

### **Council of Graduate Schools Conference**

1 December 2010 Washington, D.C.



## U.S. Copyright in the Digital Age: Impacts on Universities, Faculty and Students

## Kevin Norris ProQuest

The views expressed here are the personal opinions of the author. The presentation represents only a discussion of legal issues and is not intended as, and should not be construed as, legal advice.

Reproduction of the Statute of Anne, Parliamentary Archives, London ref: HL/PO/PU/1/1709/8&9An32

First Modern Western Copyright law: adopted by Great Britain in April 1710

### Happy Birthday Statute of Anne!

Anno Octavo Annæ Reginæ.

An Ast for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

Thereas printers, banksellers, and other persons have of late frequentig taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of seet books and writings, to their very great betriment, and too offen to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books: may it please your Majesty, that it may be exacted, and be it enacted by the Queen's most excellent majesty. By and with the aboice and consent of the lords spiritual and temporal, and commons, in this present parliament assemlied, and by the authority of the same: What

## **Happy Birthday Statute of Anne!**

"Copyright and the World's Most Popular Song", Robert Brauneis, The George Washington University Law School, 56 Journal of the Copyright Society of the USA 335 (2009). A draft is available at <u>http://ssrn.com/abstract=1111624</u>

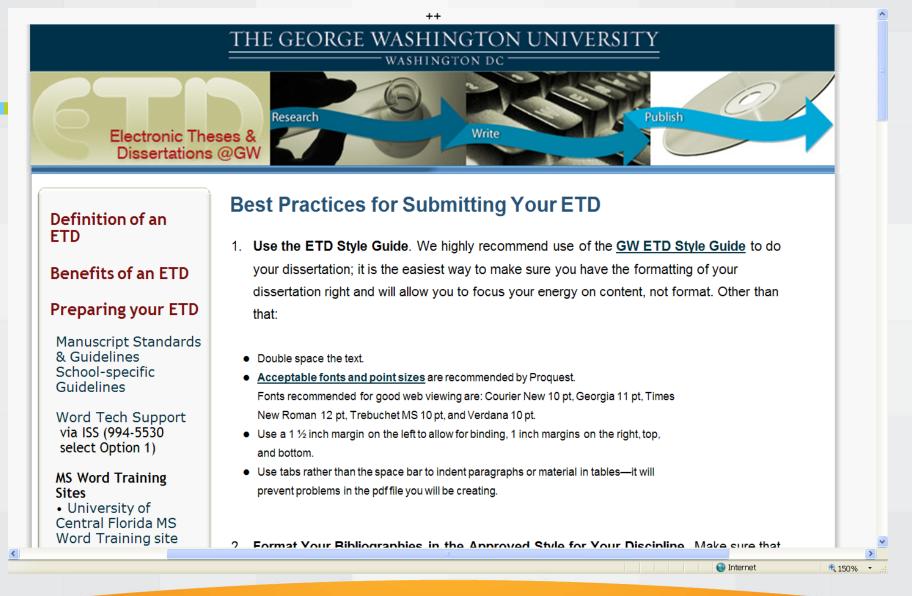
### Copyright and the World's Most Popular Song

### Robert Brauneis\*

When Justice Breyer protested Congress's 20-year extension of the term of copyright in his dissent in *Eldred v. Ashcroft*,<sup>1</sup> he chose one song to emphasize what was to his mind the already overly generous protection of copyright law: "Happy Birthday to You (melody first published in 1893, song copyrighted after litigation in 1935), [the copyright of which is] *still in effect* and currently owned by a subsidiary of AOL Time Warner."<sup>2</sup> The example, even in that brief form, is a powerful one. "Happy Birthday to You" is a simple song that most people have learned by hearing it performed by family and friends, and many probably assume that it is not under copyright at all. 1893 is a long time ago – 106 years before *Eldred* was decided. And, for those who are unsympathetic to and suspicious of large corporations, AOL Time Warner – now just Time Warner – is one of the largest media and entertainment companies in the world.<sup>3</sup>



### http://www.gwu.edu/~etds/bestpractices.html





you have a specific need to do so: (1) to pursue a patent application, which requires not publicly revealing a discovery until the patent application is safely filed, or (2) to pursue a book contract in a situation in which your publisher does not want the work released to the public as a dissertation. In most cases, any planned book will be so different from the dissertation that distribution of the dissertation through Proquest will not be a problem—see **Publishing Issues**. Professional journals generally do not care that parts of an article based on your dissertation were previously made available through Proquest's Dissertation and Theses database.

12. Filing the Copyright. The Proquest web site will ask you if you want to pay them to file the copyright for your dissertation with the government. This may be wise if you think that your dissertation has commercial value and envision that you might sometime want to be in position to sue someone for violating your copyright by using your work without permission.
Typically, though, it is a waste of money. You already hold the copyright by virtue of being the author. If you later discover that someone has infringed your copyright, you can belatedly file the copyright with the U. S. government to position yourself to sue infringers. See Copyright Issues.

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### http://www.zephoria.org/thoughts/archives/2009/02/18/licensing\_your.html

HOME BEST OF APOPHENIA DISCLOSURE STATEMENT CONTACT INFO



danah boyd | apophenia

making connections where none previously existed



My name is danah bovd and I'm a researcher at Microsoft Research New England and a Fellow at the Harvard Berkman Center for Internet and Society. I received my PhD from the School of Information at UC-Berkeley. I live in Boston, MA. Buzzwords in my world include: public/private, identity, context, youth culture, social network sites, social media. I use this blog to express random thoughts about whatever I'm thinking.

Hanging Out, Messing Around, and Geeking Out « "Elsewhere, U.S.A." by Dalton Conley = FABULOUS

doing the math on MySpace and registered sex offenders »

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### licensing your dissertation under Creative Commons

When I wrote my dissertation, it didn't dawn on me that using the Creative Commons license might be remotely controversial. There's a template for dissertations at Berkeley and one of those pages is the copyright page. Initially, I edited the copyright page to match the CC license that Cory Doctorow uses in all of his books on the copyright page. Shortly before I was set to file, I talked to another grad student in my department who had just filed his dissertation. Much to my horror, I learned that he was the first student to file his dissertation at Berkeley under the Creative Commons license and that it had been a disaster. He went through many iterations before they accepted it, complete with the CC license as an Appendix. Not wanting to pick a fight, I copied his approach verbatim. I went to file my dissertation and hit a stumbling block. They told me they had never seen such a thing. I told them that Joe Hall had filed that way only a few months back. They told me that it would need approval from high up and that I'd have to wait a long time to get that approval. Frantic, I started texting and emailing Joe. Luckily, he had all of the emails on hand and forwarded them to me. As it turns out, the person that I was trying to file with as the one who filed Joe's and when I showed her emails that she sent negotiating this process with Joe, she let me file. I suggested she might want to take note since there would be plenty more students like me and Joe.

Today, the Daily Cal ran a story about our adventures in filing. I was pleased to learn that the Dean of the Grad Division committed to making CC licenses available to students in the future. This is truly good news!

But I also want to make a plea to all of you grad students out there who are slaving away on your dissertations... Use Creative Commons. The forms you fill out when you file your diss under ProQuest encourage you to make sure to copyright your dissertation. While theft is part of the framing, it is also framed as being about you profiting off of doing so (and ProQuest brokering the sale of your diss). Realistically, 99% of all grad students are never going to see a dime directly from their dissertation. What's the advantage of keeping "all rights reserved"? Why not let folks use it for whatever non-commercial purposes they deem fit (like teaching a chapter or two in class)? I mean... I would LOVE it if someone translated my dissertation. Or remixed it. Or turned it into a movie. That ain't ever gonna happen, but still... why actively prevent it?

And while we're at it... why not make it freely available? Part way through my dissertation, I realized that I had never read a dissertation. I was surprised to find that very few people make their dissertations easily available. Why? In some senses, the diss is quite embarrassing. It's imperfect. You're sick of it. But there are huge advantages to making it available. At the very least, it allows future students to get a sense of what they should expect. (There was nothing more nerve-calming than realizing that my mentors' dissertations were totally sloppy at points.)

Anyhow\_if you're a student out there\_consider licensing your dissertation under Creative Commons and making your diss freely



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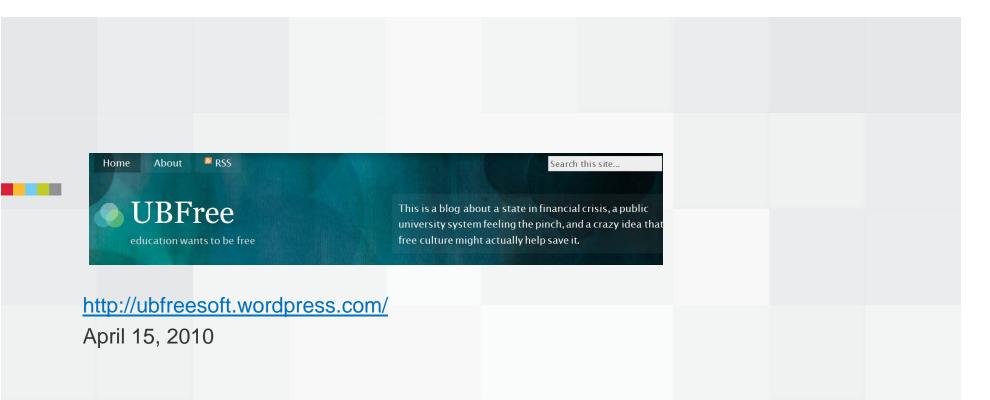
### Here's Ms. Boyd's author's page:

Taken Out of Context: American Teen Sociality in Networked Publics

Copyright © 2008, Some Rights Reserved (See: Appendix 3) danah michele boyd

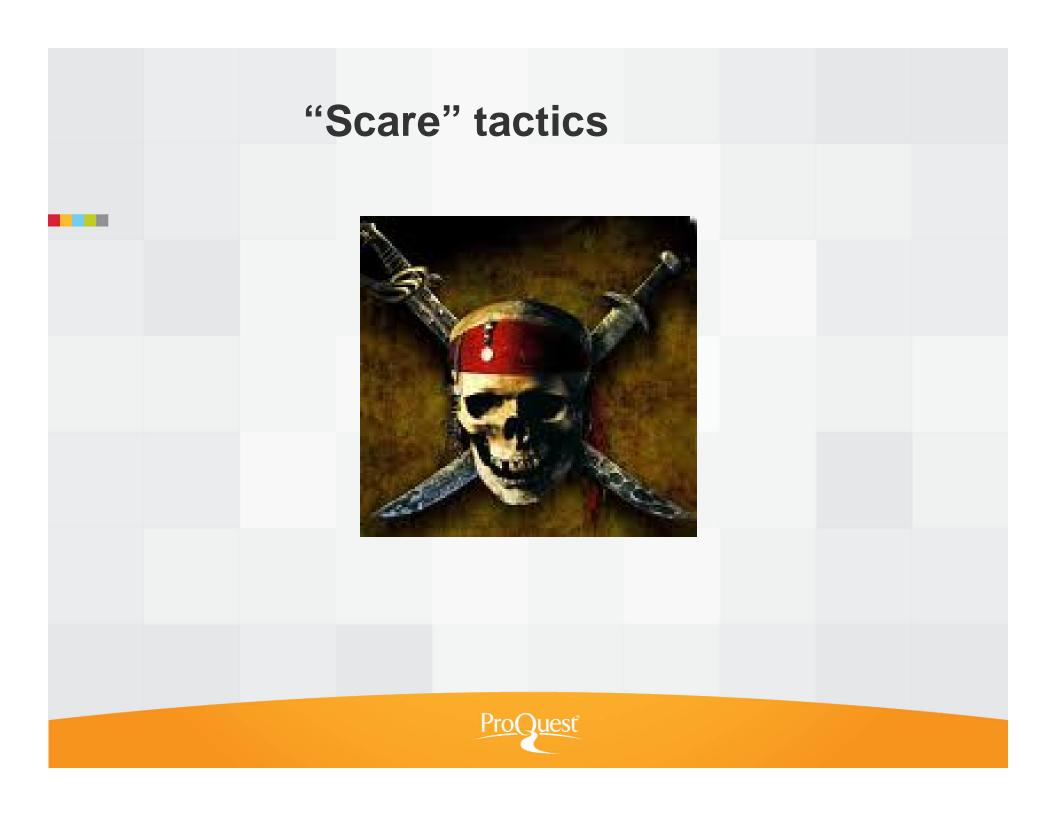
"Appendix 3" is the non-commercial use cc license. She sensibly reserved the right to convert the work into a commercial book or other work.





"... ProQuest/UMI stands to make money from scaring you into paying them to register your copyright. Perpetuating a closed culture is, in some ways, beneficial in the short term to the university...."

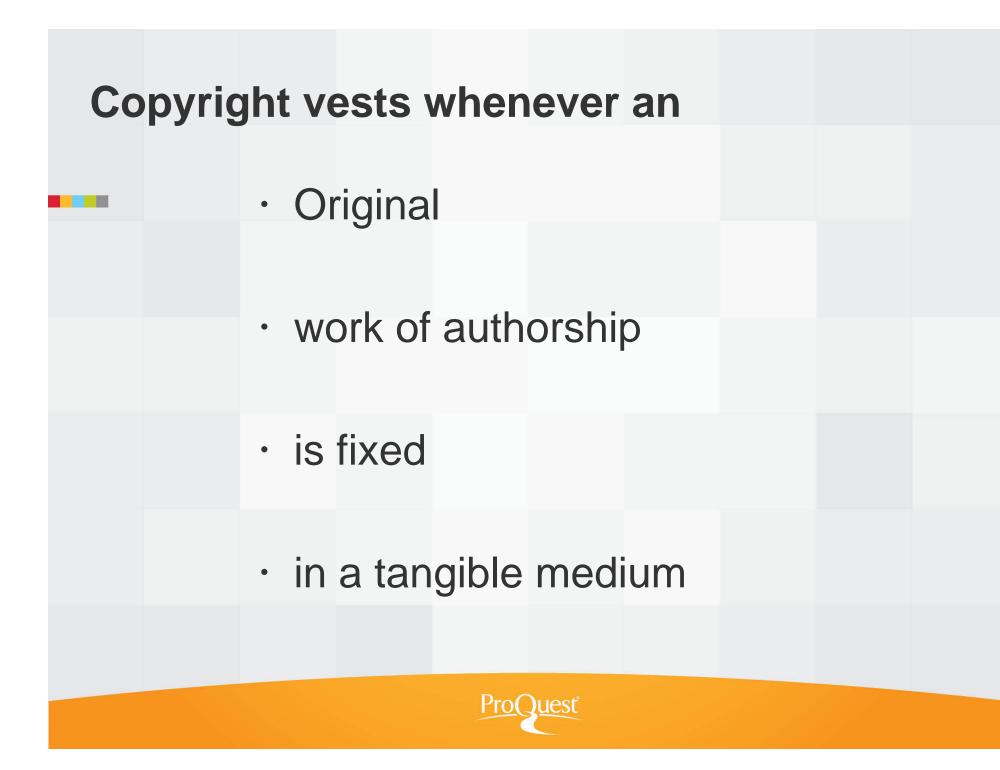




## **Copyright registration fees**

- The Library of Congress charges \$50 for registration of each work in paper form submitted and \$35 in digital form.
  - ProQuest charges students \$55 to handle registration of the copyright and deposit of the work with the Copyright Office of the Library of Congress, <u>including</u> the LoC fees.
  - The surcharge covers the costs of the collection, reproduction, delivery, administration and follow-up of these submissions.





### There is a U.S. © in anything in your

- Bookshelf
  - Desk Drawer
  - Computer
  - Institutional Repository

and intellectual property is "nonrivalrous" – that is, you do not lose the knowledge you give me when I read your dissertation. We can all hold it simultaneously.



# So if copyright is easy to get, and we can all share it without loss, why ever register © ?

Two (and a half) reasons why one might:

- Cultural
- · Legal
- & a bonus ½ reason



### **Cultural Reasons to Register ©**

- The copyright f-bomb
- One of these things is not like the others
- Part of the scholarly corpus



### The copyright f-bomb:

Signal to the

## FORMALIJES

- © claim appearing on work
- Registration

 Registration
 Renewal
 Renewal rall (rise?) into the public domain auve Commons' attribution and other licenses bringing formalities back



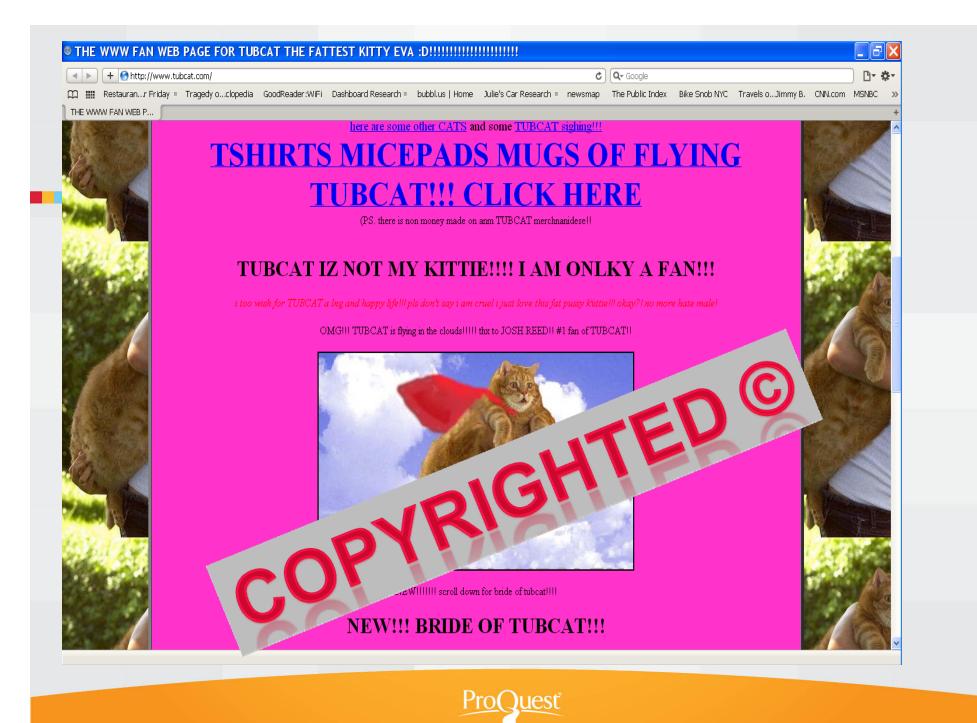
### **Cultural Reasons to Register ©**

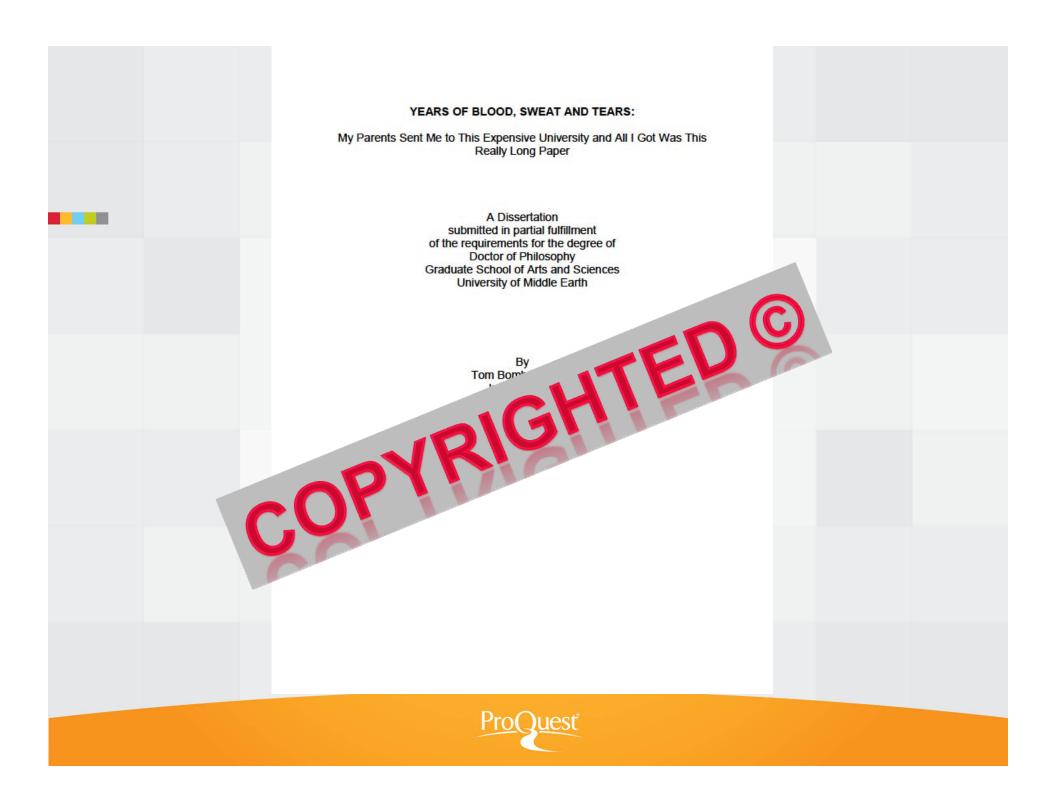
If everything is special then nothing is.

## One of these things is not like the others:











### Dumbass "Copyright Registration" "service"

POSTED BY CORY DOCTOROW, FEBRUARY 6, 2004 4:31 PM | PERMALINK



<

GoDaddy has created an idiotic "Copyright Registration" service that provides "expert assistance" in registering your copyright -- something that you have virtually no good earthly reason to do, and something you absolutely don't need any pricey "expert assistance" with. They offer a goony little badge you can put on your work to show that <u>it's really, really, sooper-copyrighted</u>, too ('Display this on your site and show thieves and others that you have federally assured rights to damages and attorneys' fees"). This is about half a step above the Green Card lotto scam and pay-for-book-doctoring "services" that prey on wouldbe artists' anxieties. Link (Thanks, Devon!)

http://www.boingboing.net/2004/02/06/dumbass\_copyright\_re.html



"I'd recommend LITTLE BROTHER over pretty much any book I've read this year."

> NEIL GAIMAN, author of sandman and american gods



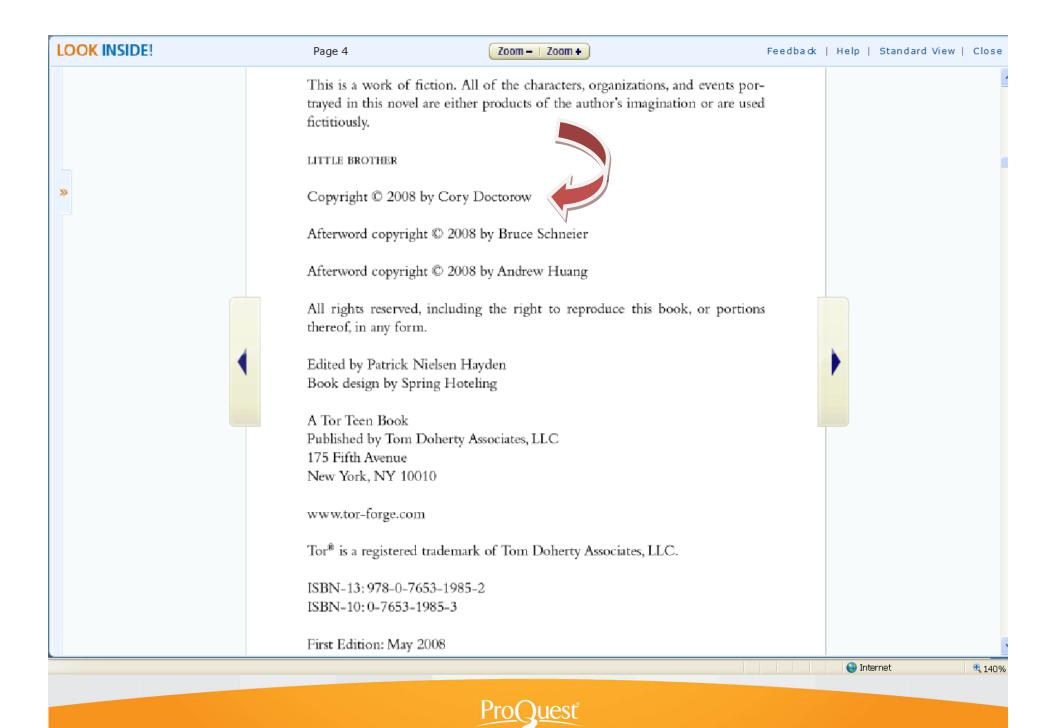


## **CORY DOCTOROW**

"A rousing tale of techno-geek rebellion." **SCOTT WESTERFELD**, author of UGLIES, PRETTIES, and SPECIALS

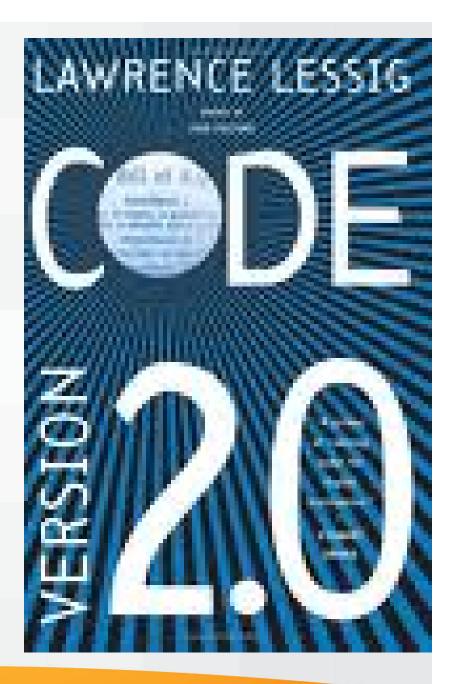






## **Even better book!**

"Code can, and increasingly will, displace law as the primary defense of intellectual property..."







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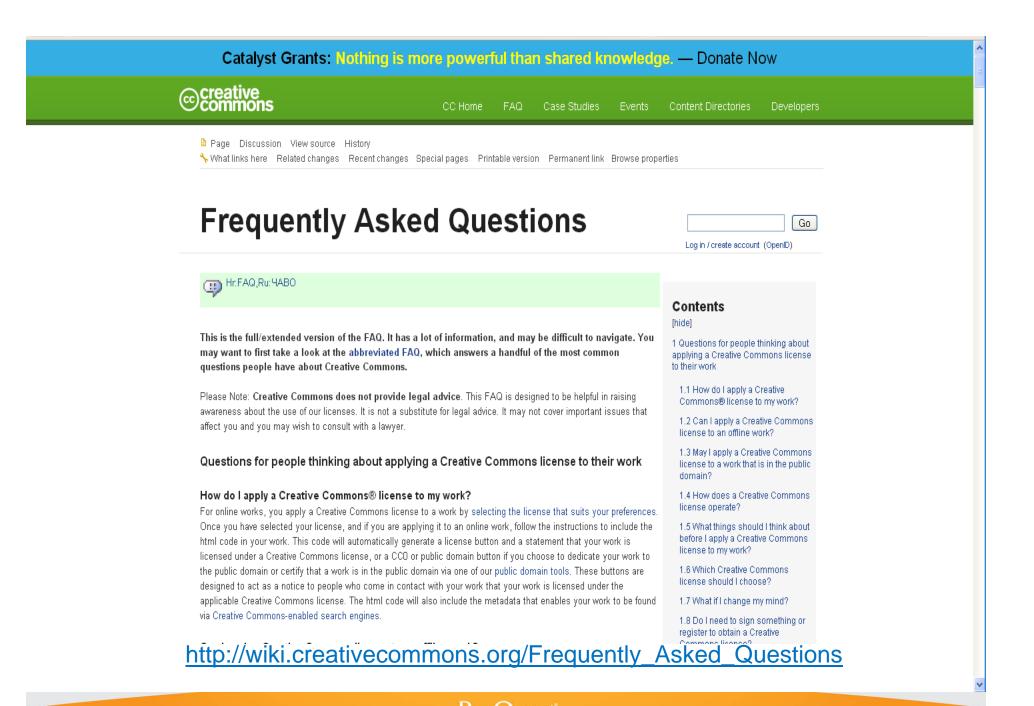
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Is applying a Creative Commons license to my
 work the same or an alternative to registering the copyright to my work?

"No. Applying a Creative Commons license to your work does not give you the same, similar or alternate protection to registering your copyright. Creative Commons licenses apply in addition to and on top of an existing copyright."

http://wiki.creativecommons.org/Frequently\_Asked\_Questions#Is\_applying\_a\_Creative\_Commons\_ license\_to\_my\_work\_the\_same\_or\_an\_alternative\_to\_registering\_the\_copyright\_to\_my\_work.3F

## Do I need to register my copyright?

"In most jurisdictions, registration is not required. However, for creators in the United States registration can be obtained and is advisable so that you can enforce your copyright in court. For USbased creators, you should check out the U.S. Copyright Office's 'Copyright Basics' page, which explains more about copyright registration."

http://wiki.creativecommons.org/Frequently\_Asked\_Questions#Do\_l\_need\_to\_register\_my\_copyright.3F



With the Scholarly Publishing and Academic Resources Coalition (<u>www.arl.org/sparc/</u>), Creative Commons developed a Scholar's Copyright Addendum Engine in support of the self-archiving route to Open Access at <u>scholars.sciencecommons.org/</u>

The addendum engine generates an addendum that reserves certain rights to the author, such as the right to post to institutional repositories.

Whitepaper: "Opening the Door"

http://wiki.creativecommons.org/Frequently\_Asked\_Questions#Do\_I\_need\_to\_register\_my\_copyright.3F



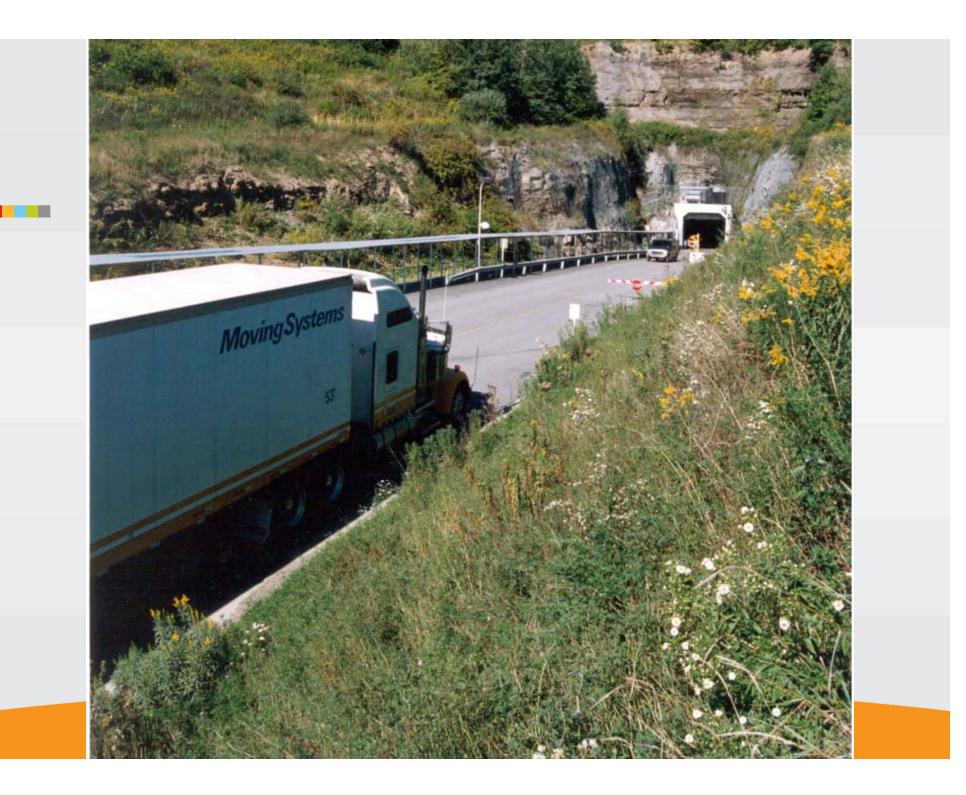
### **Cultural Reasons to Register ©**

- Part of the Scholarly Corpus
  - · Copyright registration is not the enemy of dissemination, it is its ally
  - By registering, authors add their contribution to the intellectual history of the United States
  - Registered works are centrally indexed by the Library of Congress, and
  - Permanently stored both digitally and physically













# So if copyright is easy to get, and we can all share it without loss, why ever register © ?

Two (and a half) reasons why one might · Cultural

- · Legal
- · (& compliance with mandatory deposit)



#### Legal Reasons

- Commercial protection
- Disparate treatment of unregistered works



### **Legal Reasons: Commercial protection**

These are the grounds people are often considering when they write registration off as 'typically a waste of money':

- Clear statement of work's value
- Claims accrue immediately
- Money damages don't have to be proven



Not all copyrights are created equal:

- Different damages in class action cases
- Different protections in copyright reviews



#### Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

#### SUPREME COURT OF THE UNITED STATES

Syllabus

#### REED ELSEVIER, INC., ET AL. V. MUCHNICK ET AL.

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-103. Argued October 7, 2009-Decided March 2, 2010

The Copyright Act (Act) generally requires copyright holders to register their works before suing for copyright infringement. 17 U. S. C. A. §411(a). The complaint in this consolidated, class-action copyright infringement suit alleged that the named plaintiffs each own at least one copyright, typically in a freelance article written for a newspaper or magazine, that they had registered in accordance with §411(a). The class, however, included both authors who had registered their works and authors who had not. The parties moved the District Court to certify a settlement class and approve a settlement agreement. The District Court did so over the objections of some freelance authors. On appeal, the Second Circuit *sua sponte* raised the question whether §411(a) deprives federal courts of subject-matter juris-



Different treatment in class action cases: <u>Reed Elsevier, et al. v. Muchnick, et al., U. S. Supreme</u> <u>Court Docket 08-103, 559 U.S. (2010).</u>

 Court <u>allowed</u> settlement of claim involving *both* registered and unregistered works of freelancers who had not expressly granted digital rights

• **BUT,** Authors who did not register will receive less money than those who did



| Case 1:05-cv-08136-DC Document 772  | Filed 11/19 1000 Page 1 of 11<br>USDC SDNY<br>DOCUMENT   |
|---|--|
| UNITED STATES DISTRICT COURT<br>SOUTHERN DISTRICT OF NEW YORK                               | ELECTRON:CALLY FILED   |
| The Authors Guild, Inc., Association of American<br>Publishers, Inc., et al.,               | <u> </u>   |
| Plaintiffs,   |  |
| v.  | : Case No. 05 CV 8136 (DC)   |
| Google Inc.,  | :  |
| Defendant.  | :  |
| (PROPOSED) ORDER GRANTING PRELIMINARY APPROVAL<br>OF AMENDED SETTLEMENT AGREEMENT           |  |
| This matter is before the Court pursuant to the motion of Plaintiffs in the above-captioned |  |
| class action (the "Action") for preliminary approval of an Amended Settlement Agreement     |  |
|   | Service Se |
| ProQuest  |  |

#### **Google Book Settlement:**

Dissertations are not included in the body of the GBS settlement document, but your students' works are swept up at the bottom of the first page of Attachment 'J' of the official Notice

("Books' includes in copyright written works, such as novels, textbooks, dissertations, and other writings....")



#### **Google Book Settlement:**

The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google, Inc., United States District Court Southern District of New York, Case No. 05 CV 8136-JES

Registered works are expressly included in the proposed settlement

·Unregistered works are expressly excluded



Regardless of whether we view the proposed GBS as creating a modern Library of Alexandria or the trampling of 300 years of settled copyright law, there is no escaping that works are to be treated differently depending on whether authors registered their copyrights.



So if copyright is easy to get, and we can all share it without loss, why ever register © ?

Two (and a half) reasons why one might · Cultural

· Legal

· (& compliance with mandatory deposit)



**Bonus** <sup>1</sup>/<sub>2</sub> reason to consider registering copyrights in dissertations and theses:

Mandatory Deposit

• Even if copyright is not registered, 17 U.S.C.§407 requires the owner to deposit 2 copies within 3 months of publication.

 Is inclusion in an open web institutional repository "publication" governed by this statute? Since the rules are evolving, we don't know for sure yet.... But it certainly seems public.

• Only ½ because it isn't *really* © rule, but since registration fulfills the requirement it solves the problem.



### Paraphrasing what they say about gravity,

### Copyright's not just the law...it's a good idea.





#### **Council of Graduate Schools Conference**

1 December 2010 Washington, D.C.

