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"Book Review of Controlling Voices: Intellectual Property, Humanistic Studies, and the Internet"

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Controlling Voices: Intellectual Property, Humanistic Studies, and the Internet, TyAnna K. Herrington. Carbondale and Edwardsville, IL: Southern Illinois University Press, 2001. 171 p. \$25 paper (ISBN 0-8093-2373-7) or cloth \$50 (ISBN 0-8093-2372-9)

Author TyAnna Herrington has a law degree and a PhD from Texas Tech and is a professor in the School of Literature, Communication and Culture at Georgia Tech. I was intrigued by Herrington's background and looked forward to reading a book that melded copyright and philosophy. Although I can write with a modicum of intelligence on copyright issues, my comments about philosophy are much more tentative.

Herrington raises many important issues in her book, but her writing style is overly complex and sometimes ponderous. Her message is that every author builds on what he or she has read, seen, or heard,

and sharing knowledge is important for educators in particular, and for society at large. The interests of publishers and large companies usually conflict with those of teachers and students. It is our country's legislative branch, rather than our courts, that determine public policy. Publishers and large companies have an inordinately strong influence on Congress. Therefore, the academic community must participate actively in public policy discussions that address the creation, dissemination, and use of intellectual property.

Herrington notes that American copyright law is founded in our Constitution (Art. I, sec. 8, cl. 8), has been codified by Congress (the entire Title 17 of the U.S. Code is devoted to copyright), and is interpreted by the courts. She admirably tries to simplify and clarify complex issues. Commentators must balance carefully the goal of simplification with the need for fuller disclosure, without getting too complex. Whereas Herrington seems to complicate basic issues when discussing philosophy, she occasionally oversimplifies the tricky area of copyright law.

For example, in discussing the fair use provision (section 107) of the 1976 Copyright Act, Herrington writes that "the statute requires that a fair use exception be applicable in cases in which the use is 'productive,' 'resulting in some added benefit to the public beyond that produced by the first author's work,'" (p. 62) and cites William Patry's *The Fair Use Privilege in Copyright Law* for the latter quote. In fact, the word "productive" does not appear in section 107. Courts, not Congress, introduced the concept of productive uses, or those that add something new to the work copied. Furthermore, courts have blown hot and cold on this issue. In *Sony Corp. v. Universal City Studios* (1984), the Supreme Court largely discredited the requirement

that a "fair use" be a "productive use." But a decade later, the Court spoke in favor of "transformative" uses in *Campbell v. Acuff-Rose Music* (1994). At any rate, a use need not always be "productive" for it to be a "fair use" under section 107, and not all productive uses will be "fair."

Herrington's interpretation of some court decisions is questionable. For example, she writes, "when an unofficial biographer quoted from J.D. Salinger's unpublished letters, the court found that the defendant could not claim a fair use exception because he used the quotations to add interest to his work, rather than for scholarly commentary." (p. 63) In fact, the critical aspect of *Salinger v. Random House* (2nd Cir. 1987) was that Salinger's letters were unpublished, not that they merely added interest to Ian Hamilton's biography, *J.D. Salinger: A Writing Life* (Random House, 1986). Furthermore, in 1992, five years after the *Salinger* decision, Congress amended section 107 by adding the clause: "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."

Herrington also occasionally oversimplifies the analysis a court must complete in determining whether a use is fair. For example, with regard to commercial copying, citing the 1984 *Sony* decision above, she writes "the Supreme Court has created a specific presumption that all commercial use is un-fair," (p. 62), and later "[t]he Supreme Court created a bifurcated test for fair use based on whether the use was commercial or noncommercial in *Sony Corp. v. Universal Studios, Inc.*" (p. 75-76). She then quotes commentator William Patry: "[T]he court held that 'every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of copyright



. . .'" [Patry] (454). The bibliography Herrington provides at the end of her book includes only a reference to the second edition of Patry's *The Fair Use Privilege in Copyright Law* (Bureau of National Affairs, 1995). Herrington's citation to Patry's quote references page 454 of *The Fair Use Privilege*. The quotation, however, is not from the second edition, but rather from the *first* edition of Patry's treatise, published a decade earlier (Bureau of National Affairs, 1985).

This is important, because a decade after the *Sony* decision, the Supreme Court modified its approach to commercial and non-commercial uses in *Campbell v. Acuff-Rose Music* (1994). In his second edition, Patry notes this change: "[u]nder *Campbell*, the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character." (Patry, *The Fair Use Privilege in Copyright Law*, 2nd ed., Bureau of National Affairs, 1995, p. 429). Patry continues: "Campbell satisfactorily returns the law of fair use to its pre-Sony days, consistent with the statute, the legislative history, and pre-1976 Act case law. The fact that a use is commercial or noncommercial is both a subfactor of the more general inquiry into the purpose and character of the use; and but one element of the larger fair use balancing of all relevant factors." (Patry, p. 429) Perhaps this level of analysis may not mean much to many readers, but the facts are the facts.

Ultimately, readers would be better served by reading some of the authors Herrington quotes or includes in her bibliography. Perhaps most notable are the works of L. Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968), and, with Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, 1991),

which she cites frequently. Contemporary legal scholars who advocate user rights include University of California, Berkeley law professor Pamela Samuelson, and Stanford's Lawrence Lessig. For a basic, yet very sound introduction to copyright law, readers may want to look at Kenneth Crews' *Copyright Essentials for Librarians and Educators*, published in 2000 by the American Library Association.

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