THE LAW OF TEXTS:
COPYRIGHT IN THE ACADEMY

Martha Woodmansee and Peter Jaszi

What am I then? What have I accomplished? Everything that I have seen, heard, and observed I have collected and exploited. My works have been nourished by countless different individuals, by innocent and wise ones, people of intelligence and dunces. Childhood, maturity, and old age all have brought me their thoughts... their perspectives on life. I have often reaped what others have sowed. My work is the work of a collective being [Kollektivwesen] that bears the name of Goethe.

In the above pronouncement to a friend a few weeks before his death in 1832 Goethe gave voice to a fact of writing that we all recognize the truth of—when we are being honest with ourselves (19). Yet this obvious feature of our writing activities—their corporate, collective, and collaborative roots—is occluded by our notion of authorship: an “author” in the modern sense is the sole creator of unique “original” works.

It is perhaps somewhat surprising to find Goethe so boldly foregrounding the collective element in his writing, for Goethe was instrumental in elaborating this modern construct. In an effort to live by the pen, to promote their own writing in a market awash in printed matter, Romantic poets from Herder and Goethe to Wordsworth and Coleridge tended to emphasize the element of innovation in composition—to stress their break with tradition to create something utterly new unique—in a word, “original.” Their ammunition had been provided in Edward

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Young's warning to the writer in his influential *Conjectures on Original Composition* (1759) not to let great examples, or authorities, browbeat thy reason into too great a diffidence of thyself: thyself so reverence, as to prefer the native growth of thy own mind to the richest import from abroad: such borrowed riches make us poor. The man who thus reverences himself, will soon find the world's reverence to follow his own. His works will stand distinguished; his the sole property of them; which property alone can confer the noble title of an author; that is, of one who, to speak accurately, thinks and composes; while other invaders of the press, how voluminous, and learned sover, (with due respect be it spoken,) only read and write. (564–65)

Amid the organic analogues for genial creativity that made this essay a monument in the history of criticism, Young raises issues of property: he makes a writer's ownership of his work the necessary and even sufficient condition for earning the honorific title of "author," and he makes such ownership contingent on a work's originality.

The present essay grows out of several years of conversation among a group of literary and legal scholars that was inspired by Martha Woodmansee's observation of law's complicity in this reconceptualization of writing in Germany. In the last quarter of the eighteenth century, legal experts there joined poets, philosophers, and publishers in an intense conversation about the nature of composition, the object of which was to ascertain whether and, if so, how one could lay claim to property in one's writing. Its outcome was a reconceptualization of writing along the lines sketched out by Young which rationalized "vesting exclusive rights to a text in its author insofar as he is an Urheber (originator, creator)—that is, insofar as his work is new or original (eigentümlich), an intellectual creation which owes its individuality solely and exclusively to him" (Woodmansee, "The Genius and the Copyright" 445).

The chief interest of these German materials in the present context lies in the fact that they document a moment in which aesthetic and legal theory were still in conversation with one another. Thereafter they seem to have diverged, leaving two discourses to grapple independently with the same content down to the present day. Woodmansee describes one notable exception: William Wordsworth's intervention in the debate over copyright reform in Britain—worth mentioning here because it reveals so vividly the law's tacit Romantic biases (*The Author, Art, and the Market* 145–47).

Although the term of copyright protection had been extended in Britain in 1814, Wordsworth felt that the new term of the greater of twenty-eight years or the life of the author was still much too short to accommodate the work of true genius, which, to quote the Essay, *Supplementary to the Preface*, is obliged to "create[ ] the taste by which [it] is to be enjoyed" (80). The great difficulty of such "original" writing forced its authors to look to posterity for recognition, Wordsworth felt,
Composition

while that of “the useful drudges,” being “upon a level with the taste and knowledge of the age,” turned over rapidly. The latter could thus more easily recoup their investment within the allotted twenty-eight years.

Initially Wordsworth argued for perpetual copyright, but after 1837, when a new copyright legislation with a sixty-year term was proposed, he threw himself into lobbying for this compromise. In answer to the objection of publishers that the proposal would “tend to check the circulation of literature, and by so doing would prove injurious to the public,” he wrote:

what we want in these times, and are likely to want still more, is not the circulation of books, but of good books, and above all, the production of works, the authors of which look beyond the passing day, and are desirous of pleasing and instructing future generations... A conscientious author, who had a family to maintain, and prospect of descendants, would regard the additional labour bestowed upon any considerable work he might have in hand, in the light of an insurance of money upon his own life for the benefit of his issue... Deny it to him, and you unfeelingly leave a weight upon his spirits, which must deaden his exertions; or you force him to turn his faculties... to inferior employments. (‘To the Editor of the Kendal Mercury’ 312)

His exalted understanding of an author’s calling leads Wordsworth to advocate an expansive view of copyright protection. The new legislation he hoped for was not forthcoming until 1842, and even then the proponents of greater protection had to settle for forty-two years (or, if the author survived that period, life plus seven years). Only gradually would the term of copyright edge toward the present basic formula of the life of the author plus fifty years. But, as Peter Jaszi has shown, since the time of Wordsworth’s intervention copyright law has been informed by the aim of self-declaring original genius—which has in turn been empowered by this body of law (474ff.).

After the divergence of literary and legal theory it was possible to overlook the substantial contribution of Romantic aesthetics to our law of texts, with the result that while legal theory participated in the construction of the modern “author,” has yet to be affected by the structuralist and poststructuralist critique of authorship that we have been witnessing in literary and composition studies for two decades now.

This is not to say that scholars in literature and composition have wholly accepted the postmodernist claim of the death of the author. Indeed a resurgence of interest in the “author” and cognates of the term—individuals, selves, persons, and so on—is currently noticeable. Thus, Sean Burke argues that after Derrida literary theory should acknowledge the untidy “proximity of work and life” (170) and struggle anew with the “unquiet presence” of the author not as a function of Cartesian certitude... but as a principle of uncertainty in the text, like the Heisenbergian scientist whose presence invariably disrupts the scientificity of the observation
(17). Writing with specific reference to composition studies, Susan Miller has called for a rejection of strictly reader-centered approaches in favor of a new "textual rhetoric" that would "insist on historicizing descriptions of writing" and "direct us to acknowledge each writing event's relation to its writer, place both in changing material and social circumstances for writing, and relate each to broadly generic textual developments they inevitably encounter" (37). And in this journal Reed Dassenbrock recently went so far as to urge that the proprietary element in authorship be reintegrated into our theories of writing and reading.

Where the law is concerned such revisionary proposals may be beside the point, however, for as the French copyright authority, Michel Vivant, put it, while "deconstructivist" philosophy may well say that the author is dead, . . . he is still celebrated in the writings of many jurists, and everything, at least in those writings, seems to be based on him" (69). Whatever the value of recent proposals to revive the "author" in literary studies—coming as they do at the end of two decades of intense scrutiny of this concept—we believe that such proposals overlook the adverse ways in which proprietary authorship shapes the law governing our textual practices as scholars, teachers, and students. And this makes it imperative to reopen the conversation between the law and literary theory that broke off in the nineteenth century. That is the object of the interdisciplinary project out of which the present essay grows.

According to the Copyright Act of 1976, copyright subsists in "original works of authorship fixed in any tangible medium of expression." In recent years courts have taken their charge to safeguard "original authorship" ever more seriously, with the result that the intellectual commons on which we may draw freely as writers and readers, scholars and teachers, is shrinking fast. This enclosure of the public domain is making itself felt both locally and globally, and the chief engine of this trend is the Romantic authorship construct.

The trend is vividly illustrated by the evolution of the law's interpretation of an author's "work" as the subject matter of copyright protection. As recently as 1853 this notion does not appear to have included the work's translation into other languages. When Harriet Beecher Stowe complained about an unauthorized German version of Uncle Tom's Cabin, the court sided with the translator on the grounds that Stowe's rights were not infringed. "A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conception," it ruled in Stowe v. Thomas, "but in no correct sense can it be called a copy of her book." Its reasoning was that an "author's exclusive property in a literary composition, or his [sic] copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions" (207). To this court Stowe's protected work consisted, in short, of the literal text of the English version and little more. Today, of course, we feel that translations into other languages belong to a work, but what about more distant variations such as, say, parodies?
By the 1990s the scope of the “work” for which an author can legitimately claim protection had grown so dramatically that even parody could be pronounced an infringement of copyright. In *Acuff-Rose Music, Inc. v. Campbell* the popular rap group 2 Live Crew was sued for its use of the old Roy Orbison/William Dees hit “Oh, Pretty Woman” in defiance of the copyright owners’ refusal of permission. It seems that 2 Live Crew appropriated the music and meter of the earlier song to a substantial degree while altering all but the first line of its lyrics. The result is a parody of the original song designed, according to the expert musicological testimony in the case, to expose the blandness and banality of the original song. It is just one example of this “anti-establishment” group’s “derisive approach to ‘white-centered’ popular music,” the same expert testified, and “consistent with a long tradition in the United States of making social commentary through music” (1433). To the U.S. Court of Appeals, however, such critical objectives seemed incompatible with the commercial one of profiting from sales of the parody. It reversed a lower court finding in favor of 2 Live Crew on the grounds that the group’s parodic use amounted “to purloining a substantial portion of the essence of the original” (1438). Inasmuch as the resulting new work was intended for commercial distribution, the Court ruled, it could be presumed to adversely affect the market for the original.

As this decision shows, the penumbral reach of the “work” protected by copyright has expanded to include not only translations but a seemingly infinite series of imaginable variations thereon—including variations as opposite as parody. Indeed, *Acuff-Rose* seemed to render all critical commentary suspect insofar as it must make use of quotation and is carried on in the expectation of some kind of profit. To observers troubled by this development it was thus a relief to learn that the Supreme Court had agreed to review the case.

In 1994 the Supreme Court set aside the Appeals Court decision in *Acuff-Rose* in language that reaffirmed the value of critique. However, this victory for access to copyrighted information is both modest and tentative. For the case is to go back to the trial court for reconsideration, making the outcome of this particular dispute still uncertain. More importantly in the present context, in returning the case the Court expressed no general reservations about the erosion of the intellectual commons through expansion of the scope of copyright protection.

Over the almost three hundred years of its existence the trend in copyright law has been toward longer and longer terms of protection, against more and more kinds of unauthorized uses, to more and more different kinds of so-called “works.” Our object here is to alert readers to this development and call attention to its source in the general subjection of intellectual property law to a Romantic aesthetics that is no longer current in literary and composition studies. Thus, for example, the assumption in the appellate court’s ruling in *Acuff-Rose* that because it was executed for profit, the 2 Live Crew version of “Oh, Pretty Woman” cannot be genuine parody, but only parody in some extended “popular” sense, recapitulate
Wordsworth's self-serving argument for perpetual copyright, which disparages the literary value of any text capable of bringing immediate profit. But the Supreme Court's affirmation of the parodist's interest in access invokes an equally Romantic notion—that of "transformative" appropriation. In the view of the Court, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use" (Campbell v. Acuff-Rose 1171). In what follows we sketch some of the ways in which the expansionist trend in copyright is affecting or will soon affect teachers, scholars, and critics like ourselves.

II

To "Promote the Progress of Science and the Useful Arts" the Constitution provided for the enactment of copyright laws "securing for limited Times to Authors ... the exclusive Right to their ... Writings." At the end of those "limited times," of course, these writings enter the "public domain" from which all may draw at will. In addition, the copyright statute provides that even during the term of copyright others may make what it calls "fair use" of a work (see appendix). That is, in Karen LeFevre's description at the MLA "Law of Texts" forum, under certain circumstances they may use, or reproduce, portions of copyrighted works without having to provide compensation or even obtain the copyright owner's permission. As interpreted by the courts, such "fair uses" have traditionally included criticism, news reporting, teaching, and scholarship. But recent court rulings have raised doubts about the vitality of this doctrine. The sort of criticism of contemporary values and institutions that is in jeopardy in cases like Acuff-Rose is but one of the so-called "fair uses" that had traditionally been allowed. Recent court rulings have sharply restricted other unauthorized uses of both published and unpublished works in ways that may drastically curtail our activities as teachers and scholars.

As teachers we have come to rely increasingly on photocopying. Many of us had even begun, with the aid of our campus Kinko's, to design our own individualized course anthologies—when a federal court ruled in Basic Books v. Kinko's (1991) that such anthologies could exceed fair use unless permission were obtained for each selection. The ensuing "logistical nightmare," in Karen LeFevre's phrase, hardly needs to be described here. It will suffice to quote the cartoon by Vivian Scott Hixon in the Chronicle of 10 June 1992 which depicts one teacher happily announcing to another, "This is the best reading list I've ever developed; there's nothing in it that's still under copyright!" (B7). Central to the decision against Kinko's was the finding that it had been engaged in strictly "non-transformative repackaging" of the unauthorized excerpts included in the anthologies it reproduced. Al-
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though in each case the materials had been chosen by instructors to suit their own courses, culled from diverse books, articles, and other publications, and assembled in packages totaling hundreds of pages, the court held that

in this case, there was absolutely no literary effort made by Kinko’s to expand upon or contextualize the materials copied. The excerpts in suit were merely copied bound into a new form, and sold. . . . The copying in suit had productive value only to the extent that it put an entire semester’s resources in one bound volume for students. It required the judgment of the professors to compile it, though none of Kinko’s. (1530–31)

Would the outcome have been different if the professors rather than the commercial copy shop had been sued? Would the exercise of their judgment have been enough to qualify as “transformative”? The value added to the individual material in question by their being juxtaposed with one another between the covers of a single volume seems to have been lost on this court, which brought a Romantic notion of genuinely authorial activity to bear on the case.

In Romantic ideology the collective and collaborative element in composition—including the cutting and pasting—is denied. An author is not thought to create by selecting and arranging inherited ideas but to be the very source, or origin, of new ideas—or at least to “transform” received ideas in the loaded sense that the young Goethe had in mind when he described writing as “the reproduction of the world around me by means of the internal world which takes hold of, combines, creates anew, kneads everything and puts it down again in its own form, manner” (Letter to Jacobi 116). Viewed in this light, Kinko’s course packets would indeed seem to exhibit “absolutely no literary effort.” The tendency to privilege uses that are thus “transformative” was carried forward when the U.S. Court of Appeals for the Second Circuit declared in American Geophysical Union v. Texaco (1994) to treat the photocopying of scientific journal articles by a corporate research scientist as a “fair use.” The researcher had not incorporated material from the photocopies in his publications, and the court concluded that such copying was “archival” rather than genuinely transformative—it “merely transform[ed] the material object embodying the intangible article that is the copyrighted original work,” rather than the “original work” itself. Ominously, the court reasoned that “the concept of ‘transformative’ use would be extended beyond recognition if it was applied to [scientist’s] copying merely because he acted in the course of doing research (891–92).

Copyright law in general and the increasingly restrictive view of “fair use” current in our courts also affect us as scholars by limiting our access to archival source materials in the form of unpublished manuscripts, letters, notebooks, and the like. Since the landmark Supreme Court case of Harper & Row Publishers, Inc. v. Nation Enterprises in 1985 American judges have been interpreting copyright and “fair use” in ways that restrict our freedom to use such sources in our own writings.
The effect of that decision, which involved a news story incorporating unauthorized quotations from former President Gerald Ford’s unpublished memoirs, was to confine the “fair use” doctrine in situations involving “unpublished” works by overtly privileging one of the “exclusive rights” of the copyright owner—the so-called “right of first publication.” That act of privileging, in turn, was accomplished by invoking the notion of a strong, quasi-paternal bond between “author” and “work,” with all its overtones of Romantic aesthetic ideology:

The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from the other Sec. 106 rights in that only one person can be the first publisher. . . . Because the potential damage to the author from judicially enforced “sharing” of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts. (553)

Not coincidentally, the Harper & Row decision created in American law the functional equivalent of the near-absolute “droit de divulgation” (or right of first disclosure) which has long been one of the “moral rights” of authors recognized in the many civil law countries where the Romantic “author construct” has been an even more visible (if not necessarily more powerful) shaping influence on law.

Since 1985 the only question about the reinvigorated “right of first publication” has been whether it was itself effectively absolute, or whether on the other hand it might still be subject to some “fair use” limitation. The early decisions, including well-known cases involving attempted biographical uses of letters by J. D. Salinger and L. Ron Hubbard, were not encouraging. In the first case the talismanic “unpublished” character of the letters won out over the biographer’s “fair use” claim, even though the letters were readily available to researchers in academic libraries (Salinger v. Random House). In the second even the apparent relevance of the quoted portions of the subject’s letter to the biographer’s critical portrayal of his character was insufficient to establish a basis for a “fair use” defense (New Era Publishing International v. Henry Holt & Co.).

Since this first round of cases involving claims of “fair use” in unpublished materials, there have been further developments—including signs of retrenchment in the courts and new legislation from the Congress. In Wright v. Warner Books (1992), for example, the same court that had decided against the biographers of Salinger and Hubbard found for a biographer who made use of unpublished letters and journals by Richard Wright. Somewhat paradoxically, however, the use was justified in part because the quoted portions of Wright’s letters struck the court as themselves deficient in “authorship.” Donning the mantle of the literary critic, it ruled:

Of the ten quoted sections, four bear Wright’s stamp of creativity and meet the threshold test of copyright protection. The other six tersely convey mundane details of Wright’s life and serve only to illustrate Dr. Walker’s friendship with Wright . . . and [thus] are not entitled to copyright protection. (736)
The very arbitrariness of this distinction between the unprotectably terse and the certifiably creative deprives this opinion of much of the value it might otherwise have as a guide to scholars. Nor can we glean much from recent legislation, which has added to the “fair use” section of the Copyright Act the equivocal statement that “the fact that a work is unpublished shall not itself bar a finding of fair use.” This amendment apparently was designed to return the law to 1985 when the Supreme Court in *Harper & Row* announced its strong, although theoretically rebuttable, presumption that any unauthorized use of an unpublished work is unfair. Thus, whatever comfort we may take from learning that the limitation on “fair use” defenses in cases involving “unpublished” works is not absolutely absolute cool with the recognition that we cannot realistically hope that the defense will be given significant scope in practice.

For the historian and the literary biographer, then, the dilemma remains much as it has been, and the “chilling effect” of the law’s uncertainty is compounded by the conservatism of publishers and their lawyers. As David Garrow has noted, there is a “fairly long list” of “scholars [who have] been forced to truncate their biographies or works of history because of their inability to quote from unpublished letters or other documents without running the risk of litigation” (“Law of Texts forum). Presumably the same is true—or soon may be—for textual scholars as well. It is more than a little ironic that our ability to comment on past authors and their work is being thus constrained by the long shadow of their very authorial persona.

Moreover, the chill is likely to be still more frigid in years to come. As we write the Congress has approved legislation to implement the Final Act of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Tucked away in the omnibus legislation is a provision that will automatically restore protection under U.S. copyright law for uncounted thousands of foreign works now in the public domain—including many that have enjoyed copyright protection in this country. A wide range of twentieth-century literary texts, musical compositions, photographs, paintings, and other works of art—the raw materials of many contemporary artists and scholars—will receive a new lease on copyright life. Such legislation may yield greater protection for U.S. copyright exports abroad, but it will also supported by another rationale, which goes closer to the heart of the matter that this was the right thing to do in the cause of authors’ rights. Speaking in favor of the legislation last October, then-chairman of the House Judiciary Subcommittee on Intellectual Property, Representative William Hughes, put it:

> Because of the United States’ unique history of depriving authors of their copyrights for failure to comply with formalities, there are works of foreign Bernc origin that are in the public domain in the United States for reasons other than expiration of term (Hughes F.2264; emphasis added).

In defense of the legislation it is simply a matter of the entitlements of “authors, once unfairly denied, being—justly—restored. It might seem to follow from such
reasoning that domestic authors ought to receive the same consideration, and in
fact a drive for just such copyright “restoration” seems almost inevitable in light of
the 1994 legislation.

Meanwhile, concrete proposals for further raids on the public domain are
making their way through Congress. H.R. 989, the proposed “Copyright Term
Extension Act of 1995,” would increase the basic term of copyright for new works
created in the United States from fifty to seventy years post mortem auctoris and
give an additional twenty years of protection to works currently under copyright.
Even if it had strictly prospective effect such legislation would be hard to reconcile
with the traditional utilitarian rhetoric of public benefit. As Dennis Karjala has
recently written, expressing skepticism about the project of term extension as a
whole,

copyright protection is a balance between an incentive for authors to create desirable
new works and the public interest in a large and vibrant public domain from which
later authors can extract materials for new creative works. It is implausible that an
additional twenty years of protection . . . would provide any further incentive than
the current term.

But when it is given retroactive effect, term extension can be understood only in
terms of inherent entitlement—an author’s natural right transformed into an an-
nuity for his or her heirs along with legal power to impose their particular visions
of authorial intention. Thus, the widow of Frank Loesser, having detected “a
changed line involving the color of Sky Masterson’s tie” in the recent revival of Guys
and Dolls, was able to make “the director restore the original,” according to the New
York Times, and looked forward to an extension of her right “to police her husband’s
artistic legacy for authenticity” (Blumenthal). In Great Britain, where the desir-
ability of adopting a retroactively applicable seventy year p.m.a. term is also being
debated, John Sutherland warns that as those of us who buy “classic reprints” will
have noticed, “good editions of great works coincide with the end of copyright pro-
tection” (3; emphasis added).

Here, as in Great Britain, the costs of copyright restoration and term exten-
sion will be borne, in large part, by the educational community. In the future new
scholarly and pedagogical projects will be more difficult and expensive to launch as
a result of these new incursions on the intellectual commons in the name of “au-
thors’ rights.”

Many of us have begun to see our careers as scholars and teachers as intimately
bound up with the progress of electronic data technology—and particularly the
technology of digital networks, whether the Internet or the promised Electronic
Data Superhighway of the future. And as anyone knows who has used a network to
send or receive e-mail, to access distant libraries, to tap into data bases, or to par-
ticipate in electronic bulletin boards, the network environment of today is polyvoca-
cal, polymorphous, and even chaotic, characterized by the exchange of tremendous
amounts of miscellaneous information with little apparent concern for claims of proprietorship.

Jay Bolter has described these digital communication networks as constituting an "enormous hypertext," illustrating his point by reference to the phenomenon of network "newsgroups":

Each message is a unit of text, and these texts are called up and displayed at the reader’s request. In a newsgroup, each message is sent simultaneously to hundred or thousands of readers. A reader can then reply to the message, and that reply is "published" for the whole readership. There may be replies to the replies, engaging debates that can last for months. Each reply may incorporate text or other links to previous messages. So each newsgroup is a disorganized collaborative hypertext. And the whole Internet consisting of hundreds of newsgroups and probably millions of messages is a vast hypertext that spreads its reticulations over the United States and around the world. It is a text that changes minute by minute, as users add messages and as moderators and systems delete them. None of which is more than a tiny fraction of the messages, and no reader can read more than a fraction. ("Law of Texts" forum)

From our standpoint as teachers and scholars, the liberating potential of this medium may lie precisely in the networks' freedom from the sorts of controls—legal and otherwise—to which other information technologies such as print are subject. Through the networks we can envision the end of publishing as we have known it, but to the traditional proprietors of information that vision is a profoundly threatening one. As Pamela Samuelson has noted, the very ease with which material can be copied and distributed digitally makes copyright industries (publishers, software companies, film producers, and so on) want to submit the Internet and the network of the future to more rigorous copyright discipline.

At a recent seminar covered in Rights, the journal of the International Publishers Association, Nicholas Negroponte of MIT is reported to have offered the opinion that

with increasing customization directed to individual demand, “books will be written for an audience of one.” The reader will be able to engage in conversation with the publisher/producer and ask questions, go deeper and deeper into a subject as his wishes. . . . Eventually the publisher will be publishing “an idea and not the form” concepts of copyright may not apply. “I am not sure copyright law would cover interaction.” Furthermore, copyright has “been in the hands of the author not the reader. . . . Expression will now be partly in the hands of the reader.” (“A Look in the Electronic Future”)

No wonder publishers are intent on “controlling electronic rights”: “If we lose the electronic publishing battle,” they fear, “we will have worldwide uncontrollable piracy” (“Controlling Electronic Rights”).

In short, a battle is shaping over the future of the Internet and its success. On one side are those who see its potential as a threat to traditional notions
individual proprietorship in information, and who perceive vigorous extension of traditional copyright principles to the new information environment as the solution. On the other side are those who believe that the network environment could become a new cultural “commons” if its development is not stifled by premature or excessive legal controls. In the next few years this battle will be fought on several fronts. Indeed, it is arguable that the first skirmish has already been concluded almost without a shot being fired. In 1992 the Congress adopted severe new felony penalties for the reproduction of multiple copies of copyrighted works, and these new provisions add significantly to the legal uncertainty in which participants in electronic networks now operate.

More generally, there is profound uncertainty about how the principle of “fair use” will apply in the network environment. Pamela Samuelson has noted that the recent developments in the law relating to photocopying, including in particular the restrictive view of “fair use” taken by the courts in the Kinko’s and Texaco cases, has potentially far-reaching implications for the regulation of network environments. Another portent is the recent Preliminary Draft of the Report of the Working Group on Intellectual Property Rights of the administration’s Information Infrastructure Task Force, which has been charged with recommending changes in the laws to take account of the new digital communications environment.

The Report recommends changes in the Copyright Act which would make simple unauthorized digital transmission of a protected work a copyright violation, and it also serves notice that—if the Working Group has its way—the role of “fair use” in the National Information Infrastructure will be a very limited one indeed. In its conclusion the Report articulates a vision of the digital future in which “information contained in protected works” is “freely available” but not necessarily “available free,” and recommends the reopening for possible revision of the guidelines on educational fair use under which the American educational community has operated since 1978, on the grounds that it is “difficult and, perhaps, inappropriate to apply the specific language of some of those guidelines in the context of digital works and on-line services” (Working Group 133–34).

In addition, the next decade will see efforts to bring about recognition of new forms of intellectual property, both outside copyright law and within it. Into the former category fall initiatives, already well underway in Europe, to create new rights in “databases,” beyond the limited rights recognized in copyright, in recognition of the financial stake of the firms that invest in their creation, and despite the absence of the earmarks of “authorship” in the traditional sense from that process (“Proposal for a Council Directive on Databases”). In the latter category we will see concerted efforts to reimagine “authorship” so as to encompass more and more aspects of the network “commons”—to sweep in, for example, the efforts of so-called “infopreneurs” who trade in their skills in retrieving information from the myriad sites at which it may be found throughout the network.
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Given the stakes, it seems unlikely, and possibly even undesirable, that a network “commons” would be preserved as a pristine “proprietor-free zone.” Some measure of regulation is inevitable, and it may even be essential if information proprietors are to participate fully in the networks. But teachers and scholars have a stake in assuring that the form of that regulation meets their needs as well as those of information proprietors. We must insist that discussion of the legal future of the network is informed by a considered balancing of competing interests rather than by the charged mythology of Romantic “authorship.” Having played so important a role in the creation and perpetuation of that mythology in the past, literary and composition studies now has an obligation to help to refocus the debate over the futures of information technology.

In addition, as network writers and readers whose stakes in our work generally have more to do with status than with pecuniary return, we have a special opportunity to point the way toward one of those futures—the vision of “coylef” articulated by Richard Stallmann, in which participants in a given forum of communication such as the Internet would actively renounce proprietary claims at the outset (“Gnu set to take on Unix”). We should consider whether, in the existing environment of Internet bulletin boards and newsgroups, or in the context of digital experiments such as electronic journals, we could realize this vision through our own disclaimers of “authorship.”

III

There are a number of other steps that readers might take to resist the trend that we have described. In particular, we must respond promptly and effectively to the aspects of the copyright “reform” agenda that could adversely affect our practices as teachers, students, scholars, and critics.

First, we need to organize to preserve the concept of educational “fair use” from further erosion, both with respect to print media and in the context of the emerging digital communications environment. The next several years will see renewed efforts on the part of publishers, in the courts and in the Congress, to subject academic users to ever more rigorous copyright discipline, and as a community we have important roles to play: in lobbying the legislature and in helping to stiffen the resolve of our own universities to resist coercive pressure to make unreasonable concessions to copyright proprietors.

Second, we should resist further plundering of the “public domain.” Passage of the GATT implementation legislation, with its “copyright restoration” provisions, is going to lead to “test cases” challenging the constitutionality of retroactive grants of intellectual property protection. Our community should be prepared to stand and be counted on the issue, either as parties to such litigation or through the submission of amicus briefs. We must also be prepared to oppose the inevitable
pressure for application of the copyright restoration principle to works of domestic authorship.

Third, we must make ourselves heard on the issue of copyright term extension, discussed at length above, which could well come up for a final vote in the current session of Congress.

Fourth, we must be alert to other potential legislative initiatives as well. In 1994 Congress came perilously close to passing legislation (H.R. 897) that would have eliminated most legal incentives for the registration and deposit of copyrighted works with the Copyright Office of the Library of Congress. In the name of eliminating burdens on the exercise of "authors' rights," the bill would have eliminated the main mechanism by which the Library's unparalleled collections of published and unpublished materials have been developed over the years. We may expect further such bills in years to come.

The academic community in general, and the disciplines of literary and composition studies in particular, have been too slow or too timid in responding to new copyright proposals. And we have paid a price. Today we run a real risk of once again being left behind—or simply left out—as the discussion of "reform" proceeds.

Fortunately our community does have vehicles through which to exert its influence. In Washington the Educators' Ad Hoc Committee on Copyright Law invites support from elementary, secondary, and college teachers and administrators [August Steinhilber, National School Boards Association, 1680 Duke St., Alexandria, VA 22314; (703) 838-6722]. Organized to contribute to the deliberations over copyright reform which produced the general revision of 1976, the Ad Hoc Committee has been an important voice for educators resisting the trivialization of "fair use" and insisting on maintenance of the balance between proprietors' and users' interests which is the hallmark of traditional American copyright. It could continue to play this role as "fair use" is subjected to new challenges. Meanwhile, the American Library Association is organizing to represent academic and non-academic libraries (and their users) in the coming debates over copyright regulation of the National Information Infrastructure (NII). The ALA and other library groups recently issued an important statement outlining their positions, "Fair Use in the Electronic Age: Serving the Public Interest" (contact Anne Henee, alawash@alawash.org). And an informally organized group of law professors is attempting to stir up more general academic resistance to proposals for copyright term extension, with Dennis Karjala at Arizona State University coordinating efforts (dennis.karjala@asu.edu).

In addition, our professional organizations—the Modern Language Association, the National Council of Teachers of English, and the Conference on College Composition and Communication—might get formally involved by establishing standing committees to study and recommend positions on developments in copyright law. We note that a first step was taken at the 1994 annual Conference on Col-
of domestic conflicts in the form of a "black hat" vote in the resolution of抄袭. In the name of authors' rights we have to challenge new copyright,
sociation in December 1992 twenty-four scholars and practitioners of the law and literature/rhetoric came together to consider “The Law of Texts: Copyright in the Academy.” Some of the material contained in the present essay derives from the transcripts of this forum.

APPENDIX

Section 107 of the Copyright Act, 17 U.S. Code

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 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.

WORKS CITED


Karjala, Dennis. Letter to Greg Simon, Domestic Policy Advisor to the Vice President, nd.


United States Constitution, Art. I, Clause 8, Section 8.


Postscript: The White Paper of the NII Task Force’s Working Group on Intellectual Property has now appeared (the text is available at http://www.uspto.gov/web/ipnii; for an analysis by a group of law teachers, e-mail pjjaszi@american.edu). Although it expresses a nominally more flexible view of fair use than did the earlier draft (780), its proposals may have severely restrictive effects: even electronic “browsing” of copyrighted materials could constitute infringement. Concerned readers should prepare to participate, as individuals and through their professional organizations, in the coming Congressional deliberations.