



**International Society for the History and Theory of Intellectual
Property (ISHTIP)**

Third Annual Workshop

5-6 July 2011

Griffith University, South Bank, Brisbane, Australia

Program

Day One 5 July 2011

9.00 am	Registration
9.30 - 10.30am	Elena Cooper, <i>'Field, Blaine and the Artistic Copyright Committee of the Society of Arts, Manufactures and Commerce 1857-1862'</i>
10.30 - 11.00am	Morning Tea
11.00 – 12.00 pm	Ramon Lobato, <i>'Piracy and anti-piracy as generative forces'</i> (co-authored by Julian Thomas)
12.00 – 1.00pm	Lunch
1.00 – 2.00pm	Jose Bellido, <i>'Torres Caicedo A decade in international intellectual property history (1879-1889)'</i>
2.00 – 3.00pm	Kathy Bowrey, <i>"The World Daguerreotyped – What a Spectacle!" Copyright law, photography and the importance of a public visual space</i>
3.00 – 3.30pm	Afternoon Tea
3.30 – 4.30pm	Roundtable Discussion: Intellectual Property as a problem of historiography
7.00pm	Conference Dinner

Day Two 6 July 2011

9.30 - 10.30am	Martha Woodmansee, <i>'Fan Control in the Era of the Entertainment Franchise: The Case of Harry Potter'</i>
10.30 - 11.00am	Morning Tea
11.00 – 12.00 pm	Marett Leiboff, <i>'No Idea: Tristram Shandy, transgressive creativity, John Locke's tabula rasa, and the legal imaginary.'</i>
12.00 – 1.00pm	Lunch
1.00 – 2.00pm	Stephen Hubicki <i>'DNA neither knows nor cares, [it] just is': The problem of embodiment in biotechnology patents'</i>
2.00 – 3.00pm	Jason J. Du Mont, <i>'Design Patent's Non-Patent Origins'</i> (co-authored by Mark D. Janis)
3.00 – 3.30pm	Afternoon Tea
3.30 – 4.30pm	Rosemary Coombe and Joseph Turcotte, <i>'Reimagining Fair Dealing: Creating Archiving Software for Enhancing Canadian Cultural Heritage Online'</i>

Field, Blaine and the Artistic Copyright Committee of the Society of Arts, Manufactures and Commerce 1857-1862

Elena Cooper
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Abstract

While the history of the painting copyright provisions of the Fine Arts Copyright Act 1862¹ has been the subject of recent scholarship,² very little is known about the detail of the debates that took place in the body which led the campaign for reform: the Artistic Copyright Committee of the Society of Arts, Manufactures and Commerce. Appointed in 1857 under the Chairmanship of Sir Charles Eastlake (then President of the Royal Academy of Arts), the Committee drew together representatives from a broad cross-section of the Victorian art-world, including collectors, museum administrators, engravers, photographers, sculptors, architects and painters.

Drawing on previously unpublished archival material, this paper will chart the history of the debates in the Copyright Committee in the period from 1857 to 1862. Particular prominence will be given to the contrasting positions taken by the Committee's two lawyer protagonists: Edwin Wilkins Field and Delabere Robertson Blaine. Using the different visions of copyright put forward by Field and Blaine as a starting point, the paper will tease out the themes and legal issues surrounding artistic copyright which came to be debated in the later nineteenth and early twentieth century, to codification in 1911. In doing so, the paper will consider the legacy of these mid-nineteenth century debates, reflecting on to what extent the Artistic Copyright Committee of 1857-1862 was a microcosm for the interests and positions on copyright which came to be played out later in that century and beyond.

Piracy and anti-piracy as generative forces

Ramon Lobato

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(co-authored by Julian Thomas)

Abstract

From the perspective of rights holders, piracy represents lost revenue. In this article we argue that piracy, nevertheless, has important generative features. We consider the range of expanding commercial opportunities that piracy opens up around the media industries, and we offer a preliminary model of transnational anti-piracy enterprise. We situate piracy not only in relation to the law, but as an element of what we take to be a larger informal media sector, characterised by close relationships with formal businesses that are not necessarily aligned to media production. Our analysis notes the increasing commercialization of piracy-related research, enforcement, and technology, and the continuing development of new business models for capturing revenue from pirate distribution. A case study of “speculative invoicing” lawsuits demonstrates both the extent of this commercialization and its detachment from the mainstream content industries. By focusing on the diversity, agency and autonomy of anti-piracy businesses, we seek to move the deadlocked piracy debate away from sectional advocacy, and toward a more positive analysis of the complex legal and economic ecologies of intellectual property.

Torres Caicedo A decade in international intellectual property history (1879-1889)

Jose Bellido
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Abstract

One year after signing the Paris Convention of Industrial Property (1883), Jose Maria Torres Caicedo, the president of the most important copyright association at the time, the Association Littéraire et Artistique Internationale (ALAI), sent a letter to the French Ministry of Foreign Affairs. His main concern is to reach a bilateral copyright agreement between the tiniest Latin American country, the Republic of El Salvador and France. Few days earlier, he had publicly announced the forthcoming bilateral agreement. Few months later, he will be secretly meeting the Swiss politician Numa Droz to convince him of the urgent need for a multilateral copyright gathering, what will become the major international copyright agreement still in force, the Berne Convention (1886). This paper explores the footsteps and problems of political representation between person and office in the political history of international intellectual property. It follows the complex, gentle and multifaceted persona of Jose María Torres Caicedo (1830-1899). Torres Caicedo was not only a Colombian writer and a Latin American diplomat; he became one of the first cosmopolitan IP scholars.

“The World Daguerreotyped – What a Spectacle!” Copyright law, photography and the importance of a public visual space’

Kathy Bowrey
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Abstract

This paper concerns copyright law and the history of photography. As has been documented by other writers such as Edelman, Bently and Deazley, the inclusion of photography in the copyright regime was controversial because of the mechanical and scientific nature of the method of production. However there is more to the story of copyright law and photography than one about classificatory objections and the derisory attitudes of particular legal and cultural elites about a new technology. The legal history needs to be understood in light of a much wider celebration of the wonder of photography and its importance to the world. Enthusiasm for the photographic medium impacted on political, economic and social life. This in turn left a mark on copyright law.

My presentation considers (1) The role of photography in constructing the political idea of the Nation and the priority of creating a public visual space; (2) the importance of copied images to Art Education, ideas of progress and civilisation; (3) the production of authorized copies for the art reproduction market, and (4) broader debates about piracy and the apparent ease of enforcement of a controversial copyright.

This historical account of photography and the public visual space is a positive one about how a complex mix of the public, political and economic motivations impact on rights in practice. I conclude with a brief discussion of the contemporary relevance of this history and the ongoing importance of access to a public visual space.

Fan Control in the Era of the Entertainment Franchise: The Case of Harry Potter

Martha Woodmansee

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Abstract

Literary commentary, interpretation, translation, adaptation, sequelling, and criticism have figured among the defining activities of literary culture since the invention of printing. This paper is concerned with the constraints being imposed on these activities by the growth of the entertainment franchise. I examine the efforts of the Harry Potter franchise to constrain the diverse “fan” activities inspired by J.K. Rowling’s Harry Potter novels. My focus is this franchise’s legal action in *Warner Bros. and J.K. Rowling v. RDR Books* (2008) against the author of a comprehensive “reader’s companion” to the multi-volume Harry Potter universe. While the franchise prevailed, preventing this useful handbook from seeing the light of day, I argue that the court opinion should nevertheless be viewed as supportive of such “follow-on” activities. Through close reading of the court documents I suggest that the court’s acknowledgment of the importance of such activities to a vibrant literary culture may be traced to the expert testimony that painstakingly situated the handbook in an established tradition of literary practice. By demonstrating how the detailing of traditions of practice can help to educate judges, *Warner Bros. v. RDR Books* suggests the vital role that current “best practices in fair use” initiatives can play in curbing franchise ambitions.

No Idea: Tristram Shandy, transgressive creativity, John Locke's tabula rasa, and the legal imaginary

Marett Leiboff

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Abstract

Pray, Sir, in all the reading which you have ever read, did you ever read such a book as Locke's Essay upon the Human Understanding? ——Don't answer me rashly, -- because many, I know, quote the book, who have not read it,---and many have read it who understand it not:--- Laurence Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, Vol. II, Chap. II

John Locke's *An Essay Concerning Human Understanding*, first published in 1690, contains the blueprint for copyright law's axiomatic distinction between unprotectable ideas and protectable expression. Locke claims that our minds are blank slates – the famed *tabula rasa* – which draw upon freely available ideas that interact with the mind to create expression. Thus sense data – ideas – must be free and available for all. Only expression, as a production of the output of ideas, can be the subject of copyright protection.

This seemingly simple delineation between idea and expression is an artifice which relies upon a mechanical and imaginary mode of thinking that does not conform to the conditions in which creativity occurs. Yet it is grounded in a long since discredited theory of the mind. While Locke's notion of idea eventually persuaded the courts during the 18th century literary property debates, thus vouchsafing its place in copyright, its premise was the subject of considerable hilarity even during the same period.

Indeed, Locke's conception of 'idea' was far from accepted during the 18th century. In this paper, I will trace the key concepts underpinning Locke's conception of idea and their dismissal through the agency of Laurence Sterne's digressive comic masterpiece *The Life and Opinions of Tristram Shandy, Gentleman*. This nine-volume novel published during the middle of the 18th century not only sent up Locke's construction of the processes of thought and the notion of idea itself, but through the fabric of its creation – the use of blank and black pages, squiggles and dashes, interspersed sheets of marbled paper - and the textual devices used throughout, Sterne sought to unravel its central tenet: that creation and thought cannot be contained and controlled mechanically and mechanistically. *Tristram Shandy's* shambolic proto-21st century creativity provides a critical gesture through

Design Patent's Non-Patent Origins

Jason J. Du Mont

Max Planck Institute for Intellectual Property & Competition Law;
(co-authored by Mark D. Janis)

Abstract

Design patent protection is the oldest American form of intellectual property protection for ornamental designs, but still the most enigmatic. Congress passed the first design patent legislation in 1842, operating on the assumption that existing rules for utility patents could be incorporated *en masse* to protect designs. This Article questions that assumption. Drawing on new archival research and historical analysis, this Article demonstrates for the first time how the design patent system originated. We analyze the international trade aspects of the first design patent legislation, linking the legislation with a brief burst of protectionist measures associated with the Whig party. We also examine technological innovations that ushered in the first major era of American industrial design in key antebellum industries, and we analyze lobbying efforts on behalf of those industries that led to proposals for early design protection, proposals that did not assume the incorporation of patent rules. We also prove for the first time how the American design patent system originated as a knock-off of British copyright and registered design legislation, and why the American system was likely forced into a patent rubric. Finally, we conclude by offering concrete suggestions for the courts and Congress to ease the design patent system back to its non-patent roots.

Reimagining Fair Dealing: Creating Archiving Software for Enhancing Canadian Cultural Heritage Online

Rosemary Coombe

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Joseph Turcotte

PhD Candidate, Communication and Cultural Studies
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Abstract

The presentation will simultaneously describe and present new open source arts content management software developed to enable arts organizations to digitally exhibit and share a wider range of Canadian cultural content online. The architecture of this system has been explicitly developed to meet Canadian fair dealing requirements while simultaneously using digital communications technology to create a dynamic and dialogic archives that will increase our knowledge and understanding of Canadian cultural history. Nevertheless, we recognize that our interpretation of fair dealing requirements will be considered unorthodox and we invite discussion about the merits of our approach.