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Digital Humanities, Copyright Law, and the Literary

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Abstract

Embedded in the rich textual record of international copyright law, we often encounter a quaint, and perhaps naïve definition of the "literary" around which the law has crystallized and which has the potential to influence the work of all digital humanists, whether they think of themselves as literary scholars or not. The first part of this article explores how a relatively narrow definition of the "literary" as a category of "high" or belletristic cultural production has informed the contours of U.S. copyright law, in particular. Section 101, Title 17 of the United States Code expressly defines "literary works" as any "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied" [Section 101, Title 17]. US courts have, however, often employed a narrower, more commonplace understanding of the "literary" as an aesthetic category when sorting artifacts or content into other legally more significant categories such as idea, expression, criticism, parody, and satire. The second section of the article considers some of the potential implications and consequences of the current regulatory structure for the work of digital humanists. Judges engaging in a fair use analysis more often than not expect scholarship to come packaged in print monographs written in academic language aimed at an audience of disciplinary specialists. When they encounter scholarly artifacts that depart from those formal expectations and draw from pre-existing work, judges are less likely to find the use of pre-existing work is fair and therefore non-infringing. Finally, the article examines whether the literary as a category should be abandoned altogether, or whether digital humanists might productively redefine the literary as part of a strategy for re-imagining the institutional and legal regulations that govern academic work.

Introduction

In his "An Attempt at a 'Compositionist Manifesto,' " Bruno Latour advocates for a discursive practice he labels "composition." Composition involves assembly, construction, creation [Latour 2010, 474]. It thus stands in contrast with "critique," which, for Latour at least, involves a futile attempt to tear down facades in order to reveal the truth concealed beneath them: 1

> The difference is not moot, because what performs a critique cannot also compose. It is really a mundane question of having the right tools for the right job. With a hammer (or a sledge hammer) in hand you can do a lot of things: break down walls, destroy idols, ridicule prejudices, but you cannot repair, take care, assemble, reassemble, stitch together. [Latour 2010, 475]

Within the compositionist landscape Latour imagines, our attention would be drawn "away from the irrelevant difference between what is constructed and what is not constructed, toward the crucial difference between what is well or badly constructed, well or badly composed" [Latour 2010, 474]. Composition as Latour defines it challenges and calls into question the conceptual boundaries that often separate literary things, e.g., things such as books and scholarly essays, from non-literary things, e.g., paintings, musical scores, and dance [Latour 2010, 473–74]. 2

Latour's discussion of compositionism also seems to blur at least some of the distinctions we often make between literary "authorship" and literary "scholarship" by suggesting the artist and the humanist ultimately draw upon many of 3

the same tools and processes [Latour 2010, 474–75]. In this, composition as a mode of production seems particularly suited to the digital humanities, which as an inter- or trans-discipline challenges and calls into question some of these same conceptual boundaries. In a talk at the 2011 convention of the Modern Language Association that caused a stir because of what it potentially said about who is "in" and who is "out" of the digital humanities community, Steve Ramsay argued, "Personally, I think Digital Humanities is about building things. [. . .] If you are not making anything, you are not . . . a digital humanist" [Ramsay 2011a]. Ramsay's discussion, in a subsequent blog post, of building as a "distinctive" scholarly mode in digital humanities [Ramsay 2011b] suggests digital humanities scholarship is (or has the potential to be) formally and methodologically different from what we might think of as more traditional literary "criticism".

4 Even though it resists many of the rhetorical and formal conventions we have come to associate with literary scholarship, compositionism in Latour's definition nevertheless engages processes of interpretation, deconstruction, and theoretical framing. Latour's "manifesto" thus also provides insight into how those digital humanists who like Ramsay are interested in building things may also respond to Alan Liu's call, in his own 2011 MLA address, for more engagement within digital humanities with the quintessentially humanistic endeavor of cultural criticism [Liu 2011]. Ramsay and Liu understand building as an activity that engages critical intellectual processes, even though critique may not be its ultimate end [Liu 2011]. The debate about the relationship, or potential lack thereof, between composition and building, on the one hand, and criticism, on the other, has even found its way into the mainstream press in an essay by Adam Kirsch in the *New York Times Sunday Book Review*. What I find particularly thought-provoking in Kirsch's account is his suggestion, which mirrors Latour's, that a conceptual turn towards composition or building in the work of literary scholars has the potential to undo the distinction we often make between the objects of literary study and the objects produced by literary study: "The critic participates in the world of literature not as a lawgiver or a team captain for this or that school of writing, but as a writer, a colleague of the poet and the novelist" [Kirsch 2010].

5 As a digital humanist, I am persuaded by the assertions Latour, Ramsay, and Liu have made about how academic scholarship in general and digital humanities scholarship in particular can and should evolve in response to new technological and cultural pressures. As a lawyer and legal scholar, I am also intrigued by how that evolution might challenge the current regulatory framework in productive new ways. Copyright law has frequently imported and even codified prevailing academic ideas about what constitutes literature and literary scholarship [Vaidhyanathan 2001, 35–37]. Digital humanists should, therefore, be prepared to confront a set of legal paradigms ill-designed to accommodate new modes of scholarly production that depart from those traditional formal expectations. Unraveling how the language of literary study has informed the language of the law, though, also provides a persuasive demonstration of the potential agency literary scholars can assert to influence jurists and legal decision-making. In order to change the way we work, we must also articulate new theoretical structures through which that work can be justified — both within our departments and within legal briefs and judicial opinions — *as scholarship*.

6 In the following section, "U.S. Copyright Law and the Literary," I explore in more detail how the category of the "literary" evolved within and continues to inform the application of U.S. copyright law. The focus on the United States here results from both practical and strategic considerations. As a practical matter, a detailed examination of copyright law in multiple jurisdictions is beyond the scope of a single treatise, much less a single essay. Strategically, I want to continue what I see as a productive trend toward more granular studies of legal texts and legal history that add detail to broader international narratives such as the one Martha Woodmansee [Woodmansee 1984] has constructed.[1] This is not an attempt to explain how the literary as a category informs copyright law in every jurisdiction, in every case. Rather, by engaging with the central theme running through this issue, I hope to demonstrate how the ongoing conversation about copyright reform engages and enriches our discussion of how digital humanities will define itself as a discipline. The article then turns, in the section titled "Digital Humanities and Copyright Law," to a consideration of some of the practical consequences for digital humanists working in the United States, or working with materials first published in the US, of the continued legal application of categorical distinctions between "high" and "low" literature, and between "original" authorship and "derivative" scholarship. That section also explores how, as digital humanists reconfigure the literary as a category by considering what place building or making things *with* literary objects has or should have in disciplines where scholarly work has consisted primarily of writing *about* literary objects, we may also need to think strategically beyond the lab and into the courtroom and legislative chamber. The final section, "Transformative Use, Joint Authorship,

and More Productive Relationships," concludes by looking at the existing law as a source of authority upon which digital humanists might draw as we press for a re-examination of the institutional regulations that govern academic work.

U.S. Copyright Law and the Literary

7 As humanists, we confront an intellectual environment where we must constantly demonstrate what we do is relevant and necessary. The law governing our work, however, has been built around a presumption the literary objects we study (a category that has been extended by analogy to cover visual, cinematic, dramatic, and performing arts) are only "useful" when they look like technical manuals. Further, as digital humanists, we are engaged in a consideration of how new tools and methods might fundamentally alter the shape of humanistic inquiry. In this too, we are potentially confounded by jurisprudential use of the literary as a rather narrow category that segregates "high" from "low" culture. Judicial deployment of what I will refer to throughout as a "belletristic" definition of the literary places implicit aesthetic and formal limits on the acceptable artifacts of literary study, as well as the scholarship produced by such study.

8 Ray Patterson [Patterson and Lindberg 1991, 47–55], Ty Herrington [Herrington 2001, 59–76], Lawrence Lessig #lessig2004, and James Boyle [Boyle 1996, 51–60] have all described how U.S. copyright jurisprudence is shaped by an internal tension between a desire to reward the creation and dissemination of all manner of cultural production on the one hand, and a belief economic monopolies stifle innovation and creativity on the other. Pursuant to the Intellectual Property Clause in the U.S. Constitution, copyright is a means to an end, promoting the "Progress of Science and useful Arts" [U.S. Constitution, Article 1, Section 8, Article 1, Section 8]. In this passage, by including that revealing modifier "useful," the Constitution's framers appear to reject belletristic justifications of copyright grounded in appreciation of authorial genius or artistic merit. Instead, the Constitution casts the "the exclusive right" granted to "authors and inventors" as a sort of reward for rendering a civil service to the community [Herrington 2001, 35–58], as an incentive to disclose the patented invention or publish the copyrighted work. The ultimate end of granting private property rights is to expand the public domain; rewarding authors and inventors is just a means to that end. In addition, while the clause identifies "writings," as the proper subject of copyright regulation, coverage under the original Copyright Act of 1790 for "maps, charts, and books," in that order, makes fairly clear the category "authors" included cartographers and technical writers, as well as novelists and poets. The current version of the law, which was substantially codified in 1976, now defines "literary works" as any "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied" [U.S. Constitution, Article 1, Section 8, 17 U.S.C. Section 101].

9 Although the statutory definition of the literary remains quite broad, statutes and legislative history provide, at best, only half the story. Putting together an accurate account of how the law employs the literary as a category requires a turn to case law, and a brief tour through significant cases where courts have defined key concepts such as "idea," "expression," "originality," and "fair use." In reading these cases, I want to highlight how judicial attempts to define other, legally significant categories often involve an unreflective application of a definition of the literary drawn, not from the Constitution or the copyright statute, but from somewhere else entirely. I am less concerned with the problem of where the courts get this implicit definition of the literary, than with the subsequent social and legal consequences of defining "literature" as a relatively small subset of literary works that can be distinguished on the basis of their aesthetic appeal, or identifying critique as the primary mode of literary scholarship. Each of these cases is a historically specific response to a very complex set of circumstances. They are also the sources of important legal doctrines that have been shaped by unarticulated assumptions about the world the law is supposed to regulate. By understanding how judicial assumptions about literature and the work of literary studies have influenced judicial decision-making, I hope to provide some insight into how a reconfiguration within the academy of those categories and relationships might have the potential to effect substantial, beneficial change in the law.

10 From the outset, the First Amendment and the underlying policy of the copyright law — to promote the progress of science, or knowledge, and the useful arts, or industry — have exerted pressure on courts to place inherent limitations upon or create exceptions to the exclusive rights of authors [Leval 1990, 1106–8], [Shipley 1986, 984–98]. The originality requirement [17 U.S.C. Section 102(a)] and the idea versus expression dichotomy [17 U.S.C. Section 102(b)]

both limit what can be considered copyrightable subject matter. Fair use [17 U.S.C. Section 107], which I address in more detail in the section below, is the most significant exception to an author's right to prevent unlicensed copying. These three concepts, which began as common law doctrine and have since been codified in Title 17 of the United States Code, provide the underpinnings for our modern understanding of the public domain, also known as the intellectual commons [Boyle 1996, 45]. They do so, however, through the implicit encoding of narrow definitions of literature and literary scholarship, both of which entered US copyright law during the late-nineteenth century.

11 Thus, the modern formulation of the idea-expression dichotomy originates in the Supreme Court case of *Baker v. Selden*, 101 U.S. 99 [1879], in an opinion still routinely cited to justify judicial decision-making in copyright cases. The underlying action arose from Baker's publication and use of accounting ledgers predicated on a system Charles Selden had invented and described in a prior publication. The evidence clearly demonstrated the words, charts, and forms Baker employed were similar to but still distinct from those Selden used, but Selden's widow, the plaintiff in the original action, argued Selden's copyright covered the ideas expressed in the work as well as the expression used to convey them. The Supreme Court, arguing from a set of hypothetical situations involving technical manuals on subjects such as medicine, perspective drawing, and mathematics, held expression is the purview of copyright and ideas are the purview of patent law:

> The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book without getting a patent for the art, the latter is given to the public [Baker v. Selden 1879, 102].

12 Only copying of expression gives rise to copyright infringement; use of the ideas does not. In the process of reaching its holding, the Court begins to break down the broad, legislative category of "writings" — e.g., maps, charts, books, etc. — into literary expression that consists primarily of words and other forms of expression that comprise "illustrations of lines and figures" and "diagrams (which merely stand in the place of words)" [Baker v. Selden 1879, 102]. Words, illustrations, lines, figures, and diagrams are all forms of expression that can embody ideas. Words, though, are the paradigmatic form of expression, the vehicle to which the Court returns repeatedly in drawing out an extended series of analogies to clarify its reasoning:

> The fact that the art is described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book [Baker v. Selden 1879, 102–103].

13 Unlike words, which maintain a stable identity as expression throughout the Court's discussion, the diagrams "which merely stand in the place of words" and thus presumably constitute expression in one sentence become in the next ideas "which were in the author's mind, and which he thus described by words in his book."

14 In addition to the distinction between idea and expression, the Court thus ends up drawing a line between two different kinds of expression. We get expression in which the idea is separable from the form in which it has been embodied, which the Court repeatedly illustrates through resort to literary examples, and expression in which the idea has "merged," which the Court always identifies with non-verbal, non-literary modes of representation:

> The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public — not given for the purpose of publication in other works

> explanatory of the art, but for the purpose of practical application. [Baker v. Selden 1879, 102–103]

15 Although expression is generally subject to copyright protection, in some cases, pursuant to what has come to be called the "merger" doctrine, even that is given over to the public along with the ideas expressed where one must reproduce the expression not "in other works explanatory of the art, but for the purpose of practical application." The quoted passage further demonstrates how the circumstances of the case, which involved a technical manual, set the conceptual parameters the Court employed to think through the problem. In its analysis, the Court did not hold the abstractions behind images or words are never subject to copyright protection under any circumstances. It also did not conclude non-literary expression will never be separable from the ideas it embodies. Rather, it concluded the kinds of abstractions, the "methods" and "knowledge" involved in the particular case of *Baker v. Selden*, were more appropriately treated as the subject of patent law, if they could be subject to regulation as property at all. Consequently, their public disclosure without making them the subject of a patent application gave them up into the public domain, if they were not part of it already. Similarly, the kinds of non-literary expression involved in the case, forms and diagrams, provided quintessential examples where idea and expression had merged.

16 The Court's reasoning, as quoted thus far, would have been entirely sufficient to justify its holding "that blank account books are not the subject of copyright, and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account books, ruled and arranged as designated by him and described and illustrated in said book" [Baker v. Selden 1879, 107]. The Court went on, however, to address hypothetical future cases involving "ornamental designs or pictorial illustrations addressed to the taste":

> Of course these observations are not intended to apply to ornamental designs or pictorial illustrations addressed to the taste. Of these it may be said that their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition as are the lines of the poet or the historian's period. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use, and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art would undoubtedly be an infringement of the copyright. [Baker v. Selden 1879, 103–104]

17 I quote at length here in order to demonstrate more clearly how the Court introduces extra-legal concepts regarding literature, literary production, and the various functions of different kinds of "writings" into its legal reasoning. "Ornamental designs or pictorial illustrations addressed to the taste" are like "the lines of the poet or the historian's period," in that the visual and written material both are "the product of genius and the result of composition." As such, the Court concludes, both can be distinguished from the "mere language" and instructional "diagrams" of the technical manual at issue in the case at hand, which are the more mundane vehicles through which knowledge is communicated. Although the Court is still concerned with untangling the distinctions between idea and expression, and between patent and copyright as outlined legislatively, its conclusions about what can and cannot be borrowed, what can and cannot be protected, are clearly influenced by more than just the letter of the law as it currently stood. The influence of extra-legal, primarily aesthetic considerations about the nature of art in general and literature in particular leads the Court to distinguish artistic creation from technological innovation, ornament from utility, and the "production of pleasure" from the communication of useful knowledge. These conceptual distinctions continue to permeate the academy and often trouble digital humanists and other scholars whose work ignores or transcends them, and they also continue to play a significant role in how courts interpret and apply the law.

18 *Baker v. Selden* was handed down in 1879, nearly a century after the first federal copyright statute was enacted, under the Copyright Act of 1831. The 1831 act extended the copyright term, made copyright a descendible property right that could be transferred to one's heirs by will or through the laws of inheritance, and added sheet music to the list of copyrightable subject matter [Copyright Act of 1831]. In the passage from *Baker v. Selden* quoted above, though, we

can read influence of the conceptual turn that produced the Copyright Act of 1870. Although the more recent law did not apply in the case because Selden wrote his treatise before it went into effect, its gravitational pull clearly shapes the Court's opinion. The Copyright Act of 1870 was part of a legislative package that included an overhaul of the patent system and attempted to establish a federal regulatory structure for registering and protecting trademarks. Among a number of other substantial changes to the copyright law, the new legislation extended the list of works subject to copyright, and included an exclusive right to produce translations in the "bundle of rights" granted to the owners of copyrights in literary works [Copyright Act of 1870].

19 By adding the translation right, Congress legislatively overruled the decision in *Stowe v. Thomas*, 23 F. Cas. 201 [1853]. In that case, the court held a German translation of Harriet Beecher Stowe's *Uncle Tom's Cabin* did not infringe the copyright in her work. Denying Stowe's copyright claim, the court, like the Supreme Court in the later decision of *Baker v. Selden*, distinguished "abstract" ideas from "concrete" expression. Unlike the Supreme Court, however, the lower court in *Stowe v. Thomas* did not make what have since become conventional distinctions between literary creation and technological innovation:

> An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise. [Stowe v. Thomas 1853, 205–6]

20 Here, in a case involving a literary work in both the legal and the commonplace understanding, the court describes the author as the "creator or *inventor* " of her book, who upon publication gives up her "conceptions" to her "readers, who cannot be deprived of the *use* of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise" (emphasis added):

> The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist as dissevered from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. [Stowe v. Thomas 1853, 206]

21 The *Baker v. Selden* Court defined uncopyrightable abstractions, ideas, narrowly, as "knowledge" and "methods." In this earlier case, the lower court takes a much more expansive approach, concluding "ideas, sentiments, or the creations of the imagination of the poet or novelist as dissevered from the language, idiom, style, or the outward semblance and exhibition of them," all resided outside the domain of copyright. The holding thus expressly rejected Stowe's argument that as the " 'efficient cause' of a thing," the author "[i]n respect to a book . . . is the creator of the ideas" it contains and therefore is entitled, pursuant to copyright law, to the exclusive right to sell them. [Stowe v. Thomas 1853, 202].

22 In my analysis of these two cases, I am attempting, as Latour suggests, to draw attention "away from the irrelevant difference between what is constructed and what is not constructed, toward the crucial difference between what is well or badly constructed, well or badly composed" [Latour 2010, 474]. The law itself is a composition, built up, broken down and rebuilt over the years in response to historical circumstance. *Baker v. Selden* and *Stowe v. Thomas* can, of course, be read as judicial responses to historically specific social, political, and economic pressures. They may also — I would even argue must also — be read as judicial efforts to create an internally coherent legal epistemology that not only reacts to the world it is intended to regulate but also proactively creates the terms by which that world will subsequently be known and understood. These two cases represent two alternative means of constructing the idea v. expression dichotomy. One of them, *Baker v. Selden*, constructs that dichotomy through reference to an extra-judicial understanding of the literary as a relatively narrow category of cultural production comprising writings whose artistic

merit renders them, among other things, somehow less useful. The other, *Stowe v. Thomas*, relies on a very different, but also extra-judicial understanding of literary authorship that depends upon drawing parallels, as opposed to distinctions between literary and technological invention.

23 The Congressional decision effectively to overrule *Stowe v. Thomas* and include a translation right in the 1870 act might have been construed broadly as a statutory codification of Stowe's position, one that effectively put an end to the idea-expression dichotomy in copyright law, at least as far as literary works were concerned. It certainly marks what many have argued was the beginning of a long legislative turn away from the original policy concerns of the Intellectual Property Clause, and a redefinition of authorship and copyrightable subject matter in accordance with more conventional notions of genius, creativity, and artistic merit. The Supreme Court, however, took the opportunity in *Baker v. Selden* to breathe life back into the idea-expression dichotomy, or at least put it on life support. When we read *Baker v. Selden* as a response to the 1870 act, we see how, in order to accommodate both the original intent behind the Intellectual Property Clause and to make room for the emerging definitions of authorship and creative production that helped to produce the new copyright legislation, the *Baker v. Selden* Court split the baby. It does so by conceptually dividing what began in the Intellectual Property Clause as an inclusive and undifferentiated category of "writings" into the sub-categories of writings that are "useful," that is works whose "final end" is to teach the public about the useful arts, and writings that are literary in a conventional sense, writings whose "form is their essence," and whose "final end" is in "the production of pleasure in their contemplation" [Baker v. Selden 1879].

24 This narrow definition of the literary is implicit in how the idea v. expression dichotomy is used today. To put it another way, in order to understand how "ideas" and "expression" are distinguished under the law, we must read into the law a distinction between technological innovation and artistic creation, between technical and scientific literature and "literary" works like novels and plays. In scientific and technical literature, the distinction between idea and expression is relatively clear. The ideas themselves, furthermore, are of "use" to the public, and understanding "use" in this context also depends upon drawing fairly conventional distinctions between technological or scientific, and artistic endeavors. Hence the potential those "useful" ideas possess to become the subject of patent law and their availability for unlicensed reproduction if they are not patented. As codified in Title 17, Section 102(b) of the Copyright Act of 1976, the current version of the statute, the idea-expression dichotomy continues to associate "idea" with a utilitarian vocabulary: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work" [17 U.S.C. Section 102(b)].

25 In the latter category of literary objects addressed by the Court in *Baker v. Selden*, which includes things like poems and novels, however, the distinction between idea and expression was and still remains less than clear. After the 1870 act, the copyrightable expression in these works clearly included more than the "mere language" in which an author's ideas were "clothed." Indeed, after copyright was expanded yet again to incorporate an exclusive right to make "derivative" works, subsequent cases extended copyright protection to conceptual elements such as the story and the characters in a fictional work, bringing them under the umbrella of copyrightable expression [Kurtz 1986, 429]. This extension of coverage provides the basis for precluding unlicensed creation of sequels to and adaptations of a literary work. Not surprisingly, though, courts have trouble drawing the line between artistic expression and the public domain, or perhaps the collective unconscious, in some cases. In two cases involving the Pixar animated film *Monsters, Inc.*, for example, judicial decision-making turned upon literary questions and the expert testimony of academics regarding whether certain thematic and even visual elements are fundamental components of monster stories as a genre and therefore not subject to protection under copyright law [Price 2008, 188–195, 202–207].

26 By announcing copyright coverage is potentially broader for what we might, purely as a matter of convenience, call high, or creative literary works, *Baker v. Selden* implied most of the ideas embodied in books from this category, although they may be the "product of genius and the result of composition," are to be valued for the pleasure they produce, rather than their utility. They are not subject to patent law, nor do they demand to be circulated as freely as the "useful" ideas we find in low, or "practical" literary works like maps, charts, and technical manuals. The Court implicitly concluded the "Progress of Science and the useful Arts" is not directly served by their circulation as material for use and application, rather than simple consumption. The Court's reasoning also hinges on yet another implicit presumption works produced

for instruction are not generally “addressed to the taste.” They will not in the ordinary case “produce pleasure in their contemplation,” at least not in the same manner as belletristic literary works whose final end is to do so.

Digital Humanities and Copyright Law

27 Like the idea-expression dichotomy, the fair use doctrine creates breathing room for the public domain in U.S. copyright law. In many cases, though, judicial descriptions of fair uses have effectively limited literary scholars to what Latour has identified as the tools of critique. The fair use analysis relies on a presumption the items enumerated in the fair use preamble — “criticism, comment, news reporting, teaching . . . , scholarship, or research” [17 U.S.C. Section 107] — will not look like creative artifacts “addressed to the taste,” that literary scholarship will not resemble, except in the most superficial way, the literary objects with which it engages. This presumption literary scholarship will not resemble its objects of study further reflects an implicit belief literary scholars will ordinarily direct their work to the study of “high” literature. These formal expectations operate hand in glove with a very narrow understanding of what literary scholars may do with the work they study. Rather than using pre-existing material to build or create, literary scholars are expected to limit their work to dissecting, examining, commenting, discussing. For those scholars who desire formal innovation, who would take up Latour’s challenge to create a scholarly discourse that shares as much with “art, painting, music, theater, dance,” [Latour 2010, 473–74] as it does with the technical manuals discussed by the Court in *Baker v. Selden*, the fair use analysis works against them. The more literary scholars innovate with the form of their scholarship, the more likely they are to be limited in the scope of its coverage by a judicial definition of literary scholarship as a formalist critique that “make[s] war” [Suntrust Bank v. Houghton Mifflin 2001, 1271] against its objects of study.

28 Digital humanists have already begun to reconfigure the literary as a category by considering whether using literary objects as building blocks for archives and exhibits designed to preserve, display, and study them can be considered an act of literary scholarship. When added to the fact many digital humanists already include “non-traditional” texts such as code, video games, and social media, for example, in the list of objects that might be studied and used in ways similar to novels and plays, one gets the sense digital humanities may change substantially both our common understanding of the “literary” as a category and how we use it as a means of distinguishing one thing from another. Yet even as our working definitions of the literary are evolving, legal incorporation of prior definitions has resulted in a system that effectively limits the work of scholars who study artifacts that are literary, in the narrow, belletristic sense, to producing traditional academic criticism in the form of articles and books, at least those scholars who want to avoid getting sued and do not have the money to pay potentially exorbitant license or attorneys’ fees.

29 In the nearly 150 years since *Baker v. Selden* was decided, continued application of the useful v. artistic, or low v. high distinction the Court drew in that case has evolved into a jurisprudence of “thin” v. “thick” copyright [Shipley 2007].[2] Although all “works of authorship” receive copyright protection, not all works are therefore created equal. Creative and artistic works, works that are “literary” in the narrower, belletristic sense in that they can lay “claim to consideration on the ground of beauty of form or emotional effect,” [OED 2012] receive a great deal of legal protection from infringement, while historical, factual, or technical works get less, sometimes substantially less protection [Shipley 2007, 94–99]. This distinction comes into play perhaps most clearly in cases involving a fair use defense to a claim of copyright infringement. U.S. law requires courts to consider four factors when determining whether an allegedly infringing use is actually fair:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a

whole; and

4. the effect of the use upon the potential market for or value of the copyrighted work.

> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. [U.S. Constitution, Article 1, Section 8]

30 Section 107 codifies a long line of case law that originated in 1841 with *Folsom v. Marsh*, 9 F. Cas. 342 [1841]. Courts have made clear the "preamble" enumerating typical examples of fair use — "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" [17 U.S.C. Section 107] — does not control whether something is or is not a fair use. In every case, courts must apply the four factors, along with any other factors they consider relevant to making a fair use determination. Nevertheless, in practice, the preamble sets a sort of aesthetic standard informing judicial application of the four-factor test.

31 The first factor, regarding the "purpose and character" of the allegedly infringing use, is supposed to cull thieves of creative expression from the herd of those who are simply borrowing facts, figures, and ideas, or who are treating creative expression like "facts" to be displayed, dissected, and discussed, i.e., critiqued. The second factor, concerning the "nature of the copyrighted work," is designed to separate works that are really cobbled together out of facts, figures, and history — i.e., works where the copyright is "thin" — from those high literary works that comprise mostly creative expression and thus get "thicker" protection. Under the law as it has been interpreted and applied, creative, artistic works get a high level of copyright protection in the fair use analysis. They are also less likely to be viewed as fair uses. Consequently, if one authors a creative, artistic work that makes substantial use of pre-existing expression from another creative, artistic work that has not yet entered the public domain, the safest strategy would be to claim one's work parodies the original.

32 So, for example, in *Suntrust Bank v. Houghton Mifflin*, 286 F.3d 1257 [2001], the Court of Appeals for the Eleventh Circuit determined Margaret Mitchell's heirs could not prove a likelihood of success on the merits in an infringement action involving Alice Randall's *The Wind Done Gone* because it was more likely than not a parody, as opposed to a derivative sequel, of *Gone With the Wind*. In reaching its decision, the court first had to "ensure that 'a parodic character may reasonably be perceived' in [Randall's] work":

> The Supreme Court's definition of parody in Campbell [v. Acuff Rose], however, is somewhat vague. On the one hand, the Court suggests that the aim of parody is "comic effect or ridicule," but it then proceeds to discuss parody more expansively in terms of its "commentary" on the original. In light of the admonition in Campbell that courts should not judge the quality of the work or the success of the attempted humor in discerning its parodic character, we choose to take the broader view. [Suntrust Bank v. Houghton Mifflin 2001, 1267] (citations omitted)

33 Where engagement with a belletristic idea of the literary — its definition, its utility in defining legal concepts, its implicit presumptions about the relationship between art and utility — remains largely in the background in *Baker v. Selden* and *Stowe v. Thomas*, in *Suntrust v. Houghton Mifflin* we see the court engaged in an explicit attempt to define and apply literary terminology. The fair use determination turns upon how the court weighs in regarding an ongoing debate in literary studies and in copyright case law about the difference between parody and satire:

> For purposes of our fair-use analysis, we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work. Under this definition, the parodic character of TWDG is clear. TWDG is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW. The fact that Randall chose to convey her criticisms of GWTW through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive TWDG of fair-use protection. We therefore proceed to an analysis of the four fair-use factors. [Suntrust Bank v. Houghton Mifflin 2001, 1267] (citations omitted)

Where parody is generally considered to be a fair use, satire is not. In this passage, the court struggles, as a number of courts have, with a literary distinction that has important legal consequences. As the *Suntrust* court summarizes it, “Parody, which is directed toward a particular literary or artistic work, is distinguishable from satire, which more broadly addresses the institutions and mores of a slice of society” [Suntrust Bank v. Houghton Mifflin 2001]. Thus, in order to find Randall’s work could be construed as a parody, the court necessarily had to determine first *The Wind Done Gone* offers a critique of *Gone With the Wind* itself, rather than “a general commentary upon the Civil-War-era American South.” 34

The line courts draw between parody and satire is grounded in a presumption the work of literary criticism is to critique the author’s craft, rather than explore the broader socio-political circumstances that might have produced or might be reflected in the appropriated work. To the extent *The Wind Done Gone* pokes fun at the “formal” qualities of *Gone With the Wind* by demonstrating how far they deviate from reality in the Civil-War-era South, the *Suntrust* court held it could be properly construed as operating like a “scholarly article” about the book. That narrow definition of literary scholarship only applies, however, when the allegedly infringing work itself looks suspiciously like a belletristic literary object. Had Randall chosen to write an academic “commentary upon the Civil-War-era American South,” she very likely could have quoted extensively, word-for-word — and without fear of a copyright infringement action — from *Gone With the Wind* in order to demonstrate how the ante-bellum period is romanticized in post-war fiction. By examining *The Wind Done Gone* for “parodic character” before engaging in the four-factor analysis, the *Suntrust* court once again divided the broad, statutory category of literary objects into two categories. In the first category are literary things that are generally considered to be fair uses, things like scholarly articles. In the second, the court places things that are literary in the narrower, belletristic sense, such as “work[s] of fiction” that will, under most circumstances not constitute fair use, that is unless they can be construed as “parody” engaged, like a more recognizable piece of literary criticism, in a formalist critique of the appropriated work. 35

The court’s holding in *Suntrust* demonstrates how unrealistically narrow and highly conventional definitions of both the literary and literary scholarship continue to inform judicial application of U.S. copyright law. Perhaps even more troubling, it describes the relationship between literary scholarship and its object as a fundamentally hostile one: 36

> A parody is a work that seeks to comment upon or criticize another work by appropriating elements of the original. “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its *victim’s (or collective victims’)* imagination.” Thus, Randall has fully employed those *conscripted* elements from GWTW *to make war against it* [Suntrust Bank v. Houghton Mifflin 2001, 1271]

(emphasis added).

Some see in the digital humanities a potential to transform humanistic inquiry from a primarily critical enterprise into something that is still critical but in which critique is just one step in a longer process of something that might resemble Latour’s idea of composition. If this is the case, then digital humanists have a vested interest in the ongoing debate regarding the evolution of international copyright law. We need to ask ourselves whether or how we should reconfigure or even continue to deploy questionable aesthetic categories the law preserves like flies in amber when talking about the work we do as digital humanists. 37

Perhaps one of the most important things we gain from understanding how courts have drawn upon and engaged with the literary as a category when interpreting and applying copyright law, is a better sense of just how much is riding upon the outcome of academic debates regarding the future of humanistic inquiry and scholarly communication. As a practical matter, preservation within the academy of traditional aesthetic and functional distinctions between literary objects and literary scholarship, between technological innovation and artistic creation, between composition and critique, will facilitate the continued preservation of those same distinctions within US copyright law. That in turn will mean that, under the law at least, all objects of study will not be available in the same way to the same kinds of activities. Perhaps that is a good thing. Because public domain materials are generally available to a wider range of scholarly activities involving building or composition, keeping the binary intact might ensure a continued interest in and 38

engagement with older work in spite of external pressures to specialize in more “relevant” areas such as new media studies rather than historical literary periods. Modern literary artifacts would continue to be amenable only to relatively traditional methods, though. Difficulty convincing our colleagues and institutions to value certain modes of scholarly production translates in the courtroom into judicial confusion over whether or not such work constitutes “scholarship” and fair use. Preserving the old categories in the law and within our disciplines would help to perpetuate a legal as well as a professional distinction between acceptable or legal uses of literary work in scholarly study and disfavored or illegal (unless licensed) uses.

Transformative Use, Joint Authorship, and More Productive Relationships

39 Yet even as judicial interpretations of U.S. copyright law have incorporated narrow and confining definitions of both the literary and literary scholarship, some courts have also demonstrated how reconfiguring the literary as a category potentially opens up a more expansive space for humanistic inquiry. Just as digital and traditional humanists alike have called into question the criteria used to distinguish high from low or creative from technical literary artifacts, so too have U.S. courts begun to question the utility of such categories in analyzing the “purpose and character” of an allegedly infringing use in cases involving a fair use defense. Courts in a number of recent cases building upon the decisions in *Kelly v. Arriba Soft Corp.* [Kelly v. Arriba Soft Corp 2003], and *Bill Graham Archives v. Dorling Kindersley Ltd.* [Bill Graham Archives v. Dorling Kindersley Ltd. 2006], have turned to the concept of “transformative use” in order to determine whether a use is fair. Rather than relying on traditional aesthetic criteria to determine whether a given use is “critical” or merely “derivative” of the pre-existing work, courts applying transformative use consider instead whether “the secondary use adds value to the original — if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding” [Castle Rock Entertainment v. Carol Publishing Group 1998, 142].

40 Thus, in the case of *Blanch v. Koons*, 467 F.3d 244 [2006], the U.S. Court of Appeals for the Second Circuit upheld the district court’s grant of summary judgment in favor of Jeff Koons, who had reproduced in a painting an image drawn from one of the plaintiff’s photographs. Central to the circuit court’s holding was its conclusion Koons’s painting, “Niagara,” made “transformative” use of copyrightable subject matter from Blanch’s photograph, “Silk Sandals”:

> Koons is, by his own undisputed description, using Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch’s *Silk Sandals,* but to employ it “in the creation of new information, new aesthetics, new insights and understandings.” When, as here, the copyrighted work is used as “raw material,” in the furtherance of distinct creative or communicative objectives, the use is transformative. [Blanch v. Koons 2006, 254]

41 The court’s discussion of transformative use, as an activity that creates “new information, new aesthetics, new insights and understandings” from the “raw material” of copyrighted expression calls to mind Latour’s description of composition, in which the compositionist aims not (or at least not only) to “break down walls, destroy idols, ridicule prejudices” but to “repair, take care, assemble, reassemble, stitch together” a set of “utterly heterogeneous parts” into something new and at least momentarily useful [Latour 2010, 475].

42 The Second Circuit, unlike the Eleventh Circuit in *Suntrust v. Houghton Mifflin*, also concluded the consideration of whether something is parody or satire, while relevant to the fair use inquiry, is not dispositive: “We have applied [the transformative use doctrine] in too many non-parody cases to require citation for the proposition that the broad principles of [transformative use] are not limited to cases involving parody. But the satire/parody distinction may nevertheless be relevant to the application of these principles” [Blanch v. Koons 2006, 255]. The court further held the benefit accruing to the public from the exhibition for which “Niagara” was commissioned helped to balance the commercial nature of the overall enterprise and the private financial benefits derived by the defendants [Blanch v. Koons 2006, 256]. Perhaps even more surprising, the Koons court disagreed with the lower court’s determination, pursuant to the second fair use factor, that Blanch’s work was not “creative” or “artistic”: “Accepting that ‘Silk Sandals’ is a creative work, though, it does not follow that the second fair-use factor. . . has significant implications for our overall fair-use

analysis. As we recently explained, . . . 'the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose' " [Blanch v. Koons 2006, 257]. Throughout its holding, the court in *Koons* implicitly reaffirms and recognizes the production of aesthetic pleasure is just one among the many important and useful social functions performed by art.

43 The decision in *Blanch v. Koons* has drawn both praise and criticism, and I do not want to suggest it represents, even seven years later, a normative standard guiding judicial application of U.S. copyright law. It does, however, provide substantial support for the proposition that courts of law have begun to accept the argument that transformative uses of pre-existing expression in songs, paintings, films, and the like may be classified as fair use alongside more recognizable forms of "criticism, comment, news reporting, teaching . . . , scholarship, or research" [17 U.S.C. Section 107]. The court's reasoning also destabilizes the distinction U.S. copyright law has drawn for more than a century between works whose end is instruction, and works whose end lies in producing pleasure in the contemplation. *Koons* rests on an understanding the abstractions conveyed in creative and artistic expression may not be the exclusive creations of the author, may often signify beyond the individual composition in which they appear, and, therefore, like "knowledge" and "methods" should be available in the public domain for use as well as consumption. In *Koons*, the court's version of the creative or information economy is far more hospitable to both Latour's idea of "composition" and digital humanists working in non-traditional scholarly modes and media.

44 As digital humanists make the argument in promotion and tenure review that humanities scholarship does not have to look like traditional journal or book publication in order to do similar scholarly work or benefit the public in substantial and meaningful ways, a positive legal response to that argument would seem to provide yet another source of authority on which we can rely. After all, as a practical matter, the people making the argument and convincing judges are, in fact, often our colleagues in academia, filing briefs as friends of the court in significant cases, or working as expert witnesses hired by the parties or as special referees appointed by the court. One has to wonder why we have been relatively successful in making this argument outside of the academy in high-stakes copyright litigation, but still sometimes face substantial opposition within our own academic departments. In many cases, not only the judicial opinions, but also the parties' legal memoranda in which transformative use arguments have been articulated — and rebutted — are a matter of public record. We should consider whether we can productively mine these textual resources for vocabulary and conceptual framing as we create the standards we will apply in evaluating digital and non-traditional scholarship, standards such as the MLA's "Guidelines for Evaluating Work in Digital Humanities and Digital Media" [MLA 2012]. These same legal resources would unquestionably be of value as we attempt to refashion institutional policy regarding fair use and copyright matters.

45 Speaking more broadly, I hope this discussion of U.S. copyright law and the literary demonstrates how what we do matters beyond the walls of the ivory tower. At times, the corporate economic interests that have shaped recent copyright legislation such as the Digital Millennium Copyright Act (the "DMCA") and the Sonny Bono Copyright Term Extension, which legislation most scholars agree has created a more hostile environment for fair users of copyrighted content and decimated the public domain, can seem an almost overwhelming force. In 2010, however, in a round of federal rulemaking under the DMCA, libraries and producers of fan culture secured significant regulatory clarifications to facilitate their continued work [Schofield 2010] [Section 101, Title 17]. The Creative Commons and Open Access movements have substantially raised public and institutional awareness of the importance of protecting the public domain and encouraging free circulation of content for use and reuse. During the time I have been working on this article, in 2012, an internet "blackout" campaign against the Stop Online Piracy and Protect Intellectual Property Acts ("SOPA" and "PIPA," respectively) helped to persuade US legislators to put the bills on hold indefinitely. Scholars of all disciplinary stripes have played an important role in each of these efforts.

46 The language of literary scholarship and humanistic inquiry has done more than simply shape our own institutional practices. Through the integration of that language into case and even statutory law, certain strands of these discourses have in some situations acquired the force of law, for better or worse. We should therefore be careful as we call for reform of the academy. Law and policy makers do not regulate in a vacuum; they shape regulations to promote or discourage certain tendencies that already exist within the systems affected by the exercise of regulatory authority. Understanding the process reveals a potential opportunity to consider how, as we reconfigure the academic workplace,

we might work more productively towards producing a regulatory framework more favorable to the public the academy ostensibly exists to serve, the policies to which we adhere, as well as the work we would like to do.

Differences of opinion exist among digital humanists about how to define the digital humanities as a discipline. Many of the various definitions share in common a tendency to turn away from defining digital humanities in relation to the literary, both as a category that may apply to the objects we study, and as a category into which the work we produce might fall. One fairly prevalent and commonplace definition of the literary has been deployed in the copyright law context to define scholarship and teaching in relatively narrow and problematic ways. One might question, therefore, the continued effectiveness of the literary as a vehicle for conceptualizing the work of digital humanities, even for digital humanists working in traditional areas of literary studies. If digital humanists are to take advantage of the opportunity to affect public policy, however, by modeling at the disciplinary and institutional levels how we believe intellectual property regulation does and should work, then we must be able to articulate an alternative formulation of the literary that will prove useful inside the academy as well as the courtroom. The Second Circuit in *Koons* and Latour in his "Compositionst Manifesto," present strong arguments for reimagining scholarly work in terms of building new things that make use of instead of simply critique our objects of study. Along with the broad and inclusive definition of the literary as currently codified in the copyright statute itself, they also provide much-needed guidance regarding how we can justify building and digital humanities work with non-traditional texts as a scholarly activity within a more inclusive, more public-facing definition of literary scholarship. Lest copyright law prove an insurmountable barrier that stops digital humanists from experimenting with new forms of scholarship before we have even really begun, to accomplish the first goal requires giving due attention to the second.

Notes

[1] Such studies include detailed examinations of how copyright was extended beyond the book trade in particular jurisdictions [Surwillo 2007], how concepts such as intellectual "piracy" have evolved alongside that of the authorial genius [Johns 2009], and why the globalization of copyright has encountered resistance in the developing world [Boateng 2011].

[2] Others have used the thick v. thin distinction to describe the operation of copyright more generally, observing how copyright has evolved from a relatively "thin" right to prevent exact duplication for a limited time into a "thick" bundle of rights that can be invoked to prevent many different forms of reuse for a much longer term [Vaidhyanathan 2001, 1–8]. I am using the thick v. thin distinction as the Supreme Court used it in the case of *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 [1991] to distinguish factual works where, due to a relative lack of originality, copyrightable subject matter is scant and protection therefore "thin" from creative works, where originality and copyrightable subject matter are abundant and protection is "thick."

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