



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

A Day at the Courtroom

Eva

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

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

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

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

Andrea

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

WHÄIS OFF BIEJING DSCHON BÖRGA

Ä Tränsläischen bei Sarah Lüdemann

Biejing kams bifoa Whöads. Sö Tschelid lucks änt räköckneises bifoa it kån fpiiek.

Bat sãa iss oolifou ennasa flänns in whitsch Biejing kams bifoa Whöads. It iss Biejing whitsch estäbliches aus Piaif in sö Böraundig Whöalt; whi ekaplän sätt Whöalt whifö Whöads, bat Whöads kån newwa anndu sö Fäkt sätt whi aa Böraundet bei it. Sö Riläischen bitwien whoat whi fie änt whoat whi nou iss newwa fättelt.



Sö furrealist Päinta Magrit kommentet on sif
oolwäis-present Gåp bitwien Whöads änt Biejing in ä Painting
koolt Sö Kie off Dilems.

Sö Whäi whi fie fings iss effäktet bei whoat whi

Author: Sarah Lüdemann, UK

Whäis off Biejing

Date: 2011

Format: 20 x 13 cm, 156 pages

ISBN: None

Source: John Berger, *Ways of Seeing*

Publisher: Self-published

Printing: Blurb.com, perfect binding

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

WHÄIS OFF SSIEJING

Andrea

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

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

Sergio

Can you clarify what you mean by translation?

Eva

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

Andrea

Can you read a bit?

Eva reads from the book. Laughter.

Andrea

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

Eva

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

Prodromos

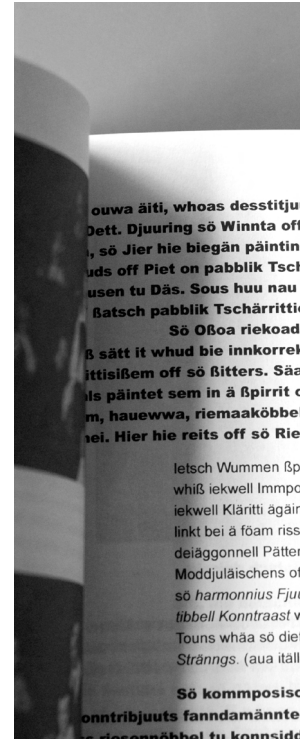
How many copies has she sold? And how much is she selling them for?

Eva

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

Lionel

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



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

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

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

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

Prodromos

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

Eva

It is the same. She used the same type.

Prodromos

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

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

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

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

Jury Member

Is parody a legally recognised exception?

Prodromos

Yes.

Lionel

Yes and no.

Prodromos

I would say yes.

Lionel

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

Prodromos

But it is within the European Union...

Lionel

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

Prodromos

On the continent yes.

Jury Member

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

Andrea

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

Parody - Copyright Issues

United States

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

United Kingdom

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

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

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

- Enforcement of copyright is contrary to the public interest.

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

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

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

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

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

Prodromos

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

Sergio

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

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

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

Lionel

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

Sergio

Yes.

Prodromos

It does, right.

Sergio

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

Jury Member 2

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

Sergio

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

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

Jury Member 2

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

Sergio

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

Jury Member 2

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

Eva

You mean a facsimile of the original?

Jury Member 2

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

Lionel

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

Prodromos

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

Sergio

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

Jury Member 2

Is the translation relevant to win the case?

Sergio

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

Jury Member 2

But it would still be copyright infringement?

Prodromos

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

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

Eva

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

Prodromos

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

Sergio

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

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

Eva

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

Sergio

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

Lionel

That's slightly different here in the UK.

Prodromos

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

Lionel

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

Prodromos

Shall we say that's a compromise?

Eva

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

Jury Member 3

Me?

Eva

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

Jury Member 3

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

Sergio

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

Sergio

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

Jury Member 4

Does satire have a function?

Sergio

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

Andrea

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

Eva

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

NEW YORK TIMES SPECIAL EDITION

Eva

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

Infopaq International A/S v Danske Dagblades Forening

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

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

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

Lionel

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

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

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

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

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

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

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

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

Jury Member 3

So you would have to research the reception?

Lionel

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

Jury Member 4

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

Lionel

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

Prodromos

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

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

Neighbouring Rights

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

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

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

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

Lionel

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

Prodromos

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

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

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

Sergio

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

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

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

Eva

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

Sergio

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

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

Prodromos

That's really a problem.

Eva

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

Jury Member

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

Eva

They were written by the artist collective and collaborators.

Jury Member

What about the adverts?

Eva

They're all made up...I think.

Jury Member

But I can see an HSBC ad there.

Andrea

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

Jury Member

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

Eva

They are all fictitious but they use the logo.

Sergio

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

Eva

Where would you place it Sergio?

Lionel

I would put it – if somewhere – here again.

Prodromos

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

Andrea

How does the jury feel about it?

Jury Member 1

Do we have to restrict it to copyright?

Jury Member 2

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

Lionel

Yes, there should be.

Sergio

Not in the US.

Prodromos

It wouldn't be artistic work?

Sergio

No, it's a font.

Prodromos

Is that not a design?

Sergio

Trademark, and the fonts probably protected by patents.

Prodromos

OK.

Sergio

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

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

Jury Member 2

Isn't there any copyright on the fonts here?

Lionel

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

Prodromos

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

Jury Member

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

Lionel

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

Jury Member

Yes.

Lionel

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

Sergio

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

Prodromos

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

Castle Rock Entertainment Inc. v. Carol Publishing Group

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

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

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

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

Andrea

Does the jury agree?

Prodromos

It's a nice place there...

SUITCASE BODY IS MISSING WOMAN

Andrea

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

US Copyright Act of 1976

Subject matter of copyright

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

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

Sergio

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

Eva

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

Sergio

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

**SUITCASE
BODY IS
MISSING
WOMAN**

EVA WEINMAYR

Author: Eva Weinmayr,

Suitcase Body Is Missing Woman

Date: 2005

Format: 210x140 cm, 40 pages, soft cover;

ISBN: 978 1 870699 77 8

Source: Evening Standard newsstand posters

Publisher: Book Works

Printing: offset, color, perfect binding

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

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

Jury Member

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

Sergio

It doesn't mean that it's lawful.

Andrea

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

Sergio

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

Jury Member

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

Sergio

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

Eva

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

Sergio

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

Jury Member

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

Lionel

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

Fair use under United States Law

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

Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. §106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for 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.

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

Eva

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

Sergio

That makes me think it probably is protected.

Lionel

Well, I don't know...

Sergio

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

Prodromos

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

Jury Member

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

Prodromos

No.

Jury Member I

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

Prodromos

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

Jury Member 2

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

Sergio

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

Jury Member 2

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

Sergio

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

Jury Member 3

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

Sergio

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

Lionel

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

Sergio

A drawing.

Jury Member 2

I would put that book on blue.

Sergio

Wait, why would you do that?

Jury Member 2

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

Sergio

The problem with that...

Jury Member 2

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

Sergio

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

Jury Member 2

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

Eva

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

Jury Member 2

How much money did you make?

Eva

I personally received £500 artist fee from the publisher.

Jury Member 3

How much does *The Evening Standard* employee get for his work? Do you know what’s his wage?

Eva

I don’t know.

Jury Member 3

Did you give him a free copy of the book?

Eva

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

Jury Member 2

And he never got back.

Eva

No.

Sergio

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

Jury Member 1

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

Eva

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

Lionel

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

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

Sergio

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

Prodromos

Or she makes a font.

Sergio

Right, rather than re-photographing.

Lionel

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

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

Prodromos

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

Eva

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

Lionel

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

Jury Member

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

Sergio

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

Jury Member

Before the computer it would be a designer handwriting...

Sergio

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

Prodromos

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

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

Sergio

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

Jury Member 4

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

Sergio

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

Jury Member 4

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

Sergio

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

Lionel

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

Jury Member 4

Is there expression in a fingerprint, for example?

Lionel

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

Sergio

Yeah you could...

Jury Member 4

There is originality but he said "expression."

Sergio

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

Prodromos

We will be going to another area entirely.

Sergio

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

Prodromos

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

Sergio

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

Andrea

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

Sergio

No.

Jury Member

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

Sergio

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

Jury Member

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

Sergio

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

Andrea

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

Prodromos

Orangey-red.

Jury Member 2

Blue.

Andrea

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

Sergio

How did that get in the blue?

Andrea

With a vote...

OCTOBER

Andrea

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

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

Jury Member

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

Andrea

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

Prodromos

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

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

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

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

Laughter.

Lionel

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

Eva

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

Lionel

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

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

Sergio

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

Sergio

It's probably as red as it can get...

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

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

12

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Author: Steven Kado

October Jr.

Date: 2010

Publisher: self-published

Format: 19 x 14 cm, 132pp

Printing:

ISBN: N/A

Source: October Magazine 12, MIT

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

Andrea

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

Prodromos

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

Sergio

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

Eva

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

Prodromos

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

Eva

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

Laughter.

Sergio

I just thought it was fun.

Eva

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

Prodromos

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

Lionel

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

Sergio

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

Eva

Would that work?

Laughter.

Cariou v. Prince

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

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

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

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

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

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

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

Sergio

I don't know if it would work...

Andrea

So red?

Jury Member

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

Lionel

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

Andrea

So, does everybody agree on red?

Eva

Yes.

Lionel

And you did it.

Laughter.

INTERNATIONAL COPYRIGHT

Eva

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

INTERNATIONAL COPYRIGHT

Principles, Law, and Practice

PAUL GOLDSTEIN

Author: Hester Barnard, Canada

Copied Right

Date: 2011

Publisher: Self-published

Format: 23 x 16 cm, 622 pages

Printing: Lulu.com, perfect binding

ISBN: None

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

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

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

Lionel

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

Prodromos

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

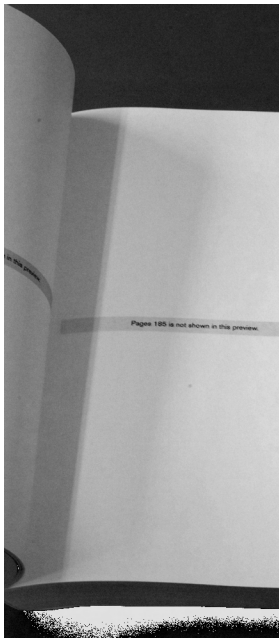
If it's clear that I can do this not through my browser but through the services then I would assume I have received a license from Google that has obtained a license from the authors and that would be the only defence I could see – that I got a license from Google to do so. But if I were to print it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

Sergio

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

Prodromos

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



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

Eva

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

Prodromos

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

Sergio

You don't think it meets those three?

Prodromos

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

Lionel

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

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

Andrea

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

Prodromos

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

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

Lionel

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

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

Sergio

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

Andrea

So would you put this towards red or blue?

Sergio

Blue.

Prodromos

We'll take our chances.

UNREALISED PROJECTS

Eva

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

Prodromos

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

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

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

Copyright law of the European Union permitted limitations are:

- paper reproductions by photocopying or similar methods, except of sheet music, if there is compensation for rightholders;
- reproductions made for private and non-commercial use if there is compensation for rightholders;
- reproductions by public libraries, educational institutions or archives for non-commercial use;
- preservation of recordings of broadcasts in official archives;
- reproductions of broadcasts by social, non-commercial institutions such as hospitals and prisons, if there is compensation to rightholders;
- use for illustration for teaching or scientific research, to the extent justified by the non-commercial purpose;
- uses directly related to a disability, to the extent justified by the disability;
- press reviews and news reporting;
- quotations for the purposes of criticism or review;
- uses for the purposes of public security or in administrative, parliamentary or judicial proceedings;
- uses of political speeches and extracts of public lectures, to the extent justified by public information;
- uses during religious or official celebrations;
- uses of works, such as architecture or sculpture, which are located permanently in public places;
- incidental inclusion in another work;
- use for the advertisement of the public exhibition or sale of art;
- caricature, parody or pastiche;
- use in connection with the demonstration or repair of equipment;
- use of a protected work (e.g., plans) for the reconstruction of a building;
- communication of works to the public within the premises of public libraries, educational institutions, museums or archives.

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

Andrea

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

Prodromos

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

Lynn

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

Prodromos

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

Lynn

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

Jury Member

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

Lynn

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

Lionel

Do you mind being associated with any of the...?

Lynn

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

Eva

What would happen if she was offended?

Lionel

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

betascript
publishing



Unrealised Projects

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

High Quality
Content
by WIKIPEDIA
articles!

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

Author: Betascript Publishing,

Unrealised Projects by Betascript Publishing

Date: 2011

Format: 23 x 13 cm, 64 pages

ISBN: 978-613-5-22491-7

Source: Wikipedia

Publisher:

Printing: POD, perfect bound

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

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

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

Lynn

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

Jury Member

It does seems to imply that you endorse it.

Prodromos

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

Eva

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

Lionel

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

Prodromos

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

Jury Member

Couldn’t that be a trademark infringement?

Prodromos

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

Sergio

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

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

Lynn

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

Sergio

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

Lionel

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

Lynn

Not much hope there.

Lionel

The hope is that the world will shun it.

Laughter.

Jury Member

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

Lynn

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

Prodromos

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

Sergio

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

Lynn

Yeah.

Lionel

So there could be a reputational interest in the title.

Andrea

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

Prodromos

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

Sergio

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

Andrea

Blue then.



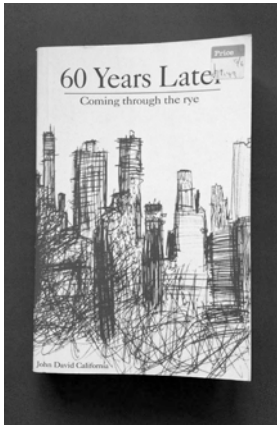
CATCHER IN THE RYE BY RICHARD PRINCE

Andrea

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

Eva

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



Sergio

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

Andrea

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

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

Eva

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

Sergio

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

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

Eva

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

Sergio

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

Eva

And then it is not valid.

Sergio

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

the **CATCHER**
in the **RYE**



a novel by **RICHARD PRINCE**

Author: Richard Prince

A Catcher in the Rye

Date: 2012

Format: A4

ISBN: N/A

Publisher: N/A

Printing: laser

Source: A Catcher in the Rye, Little Brown and Company, First edition (1951)

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

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

United States Court of Appeals for the Second Circuit

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

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

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

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

Lionel

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

Prodromos

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

Sergio

But what is the criticism of it?

Prodromos

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

Lionel

No, because of the legitimate interest of the author.

Prodromos

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

Lionel

To me this is in red.

Jury Member

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

Sergio

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

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

Roger v. Koons

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

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

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

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

The Court found both "substantial similarity" and that Koons had access to the picture. The similarity was so close that the average layperson would recognize the copying, a measure for evaluation. Thus the sculpture was found to be a copy of the work by Rogers.

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

http://en.wikipedia.org/wiki/Rogers_v._Koons

not their ideas.

Lionel

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

Sergio

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

Lionel

But she changes the meaning.

Sergio

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

Lionel

Doesn't it matter what the Supreme Court says?

Sergio

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

Lionel

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

Sergio

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

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

Jury member

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

Sergio

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

Jury member 2

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

Sergio

Those boxes are not under US Copyright Law.

Jury member 2

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

Prodromos

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

Andrea

Everybody agrees? Richard Prince on the red?

Lionel

I would put him even further.

Andrea

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

Jury Member

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

Campbell v. Acuff-Rose Music, Inc.

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

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

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

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

Lionel

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

Jury member 3

A collection of works for educational purposes?

Lionel

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

Jury Member

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

Lionel

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

Jury member 5

Would money have to exchange hands?

Lionel

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

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

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

Sergio

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

Eva

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

Prodromos

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

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

Jury member

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

Lionel

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

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

Relieved laughter.

Sergio

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

Eva

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

Jury Member

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

Lionel

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

Prodromos

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

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

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

Andrea

Thank you all so much for coming. Tom for helping with the set up. Thanks to The Showroom for hosting us and to Stephanie Thandiwe Johnstone for making the courtroom drawings.

copyright
a way of thinking about the
relationship between author
and reader

**copyright
has become a spectre haunting us**

Thanks to all, who contributed to the Piracy
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**Borrowing, Poaching, Plagiarising,
Pirating, Stealing, Gleaning,
Referencing, Leaking, Copying,
Imitating, Adapting, Faking,
Paraphrasing, Quoting, Reproducing,
Using, Counterfeiting, Repeating,
Translating, Cloning**

This book is not finished.

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

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

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

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

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

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