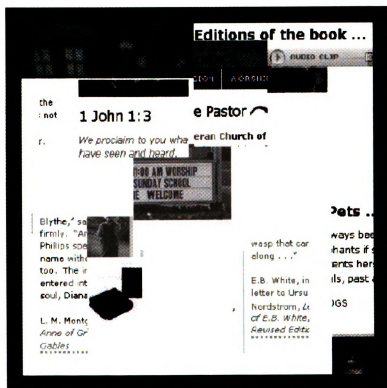
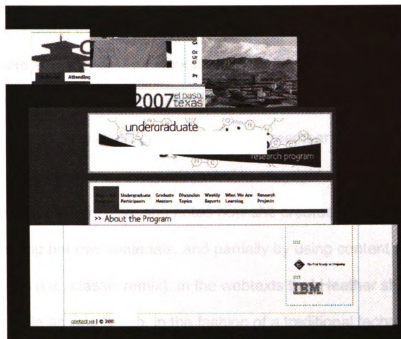


FIGURE 5.3. On the Top is Heather's Work and on the Bottom is Sarah's

In addition to being a student, Heather is also a student employee, plus she is doing freelance web design work for a faculty member at the university where she attends. Her work for the faculty member involves creating a conference webpage for a professional organization in our field. As a student employee, she also works with a faculty member in different discipline, a science program. Heather is very interested in copyright and fair use. As we proceed through the interview, she notes how she creates her web designs partially by creating her own materials, and partially by using content supplied to her by others (i.e., classic remix). In the webtexts that Heather shares with me, she is invisible as was Sarah, in the fashion of a traditional technical communicator. Heather is the expert writer behind the scenes. In order to obtain materials and resources for her web composing, Heather frequents a couple websites such as deviant art.com, which she learned of in high school.

At the time of Sarah's interview she's been out of school for over a year, and is completing webpages for family members as well as church organizations that originally connected with her through family members. Sarah's "gift writing" is developing into a web design business that will continue to increase. She is thinking about charging proper amounts and developing legal contracts to govern her work. Sarah's primary web identity is a relatively invisible one, as she creates materials to promote others' endeavors – in the typical fashion of a technical writer. One of her relatives has received a national book award, and Sarah creates a website for this person at no charge in order to promote both the author and the book. This website was a total remake of a previous website, and will

continue to expand over time: "Well I think the original idea that we had talked about, like the original website that we expanded there is another book. There is going to be five books total, and the second book is due out in spring, and then we will add another whole page, just on the second book, and the third book and the fourth book and the fifth book." Sarah's work again evidences the idea of a commonplace, a mixing of the past, the present, and the future all in a neat package of one website.

Carey is a MA student in a professional writing program. She's also an employee of the institution where she is an MA student (not a student employee). I do not provide a visual vignette of her web composition because all she could offer me was a social networking site page, and that was fairly devoid of content. Before her interview, I wondered what we would talk about because she had not sent me a web composition that triggered any copyright issues. However, when I arrived at the interview we began talking about her non-student work with a national database that encourages teachers to share teaching and testing materials. Carey's involvement with this database is central, and she is directly involved in the design of the database's interfaces. She also provides technical support and training for the university supported project. The teachers she works with include high school teachers as well as university teachers from all over the US. I cannot provide visual depictions to you because they are in a password protected area, and to do so I would risk revealing Carey's identity.

Carey's social network site is devoid of content because she feels responsible to the institution for her professional identity especially as it

intersects with her knowledge of copyright. She feels that as someone working in a technology enhanced area where others' materials are shared, and as a student in a professional writing program that has a focus on digital writing, she should also be an expert on copyright. She is also concerned about the design of her social network page with respect to code and errors in code. If she enhances her social network site, errors in the code will be visible to her scientist or web programmer colleagues. She therefore chooses to leave her personally authored site rather empty.

"Student"?

Recall that in Chapter Three I described how students were selected for interviews based on their studentness. I wish to avoid othering students in my discussion and that's easy to do, because upon examination the category of student doesn't hold much water. What I mean to say is due to the webspace as commonplace and the remixing that occurs in webwriting, I'm not sure what "student [web] writing" might look like. All of my interviewees, not just the two who had recently graduated (Amanda and Sarah) were writing for the web in contexts outside school. Rob, an international student I discuss below, along with Sarah, were regularly doing what I term gift writing – writing for the web on behalf of family members and friends. This phenomena probably comes from the digital divide, in that some individuals who are perfectly capable of putting together a traditional paper flyer or brochure, have no clue how to write and publish a webpage. Thus they tap into folks around them who can – probably younger family members. Since Rob is an international student, this might be a global

phenomena. Our TPW “students” may be active webwriters in “for-profit” environments, although they themselves are not getting paid. Rob completed webpages for his father’s business as well as a friend-professional dancer’s business. Sarah created websites for a couple churches as well as to promote a relative’s for-profit book sales. Heather, an undergraduate, was doing professional webwriting for faculty members and professional organizations. Several students were also working as teachers and marketing themselves as potential employees.

This issue of the digital divide and the pressures it exerts on younger webwriters might be worthy of further exploration. We might revisit the days before everyone could write – when the “illiterate” had to sign an “X” in place of their name on legal documents and hire others to write for them. In an email as follow-up to our interview, Amanda sums up the complexities of these issues in the context of her own family:

I was checking my web presence by googling myself and found out that there was a genealogy site that had one of our wedding photos on it. The site had my mom listed as the owner of the photo. It turns out that she saved the photo from our professional photographer’s website and sent it to some distant cousin in Texas who manages the website. Not only did she not ask our permission, but she didn’t understand the issue of copyright belonging to our photographer. I had signed a contract stating I wouldn’t reprint or publish our professional photographs without our photographer’s permission and not only was this violating that contract, but the photo’s quality had been degraded in the process so it wasn’t representative of the photographer’s talent. I had to email the webmaster of the site and ask them to remove the photo, which they did immediately, and then explain to my mom how fair use and copyright work on the internet.

The activity which ties all my interviewees together is not so much their “studentness” as their webwriting, their status as writers, and the complexities they face surviving in a networked world.

The concept of “studentness” connects to Foucault’s discussion of a discipline’s ranking and dividing. Foucault’s theory helps connect the problem with the “student” category to our understandings of authorship and originality. Recall as I mentioned in Chapter One, one cannot be an author without producing something “original.” I said in order for an artifact to be copyrightable under US law, it must be “original.” “Originality” is the essence of our concept of “author” and his sole creative genius. With respect to the student authors I interviewed, I want to call into question not just their authorship (due to the remixed nature of their web compositions), but also their “studentness.” Foucault discusses discipline in a way that helps elucidate the subject positions of my student-writers (recall my “studentness” diagram in Chapter Three). He reminds us of the functioning of differing levels of student roles. Remember Leslie was acting as a graduate student, teacher, and potential employee all at once in a convergence via her gaming-themed webtext: “Discipline is an art of rank . . . It individualizes bodies by a location that does not give them a fixed position, but distributes them and circulates them in a network of relations” (Foucault, 1977, p. 146). This art of rank is evidenced by categories such as undergraduate, Master’s student, PhD student, and so on. The art of rank is clearly visible in law school practices where students are literally ranked against each other – switching in and out of placeholders like “the top 5%” semester-to-semester.

My data supports the idea that author-creating practices actually function in the opposite fashion. Information and meaning are produced in the world but not in an organized fashion. “The author does not precede the works” (Foucault 1984, p. 118-119). Instead, the author is created to organize meaning. Student webwriters take meaning from an abundance of other sources and organize it in their digital remixes. Both the interview and survey illuminate the complexity of the “student” or “student writing” labels in digital contexts. In the survey, there was not a remarkable difference between student and teacher knowledge scores. Some undergraduate and Master’s students seemed a bit more copyright savvy than PhD students. None of the students were just students. It’s possible they are doing more complicated webwriting than their teachers, as far as navigating and maintaining multiple identities. These students are also employees, business owners, teachers, family members. As far as sole authorship, none of the student webtexts are created by the student-author in a vacuum, emanating solely from the student’s own creative genius. Instead, texts, artifacts, visuals, and ideas are liberally taken from others. However, as you might note from scanning all the visual vignettes at once as they appear in Appendix 3.6, each student writer brings us something new and inventive. Rhetorical invention can be used not just to arrange existing information, but also to produce new knowledge as these students do in their webwriting.

The remixed nature of webwriting points to the second finding I discuss in this chapter. The intertextuality of web-space-writing provides support for Foucault’s theory that the single author is an ideological production representing

the opposite of its historical function, i.e. the “author-function,” in the larger culture (Foucault, 1984, p. 119). No support was found for a human culture existing without an “author-function,” whether it is a workplace culture or even a more community-knowledge-focused culture as exists in India. Yet, “the author” switches in and out of subject positions in relationship to human and non-human actors. Amanda, who’s authorship was consumed by work-for-hire practices at her workplace, was still an “author” with respect to her web portfolio, while regarding her workplace writing, the organization occupies the subject position of “author.” For Amanda’s clients who sign release forms covering their textual, visual, and oral contributions – their stories, the organization as well consumes their authorship. Author-functions in this case are the organizations’ work-for-hire policies, the forms and releases contributors sign, and all other company practices that support the arrangement of meaning production such that individual expression disappears into organizational expression. And yet, Amanda as author of her web portfolio shows us a complicated weaving together of others’ texts synthesized, interpreted, and commented on by Amanda. The web is a place where workplace and home cultures collide. Similar collisions between home cultures and US cultures occur for international students. Rob’s interview provides additional illumination.

In Figure 5.4 is a visual-vignette created from the numerous web compositions (URLs) Rob supplies to me in anticipation of our interview. Rob is a second-year PhD student in a rhetoric and writing program. He is an international student having come to the US from India. Rob supplies me with numerous

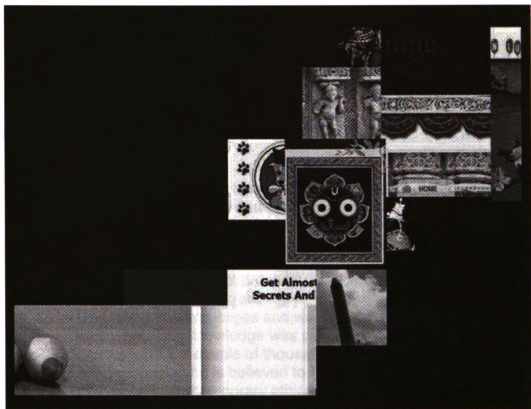


FIGURE 5.4. Visual Vignette of Rob's Web Composing

web pages he's created both while still in India, and then while a student in the US. Rob constructs webpages for family and friends, and has previously worked as a web designer in India. He describes this as doing "outsourcing" work. In India he created websites for people all over the world. He also has websites he's created as a graduate student featuring some his PhD course work. So in webspace, he occupies the roles of family member, friend, student, and employee. I create a visual vignette of Rob's work partially to protect his identity, but also to give you a flavor of the vast array of digital composing this writer completed. The purpose and audiences for Rob's work varies greatly. He is very concerned about copyright, but that is a newfound interest after coming to the

US. He notes that when obtaining his Master's degree in India, Works Cited or Reference pages were not required. He did not consider copyright law in his work previous to entering the graduate program and learning about these issues as part of a course. Rob describes his pre-graduate school thinking as solidly based in the cultural norms of India:

In spite of the tremendous development in everything related to web in India, so much that huge chunks of web based projects are outsourced to India, why is copyright not as you might expect it to be? There could be a historical/cultural reason why we Indians do not think about it much. Knowledge is a community-owned thing in India, and this concept dates back to the time before written language. The Vedas (ancient Hindu texts) were said to be the word of God given to some sages and we never came to know which sage said what. This knowledge was passed on from generation to generation for a couple of thousand years. Re-mixing, re-mediating and re-interpreting is believed to have led to its growth and relevance to contemporary ethics. Perhaps what I mean to say is that, knowledge was probably [not] allowed to be "owned" by any author flexing copyright over it, because my forefathers wanted to encourage this growth with time. Every aspect of politics, relationship, customs, dress, art is encoded in the scriptures. We use them and re-use them to suit our times. The question of asking permission to use them never arises. That is probably why [we are not that concerned with attribution and copyright] . . . Same way, if I learned something new [when attending school in India] from any author and mention that in my paper in support of any idea, I mention his/her name (of course I do not call it my idea) in my [Indian] university exam answer. But it is not necessary to add a reference to formally acknowledge the author, because to us, it is not the author, but the new knowledge that is more important.

Rob has come to see knowledge of copyright as very important, and he believes that if he obtains all his images from flickr.com, those images are free from copyright. That is not completely true as many flickr.com images are restricted in some way by the owner. A user has to read each license which can be exceedingly complicated. However, Rob definitely tries to do things correctly.

In India, Rob did not have to attribute others' work in the way we do in the US because indirectly "the word of God" through the Vedas²⁷ authors peoples' texts. It's not that there is no author in this case; it's also not so much that knowledge is "community-owned." It's just that God has been assigned the subject role of author, consuming individual authorship. God is permitted to be an author. Individuals are not. As Rob states, "Every aspect of politics, relationship, customs, dress, art is encoded in the scriptures. We use them and re-use them to suit our times." Thus when one wants to point to the author, they point to the scriptures, a non-human artifact. *The Practical Sanskrit Dictionary* states that according the Hindu tradition, the Vedas are *apauruṣeya* "not of human agency" (Apte, 1965). The text consumes any human author.

The author-function in Rob's Indian culture is comprised of many practices, one of which is reliance on the scriptures, and avoidance of direct attribution to human authors. These types of practices cause one to continually return to God as author – thus maintaining the scriptures' importance with that particular community of people. The values and beliefs in the Vedas then, are more likely to maintain potency because they are not diluted by attribution of ideas to individual persons who lived and died subsequent to the existence of the Vedas. These types of author-functions keep agency with the text rather than with the people.

A Remixed, More Robust Theory of Foucault's Author-Function

Recall that in Chapter Two I provided a quote from Foucault where he describes the author-function as an "historically given" function within a culture,

signaling our “fear of the proliferation of meaning,” and producing the “author.” We can connect Foucault’s discussion of lepers and plague (the law-function) to his discussion of the author-function because the fear of “proliferation of meaning” connects to the fear of the proliferation of disease. Like texts, like scripture and government documents, disease is meaning. It’s information. You might imagine we host culture within our bodies the same way we host disease.²⁸

Foucault (1984) writes, “The author allows a limitation of the cancerous and dangerous proliferation of significations within a world . . .” (p. 118). When the information spreads so does the disease. US copyright law, like our notion of “author” allows a limitation on the “proliferation of significations.” Fear of the proliferation of meaning is likely attached to the fear of total chaos. I argue the web and its ability to instantly deliver information contribute to fear of the proliferation of meaning, to potential chaos. Viewing the web this way makes our burgeoning discussions of authorship, copyright, and plagiarism sensible. According to Foucault the “author” serves to divide, group, and control the unimpeded proliferation of meaning. No wonder since the advent of the internet our scholarly focus on plagiarism has become more intense; some are even fixated on detecting plagiarism. It is as if we are trying very hard to maintain the ideological production: “author” – because to do otherwise potentially signals chaos. The author serves to control the unimpeded proliferation of meaning; this is also what prisons, educational institutions, and the practices of medicine do, according to Foucault.

While admitting that additional characteristics of the author-function are probably discoverable, Foucault focuses on four. The first is that the author-function is linked to the ability to transgress certain expectations of the institution. For example, copyright law attempts to maintain the author, as do practices of attribution, discourses on plagiarism, permission seeking, literary analysis, and so on. The subsequent practices these author-functions engender are things like abiding by copyright law, attributing, requesting permission, studying “the canon” and “great authors,” all practices that serve certain *institutional expectations that there is an “author” somewhere*. To break the law, fail to attribute, plagiarize, use without permission would all be behaviors that might thus “transgress” institutional expectations. If we all transgressed in this way the author would surely lose his potency. He might disappear. Amanda is always careful in her web portfolio to give credit to her collaborators and note that she received permission from others to include their materials on her website. It’s expected that she take such measures in her role as web author – to do otherwise would be a transgression. By crediting and referring to others, she creates and reinscribes: constitutes herself as writer. Thus, the practices of requesting permission and attributing others are functions that produce Amanda as web author.

The second aspect of the author-function according to Foucault is that it does not affect all discourses in a universal fashion. When we examine copyright internationally, vast differences emerge. Some European countries have “moral rights” provisions in their copyright law, protecting the integrity of an author’s

work. The US does not. China has stringent copyright laws on the books, but in practice those laws have little import. When Rob was in India, he did not attribute individual human authors because the cultural practices did not require it. Those practices instead maintained a constant looking back to the scriptures and to God's word. But when Rob came to the US, he quickly learned how important Works Citeds and Reference pages were. When Amanda wrote for her organization she gave up claims of authorship to the company. But when she wrote on her own time she maintained her author status. The data provides evidence that the author-function in different cultures does not apply uniformly. Perhaps the author-function works differently in the workplace of technical writers than it does in a first year writing course – in the former authorship may function as a discourse of the organization, providing stability to organizational practices as Amanda points out, whereas in the latter the author-function works in complex ways to teach certain practices of community, to assure us that students are synthesizing meaning, to be used for sorting texts, to control the unbridled proliferation of meaning, etc.

The third point Foucault makes is that the author-function is not simply assigning a name to a text. Instead it functions via a series of specific and complex operations (here we can think of John Law's notion of actor networks as patterned heterogeneous materials whose resistance has been overcome). US copyright law at over 300 pages just for the statutory provisions (Title 17), defines a multitude of complexities that come into play when determining if a use of another's text is legal or if is not. In interviewee Amanda's case, she had forms to

give clients and policies to obey regarding writing for the organization. It was not just a simple matter of assigning the company name to one text and her name to another. For her web portfolio, she had certain responsibilities such as asking permission and attributing. These responsibilities were different when she wrote for the organization. It was more than the simple assigning of a name. Part of the author-function in the US draws upon both practices of attribution as taught at educational institutions, and practices around copyright law and its effect, and all the discussions and practices that surround it (scholarship, research, legislative action, lobbying, etc.).

The final aspect of the author-function that Foucault points to is that the author it is not necessarily a real individual, but can represent multiple subjectivities and can be occupied by various individuals or groups of individuals. As Rob points out, God can be an author via the scriptures. The scriptures are author of the cultural practices in Rob's version of India. An organization can be an author, as can a student, a teacher, a daughter, a mom, etc. Under the definition Foucault gives, the author-function could be present in things, cultural practices, that don't look anything at all like those that support the literary "author." Three kinds of practices (I call them practices; John Law would call them patterned heterogeneous materials) come to mind and I offer these as a small beginning towards assisting our understanding of a remixed theory of the author-function. Let me first preface the following discussion by saying that Foucault eerily predicted that our fundamental understanding of author and the practices that produce him would change. He wrote:

I think that, as our society changes, at the very moment when it is in the process of changing, the author function will disappear, and in such a manner that fiction and its polysemous texts will once again function according to another mode, but still with a system of constraint – one which will no longer be the author, but which will have to be determined or, perhaps, experienced. (p. 119)

I am not alone in stating that our society is undergoing a process of changing due to communication enabled by the internet. We even wondered not so long ago whether copyright law had disappeared with respect to web writing (Herrington, 1997). There are no uniform author-functions organizing meaning and underlying writing practices on the web – so you might say such functions have disappeared (at least did so initially). As I will discuss further in the “Common Knowledge – Commonplace” section of this chapter – the system of constraint shaping our behavior is being experienced, but is not yet totally figured out. We know things are different. When Foucault says we might have to “determine” or “experience” this new system of constraint – it connects to James Kinney’s (1979) definition of empiricism I provided in Chapter One. “Empiricism is the way of knowing through the senses, through direct, physical experience” (p. 352). Latour (1993) suggests that we conduct empirical work to explore networks – that we slow down and backup: “We are going to have to slow down, reorient, and regulate the proliferation of monsters by representing their existence officially” (p. 12).

I need to slow down and momentarily take you back in time.

To go back in time, first I start by providing you with three categories of practice to frame my discussion, three categories that support a remixed version of the author-function. In order to think about things this way I had to rely on the

idea of radical symmetry from ANT along with the notion of actor networks. An author as Foucault describes it is the result of actor networks; an author is a node where the resistance of heterogeneous materials has been overcome, in ANT terms. The node does not precede the network. Seeing Foucault's discussion of the literary figure in flatter terms, we might see these three types of practices as author-functions.

1. **Exclusive Rights:** Practices that give exclusive rights to produce certain kinds of knowledge to certain ordained entities, things, people.
2. **Erasure:** Practices that erase entities, things, people.
3. **Limiting Expression:** Practices that limit expression of certain classes of entities, things, people but not others.

Note that US copyright law as it is performed can do all three of these items. In the spirit of radical symmetry and legal reasoning, I'm going to discuss these three types of practices in very abstract, flat terms even though some of the examples I provide might be disturbing. I am trying to illustrate how cultural practices other than copyright law produce the same results because like copyright law, these practices are author-functions. What I mean is that eventually I'm going to present you with a visual collage that equates US Army soldiers, Texas polygamists, the Amish, Hasidic Jews, and Iranian university graduates.

Bear with me.

The first type of heterogeneous network I list is practices that give exclusive right to produce certain kinds of knowledge to certain ordained individuals or artifacts. As defined in Chapter 1, US copyright law assigns such exclusive rights. Such practices are present in every culture. For example in

Magna Graecia, the Sybarites gave cooks a statutory time-limited monopoly on new dishes (Gellar, 2000, p.212, ft.nt. 12). A Federal Australian Court found analogies to copyright law in Aboriginal law (*Bulun Bulun v. R.&T. Textiles*, 1998). Gellar (2000) notes that tribal art is controlled as “technical virtuosos” by artisans instilling it with magical influence. In Africa, artistic know-how is passed on through “kinship, corporate, and other groups” (p.212, ft.nt. 10).

Any culture that has shamans or supports shamanism has cultural practices, author-functions that support certain persons as vested with authority to know or make knowledge. For example Katherine A. Spielmann (1998), a cultural anthropologist from Arizona State University, studies the specialists of “prehistoric middle range societies”²⁹ who produced ritual crafts – the Mimbres (southwestern New Mexico A.D. 1000-1150) and the Ohio Hopewell (southern Ohio 150 B.C.-A.D.400). The Mimbres are famous for exquisitely crafted mortuary bowls, the Ohio Hopewell for their earspools, copper plates, and obsidian bifaces recovered in burial mounds. Multiple media, some imported from far distances, were used to craft the Hopewell items including sharks’ teeth, obsidian, copper, mica, and textile.

Ritual crafts held special spiritual powers, and the makers of them were underwritten by the context of the ritual performance, a performance requiring “the specialized production of esoteric, intricate, skillfully made items” (p.153). Spielmann draws parallels between the ritual crafts of the Mimbres and Hopewell to those created by other peoples including the Iroquois and their famous False Faces, and Northwest Coast tribes. Chilcat blanket weaving was passed down

from mother to daughter, and these women could mark their authorship by signing the blanket's lower corner. Only the leader of the dance group could make the masks and wands of the Mescalero Apache mountain dancers. Mask-making and paint-making among the Pueblo people was only completed by special members of the ceremonial organization, and paints were cured in ceremonial society rooms. At the Ohio sites, evidence exists that artisans sometimes worked collaboratively, and in some prehistoric communities if the person vested with the authority to create ritual crafts did not possess the skill, he could commission a slave or common craftsperson to create the craft for him. Spielmann points to a problem though with how theories of the power-vested ritual craft maker have led to the conclusion that only certain people were permitted to create sacred items. This is untrue because she explains some items such as masks, robes and rattles among the Tlingit, and rattles, drums, and masks among the Iroquois could be made by anyone and achieve power over time, due to their history and use:

Most False Face masks began as Commoner masks, but with a long history of use could become the more powerful Doorkeepers. Likewise, among the Kwakiutl, copper plates increased in value each time they were given away (Boas, 1895: 344). Copper plates could also be intentionally broken and the pieces riveted back together to add prestige to a plate (Boas 1895: 354). (p. 156)

According to Boas (1895) each copper had a name that represented its power.³⁰

All four elements of Foucault's author-function can be seen in this extended example, if we rely on ANT to flatten out Foucault's reliance on literary author as his sole frame of reference. If ordained persons are permitted to create

certain powerful crafts, then someone who does otherwise could possibly “transgress certain expectations” of the community. Sometimes a human artisan is invested with the authority to create sacred crafts, but at other times the non-human artifact gains power by use over time, supporting Foucault’s idea that the author-function doesn’t impact all discourse in a universal fashion. Copperplates and False Faces that gain power over time are products produced by practices similar to those described by Rob. The Vedas increase their power over time by use. The cultural practices Spielmann describes are intricate enough to show us how authorship is created in more complex ways than simply assigning a name to a text. And finally, that False Face masks and copperplates can constitute their own authority, power, and knowledge over time supports Foucault’s assertion that the author is not always an individual.

I can also add that while Foucault says the author-function does not work upon all discourses in a universal fashion, sometimes there are interesting connections across cultural practices that at first might not appear similar. The Kwakiutl copperplates that accumulated power over time, remind me of the ethos acquired by page ranking in digital contexts.³¹ The more times your webpage is hit or linked by other sites, the more powerful it becomes – the more it appears vested with some kind of inherent knowledge. Copperplates that were broken apart and put back together took on special powers – similar to the remix my interviewees create in the webspace as commonplace. The Kwakiutl’s copperplates transformed existing knowledge into something novel and more valuable than what went before – similarly did the web compositions created by

the student-writers. The fact that those instilled with authority in these ancient communities sometimes commissioned others to complete work for them connects to current work-for-hire policies and law – interviewee Amanda is in a very real sense, commissioned by the national health organization she works for to create digital texts due to her special skill as a graduate from a professional writing program. The nationally recognized health organization switches in to the subject position held by the authority-vested high status Tlingit clan member, and Amanda switches in to the subject position of the Tlingit skilled carver.

Looking to more contemporary practices, the Roman Catholic pope, invested with supreme authority or papal infallibility, is invested as author, in a sense, of the word of God. All the practices that sustain the pope and invest him with authority are author-functions under this broadened view of Foucault's theory. Another clear example of the author-function in the US can be derived from the story of Phillis Wheatley, a young slave arriving on the shores of Boston on July 11, 1761, having traveled on slave ship Phillis (her purchasers, John and Susanna Wheatley named her after the ship) returning from Sierra Leone and Isles de Los. Eventually, Phillis ended up before a jury of eighteen men, including Thomas Hutchinson, governor of Massachusetts, Andrew Oliver, lieutenant governor, Reverend Mather Byles, minister of Hollis Street Congregational Church, John Hancock, and Reverend Charles Chauncy in order to defend the authenticity of poems she'd written. They affirmed her authorship,³² but according to Henry Louis Gates, Jr. (2003), her authorship has never been authenticated among more recent black scholars who condemn her for being a pariah, a cheap

imitation of Alexander Pope, a poetess well fit to the Uncle Tom syndrome. Either way, cultural practices in the US have served to stifle what Gates describes as Wheatley's sacrifices, courage, humiliations, and trials, and instead de-legitimize this black woman as "author." In contemporary contexts, it can be plausibly argued that sustained deprivation of certain groups (the old, the poor, those in rural areas) in their ability to participate in digital writing, although perhaps seemingly based in economics, emanates from cultural practices that are author-functions. These are practices that respond to our fear of the proliferation of meaning. Regardless of whether they are termed "racism" or the "digital divide," such heterogeneous networks remain practices that give exclusive rights to produce certain kinds of knowledge to certain ordained entities, things, people.

The second type of heterogeneous network I list is practices that erase things, entities, individuals. Such practices might include something as pragmatic as rules of attire, might reach to practices that decide who is featured or erased in a family's photographic history (see Rife, 2005), and might extend all the way to sophisticated text-based laws or policies such as work-for-hire practices. As promised, below I provide a simple collage (Figure 5.5) depicting cultural practices involving dress that serve the author-function in that they erase the individual. I obtained these images by conducting google image searches, and all can be found in multiple locations. In the spirit of my interviewees who often did not attribute generic images, nor could they recall where these images were obtained, I do not attribute my sources since these images are common knowledge (explained below). From the upper left hand corner clockwise are two

pictures of women from the "Texas Polygamist" group, US Army soldiers, women at a university graduation ceremony in Iran, Amish girls, and Hasidic Jewish Men. Cultural practices that invite or require certain designated groups, women,

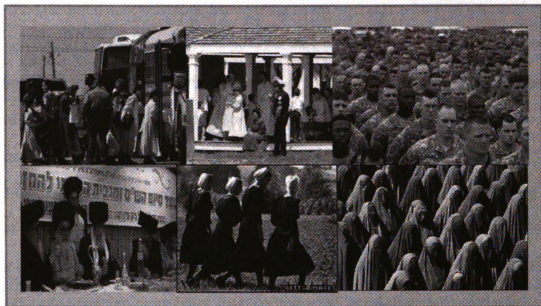


FIGURE 5.5. Visually-Symmetrical Cultural Attire Collage

solders, men, to wear similar clothing all erase individuality permitting someone/thing other than the individual (God, sect leader, the US government) to be the "author."³³ As Foucault said, the author-function is not simply assigning a name to a text. It's much more complicated than that. These practices of dress serve the same purposes, in some respects, as does copyright law. That is, they assign the right to produce certain kinds of meaning – countering our fear of chaos. These practices of dress organize knowledge production.

The last kind of heterogeneous network I list, and this is not an exhaustive enumeration but a mere start, is practices that limit expression of certain classes

of entities, things, or people but not others. US copyright law accomplishes this in that it limits the ability of a new work to copy or draw from an existing work. Such practices might be seen in religious or cultural practices which do not allow women to speak in public, or to be religious leaders, priests, or popes, or the law in the US that disallows felons from voting since voting is a form of expression. Such practices might include sustained violence, including the killing of certain groups of people as compared to others since violence and killing often or always silence their victims. Iris Marion Young (1990) says that violence is a social practice. A recent study by Scott Phillips, a professor of sociology and criminology at the University of Denver, found that in Harrison County, Texas an average of 17 of 100 black defendants and 12 of 100 white defendants indicted for capital murder were sent to death row (Liptak, 2008). The author-function is at work here silencing more black men compared to white men. Violence against women can also illuminate the author-function. In the US 31.5% of women compared to 16.1% of men were injured during a rape. 39.0 % of US women, compared to 24.8% of men were injured during their most recent assault (US Department of Justice, 2000). In the Congo, rape of women and girls, which certainly silences its victim, is an accepted cultural practice:

Every day, 10 new women and girls who have been raped show up at this hospital. Many have been so sadistically attacked from the inside out, butchered by bayonets and assaulted with chunks of wood, that their reproductive and digestive systems are beyond repair. (Gettleman, 2007)

All of these practices, administration of the death penalty, injuring an assault victim, rape of a certain group of persons, systematically injuring the reproductive

organs of a group of persons, when you flatten them out to see what ends they accomplish, when you make all of these practices “radically symmetrical,” fit within Foucault’s definition of author-function.

Further, thinking back to the survey data this illumination of the author-function is supported as well. In Chapter Four I discussed three key misunderstandings depicted in the survey data. Those misunderstandings were regarding the government document exception to copyright which respondents failed to recognize, confusion between the legalities of fair use and the ethic of anti-plagiarism’s requirement for attribution, and the failure of a majority of respondents to acknowledge that creative works receive more copyright protection than factual works. By flattening existing connotations under the ANT lens, like “misunderstanding” or “lack of knowledge” in the key areas I discussed in Chapter Four, we can try to *explain misunderstanding as instead a tacit comprehension of how the author-function works*. Three key areas of misunderstanding in my study may point instead to the presence of what Foucault names the author-function. Based on these misunderstandings, for this population copyright law functioned to impede the flow of government information, require attribution, and equally protect creative and factual work. In some ways, all of the misunderstandings actually benefit TPW by supporting the author-function in a value-added way to this community. Impeding the flow of government information gives both teachers and students, perhaps, greater likelihood of using design heuristics, ethics, rhetoric, or other motivations for composing choices, rather than laws and regulations. Seeing fair use as

requiring attribution when it doesn't sustains the economy of symbolic capital via attribution, a beneficial stance for this community. Imagining equal protection for both creative and factual work again benefits TPW, often viewed as creators of the technical or factual rather than the "creative." One of the four indicators of the author-function according to Foucault is that it does not affect all discourses in a universal fashion. If you can for a moment imagine something like "the discourse of TPW," the misunderstandings in these three key areas braid together to potentially create author-related cultural practices that support the work of TPW better than the actual law. These misunderstandings transcended the law.

Common Knowledge - Commonplace

Remember that in Chapter Two I posed the questions: How might such digital composing practices revise our understanding of "common knowledge"? Where might "common knowledge" and "commonplace" intersect? I try to begin to answer that question here. As Foucault predicted, our changing future, the digital commonplace is something that must be experienced to be understood. My Figure 5.5, a visual collage consisting of what I deem common knowledge, is only understandable to those who've experienced the web. What I deem common knowledge is just that for *this* dissertation audience at *this* moment in time. For us – I cannot see any logical reason to attribute the images that comprise the collage since anyone capable of doing a google image search can find these images at any time. The images will probably disappear one day from their current locations, and so any URL I provide will become useless and extinct anyway. Common knowledge is time stamped. I've made it clear I did not create

the individual images myself – but even that seems overdone since most of my readers will find the images familiar, and will know based on their knowledge of my limited existence, I did not travel to Texas or to a US Army drill in order to obtain the images directly. Anyone who observes the news will understand what these images represent.

In the case of my visual collage, the system of constraint for me as composer is only that provided by the technology of the web and user generated content. The images must have been uploaded by someone/something and be downloadable for me to use them. Legality and ethics seem beside the point. Based on my interview data, it's a common practice to take images from the web, mix them together, add your interpretation, and eventually forget where you obtained them. Rip, mix, burn. Ultimately, I believe my use is just – and I interpret my interviewees' stances as similar to my own. In Chapter Two I referred to Foucault's point that the same types of texts have not always required authors and were accepted, circulated, and valorized without concerns of their authorship. In the commonplace of the web, the images that circulate and can be located in multiple sites, really call into question the need for any concern of their authorship. We know the images of the women from the Texas cult are probably valid because we've seen them over and over again in multiple places. They are common knowledge. Their authorship is not important. What's important is what they represent. Images of the Texas cult women represent certain cultural practices, author-functions, that can be circulated and appropriated by others in a network of relations, as I tried to depict in Figure 5.5. In order to slow down and

reorient, to experience things the way Latour suggests, we might need to stop asking the traditional question of who is speaking, and instead examine what representations are being facilitated, how are they circulating, and who can appropriate them. This will get to Latour's concern for the proliferation of monsters. In the future that Foucault (1984) predicts, instead of asking the traditional questions of who really spoke and with what authenticity, we will instead ask "What difference does it make who is speaking?" (p. 120). Upon examination, digital composing practices bring this future Foucault predicts clearly in view. As I write this, Senate Bill 2913, the "Shawn Bentley Orphan Works Act of 2008" is under consideration. It would reduce liability of those who use found images and other materials if they have completed a "diligent effort" searching for the owner of material without success. The law appears to be following the digital composing practices of the writers in this study.

Implications for Teaching, Learning, and Research

Here I will list three major implications that arise due to this remixed theory of authorship. One pertains to student subjectivities, the second is regarding writing the history of present-day authorship, and the third concerns theory building and research paradigms.

Student Subjectivities

The category and othering of the "student" subjectivity may serve the useful purpose of organizing meaning in the institution, but webwriting otherwise seriously challenges the reality and usefulness of this category. Grabill (2007b) states:

I do not believe in clear classroom-community or university-real world distinctions. The people in our classrooms are citizens as well as students . . . These same people, in ways we surely do not know, inhabit the institutions of civil society and participate in civic culture in ways we could not imagine for them. (p. 121)

Proponents of community, informational, digital, and multi-literacies as I list in Chapter One already push against traditional notions of “studentness.” DeJoy (2005) addresses the othering problem by arguing that we might bring students in as stewards of the discipline. We might more closely read their writing. The implications for teaching and research are many.

Further research is needed to understand the complexity of digital writing practices for today’s student population. These additional complexities, such as the one I located in the data that shows students are writing in for-profit environments but without being paid – i.e. doing digital “gift writing” – might shape our pedagogies and curriculum in new ways. Some students, like Sarah, also want to become web-writing entrepreneurs. Have we enabled this? The category of “student writing” certainly changes shape between the three page paper essay, handed solely to the teacher, and the digital remix, digital portfolio, “letter to copyright holders,” and student-created movie challenging our notion of digital theft. More research is needed in this area, especially with attention to rhetoric-based notions of audience. In my study, the copyright holder and the potential appropriator become members of the students’ audience. Jessie had written an open letter to copyright holders that was posted to her website; Rob had experienced having his content ripped, mixed, and burned by another web composer.

Writing the History of Present-Day Authorship

Further tracing and writing the history of our present author-functions (globally) is in order so that we might better understand how certain practices connect to each other such as the three practices I listed earlier in this section. Those three practices pertain to entities, things, and people and concern assigning exclusive rights, erasure, and limiting expression. This further research could take a couple different trajectories. I think some might see a clear alignment between the practices I list and Iris Marion Young's (1990) version of justice and oppression. Young argues the distributive paradigm of justice negates needed focus on oppression and domination. She lists the "five faces of oppression" as exploitation, marginalization, powerlessness, cultural imperialism, and violence. These faces of oppression could be sorted into the three practices I list. Explorations such as those Young suggests are important but only provide one-half the picture. Studying how slavery "oppressed" Phillis Wheatley fails to acknowledge how author-functions served to enable her eighteen male jurors, and later even Gates himself, to validate or deny her authorship. In both cases, Wheatley's authorship is turned over to others, while we examine her "oppression." Such cultural practices thus continue to proliferate.

Due to my reliance on Foucault and ANT, my focus is not so much on how certain practices repress as on how they produce. While the violence against Congo women silences or represses them, this violence is an outgrowth of the author-function's operation which serves to organize meaning. The author-function here is productive, in that it produces violence and all the subsequent

discussions of that violence. The same is true with respect to US copyright law. While many scholars I list in Chapter One, such as Herrington, Hobbs, Jaszi, Aufderheide, Porter, Heins, Beckles, and Westbrook point to how copyright law might/does repress an individual's ability to express him or herself, in fact the existence of such scholarship negates the scholars' thesis – copyright law in service to the author-function is productive since it has produced an entire discourse on copyright, including my dissertation. I will discuss the power of copyright law and other rhetorical topics as *producers of invention* rather than oppressors in the next chapter.

The failure to conduct the kind of analysis I am suggesting continues to ignore what Latour calls the proliferation of monsters. If we ignore the operation of the author-function as a *producer* of knowledge, it will not be possible to amend our practices. In the two examples I provide in this section, the cutting out of women's reproductive organs versus the administration of copyright law, my Western gaze prefers the law as a more *just* organizer of meaning. I also prefer copyright law as an organizer of meaning rather than requiring women to wear burkas. It's simply I have not read of anyone wishing to commit suicide due to copyright – but I have read such wishes with respect to burkas (see Waldman, 2001). As stated, I cannot escape my Western gaze. All of the literature listed in Chapter One notwithstanding (scholarship that argues our creativity is impaired due to copyright restrictions) – my hypothesis here is that if a community doesn't have the mediational presence of a text-based copyright law, it's going to have some other practices in place that decide who is and is not permitted to speak.

Some of these practices are very ugly. Yet, societal chaos is not a realistic option. Especially because of the web's ability to facilitate the unbridled proliferation of meaning, we need some mechanisms to organize the production of knowledge, i.e. "author-functions." Rhetoric will prove useful in allowing us more choice in such matters.

This new kind of history of present-day authorship that I imagine we might write, would provide a different context to teach students about copyright law and plagiarism as well. Rather than situating the ethic of plagiarism in the larger IP framework (DeVoss & Rosati, 2002; Rife, 2007; Rife & DeVoss, 200X), I could see a pedagogy develop that might situate plagiarism and copyright law within understandings of these larger cultural practices, author-functions, that I discuss. Such new pedagogies might also facilitate our understandings of the cultural collisions that arise in web writing.

Conducting additional research in the area of cultural collision, authorship, and technology might also prove fruitful with respect to informing law and policy. The proliferation of meaning that takes place due to the internet causes havoc between cultures due to conflicting cultural practices or author-functions. In *Peers, pirates, and persuasion*, Logie (2006) details his visit to Ukraine, including Kiev's city center, and his experience with a culture that does not recognize the Western concept of copyright. In Ukraine, Logie witnessed the widely accepted cultural practices of using pirated copied of Window's operating systems and the open selling of counterfeit versions of popular software as well as music discs. And we can daily read the newspapers about China's "copyright problem." It's

posited: “China’s appropriation and dissemination of the world’s most valuable products and technologies, if they continue unabated, will ultimately mean a lot more than dollars lost. China’s pirating and counterfeiting could radically change the way entertainment, fashion, medicine and services are created and sold” (Fishman, 2005, p. 41). Fishman estimates the US, Japan, and European union sacrifice close to \$80 billion annually due to counterfeiting and piracy. While China has laws on the books that are as strict as any, those laws appear to have no agency. Why is that?

Sun (2004) supported in her dissertation the community-knowledge based culture in China. It seems a logical outcome that two cultures are colliding here, one where prose-based law mediates individual behaviors and authorship, and one where law has no mediational impact. This conflict seems difficult to resolve, but if Fishman is correct, the US must change its model as much as China. Bush is poised to file a complaint with the World Trade Organization but the outcome of that potential legal action is not clear (Andrews, 2007). If we consider the conflicting cultural practices, or author-functions, that underlie the US and China’s ways of regulating the production of knowledge, the China “copyright problem” can only be resolved with a huge cultural shift by either China or the US. Such a shift seems unlikely any time soon.

Rhetoric, Activity Theory, and Foucault/ANT

I also think we could further explore and test the utility of using activity theory to study writing especially in the context of exploring Foucault and ANT’s premises. The use of activity theory has proved especially fruitful in this study,

supporting the stances of its proponents Hart-Davidson (2007) and Geisler and Slattery (2007). By separating knowledge and understanding of copyright law as a potential mediator in the writing activity of TP writers, the mediational forces³⁴ I located ended up much more complex than originally imagined. Foucault as well as the ANT theorists specifically request that we test their assertions with research. While I did not set out to do that, ultimately that's what resulted by employing rhetoric alongside the activity theory triangle in my research. Foucault specifically invites us to test his two assertions regarding truth:

"Truth" is to be understood as a system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements.

"Truth" is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A "regime" of truth. (1984, p. 74)

By using rhetorical analyses along with activity theory (and influences of ANT) as a research paradigm, we might align the way probable truth, with its accompanying levels of certainty, is constructed at different times and locations, and see these constructions as emanating from author-functions within different cultures. We might be able to examine how such heuristics of probable knowledge organize meaning – how such heuristics mediate knowledge within a culture. We could align "truth" in statistics, in legal contexts, in my study, and in the native societies studied by Boas and Spielmann and compare the rhetorical nature of "truth." In Table 5.1 I provide a comparison of metrics of truth in knowledge within different discourse communities. The Kwakiutl coppers' Indian

names are not presented because I don't have the appropriate alphabet on my keyboard, so I simply provide the names' definitions instead.

TABLE 5.1: Rhetoric of Probable Knowledge – a Cross Cultural View

| Statistics | Law | My Fair Use Questions: Certainty of Knowledge | Coppers: Kwakiutl Indians |
|-------------------------|-------------------------------|---|---|
| very highly significant | beyond a reasonable doubt | very certain | all other coppers are ashamed to look at it |
| highly significant | clear and convincing | somewhat certain | steel-head salmon, i.e., it glides out of one's hands like a salmon |
| significant | preponderance of the evidence | undecided/can't answer | making the house empty of blankets |
| | scintilla of evidence | not too certain | about whose possession all are quarreling |
| | | not certain at all | sea lion |
| | | | Source: Boas, 1895, p.344 |

Recall my earlier argument that supports the view rhetoric, particularly via the use of heuristics, can be generative. As Janice Lauer (2008) points out, Wayne Booth in his book *Modern dogma and the rhetoric of assent* tells us how rhetoric can be helpful in constructing knowledge in between “fact” and “mere opinion.” All knowledge in between these two extremes is organized by rhetoric as I demonstrate in the above table. Here I think we might explore connections between heuristics, *metis*, and rhetorical invention, which I will try to do in the next chapter. To conclude, further explorations in areas where rhetoric organizes the author-function are in order.

CHAPTER 6

RHETORICAL INVENTION AND THE LAW

“When Zeus swallows Metis, at the end of the Theoretic myths, he is completing the process by which, through the various stages of his battles against the primordial powers of disorder, there gradually emerges from the original chaos an organised, differentiated and hierarchical cosmos which from now on is stable” (Marcel Detienne and Jean-Pierre Vernant, 1978, p. 134).

In Chapter Five, “A Remixed Theory of Authorship,” I framed my discussion of authorship with Foucault’s “What is an Author” essay, and then connected that to actor network theory (ANT) and its focus on radical symmetry and actor networks, particularly ANT’s focus on the relationships between entities, things, and people. I then examined the data and discussed two of the study’s major findings, to wit, webspaces as commonplaces are sites of cultural collision, and the single author is an ideological representation produced by certain functions that work in the opposite fashion. Having already introduced the web composition of interviewee Leslie in Chapter Two, in Chapter Five I introduced you to the remaining interviewees, including Jessie, a new PhD student, Amanda, a recent four-year PW graduate, Heather, and undergraduate PW major, Sarah, a recent PW master’s graduate, and Carey, a PW Master’s student who also works as a regular full-time employee for the institution she attended as a student. I also introduced you to the one international student, Rob, a second year PhD student who had previously worked for a web-based outsourcing company in India that completed commercial websites for clients across the world.

In Chapter Five, I challenged the category of “student” based on digital composing practices of my interviewees. I also tried to broaden the readers’ understanding of “author-function” by juxtaposing cultural practices of various human societies across space and time. I ended the chapter by discussing implications for teaching, learning, and research and in doing so, created a table for your review that compared cross-cultural heuristics constituting probable knowledge for various discourse communities such as statistics, law, my fair use study, and the Kwakiutl Indians. I concluded Chapter Five by arguing that as Lauer states, rhetoric can be used to generate probable knowledge rather than merely arrange existing information (i.e. the discovery-novelty dichotomy). Under the theoretical framework I constructed in Chapter Two by drawing upon Lauer and Vygotsky, rhetorical topics can construct a heuristical structure that mediates the production of probable knowledge. A fair use/copyright determination is a determination of probability. In Chapter Two, drawing upon Carolyn Miller’s discussion of novelty versus discovery in invention, I connected the idea of probability determinations with *metis*, cunningness and craftiness. The probability determinations required by copyright/fair use also require invention and might require the same kind of reasoning as legal reasoning. Since I saw my interviewees drawing on a heuristic comprised of rhetorical topics as they composed for the web as outlined in Chapter Three, I argue that we might further explore the connection between heuristics, *metis*, and rhetorical invention in copyright imbued environments. Such an exploration is my aim in this chapter. I

start by discussing four of the six findings as I promised to do in Chapter Four where I previously discussed the survey findings:

1. For this group of writers, digital speech was not chilled. Copyright law as a system of invention organized by rhetoric, *produces* knowledge.
2. Rhetorical topics congeal as a heuristic mediating the digital composing process of writers. This study provides a small and incomplete snapshot of this heuristic structure.
3. When we consider the hierarchical and embedded nature of rhetorical topics that mediate digital composing choices, for this group of writers, ethics trumped the law.
4. While the study supports the idea that laws have agency, as knowledge and understanding increase, that agency is increasingly diminished by the human actor. The agency of the law is connected to where the law ends up on the AT triangle.

Heuristics & the Role of *Metis* in Invention

Copyright Law as Producer

In this section I am going to further discuss the finding that for this group of writers, digital speech was not chilled and the related idea that copyright law as a system of invention organized by rhetoric, *produces* knowledge. Recall that the survey indicated that other scholars' claims notwithstanding, less than 3% of writers had very chilled speech, only 6% had been asked to take anything down from the web, and only 14% felt unable to express themselves due to fear. The survey takers acknowledged that their web creations may have been more aesthetically pleasing if they didn't have to worry about copyright. My interviewees, particularly Sarah and Jessie who had relatively high knowledge scores (64% and 71% respectively), noted how time consuming it was to consider copyright law. Jessie spent hours and weeks trying to obtain permission for the

use of some materials in her web movie but with no success. In tandem to her movie, an interesting component of her digital portfolio is an “Open Letter” to copyright holders explaining that while she’d tried to obtain permission, she was unable to do so and thus uses under fair use. Her open letter evidences responsibility taking, and brings to my attention Jesse’s concern for acting ethically and legally when possible. Remember that with respect to educators obtaining permission, as Jesse tried to do, Hobbs, Jaszi, and Aufderheide’s (2007) study revealed that obtaining permissions is not a realistic goal for educators because either permission is refused or the cost is prohibitive. So Jessie echoes the frustrations held by many educators regarding the impossibility of obtaining permission when she says in her letter, “I have sought – to no avail – permission to use your material(s) in my Power Point essay showcasing the ease with which a person can commit ‘piracy’ and take music, video, images, and text from the Internet these days.”

Sarah, who had composed websites for churches and non-profits, likewise spent a great deal of time reading licenses and navigating the legality of using others’ web design resources. She spent time talking over her ideas with her husband. Jessie spent time talking things over with faculty in her Master’s program. Ultimately though, neither of these web writers had chilled speech (Sarah’s chilled speech score was 3 and Jessie’s was 2; 1 very certain, 5 not certain at all).

Since neither Sarah nor Jessie received 100% on the knowledge test, as I mentioned previously it is possible that their speech was not chilled because they

weren't fully aware of some of the legal risks they were taking. Yet, in reviewing their web compositions with them, I did not see anything in their writing that could not plausibly be argued as fair use. One thing I noticed with web writing across all interviews, is that the shape of the webspace itself always already lends itself to fair use. That is, a thumbnail image simply fits better on a browser page than a full size image. Limitations on web storage space encourage the use of lower level pixels than one might prefer from a purely aesthetic lens. The shape of the webspace limits the utility of long quotes. Webspace encourages remix, a little bit of this and a little bit of that in a very small visual area. To do otherwise risks losing the audience. I do not think that the reason the writers' speech is not chilled is because of their ignorance of the law. I think it is because they found work-arounds, relying on invention informed by *metis*. They transcended the law.

However, I also acknowledge the other reason web writers' speech isn't chilled might be because copyright stakeholders are not coming after the educational community, yet. Part of the reason might be because stakeholders don't want to develop a bad reputation for going after individuals trying to learn. The web writers' lack of chilled speech could be due to copyright stakeholders knowing the potential difficulty in proving infringement against educational use. It could be because they have no easy way to hunt down potential copyright violators.

I think another reason more speech wasn't chilled is that formally educated professional writers tend to be a little smarter than the average person, more aware of risks, and thus able to develop inventional strategies that take into

consideration such risks. A web composition as a commonplace is always contingent. It's contingent on various author-functions that allow it to exist – technology, space limitations, currency of information, ethical issues, and legalities. A web composition can only exist based on a weaving together of probabilities. Like several of my writers stated, the most they would expect from a copyright stakeholder is a takedown notice. Considering the kinds of uses the writers were making – which appeared to be justifiable within fair use, I think this expectation is realistic.

So while copyright law *mediated* digital expression, it did not *chill* speech. Instead, copyright law *produced* digital speech. For example, copyright law compelled Jessie to write her open letter to copyright holders, and create her digital movie on internet piracy. Copyright law suggested Amanda to include the copyright symbol on her webpages, not to protect her work but to show the reader that she was aware of such issues. On the national teacher exchange database that Carey managed, copyright law caused users to experience more discourse – the database had to produce more texts explaining the legality of uses, and provide users with means to choose how much to lock down their donated content. Copyright law shaped the digital writing of Sarah, Carey, Rob, and Heather. It caused them to spend more time composing, to read licenses, to do special searches for copyright safe materials. All of the licenses they read, texts and words and information, existed because of the power of copyright law. Sarah and Heather purposely searched for online visuals and resources that didn't require attribution since attribution would either confuse their clients or

make their web designs less appealing. Sarah even contacted someone in Sweden to receive assurances that she didn't have to attribute the use of his boilerplate web-template on the church's webpage she was creating in order to avoid a lot of questions from church clientele. Copyright law necessitated the production of lots and lots of texts.

More knowledge about copyright law among participants seemed related to increased mediational power of the law. Copyright law had less presence in the web compositions of Leslie and Heather, both of whom scored 50% on the survey's knowledge portion – lending credence to the idea that with increased knowledge of an artifact comes the artifact's increased mediational power. Although both Leslie and Heather had some concern about copyright law's implications in their writing – prudent Leslie would abide only if it was easy to do so. Leslie had made most of her composing decisions for ethical or design reasons. The same was true with Heather. Neither Leslie nor Heather used copyright symbols in their web writing, nor did they provide users with terms of use. Jessie and Carey had the highest scores on knowledge. Jessie's work definitely had the greatest presence of copyright law since she had fair use and copyright as themes in her digital compositions. Carey didn't share a web portfolio with me, but there was a huge presence of rights management on the teacher-database exchange that Carey managed. She was very reflective about these issues and constantly evaluated the copyright related practices of users. On her social network site, she didn't supply a lot of web content but the main reason was that she didn't want colleagues to perceive any code errors. She also

knew she was representing the institution and thus knew any use she made of others' materials might possibly be evaluated for copyright violations – therefore she decided to take the most conservative route.

As I discussed in Chapter Four, the certainty scores for the entire group of 334 were relatively stable around 2.3, somewhere in-between “somewhat certain” and “not too certain.” The interviewees' certainty scores ranged from fairly high certainty – by Amanda at 1.5, to lower certainty by Jessie at 3.1. Jessie and Carey who had the highest knowledge scores had the lowest certainty scores. The two participants actually show the opposite to my original hypothesis, that with increased knowledge comes increased certainty. While the sample is too small to draw any conclusions, as someone who works with copyright law on a regular basis, I think this might make sense. The more you learn about copyright law, fair use, and the individually determined, context-based court interpretations, the less certain you become. Thinking back to Engestrom's second generation activity theory (AT) triangle featured in Figure 2.5, Chapter Two, the more tool-like copyright law becomes, as opposed to rule-like, the more a user might feel able to push and pull on that tool.

Engestrom (1990) states that rules are restrictive while tools are malleable, transformable. Rules, being more definite may provide more certainty rather than less. In the case of fair use determinations, being *less* certain might be a logical outcome of having *more* knowledge. That is, the more tool-like copyright law becomes to the user, the less certain she becomes. The more tool-like, the more mediational – in Engestrom's triangle rules are not mediational.

Rules occupy a position on the triangle that Vygotsky might describe as promoting “unmediated” memory – simple stimulus-response behavior. But I don’t think we should generalize a clear relationship between certainty and knowledge from my study. We have some conflicting results between the interviews and the survey results since the survey did show a very weak positive correlation between certainty and knowledge, but not enough to draw conclusions. This would be an area for further exploration. Overall, I would enjoy seeing higher knowledge and certainty scores across the board. To have higher scores might facilitate invention in writing and reliance on *metis* for reasons I’ll explain below.

Another reason why the writers’ speech was not chilled could be because copyright law as a system of invention organized by rhetoric, *produces* knowledge rather than chills speech. Copyright law is one of many functions in a culture that produce authors. “Authors” produce knowledge. Thinking back to the three levels of activity systems (society, TP field, and individual writer, producing virtuous citizens, experts, teachers, webtexts) I imagined I was studying as described in Chapter Three, below in Figure 6.1 is an activity triangle that better reflects the complexity of what I actually see in the data. Copyright law, like other systems of knowledge production, is a system of invention organized by rhetoric. Law is also a concrete system of power. Under a Foucaultian lens, power produces knowledge. Foucault reminds us that penalties are not simply to punish, and that we must abandon traditional notions that knowledge can only exist where power is suspended. Instead, looking at copyright law as a

mediational concrete system of power, a system of punishment, means that copyright law *produces* invention, creativity, expression, even the need to rely on *metis*. Different texts or practices in different cultures, while not called copyright law, serve the same function, the author-function. As I showed in Table 5.1 in the previous chapter, such concrete systems that include the ability to punish, are constructed by rhetoric and when more closely examined, provide guidelines for the production and organization of probable knowledge, thus countering our fear of chaos.

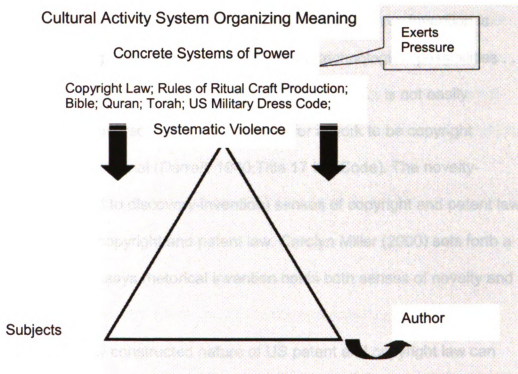


FIGURE 6.1. Cultural Activity System Organizing Meaning

Let me reiterate intellectual property (both patent and copyright) law's rhetorical roots. Recall Miller's (2000) discussion of the novelty and discovery senses of invention in the context of the hunt, the conjectural paradigm. As I mentioned, such senses of invention can also be found in US intellectual property law. Patent law explicitly requires novelty for an item to be patentable, while copyright law requires novelty only implicitly – but both are concerned with originality. In order for an invention to be patentable it must be novel, non-obvious, and useful (Title 35, US Code). Wyatt (1986) writing on patent law emphasizes the invention sense of “invention” rather than the “discovery” sense: “An invention is an addition to the stock of factual knowledge . . . Invention is construed as anything that adds to the set of known technological possibilities . . . it is clear therefore that the output from inventive activity . . . is not easily defined, let alone measured” (pp.3, 19). In order for a work to be copyright protected, it must be original (*Darrell*, 1940; Title 17 US Code). The novelty-invention (as opposed to discovery-invention) senses of copyright and patent law actually exist in both copyright and patent law. Carolyn Miller (2000) sets forth a careful argument that says rhetorical invention holds both senses of novelty and discovery.

The rhetorically constructed nature of US patent and copyright law can also be seen from tracing its historical development. Novelty was not always valued (as Foucault mentions in his essay how texts used to be circulated and valorized without an author). Early English patents did not objectively protect all new inventions, but instead were monopolies granted by Royal Prerogative

(Feather, 1994; Mandich, 1948). Kaufer (1989) writes that political clashes between Parliament and the Crown developed because under the reign of Queen Elizabeth I in England, patents grants were used to favor royal favorites and implement mercantilist policy (p. 6). It wasn't until the relatively late date of 1624, when the Statute of Monopolies passed, that the friction between the Crown and Parliament was addressed; the Statute of Monopolies abolished most aspects of privilege and established some kind of objective standard. "Thus it appears, according to prevailing doctrine, that England is the first to protect the inventor by a law, even if she is not historically the first to grant patents" (Mandich, 1948, p.168). Mandich (1948) notes that the Republic of Venice is usually credited as the first to give patent protection to inventors in the form of pure privilege (John Speyer is always the key example). Feather (1994) describes the 1469 patent granted to John Speyer as a "privilege" which gave Speyer the "exclusive right to print books in all Venetian territories" (p. 11). Speyer's protection was not dependent on his inventiveness, or originality, but rather on his industriousness. Early on, intellectual property protection was more concerned with the discovery aspect of invention than the novelty aspect. Over time this changed. But IP law, like rhetorical invention, holds both the discovery and novelty senses of invention.

In Chapter Two I described how invention was originally tied to topos or place. This was also the case with intellectual property law. Although histories frequently tie the printing press to the beginnings of copyright law, intellectual property law was early connected to real property. Venetian mineral patents

issued as early as 1409, and paralleled early non-print related invention patents in their protection of monopolies (Mandich, 1948). Mineral patents involve the protection of mining, and mining involves the hunt for valuable minerals. Like the use of hunting imagery in the Renaissance vocabulary of invention, and the quality of *metis*, early patent laws protected the seeking of minerals. What was protected in these early mineral patents was the ability to hunt, or to discover. I think the hunt informed by *metis* produces of special kind of invention.

Current US intellectual property laws also protect the ability to hunt and discover. Fair use allows reasonable remixing with a guarantee of some protection for original fixed work. Patent law promises a limited reward for innovation. To the extent intellectual property law presents problems to potential authors, it still is productive as authors become creative in order to work within the law, write articles trying to figure out or change the law, or simply stay under the radar and do as they please regardless of the law. The quality of *metis* as Miller (2000) describes it in relevance to the hunt, arises as well in the context of composing for the web in copyright imbued environments. This was confirmed in my data. It should be clear that copyright and patent for that matter, are rhetorically constructed systems of invention that also serve as concrete systems of power. It is the power, force, or pressure component of the system that makes it productive.

Vygotsky did talk about production of knowledge in the sense that he said memory happens as individuals create complex, heuristical structures that help them remember. This remembering was key to individuals' ability to be inventive

and complete particular tasks he or his students assigned, even though problems were posed for the research subject that made task completion very difficult. My study did not take place in a lab, but among mature writers who had been exposed to cultural signs over their entire lives. Unlike Vygotsky, I did not isolate a set of signs (he used cards with pictures for example), and then watch while participants internalized those signs. Instead, I used the discourse-based interviews to draw out internalized, or tacit knowledge, that participants had previously absorbed. Thus, it is not surprising that copyright law was woven together with a number of other rhetorical topics, creating a heuristical structure that writers drew upon in their work.

A Frame of Justice

US copyright law as a concrete system of power purports to sustain justice. We see that by its authorization via the US Constitution and its overriding purpose to promote justice. Many Western scholars such as Thomas Hobbes, David Hume, Adam Smith, J.S. Mill, John Rawls, and Chaim Perelman among others (see Raphael, 2001 for a summary of their stances) attempted to improve ancient definitions of justice (such as those espoused by Aristotle and Plato). Yet, every version of justice loosely fits into the three precepts of Roman Law: *neminem laedere* (to harm no one); *suum cuique tribuere* (to render each person what is his); *honeste vivere* (to live uprightly) (see Raphael, 2001, p. 86). I'm going to discuss justice more later, but I do want to make visible the connection between justice and copyright law, since I realize it might be a leap for some to see this. US copyright law, like *some* of the other productive, concrete author-

producing systems of power I mentioned earlier, is proposed to exist in order to create or maintain justice. By regulating how a writer might use others' materials (not impair their future markets), copyright law attempts to make a subsequent use of ones' materials not harmful. Since copyright law and its fair use provision sort rights, it tries to assign or render to each person what is his or hers. Because copyright law is a law in the US, and thus presupposes an individual who can abide by that law, it provides a means for one to live uprightly, virtuously, rather than as an incorrigible. It gives us guidelines to live uprightly. For now, I adopt the three precepts of Roman Law as my definition of justice in the context of this discussion of heuristics' mediational quality in digital composing processes. Justice becomes relevant as an overriding frame to my original heuristic probe as I discuss below.

A Digital Writing Inventional Heuristic

Another one of my findings is that rhetorical topics congeal as a heuristic mediating the digital composing process of writers. This study provides a small and incomplete snapshot of this heuristic structure. In this section of the chapter I discuss that finding. Recall that in Chapter Two I developed a theory of heuristics based on the work of Janice Lauer, Cynthia Haller, my pilot study completed with William Hart-Davidson, and this full study. I concluded that heuristics can be comprised of rhetorical topics, and that they can generate invention. I said heuristics have five qualities. One, they are transcendent across individual applications. Two, they have steps, sequencing, or a hierarchy – they have flexible direction. Three, they have generative power. Four, they provoke *metis*,

or the weighing and balancing of a number of variables – weighing and balancing sometimes informed by *metis*. I discuss *metis* more thoroughly below. And five, special topics, such as professional writing on the web, are tied to special audiences. My heuristic probe at the beginning of data analysis consisted of the following rhetorical topics, as I described in Chapter Three:

1. **Probability Thinking (sometimes informed by *metis*):** Thinking/calculating of probabilities, risk, weighing consequences, strategizing that isn't fitting in the other categories.
2. **Copyright Considerations:** Using, applying, referencing copyright law such as asking permission, originality, etc.
3. **Fair Use Considerations:** Referencing fair use or the four factor fair use test of section 107 (fair use elements such as educational use, amount used, size, etc.).
4. **Ethical Considerations:** Ethical/ political considerations including considerations of attribution.
5. **Design Considerations:** Issues of design/content rather than issues of copyright as influencing composing choices.
6. **Faith/religion:** Reasoning based on one's cultural background, religious beliefs, or faith.
7. **Employer Demands or Requirements:** Reasoning based on the demands or requirements of one's employer.

Thinking patterns I mentioned in Chapter Three where writers reflected on their own lack of knowledge is captured in probability thinking – since it is part of a probability calculation regarding how sure one can be in a decision and if not sure, what other strategies are available. This thought process may be informed by *metis*. As mentioned in Chapter Three, I also had interviewees who were not as reflective, but instead deferred to another authority. Heather, the undergraduate who worked for a couple departments on her campus, generally trusted the faculty members who supplied content to her regarding its copyright safeness. When it came to her work for the national health organization, Amanda

used employer generated copyright release forms, and drew upon organizationally supplied content in order to compose for the web. Thus, she was not required to be as reflective about copyright law, ethics, family values, etc. For her personal digital portfolio though she was reflective. So this depended on which subject position she occupied with respect to authorship.

All of the digital writers I interviewed used *metis*, a kind of cunningness and craftiness. A really good example is the strategy Rob used, recommended by the Indian outsourcing company where he previously worked. The web writing Rob did for that company involved the creation of promotional pages that would entice people to go to the company's actual website. Rob explained:

We didn't, didn't have the, capacity to be very creative, we just had to have the work done . . . the content was humanly not possible to write, generate so much variety of content, for the same company, twenty pages, you know. I was allowed to use [others'] web content provided that I jumbled up the words, because I had to write twenty pages for the same topic.

So the company had its employees use existing content from the web and jumble up the words, "put in our own spices," upload the pages on the web and then check the URL at copyscape.com, a website that let's you check to see if someone is copying your website. Instead of using copyscape for that reason, Rob used it to make sure the websites he created didn't "copy" another website too much, even though the content was taken from pre-existing websites.

Heather, the undergraduate professional writer working for faculty, also used *metis* by staying quiet about her concerns regarding where images provided to her had originated:

Martine: OK, so, when you were making the site did issues about copyright come up at all that you were worried about, or that anyone else was worried about?

Heather: If anyone else was worried about it, I don't think the concern reached me, like via email. I didn't really think about it too much, but I think mainly because I was given all the photos and um I did wonder like where the photos from the front page came from, but I didn't really do anything about, like that curiosity, but, um I did think about it.

Martine: Like did you wonder, were you wondering if the people had given their permission and stuff like that, or what? What were you wondering about?

Heather: Well, on the front page, the image of [name of guest speaker], he, when I was sent the photo, I was actually sent two or three photos, and they were – they seemed to be from different time periods, like one was when he was younger, like he didn't have so quite a gray beard, and um, I was just wondering like did they get them from his website? Did they get them from another?

Martine: Did they just go grab them or did he give them permission?

Heather: Right, I did wonder that but I never asked about it.

Throughout her interview, Heather discussed moments during the composing process, having been given content by faculty members, where she quietly questioned the safety of using that content – both to protect others' privacy, and for legal reasons. But ultimately Heather decided each time to defer to the faculty member, trust their judgment, and stay quiet about any of her questions.

Considering Heather's position as a for-hire writer and a young undergraduate, it was probably strategic for her to remain quiet. She wasn't really in a position of authority to question. However, when inserting images of students in a webpage that supported a grant, she did say she screened the photos to make sure no

one was pictured in a way that might be misinterpreted. She explained that faculty might not notice such things:

. . . sometimes just because, the professors and the directors are really concentrated on just making sure that the text is right, and the, and that they are getting funding and that sort of thing, that they don't always take into consideration, or it doesn't seem to me like they are always taking into consideration things like the entire context of it, like there are other people involved.

Heather never voiced any concern to her employers, but said she did screen the photos provided to her “especially if there's someone like drinking beer in a photo or something like that, I would you know, just try to casually mention, you know, is this person OK with this, do they know that we are putting it on the website, that sort of thing.” Heather exercised *metis* because she hid her knowledge strategically. She thought about copyright and privacy issues, but did not say anything since no real and pressing problems arose during the composing process. All of her thoughts though, will never be known to her employers. She used *metis* to perform her role as undergraduate “student” employee and invisible writer.

One my questions when looking at this heuristic along with considering the activity theory triangle shown in Figure 6.1 featuring concrete systems of power as mediational, is why does my heuristic *generate* invention? Why are heuristics productive? Above I concluded that copyright law actually causes the production of discourse rather than chills it. This conclusion maps onto my view of heuristics as rhetorical topics generating invention. Each of the rhetorical topics comprising my heuristic, ethics, religion, design requirements, etc., exert pressure or force

on the individual digital writer. That is, like copyright law, each rhetorical topic is a component of concrete systems of power that organize meaning.

Foucault theorized the economics of laws – how law and ethics flow through individuals as measures of control. Foucault discusses how certain discourses like that of law fold into, or are internalized by individuals in order to control them from the inside. This is an efficient strategy for control. Foucault's view here reminds us of Vygotsky's *internalization* with the difference that Foucault discusses the internalization of strategies of power, usually as they pass through individuals, and usually with a negative connotation, where Vygotsky discusses the internalization of knowledge and usually with a positive connotation.³⁵ Foucault (1977) very explicitly discusses how, after torture-as-discipline-and-punishment became viewed as an atrocity (drawing and quartering is his initial example), certain legal discourses developed to control individuals' behavior from the outside-in, eventually completely from the inside. Ethics thus makes people do things in the same way that law might. The same is true with religion, or if you are a professional writer with your ethos at stake, design best practices or guidelines can be similar to an ethic, law, or religion. Hutchins (1995) points to the same phenomena when he defines "constraints" during navigation, while Law (2003) might call this control from the inside overcoming resistance of heterogeneous materials. (All three men of course put different spins on this).

What I assert then, is that the rhetorical topics in my heuristic probe are not weightless. They are not floating at the tip of the AT triangle. They have weight. They have power – and to the extent they have power, they have an

agency independent of the writer. This fact might inform the use of inventional heuristics in composition pedagogy because I think much of the problem in motivating students to think of ideas is that there isn't much at stake, relatively speaking. There is always the grade, the due date, and the pressure of working in the space of 14-16 weeks, but for some groups of students such as those I work with at the community college, high grades are definitely not a priority. Service-learning and public rhetorics probably help create a set of heuristics with force or power, since student writing then is tied to other concrete systems of power. Perhaps one of the reasons public rhetorics and real civil engagement works in FYW curriculum, for example, is because it exerts pressure or force on the student to be inventive. Service-learning presents the student and teacher a ready made inventional strategy comprised of a set of heuristics that may or may not ever become part of anyone's meta-awareness. Heuristics often operate at the tacit level. Some students who already have a highly developed sense of citizenship or justice also may already be operating under a set of heuristics that motivates them to complete the assigned task. They may feel the pressure of morals or ethics. The connection between invention and power is worth further exploration.

Because probability thinking informed by *metis*, weighing and balancing of rhetorical topics took place across topics, I revised my original heuristic to reflect that hierarchy. I also collapsed the copyright and fair use rhetorical topics because they are really inseparable from each other, both in law, and in the writers' reasoning.

A Theory of *Metis* in Invention

Since I have now prioritized *metis* in my heuristic of digital composing, I will expand on that term a bit.³⁶ In the mid-1970's Marcel Detienne and Jean-Pierre Vernant (1978) wrote a book on *metis: Cunning Intelligence in Greek Culture and Society*. More recently Janet Atwill (1998) and Robert R. Johnson (1998) discuss *metis* and Jeff Grabill (2007b) also discusses the concept, arguing that in the context of community literacies, institutions should be "*metis* capable," i.e. support invention. *Metis* is actually a figure in Greek mythology. She was the first wife of Zeus, but right before she gave birth to their daughter Athena, Zeus swallowed her so he could capture her cunning intelligence for himself. Detienne and Vernant (1978) describe *metis*:

. . . *metis* is a type of intelligence and of thought, a way of knowing; it implies a complex but very coherent body of mental attitudes and intellectual behavior which combine flair, wisdom, forethought, subtlety of mind, deception, resourcefulness, vigilance, opportunism, various skills, and experience acquired over the years. (p. 3)

Trickster rhetorics (Powell, 1999; Terrill, 2004), performance based pedagogies (Lindquist, 2004), as well as Haraway's "Cyborg" identity are very similar to *metis*. Powell writes, "Ambivalent, androgynous, anti-definitional, the trickster is slippery and constantly mutable" (p. 9). Haraway writes, "'Cyborg writing is about the power to survive . . . on the basis of seizing the tools" (2004, p. 33). Haraway invokes the Cyborg in order to imagine a world without gender, a subject that no longer attempts to "heal the terrible cleavages of gender" (Rife, 2005, p. 18). The Cyborg is a being that no longer depends on "the plot of original unity out of which difference must be produced" (Haraway, 2004, p. 9). The reason I think

Haraway's discussion is important is because in the ancient definition, *Metis transcended* opposition, which is different than fighting against or opposing opposition. The idea of using invention to transcend, rather than oppose, I think, is worth pondering, especially in light of invention's productive power. Back in 1997, Porter wrote "the realm of hyperreality can become a realm of domination, unless writers are willing to adopt the role of 'cyborgs'" (p. 63). Transcending products of power by being productive yourself (rather than always resisting and opposing) seems to me a prudent choice. Jessie transcended copyright law by fully embracing it with her journal article, conference presentations, open letter to copyright holders, and piracy movie. Thus far, she is experiencing success and I expect that trend to continue.

I think Haraway's description of the Cyborg could have been lifted right from the pages of Detienne and Vernant. *Métis*, for the Greeks was a feminine noun, but like Haraway's Cyborg, *Métis* for the Orphics was "an androgynous god with a twofold nature" (Detienne & Vernant, 1978, p. 134) implying, according to Detienne and Vernant, that *metis* transcends the opposition between male and female. *Métis* is likened to water slipping through the enemy's hands, like fire which can lightly toast or annihilate, polymorphic, like a trap in that it is "the opposite of what it seems to be" (Detienne & Vernant, p. 44), like Homer's Odysseus, "an octopus," whose "strings of words . . . unfold like the coils of the snake, speeches which enmesh their enemies like the supple arms of the octopus" (p.39). According to Detienne and Vernant, for Aristotle, the *panourgotos*, octopus, or cuttlefish, was the "most cunning of fish" (p. 159). As

Carolyn Miller (2000) points out, *metis* is connected to cunning intelligence and the hunt, the conjectural paradigm. According to Detienne and Vernant, all activities involving *metis* involve a “conjectural type of knowledge” (p. 311):

To conjecture, *tekmairesthai*, is, in effect, to open up a path for oneself with the aid of guide-marks and to keep one’s eyes fixed on the goals of the journey just as the navigators do, placing their trust in the signs of the diviners and the luminous signals in the sky . . . approximate knowledge is explicitly represented as a long journey through the desert (*eremos*) where there are no visible paths and where one must constantly guess the way, aiming at a point on the distant horizon. (pp. 310-311)

As in Detienne and Vernant’s quote, when writing for the web in copyright imbued environments, “one must constantly guess the way.” The “guide-marks” are the variables we consider as we write. Is the use of this image legal? Ethical? A good design choice? Do the copyright stakeholders have deep pockets? Will they pursue me or leave me alone? Can I “hide” my digital writing from “the law”? Can I disguise the texts I’ve appropriated by changing their shape, texture, meaning, by synthesizing? These were all guide-marks considered by my interviewees as they constantly guessed their way in the digital composing process.

There is a clear connection between probability thinking and *metis*. Probability calculations involve conjecture – hunting for the right choice. Hunting certainly involves a cool calculation of probabilities. Successful measuring of the probabilities and successful choice in an action is evidence of thinking informed by *metis*. All of the interviewees in my study had in the literal sense, probably

violated copyright law – yet none of them had been challenged. Instead their writing had be used, celebrated, and been key to some of their successes.

Like the four factors listed in the fair use statute, section 107, the heuristic probe I offer functions as “guide-marks” used by the navigator gaining probable knowledge in the night-sky. While some argue for more certainty with respect to fair use, I remain committed to the statutes’ uncertainty. Uncertainty is more pliable and better supports invention than does certainty. Uncertainty allows *metis* to be leveraged.

Detienne and Vernant point out that after Zeus swallowed Métiis, cunningness was assigned to the gods in an ordered fashion. Not all gods had it. And it’s clear in Greek myth that having *metis* didn’t necessarily bring happiness and joy:

The cunning of Metis constitutes a threat to any established order; her intelligence operates in the realm of what is shifting and unexpected in order to better to reverse situations and overturn hierarchies which appear unassailable . . .the children of Metis inherit from her the devious intelligence which characterizes her.

The quality of *metis* is very relevant to digital composing in light of copyright law’s imposition in web space. The law tries to establish order. The digital writers I interviewed certainly constitute a threat to copyright law. In many instances they rendered copyright law impotent. One thing to point out about *metis*, is that having and showing it can be a liability. According to Greek myth, one might try to hide their cunning wit or suffer the fate of Metis who remains locked and hidden forever in Zeus’ entrails. Organizational work-for-hire policies, on a much less dramatic level, do consume the *metis* of their employees – i.e. they stand as

author and supersede individual employees' authorship. Such was the case with Amanda and Heather. Work-for-hire policies though do create order. It would be very difficult to manage an organization's identity with 2,000 individuated authors of it.

In Greek myth not all gods had *metis*; some instead had practical knowledge, prudence, or *phronesis*: “. . . *phronesis* . . . refers to the forewarned prudence which is the characteristic attribute of *metis*” (Detienne & Vernant, p. 138). *Phronesis* is the kind of inventional quality Leslie had. *Phronesis* is often associated with politicians. Aristotle made a distinction between prudence and cleverness (Detienne & Vernant, p. 316), but I see no reason to think that both aren't inventive qualities. Leslie's score on copyright knowledge was only 50%. She was aware that she didn't have a great deal of knowledge in this area, which is one reason why she didn't focus on it in the FYW course she taught. Instead, she exercised prudence – she password protected things if it was easy to do so – she basically knew that her chances of being held liable for copyright infringement were small. I quoted Chaim Perelman's definition of legal reasoning in Chapter Two – legal reasoning is an elaborated individual case of practical reasoning. Practical reasoning is prudence, like Leslie had. Practical reasoning elaborated upon, with a cunning edge, is *metis*. As I said in Chapter Two, legal reasoning at its best, draws upon *metis*. But even though Leslie was prudent rather than perhaps “cunning” with respect to copyright, she was still inventive.

For practical purposes, my writer-interviewees did exhibit *metis* as I illustrated above, although not in a fashion that I can concretely quantify. Based

on mythology as well as the characteristics exhibited by the interviewees in their goal of avoiding copyright liability or chilled speech, the following qualities can be extracted as comprising *metis* in the context of digital writing in copyright imbued environments:

1. **Kairos** – timing, especially when to keep one’s cunning wit hidden or knowing when to stay under the radar of copyright holders. Patience is an element of kairos – when Odysseus and his men were trapped in the Cyclops’s cave, Odysseus waited patiently observing Cyclops’s habits, and then waited longer for him to fall into a drunken stupor in order to make the move that allowed Odysseus and his men who’d not yet been eaten, to escape. Odysseus’ patience included the willingness to sacrifice and suffer; as he waited several additional men served as Cyclops’s evening meal.³⁷
2. **Research Abilities (Research & Appropriation or Hunting & Gathering)** – in order to have foresight one must have knowledge or know where to get the knowledge one needs. One must also know when a check with the guide-marks is in order. (You need to know what questions to ask, when, and of whom). We might revisit *stasis* theory and issue spotting to develop research abilities in the context of *metis*. Research abilities encompass the ability to hunt with foresight, to plan, to conjecture in a cunning fashion. Research abilities also include the know-how to appropriate what one needs to – or gather. One needs to be able to smartly pick and choose.
3. **Subject Area Knowledge** – this cannot be underestimated. In order to make a fair use determination or understand one’s potential liability under copyright law, one must study the law and know a lot. Clearly in the survey and interviews, digital writers want to know more about copyright law as well as other laws impacting digital writing. Sarah for example, wanted to know how to negotiate contracts with clients and how to draft and use permission and release forms.
4. **Flexibility** – be ready to change paths on a moments’ notice; have backup plans. Many interviewees had made a fair use determination of their use, but were ready to take materials down if asked – had various arguments in place they could use if called to task.
5. **Stakeholder Status** – something serious or very important to the writer must be present. In Greek myths it was often the person’s life or the life of a loved one. For professional writers it could be their ethos, the ethos of their organization, ethics, religion, or an ingrained sense of justice and fairness. *Metis* usually happens where pressure is exerted.
6. **Success** – if you are accomplishing your goal – in the case of copyright not getting sued or asked to take something down, it might be an indicator of the presence of *metis*. At this writing I report that Amanda obtained the

international teaching opportunity she applied for, and Leslie took a position at her first choice of employers.

Since it's clear *metis* can involve trickery and deceit, we have to decide what to do about that problem. As George Kennedy reminds us rhetoric's always been seductive. Perhaps President Bush fell victim to this seduction – that could explain his reliance on 935 false statements that propelled us into Iraq (“Study,” 2008). The seductive power of rhetoric springs eternal. But Powell reminds us (1999), “The trickster doesn't play malicious tricks . . . ” (p. 9). In Greek myths, justice is sometimes served through the use of *metis* (although I cannot say it is accomplished without harming anyone, one of the three precepts of Roman justice). Since all seven digital writers I interviewed were trying to act justly and fairly – perhaps why ethics was so important to them, justice might serve as a tempering framework enclosing our use of *metis* as professional writers. Aristotle and other philosophers believed that justice was the virtue that encompassed all others. Jim Porter writes (1997): “To be an effective rhetor, you have to know what is good, be able to move toward it yourself, and be able to have the persuasive capacity to move others toward it as well” (p. 37). Taking that into consideration, my revised mediational heuristic, reflecting the hierarchical and embedded nature of composing choices, the priority of *metis*, and the justice-framework, appears as in Figure 6.2.

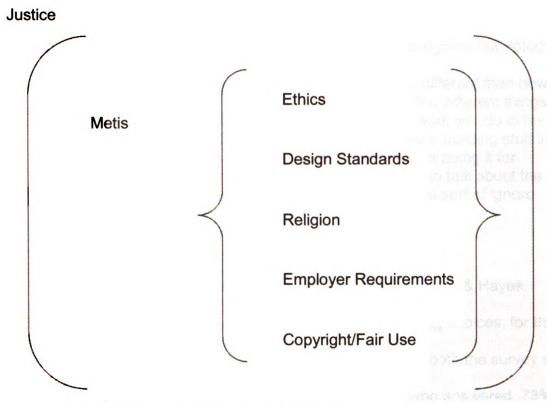


FIGURE 6.2. The Mediation-Digital Composing Heuristic

I offer this as a start to thinking about the composing processes of digital writers. I do not think it is all conclusive; I interviewed only seven writers. More research in this area is certainly needed. I should think a study of workplace-digital writing practices might prove helpful. Also, further studies on the role of *metis* and justice (and their connection, if any) might prove particularly useful in understanding digital writerly decisions. As far as teaching and learning, the digital writers in my study, both the survey takers and the interviewees, really wanted to know more about copyright law as well as other laws impacting digital writing. Sarah in particular, who was slowly developing an independently owned web design business, also wished she could have learned more about contracts, permission

forms, releases, and negotiation during her master's program. Sarah had participated in service-learning courses during her degree program, but noted:

I think so much everything I've encountered is different then how we did it in class . . . I mean I just wish, I love the different things we learned in school, but the focus was really on work you do in the classroom, and I think about all the time we were building stuff in class where I wished we had pretended we were doing it for commercial reasons. And so that we really had to talk about the issues, and think about them then as opposed to sort of ignore them because we were safe then.

Ethics Trumped the Law

When we consider the hierarchical and embedded (Flower & Hayes, 2003) nature of rhetorical topics that mediate digital composing choices, for this group of writers, ethics trumped the law. This is supported in both the survey and the interviews. Recall that in the survey, of 384 TP writers who answered, 73% would follow their conscience rather than the law on exceptional occasions, while only 14% would obey the law without exception. As Carey points out, you have to break the law sometimes "because I mean we wouldn't have all the civil rights, the law now, we wouldn't have it unless people stood up to the law." The seven interviews certainly supported the idea that digital writers are more concerned about attributing, asking permission, not harming others, than they are about legal violations. Sarah, for example, had deep concerns about implications of her use of others' content, not with respect to herself, but with respect to the church she was writing for. She contacted a content owner in Sweden to make sure her use of his materials was legal and ethical. "The whole thing was just really confusing to me, but because I was getting paid for it, it made me, it wasn't like in

school where I didn't really worry about it because it wouldn't really matter, like, I didn't want this to come back to the people I'd done it for.”

We can connect this finding to previous discussions in our field. Chapter One discussed Porter's (1997) argument that if the law is unethical, we can break it. The majority of writers in this community agree with Porter as evidenced in the survey and backed up in the interviews. In his 1998 book, Porter states that one of the first steps to developing what he calls a critical rhetorical ethics in cyberspace involves recognizing that webwriting has “legal and ethical implications” (p. 145). We are there. The 300 plus survey takers were aware of legal and ethical implications of web writing as evidenced by an average score of 63% on the knowledge portion, and by 73% responding to the question on ethics versus law, stating that on occasion it's acceptable to follow your conscience rather than the law. All seven writers I interviewed had this awareness of legal and ethical implications. Heather tacitly screened photos her employer sent her as web content since she knew of possible negative implications. Leslie used Adobe filters on flickr images in order to protect young game players' identities. Carey kept her social network site content free in order to protect the institution and its connection to her professional identity. Amanda had the same kind of concerns with her web persona and her institution's identity.

Amanda, like the other interviewees is extremely concerned with ethics which were more important to her than legal requirements. Amanda tells me in her digital portfolio she wants to showcase her editing abilities, but when using others' texts she asks permission. She explains some of her materials:

The first three were all pieces that I did in a class where everybody was developing their own published work. So my role in each of these pieces was really to do some kind of editing, whether it was developments, or something like that. With each of these I did ask permission from the people who wrote the original to have their work up there and they all gave permission so I have the original up there because I want to be able to contrast what the original looked like and what the changes were after I edited it or what suggestions I made, because some of them show like my editing comments.

Smartly, Amanda also notes in text throughout her portfolio “used with permission” in order to signal to her audience her awareness of the ethical issues arising when incorporating others’ texts into one’s own writing. Some of the other materials on Amanda’s website are chapters and flyers she’s edited. These items are from real companies.

She did not include the originals because she doesn’t have permission from the companies. But interestingly, the original chapters and flyers were provided to her by the teacher of an undergraduate course. I asked her “Did the teacher in any of these courses tell the students like did any of them address issues of copyright and fair use, or using those kinds of materials in your professional portfolio; how did you decide, was it part of the curriculum?” And she replied: “No. No it wasn’t discussed.” So she independently decided that it would be unethical to use someone else’s materials without their permission even in the case of doing it to illustrate her own editing skills acquired at an educational institution. However, she did include the original when blended with her edits. She explicitly tells me her pressing concerns when writing for the web are ethical, not legal. For a number of interviewees, even though they could use material

under fair use without receiving permission, they requested permission anyway not because of fear, but because it was the right thing to do.

All the writers had some awareness of legal implications of their webwriting even though two had scores as low as 50% in copyright knowledge (one a PhD student and the other an undergraduate). Of course, increased knowledge and understanding in the areas of law and ethics would heighten awareness. It's not possible to foresee implications when your knowledge is lacking. In research, we might further examine the connection between the weighing and balancing of legal versus ethical implications through invention and reliance on *metis*. Why ethics trumps the law can only be speculated upon without further research. It could be because students had been taught more about plagiarism, attribution, and permission than they were taught about copyright law. We cannot know the answer to this without conducting another study that might trace where and to what extent writers obtain their knowledge of ethics, law, religion, etc.

Logie replies to Porter's suggestion to avert law, arguing instead that such tactics should be public and organized which is a valid stance if we think of public advocacy. But only one of the writers I interviewed, Jessie, was involved as an activist by presenting at conferences and writing journal articles. Yet, the other writers were using *metis* and invention to transcend the law. In another research trajectory, we might focus on the larger goal of justice rather than ethics, since that is what we are all hopefully working towards. Justice is a value laden concept, a concept that has agency and which exercises its own kind of *metis* –

justice is polymorphic, able to change shape on a moment's notice, like water flowing through your hands, one of those concepts we will probably never pin down. A frame of "justice" encourages the weighing and balancing of considerations as far as what's good for the whole, the community, the union, versus what is good for the individual. Perhaps Leslie acted prudently with respect to copyright because she managed her time the best she could in order to benefit the learning of her students. Perhaps Amanda willingly conceded her own authorship to the national health organization that employed her because she knows that overall, this health organization is doing good things for people across the nation. Giving up her personal authorship in this context serves justice. I have far less answers here than I like, but think this is an interesting area for further research. What is the connection between digital authorship, the law, and justice?

Rules or Tools?: The Agency of the Law

While the study supports the idea that laws have agency, as knowledge and understanding increase, that agency is increasingly diminished by the human actor. The law's agency is connected to where it ends up on the AT triangle. In his research, Vygotsky focused on how human participants formed complex intellectual structures (heuristics) through the use of signs. He didn't look so much at how the sign itself changed. Engestrom points out that as mediation occurs, both the object (in this case the webpage) and the tool (in this case copyright law) change, producing a kind of duality in the mediational placeholder on the AT triangle. The placeholder is both the artifact (copyright

law) and the understanding of that artifact (knowledge and understanding of copyright law). In AT though, the focus remains on the interpretations of the mediational means by the human subjects. ANT, in contrast, focuses on the artifact, how it is composed, and its relationship to other entities, things, people. Engeström (1990) did not explain how something goes from being a rule to a tool on his triangle (pictured in Chapter Two, Figure 2.5) but he did say that an artifact can be both. His example is medical records, which he says are a tool if they are perceived to be so, in use, by the participants he interviewed.

If the participants (doctors and assistants) thought the records were just for storage, or prescriptive rules from above, then in Engeström's view those records occupied the rule placeholder on the triangle. He also notes that people often get confused about whether something is a rule or a tool. Rather than looking at tacit understanding the way I did, he simply asked his participants outright "is this a tool"? Their answer thus depended on however they were personally defining tool (not having been apprised of the AT definition of mediation and the idea that tools are transformable while rules are not, etc.).

The theory I began with, rhetoric theory and activity theory with Foucault mixed in, proved inadequate for analyzing the relationship between tools and rules, and for analyzing how law functions, what it causes people to do, how it flows through people, and what people do to it. I saw law changing due to writers' understandings. I saw authorship of webtexts shifting. I saw differences between various writers' motivations and understandings. I saw the law and other considerations, like ethics, flowing through people and colliding in webspace.

ANT provides a means to examine the relationship between placeholders on the activity theory triangle like copyright-law-as-tool versus copyright-law-as-rule. So if I imagine the possibility that what is mediational at one moment on Engestrom's activity theory triangle might be non-mediational at another moment, ANT would give me a mechanism to do this because ANT is good at helping examine the relationship between things. Neither Foucault nor AT have a clear method to do this.

ANT instead provides the ability to examine mediational and other artifacts, privilege them in research, and trace their origins. While Engestrom purports the importance of taking the system and the personal view in research, ANT allows me to take the human and artifact view instead. I analyze the humans, as I've done thus far. But with ANT I can put the law in a central position, and ask what the world would look like to the law. (At the point you are reading this, for you I am a text not a human – which makes more complex the irony that as a human writing this I hold out I am capable of taking the perspective of the artifact; you see I can be both a human and an artifact – therefore I am equally capable of taking either perspective). I do want to note that I cannot *fully* use the ANT lens because my study was designed with AT which imposes a certain shape on the research before data is collected.

To fully understand the *copyright* network with ANT – to understand for example where writers get their legal knowledge, a different study is needed where I'd probe that issue with different questions than the ones I asked. However, because I traced authorship with my questions, I do think my methods

were ANT-like in that they traced certain networks, or initiated the tracing of certain author-networks. An interesting future study might trace the content in a writers' webtext, and not stop with the writer, but continue backwards until one could no longer find an author. This study might involve judicial opinions, which are known to "plagiarize" attorney briefs, and then continue backwards, tracing where the content in the attorney briefs derived, and so on.³⁸ Going into the pilot-study originally, I thought copyright law would have a greater presence in the webspace-commonplace. But as my heuristic reflects, things were much more complicated than that.

Competencies of nonhuman artifacts, like laws, are folded into humans—this is where Foucault comes in, and in reverse ANT permits focus on how human competencies are folded into nonhuman artifacts in the Latourian (1992, 1988) sense. If law has agency in the ANT sense, then one might be able to suppose that like the human participants in Vygotsky's experiments, the law can "learn" and change over time (and in fact it does) – that there might be something

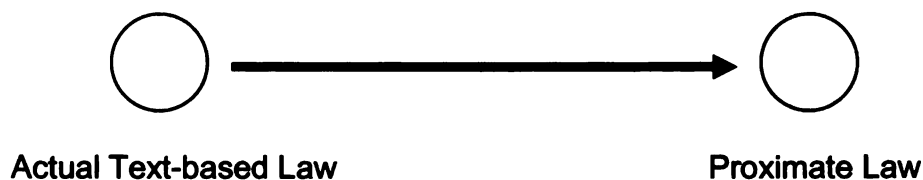


FIGURE 6.3. The Actual Law and the Proximate Law

like the actual, text-based law, Title 17, and the proximate law – the proximate law being what the law is in people’s minds and behaviors (See Figure 6.3). Figure 6.3 draws upon Vygotsky’s theory of learning: actual development and proximate development. Actual development is what a person can accomplish on their own, and proximate development is what they can accomplish in collaboration with others. Using ANT we could make an analogy between this kind of learning in humans, and the same kind of learning in a nonhuman. That is, like human learners, the law’s proximate abilities follow its actual abilities, and the law grows into, or transforms into how the law is actually being applied and understood. Every time a law is changed then, it’s always already behind where it should be and is never able to quite catch up to its proximate self.

In a dramatic view of such a perspective, while she doesn’t talk about it with the AT frame at all, Emile Cloatre (2008) of the University of Nottingham, UK has just published a study using ANT to study the presence of patent law in Djibouti. She found a total disconnect between written law and practice. In this case, patented pharmaceuticals were widely and exclusively prescribed in Djibouti even though no written law existed mandating this practice. The reason is primarily because, she found, French pharmacists have a huge presence in Djibouti, and in France pharmacists almost exclusively rely on patented pharmaceuticals rather than generic. What Cloatre found is rather stunning in that we cannot assume a written law has anything at all to do with social practice, even though as she states, and I can attest to, in legal discussions it’s always presumed that the law has huge agencies and will change people’s behaviors

upon enactment. At the law school, it is assumed laws are the ultimate motivators of human behaviors.

However, under my Vygotskian view as well as per Cloatre's findings, the actual written law is almost beside the point. It simply backs up what we are already doing. A follow-up study to mine might be to explore where writers get their copyright knowledge. There might be no connection to Title 17, US copyright law. We can only speculate a connection until we know for sure. I know few non-lawyers who have read it, and Hobbs, Jaszi, and Aufderheide's (2007) study found that copyright/fair use misinformation is likely perpetuated from teachers to students (rather than from Title 17 to students). But they assume students get their copyright knowledge from teachers. We do not know this for sure. I only slightly explored this in the current study. Students could be getting their information from youtube for all we know. Heather, for example, learned about deviantart.com from high school friends first rather than a teacher. Jessie was told two different things from two different teachers in the same professional writing program, and thus did research and made copyright decisions on her own.

Foucault's strategy was to "isolate techniques of power exactly in those places where this kind of analysis is rarely done" (Foucault, 1984, p.10). Using activity theory to isolate copyright law provides a technique, or mechanism to accomplish this. Foucault coupled with ANT provides theory on how to invert the focus in the typical AT study onto the texts' perspective rather than the humans'. Using ANT to imagine copyright law's agency, and how copyright law might flow

through writers and change the webtexts they create, might appear as in Figure 6.4. One of the difficulties with the various generations of activity theory triangles is that a figure by nature is fixed, and yet I'm trying to represent movement. To further this effort, I draw upon the work of Edwin Hutchins (1995) and his discussions of shifting perspectives that surfaced when he studied distributed cognition in the context of ship navigation. Figure 6.4 is based on his diagram of the shifting relationships between a moving boat and the stars, in relationship with an island. In my diagram, at the tip of each arrow one might image a webtext. As the writer's understanding of copyright law varies, so does the impact the law has on the writer's webtext. As the understanding of copyright law shifts, so does the web composition that is produced under its mediational powers. Figure 6.4 also represents Foucault's idea of power flowing through the individual. Finally, Figure 6.4 tries to represent both the ANT and Foucaultian perspective that actors shift in and out of positions in relation to one another. Using Hutchin's (1995) method of mapping here provides a useful way of seeing the shifting relationships between actors, both human and non-human.

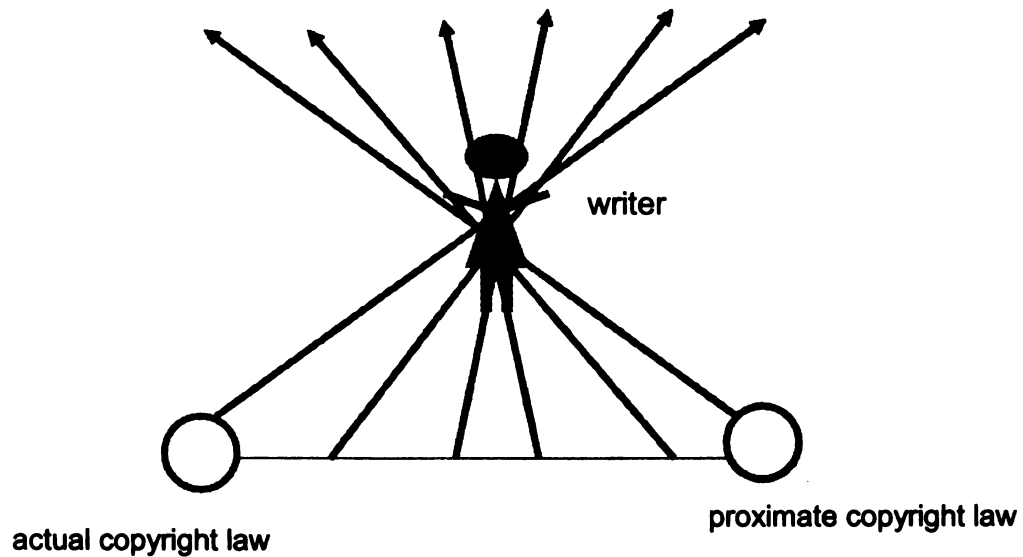


FIGURE 6.4. Relationship of Copyright Understanding to a Webtext. At the tip of each arrow one might image a webtext. As the writer's understanding of copyright law varies, so does the impact the law has on the writer's webtext. The idea of this diagram is taken from Hutchins (1995), except where I have the copyright law, he has a canoe. Where I have the writer, he has an island. Where I have the webtext, he has stars. So as the canoe travels, the position of the stars change in relation. In western navigation, the island is mapped as fixed.

Copyright law is the “end product of a lot of hard work in which heterogeneous bits and pieces . . . that would like to make off on their own are juxtaposed into a patterned network which overcomes their resistance” (Law, 1992, p.2). Copyright law as a node, is an actor into which human competencies have been folded (Latour, 1992, 1988). Like speed bumps intended to stand in for a traffic cop (Witte, 2005) copyright law stands in for the copyright police, hoping to control individuals economically (I hope you are reminded of Foucault here). The actual law is the text-based law as it appears in the statute, Title 17. In contrast the

proximate law is the law as enacted through human behaviors. Based on the key misunderstandings located in my survey, the proximate law, the law as imagined by those in TPW, actually would be more beneficial for these writers than the actual law. We cannot know of course whether the actual law will eventually morph into the proximate law in this context, but it is certainly worth pondering. It is one way to explain changes in the actual law when they do occur.

As seen in the interviews, sometimes copyright has a visible presence in the writer's webtext, and sometimes it does not. People, things, and entities which are not understood are usually ignored. Copyright law as written certainly isn't designed to be understood. Imagine if I usability tested Title 17, a 326 page document that is US Copyright Law? I imagine if users were faced with a simple task of selecting an image found on the web and placing it in their own text, legally per Title 17 – not only would they have to study Title 17, not an easy task since it's written in legalese, but they'd also have to research the origins and ownership of the image to decide the likeliness of a copyright holder challenging their "fair use." If a writer solely relied on Title 17, they might make a wrong choice because Title 17 doesn't tell you, you need to go read all the cases that interpret it. My guess is that Title 17 would be deemed entirely unusable to anyone but copyright specialists – high paid attorneys. It could be redesigned though. Perhaps this is something worth examining – a usability study of copyright law and development of recommendations. But such a study might be blocked or ignored due to the fact that if the law could be understood and applied by everyday citizens, lawyers would be out of work. But we would be closer to

achieving justice in the US if laws could actually be understood by the people they apply to.

I call the agency of our written law into question. Copyright law has a certain irrelevance in webtexts because the physical shape of the browser window lends itself to ready-made fair use (thumbnails, low pixels, short quotes). Another reason copyright law is less important than it might be is because people are incredibly imaginative in their understandings of it. It's a tool to them (like most artifacts – I think very few artifacts are actually rules). Tools transform.

Vygotsky gives a good example of how a tool can be used for something other than what it is intended for. In his experiments, he'd give people cards with pictures on them and then ask the individual to complete some type of memory task. In one of his examples he uses a picture of a crab. Participants usually select a picture that actually represents the item they are supposed to remember – like if they are to remember a crab, they pick a picture of a crab. That is unmediated memory in Vygotsky's view – a rule-based intellectual activity rather than a mediational one. He wasn't very interested in this simple association. What Vygotsky was intrigued by was what happened when he gave the person cards that didn't correspond to what they were required to remember. In his example, the crab card was used to remember something like "theater." So what happened was the research subject made up a story relating the crab to theater. Vygotsky describes that the participant explained the crab was looking into the ocean at some shells, which for the crab were as entertaining as watching something in a theater. The research subject's understanding of the crab came

out of a heuristic formed by the human subject and it was based on a story that connected everything together – not a simple one-on-one association, but a complex structure, a story. What Vygotsky didn't talk about was the fact that the crab, in his example, actually changed into a theater. When this participant looked at the crab, he didn't see a crab, he saw a theater. Likewise, I think when my writers look at copyright law, they don't see the law, they see something else: their story of the law. Their stories were their "misunderstandings" of copyright law.

Misunderstanding and confusion are productive. Among my interviewees, the law wasn't really "the law"; it was a story of the law that made sense to the writer. "Actors incessantly engage in the most abstruse metaphysical constructions by redefining all the elements of the world" (Latour, 2005, p. 51). So for Rob, his understanding was that flickr.com images were always safe – he thought he'd learned this in school from a reliable source – and he operated with that understanding even though he was probably not correct. Amanda thought that if materials came from an educational source and had previously been used to teach others, they were "fair use." It's clear the interviewees twisted and shaped the law into something that made sense for them regardless of the "truth" of their understanding. So the law didn't have as much agency as it might have liked; it didn't just pass through people uninterrupted and show up in their web compositions. It shifted and changed due to the writers' knowledge and understanding, and based on that, had a presence or lack thereof in the final webtext.

The tools and rules dichotomy that Engestrom is so bent on, was not emphasized by Vygotsky. But for fans of Latour, what Engestrom calls tools are like what Latour calls mediators, and what Engestrom calls rules are like what Latour calls intermediaries. Intermediaries are very rare – they are one thing or even nothing because they can be easily forgotten, like the medical records in Engestrom's (1990) study. Copyright law in China and TRIPS (Agreement on Trade Related Aspects of Intellectual Property) in Djibouti³⁹ are forgotten by the people. In China, copyright law is unable to produce anything to keep itself alive, unable to circulate, unable to overcome existing networks that already serve the author-function, that already organize meaning – and so in China, copyright law is an intermediary. Mediators, in contrast, are plural, transforming, potentially infinite. "They might be counted as one, for nothing, for several, or for infinity. Their input is never a good predictor of their output; their specificity has to be taken into account every time" (Latour, 2005, p. 39) – like US copyright law and its mediational effect on my interviewees' webtexts.

For the Kwakiutl Indians, un-mined copper was an intermediary, a rule. But when they harvested the copper and shaped it into copperplates which subsequently held and acquired their own agency separate from people, the copper became a thing, a mediational thing. It became a tool. Human competencies were folded into it. ANT permits the artifact perspective – and from that perspective, copyright law can learn the same way amazon.com seems to know which books I want to read next. Copyright law changes and takes different forms for each of the writers in my study. Copyright law can also be inventional

and *metis*-like. Of all the things, people, and entities in this study, I speculate Title 17 may have been the most cunning, as it has been exceedingly inventive and productive without exerting energy, and without anyone noticing. Below is Figure 6.5 showing some things Title 17 might have associated “in a legal way” due to its “circulation throughout the landscape” (Latour, 2005, p. 239).

Legal Associations Produced by Title 17

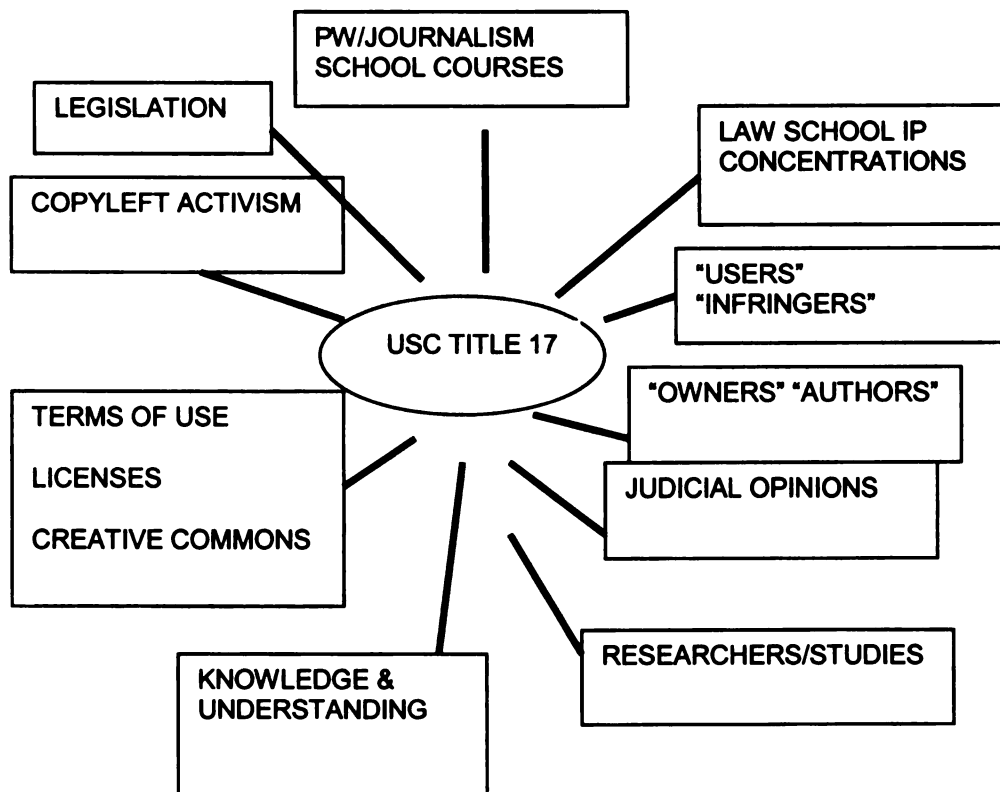


FIGURE 6.5 Legal Associations Produced by Title 17

Such possible networks would have to be explored. We cannot know the legitimacy of their existence without further research. We should not assume.

But we do know that overall, copyright law is productive. On a copyright listserv I participate in, along with artists, librarians, professors, and lawyers, in the last five days 55 posts have circulated debating the merits of the Orphan Works Act of 2008 currently under consideration. The concept of “orphan” works might indicate the law becoming more ANT-like, and also growing into its proximate self, in that it is trying to recognize what we already know – that things people make can detach from their creators and take on meaning and power that was never anticipated. The Orphan Works Act makes it easier for users to appropriate texts, images, sounds, that have no “owner” – they have no creator because their creator cannot be found. Such texts are construed as “orphans.” The 55 posts remind me of the law’s productiveness – Title 17, and its revisions, continue proliferating.

What would a theory of rhetorical invention for things and entities look like? I think Grabill (2007b) gives us a start with his idea that institutions can be *metis* friendly. I also think that diseases and viruses are “things” that have *metis*, but like the plague, they exercise it without justice. If we think of entities and things as being inventional and productive, all kinds of research trajectories open up.⁴⁰ Assembling the theories of Janice Lauer, Cynthia Haller, Carolyn Miller, Lev Vygotsky, John Law, and Bruno Latour, a small start to a theory of rhetorical invention for people, things, and entities might look like this: *Rhetorical invention is when people, things, entities create heuristics formed of interlocking stories,*

stories about situations, and then use those stories as a basis to maintain, act upon, resist, or transcend those situations.

Implications for Teaching, Learning, and Research

One thing I had asked in this study was whether or not the interviewees were conducting legal reasoning in the same sense that attorneys, judges, law professors do. I think they are, but I cannot really answer that completely because I have no participants that were actually in the legal field to use for comparison purposes. So if I wanted to really know the answer to this question, I'd have to conduct another study. I do think the reasoning of my interviewees call into question the real effect of what's described as the "signature pedagogy" of law school. I do want to point out the similarity between ANT's idea of radical symmetry, which for research purposes can provide a different kind of reasoning than we in R&W are used to, and legal reasoning. Legal reasoning, and US laws for that matter, employ their own kind of radical symmetry by using abstract language which as Patricia Williams points out "flattens." As she notes, this flattening often erases the humans (as does ANT).

But it's this same flat "rule of law" that allows justice to be blind, or justice to exist at all. "A form of behavior or a human judgment can be termed just only if it can be subjected to rules or criteria" (Perelman, 1967, p. 20). Without rules or criteria we end up with something like the Royal Prerogative that decided the award of patents in 17th century England. From a research perspective, I think using ANT, like legal reasoning, has interesting possibilities for achieving a certain kind of justice. The concept of justice is definitely grounded in equality.

Chaim Perelman defines justice as seeking to treat beings in the same essential category the same. Traditionally, what we argue about is what constitutes the “same essential category” – should copyright law apply to students and teachers in the same way it applies to those working in strictly for-profit environments? Generally, in the US, the answer has been no – therefore, students and teachers, while also “users” of others’ content, are not in the “same essential category” as for-profit users. Therefore we don’t treat them the same under the law. Students and teachers get more leeway. What ANT does, is change the justice argument from one about what constitutes the “same essential category” to an argument about which “beings” are allowed in the category. Instead of simply focusing in people who are inventive, for example, it opens the “beings” concept out to include people, things, and entities. Thus, using ANT, we can think about a theory of invention that includes non-humans. We might learn something by doing this. ANT seeks a sort of “justice” in research, the same way that the law and legal reasoning seek justice for humans. *ANT seeks equality for all the actors, not just the humans.*

Regarding implications for my heuristical, rhetoric and AT based model of digital composing, it might inform our understanding of other cognitive models. While I agree with Flower and Hayes (1980) that writers organize their “distinctive thinking processes” during composing, and that writing processes have a “hierarchical, highly embedded organization,” I cannot agree that digital composing is “goal directed” in the way Flower and Hayes assert, nor do I think that writers “create their own goals . . . by generating both high-level goals and

supporting sub-goals . . .” (p. 274). In Chapter Five I already challenged our understanding of authorship especially in digital environments, relying on Foucault’s essay written decades ago. Based on the power of these heuristical elements as well as the fact that the single author is an ideological production representing the opposite of the functions that create him, in many respects the goals for a piece of writing are selected by non-human texts, laws, concrete systems of power, not the writer him or herself. My heuristic probably factors in rhetorical principles more than does Flower and Hayes since it is constructed by writers for the purpose of generating probable knowledge – the webspace as remix and commonplace, is always contingent and scaffolded upon the convergence of a number of probabilities. The “goals” as Flower and Hayes describe them, for a single webtext can be multiple, transform over time, and can derive from people, things, entities outside the individual writers in my study.

If one of our goals as a field is to have the professional writers associated with us, understand copyright law, we have a way to go. Engestrom points out certain communal tools that might be part of a system (in my study, copyright law), can lose or never acquire their status as communal tools when the activity system has to change how it functions. As I explained in the authorship chapter, digital writing surely changes the underpinnings of originality and authorship – all of the recent discussions on plagiarism, copyright, and cross-cultural communication derive in part from the activity system changing. Copyright law has become more relevant, but isn’t fully functioning as a communal tool. Engestrom suggests that when such a tool is communally constructed, it’s more

likely to be used by the people in the system. Our copyright law is communally constructed in the sense that it was created in a sort of democracy, and is constantly re-evaluated through court opinion and the legislative process. But if the people who actually created things supposedly governed by copyright law had a more hands-on say in its construction, I think it would probably be understood and used more. As it stands, my interviewees kind of ignored what they didn't understand, transformed the law itself, or transcended any of its perceived limitations.

As for the pragmatic considerations of teaching and curriculum in professional writing programs, it's clear that the study participants would like to know more about copyright law. Several interviewees wanted to know more in general about laws that impact digital writing. Engestrom also points out that systems can change if they become future oriented rather than simply looking at past practices. I think if we imagine our students owning their own web design businesses, doing independent consulting for non-profits, being lifelong job seekers, becoming entrepreneurs in digital writing, – I think it might make a curriculum that includes legal issues and digital writing more likely to occur. It might be best to include curriculum that touches on things like negotiation, how to write a contract, permissions, protecting people's privacy, release forms, starting your own business, and copyright-intellectual property issues. Such a curriculum would also embrace Grabill's (2007b) emphasis on planning as well as the "anticipation" component of rhetorical velocity, a theory originated by Jim Ridolfo.

ENDNOTES

¹ Sarah, and all other "research participant" names are pseudonyms used to protect research participant privacy.

² In order to gather data, the researchers contacted teachers, media literacy curriculum producers, and organizational leaders. While many of the participants worked in K-12, a number of them were from universities. Interviews were conducted by phone and lasted about 45 minutes. According to the researchers, the interview questions were open-ended and explored how teachers use copyrighted materials for education and asked teachers to describe how their students use copyrighted materials in student-created coursework.

A unique aspect of the study was that all interviewees were named along with their area of expertise and institutional affiliations – 62 participants are listed in the appendix, about 30% are associated with teaching in K-12. Many of the participants were from the geographical regions near Temple University (Pennsylvania), but some were from as far away as California. The researchers did not describe their participant recruitment methods in the report except that they did use membership lists of various organizations, including the Action Coalition for Media Education, Alliance for a Media Literate America, The National Council of Teachers of English, the Student Television network, the National Alliance for Media Arts and Culture, and the Youth Media Reporter (p. 23).

The major finding of the study was that the key goals of teaching media literacy were "compromised by unnecessary copyright restrictions and lack of understanding about copyright law" (p. 1). Because of participants' lack of knowledge and understanding about the law's protections, their ability to share, teach, and have students produce media-rich texts was severely circumscribed. Not only that, but the researchers found that teachers' lack of knowledge was passed on to students as well as colleagues, perpetuating "copyright folklore" (p. 12) that often characterized the law as much more restrictive than it is.

Additionally, the study offered the following findings:

- During the last decade, copyright awareness has greatly increased among the educational community.
- Teachers believe that the ability to access and use copyrighted materials is central to educating citizens, and is a necessary component to maintaining a democracy. "More than any other feature of copyright law, fair use recognized the core speech values enshrined in the first amendment" (p. 6).
- Too many teachers are unaware of the expansive nature of fair use, and instead rely on various "Guidelines" circulating on the web and adopted by some institutions. The guidelines have varying histories, but are mainly products of the publishing industry.
- Teachers are confused about the differences between plagiarism and copyright, and talk about the two interchangeably although they are separate doctrines (attribution is irrelevant to the issue of "fair use").

-
- Teachers received their information from the media, their institutions, and lore. The information they receive either negates fair use or casts it in a conservative light.
 - Many institutions have extremely restrictive policies about using copyrighted materials – including how students' texts can be displayed. For example, some schools would only let student multimedia pieces be displayed in individual classrooms rather than on school-wide media display systems. Such policies fail to recognize fair use as a legitimate part of US law.
 - Gaining permission from copyright holders for educational use was not "an option among interviewees" (p. 10). Either the permission was not granted, or the fee requested was unreasonable in the context.
 - Teachers' lack of understanding (characterized as "cognitive dissonance" by the researchers), caused them to develop three coping mechanisms: 1) studied ignorance; 2) quiet transgression; 3) hyper-compliance (p. 14).

"Studied ignorance" was defined by the researchers as the "what I don't know can't hurt me" attitude. Teachers believed that if they stayed ignorant of the laws, they didn't need to worry or comply. "Quiet transgression" described teachers' willingness to do what they considered illegal with the hopes that they were unlikely to get caught. "Hyper-compliance" was defined as teachers who created blanket prohibitions in the area of student work especially – such as not permitting students to use any copyrighted materials in their own coursework.

The "costs" of this confusion, according to the report, are less effective teaching materials, constriction of creativity for teachers and students, and the perpetuation of misinformation. Recommendations included developing a code of practice or a statement of fair use practices to assist the educational community. As an example, the authors refer to the recently developed Documentary Filmmakers' Statement of Best Practices in Fair Use which have been negotiated with the Cost of Copyright Confusion co-authors along with documentary filmmaker organizations. Apparently, the Statement had an immediate effect. "Filmmakers themselves, commercial networks, and the Public Broadcasting System all refer to it on a regular basis . . . it has permitted filmmakers to portray reality as they see it without compromise" (p. 23).

³ Marjorie Heins and Tricia Beckles' (2005) study culminated in a handy 67 page pamphlet obtainable at no charge from the Brennan Center for Justice. The purpose of the study was to learn how fair use and the understanding of same, were being used by artists and scholars. The main research question was: How well are fair use and other free expression safeguards in intellectual property law working to protect speech? The methodology used is as follows. First of all, the researchers openly state: "Our research was not strictly 'scientific'"(p. 8). Therefore, to some readers the findings might be considered anecdotal. Data was collected through multiple means including focus groups, telephone calls, an online survey, and analysis of over 300 cease and desist letters. Four focus groups were conducted. Groups were chosen for focus groups because of their stake in fair use issues (Women Make Movies, College Art Association, Location One Gallery). The groups were moderated and contained 7-12 individuals who discussed their experiences grappling with fair use and cease and desist letters. The next step was to examine cease and desist letters deposited with the Chilling Effects web site during the 2004 calendar year. (Chilling Effects is in favor of fair use and has a political agenda; therefore, cease and desist letters posted there might tend to be from the particular audience that visits and supports Chilling). From those letters, the Chilling Effects administrators were asked to contact persons who deposited the letters, if those persons had left contact information. This is how the telephone interviews were solicited. Seventeen people were interviewed this way. The last step was the web survey which was provided on a web site. Arts organizations were asked to publicize it. From this,

about 290 completed surveys were gathered. The surveys asked about attitudes and experiences with copyright and fair use (I contacted Marjorie Heins and she sent me a copy of the online survey). The survey asks mainly for essay type responses to various prompts.

The Heins and Beckles (2005) report is valuable because it contains a very intense and condensed discussion of some major fair use cases. Visuals are included as well. The general findings were as follows:

- Among artists and scholars fair use is known and sometimes relied on. Levels of understanding vary, with significant amounts of misunderstanding. Misunderstanding led to chilled speech.
- Prevailing practices in industry have a large influence on whether fair use can be leveraged. If an industry requires permission (the film world, for example), then fair use will be of no consequence. For "students, Web activists, and artists" who frequently appropriate materials, fair use is often exercised.
- Based on percentages of the total amount of cease and desist letters sent each year, substantial numbers of these letters contain weak claims.
- Many recipients of cease and desist letters who refuse to acquiesce are not sued. Non-acquiescence is alive and well. In contrast, many acquiesce out of fear even though claims in cease and desist letters are weak.
- Pursuant to the needs as expressed in the study findings, Heins and Beckles are crafting a web resource (See Fair use network).

⁴ Renner (2002) and Sweeney (2004) dissertation studies were produced by PhD candidates in programs of education rather than rhetoric, writing, or professional communication. In her dissertation, "An analysis of the knowledge levels of Ohio's post-secondary educators in public/state, private and two-year colleges and universities regarding copyright ownership of Web-based/online courses and materials," Jasmine Renner, Ed.D, (2002) examined knowledge levels of post-secondary educators in Ohio on copyright and copyright related issues. In her study, 62 educators who taught web/based courses from a variety of public and private institutions, including two-year colleges, participated. Two instruments were used to measure knowledge: a copyright questionnaire that analyzed knowledge of educators on copyright law, and a follow-up survey that measured educators' knowledge about copyright policies at their own institutions. The study also used legal research to collect and analyze appropriate laws. The results found that educators had some knowledge of copyright but were mainly "unstudied." Educators teaching graduate courses as opposed to undergraduate or professional courses scored significantly lower. Those who were aware and knowledgeable about their institution's copyright policy scored significantly higher. The study argues that institutions should provide on-going copyright education and materials to educators.

In Phyllis Sweeney, Ph.D's dissertation, "What faculty know about designing online materials in compliance with current United States copyright and fair use laws," (2004) the researcher examined resources used by faculty to develop online courses plus faculty levels of knowledge and methods for gaining knowledge on fair use as it pertains to constructing online courses. Methodology included quantitative methods of posting an online survey to the web, and qualitative methods incorporating online focus groups via Blackboard. The author was interested in these issues because of the rush to create online courses – but the simultaneous lack of training for faculty with respect to fair use and using materials to construct online courses. The findings indicated that very few faculty were aware of the copyright and fair use policies of the institution studied. Quantitatively, very few faculty were informed about copyright issues; qualitatively "lack of training, a desire to comply, and urgency in designing online course materials in time for the start of a new semester" were major factors that influenced decision making regarding online content. While both of these studies inform my inquiry, neither examined the mediational qualities of fair use in a professional writing program among writing specialists, and

neither used discourse-based interviews in order to explore tacit knowledge informing writing practices. In fact, neither of these dissertations were centered around writing processes, as is my study. These dissertation findings support the findings of my pilot study, generally, that copyright issues are on the minds of educators. However, none of the studies focus on tacit knowledge, or laws as mediational understandings influencing writing processes.

⁵ More detailed findings from "The digital learning challenge" include:

- While a great deal of fear exists, "In many situations, the availability of a fair use defense for a certain use is completely clear and the likelihood of litigation – or even a dispute with a rightsholder – is infinitesimal" (p. 85).
- "According to several . . . [interviews] publishers are now threatening litigation and entering into private negotiations to seek restrictions of a similar scope on digital uses of content at universities" (p.87).
- "Workshop participants and others interviewed . . . were aware of recent litigation threats by legal representatives of publishers against several large research universities" (p.53).
- Fair use guidelines that "shrink the scope of fair use and greatly limit the doctrine's flexibility" (p.56) have been adopted by 80% of American universities (p. 57).
- "A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under one million dollars" (p. 57).
- "The near-total absence of lawsuits against educators may suggest that rightsholders have tacitly accepted that the appropriate construction of the fair use doctrine leaves significant room for educational uses of content, or that they fear a negative public reaction if they sue educators" (p.53).
- "There are virtually no precedents in which educators themselves were defendants . . ." (p. 60).
- The good faith fair use defense available for employees of nonprofit educational institutions as stated in section 504(c) has never arisen in a reported opinion (p. 60).

The Berkman white paper also offers possible solutions to some of these controversies, such as an interactive web resource that allows complicated fair use determinations based on data input by users.

⁶ The methodology of this study was as follows. In October and November 2004, 1,100 telephone interviews were conducted with a nationally representative US sample of teens ages 12-17 and their parents. The telephone interviews measured attitudes and not the "whys." Statistical results of the interviews were weighted to correct known demographic discrepancies. The margin of sampling error for the complete set of weighted data is $\pm 3.3\%$. Using an incentive of two movie passes to a local theater, 38 high school and middle school students were placed into four focus groups. Prior to focus group participation, a short online survey was administered. Nine teens took the online survey that included open ended and multiple choice questions. Statistical data was not collected on the survey responses, although some of that information was used in the report. Since the snowball method was used, the information gathered is not reliable from that portion of the study (p. 18). The report provides detailed explanations of how the telephone interviews were conducted.

⁷ I must say here that I did not clearly understand the author this way until after I completed my study – I tell you this simply to state that I will revisit the issue of authorship more fully in Chapters Five and Six.

⁸ This was the gist of Sid Dobrin's recent talk at MSU, spring 2008, as well as his 2008 CCCC's presentation.

⁹ Janice Lauer (1970) privileges invention as well: "Most teachers know that rhetoric has always lost life and respect to the degree that invention has not had a significant and meaningful role" (p. 396).

¹⁰ To illustrate an extreme case of how legal language flattens complexity, and erases moral and ethical considerations, Williams offers this example language, taken from an 1835 Louisiana decision on the issue of defective "merchandise":

The plaintiff alleged that he purchased of the defendant a slave named Kate, for which he paid \$500, and in two or three days after it was discovered the slave was crazy, and run away, and that the vices were known to the defendant . . . It was contended [by the seller] that Kate was not crazy but only stupid, and stupidity is not madness; but on the contrary, an apparent defect, against which the defendant did not warrant . . . The code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. We are satisfied that the slave in question was wholly, and perhaps worse than, useless. (p. 3)

¹¹ See however Flower and Hayes, 2003; Odell, Goswami and Herrington, 1983; Perl, 2003, for a few research models involving what might be characterized as the inventional part of writing processes; See Geisler and Slattery, 2007 and Hart-Davidson, 2007 for recent examples of how one might use activity theory to research writing processes.

¹² Glick (1997) comments on the continuing confusion about how we should receive Vygotsky's work:

How is Vygotsky to be understood? As a hidden treasure who can now be revealed to the world? As an historical figure; part icon, part relic? As the construction of an historical figure used for contemporary purposes to ventriloquate contemporary arguments? As a lost contemporary, speaking to us across time? There is no exclusively correct choice among these alternatives, he is all of these. (p. v)

¹³ He did this through his writings as well as through his work in the Laboratory for Comparative Human Cognition at the University of California, San Diego.

¹⁴ Walter Ong (1988) argues writing itself is a technology.

¹⁵ Vygotsky (1978) examined what he called internalization by giving children and adults memory tasks to complete. For example he would use signs like a packet of colored cards, and tell the participant he would be asking a series of questions. The questions were to be answered under certain conditions – perhaps the participant should never repeat a color nor use the names of certain colors. He then observed as participants figured out ways that they could use the cards to strategize remembering which colors they had already named and which colors they were not supposed to use for an answer. He found that adults would usually refuse to complete these

memory tasks until they had mastered the “system of relations as a whole” (p. 71) between the signs that were associated with the task. On the other hand, very young children would set off immediately, having heard the instructions once, and try to complete the memory task. They would of course be unable to do so, and would start asking questions about each individual stimulus, treating each one as if it operated under individual rules. Vygotsky posited that this demonstrated a less developed level of psychological processes since the young child was relying solely on “unmediated memory” (p. 70).

After continuing the experiment long enough, the children began to see the relationships between stimuli, and eventually came to an understanding of the system of relations as a whole. After time had passed, the children no longer needed external stimuli (colored cards in my example) in order to complete memory tasks. “In its most developed form, this internal operation consists of the child grasping the very structure of the process, learning to understand the laws according to which external signs must be used. When this stage is reached, the children will say, ‘I don’t need pictures anymore, I’ll do it myself’” (p. 72).

¹⁶ Vygotsky does not talk about “invention.” He talks about “development.”

¹⁷ While the STC and ATW membership lists were supposed to be for technical/professional writing “programs,” in several instances, someone had uploaded their institution’s single class as a “program.” It did not appear that the membership lists were centrally reviewed or edited. The STC list especially was totally user-created and unedited.

¹⁸ The concept of tacit knowledge derives originally from the work of Polanyi (1962).

¹⁹ “The [mixed methods] researcher bases the inquiry on the assumption that collecting diverse types of data best provides an understanding of a research problem. The study begins with a broad survey in order to generalize results to a population and then focuses, in a second phase, on detailed qualitative, open-ended interviews, to collect detailed views from participants” (Creswell, 2003, p. 21).

²⁰ Also note that “the ideas of pragmatism have common features with activity theory” (Engstrom & Miettinen, 1999, p. 6).

²¹ John Law (2003) might describe what I’ve done as overcoming the resistance of “heterogeneous materials” and placing them into ordered networks (p. 2).

²² There might be a different answer if one takes a judicial opinion from Lexis Nexis or Westlaw where the opinion has elaborate footnotes, headnotes, or annotations. In that case, the waters become a bit murkier when considering authorship.

²³ The next few paragraphs are taken in part from: Rife, M.C. (2008b, Jan.). The “shock and awe” of digital research design: Rhetorical strategies as mediational means in digital survey research. Conference proceedings paper forthcoming with IEEE-IPCC.

²⁴ *Roe v. Wade* is a great example of a case where the court had to carefully balance the interests of the individual with the interests of the state.

²⁵ The exclusionary practices in US policy might be something like the anti-immigration stance.

²⁶ Another connection with Foucault and ANT is here as Foucault (1972) calls a book a "node within a network" (p. 23).

²⁷ I am going to talk about Rob's interview and its contextualization of India in the most general fashion. I am not an expert on India nor its religious backgrounds. For purposes of providing the reader an example of how the use of scriptures might function in a culture, I am letting Rob, for these limited purposes, represent "India." Rob talked about the "word of God" in the singular, and I am letting Rob have all the agency in this discussion of religion, India, and authorship. I think further work exploring authorship and copyright in India is much needed and would be very timely considering India's economic rise in the world. I would love to see research and writing in this area.

It wasn't until reviewing the interview data that I knew what "Vedas" were. And still my knowledge is only the most limited. According to wikipedia:

The Vedas (Sanskrit, *véda*, "knowledge") are a large corpus of texts originating in Ancient India. They form the oldest layer of Sanskrit literature and the oldest sacred texts of Hinduism.

According to Hindu tradition, the Vedas are *apauruṣeya* "not of human agency", being supposed to have been directly revealed, and thus are called *śruti* ("what is heard"). Vedic mantras are recited at Hindu prayers, religious functions and other auspicious occasions.

The Sanskrit word *véda* "knowledge, wisdom" is derived from the root *vid-* "to know". This is reconstructed as being derived from the Proto-Indo-European root **u̯eid-*, meaning "see" or "know".

The Vedas are arguably the oldest sacred texts that are still used.

²⁸ The most some of us can hope for is remission from our culture as is the best one can do with some diseases.

²⁹ I realize some might find the term "prehistoric" charged with meaning. However, I am using this term because this is the term used by the anthropologist. While some might interpret me as placing a value judgment on a society due to my use of the term, instead I am simply using it out of respect for Spielmann, and in my mind it means "before the massive use of prose to record a multitude of histories." In anthropology, it probably has a specific meaning and since I am not an anthropologist I would like to preserve that meaning for now.

³⁰ Boas wrote:

Still more complicated is the purchase or the gift, however one chooses to term it, of a "copper." All along the North Pacific coast, from Yakutat to Comox, curiously shaped copper plates are in use, which in olden times were made of

native copper, which is found in Alaska and probably also on Nass river, but which nowadays are worked out of imported copper. The typical shape of these copper plates may be seen in figs. 2 and 3 and Plate 4. The T-shaped part (qala's), which forms two ridges, is hammered. The top is called "the face" (o'nuxleme), the lower part the hind end (o'nutsexste). The front of the copper is covered with black lead, in which a face, representing the crest animal of the owner, is graven. These coppers have the same function which bank notes of high denominations have with us. The actual value of the piece of copper is small, but it is made to represent a large number of blankets and can always be sold for blankets. The value is not arbitrarily set, but depends upon the amount of property given away in the festival at which the copper is sold. On the whole, the oftener a copper is sold the higher its value, as every new buyer tries to invest more blankets in it. Therefore the purchase of a copper also brings distinction, because it proves that the buyer is able to bring together a vast amount of property.

Each copper has a name of its own, and from the following list of coppers, which were in fort Rupert in 1893, the values attached to some of them may be seen. (p. 344)

³¹ This idea of connecting page rank to ethos is Michael Wojcik's. I saw him present it at Computers & Writing, 2008, in Athens, Georgia.

³² Their declaration appeared as such:

We whose Names are under-written, do assure the World, that the Poems specified in the following Page, were (as we verily believe) written by Phillis, a young Negro Girl, who was but a few Years since, brought an uncultivated barbarian from African, and has ever since been, and now is, under the Disadvantage of serving as a Slave in a Family in this Town. She has been examined by some of the best Judges, and is thought qualified to write them. (Gates, 2003, p. 3)

³³ I could also have pictured a group of blue-eyed, blonde haired Paris Hilton look-alikes – I acknowledge the sameness and difference in attire originates from a certain gaze. A colleague who studies in Jewish history and culture reviewed this chapter and caused me to switch out my original image of Hasidic Jewish men. I had selected a picture that was common knowledge among Jewish scholars to depict something politically charged. I wanted to avoid that. But because I lacked the same common knowledge as my colleague, I was unaware of the possible faux pas I was about to make by including the wrong picture – by essentializing. One of the dangers of ANT, is that when you make things radically symmetrical, when you flatten things as Patricia Williams' says, you in effect must essentialize many experiences and differences into one thing. But it is just a research stance, not a stance for living.

³⁴ I realize the word "forces" here might seem strange. Neither Vygotsky nor the ANT theorists write about mediational means as having force or power. I will try to make a small start to addressing this in the next chapter.

³⁵ Kenneth Bruffee (1984) conceptualizes this internalization as one of an externalized conversation that then re-externalizes itself in the written product. So you could map Bruffee onto Foucault and say that as power flows through an individual, one of its products might be writing.

³⁶ I have to credit Donnie Johnson Sackey, a graduate student, for sharing his ideas with me about *metis*.

³⁷ If you want to read the whole story the version I read is in Homer (1996).

³⁸ You actually might find a circle here because attorney's briefs rely on precedent, which comes from previous judicial opinions. Judicial opinions in turn come in part from attorney's briefs.

One thing I've looked at previously is the presence of international influence in Canadian versus US supreme court opinions. Instead of looking at "international influence" – it might be interesting to take a key US supreme court opinion and then trace its sources backwards to see the agency of other writings. That would call into question who is really authoring the opinion. For example, in the recent Guantanamo Bay opinion, *Boumedienne et al. v. Bush*, the majority went back to English common law to find a solution to the problem before it – the question of whether to restore habeas corpus rights to enemy combatants detained at Guantanamo. But the networks that actually formed the opinion are very complicated and multiple just based solely on the text.

³⁹ Emile Cloatre (2008) of the University of Nottingham, UK has just published a study using ANT to examine patent law in Djibouti.

⁴⁰ Like I have recently thought that community colleges are actually products (or associations) of doctoral universities. But most people think of them as deriving from high school and so they always look to high schools for their origin stories. Using ANT, one could interview the actors, like the teachers, the students (average age of 28), at community colleges and see where they came from – I expect one might be able to trace a line to the doctoral university. The originator of a product matters to those of us who think good citizens should take responsibility for their productions.

APPENDIX 1.1

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in 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. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 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 purposes 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 considered 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.

APPENDIX 3.1

**Student Interview Recruiting Email
Digital Composing and Fair Use: Knowledge and Understanding in a
Technical/Professional
Writing Program
IRB# / APP# i023983**

Dear _____:

I am conducting a research project supported in part by the WIDE Research Center at Michigan State University. My name is Martine Courant Rife and I am a PhD Candidate in the Rhetoric & Writing Program at Michigan State University. Earlier this year you took an online survey titled “Is there a chilling of digital communication?” that asked about your knowledge and understanding of fair use and copyright. In the survey, you supplied contact information and indicated you’d be willing to be interviewed.

I am now conducting the interviews. The interview will be about 30 minute long, and will ask about the same issues as the survey, but with reference to a web composition or web page that you’ve recently created. I will need you to supply me with a copy of that web composition (a URL for example) at some point after the consent form is returned.

Depending on your location, I will conduct the interview by telephone, or set up a time to meet with you for 30 minutes, at your convenience and at a location convenient to you. You can also let me know if you’d rather do an in-person or telephone interview. Either way, I need to audio-record the interview.

If you are willing to participate in the interview, at all times I will keep your responses private and confidential. I will keep your identity private with respect to the interview and the webpage. It is completely up to you whether you want to participate or not – participation is voluntary. Your participation will not affect your grades. You will receive no course credit for participating. And, if you participate, you may withdrawal from the study at any time.

If you are willing to participate in the interview, please reply to this email and let me know. I will then send you the consent form and we can go over that. If you agree to be interviewed, it will greatly benefit the research project.

**Thank you for your time
-Martine Courant Rife**

APPENDIX 3.2

Institutions with confirmed participation (usually just one to four people from most institutions; N=64)

Arizona State University
Arizona State University East
Austin Peay State University
Ball State University
Baylor University
Boise State University
Briar Cliff
Clarkson University
Clemson University
Coe College
Eastern Michigan University
Edison Community College
Georgia Institute of Technology
George Mason University
Grand Valley, MI
Hilbert College
Illinois Institute of Technology
Illinois State University
Iowa State University
Ithaca College
Kutztown University of Pennsylvania
Louisiana Tech University
Lebanon Valley College
Massachusetts Institute of Technology
Mercer University
Miami University
Michigan State University
Milliken University
Minnesota State University, Mankato
Missouri State University
Missouri Western State University
Murray State University
Montana Tech of the University of Montana
Nazareth College of Rochester
New Jersey Institute of Technology
New Mexico State University
North Carolina State University
Oklahoma State University
Penn State University
Purdue University

Rensselaer Polytechnic Institute
Rocky Mountain College of Art and Design
San Francisco State University
San Jose State University
Southern Polytechnic State University
Texas State University
University of Arkansas at Little Rock
University of Baltimore
University of Central Florida
University of Cincinnati
University of Hartford
University of Illinois
University of Massachusetts
University of Massachusetts-Dartmouth
University of Minnesota
University of New Mexico
University of North Carolina Wilmington
University of Pittsburgh
University of Texas at San Antonio
University of Wisconsin-Milwaukee
University of Washington
University of Wisconsin
Utah State University
Washington State University

APPENDIX 3.3

COVER PAGE

Welcome to: IS THERE A CHILLING OF DIGITAL COMMUNICATION?.....click next to start the survey.

SECTION A: Informed Consent Agreement

Welcome! You have been randomly selected to participate in this survey which hopes to generate important field knowledge on issues of copyright and digital composing. Your contribution is extremely valuable.

SURVEY CONSENT FORM

Researchers at the WIDE Research Center at Michigan State University want your help with a survey on the topic of fair use/copyright and digital composing. We would like to gain a better understanding of how understanding of fair use/copyright interacts with digital composing. Even if you think you know little about fair use/copyright, we still need your input.

Participation in this survey is voluntary. The survey takes approximately 20 minutes to complete. The current survey consists of questions about knowledge, understanding, and attitudes on copyright and fair use. You may take the survey once. Your participation is strictly voluntary. You may refuse to participate or discontinue participation at any time without penalty. You're welcome to contact Martine Courant Rife, information on next page, at any time if you have questions about the survey. You may also contact the MSU IRB Office, information on next page, with your questions about research participants' rights. If you decide to complete the survey, your feedback will give us valuable information.

The survey is confidential. Any and all information we receive will be kept strictly confidential. If you wish to remain anonymous throughout the survey you may do so, and your answers will still be extremely valuable to us. Data gathered from the survey will be summarized in the aggregate, excluding all references to any individual responses. The aggregated results of our analysis will be shared with the technical and professional writing community and others interested in providing services to educate people about fair use. In the event analysis on individual responses is completed, pseudonyms will be assigned to describe participants.

At the end of the survey student-participants are asked if they'd be willing to participate in a face-to-face or telephone interview. Please note that if you do not indicate that you are willing to do an interview that the survey is anonymous; However if you do elect to participate in the interview by supplying your contact information, we will know your identity. But, we will keep your identity confidential.

Your answers on this survey are not necessarily relevant to selecting interviewees, and overall we will select very few individuals for interviews. If you are selected, we will contact you by email in about 6 – 8 weeks. Again, you can stop participating at any time. Those who are selected for interviews and agree will go through a second consent process. Again, if you have questions please feel free to contact us.

You will not be compensated in any way, nor will you receive any course credit. Thank you for taking the time to help us with this important project.

By taking this survey, you have agreed to the terms above.

SECTION B: Questions or Concerns?

If you have any questions about the study, feel free to contact Martine Courant Rife, Rhetoric & Writing Program; WIDE Research Center, Michigan State University. Office: Suite 7 Olds Hall; Cell phone: 517-2940895; E-mail: courantm@msu.edu.

Martine will be happy to answer any questions you may have about this study and/or your participation in it. Please feel free to ask questions or express any concerns you may have at any time. Please keep the contact information provided on this page on hand for this purpose.

If you have any questions or concerns regarding your rights as a study participant, or are dissatisfied at any time with any aspect of this study, you may contact -anonymously, if you wish -Peter Vasilenko, Ph.D., Director of Human Research Protections, 517-355-2180, fax 517-432-4503, e-mail irb@msu.edu, mail: 202 Olds Hall, Michigan State University, East Lansing, MI 48824-1047.

CLICK "I AGREE" to start survey.

Do You Agree?

I AGREE

NO I DO NOT AGREE

SECTION C: Digital Writing

The survey consists of 28 short questions. The survey examines your knowledge, understanding, and attitudes about fair use/copyright and whether the law may have influenced your writing. Please select the best answer.

These first 4 questions ask for information about digital writing. (NOTE: If you answer no to either of the first 2 question, we thank you but do not need to collect further data. Thanks!).

1. Have you ever completed a web composition such as a web page, web space, wiki, blog, page on facebook/myspace or other social networking software application?

Yes

No

SECTION C (cont.): Digital Writing

2. Has the web composition been posted to the web such that it's available to at least some people (other than yourself or your teacher) with internet access and a computer?

Yes

No

SECTION C (cont.): Digital Writing

In general, would you say that people should obey the law without exception, or are there exceptional occasions on which people should follow their consciences even if it means breaking the law?

Can't answer.

Follow consciences even if break law.

Should obey without exception.

4. Please pick the choice that best describes your *highest* educational level:

Undergraduate Student

Masters Student

PhD Student

Undergraduate Degree/Certificate Holder

Graduate/Professional Degree Holder

Other/Can't Answer

SECTION D: How Chilled is Your Speech?

The next 6 questions measure how law may have impacted your digital speech (how chilled is your speech). All answered yes, no, or can't answer. Please pick the best answer

1. Have you ever been asked to take down something (text, audio, image) you had posted to the web by a copyright holder or alleged copyright holder because the text, audio, image, etc., was allegedly infringing on the owner's copyrights (for example, via a communication by way of a take down notice or a cease and desist letter, or even an email)?

Can't answer

No

Yes

2. If so, have you ever actually taken down such material because of this request?

No

Yes
Can't Answer

3. Have you ever voluntarily taken something down, on your own initiative, which you had posted to the web because you felt you might be subject to copyright liability even though you never actually received a request to do so?
copyright liability even though you never actually received a request to do so?

Yes
Can't Answer
No

4. Have you ever not posted something to a web composition you were creating because of fear of copyright liability?

Can't Answer
No
Yes

5. Have you ever felt that the purpose or message of a web composition you were creating would be better, clearer, or more aesthetically pleasing to the audience if you could use others' copyrighted materials without fear of legal liability?

Can't Answer
No
Yes

6. Have you ever felt that you weren't really able to say what you wanted in a web composition because you were afraid if you said it the way you wanted, someone might sue you for copyright infringement?

Can't Answer
Yes
No

SECTION E: Knowledge and Understanding

The next 14 questions measure your knowledge and understanding of fair use. Each question has two parts – one that asks for a substantive answer, and one that asks for your attitude/confidence level towards that answer. Please choose the *best* answer.

Please calculate your answers based on current US law.

1. Even though you have no permission, as long as you use less than three minutes of a legally obtained song, it is certainly fair use.

True
False

How sure are you that your answer is correct?

Very certain
Somewhat certain
Undecided/Can't
Not too certain
Not certain at all

SECTION E (cont.): Next . . .

2. Using someone's "creative" work (i.e. fiction, drama, poetry, art, artistic designs, music) without their permission, is just as likely to be a fair use as is using their "factual" work (i.e. non-fiction, unaltered photographic representations, news items) without permission.

True
False

How sure are you that your answer is correct?

Very certain
Somewhat certain
Undecided/Can't
Not too certain
Not certain at all

SECTION E (cont.): Next . . .

3. If, without permission, you use someone else's copyrighted material in order to create a political parody, or otherwise conduct political commentary/criticism, it is more likely to be a fair use than if you were using the same material for simple decorative purposes.

True
False

How sure are you that your answer is correct?

Very certain
Somewhat certain
Undecided/Can't
Not too certain
Not certain at all

SECTION E (cont.): Next . . .

4. The owner of a copyrighted novel has failed to make this novel into a play. You decide to do so without the copyright holder's permission. Your derivative work, the play, closely follows the plot and characters in the novel, but is likely to be a fair use because it is different than a novel.

True
False

How sure are you that your answer is correct?

Very certain

Somewhat certain
Undecided/Can't
Not too certain
Not certain at all

SECTION E (cont.): Only 10 more questions in this section.

5. Let's say you decide to, without permission, use a very small amount of a copyrighted work, incorporating it into your own web composition. The original copyrighted work is a text of 200,000 words. You use 50 words, but, the 50 words you decide to use are key, and the very best and most financially valuable part of the original copyrighted work. In fact, the other 199,950 words are unanimously considered useless, mundane, and trite. Even so, since your use is so small, it is certainly a fair use.

True
False

How sure are you that your answer is correct?

Very certain
Somewhat certain
Undecided/Can't
Not too certain
Not certain at all

SECTION E (cont.): Next . . .

6. In the event you have no permissions, using someone else's unpublished work is more likely to be a fair use than using someone's published work.

True
False

How sure are you that your answer is correct?

Very certain
Somewhat certain
Undecided/Can't
Not too certain
Not certain at all

SECTION E (cont.): Next . . .

7. Without the copyright holders' permissions, you copy five copyrighted, freely available web-published images from five different authors. You mix these five images together, cropping them, and substantially changing their overall appearances such that they are totally unrecognizable from their original forms. You then blend in five of your own original images plus some original text you've written, creating a collage that is politically informative on an extremely urgent topic in current events. You publish your collage on your website for the internet world to have free access to for educational and political purposes. In this kind

of situation, your use of the five images you started with is probably a fair use even though you did not obtain permissions from the copyright holders of those first five images.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Next . . .

8. If you ask a copyright holder for permission to use their material in your own original web composition, and they say no, this means you absolutely cannot use the copyright holder's material under fair use.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Next . . .

9. The single most important thing US courts look at when deciding whether or not a particular use is a fair use, is whether or not the original author has been attributed and/or credited.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Only 5 more questions left in this section.

10. If you use something with a Creative Commons license, it means you automatically get fair use.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Next . . .

11. Mary, a law abiding citizen, is using a large chunk of text (1,000 words) in her webpage. The sole copyright holder of this text is her friend Tim. Tim's given her express written permission to use this text in her webpage. Even so, as a conscientious, law abiding citizen, Mary should still make sure she is within fair use when using Tim's text in her webpage.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Next . . .

12. When you were 2 years old you drew an original crayola drawing from your imagination. You've saved it all these years. Unbeknownst to you, your friend steals this from you, scans it, and posts it on her webpage as part of the design. You have no right to ask her to take this down based on copyright laws, because such drawings are not copyright protected in the US anyway.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Next . . .

13. Kim, a law abiding citizen, does a search on the Creative Commons website for an image that allows her to use it as long as she attributes the original author and uses for educational use. Kim decides to use this image for a 100% educational use. She clearly and prominently attributes the original author.

Nonetheless, as a conscientious and law abiding citizen, Kim should still carefully make a determination on whether she is within fair use.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION E (cont.): Next . . .

Please remember to chose the *best* answer.

14. Mary, a law abiding citizen, decides to use five pages of a seven page ninth circuit court decision in her website. She legally obtains this unedited opinion directly from the court's website. She wants to cut and paste all five pages directly onto the html page she is composing. She will not edit or comment on the court opinion, nor does her webpage allow commenting by others. Before using the text in her website, as a conscientious, law abiding person she should be sure she is within fair use.

True

False

How sure are you that your answer is correct?

Very certain

Somewhat certain

Undecided/Can't

Not too certain

Not certain at all

SECTION F: Last Four!

These last four questions are just general in nature – you are almost done!

1. How important do you think it is, as a digital writer, that you have some knowledge and understanding of copyright and fair use laws in the United States?

Not very

Somewhat

Neutral/Can't Answer

Important

Very important

2. How would you primarily describe yourself:

Student
Teacher
Other

3. From the following list, please select your institutional name:

Arizona State University
Belleville Area College
Bethune-Cookman College
Bowling Green State University
Carroll College
California State University, Fullerton
California State University, Sacramento
California University of Pennsylvania
Clemson University
College of DuPage
Eastern Kentucky University
Eastern Washington University
Ferris State University
Grand Valley, MI
Houston Community College -Southwest Campus
Illinois Institute of Technology
Illinois State University
Ithaca College
Kutztown University of Pennsylvania
Lehigh University
Mercer University
Metropolitan State College of Denver
Middlesex Community College
Montana Tech of The University of Montana
Morehead State University
Nazareth College of Rochester
New Mexico State University
New York University
Northern Arizona University
Orange Coast College
Oregon Institute of Technology
Portland State University
Purdue University
Purdue University Calumet
Rock Valley College
San Diego State University
San Francisco State University
Southern Polytechnic State University
Southwest Missouri State University
State University of New York at Cortland
Tarleton State University

Tarrant County Jr. College
Thomas Nelson Community College
Towson University
University of Central Florida
University of Cincinnati
University of Findlay
University of Massachusetts
University of Minnesota
University of Minnesota-Crookston
University of Pittsburgh
University of Tennessee at Chattanooga
University of Texas at San Antonio
University of Wisconsin-Milwaukee
University of Wisconsin-Stout
Western Wisconsin Technical College
Washington State Community College
Waynesburg College
Wright State University
None/Can't Answer
Other (please specify)

FINAL QUESTION

4. For ****students**** only: Would you be willing to supply your email and name in order to be contacted for a follow-up interview (yes, you can change your mind later)? If no leave blank; if yes fill in information.

EMAIL ADDRESS:

NAME:

Thanks for participating!!

Thank you very much. I will be posting results soon in a public place.

Best,

Martine Courant Rife
WIDE Research Center
Michigan State University
courantm@msu.edu
517-294-0895

APPENDIX 3.4

Explanation of Hypotheses

H1: The more knowledge one has about fair use, the less one's speech is chilled. In this hypothesis the dependent variable is chilled speech, and the independent variable is knowledge of fair use. Fair use is a writer's understandings of the fair use doctrine as it is situated within copyright law, as well as the doctrine's ability to protect one from copyright infringement liability. Chilled speech occurs if a digital writer is not allowed to or is afraid to speak at all in digital formats, or is otherwise not allowed or afraid to express him/herself to the extent that he/she wishes to. This hypothesis tests conclusions inferred from the Heins & Beckels' (2005) study, but in a more scientific fashion. Testing of this hypothesis will also inform arguments outlined in research on educational fair use as described above.

H2: The higher the educational level, the higher the knowledge about fair use. In this hypothesis the independent variable is educational level, and the dependent variable is knowledge about fair use (conceptually defined above). Educational level will generally mark placement in the population such as undergraduate degree holder, master's degree holder, doctorate degree holder, or professional degree holder. These attributes are expected to be present in this population. Degrees obtained will not only be measured, but so will years taken towards a degree. This hypothesis relates to the general theory that education should make people more knowledgeable about things, but also challenges that general rule since technology changes so quickly that education alone might not be a determining factor in this domain of knowledge.

H3: The higher the knowledge of fair use, the more likely one is willing to see exceptions to obeying the law. Knowledge of fair use is an independent variable, and willingness to see exceptions to obeying the law is the dependent variable. Whether or not one thinks the law might be broken is a measure of attitude, and the question itself that measures this variable is taken from the GSSDIRS, General Social Survey, 1972 - 2000 Cumulative Codebook. The theory is that the more knowledgeable one becomes regarding the law, the more one is willing to bend or break the law (think of activities of lawyers and police officers, for example). "In general, would you say that people should obey the law without exception, or are there exceptional occasions on which people should follow their consciences even if it means breaking the law?"

H4: The higher the knowledge of fair use, the higher the certainty one's knowledge is correct. Knowledge of fair use is the independent variable; level of certainty in that knowledge is the dependent variable. Certainty in one's knowledge measures how sure participants are about their answers to the fair use knowledge questions measured on a Likert scale of 1-5, with choices ranging

from very uncertain, to very certain. The theory related to this hypothesis is that the more knowledge one has, the more confidence they have that they have knowledge. Kenneth Burke sees language as a mode of action affected by attitude. Therefore, studying the attitudes of writers, attitudes that may inform invention, might be helpful.

H5: The more certain one is in their knowledge, the less one's speech is chilled. Certainty of knowledge is the independent variable; chilled speech is the dependent variable. Both concepts are defined above. The theory is that the more confidence one has that they understand how things work, the less likely their speech is going to be chilled. The more confidence one has in their abilities, the more they can push on certain boundaries, even legal boundaries. Also, fair use is an enabling law – and so increased knowledge of how one might leverage it should logically allow one to say more—and more freely!

H6: Persons who believe in exceptions to obeying the law will have lower levels of chilled speech. Whether one feels compelled to obeying the law or not is the independent variable; chilled speech level is the dependent variable. This hypothesis relates to the theory that those who are willing to do what's right, rather than what's legal, will have freer speech – especially because some view our copyright laws overbearing and impinging on creativity.

APPENDIX 3.5

Interview Protocols

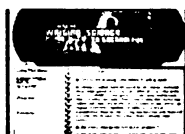
Sample Interview Questions

- 1. Can you tell me about this website?**
- 2. Did you get paid to make this?**
- 3. Did you come across any copyright issues as you wrote this?**
- 4. How did you get these visuals?**
- 5. For your slide show, would you consider including music as well?**
- 6. Rather than including this thumbnail of the book cover, would you consider instead including a link to a PDF of the entire book?**
- 7. Here where you talk about the book, would you consider including an excerpt from the book instead?**
- 8. Would you consider including a larger, clearer image rather than this thumbnail?**
- 9. Here you have included attribution to your co-authors; would you consider eliminating this attribution?**
- 10. Here you have (don't have) copyright information on your web composition, would you consider deleting (including) this?**
- 11. Rather than having a link here to an external site, would you consider instead creating a PDF and housing it on your own website, and then linking to that instead?**
- 12. Would you consider packaging up your web site and putting it on a CD and selling it at a profit? How about doing the same thing but giving the CD away at conferences?**
- 13. Would you have done anything differently if copyright law didn't exist and everything was in the public domain?**
- 14. Is there anything you want the readers of my study to know about issues of copyright and fair use as those issues impact teaching, learning, and web composing?**

APPENDIX 3.6

**VIGNETTES OF SEVEN RESEARCH PARTICIPANTS – STUDENT WRITERS
INTERVIEWED NOVEMBER 2007**

LESLIE'S VIGNETTE..... 317



CAREY'S VIGNETTE..... 320

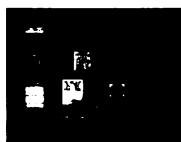
ROB'S VIGNETTE..... 323



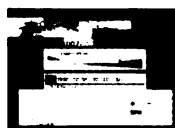
SARAH'S VIGNETTE..... 326



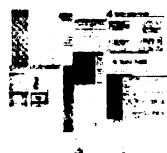
JESSIE'S VIGNETTE..... 330



HEATHER'S VIGNETTE..... 334



AMANDA'S VIGNETTE..... 338



LESLIE'S VIGNETTE

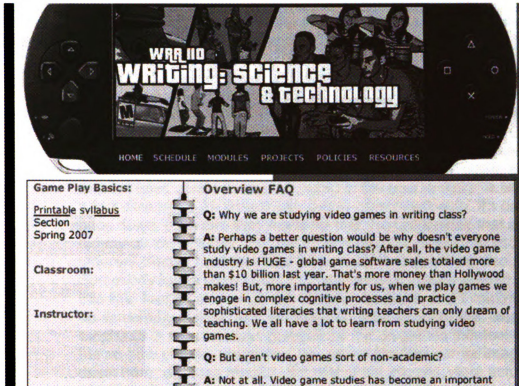


FIGURE 7.1. LESLIE'S VISUAL VIGNETTE

Leslie is a PhD candidate teaching first year writing at a doctoral university as she completes her degree requirements and enters the job market. The webtext depicted above is a screen capture of the course web page Leslie creates for her first year writing students. She's interested in using a theme for her writing course that might draw upon her students' interests while simultaneously involving the study of digital writing. Leslie said, "I wanted to have a cool site for them, when they first signed up." In her web writing, Leslie plays the roles of graduate student, teacher, and potential employee-job seeker. This workspace serves the pragmatic function of housing teaching materials, incorporating work Leslie did as a graduate student, and also showcases Leslie's web design abilities and innovative pedagogies for potential employers. The gaming control and visuals were blended together by Leslie in a graduate visual rhetoric course, where she received feedback and even a grade from her professor. By the time Leslie taught this course though, the gaming control visual as a graduate course project had detached from its origins and was acting simply as a teaching and marketing tool for Leslie. By considering Leslie's multiple audiences, and how she fashioned this webtext over a period of time (more than one year) and with multiple underlying motivations illustrates the commonplace at

work – a place of convergence of the past (graduate student), the present (graduate teaching assistant), and the future (faculty member at new institution).

On a very practical level, the webtext shown above illustrates a commonplace from the point of view of remix writing, by bringing together the familiar with the unfamiliar. Leslie explains the complexity of the visual:

We'd just learned Photoshop that semester and I was playing with my new knowledge of Photoshop and doing cool things. So, it's made up of like 100 different pieces. The major part of it is a play station portable; the console there, and then what I did was I took the part where you'd normally see the video game, and I replaced it with this composite image of my own, the name of the class, and the font used where it says the name of the course there, is actually a font developed for a particular game, grand theft auto. It's called price down. It's a font they made for that. So I replicated that and did my course title with that name, and then it's divided up into different pieces. I got that idea from, I saw it somewhere else. Somebody had a book cover that had like little pieces divided up into little frames, sort of almost like stained glass, and I wanted to do something similar. And so what I decided to do for that was, the emphasis in my class was going to be not on games themselves but on how people use games, so, all but the final corner image down here, all those images, the rest of the images, were actually people's photos I found on flickr.com, I searched for video games, and I got pictures of real people playing video games, and then I cut out just the people that I wanted. I mean just the parts that I wanted. I traced, cut out the people, and I ran them through some kind of filter to make it look funky like they do. They look kind of stylized, almost like video games, and then I assembled them into these little frames, and put them in there, the ah, like, I said the only image here, that is not of real people is the lower left hand corner.

Leslie had taken things familiar to students, a game control, game fonts, a look of "stained glass," people playing games, a portable play station, typical web page navigation elements, an image of notebook paper, a posting of office hours, and then blended that together with the newness of a new college course, an unfamiliar medium for a syllabus, unfamiliar connections of games to formal education, an unfamiliar combination of game control and web page navigation links, and brought all of these images and allusions into a new light. This is the commonplace, the digital remix. And it triggers all kinds of copyright issues.

Fonts can be copyrightable and usually are in the context of gaming and branding; gaming control designs are copyrightable. All the visuals Leslie took from flickr.com may well have copyrights owned by others. Leslie did all this without permission. She was far less worried about copyright than about protecting peoples' privacy, especially the younger individuals featured playing games. That was one of her main motivations for applying the filters in

Photoshop. She said, "I wasn't really worried about copyright. I didn't think anyone would come after me for taking their flickr pictures." She did say she'd be more careful about using these materials to make her remix if she was going to sell this image for a profit. But in the context of educational use, "I think for not for profit, for educational purposes I think that would be pretty low on anyone's list of priorities for anyone to come after me about it." What is shown by this interview combined with the visual vignette above – a simple screen capture that serves as a capstone of Leslie's web composing, is how the webspace as commonplace triggers rhetorical invention and begs for an examination of whether copyright is influencing writerly decisions.

Leslie was one participant who was least concerned about copyright – the law did not stop her from inventing and being creative. She'd concern herself with copyright only if it was easy to do so and still accomplish her pedagogical and creative goals. For example, when asked about the possibility of posting copyright protected articles and teaching materials in an open webspace as opposed to a password protected one, Leslie explained:

I probably would, if that was the easiest thing to do. I would worry a little bit about copyright violations, but you know I would weigh that against what my options were. If I had an easy option to make it password protected I would do that but if I don't have an easy option . . .

In this case, Leslie made this web composition her own by cutting, pasting, applying filters, adding text, synthesizing her own interpretations and ideas with others' materials. In Leslie's case, it turned out her inventional decisions were made to protect peoples' privacy, for design reasons – to intrigue her students, rather than to abide by copyright law. Leslie takes the old, and turns it into the new.

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 3.0

Fair Use/Copyright Knowledge Score: 50%

Level of Certainty Score (1 very certain; 5 not certain at all): 3.0

CAREY'S VIGNETTE

Carey is a MA student in a professional writing program. She's also an employee of the institution where she is an MA student (not a student employee). I do not provide a visual vignette of her web composition because all she could offer me was a social networking site page, and that was fairly devoid of content. Before her interview, I wondered what we would talk about because she had not sent me a web composition that triggered any copyright issues. However, when I arrived at the interview we began talking about her non-student work with a national database that encourages teachers to share teaching and testing materials. Carey's involvement with this database is central, and she is directly involved in the design of the database's interfaces. She also provides technical support and training for the university supported project. The teachers she works with include high school teachers as well as university teachers from all over the US. I cannot provide visual depictions to you because they are in a password protected area, and to do so I would risk revealing Carey's identity. Regarding her work as an employee she states that the users she worked, because it is easier not to, usually did not choose to lockdown their own information in the system, although they could:

Carey: It's open source and it's also considered a content management system for education and so when an instructor creates a homework problem they can code their own randomized homework problem; and then the instructor publishes it to the whole . . . network, so someone at [Carey's university]. . . could build their physics course out of homework that they created themselves, another colleague at [the same university]. . . someone else at [another university]. . . , and problems from the textbook they are using . . . they choose to publish it as system wide, meaning anyone in the system can publish it and then they also have options to only publish it to people in their school, they even have options to customize it and really lock it down so that only people in certain courses can look at this.

Martine: Do they do that very often?

Carey: Most people do the default system wide, because it's easier.

According to Carey, textbook publishers regularly give all the images from textbooks to requesting teachers, who then publish these images to the entire network. Carey expresses concern about whether the publishers know the images will be published in this way. Carey's general impression is that teachers are concerned about who might be able to access their self-created teaching materials. These same teachers are less concerned with any implications for

sharing textbook materials or images with others who may not have purchased that book.

It turns out there was a logical explanation for the bareness of Carey's social network site. The main reason is that she feels responsible to the institution for her professional identity especially as it intersects with her knowledge of copyright. She feels that as someone working in a technology enhanced area where others' materials are shared, and as a student in a professional writing program that has a focus on digital writing, she should also be an expert on copyright. She is concerned about the design of social network page with respect to code and errors in code. If she enhances her social network site, errors in the code will be visible to her scientist or web programmer colleagues. She has taken a special course at the library on copyright – offered for employees and students but not part of her regular curriculum:

Carey: And this is my [social network page], and yes, I have one of the most boring pages . . . I mean I could read all this stuff. I actually read those forms and I found out, like early on, when I first signed up, it says like oh you grant them your copyright– oh what a bunch of bull! And so I'm just kind of like afraid of putting anything up there, even anything original, because like to me it's like if I had a big collection of original stuff, I would put like my good stuff, and save my excellent stuff [for my personal website]

Martine: Is that why you don't jazz it up?

Carey: Yes because if you do jazz it up, I'm afraid of like there's all those pimped out things you can get. I'm like snobby with my code, and I can see errors, and so many of them don't work on a linnix machine because they are not coded correctly, and I just get! So it ends up looking like that. Like scientists and web programmers and stuff, their webpages are really boring, and structurally, they have no errors, but they aren't very artistic.

In her webspaces, Carey occupied the roles of tech-savvy employee, graduate student, and family member. She and her husband are befriended through their social network software profiles. While Carey is exceedingly knowledgeable about copyright issues, she does not feel totally confident about her abilities, and thus she prefers to keep a low profile on the web.

Carey isn't doing a lot of reflection about copyright or fair use with respect to her social network site because she decides to keep her site clean. She did worry about having her own materials exploited. The main reason she kept her site clean was to control her professional identity, not necessarily to avoid copyright liability. With respect to the teacher course management system she maintains and supports, it is her employer's requirements that she allow teachers to share their materials. I'm not sure the institution has invested Carey with the authority to police these teacherly exchanges for copyright violations. She

doesn't seem to think she has that kind of authority. My impression is that the institution that maintains this teacher exchange site looks the other way with respect to the technicalities of copyright. While Carey worries about copyright and ethical issues, she doesn't let that stop her from supporting others' use of the CMS. She doesn't act as a police officer with respect to how others' use the system. She is very enthusiastic about the service, and wants teachers to use this system to share their materials. She does have some very strong ethical concerns regarding the survey question in my study on whether it is acceptable to break a law on occasion if that law is wrong. To this she gives a resounding yes, explaining to me "because I mean we wouldn't have all the civil rights, the law now, we wouldn't have it unless people stood up to the law."

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 1.0

Fair Use/Copyright Knowledge Score: 71%

Level of Certainty Score (1 very certain; 5 not certain at all): 3.2

ROB'S VIGNETTE

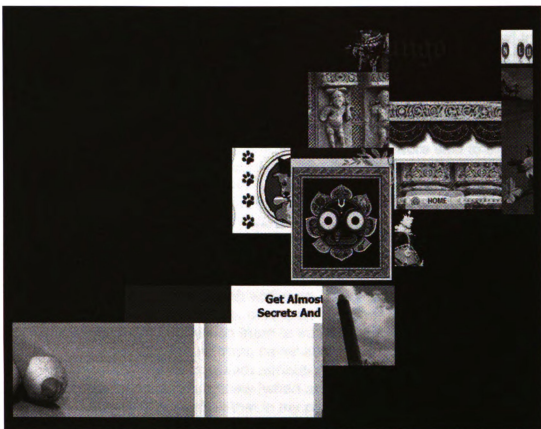


FIGURE 7.2. ROB'S VISUAL VIGNETTE

Above is a visual-vignette I create from the numerous web compositions (URLs) Rob supplies to me in anticipation of our interview. Rob is a second-year PhD student in a rhetoric and writing program. He is an international student having come to the US from India. Rob supplies me with numerous webpages he's created both while still in India, and then while a student in the US. Rob constructs webpages for family and friends, and has previously worked as a web designer in India. He describes this as doing "outsourcing" work. In India he created websites for people all over the world. He also has websites he's created as a graduate student featuring some of his PhD course work. So in webspace, he occupies the roles of family member, friend, student, and employee. I create a visual vignette of Rob's work partially to protect his identity, but also to give you a flavor of the vast array of digital composing this writer completed. The purpose and audiences for Rob's work varies greatly. He is very concerned about copyright, but that is a newfound interest after coming to the US. He notes that when obtaining his master's degree in India, works cited or reference pages were not required. He did not consider copyright law in his work previous to entering the graduate program and learning about these issues as part of a

course. Rob describes his pre-graduate school thinking as solidly based in the cultural norms of India:

In spite of the tremendous development in everything related to web in India, so much that huge chunks of web based projects are outsourced to India, why is copyright not as you might expect it to be? There could be a historical/cultural reason why we Indians do not think about it much. Knowledge is a community-owned thing in India, and this concept dates back to the time before written language. The Vedas (ancient Hindu texts) were said to be the word of God given to some sages and we never came to know which sage said what. This knowledge was passed on from generation to generation for a couple of thousand years. Re-mixing, re-mediating and re-interpreting is believed to have led to its growth and relevance to contemporary ethics. Perhaps what I mean to say is that, knowledge was probably [not] allowed to be "owned" by any author flexing copyright over it, because my forefathers wanted to encourage this growth with time. Every aspect of politics, relationship, customs, dress, art is encoded in the scriptures. We use them and re-use them to suit our times. The question of asking permission to use them never arises. That is probably why [we are not that concerned with attribution and copyright] . . . Same way, if I learned something new [when attending school in India] from any author and mention that in my paper in support of any idea, I mention his/her name (of course I do not call it my idea) in my [Indian] university exam answer. But it is not necessary to add a reference to formally acknowledge the author, because to us, it is not the author, but the new knowledge that is more important.

Rob has come to believe that copyright is very important, and he believes that if he obtains all his images from flickr.com, those images are free from copyright. That is not completely true as many flickr.com images are restricted in some way by the owner. A user has to read each license which can be exceedingly complicated. However, Rob definitely tries to do things correctly.

He is the only interviewee who had experienced having his own web materials, photos and text, appropriated by someone else. One day Rob was searching the web and found a site that had taken his materials. But in this case it was materials from the website of an Indian professional dancer he was writing for (gift writing), and she was happy someone had taken her images because it gave her additional publicity. So in that case Rob didn't have any worries about others using his material. But, when I asked what he might do if another person appropriated his webspace design, in which he had situated the pictures the dancer had given him, if someone took his design and used it, simply switching in different dancers' pictures, he said he'd "scream" and wanted to know if he could sue for something like that.

Rob is willing to share the dancers' text and pictures as long as it was acceptable to the dancer. But as for his design, he expects others to respect his work and not use it without asking. He also tries very hard to use materials that are copyright free, within fair use, properly licensed, or have a low risk of triggering legal liability. He is very appreciative of learning about intellectual property issues in graduate school courses, and discusses these issues as well with the first year writing students he teaches as a teaching assistant at the university. Rob does consider copyright law and fair use as he composes for the web. He is also very concerned about ethical issues in the context of using others' materials including proper attribution, and he of course considers design issues as he composes for the web. In the background of Rob's composing practices, is his experience in India. This prior experience provides Rob with a rich contrast from which he can compare situations and practices in the US, making Rob very reflective and thoughtful about using others' materials. His India background presents a different cultural norm for remixing. This contrasting cultural norm is underneath some of Rob's pre-graduate school web composing practices. I try to capture this "cultural collision" in the visual vignette above, although I'm not sure I have done so.

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 3.0

Fair Use/Copyright Knowledge Score: 64%

Level of Certainty Score (1 very certain; 5 not certain at all): 2.3

SARAH'S VIGNETTE

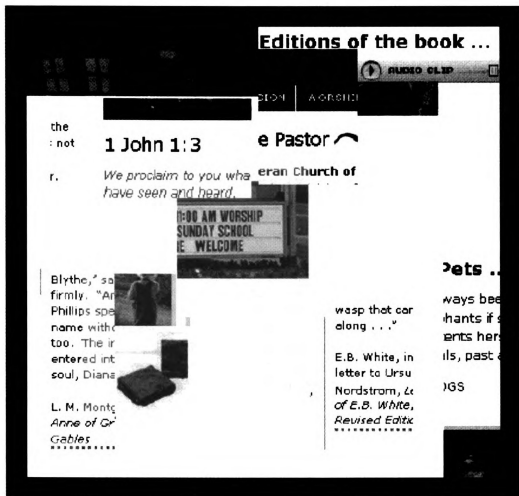


FIGURE 7.3. SARAH'S VISUAL VIGNETTE

Sarah is a recent master's degree graduate of the professional writing program. At the time of the interview she's been out of school for over a year, and is completing webpages for family members as well as church organizations that originally connected with her through family members. This work is completed either for free or at a very low cost. At the time of the interview, it appears that Sarah's "gift writing" is developing into a web design business that will continue to increase. She is thinking about charging proper amounts and developing legal contracts to govern her work. Sarah's primary web identity is a relatively invisible one, as she creates materials to promote others' endeavors – in the typical fashion of a technical writer. One of her relatives has received a national book award, and Sarah creates a website for this person at no charge in order to promote both the author and the book. This website was a total remake of a previous website, and will continue to expand over time: "Well I think the

original idea that we had talked about, like the original website that we expanded there is another book. There is going to be five books total, and the second book is due out in spring, and then we will add another whole page, just on the second book, and the third book and the fourth book and the fifth book." Sarah's work again evidences the idea of a commonplace, a mixing of the past, the present, and the future all in a neat package of one website. Sarah also creates a website for a church at a low cost, and is working on another church site, plus has additional jobs coming along in the pipeline. She thus composes for a range of audiences. Of the seven interviewees, Sarah (along with Jesse) is one of the most reflective (draws upon *metis*, uses probability thinking and a weighing and balancing of issues) about her use of others' materials. She cares deeply about using others' materials ethically, and went to great lengths to try to use materials that don't require either permission or attribution. Sarah reads licenses and tries her best to understand them. She is very interested in copyright and fair use, and strives to learn more and keep up to date on such matters. She also knows the flip side of copyright, in that her relative who had won the book award has a proprietary interest in maintaining for-sale use of her book, and Sarah thus works to protect that in her web design. When asked whether she would consider including a link to a pdf of the entire book rather than a short audio excerpt imported from a commercial site, she says: "Well it would be bad business for her, I don't know if a pdf of the entire book exists, which means I would have to do it. As an employee of hers, I wouldn't suggest it because it wouldn't make sense to the purpose of the website, which is to advertise and publicize her book."

Sarah, as an independent contractor, also worries about protecting her clients from legal or ethical problems. For example, she carefully considered the use of others' photographs on the church websites, and checks that these individuals had given some kind of permission. Although Sarah would have loved to have forms and perhaps a contract that she could have her clients sign, at the time of our interview she was working under informal verbal agreements. "It [the website] was for a whole church that I've never met before, and the idea of letting them down or getting in trouble was pretty nerve racking for me, because they trusted me, and I tried to be the best I could but I honestly didn't feel equipped, you know." These issues of privacy protection, contract negotiation, and detailed copyright in for-profit environments are not something she'd learned in the professional writing program where she'd obtained her degree. She said:

I mean I just wish, I love the different things we learned in school, but the focus was really on work you do in the classroom, and I think about all the time we were building stuff in class where I wished we had pretended we were doing it for commercial reasons. And so that we really had to talk about the issues, and think about them then as opposed to sort of ignore them because we were safe then.

In other words, Sarah's program in her mind had not really prepared her for entrepreneurship or operating an independently owned web design business. Undoubtedly, "fair use" plays a larger role in educational contexts. It's role is much less prominent in for profit environments. In our talk it was clear that Sarah did not feel she could rely on "fair use" in for-profit environments in the same way she could while still a student. And while she wanted to further develop her web design business, she hesitated, explaining:

No, it's just a verbal agreement, since they've all just been for family. Honestly I'm not sure with these last few websites, I really love to do, but I'm not sure if, I kind of feel like they've deterred me from going further into independent web design, and I wonder if in the future if I were going to do it if I would want to work with a group, instead of by myself, because I feel like it's just a little too much, gray for me. On my own, you know.

The web compositions Sarah creates do use others' materials. Much of the content has been given to her, some she'd locates, some she'd creates from scratch. For example, on the relative's promotional site Sarah has been given quotes (including quotes from well-known authors that somehow connects to this new book), images, and text from her relative. Sarah herself has taken entire book reviews and audio samples from commercial websites and incorporates those into the site. "She [Sarah's relative] wanted to quote, and she took them all herself, and listed them and I just put them all [on the site]. I really hadn't thought about it until now, but I can't imagine that there would be a copyright issue." Sarah also creates part of the design and text from scratch. This kind of remixing was also present for the church websites she is working on. When asked whether she'd consider just grabbing some images from a google image search, Sarah explained how she created a logo for a church website:

Yea, so that would be like blatant copyright, and I don't just go searching the internet for pictures and then use them, you know. So I went to istock photo, and there you can download a sample of the picture, so, and I'm guessing that the reason that you do that is so that you can make a mock-up and sell it before you have to buy the picture. The photos are basically royalty free photographs, so you buy one and then you get it. So this is just the sample, and then I changed it up in Photoshop, and made it more like a painting, then a photograph, and changed the colors to make it more vibrant, and I showed it to them and they really liked it. Now I've got to go back and purchase the one time, licensing fee for the picture.

She will then bill her client for this amount. Together, using classic strategies of remix – webspace as commonplace, these multi-authored "100 different pieces" of content come together under Sarah's hand and converge in the web compositions Sarah shares with me.

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 3.0

Fair Use/Copyright Knowledge Score: 64%

Level of Certainty Score (1 very certain; 5 not certain at all): 2.3

JESSIE'S VIGNETTE

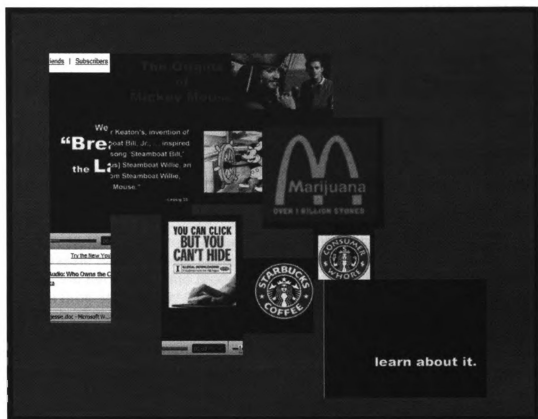


FIGURE 7.4. JESSIE'S VISUAL VIGNETTE

Jessie is transitioning from MA student to PhD student. At the time of our interview she is finishing up her MA in professional writing, and applying to PhD rhetoric and writing programs. At the time I write this, several months later, Jessie's been accepted into a PhD program and will continue her studies in this area. As a digital writer, Jessie maintains web identities as graduate student, graduate teaching assistant, teacher (having taught at other institutions), and applicant to PhD programs. Again I see the past, the present, and the future converging in Jessie's commonplace, her digital portfolio. She has this digital portfolio she shares with me that contains all the basic elements like CV, teaching philosophy, classes taught, and so on. Jessie has taught web design and multimedia writing and even in first year curriculum also has a major multimedia component. She always discusses and teaches fair use and copyright issues in the courses she teaches. Jessie might be called a copyright activist, in that she has a great deal of interest in preserving and expanding fair use, and by the time I write this she's done at least two conference presentations, many

informal classroom presentations, and had a publication in a major journal in our field on the issue of fair use, copyright, and multimedia writing.

Our talk centers around a movie she's created that argues for activism in the area of fair use and argues for changes in the law. Her movie is also to increase public awareness. In tandem to her movie, an interesting component of her digital portfolio is an "Open Letter" to copyright holders explaining that while she'd tried to obtain permission, she was unable to do so and thus uses under fair use. This open letter evidences responsibility taking, and brings to my attention Jesse's concern for acting ethically and legally when possible. Remember that with respect to educators obtaining permission, as Jesse had tried to do, Hobbs, Jaszi, & Aufderheide's (2007) study revealed that obtaining permissions is not a realistic goal for educators because either permission is refused or the cost is prohibitive. So Jessie echoes the frustrations held by many educators regarding the impossibility of obtaining permission when she says in her letter, "I have sought – to no avail – permission to use your material(s) in my Power Point essay showcasing the ease with which a person can commit 'piracy' and take music, video, images, and text from the Internet these days."

Jessie has endlessly reflected about copyright and fair use issues as she constructed her movie, and reports being told two different things from two different professors in her graduate program. These differing viewpoints she experienced are reminiscent of the fair use ethics case that appeared in *Intercom*, and that I discussed in Chapter 1 (Waller, 2006a,b). One professor cautioned her about showing the movie at an academic conference because her use was not necessarily fair, and the other had said, for the most part just about anything goes at a conference because it's fair use. After agonizing over these two competing views for quite some time (months and months), Jessie reports going ahead and showing the movie at a conference. Jessie's ten minute movie includes remixed materials from a variety of sources, including texts, music, images, quotes, and so on. She explains the genesis and development of her web composition, which she estimates took about 100-150 hours for the single movie. The movie is posted and available for the public to view without password protection:

OK, um, [name of movie] started to be a book report about Larry Lessig's book *Free Culture*. I was just supposed to present on that information, and um, kind of interesting my son had made a power point that ah, was an automatic, you click it one time and it played all the way through and it played to when "Wake me when September ends," and I'm inspired by this. I'm thinking how did he do that? I want to do something like that. So that's really where [name of movie] came about, was the idea of, oh I could present Lessig's material in a moving power point movie, and do a sound track with it, um, that's basically the context for me making it. Now once I started making it, it was, it became more interesting because I'm like, oh wow, I remember an old song called "Breakin' the Law." This is about breaking the law. It's about appropriation. That really

fits. I'll put those together, and um, it just kind of grew from there. It ah, ended up being ten minutes, three songs in the background.

When asked about where she obtained the materials for her webtext (the movie), she answered:

Google.com. I mean I knew that ah, one of Lessig's examples was when Walt Disney remixed Steamboat Bill into Steamboat Willie, or got his idea for Steamboat Willie, Mickey Mouse's first cartoon from a movie that was called Steamboat Bill. So that's kind of where that started, but it certainly was easy enough to go to google and do an image search and find images to highlight when I was talking about in the written, in the text portions of the report. And it didn't stop there. There's a picture of *Pirates of the Caribbean* in the piece.

And um, and many a logo, where I talk about remix and how it's not necessarily needed in society but it's part of our freedom of expression. So I show a logo of star bucks and someone's remixed it to consumer whore logo. I show a logo of coca cola and someone remixed it into a enjoy capitalism logo, and so, the star bucks, the coca cola, what else did I use, McDonalds, eBay, these logos were um, "right click," "save file," "save image as," and I had them. They were just. They're available on the internet. That's some of the problem associated with all of this today, is that the ease in which we can break the law, ah, steal, whatever words you want to use, but all we have to do is right click and it's ours for the taking, and there's um, big, um, disjuncts, and whether or not people know that it's illegal when they do it, whether or not they care, and whether or not we have ethical issues that are surrounding these moves, that I made to bring light to the issue. I'm very proud of what I've written. I also in the back of my mind think that the copyright police will come after me someday, but you know.

And so Jessie lives with everyday fear that something will come up and subject her to some kind of legal liability for her uses. Recall I mentioned earlier that Jessie is a copyright activist. As we finish the interview I ask her if there's anything she wants the reader to know. She answers:

It's our students that are suffering because the laws, the way the laws are. The students use Limewire, and who do image searches and they . . . anytime I guest lectured, I've gone into a classroom and I always ask, "hey don't incriminate yourselves, but tell me you know, do you know what Limewire is?" And of course all the hands go up. "Do you know anyone on campus who has got in trouble for using Limewire"? There's always a hand that goes up. Someone in that classroom, knows someone, has a friend, who um, [the

university] has taken their lap top, taken away their online privileges, and if it ever happens a second time threatened to expel them from the school. They are the ones that are suffering because our laws are based on Thomas Jefferson's, you know, 200 year old copyright laws. They are set for print, they are not set for our right clicking world, so, that's it. It's the students who are suffering, they are the ones who are getting in trouble.

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 2.0

Fair Use/Copyright Knowledge Score: 71%

Level of Certainty Score (1 very certain; 5 not certain at all): 3.1

HEATHER'S VIGNETTE

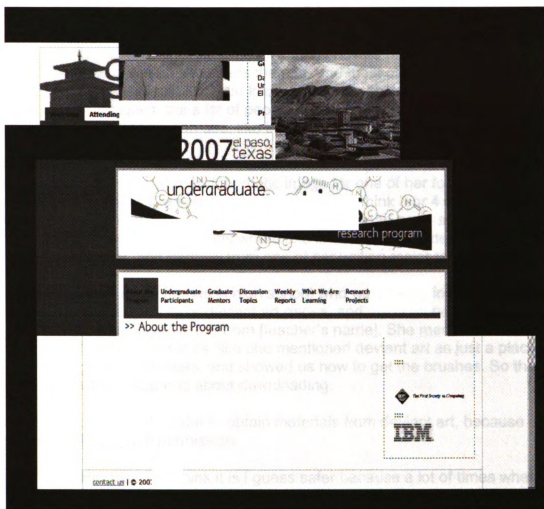


FIGURE 7.5. HEATHER'S VISUAL VIGNETTE

Heather is a third year undergraduate in a professional writing program. She is also a student employee, plus she is doing freelance web design work for a faculty member at the university where she attends. Her work for the faculty member involves creating a conference webpage for a professional organization in our field. As a student employee, she also works with a faculty member in different discipline, a science program. Heather is very interested in copyright and fair use. As we proceed through the interview, she notes how she creates her web designs partially by creating her own materials, and partially by using content supplied to her by others (i.e., classic remix). In the webtexts that Heather shares with me, she is invisible as was Sarah, in the fashion of a traditional technical communicator. Heather is the expert writer behind the scenes. In order to obtain materials and resources for her web composing, Heather frequents a couple websites. One website she likes is deviant art:

Deviant art is sort of a forum for people to put up any images, or even poetry and that sort of thing you want. You create a profile. It's sort of like, like facebook or something like that, but it's not really social networking. It's more like art and creative networking, so you can upload finished products. Like I have a friend who has paintings and she scans them in, and most of the time you just put like comments like, you know I really like this or, ask about techniques, but a lot of people create things on Photoshop that other people can use, like brushes.

Heather goes on to explain to me where she obtains specialized artistic brushes she uses to create a background thematic image for one of her for-hire web spaces. "They come in like sets. This set came with I think 3 or 4 other just DNA related brushes, and you have the option of like download here, and then you can install it yourself." She explains where she'd learned about deviant art, partially from friends, and partially from one of her writing major teachers:

I had some friends in high school who were really involved in art, and they all have deviant art pages, and also I found out about the brushes specifically from [teacher's name]. She mentioned them in [name of class] as, like she mentioned deviant art as just a place to go and get ideas, and showed us how to get the brushes. So that's where I learned about downloading.

She felt that it was legally safer to obtain materials from deviant art, because people sometimes gave permission:

Heather: I do think it is I guess safer because a lot of times when people post things they'll have a disclaimer at the bottom, like their own little thing that says like you're free to download it but um sometimes they say that you have to just credit them for it on your website, or somewhere on your image, or some of them say like friend me, like if you have a page, you just add that particular user as a friend if you are going to download their things.

Martine: How do you feel, do you honor those things?

Heather: Most of the time, yeah. I tend not to download anything that says I have to credit them, just because I think it's going to take away from the overall, like image, the product. So I try to find people who say, like just friend me, so that I have a profile, and I have a list of friends, like people, like um, used their images for.

Like Sarah, Heather tries to locate materials to use that don't require attribution because it may have a negative impact on the design. Heather thinks about ethical issues when others give her materials or when she uses others' materials.

Regarding her work with respect to the professional organization conference webpage, she said she had some concern about where the organizers had gotten some images they sent her, but she just wondered and never did anything about it:

I did wonder like where the photos from the front page came from, but I didn't really do anything about, like that curiosity, but, um I did think about it . . . on the front page, the image of [name of guest speaker], he, when I was sent the photo, I was actually sent two or three photos, and they seemed to be from different time periods. One was like when he was younger, like he didn't have so quite a gray beard, and um, I was just wondering like did they get them from his website? [Martine: Did they just go grab them or did he give them permission?] . . .Right, I did wonder that but I never asked about it.

To make sure she was ethically and legally using others materials, she'd carefully read the guidelines for her use of the university logo, and tried to follow those to "make sure that I wasn't screwing it up or anything." Regarding the science-focused web design she did as a student employee, one where she incorporated other students' reports and pictures on an undergraduate research project into the program webpage, she felt confident that she'd acted legally and ethically because she knew the students regularly visited the site:

I know that she [the faculty member] had them sign a form at the beginning of the research part, their own program, that was like a photo permission form, and they were all informed of the website, like I send them a link every time, and it was like, every time something new was uploaded, so that they knew what was going on.

She works collaboratively with several faculty members as she completes her own writing. Her own personal digital portfolio was still under construction at the time of the interview, but she has no hesitation about using the materials she creates for others as part of her portfolio. She did say that she wasn't sure who owned the webspaces that she'd created for others – raising questions about work-for-hire issues. Heather also feels secure about her web design abilities such that she'd ask questions or make suggestions if she thought something might be an ethical or copyright issue, as far as materials others gave her. She felt a responsibility to do so in fact, stating:

Especially if there's someone like drinking beer in a photo or something like that. I would you know, just try to casually mention, you know, is this person OK with this? Do they know that we are putting it on the website? That sort of thing . . . Just because it's like online and you never know what people are going to put online. I

consider this whenever I'm putting things online, and whenever people, especially on like facebook, where people are putting photos of me online and whatnot. I consider permission, and if I don't want a photo up online, I have to make sure someone knows that I don't want this. So whenever I'm doing webwork, and there are other people, like their content involved, I always want to make sure that they at least know what's going on and that they don't have any problem with it.

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 1.0

Fair Use/Copyright Knowledge Score: 50%

Level of Certainty Score (1 very certain; 5 not certain at all): 2.9

AMANDA'S VIGNETTE

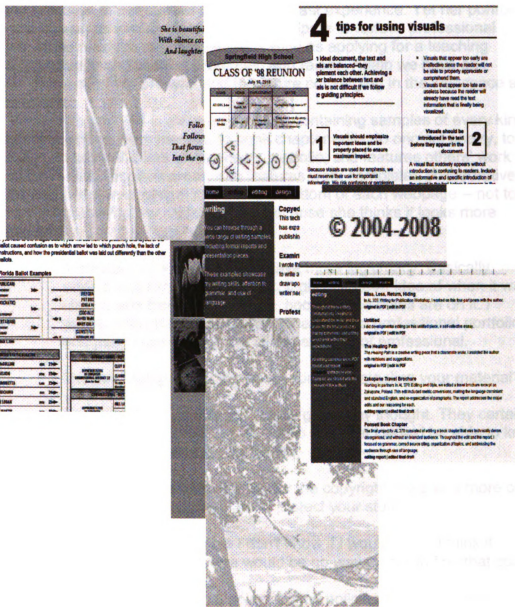


FIGURE 7.6. AMANDA'S VISUAL VIGNETTE

Amanda is a recent graduate with an undergraduate degree in professional writing. At the time of the interview, it's been about two years since she graduated and she is in her second full-time position. She is working for a national non-profit health organization as an online communication specialist. She regularly maintains their website and uses the organization's intranet. The

visual vignette I provide for you here contains pieces of Amanda's professional portfolio. She is involved as an alum with her undergraduate program, and generally finds it beneficial to stay marketable and keep her web portfolio up to date and reflective of her current position and past experience. Yet her portfolio is forward looking as well since she does participate in various professional activities, some of which are competitive – such as applying for a teaching abroad opportunity and seeking promotion and raises. Again we have an example of the past, the present, and the future converging in the webspace as commonplace.

Amanda's portfolio is extremely robust, containing samples of every kind of imaginable writing, from memos, to book chapter edits, to original poetry, to web design. In several areas of Amanda's portfolio, she features others' work that she has edited. In other areas, she features work completed collaboratively. Amanda also keeps a copyright mark on the bottom of each webpage – not to stop people from taking her materials, but because she thinks it looks more professional:

Amanda: . . . I just felt like it gave more legitimacy. Basically saying, you know, it's my work. It gives a good idea of when it was started and that I still update it, because the dates are on it. I guess: one I wanted to communicate, it is a professional portfolio and [two] I wanted to have all the aspects of professional.

Martine: Are you worried about someone stealing your material?

Amanda: Um, no, I haven't really given any thought. They certainly could if they wanted to. There's no way that I would be able to know if they were taking my [materials].

Martine: So the main reason for the copyright there was more of a rhetorical move rather than to protect your stuff?

Amanda: Yes, because I don't know if I would – like I think if somebody wanted, there would be no way for me to find that out.

Martine: So you're not going around policing the web to see if people took it

Amanda: No. I'm not.

Amanda incorporates texts, visuals, and designs created by others. She uses proofreading marks in her design that she obtains on the web and considers a fair use partially because she retrieved these marks from a university website that was used to teach students editing marks. She has a knack for incorporating undergraduate course assignments into her portfolio in such a fashion as to make these items look like work completed in for-profit environments. Part of this

knack comes from her ability to keep everything clean and professional. Amanda wants to showcase her editing abilities, but when using others' texts she asks permission. She explains some of her materials:

The first three were all pieces that I did in a class where everybody was developing their own published work. So my role in each of these pieces was really to do some kind of editing, whether it was developments, or something like that. With each of these I did ask permission from the people who wrote the original to have their work up there and they all gave permission so I have the original up there because I want to be able to contrast what the original looked like and what the changes were after I edited it or what suggestions I made, because some of them show like my editing comments.

Smartly, Amanda also notes throughout her portfolio "used with permission" in order to signal to her audience that she is aware of the ethical issues that arise when incorporating others' texts into one's own writing. Some of the other materials on Amanda's website are chapters and flyers she's edited. These items are from real companies. She does not include the originals because she doesn't have permission from the companies. But interestingly, the original chapters and flyers were provided to her by the teacher of an undergraduate course. I asked her "Did the teacher in any of these courses tell the students like did any of them address issues of copyright and fair use, or using those kinds of materials in your professional portfolio, how did you decide, was it part of the curriculum?" And she replied: "No. No it wasn't discussed." So she independently decided that it would be unethical to use someone else's materials without their permission even in this case of doing it to illustrate her own editing skills acquired at an educational institution. However, she did include the original when blended with her edits. She clearly states her concerns were ethical, not legal.

She uses lots of white space and not many visuals on each linked interface page of her site. While I thought perhaps this was because she feared copyright liability, she emphasizes that she avoids using visuals because of design reasons:

Well a lot of it was the whole design standpoint, that I wanted it to be more clean, and there isn't really a lot of . . . with pictures, it's not necessarily going to be consistent. So if you do them all the same size and it's going to be from different views whether somebody pulls that view or not, and I just wanted to keep it clean and simple and I wanted to be able to control the colors and everything, and not really have the graphical representation. So I just mostly dealt with text. My stuff, I mean even with the design, I still think it focuses more on the text that I did. The work I did with text, not necessarily the design.

With respect to the visuals she did use, some of them are very generic and from her early college experience – at times she was the only student in her class doing a webpage for a course assignment. She does not remember where she obtained these generic visuals, although she knew she herself had not made them. As far as copyright, Amanda is not terribly concerned about it. In her job, the employer provides forms that others must sign to release their rights to donated materials, pictures, and texts. With the advent of user generated content, such releases are crucial for Amanda to perform her job. She is well aware that she is not the author of material she completes as an employee and also feels a sense of responsibility as a representative of the organization to make sure the organization is presenting a uniform identity, and is using others' materials fairly:

We want to make sure that you know we are presenting the same information that we are presenting everywhere else, to make sure we are pulling all of our statistics from the same place. In that sense, I mean it all falls under one copyright, whether it's being done by me, or whether its be done nationally, or another state. It's all under the organization's copyright. So it's more important that people can always go and look to see if that it is actually our website and when we are writing the articles and when we are interviewing people, their personal beliefs and that sort of thing, so we quote them, and we attribute it to them, and then they sign consent forms and say that we can use anything that they say, and any images that they supply, or anything like that in whatever way we feel best. So we can use it in our multiple publications, websites, anything like that.

We have a -- it's a publicity [form] and something else, and it's just like a legal document, and the person can sign it for interviewing and if it's a kid then the parents have to sign it . . . it has all the same sort of language that like our websites have when people want to share their story, or talk about their experiences, and they say that you can publish this in any way that you see fit, and they trust us, our organization, to use it, in a way that's not disrespectful, or judgmental about their character, or anything.

This basically to protect the organization, and the people who we are getting the stories from, so I think it's more a legal issue. . . and when you're writing stories for the newsletter, for the external newsletter, and anybody we interview, I give them the option to review it first before I publish it . . so that they can see what we are saying. To make sure that they are comfortable with it being published, and I give them an option to say yes or no. It's just a courtesy.

As we end the interview, I give her an opportunity to tell the reader what she wants them to know about the importance of copyright in educational contexts, or otherwise:

Um, well I think it's definitely important to teach it and I know in our program it definitely was, but I don't know if it was in other programs. I think especially with the way the internet is going. It's getting huger, and I don't think enough people have the education of what they can use and what they can't use, especially with the idea of user generated content. What does that mean? Does it belong to the user? Does it belong to the website? Can anybody take it? So I think that just having like that kind of basics in terms of – you could do it in any kind of writing class I think. It's still the idea of you have your own work, and you're not plagiarizing and how that extends to the web, which I don't think is really done right now, especially with images. I think it's not really clear what you are allowed to use and when you are allowed to use it, and when you have to get permission, stuff like that.

I mean the only thing I would have wanted, is more explanation of is the whole creative commons thing because I still don't understand that completely, but I think that copyright is, I mean I think it is big issue, and I think it is getting bigger as people are trying to deal with the issue of what is fair use and what's not.

Chilled Speech Score (0-2 not chilled; 5-4 very chilled): 2.0

Fair Use/Copyright Knowledge Score: 57%

Level of Certainty Score (1 very certain; 5 not certain at all): 1.5

APPENDIX 4.1

| TABLE 4.6: Knowledge and Understanding—Copyright and Fair Use | | | | | | | |
|--|--------------|------------------|------------------------|-----------------|--------------------|--------------------|-----------|
| COPYRIGHT AND FAIR USE QUESTIONS | | | | True | False | Best Answer | N= |
| 1. Even though you have no permission, as long as you use less than three minutes of a legally obtained song, it is certainly fair use. | | | | 16% | 65% | FALSE | 360 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | |
| | 23% | 45% | 7% | 20% | 5% | | |
| | | | | True | False | Best Answer | N= |
| 2. Using someone's "creative" work (i.e. fiction, drama, poetry, art, artistic designs, music) without their permission, is just as likely to be a fair use as is using their "factual" work (i.e. non-fiction, unaltered photographic representations, news items) without permission. | | | | 58% | 42% | FALSE | 356 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | |
| | 24% | 47% | 14% | 12% | 3% | | |
| | | | | True | False | Best Answer | N= |
| 3. If, without permission, you use someone else's copyrighted material in order to create a political parody, or otherwise conduct political commentary/criticism, it is more likely to be a fair use than if you were using the same material for simple decorative purposes. | | | | 62% | 38% | TRUE | 353 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | |
| | 27% | 44% | 11% | 15% | 4% | | |
| | | | | True | False | Best Answer | N= |
| 4. The owner of a copyrighted novel has failed to make this novel into a play. You decide to do so without the copyright holder's permission. Your derivative work, the play, closely follows the plot and characters in the novel, but is likely to be a fair use because it is different than a novel. | | | | 5% | 95% | FALSE | 350 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | |
| | 40% | 43% | 7% | 8% | 2% | | |

| | True | False | Best Answer | N= | |
|---|---------------------|-------------------------|-------------------------------|------------------------|--------------------------|
| 5. Let's say you decide to, without permission, use a very small amount of a copyrighted work, incorporating it into your own web composition. The original copyrighted work is a text of 200,000 words. You use 50 words, but, the 50 words you decide to use are key, and the very best and most financially valuable part of the original copyrighted work. In fact, the other 199,950 words are unanimously considered useless, mundane, and trite. Even so, since your use is so small, it is certainly a fair use. | 21% | 79% | FALSE | 346 | |
| Confidence Level | very certain 28% | somewhat certain 48% | undecided can't answer 8% | not too certain 12% | not certain at all 4% |
| | True | False | Best Answer | N= | |
| 6. In the event you have no permissions, using someone else's unpublished work is more likely to be a fair use than using someone's published work. | 18% | 82% | FALSE | 344 | |
| Confidence Level | very certain 27% | somewhat certain 46% | undecided can't answer 12% | not too certain 12% | not certain at all 3% |
| | True | False | Best Answer | N= | |
| 7. Without the copyright holders' permissions, you copy five copyrighted, freely available web-published images from five different authors. You mix these five images together, cropping them, and substantially changing their overall appearances such that they are totally unrecognizable from their original forms. You then blend in five of your own original images plus some original text you've written, creating a collage that is politically informative on an extremely urgent topic in current events. You publish your collage on your website for the internet world to have free access to for educational and political purposes. In this kind of situation, your use of the five images you started with is probably a fair use even though you did not obtain permissions from the copyright holders of those first five images. | 55% | 45% | TRUE | 341 | |
| Confidence Level | very certain 17% | somewhat certain 48% | undecided can't answer 12% | not too certain 20% | not certain at all 3% |
| | True | False | Best | N= | |

| | | | | | | | | |
|--|--------------|------------------|------------------------|-----------------|--------------------|-----|--------------|-----|
| | | | | | Answer | | | |
| 8. When you were 2 years old you drew an original crayola drawing from your imagination. You've saved it all these years. Unbeknownst to you, your friend steals this from you, scans it, and posts it on her webpage as part of the design. You have no right to ask her to take this down based on copyright laws, because such drawings are not copyright protected in the US anyway. | | | | | 26% | 74% | FALSE | 336 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | | |
| | 24% | 37% | 14% | 19% | 6% | | | |

APPENDIX 4.2

| TABLE 4.7: Knowledge and Understanding—Unauthorized Use vs. Authorized Use Questions | | | | | |
|---|--------------|------------------|------------------------|-----------------|--------------------|
| UNAUTHORIZED V. AUTHORIZED USE QUESTIONS | True | False | Best Answer | N= | |
| 1. If you ask a copyright holder for permission to use their material in your own original web composition, and they say no, this means you absolutely cannot use the copyright holder's material under fair use. | 53% | 47% | FALSE | 340 | |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all |
| | 28% | 43% | 12% | 15% | 2% |
| | True | False | Best Answer | N= | |
| 2. If you use something with a Creative Commons license, it means you automatically get fair use. | 32% | 68% | FALSE | 339 | |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all |
| | 18% | 31% | 21% | 16% | 14% |
| | True | False | Best Answer | N= | |
| 3. Mary, a law abiding citizen, is using a large chunk of text (1,000 words) in her webpage. The sole copyright holder of this text is her friend Tim. Tim's given her express written permission to use this text in her webpage. Even so, as a conscientious, law abiding citizen, Mary should still make sure she is within fair use when using Tim's text in her webpage. | 48% | 52% | FALSE | 336 | |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all |
| | 27% | 49% | 9% | 13% | 2% |
| | True | False | Best Answer | N= | |
| 4. Kim, a law abiding citizen, does a search on the Creative Commons website for an image that allows her to use it as long as she attributes the original author and uses for educational use. Kim decides to use this image for a 100% educational use. She clearly and prominently attributes the original author. Nonetheless, as a conscientious | 46% | 54% | FALSE | 335 | |

| | | | | | | | | | |
|---|--------------|------------------|------------------------|-----------------|--------------------|-------------|--------------|--------------------|-----------|
| and law abiding citizen, Kim should still carefully make a determination on whether she is within fair use. | | | | | | | | | |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | | | |
| | 21% | 53% | 12% | 10% | 4% | | | | |
| | | | | | | True | False | Best Answer | N= |
| 5. Mary, a law abiding citizen, decides to use five pages of a seven page ninth circuit court decision in her website. She legally obtains this unedited opinion directly from the court's website. She wants to cut and paste all five pages directly onto the html page she is composing. She will not edit or comment on the court opinion, nor does her webpage allow commenting by others. Before using the text in her website, as a conscientious, law abiding person she should be sure she is within fair use. | | | | | | 68% | 32% | FALSE | 335 |
| Confidence Level | very certain | somewhat certain | undecided can't answer | not too certain | not certain at all | | | | |
| | 24% | 43% | 15% | 15% | 3% | | | | |

APPENDIX 4.3

| TABLE 4.9: Chilled Speech Index | | | | |
|--|------------|-----------|---------------------|----------|
| | YES | NO | Can't Answer | N |
| 1. Have you ever been asked to take down something (text, audio, image) you had posted to the web by a copyright holder or alleged copyright holder because the text, audio, image, etc., was allegedly infringing on the owner's copyrights (for example, via a communication by way of a take down notice or a cease and desist letter, or even an email)? | 6% | 94% | | 373 |
| 2. If so, have you ever actually taken down such material because of this request? | 5% | | | |
| 3. Have you ever voluntarily taken something down, on your own initiative, which you had posted to the web because you felt you might be subject to copyright liability even though you never actually received a request to do so? | 18% | 78% | 4% | 373 |
| 4. Have you ever not posted something to a web composition you were creating because of fear of copyright liability? | 46% | 50% | 4% | 373 |
| 5. Have you ever felt that the purpose or message of a web composition you were creating would be better, clearer, or more aesthetically pleasing to the audience if you could use others' copyrighted materials without fear of legal liability? | 58% | 34% | 8% | 373 |
| 6. Have you ever felt that you weren't really able to say what you wanted in a web composition because you were afraid if you said it the way you wanted, someone might sue you for copyright infringement? | 14% | 82% | 4% | 373 |

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