THE 2019–2020 INTELLECTUAL PROPERTY ANNUAL

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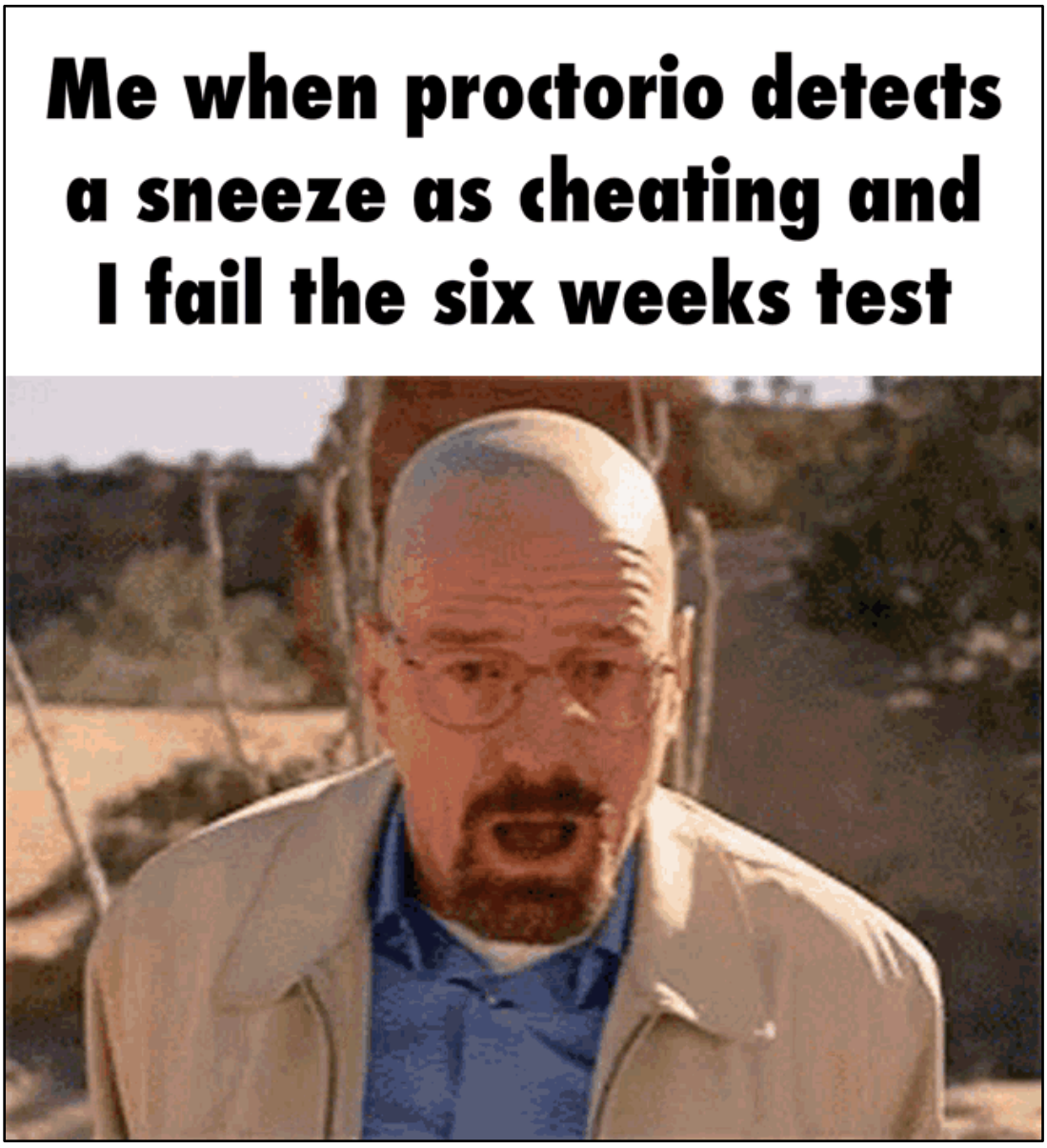
Clancy Ratliff

INTRODUCTION TO THE 2019–2020 ANNUAL

This is our first-ever, and hopefully last-ever, double issue of the *CCCC-IP Annual*. Our usual publication timetable results in a new issue every year in late spring or early summer. In spring of 2020, however, the COVID-19 global pandemic with its school closures and quarantining had forced everyone into different responsibilities, work habits, and new routines, especially mothers like me. When I told the Intellectual Property Standing Group that I'd have to roll the 2019 articles into the 2020 issue, Kim Gainer graciously replied, "'This year has thrown off so many plans that no one will be blinking an eye at the Annual taking a 'gap year.'"

This issue will also be my last as editor because I will soon be starting a term as co-editor of *Peitho*, the Coalition of Feminist Scholars in the History of Rhetoric and Composition's journal, and I'm thrilled to announce here that Karen Lunsford will be taking over the Annual. She has done a lot for this publication over the years, not only as a contributor but also as archivist, overseeing the uploading and cataloging of the archives of the *CCCC-IP Annual* in the University of California System's eScholarship open-access repository. I know she will be an outstanding editor.

Compared to 2020, 2019 was a typical year, at least a typical year in the Trump Administration. We saw climate disasters, police killings of unarmed people of color, environmental racism, mass shootings, astronomical student debt, corruption, and children and infants taken from their families at the southern border of the United States. In the thrall of shock doctrine, it can be hard to focus on copyright and intellectual property issues, but we can see IP policy and practice become more extreme as conditions become more extreme. Two examples show this: first, the increased use of surveillance software in educational technology (test proctoring tools, plagiarism detection software, etc.) as schools transitioned to remote learning. The CCCC Intellectual Property Standing Group is very concerned about the increase in use of these software tools, and we will soon be issuing a statement expressing these concerns in detail and affirming students' rights to privacy, academic freedom, and the work they create.


Me when proctorio detects a sneeze as cheating and I fail the six weeks test

The second example showing the escalation of intellectual property policies and norms in conjunction with extreme conditions is the case of COVID-19 vaccines. By now, Pfizer, Moderna, and Johnson & Johnson are household words associated with the vaccines that are saving lives. They are also holders of the patents for those vaccines. At this writing, according to the World Health Organization, 3,494,758 people have died of COVID-19 worldwide. Over three million people, dead.

Over three million people, dead.

Over three million people, dead, but it took months of debate for the United States government to declare its official position in favor of temporarily waiving those corporations' patents so that countries may manufacture their own vaccines. The patents have not yet been waived, and it remains to be seen if they will at all.

The last couple of years have also seen the continued development of cryptocurrency as well as non-fungible tokens, or NFTs, a means of ownership that exists only conceptually. In a March 2021 article for *Rolling Stone* announcing Kings of Leon's decision to release their new album as an NFT, Samantha Hissong offers one explanation:

> A quick rundown: NFTs are a type of cryptocurrency, but instead of holding money, they can hold assets like art, tickets, and music. NFTs operate on a blockchain, which is a publicly accessible and transparent network — meaning anyone can see the details of any NFT transaction. Computers involved in the transactions become part of the network, which keeps updating and can't be hacked due its nature as many-headed hydra. In the case of NFTs, their value becomes subjective and therefore fluctuates, kind of like stocks.

Tumblr user queersamus offers another explanation (I'm keeping the all-lowercase and punctuation of the original post):

> imagine if you went up to the mona lisa and you were like "i'd like to own this" and someone nearby went "give me 65 million dollars and i'll burn down an unspecified amount of the amazon rainforest in order to give you this receipt of purchase" and went to an unmarked supply closet in the back of the museum and posted a handmade label inside it behind the brooms that said "mona lisa currently owned by jacobgalapagos" so if anyone wants to know who owns it they'd have to find this specific closet in this specific hallway and look behind the correct brooms. and you went "can i take the mona lisa home now?" and they went "oh god no are you stupid? you only bought the receipt that says you own it, you didn't actually buy the mona lisa itself, you can't take the real mona lisa you idiot. you CAN take this though." and gave you the replica print in a cardboard tube that's sold in the gift shop. also the person selling you the receipt of purchase has at no point in time ever owned the mona lisa.
>
> unfortunately, if this doesn't really make sense or seem like any logical person would be happy about this exchange, then you've understood it perfectly

harblkun sugaredrefrain Follow

jacobgalapagos Follow

i dont know what an NFT is and im too afraid to ask

queersamus Follow

imagine if you went up to the mona lisa and you were like "i'd like to own this" and someone nearby went "give me 65 million dollars and i'll burn down an unspecified amount of the amazon rainforest in order to give you this receipt of purchase" so you paid them and they went "here's your receipt, thank you for your purchase" and went to an unmarked supply closet in the back of the museum and posted a handmade label inside it behind the brooms that said "mona lisa currently owned by jacobgalapagos" so if anyone wants to know who owns it they'd have to find this specific closet in this specific hallway and look behind the correct brooms. and you went "can i take the mona lisa home now?" and they went "oh god no are you stupid? you only bought the receipt that says you own it, you didn't actually buy the mona lisa itself, you can't take the real mona lisa you idiot. you CAN take this though." and gave you the replica print in a cardboard tube that's sold in the gift shop. also the person selling you the receipt of purchase has at no point in time ever owned the mona lisa.

unfortunately, if this doesn't really make sense or seem like any logical person would be happy about this exchange, then you've understood it perfectly

Source: jacobgalapagos

#reblogs #signal boost #ah good
#a nice clean post with a good analogy #thanks much

12,823 notes

I'm not sure what else to say about NFTs at this time; I don't have a fix yet on what their implications for rhetoric and composition studies may be, but I wanted to note their emergence in the last two years onto the intellectual property mediascape.

We have several very interesting essays in the 2019-2020 issue, but as a segue to introducing the articles, here is one last 2019-2020 meme, this time referring to white nationalist rallies:

On weaponizing algorithms, Devon Fitzgerald Ralston's essay in this issue reviews t-shirt bots that commit automated copyright violation: these bots find tweets that quote-tweet or reply to images with "I want this on a t-shirt," and the bots import the images to commerce websites to be printed on t-shirts to sell.

The artists whose work had been appropriated by the t-shirt bots quickly began manipulating the algorithm to call attention to the copyright infringement, which Ralston describes with helpful clarity. She raises the question of the CASE Act (Copyright Alternative in Small-claims Enforcement), which was designed to help independent artists pursue infringement claims in situations like this, but with the

caveat that the CASE Act can enable copyright trolls (entities that file many frivolous infringement claims as a means to use litigation to make money) and not address the matter of t-shirt bots or other acts of infringement that take place at high speed online.

I would recommend reading Ralston's essay as a lead-in to Kim Gainer's, as Gainer offers an excellent, well-researched briefing on the CASE Act. Gainer shows that what we do as rhetoricians and teachers of writing, regarding copyright, is a balancing act: we want copyright to be strong enough to protect small independent rightsholders like students, struggling artists and musicians, and minoritized cultures. But we want it to be weak enough to let those same people use copyrighted work, owned in some cases by large corporations that aggressively protect their intellectual property, to create new work and to have access to read, view, and listen to content.

As always, plagiarism has remained a part of the conversation about authorship and IP.

Steven Engel and April Johnson do not compare universities' responses to these two acts, but they do provide a valuable list of types of plagiarism in scholarly publishing that are relatively new: translation-plagiarism authorship, gift or reciprocal authorship, honorary authorship, paid co-authorship, bully authorship, fraudulent authorship, paper mill/essay mill authorship, and pharmaceutical ghost authorship. I'm proud to help bring this excellent scholarship about plagiarism to the rhetoric and composition community.

Wendy Warren Austin's essay acquaints us with China's shanzhai culture, reflecting on the creativity of knock-offs and the observation that imitation precedes innovation. China has long had not-quite-counterfeit versions of products that many of us will recognize:

Next, Mike Edwards relays the most recent news about Elsevier: while several universities have discontinued their subscription contracts with Elsevier, the corporation has been making counter-moves to change their business model. Instead

of working only with publishing, they have been infiltrating other phases of research, by marketing software that stores and visualizes data, for example. Edwards reiterates the call that he and others in the Intellectual Property Standing Group have made over the years, for the journals in our field that work with Elsevier to stop doing so.

Closing out this double issue is a review. Alex Nielsen reviews the latest strategic planning report from Creative Commons, which is celebrating its twentieth anniversary in 2021. He provides a thorough summary of the plan as well as some critique for its lack of specificity. Nielsen is diplomatic, even charitable, in this critique; while certainly the board of Creative Commons has specific projects planned, their omission in the report of the strategic plan is a little disappointing, making the report sound almost like an auto-generated sample strategic plan report drawing on common jargon: collaboration, advocacy, accountability, capacity building.

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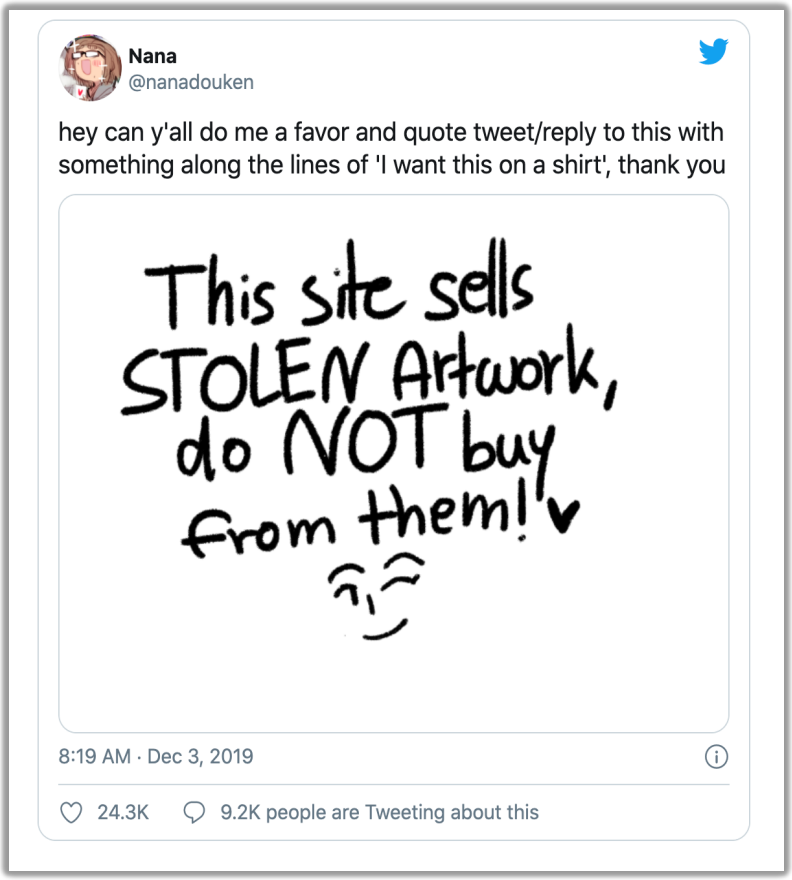
Devon Fitzgerald Ralston

T-SHIRT BOTS AND THE INDEPENDENT ARTIST: THE FIGHT AGAINST AUTOMATED INTELLECTUAL PROPERTY THEFT

Within illustrator, design, craft and art communities on social media, it isn't unusual to see some kind of self-promotion post, and it isn't unusual to ask followers to retweet or share a message, but it is atypical that followers are asked to tweet something that purposefully leads to copyright infringement. Yet, in December 2019 artists on Twitter asked their followers to join them in calling attention to a prevalent and frustrating problem almost any creator who shares their art (particularly images, drawings, and designs) faces: theft of their work. In this particular case, however, followers were not tweeting about a specific person, or website. This time the theft was automated and the designs scattered to numerous print-on-demand commerce sites.

When creators post their art (images, illustrations, calligraphy) on Twitter, followers often respond with "I'd love this on a t-shirt." This response occurred frequently enough that people began programming bots to find and scrape images associated with such tweets so they could be printed on t-shirts, and sold cheaply without crediting the artist. To confirm this theory that bots sought out specific phrases in order to generate t-shirt designs, artists who almost exclusively use internet platforms to share and circulate their work wanted to see how far they could push the algorithm. They wondered, in fact, if they could use it against the sites that profit off of their stolen designs.

Twitter user and artist @Nanadouken encouraged her followers to retweet an image she created that read "This site sells stolen artwork. Do not buy from them" accompanied with a smiley face. She suggested the retweet include "I want this on a t-shirt" or a similar phrase, since this is what the bots typically use as a search term (Ramos).



In under 24 hours well-known sites like ToucanStyle, GearPress, TeeChipOfficial and even store listings on Amazon were displaying shirts with the text declaring the image as stolen. The idea of using the algorithm against the bots was quickly taken up by other artists on Twitter who included memes and intellectual property of Nintendo and Disney with sayings like "Not licensed by the Walt Disney Company. This is NOT a parody! We committed copyright infringement and want to be sued by Disney. We pay ALL court and tribunal fees" (Morris and Pressman). The move to fight the algorithms drew significant attention to the problems created by print-on-demand technologies; it also simultaneously shows the strain of participating in internet commerce as an independent artist, particularly as new t-shirt sites and listings with infringed designs show up across the internet almost daily. The internet offers numerous ways to distribute and sell creative work and allows creators to control the entirety of creative output. But what they can't control are the technologies, data, algorithms, bots being deployed to steal their work.

Since CafePress first launched in 1999 print-on-demand technologies have grown significantly. Most sites allow users to upload designs and then order it on mugs, t-shirts, bags. You name it; you can print something on it. These technologies complicate the Digital Millennium Copyright Act (DMCA) which protects online

platforms from liability for copyright infringement simply for hosting user-uploaded digital content. This is why if infringement does occur, rights holders must request that each infringed item be removed from a site. Since most print-on-demand companies are transforming digital files into physical products, this further places the sites in a legal gray area. And the DMCA doesn't apply to trademarks or proprietary symbols like the Nike swoosh or the Nintendo "N," so infringed work shows up frequently on such sites. Many companies including Disney and Exurbia Films who owns the rights to Texas Chainsaw Massacre have dedicated departments to track unauthorized use of trademarks and copyrights (Sollenberger). Rarely does an independent artist have that luxury. In fact, independent artists are not able to utilize many of the systems in place to fight intellectual property theft.

Take, for example, the Brand Registry on Amazon. The Brand Registry allows corporations with registered and active text/word marks that appear on packaging, for example, to upload trademarks which help to combat counterfeiting. Independent artists cannot participate since works of art are considered copyrighted goods and are not trademarks like a logo. The "proactive brand protection" provided by Amazon's Brand Registry does not extend to them ("Eligibility"). Instead, they must resort to filing takedown notices which takes time away from creating. If the listing is removed, another one often shows up elsewhere on the site. Further, there's no consequence for stealing the designs in the first place. On other e-commerce sites like Etsy, members who receive repeat infringement notices have their account privileges terminated; no such rule seems in place on Amazon ("Intellectual Property Policy") Despite consistent violations, many Amazon sellers continue to post listings with stolen work.

Small business artists estimate they spend hours filing requests because there is no streamlined way to block bots or create recourse for sites which use their stolen designs, and lose thousands of dollars in the process (Tron). They must contact each site or platform individually (due to DMCA) to begin the takedown process of the infringed work. And while corporations like Disney have the money and power to fight intellectual property theft, independent artists simply don't. Deploying automated bots to sell cheap, ripped-off goods encourages a cycle where the artist is consistently infringed and cut out of the opportunity to make money. Though there is legislation that would make it cheaper for artists to pursue litigation in cases like the t-shirt bots, there is growing concern that the CASE (Copyright Alternative in Small Claims Enforcement) Act of 2019 also potentially opens a wider door for copyright trolls to make copyright claims and extort money from average Internet users. The proposed act would create a Copyright Claims Board within the Copyright Office to hear infringement claims with no attorney required. The proposed process would work like this: the Copyright Office sends a notice about a copyright complaint with

information about how to opt out of the dispute. If one does not opt out within 60 days of the notice then that individual is bound to whatever decision the Claims Board makes. The opt out process is not clear nor easy and there is concern that average Internet users may not know that they should opt out and thus risk a judgment without being able to present their side of things. There are also concerns about what the Copyright Office notice would look like and if it would be sent via mail, email, or phone. Though the Supreme Court ruled in *Fourth Estate v. Wall Street.com* that the copyright registration process be completed (granted or denied application) before infringement claims can be filed, such registration is not required to bring action under the CASE Act, leaving no guaranteed way to determine who holds the rights to work that is unregistered. If artists haven't registered their work in some way, this act has the potential to work against them (Adams).

In the past artists might have uploaded pixelated or watermarked photos but social media sites today demand high enough resolution for printing and clearly the bots aren't selective about what images they scrape and sell. Watermarks can, however, alert the buying public that the artwork on a t-shirt has not been licensed by the artist. But in the case of jewelry or other artist-designed goods, there aren't many proactive measures available. Unfortunately, the trends seem to be a consequence of doing business online. Artists depend on the Internet and the communities fostered by online spaces for support and commerce, but most are not well-versed in intellectual property and copyright law. Having their work stolen seems an inevitability, especially on image-driven sites like Instagram and Pinterest where artwork is circulated so often and so readily that it quickly becomes divorced from its source.

There is speculation over whether something like YouTube's ContentID which scans uploaded videos against a database of audio and video files uploaded by rights holders could be used to pinpoint infringement before it becomes part of a print-on-demand listing. Amazon already has image recognition technology but does not apply the software in the same way YouTube does to address copyright infringement. However, artists could deploy Amazon's mobile app which has a "search by camera" feature where customers can take a photo of dental floss, for example, and photo search Amazon for that exact floss. Artists could photograph their own artwork to quickly find listings with copyrighted images, which might cut down on the time it takes to discover their unauthorized work. Of course, they still have to write individual takedown notices for each listing and wait for Amazon to respond, but the tool could speed the initial process of recognition and provide proof to Amazon that the work has been stolen (Nguyen).

T-shirt bots seem to be simply one new tool in automating intellectual property theft. They do significant harm to artists who do not have the resources to continuously fight the sites behind them. It's clear that artists need an alternative to the current copyright system. In a recent *Wired* article, Roger Sollenberger draws parallels to the royalty crisis in the music industry where licensing groups intervened and established revenue sharing agreements (Sollenberger). Whether a similar model could work in such a wide and diverse field remains to be seen. Independent artists may want to license some designs and not others or may not want to participate at all. Such a model also might reinscribe many of the same issues of power imbalance relayed in the t-shirt bots case since quality control cannot be guaranteed or regulated. Ultimately, the burden of protecting one's art whether it's illustrations, jewelry, photography, or other craft falls heavily on the creator who has to learn quickly about all the various ways her work can be stolen. The best approach, most artists suggest, is to have and promote an online store where creative goods can be sold directly to those who want to support your art.

The tension in craft e-commerce between industry and community is easily recognizable and is more frequently and more collaboratively discussed within small business and art communities than ever before. Seasoned makers create Pinterest guides, provide tips on watermarking content, using Etsy, and how to navigate some of the trickier legal issues that often arise (Jacobson). The emphasis on collaboration and reliance on other artists and craft communities seems to be a source not only of support but also of action. When legal avenues are not an option, crowdsourcing provides an outlet for frustration and calls attention to the struggle of individual artists who grapple with what it means to create and share their work in virtual worlds where there is little control over how their work is used or interpreted.

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Kim D. Gainer

THE CASE ACT REDIVIVUS

In the 2018 *CCCC Intellectual Property Annual*, I reported on legislation introduced in the House of Representatives in 2017 that would have had implications for fair use and remix culture. This proposed bill, the Copyright Alternative in Small-Claims Enforcement (CASE) Act, died at the conclusion of the 115th Congress, but I noted that it would probably be re-introduced. The CASE Act was indeed revived in 2019 and ultimately folded into a combined COVID stimulus relief package and omnibus spending bill, the Consolidated Appropriations Act of 2021, that was passed and signed into law in December of 2020. This article will review the arguments for the bill and will summarize the concerns of its opponents.

RATIONALE FOR THE CASE ACT

The argument most often offered for the CASE Act is that there has been no *practical* way for independent creators without substantial resources to protect their intellectual property from infringement, particularly in this internet era when copying and redistributing content may require little more than the ability to click a mouse. For this reason, organizations like the North American Nature Photography Association, the National Press Photographers Association, and the Graphics Arts Guild encouraged their members to support the Act because it purports to provide an avenue for independent creators and small businesses that otherwise would have no realistic recourse as photographs, graphic designs, illustrations, animations, comic books, and cartoons are copied and pasted and recopied and pasted without payment of commissions or fees. For the same reason, independent authors, composers, lyricists, and performers are numbered amongst supporters of the Act (Calzada and Osterreicher; Graphic Arts Guild; North American Nature Photography Association).

Pursuing copyright claims can be a profitable business for copyright trolls who target naïve users who are unaware of how to parry predatory attacks; conversely, it can be an expensive business for legitimate copyright owners. As reported by Terrica Carrington, the American Intellectual Property Lawyer's Association (AIPLA) regularly surveys its members on the cost of intellectual property litigation and reports that cases that go to trial may cost the copyright owner hundreds of thousands of dollars. Unless the copyright owner has deep pockets, and unless the expense of pursuing the infringer is likely to result in a return on investment, so to speak, it may be fiscally impractical to protect one's intellectual property:

> …the average cost of litigating a copyright infringement case in federal court from pre-trial through the appeals process is $278,000. To put that number in perspective, on average, a full-time book author made only $17,500 from writing in 2015. Combine that with the fact that most copyright attorneys will not take on a case with a likely recovery of less than $30,000, and it's clear that as long as federal court continues to be the sole option, small creators and the works they contribute will remain at the mercy of infringers.
>
> (Carrington)

The reluctance of intellectual property lawyers to take on certain clients is understandable in the face of cases like that of photographer Daniel Morel, who in 2013 was awarded $1.2 million dollars for infringement by Getty Images and the AFP news agency. The law firm's expenses and billable hours totaled $2.5 million, most of which the law firm would have to write off (Zhang).

The above paragraphs describe the situation up to 2017. Subsequently it became even more challenging for a copyright owner to pursue infringers. For U.S. artists (but not, because of a wrinkle in the law, international ones) two Supreme Court rulings in 2019 both increased the costs of filing copyright lawsuits and made it impossible to recover some of the filing expenses:

> Artists used to face a cost of $435.00 to file a copyright infringement case, with that amount comprised of a $400.00 court filing fee and a $35.00 copyright registration charge. Overnight, assuming the artist does not want to wait more than half-a-year for the Copyright Office to act, that cost ballooned to $1,200.00. While this sum is not enormous, it is enough to dissuade independent artists from filing suit.
>
> (Burroughs)

In addition, the litigation expenses have ballooned since Carrington's report on the AIPLA's calculations of the cost of taking a case from pre-trial through appeals in the federal courts. By 2019, the AIPLA was calculating an average cost of $397,000 for copyright litigation (Giovanetti).

Thus, while it might be worth the while of deep-pocketed copyright owners to go after infringers, and for law firms to take them on as clients, it would seem that independent creators do indeed have no realistic recourse. Presumably the CASE Act is meant to provide an avenue of redress for that population. Keith Kupferschmid, the CEO of the Copyright Alliance, a strong proponent of the Act, argues that the beneficiaries will be "small copyright holders, small creators, your songwriter, your

artists, your authors, your blogger, your YouTuber" and that the act "isn't about the big movie studios or the big record labels" (Ulaby). The Copyright Alliance, whose web site describes it as "The Unified Voice of the Copyright Community," reports that it "represents the copyright interests of over **1.8 million** individual creators and over **13,000** organizations in the United States" (bolding in original). Member organizations whose logos are featured at the site include some of the big players that Kuperschmid declares the Case Act is "not about," such as Adobe, Disney, Getty Images, the NBA, NBCU Universal, Netflix, NFL, Nike, Oracle, Sony Pictures, ViacomCBS, and WarnerMedia; and the influence of the big players is visible on the Board Directors, with members from ViacomCBS, WarnerMedia, Adobe, NBCUniversal, and the Oracle Corporation. None of the above information suggests that the CASE Act would not provide recourse to independent creators or small businesses with shallow pockets, but it may be disingenuous to imply that the big players would not themselves be highly invested in a system that would allow them to bypass expensive litigation.

THE PATHWAY TO INITIATING A CLAIM UNDER THE CASE ACT

The Act will establish a Copyright Claims Board that will be "an alternative forum in which parties may voluntarily seek to resolve certain copyright claims" (*CASE Act of 2020* § 1502(a)). The Board will have three full-time officers who will be recommended by the Registrar of Copyrights but appointed by the Librarian of Congress. Participation by any party to a potential claim is voluntary, and any party has "the right…to instead pursue a claim, counterclaim, or defense" in a federal court (§ 1504(a)). The statute of limitations for bringing claims to the Board is three years from the date of the alleged infringement. The Board will render judgements on claims of infringement, but the Board can also rule on claims of noninfringement. Additionally, the Board can rule on claims for "misrepresentation in connection with a notification of claimed infringement" and on any "counter notification seeking to replace removed or disabled material" (§ 1504(c)(3)) (a mechanism that allows a response to erroneous or abusive DMCA takedowns). In the case of both claims and counterclaims, the Board can rule on requests for damages. Actual damages may be awarded. Alternately, the Board may award statutory damages. The amount of statutory damages will depend upon whether or not the work at issue was timely registered, that is registered before the alleged infringement or no more than three months after the work was first published. The maximum award for timely registered works is potentially double that of works that fall outside those parameters. The Board will not consider whether or not "the infringement was committed willfully in making an award of statutory damages," but the Board can consider "whether the infringer has agreed to cease or mitigate the infringing activity" (§ 1504(e)(1)). Damages in any given proceeding will be capped at $30,000 regardless of how many

instances of infringement (or claims of noninfringement) were at issue. The amount awarded would not routinely include legal expenses; instead, participants would be responsible for their own costs "except in the case of bad faith conduct" (§ 1504(e)(2)).

No claim will be adjudicated by the Board until the Copyright Office has issued a certificate for the registration of a copyright. The claim can be filed, but if the claimant does not already have certificate in hand, they must submit an application for copyright to the Copyright Office, accompanied by a deposit and registration fee. If the copyright application is turned down, the case will be dismissed. If a year has passed without resolution of the copyright issue, the case also will be dismissed, although without prejudice; that is, nothing prevents the claimant from filing a case in another forum. In addition to paying the Copyright Office deposit and registration fee, bringing a claim before the Board will require payment of a filing fee to be determined by the Register of Copyrights.

Beyond registration and fees, the Board specifies another bar that must be cleared before it will adjudicate a claim. A Copyright Claims Attorney will review the filing and notify the claimant if it is flawed. Thirty days will be allowed for the submission of amended filing. If the filing is still deficient, another thirty days will be allowed for submission of a second amended filing, which will again be reviewed by a Copyright Claims Attorney. If the filing is still flawed, it will be dismissed, but without prejudice. The Board also may dismiss a case if it "is unsuitable for determination" by the Board. Such a situation would arise if adjudicating an issue required "essential witness[es], evidence, or expert testimony" that would be unavailable to the Board, or "determination of a relevant issue of law or fact [that] could exceed" the administrative resources or the "subject matter competence" of the Board (§ 1506(f)(3)).

If the Board does agree to take up a case, the claimant has ninety days to properly serve the respondent. The notice must "set forth the nature of the Copyright Claims Board and proceeding, the right of the respondent to opt out, and the consequences of opting out." Regarding the opt out, there must be "a prominent statement" explaining that a respondent who does not opt out within sixty days after receiving the notice "loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States; and waives the right to a jury trial" (§ 1506(g)(1)). Moreover, service must conform to state law applicable to the person to be notified, and the notice must be either delivered to the individual personally or it must be left with a responsible adult at the respondent's home or with someone that they have designated as their agent. The Act also itemizes what the claimant must do it they wish to ask the respondent to waive personal service. If the

claimant does not serve the respondent within the ninety days, the claim against that respondent is dismissed without prejudice. The entire process also comes to a halt if the respondent informs the Board within sixty days of being served that they wish to opt out. In that case, the claim is dismissed without prejudice. (The Board may allow additional time "in exceptional circumstances…in the interests of justice" [(§ 1506(i)].) However, if the respondent does not reply to the notice or misses the deadline and is not granted an extension, they have opted in by default. From that point, practically the only way the process could be derailed would be as a result of the claimant missing procedural deadlines, in which case the claim would be dismissed, and with prejudice.

QUESTIONS AND CONCERNS ABOUT THE CASE ACT

Critical responses to the CASE Act range from the f-bomb fiery to the sedately scholarly. Mike Masnick, founder of the blog Techdirt, described the introduction of the CASE Act (and the Felony Streaming bill) into the omnibus package as a hasty act—"jammed through in [a] manner [that] is a total and complete travesty"—that left "people…scrambling to find out what's actually in the fucking bill" and accused Congress of "sucking up to Hollywood at the expense of the public." Brian L. Frye, writing for Jurist, somewhat cynically opined, "It's a truism that when lobbyists push a bill supposedly intended to help the disadvantaged, the real beneficiary is someone else," and predicted that the CASE Act would "just help predatory law firms extract even more unjustified settlements from unsuspecting businesses and charities." Senator Ron Wyden of Oregon cautioned that the legislation would create "an extrajudicial, virtual unappealable tribunal," one that "could impose statutory damages of $30,000 on an individual who posts a couple of memes on social media, even if the claimant sustained little or no economic harm" (Liu). The American Civil Liberties Union warned of the impact the legislation might have upon freedom of expression, arguing that the proposed process would generate a "chilling effect with respect to speech online" and pointing to abuse of the Digital Millennium Copyright Act to illustrate the potential for harm. Katharine Trendacosta and Cara Gagliano, writing for the Electronic Frontier Foundation, described the legislation as "at best, a huge waste of time and money," but at worst, something that "will hover unconstitutionally like a dark cloud over everyone attempting to share anything online." These and other critics of the Act raise several objections. Opponents question the Act's constitutionality and also raise issues of jurisdiction, express concerns about process ranging from adequacy of notice to limited rights to appeal, and warn about the potential to abuse the process. They also caution that the Act may cast too wide a net and ask whether alternatives are possible that would be more focused on legitimate small claims and not raise the issues above. Pamela Samuelson and Kathryn Hashimoto, reporting on a workshop devoted to the CASE Act, ask "whether

copyright is so special that it should have a tribunal of its own, given that many federal laws are underenforced because of the high costs of litigation" (689). (For an explicit point-by-point response to this point and other points, raised in the workshop, see Aistars.)

Some critics who raise constitutional objections point to the fundamental issue of separation of powers. Writing for Mozilla's Open Policy & Advocacy blog, Ferras Vinh and Daniel Nazer argue that "the creation of a board to decide infringement disputes between two private parties would represent an overextension of its authority into an area traditionally governed by independent Article III courts." The Constitution is famously divided into three Articles, the first describing legislative powers, the second executive powers, and the third judicial ones. According to several Supreme Court rulings, Congress would overstep the separation of powers if it created administrative boards to adjudicate "private rights" instead of "public rights." To illustrate the distinction, with regard to public rights, the power of the Patent Trial and Appeal Board (PTAB) "to review the validity of patent claims…and to extinguish erroneously issued patent claims" was upheld by the Supreme Court because the PTAB was reviewing an action of another government body, the United States Patent and Trademark Office (Samuelson and Hashimoto 692). However, claims involving disputes between private entities, such as infringement claims, have been reserved for courts operating under Article III of the Constitution. As Samuelson and Hashimoto observe, "Adjudicating infringement claims is exactly what Article III courts are supposed to do" (693).

Due process is another constitutional issue raised by critics. Samuelson and Hashimoto enumerate several problematic process issues: (1) the "assertion of nationwide personal jurisdiction"—the prospect that proceedings would take place in Washington, DC, regardless of the location of respondents, (2) questions about how notice of alleged infringement would be served, (3) limits on both the opportunity and the grounds to appeal, (4) availability of documents at each stage of the process, and (5) abrogation of the right to trial by jury in civil cases that is guaranteed by the Seventh Amendment (694). On the matter of how notice would be served, for example, Samuelson and Hashimoto wrote, "The scheme envisioned by the statute may not satisfy the baseline due-process requirements of notice and opportunity to be heard, particularly if it appears likely that notice will not always reach the putative defendants" (694 n. 19). Above all, they found that the "most substantial due process issues" arose from the reliance on an "opt-out" method to establish that the alleged infringers were voluntarily submitting to participation in the tribunal. Samuelson and Hashimoto suggest

> that the opt-out system would, in practice, not be as voluntary as necessary to pass constitutional muster. A significant consequence of nonresponse in an opt-out model would be a high proportion of cases in which the Tribunal would enter default judgments and damage awards. Following such defaults, claimants could ask a federal court for an order to enforce the Tribunal's ruling against the defaulting party. A large number of judicially enforceable default judgments could result, which would be difficult to overturn given the restrictions…on grounds for appeal and overturning default judgments.
>
> (Samuelson and Hashimoto 696)

There are only three categories under which alleged infringers can appeal rulings by an administrative board that will be established on the basis of what Ferras Vinh and Daniel Nazer describe as "a more coercive model that will disadvantage defendants who are unfamiliar with the nuances of this new legal system": alleged infringers can appeal based on the claim that "the board exceeded its authority; failed to render a final determination; or issued a determination as a result of fraud, corruption, or other misconduct" (Vinh and Nazer). Appeal on the grounds that the administrative board misinterpreted or misapplied copyright law—for example, that the user was protected by fair use—is not allowed for by the Act. In short, for all practical purposes, there is no appeal of a finding by the administrative board.

The criticisms based on due process concerns are partly grounded in arguments as to how to apply constitutional principles, partly on predictions as to how implementation will play out in practice. Also grounded in concerns about how implementation will play out in practice are warnings that the Act will encourage trolls. Joshua Lamel and Sasha Ross, digital rights activists, write that the Act "combine[s] the worst elements of the abusive legal tactics of patent trolls, with the pain and absurdity of the file-sharing copyright lawsuits." Matthew Sag and Jake Haskell, in an article in the *Iowa Law Review*, report that in spite of legal setbacks experienced by trolls such as Malibu Media and the Prenda Law firm, "between 2014 and 2016 copyright trolling account for 49.8% of the federal copyright docket" (577). Sag and Haskell were documenting a "wave of file-sharing lawsuits" that qualified as "copyright trolling because of the opportunistic way in which they seek to monetize assertions of infringement" and "because the plaintiffs' claims of infringement rely on poorly substantiated form pleadings and are targeted indiscriminately at noninfringers as well as infringers" (636).

Sag and Haskell describe a system in which trolls file lawsuits "primarily to generate a list of targets for collection" even though many cases "are unlikely to withstand the scrutiny of contested litigation." The trolls do so because

> Even when the infringement has not occurred or where the infringer has been misidentified, a combination of the threat of statutory damages—up to $150,000 for a single download—tough talk, and technological doublespeak are usually enough to intimidate even innocent defendants into settling. The plaintiffs play a numbers game, targeting hundreds or thousands of defendants and seeking quick settlements priced just low enough that it is less expensive for the defendant to pay than to defend the claim. This game is profitable, whether the lawsuits are targeted at actual infringers or not.
>
> (Sag and Haskell 636)

Lamel and Ross warn that process mandated by the CASE Act, which allows as much as $30,000 in statutory damages, as well as legal fees and costs, would facilitate similar "trolling business models." Respondents will be disadvantaged at every point. They may not have known that they would be liable to a charge of infringement ("a registration merely needs to be pending and awaiting certification for a claim to be brought"); they may need a lawyer to help them understand and navigate the process ("an expense they will face with or without actually having done something wrong"); they may face expenses if they wish to appear on their own behalf (unless they opt to participate remotely).

In the face of a process that may seem rigged against respondents, Lamel and Ross call the opt-out provision a "panacea" and indeed warn that many recipients of infringement notices will not understand their import or "will just ignore the notices, thinking they are yet another addition on the long list of scams that have propped up over the last decade." Failure to opt out will then lead to a default judgment that will be unappealable. Conclude Lamel and Ross,

> We have seen massive bad behavior by attorneys with the history of patent trolling and the current rise of copyright trolling. We have seen individuals during the file-sharing days face copyright lawsuits that are a public relations nightmare because of the power of statutory damages in copyright and excessive damages threat they place on so many of us. The CASE Act would create an expedited, non-appealable procedure that would combine the worst elements of both these worlds.
>
> (Lamel and Ross)

Most critics of the Act describe respondents as copyright naïve and therefore at a disadvantage. For example, Kerry Maeve Sheehan, Copyright Research Assistant for the Authors Alliance, argues that "authors, educators, and small creators without

sophisticated legal knowledge or representation may not fully understand the implications and may ignore the notice—ending up on the hook for substantial damages awards." Not all critics view the procedure as disadvantaging respondents, however. Brandon Vogts, writing in *Apalmanac: Architectural Photography Almanac*, opposes the CASE Act in part because in his view it is the claimant who is disadvantaged. The fact that the respondent can opt out results in the claimant "go[ing] through all the work of filing the claim, pay[ing…] at least some kind of filing fee, and with one opt-out notice from the defendant, hav[ing] all your efforts automatically rendered for naught." At that point the claimant could turn to a federal district court, which would require them to hire a lawyer. But, Vogts observes, that avenue is not available to the claimant unless their work had been timely registered. According to Vogts, that the claimant will file in a federal district court is "unlikely to happen, and the defendant likely knows it."

Vogts sees respondents as vastly more knowledgeable about their options than do many critics of the Act. He describes individuals and small businesses as having access to the information they need to make an informed decision as to whether to participate in the process:

> Since the advent of image discovery/recovery services who identify infringing uses of photographers' work online and attempt monetary recovery on behalf of the photographer, there are now entire user forums dedicated to helping infringers fend off inquiries from organizations like Copytrack or Pixsy attempting to resolve such infringement disputes. I expect it will not take long for these same folks to figure out that if the works in question were not timely registered, a CASE Act claim has no more teeth than the empty threat of litigation, as long as they opt out within the 60-day timeline and verify the works were not timely registered.
>
> (Vogts)

If Vogts is correct, some of the fears that the Act will "supercharge a 'copyright troll' industry" (Falcon) may be mitigated. Moreover, in addition to the possibility that respondents may be knowledgeable enough to recognize when it is in their best interest to opt out, the Act incorporates procedures that may deter misuse of the process by trolls. Before a claim can be taken up by the Board, the claimant must front the cost both for registering the copyright and for filing a claim. The filing must survive the scrutiny of the Board's Copyright Claims Attorneys before the claimant is given permission to serve the respondent with the claim. The claimant must pay their own legal expenses unless the respondent acts in bad faith. The claimant may become responsible for the costs and legal expenses of the respondent, up to $5,000, or even

more in "extraordinary circumstances," if they are judged to have filed a claim for "harassing or other improper purpose, or without a reasonable basis in law or fact." The Register of Copyrights can limit the number of claims that any one person or business may file in a year. Moreover, a person or business can be barred from pursuing claims for a year "if the Board finds such party to have pursued a claim, counterclaim, or defense in bad faith on two or more occasions within a 12-month period" (§ 1506(y)(2)).

The proof, of course, will be in the implementation. The Copyright Office has until one year from the enactment of the legislation, which was signed on December 27, 2020, to get the Board up and running, with the possibility of a 180-day extension beyond that point. Then we will see whether the Board will allow independent creators and small businesses to defend their intellectual property without simultaneously facilitating copyright trolls. Likewise, we will see whether respondents are as savvy as Vogts suggests or whether naïve users will be left on the hook for as much as $30,000 per proceeding for their participation in the copying and sharing that has become second nature in today's remix culture.

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Steven Engel and April Johnson

IRRESPONSIBLE AUTHORSHIP: A GROWING TYPOLOGY

Academic spam email (ASE) has become its own specific subgenre. ASE includes messages from predatory journals offering quick and painless processes, opportunities to serve on editorial boards, or calls to present at dubious conferences (Wood and Krasowski). Like all electronic communication, ASE takes time to read, sort, and delete. In a study of recipients of the 2015 National Institute of Health's K Award (a competitive career development funding mechanism), all respondents reported receiving academic spam emails daily, and over 15% of awardees indicated that they spent over 10 minutes a day dealing with them (Wilkinson, et al). In addition to being a nuisance, academic spam emails can provide challenges for new faculty members who are less able to determine the legitimacy of the quality of the offers due to a lack of experience. Even well-mentored developing researchers might be unsure of who to ask for guidance about the deluge of questionable opportunities. And because of this never-ending stream of email, it can be an additional challenge to determine when and how often to make the request.

These spam emails range from ones that appear to be legitimate publishing venues or conferences to those that blatantly invite the receiver to commit fraud. Some feel like they are a mash-up of translated politeness moves, mail-merge errors, and a lack of understanding about the expectations of academics. Others are amusing in their boldness or cluelessness. But underlying many of these spam emails are elements that bring to the surface the array of ways that authorship can be abused in scholarly writing.

In this article, we present one academic spam email and use it as a springboard for a tentative typology of authorship abuses. We don't claim that this list is complete, but we offer it as a way to investigate what we value about authorship.

THE CASE

On October 20, 2020, Rob J. Hyndman, a professor of statistics at Monash University in Australia, posted on his blog, *Hyndsight*, an unsolicited email he received from a Dr. Stutaluk Vladimir[1] (Hyndman, "Co-Authorship"). In this letter, Dr. Vladimir praises Hyndman's published works based on his Scopus profile and offers a "co-publishing partnership." In this partnership, Hyndman would "offer" authorship spots to

[1] A Google search for "Dr. Stutaluk Vladimir" returns only the *Hyndsight* blog post.

Vladimir's clients who are scientists looking for "scientific articles that are in line with their research interests." Vladimir ends with an apology if the inquiry is not of value or boring. Hyndman notes that other colleagues have told him that they have received similar requests (Hyndman, "Re: Inquiry").

> "
>
> Dear Hyndman, Rob J.
>
> Hope you are doing well.
>
> I write this letter on behalf of authors seeking to co-publish. We have seen your previous works (https://www.scopus.com/authid/detail.uri?authorId=7006914313&eid=2-s2.0-85063573156) and they were considered to be of high quality. Therefore, I offer you a co-publishing partnership.
>
> Our clients wish to buy positions in scientific articles that are in line with their research interests. As our partner, you can offer us a position or two in your work. In this way, we develop a network of scientists with whom we would like to partner. We hope you will agree that this type of partnership can be mutually beneficial, and beneficial for authors too!
>
> If you are interested in this, please, let me know. I will forward all required information to you and answer all your questions.
>
> P.S. Sorry for bothering you if you find this letter useless and not interesting.
>
> Respectfully,
> Dr. Stutaluk Vladimir

(from https://robjhyndman.com/hyndsight/coauthorships-for-sale/ Used with permission from Prof. Hyndman)

The email contains language that masks the ethical dilemmas of selling authorship. Vladamir frames the arrangement as one that would be "mutually beneficial" and uses a discourse of equality and cooperation: "a network of scientists," "partnership," and "co-publishing," The invitation contains several niceties ("Hope you are doing well," "If you are interested in this, please, let me know," "Sorry for bothering you," and "Respectfully.") These positive words overlay the problematic request. His clients are "authors" who, although they would not contribute to the article in any of the ways that most academic organizations would recognize as central to authorship, would be willing to "buy positions" in scientific articles. They are not looking to collaborate or co-write an article. Instead, they are looking to "co-publish" and to occupy the position of authorship. In addition, the clients who are unable or unwilling to write

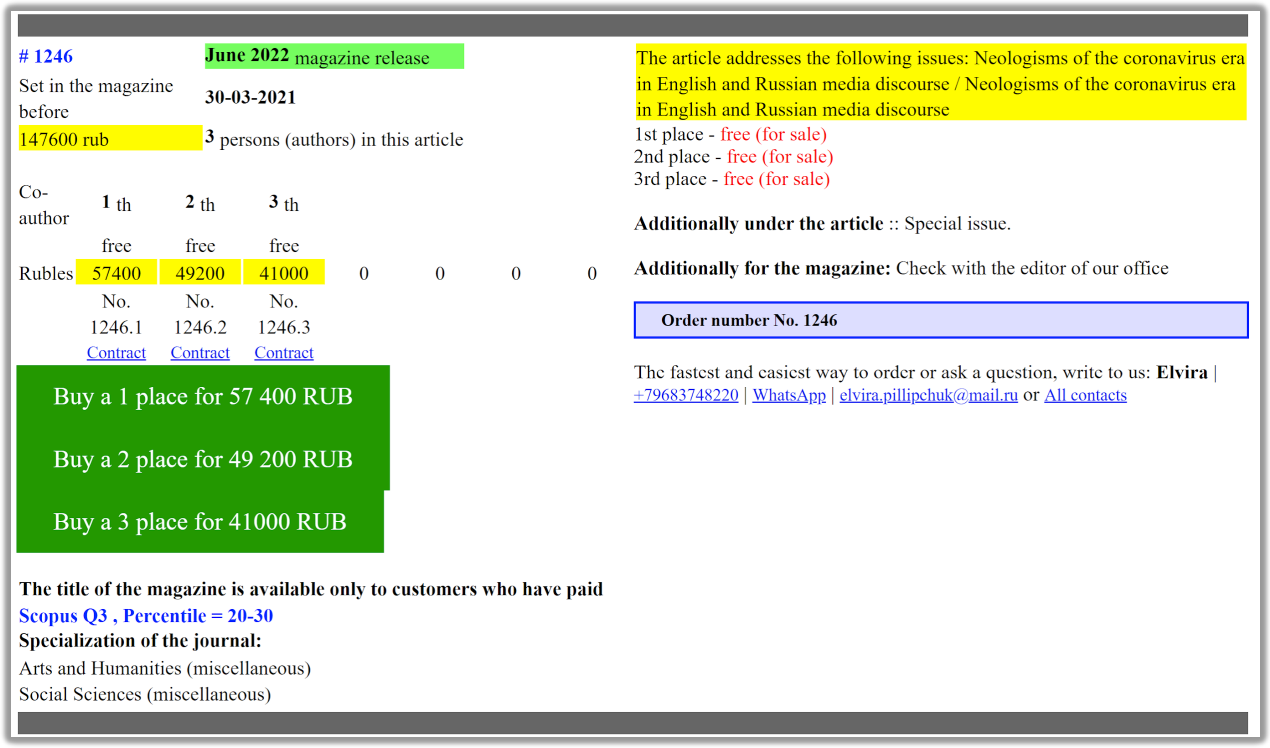
their own manuscripts are speaking through another author (Dr. Vladimir) to make the request to Hyndman.

It is also interesting to note the logic of the invitation. Hyndman is given the opportunity to commit authorship abuse based on his track-record of publications of "high quality." There isn't an appeal to a desire to help others or a call to even the playing field. Instead, there is a sense that Hyndman has written good stuff and so Vladimir's clients want to attach themselves to that success. Certainly, the email implies, there must be room to squeeze in another author or two, especially if the price is right.

It would be easy to assume that Vladimir's clients are merely too lazy, incompetent, or busy to compose their own scientific articles. In fact, we have caught ourselves falling into the trap of generalizing and moralizing about this plagiarism, much in the same way that instructors sometimes react to student plagiarism. Certainly the pressures and perverse incentive system for academic publication have led to a full-blown, underground industry to recruit, solicit, and monetize authorship positions in publications. This, combined with "author inflation," or the growing number of authors listed on the average scientific paper, has created an avenue for these unscrupulous authorship practices (Tilak). Academic institutions are not blameless in this system, especially those outside the US. Just last year, the Chinese government prohibited universities from offering cash awards for publications in an attempt to curb unethical behaviors in academic publishing (Mallapaty). Researchers could earn awards that had been steadily increasing over the past decade (Quan, et al). Additionally, the Chinese ministries of education and science have asked their universities to stop promoting researchers based solely on the number of publications (Mallapaty).

China is not alone in trying to deal with issues of authorship. In a 2019 article, *RetractionWatch* co-founder Adam Marcus wrote about 123mi.ru, an online auction site for academic papers.[2] This site allows users to pay for authorship positions on specific articles that have already been slated for publication. In the example below, a first author position on a paper to be published in a lower-tier journal would cost approximately $770.

[2] This site has been shifted to a "new design" site, http://publisher-moscow.com/



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The site makes the transaction as easy as possible. Users can contact the site by phone, WhatsApp, or email. It is a virtual eBay for authorship. These examples add to the growing list of authorship misconduct.

[3] Translation provided by Google.

GUIDELINES

Many organizations have articulated requirements for authorship. For example, the International Council of Medical Journal Editors's guidelines for authorship lay out four requirements:

> 1. Substantial contributions to the conception or design of the work; or the acquisition, analysis, or interpretation of data for the work; AND
> 2. Drafting the work or revising it critically for important intellectual content; AND
> 3. Final approval of the version to be published; AND
> 4. Agreement to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved.

In order to be considered an author, contributors need to add labor to the manuscript, participate in the composing process, and claim responsibility for the content. Meeting only some of these requirements is not enough to be added as a co-author. For example, contributing to a research project by recruiting participants to a study or mentoring the researcher is not, in itself, to allow a contributor as a co-author (COPE Council). Still, each discipline has different expectations and traditions around authorship, complicating matters.

In the field of rhetoric and composition, journals tend not to foreground concerns about authorship. Of the 25 active, accessible journals listed on one large public university library's website about "Important Journals in Composition and Rhetoric," only six had specific guidelines on authorship. Most of the journals that did have statements in their guidelines for authors were part of larger publishers like Elsevier, Sage, or Taylor and Francis; these journals had what appears to be more general authorship statements that stretched across the publisher's portfolio. This is most likely because composition journals don't have the same problem with authorship abuses as many articles are single-author, but it is notable that in a field that is acutely aware of authorship concerns, the definition of authorship is not explicitly stated in the submission requirements. (It may be that later in the submission process that authors have to attest to their role in the composition of the manuscript and aren't readily available on the journal's website.)

TYPOLOGY

In our exploration of co-authorship for sale, we have encountered references and examples to a variety of irresponsible authorship practices. We offer here a rough typology of these types of misconduct:

1. **Translation-plagiarism authorship**

   Translation-plagiarism authorship occurs when an article is translated (usually in its entirety by computer) and then republished as a new article, with new people claiming they authored the piece without giving credit to the original authors. In a recent study commissioned by the Russian Academy of Science, the Commission on Counteracting the Falsification of Scientific Research found problems with "259 articles from Russian authors, many of which were plagiarized after being translated from Russian into English" (Linacre). These papers had already been published in Russian and then were submitted as original research by different authors after being translated into English. Some of the original Russian publications appear to have been plagiarized texts themselves (Chawla).

   Student writers have followed a similar pattern of translingual plagiarism by translating a text originally written in English into another language text and translating it back into English to change the wording of the original text (Sousa-Silva 72). Then, through the help of revision software like Grammarly, they are able to correct any grammar mistakes and to increase the paper's coherence.

2. **Gift or reciprocal authorship**

   Gift authorship is when a person is added to a paper who did little to no work on the paper. Sometimes this authorship is given in the hopes that it will be reciprocated (Albert and Wager 34). Gift authorship is often used as an incentive for others to get something in return, such as promotion, loyalty, or funding.

3. **Honorary authorship**

   Honorary authorship is similar to gift authorship in that the added author has not contributed to the manuscript. Honorary authorship tends to rely on the reputation of the added name. Honorary authorship is given or received for many reasons such as maintaining a good work relationship among superiors or improving the likelihood of acceptance; there is even a custom in some communities for the heads of

departments to be automatically given honorary authorship (Bavdekar). This type of authorship abuse is fairly common: over a third of articles in six key geriatric journals contained an ICMJE-defined honorary author and 14.8% of survey respondents gave their department heads honorary authorship automatically (Verhemel). Sometimes honorary authorship is done without consent. For instance, Teixeira da Silva and Dobránszki report on a case in which Charles D. Michener, a leading figure in entomology, was added to a paper without his consent or knowledge (1462). In fact, the article made an argument that questioned the validity of Darwin's theories, even though Michener had written the introduction to an edition of Darwin's *The Origin of Species*; the paper was later retracted (Oransky).

4. Paid co-authorship

Paid co-authorship happens when someone pays to be added as an author on a paper that will be published. This can be seen in the Hyndman email invitation. Companies recruit published authors, offering money for co-authorship on their next papers. A study by Pravin Bolshete stated that some 16% of predatory journals, when offered money, were willing to add new authors to papers that they were publishing knowing that person did not contribute to the manuscript.

5. Bully authorship

Bully authorship occurs when names are added to the byline of an article because someone forces their way on through harassment or bullying. Often, these are asymmetrical relationships in which the bully holds a position of power. Mahmoudi argues that these types of acts are more damaging for international students who "are already disadvantaged by visa requirements and financial constraints, and such abuse exacerbates their insecurities over position and job prospects — particularly if it takes the form of infringement of intellectual property and unfair authorship positioning on publications" (494).

An extreme version of this could be labeled as the White Bull Effect. Alluding to the Greek myth of Europa, the term white bull refers to a type of manipulation and coercion used by people in senior positions toward inexperienced researchers. Kwok describes the disturbing machinations of the white bull: "The White Bull perpetrator uses his experience and deviousness to exploit uncertainties or ambiguities in research guidelines and prospers in poorly regulated, grey areas" (554).

6. Fraudulent authorship

This type of authorship abuse is the one that comes to mind when we think of plagiarism: it is the act of submitting something that someone else wrote, and it is the kind of literacy practice that can be particularly irksome (Howard 488). The name on the work is not the person who completed the work. While all of the irresponsible practices listed here involve some sort of fraud, this practice is one where the primary act is one of cutting and pasting text and claiming it as one's own. As such, it can occur on the sentence- or paragraph-level as opposed to the other forms of authorship abuses that often deal with the complete text.

7. Paper Mill/Essay Mill authorship

Essay mills are companies that provide papers to undergraduate students. These companies have resorted to more deceptive and illegal tactics such as compromising university websites (Ridolfo and Hart-Davidson). More than just a catalogue of papers available for purchase, these paper mills also offer customized writing services, or contract cheating, where students can receive a bespoke essay that will not get detected by plagiarism detection services like Turnitin (Medway). Some services will even adjust the writing quality of the paper to match the skill level of the student so as to avoid detection. Similar services are surprisingly available for dissertations.[4]

8. Pharmaceutical ghost authorship

In the past decade or so, there have been several sensational cases of pharmaceutical firms writing research articles and then looking for senior scholars to add their names to the manuscript in order to make it more palatable to biomedical journals (PLoS Editors). This type of authorship abuse feels particularly dangerous since it doesn't just undermine the idea of authorship; it also gives authority to these articles that are essentially advertisements for drugs. Sometimes this type of authorship can be deadly. For example, pharmaceutical companies hired "medical education and communication companies" (or MECCs) to recruit "key opinion leaders (KOLs)" and provide talking points for presentations (Marks 174). Additionally, articles "were often prepared by unacknowledged authors and subsequently attributed authorship to academically affiliated investigators who often did not disclose industry

[4] See Meyer, Craig A. (2017). "Corruption, Higher Ed, and Russians (Oh My!)." *The 2016 CCCC-IP Annual*. https://prod-ncte-cdn.azureedge.net/nctefiles/groups/cccc/committees/ip/2016/meyer.pdf

financial support" (Ross, et al.). In most of these documented cases, the industrial ties were not fully disclosed.

CONCLUSION

The variety of authorship abuses makes visible the complexity of our understanding of authorship. While the email that initiated our exploration of academic spam email and other academic authorship abuses can be dismissed as merely junk email, it is worth highlighting so that researchers can develop the awareness of these practices, especially those that are deceptive and attempt to lure unsuspecting early career scholars into questionable arrangements. Like many of the internet-based scams and schemes out there, it is easy to identify the ones that you don't fall prey to or the ones that our email client filters out. It is obviously the ones that we don't recognize that are most dangerous.

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Wendy Warren Austin

CHINA'S ROAD AHEAD FOR INTELLECTUAL PROPERTY: HOW ONGOING TALKS AND LEGISLATION SEEK TO SHIFT FROM SHANZHAI TO BONA FIDE

As I have been teaching for a Chinese EMI (English as a Medium of Instruction) university for two years and am looking ahead at my third, I often find myself trying to describe what China is like to my family and friends when I return to my struggling, rust-belt hometown of Erie, Pennsylvania. China is like a beautiful, unwieldy beast trying to find its footing. At one moment I'm startled by its sheer enormity, unevenness, and primordial power, at another, dazzled by its effervescent energy and innovative adaptability. Both President Xi Jinping's "One Belt, One Road Initiative" (OBORI), launched in 2013 (Chatzky and McBride), and his 10-year plan, "Made in China, 2025," (McBride and Shatzky) combine to give its people strong ambitions to dominate high-tech markets and a solid (sometimes literal) path toward its global role.

To that end, China has not only emphasized English mastery starting in 4th grade, but high academic achievement in science, technology, and biomedical sectors, but especially in innovation. With innovation comes new ideas, many of them copied from prior products and/or trademarks, giving birth to a shanzhai[5] culture, where, instead of *Snakes on a Plane*, we have *Snakes on a Train* (Blankenship, 2019), and Qiaodan (in pinyin, it sounds similar to Jordan) instead of (Michael) Jordan merchandise.

Rampant copyright and trademark infringement have been more the norm than the rule. Zheng Tang (2019) points out in an *Asia Pacific Law Review* article that "China has been accused of being responsible for 72 per cent of the counterfeit goods circulated in the European Union (EU), Japan, and the United States (US) in 2016, while approximately 12.5 per cent of China's total merchandise exports were estimated to be fake" (p. 177). Lawrence Page puts that estimate at 86 per cent (2019). Tang reports that "the value of unlicensed software usage in China reached around $6.8 billion during 2019."

[5] *For a good overview of Shanzhai culture and its relationship to copyright piracy, see Blankenship's "Harry Potter & and the `Chinese' Philosopher's Stone: Deconstructing Copyright Piracy Through Shanzhai."

Imitation more often precedes true innovation, and with lax enforcement of infringement, a rich knock-off culture has flourished in China. According to Page's recent law review article entitled, "Goodbye, Shanzhai: Intellectual Property Rights and the End of Copycat China," he predicts that a more "robust IP regime" is on the horizon.

By 2019, President Xi Jinping indicated that China would begin imposing stricter guidelines on intellectual property rights, along with stricter penalties for infringement, and the courts have followed through on these efforts to a certain extent. Indeed, on January 15, 2020, then-President Trump and President Xi Jinping met and agreed upon a "Phase One" US-China trade deal. Pratyush Nath Upreti and Mariá Vásquez Callo-Müller in an article forthcoming this year (2020) note that "it is quite remarkable that the `IP Chapter' appears as the first chapter of the Agreement," the first time this has happened in US-China trade deals, despite the issue being a longtime central one between the two countries. Included among the provisions that the trade deal covers are trade secrets, pharmaceutical-related intellectual property, patents, piracy, and counterfeiting, software, trademarks, and judicial enforcement (Upreti & Callo-Müller, 2020).

In January 2019, a specialized Intellectual Property Court opened in Beijing, along with two more dedicated courts in Shanghai and Guangzhou so that intellectual property disputes could be held at the national level. In April 2020, leaders of China's Supreme People's Court held a press conference reporting that 481, 793 new Intellectual Property Rights (IPR) cases had been accepted for this year, up slightly from the 475, 853 cases handled in 2019 ("SPC Reports Progress on Judicial Protection of IPR"). The National Law Review web site lists China's Top 10 Intellectual Property Cases for 2019 among its most recent articles (Wininger). Already, Peppa Pig's owner won damages for a copyright infringement case that was ruled on Dec. 31, 2019 for 30,000 yuan (about $4,300). Although the amount wasn't much (because the Peppa Pig's owner didn't show enough evidence of monetary loss from the infringement) ("Peppa Pig Owner"), the outcome for the original owner at least shows a start in the right direction.

As Yushu Liu points out, the OBORI requires digitalization as part of its plan, so "the digital Silk Road is also a road of intellectual property rights protection," particularly as it needs to have the cooperation of multiple participating countries to accomplish it. Liu notes that 150 countries have already signed on with the OBORI.

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Mike Edwards

ELSEVIER SEEKS NEW FORMS OF REVENUE AS UNIVERSITIES RESIST PROHIBITIVE CONTRACTS

Universities have recently begun to resist academic publisher Elsevier's enormous and increasing subscription fees. That resistance has increased as Elsevier fights against open access to scholarly knowledge, and Elsevier has refused to let authors make their own scholarship publicly available through institutional repositories and other means, even sending mass takedown notices to academics who post their published research on university web sites and networking sites like academia.edu (Edwards, "Publisher Elsevier"). The Electronic Frontier Foundation summarizes the problem with Elsevier:

> Elsevier boasts profit margins in excess of 30%, much of it derived from taxpayer dollars. Academics effectively volunteer their time to publishers to write articles, conduct peer review, and sit on editorial boards, and then publishers demand ownership of the copyright and control over dissemination. Universities and other institutions fund these researchers, and a mega-publisher like Elsevier reaps the benefits while trapping all of that work behind a paywall. (Press)

While some other publishers like Sage, Springer, and Wiley-Blackwell have engaged in similarly problematic practices of value extraction, none has a record of behavior as egregiously awful as Elsevier's.

Last year, the University of California system responded to Elsevier's extortionate practices by ending its subscriptions to Elsevier journals. According to the University of California press release,

> As a leader in the global movement toward open access to publicly funded research, the University of California is taking a firm stand by deciding not to renew its subscriptions with Elsevier. Despite months of contract negotiations, Elsevier was unwilling to meet UC's key goal: securing universal open access to UC research while containing the rapidly escalating costs associated with for-profit journals. (UC Office of the President)

Months later, thirty scientists from the University of California system (including a co-inventor of the CRISPR genetic engineering technology and a Nobel Prize winner) resigned from the editorial boards of Elsevier journals, citing Elsevier's practices as the reason (McKenzie, "California Scientists").

Elsewhere, Louisiana State University also ended its bundled journal subscription with Elsevier, and as Inside Higher Ed reporter Lindsay MacKenzie observes, "LSU is just the latest of several U.S. institutions, including the University of California system, Temple University and Florida State University, to announce its intentions to end its business relationship with Elsevier in the last two years" ("Another 'Big Deal'"). In April 2020, the University of North Carolina at Chapel Hill followed suit (MacKenzie, "UNC Chapel Hill"), as did the State University of New York (SUNY) system, announcing that they "anticipate saving around $5 to $7 million per year" (MacKenzie, "SUNY Cancels Big Deal").

In June 2020, the Massachusetts Institute of Technology (MIT) also ended its negotiations with Elsevier, citing Elsevier's inability to work with the principles in MIT's "framework for publisher contracts... that no author should be required to relinquish copyright of their work, and must have 'generous rights to reuse their own work'" (MacKenzie, "MIT Ends Negotiations"). In discussing the unanimous decision to end negotiations with Elsevier, MIT Associate Professor Roger Levy points out that "the value in published scholarship originates in our work and in the institutions that support us... We are publicly committed to supporting the rights of MIT community members to freely share the scholarship we create" (MacKenzie, "MIT Ends Negotiations).

Carnegie Mellon University had more success in its negotiations with Elsevier, announcing in 2019 "a transformative agreement that prioritizes free and public access to the university's research. Under the terms of the agreement, which is the first of its kind between Elsevier and a university in the United States, Carnegie Mellon scholars will have access to all Elsevier academic journals. Additionally, all articles with a corresponding CMU author published in Elsevier journals after Jan. 1, 2020, will have the option to be published open access" (Carnegie Mellon). Details of the agreement are not available.

However, Elsevier's recent acquisitions and product launches contribute to an increasing vertical integration of publishing infrastructures that may allow it to maintain its substantial profit margins. The Scholarly Publishing and Academic Resources Coalition observes that "in a 2015 investor presentation, Elsevier explicitly indicated its intent to increasingly serve university administrations, funding bodies, and governments with tools aimed at estimating and improving the productivity of

research and optimizing funding decisions" (Aspesi et al.). Colleen Lyon, "a librarian of scholarly communications at the University of Texas at Austin," offers an idea of what such tools might be in a list of Elsevier's recent acquisitions: "In 2013, the company bought Mendeley, a free reference manager. It acquired the Social Science Research Network, an e-library with more than 850,000 papers, in 2016. And it acquired the online tools Pure and Bepress—which visualize research—in 2012 and 2017, respectively" (Ellis). These tools, in conjunction with other Elsevier properties like the SCOPUS-Scimago journal and institution ranking databases and bibliometrics, give Elsevier an unprecedented degree of integrated control over all levels of the circulation of scholarly knowledge.

Alejandro Posada and George Chen investigate this integrated control in a 2019 paper investigating "the acquisition and integration of scholarly infrastructure, the tools and services that underpin the scholarly research life cycle" (1). Their research suggests that "moves toward openness and increased control of scholarly infrastructure are simultaneous processes of rent-seeking which could further entrench publishers' power and exacerbate the vulnerability of already marginalized researchers and institutions" (1), and they observe that "Elsevier has acquired and launched products that extend its influence and its ownership of the infrastructure to all stages of the academic knowledge production process" (6). If we understand the circulation of scholarly knowledge as a cycle of production, distribution, use, and re-production leading back into production (see Edwards, "Digital Literacy" and "Economies of Writing"), Elsevier has shifted its emphasis from appropriating economic value at the point of distribution to appropriating economic value at all points in the cycle, a move that Posada and Chen characterize "as a vertical integration of the academic production value chain" (5). Their visualizations are useful in understanding this dynamic.

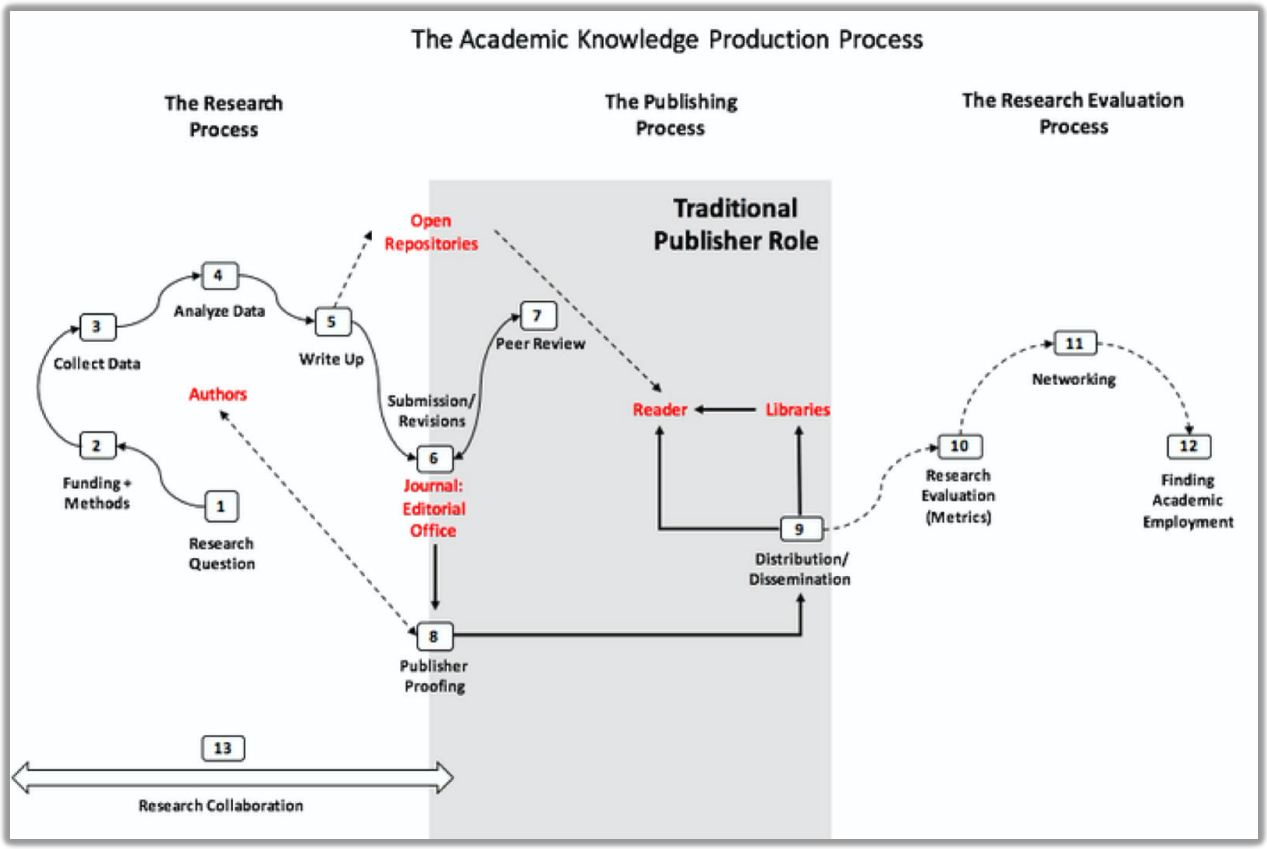

Figure 1. "The Academic Production Lifecycle." Distributed under a Creative Commons Attribution 4.0 International License. Posada, Alejandro, and George Chen. "Inequality in Knowledge Production: The Integration of Academic Infrastructure by Big Publishers." ELPUB 2018, Jun 2018, Toronto, Canada. https://hal.archives-ouvertes.fr/hal-01816707

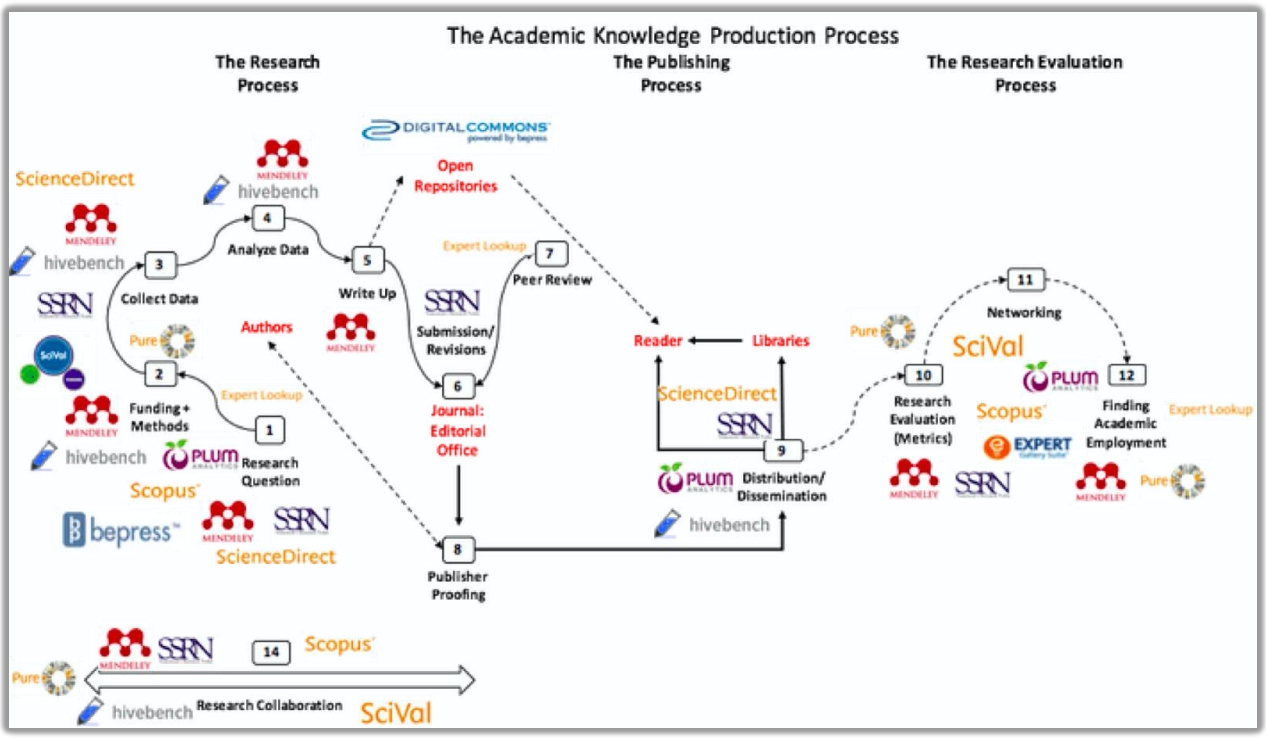

Figure 2. "Elsevier Presence Throughout the Lifecycle." Distributed under a Creative Commons Attribution 4.0 International License. Posada, Alejandro, and George Chen. "Inequality in Knowledge Production: The Integration of Academic Infrastructure by Big Publishers." ELPUB 2018, Jun 2018, Toronto, Canada. https://hal.archives-ouvertes.fr/hal-01816707

Elsevier's monopolistic pricing practices have hindered rather than promoted access to scholarly knowledge, and universities have begun to push back against those practices. However, these new developments in Elsevier's vertical integration of academic publishing infrastructures should be alarming, as they offer Elsevier increased control over all stages of academic knowledge production, as demonstrated in Figures 1 and 2. As I noted in the 2013 *CCCC Intellectual Property Annual*, "[i]n the 35 journals listed by the Bedford Bibliography as being associated with rhetoric and composition studies, three are associated with Elsevier: *English for Specific Purposes*, *Computers and Composition*, and *the Journal of Second Language Writing* (Reynolds, Dolmage, Bizzell, and Herzberg). *Computers and Composition* seems a particularly curious case, given that many articles published in the journal have endorsed strong positions in support of fair use and knowledge circulation, and the journal has in fact published a special issue (15.2, 1998) on intellectual property and a special issue (27.3, 2010) on

'Copyright, Culture, Creativity, and the Commons'" (Edwards, "Publisher Elsevier" 6). It's long past time for the editors, prospective authors, and editorial boards of these journals to reconsider the effects of their decisions upon university budgets and the circulation of knowledge in our discipline.

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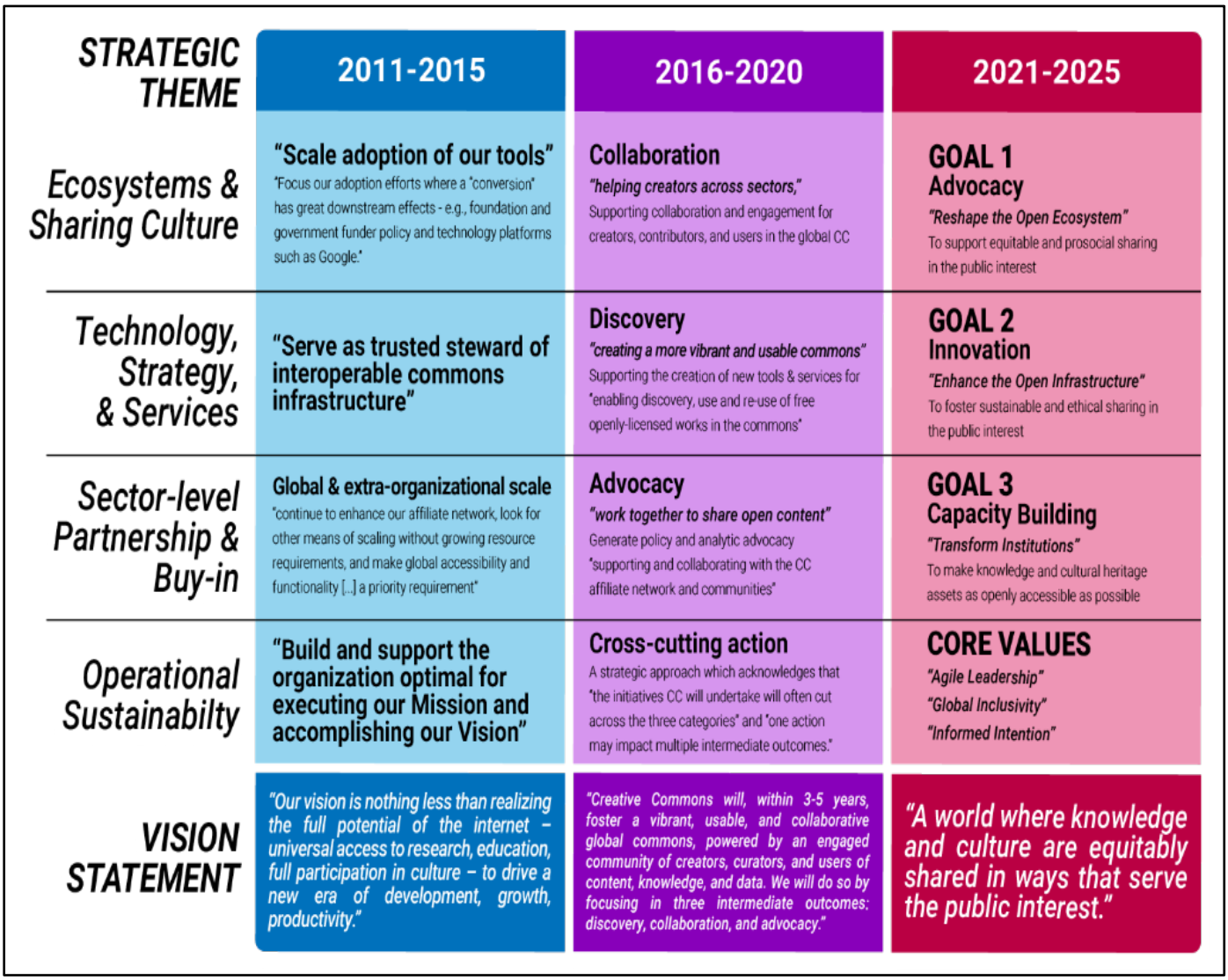
Alex C. Nielsen

LEARNING FROM THE PAST? A REVIEW OF CREATIVE COMMONS' 2021-2025 STRATEGIC PLAN IN LIGHT OF THE PAST TEN YEARS.

Founded in 2001, the Creative Commons (CC) has long been a keystone for the open access community. An international nonprofit chartered to extend and sustain knowledge sharing and advocacy, CC has represented and acted as the the de facto custodian of sharing culture in the 21st century.

Embarking this year on its third decade of advocacy for legal, technical, and public solutions to support open sharing culture and communities, CC finds itself at a crossroads. In December, the Creative Commons announced its most recent 5-year plan with the release of a new report, "Creative Commons Strategy 2021-2025." The product of three months of aggressive re-tooling in coordination with members of the Creative Commons Global Network (CCGN) and other stakeholders, this strategic vision document is presented by CC's CEO Catherine Stihler as a "fresh start for Creative Commons" (1), one offering novel approaches capable of addressing new issues in the Intellectual Property ecosystem, alongside community practices at the heart of permissive/open access licenses, with a mind towards sustainable growth, intentional action, and strong advocacy for reuse, remix, and sharing culture. "We know the open sharing ecosystem is broken" Stihler notes, "and we stand ready to fix it" (6).

This new direction is centralized around three strategic goals (advocacy, innovation, and capacity building) each mapped to a single course of action (see figure below), and associated with a set of aspirational metrics of success. Core to this term's metrics are concepts of access, inclusion, and equitability (5), and strategically all three goals are mediated by a premise of public interest and values of "integrity, accountability, insight, and humility" (6).



Goal 1: Reshape the Open Ecosystem

Presented through a theme of "advocacy" (8), this goal is characterized by shifts in "laws, policies, norms and public opinion that affect the open ecosystem." While success is primarily measured in organizational information, awareness, and community visibility, CC leadership also focuses here on having "amplified diverse voices in the open movement" in order to have outsized impact on copyright policy within various communities (9).

Goal 2: Enhance the Open Infrastructure

As an "innovation"-oriented goal, Goal 2 aligns with past efforts to remain informed about what communities and sectors use various legal and cultural apparatuses of the open movement and to understand how they are leveraged to organizational, economic, political, and public benefit (10). Core metrics presented in this goal include the completion of analytic review of this utilization and the leveraging of partnerships to reduce the economic and ethical impact of open content practices across those same sectors. Again, of special note is a focus on accessibility, both in terms of multi-lingual documentation and better tools which are more accessible, intuitive, and well-documented.

Goal 3: Transform Institutions

Finally, as a course of action to increase the capacity of the open ecosystem, the CC leadership aims to "motivate public and private institutions in the cultural heritage, education, research and data, and government sectors to open their content in legally robust ways" (11). This goal also possesses the most concrete metric—the publishing of case studies with a specific focus on sector-level shifts in open culture. However, this is also the goal where the globally-inclusive and accessible sub-theme falls off in deference to the broader and less-defined "public good."

"TOWARDS A VIBRANT, USABLE COMMONS": CONSIDERING THE PLAN IN LIGHT OF THE LAST 10 YEARS OF CC STRATEGY

The 2021 plan comes at the end of a decade of broad success in the global commons marked by significant public losses in the domains of copyright and IP control. After the 2002 establishment of CC licenses and several years advancing a legal apparatus capable of protecting the intellectual property of Copyleft creators, the period of 2011 to 2020 was one marked by advocacy, unification, and the coalescing of a coalition of scholars, legal experts, content creators, developers, and platform owners committed to supporting alternatives to the modern copyright ecosystem.

This plan, as outlined in the report and reviewed here, is solid, measured, and likely to broadly succeed. It continues much of the work of the past decade. It is quite likely that Goal 3 will be an area where extending past efforts could be entirely fruitful—these sectors are likely to have outsized impacts based on their proximity to various public welfare activities, and are likely to be an area of primary impact in the coming five years with the growth of Free and Open Source as resources of first resort for many such institutions (Setia & Rajagoplan 2020); with enhanced familiarity and dependence upon various sharealike and attribution licenses (and increased exposure to CC licenses specifically) the sharing ethos is increasingly likely to be

adopted within such communities and to spread in public services broadly. This enculturation, in hand with economic, workflow, and disclosure benefits (Jokonya 2015), may indeed cross a saturation in the coming 5 years—though the degree to which this strategic plan will put a finger on that scale is yet to be seen.

Overall, Stihler's positioning these goals as a novel approach or new directions for the organization is somewhat surprising. For one thing, it seems quite familiar, harkening back to the 2011-2020 plans which both called for very similar alignments around expansion and cementing of shared capabilities among and between sectors, all tied together through a robust advocacy campaign. As expressed in the 2016 vision statement by then-CEO Ryan Merkley:

> Creative Commons will, within 3-5 years, foster a vibrant, usable, and collaborative global commons, powered by an engaged community of creators, curators, and users of content, knowledge, and data. We will do so by focusing in three intermediate outcomes: discovery, collaboration, and advocacy (5).

Much of what is carried forward in the current plan lives within this statement—a statement which further extends from the 2011-2015 strategic plan's targeting of potential impacts on "global welfare from the use of CC's tools" in a bid for more public advocacy alongside an interoperable apparatus and stewardship of commons culture and infrastructure (Creative Commons 2010). If the new CC strategic vision is advocating for a fresh start for the organization, it is clearly nonetheless a continuation of the past vision—for better and for worse. This is not inherently negative – indeed, the continuity of vision and adherence to past leadership's decades-long targets indicates a strong goals-minded organization making continual progress. However, it also raises into question the viability of a continuation of strategies that have to this point done little to prevent a broken ecosystem, as described by Stihler and this year's Creative Commons executive report. If there is a path to "fixing" the open sharing ecosystem, it does not present itself here as much different from the actions already taken that at best cemented it where it currently is.

Of higher concern in this term is a shift in the level of both effort and detail contained within this broad strategy compared to past years. While both the 2011 and 2016 reports included varying levels of risk assessment, capital and other resource alignment, and action planning, the 2021 plan is scant on details of how, precisely, the Commons intends to execute on its current vision. At the same time, the claim of "over three months of stakeholder engagement" does pale slightly in light of the six-month effort to not only produce but also test components of the 2011 strategy (creativecommons.org, 2010), and the more than year-long engagement of the CC

Board in "intensive consultation, discussion, brainstorming, analysis, and testing" across the global commons (CC Board 2015). For a set of themes centralized around an ethic of inclusion and community ownership, and given CC's highlighting of the process as "designed to be inclusive and transparent" (Stihler 2020) this dramatic reduction in integration with the communities in question is concerning. Furthermore, such differences in output, scale, and effort make the absence of organizational risk disclosure, more firm metrics, and awareness of cross-cutting efforts and impacts more of a red flag than they might have otherwise been. Hopefully these more concrete structures will manifest (and be broadly disseminated) in the coming months and years.

CONCLUSION

The global commons is, as noted by CC leadership both current and historical, imperiled. As the 2016 report notes, "Creative Commons didn't change copyright," and "while CC has been successful, our work will not be complete until we light up that universe of content and creators" (3). Is the 2021 plan a step in this direction? Perhaps, but it is not likely to be an outsized one. As the "theory of change" section of the 2011 plan contemplates, "sharing is growing rapidly, but so is control" across policymakers and corporations, all with "vastly greater resources at their disposal" to impose their legal and cultural will on the commons (2011).

For organizational leadership (and a sharing community) structured around transparency and accountability (6), it would be nice to see—in light of claims of novelty, fresh views, and a readiness to fix a broken ecosystem—a more aggressive, formalized, and tactical set of goals out of the current plan. At minimum, a more robust course of actions and connection to the structured metrics provided will be necessitated in the coming term if leadership hopes to enact meaningful change. However, a continuity of leadership and vision is not inherently detrimental, and stability in mission and purpose is one of the great assets of the global commons. There is much cause to be optimistic, especially when considering the incredible accomplishments touted by the same leadership in last year's "State of the Commons" report (Heath 2020). To say the least, it will be interesting to witness where the next five years of effort take the commons and how such activity will impact sharing culture broadly.

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