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Uncommon Controversies

Legal Mediations of Gift and Market Models of Authorship

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I. Introduction

Is a work of scientific authorship a gift or a commodity?[1] Perhaps the most vexing feature of authorship in academic science is its ability to instantiate and traverse two visions of scholarly exchange. According to one vision, scientific authors participate in a gift economy, a system of exchange premised on reciprocity, reputation, and responsibility in which the commodification of scholarly work is immoral (Hyde 1983; Hagstrom 1965). Pierre Bourdieu (1988), however, argues persuasively that the academic knowledge economy can be better understood not as a web of moral obligations, but as a system of capital accumulation and investment. In Bourdieu's view, the value of that capital depends on the continuing ability of the academy to define and guarantee a market. Taking the laboratory rather than the university as the unit of analysis, Bruno Latour and Steve Woolgar (1979) portray authorship as the linchpin of this market, or, more directly, of a "cycle of credit" wherein "knowledge" is made available in exchange for credit (recognition), which can be reinvested in the means of production of more knowledge.

In what follows, I consider how copyright doctrine, the body of law most directly concerned with scientific authorship, enables and addresses particular tensions between gift and market economies. To ground this inquiry, I offer a copyright dispute between a junior professor and her mentor, the resolution of which would involve the

mobilization and concealment of a set of assumptions about the nature of scientific authorship and, most remarkably, the reconstruction of scholars as celebrities. Authorship narratives shared by students and professors on the campus of a major U.S. university supplement the legal tale.[2] Using these stories as navigational tools, I map the production of scientific authorship at the gift/market border. I show how, as law reconstructs some of its foundational categories to apply to the university—categories rooted in the market economy, yet imbued as well with values and rhetorics associated with the gift economy—law helps reconfigure knowledge work and knowledge ownership.

II. An Uncommon Controversy

Heidi Weissmann began working with Leonard Freeman in 1977 when she was a fourth-year radiology resident and he was chief of nuclear medicine at Montefiore Medical Center. Their collaboration resulted in several published and unpublished works, among them a syllabus created for a course they co-taught at Harvard Medical School in 1980.[3] This syllabus was revised several times by both parties for review courses at several institutions.

In 1985, Weissmann published a version of the syllabus under her name alone. This syllabus reorganized the original work and added new illustrations, captions, references, and text. Unbeknownst to Weissmann, Freeman reproduced this version of the syllabus for his 1987 review course, listing himself as its sole author. When Weissmann learned of the reproduction, she demanded that the syllabus be withdrawn from the course materials. Freeman complied, but not before the work had been circulated among a few people. Weissmann filed suit for copyright infringement, arguing that her changes were significant enough to grant her individual copyright in the piece as a derivative work. Freeman counterargued that the piece was jointly authored, a product of their research partnership. He further argued that, even if the syllabus were not the product of that collaboration, his use of it was a fair use rather than an infringement. Who was right?

According to the *Chicago Tribune*, the answer to this question mattered less than the fact that the case, along with several others like it, had been brought to the courts at all (Grossman 1997). In a lengthy

article, the newspaper suggested that the "human architecture of higher education" was being dismantled (C1). The agents of this change were resentful graduate students and junior researchers who had turned to the legal system to resist the appropriation of their research by senior professors anxious to boost their own publication rates. In a world of shrinking research budgets, the *Tribune* contended, professors and advanced graduate students had become competitors rather than collaborators. It was perfectly logical, therefore, for students to try to defend their position in this competition by asserting property rights. If the trend continued, the report concluded, the "medieval" guild structure of academe might at last be dragged into modernity.

If the university is no longer a guild, does it look more like a factory or a limited partnership? Or perhaps a temp agency? These are questions worth keeping in mind, for they point to the stakes of the *Weissmann* case. The gift model of academic exchange grounds the university's enviable and strategic position as producer and guarantor of valuable knowledge. Put simply, modern universities are crucial "knowledge resources" precisely because of their "reputations for neutrality," a reputation based on their location "outside" of the realm of economic interest (Walshok 1995, 191).[4] At the same time, the university and its inhabitants must ultimately operate in the market and assert themselves as property owners if they are to reap the benefits of this position. Scholars may "reach beyond the walls," as former Stanford president Donald Kennedy (1997, 241) puts it, but their feet had better stay firmly planted within those walls if the academy is to retain its position outside the messiness of "society" and its products are to retain the value generated from that location (241). By bringing the case forward, Heidi Weissmann positioned herself as an autonomous individual property owner rather than an aspiring member of a gift community. She pulled the market right into the walls of academe, thereby exposing the unstable foundations of the walls themselves.

Without Foundations

The task of the courts, then, was to shore up those foundations, or so it would seem from the reasoning advanced by the two judges who heard the case. The District Court for the Southern District of New

York viewed the dispute as a simple matter of misguided ego, a standpoint that was given sense by the court's equally misguided effort to ignore basic copyright doctrine.[5] The Court of Appeals for the Second Circuit would sharply rebuke the lower court on this point but, as we shall see, the appellate court offered a strange and contradictory rhetorical strategy of its own.[6]

To parse these interpretations, we need to know something about joint authorship doctrine, a body of law that is itself fraught with contradiction. In general, copyright law assumes and invokes a highly individualized model of creative production (Edelman 1979; Rose 1993; Jaszi 1994; Woodmansee 1994).[7] Yet copyright law does acknowledge that some works, such as a song that emerges from a partnership between a lyricist and a musician, are collaborative. All identifiable contributors are considered authors of such joint works, and each has an undivided right of ownership thereto. In principle, then, joint authorship seems to carve out room for sociality in copyright law. To be identified as a joint author, however, each individual author must have contributed an independently copyrightable element.[8] In addition, each author is granted property rights in the work as if he or she were the sole author, and need not consult with other authors regarding subsequent use so long as he or she "shares" the profits of that use. Authorship, then, is only "shared" in a financial sense (Jaszi 1994).

Under this doctrine, two questions should have been asked in *Weissmann*: First, did both authors intend for the piece to be a joint work? Second, were Weissmann's changes substantive and original enough to transform the syllabus into a derivative work?[9] Strangely enough, these questions were not prominent in the first phase of the case. Instead, the opinion issued by Judge Milton Pollack focused on Weissmann and Freeman's relationship and their individual credibility.

Judge Pollack pointed to the pair's history of research and publication, arguing that the work was an "evolutionary stock piece" that had "evolved" from that collaboration. In other words, the syllabus was not an individual effort but a product of a set of reciprocal obligations that emerged in and through community activity (1261). Yet, legally

speaking, the appearance of an evolutionary process should have been less important that the question of whether the work was original enough to count as a new subspecies. Fortunately, Judge Pollack declared, the court was provided with the "best qualified expert opinion [on the matter], that of the defendant, the acknowledged outstanding expert in the field" (1257). Such an eminent scientist would, of course, be capable of forming an objective opinion on the originality of Weissmann's changes. Freeman had found her changes to be trivial. Enough said.

Well, almost. Made uneasy, perhaps, by his own quick acceptance of the objective viewpoint of the defendant, Judge Pollack was careful to emphasize Weissmann's lack of credibility as a witness and as a scientist. Weissmann had testified that Freeman had not contributed at all to the piece. "This is my words, my work, my expression," she said, "Dr. Freeman had no participation in it" (1258). This claim, combined with her hostile demeanor, fatally damaged Weissmann's credibility in the court's eyes. First, physical evidence of Freeman's contribution of visual material existed. Second, Freeman was listed as a coauthor on previous versions of the syllabus. Besides, Judge Pollack stressed, Freeman *had* demonstrably contributed in another way: it was his name as principal investigator that made the research possible, and, as such, he was "the person with whom 'the buck stops'"(1259). Obviously, Weissmann had lied on the stand when she said Freeman had not participated in the creation of the work. Freeman's claim to joint authorship of the piece was affirmed.

Empirical studies of scientific authorship suggest that Weissmann's claim was not so incredible, and that Freeman's position as coauthor might have been based on minimal or no written contribution to the work (Shapiro, Wenger, and Shapiro 1994; Tarnow 1999). I want to defer the question of contribution, however, in order to address a different question. Namely, what could justify Judge Pollack's preoccupation with the relationship between the authors and their individual credibility rather than with the object of the dispute—the work itself? The answer is: a set of assumptions about the exceptional nature of academic authorship and the economy of knowledge within which it is situated.

The Gift

> This essay of mine, though it will be added to the inventory of my own intellectual capital, my curriculum vitae, and hopefully will count towards enhancing my academic status and income—is still a gift, to be consumed and circulated in the gift culture of research and scholarship; no one will pay me for writing it and I will not sell it.
>
> —Jim Swan

Judge Pollack characterized the case as an "uncommon controversy." The only thing really uncommon about it was the profession of the parties involved, a profession in which it is inappropriate to identify one's creations as private property. Copyright law in general assumes that authors need and deserve monetary profit and fosters a market economy in intellectual commodities. Few bonds of trust exist in this market, and one of the principal objects of copyright law is to make up for that lack by defining the respective economic rights of market actors.

Academic authors, by contrast, are supposed to write for honor, and the academic system of exchange is supposed to be based on the reciprocal and personalized exchange of gifts, not the impersonal selling of private property (Hyde 1983; Mauss 1967). Through the quality and generosity of one's giving, receiving, and repaying, one demonstrates authority, spiritual favor, and especially honor, for reputation is the heart of this system of obligation. As Marcel Mauss observes, "men could pledge their honour long before they could sign their names" (36). Reputation is invested in and guaranteed by things, and that investment stands as guarantee, in turn, of future prosperity. As a marker of obligation, moreover, gifts remain bound up with the donor, such that the donor's identity works to animate the gift. This close relationship between donor and gift reflects a prior duty on the donor's part, for individuals owe themselves, as well as their possessions, to the community. Impelled by the same duty, other community members must in turn accept the gift and thereby create a channel to relieve themselves of their own obligation to give to others.

Searching for remnants of a gift economy in liberal societies, Mauss points to the "liberal professions," within which, he implies, "honor, disinterestedness, and corporate solidarity are not vain words" (1967, 67). Applied to the academic professions, "the gift" is most often invoked in the context of a boundary, as in Jim Swan's suggestion that university administrators must negotiate "the boundary between two cultures, between the 'feminine' economy of the gift culture and the market economy of risk and exploitation" (Swan 1994, 77). A recent study by the Pew Higher Education Roundtable describes the "gift" side of the border as occupied by "communit[ies] of devotees bound by a common interest . . . [each hoping] to win the regard of other members" (1998, 3).

As the above suggests, the gift-donor identity relation is crucial to academic exchange. Academic efforts are sent out into the world to bring an equivalent gift back to the donor. "The thing given is alive and . . . strives to bring to its original clan and homeland some equivalent to take its place" (Mauss 1967, 10). Once published, an article can garner recognition and status for the donor and the more recognition the gift (and therefore the donor) receives, the greater the value of the original and subsequent gifts (Hyde 1983; Hagstrom 1965).[10] The community, in other words, determines value, a fact to which we will return below. At the same time, as Warren Hagstrom (1965) notes, a scientist cannot publicly admit to any expectation of reciprocity, lest she be suspected of a less than perfect devotion to the production of truth.

By instantiating mutual obligations (to truth, to persons), the academic work also recreates a receptive community even as it marks the donor's status in that community. For Lewis Hyde (1983), this operation is made visible in the breach. Hyde argues that the production of knowledge as a commodity situates the producer as "less a part of the community" (81). "Community appears," he insists, only "when part of the self [in the form of research] is given away" (92). Community ties are further affirmed through repayment in the form of reciprocal papers, citations to the work, and financial support for the creation of new gifts.

The Creator-Work Relation

Ironically, perhaps, the gift-donor relation marks a point of shared meaning between legal and scientific discourses. A brief comparison

between plagiarism and copyright infringement may help clarify this connection. Copyright infringement cases tend to focus on the work, and particularly on the existence of substantial similarity between the original and the infringing work. Guilt depends on fairly extensive borrowing of fixed expression and is not excused by attribution: the work, rather than the author, is the primary focus of analytical attention. Plagiarism, however, involves ideas as well as expression; explicit borrowing may be slight or nonexistent, and attribution will generally resolve the issue. This last aspect is crucial, for it bespeaks an older and very different system of valuation. Plagiarism was condemned in ancient Rome and Greece, where "literary theft" was characterized as an appropriation of another's honor and "immortal fame" (Long 1991, 856). The term derives from *plagiarius*, to kidnap, and signifies breaking a connection between the author's name and the work (Stearns 1992; St. Onge 1988). To sever this connection is to destroy the basic requirement of the gift: that it be imbued with the spirit of the giver and remain connected to that person. This connection is one reason gifts matter: it is what makes gifts risky to give and receive and helps give them value.

Yet honor is one of the elements of authorship that allows the concept to traverse gift and market models. A tight linkage between authorial identity and the work was one of the pillars of modern copyright. Seventeenth- and eighteenth-century advocates of copyright constructed the work as the embodiment of the author, "the objectification of the writer's self" (Rose 1993, 121). This object could be copied, of course, and the ideas within it circulated, but the author's expression remained her own. Thus, copyright discourse treated the author and the work as simultaneously linked and autonomous. It is not surprising, therefore, that Mauss identified a remnant of gift culture in intellectual property rights. Both regimes acknowledge, indeed depend on, an intimate relationship between the law of persons and the law of things.

In both models, this creator-work relation is the basis of value. Intellectual property law creates and maintains the exchange value of texts by policing reproduction. This activity, and the market economy of knowledge it engenders and secures, rests on the fiction of the singular creator. The promulgation of codes forbidding plagiarism, coupled with unspoken pressure not to accuse suspected perpetrators, similarly work to maintain the value of gifts by constructing them as the true products of the giver.

In a gift economy, however, the author's name guarantees both a product and a truth-seeking process (Stearns 1992). Copyright law holds an infringer responsible whether or not there was any deliberate effort to deceive, because the copyright holder's economic interest has been damaged. Because it undermines the code of conduct in and through which rational discourse is produced, plagiarism is a crime against reason and academic science itself rather than an infringement on individual economic rights. Money is not at issue in plagiarism cases, at least not overtly—what is at issue is truth. Thus, if the copying is demonstrably accidental, it may be excused, for while it may still harm the originator, it is no longer a harm to the process of creation.

This emphasis on the violation of process was present in the comments of researchers with whom I spoke in 1998 in the course of a larger study of academic intellectual property formation. Most researchers reported at least one experience with suspected plagiarism. Of those, only three pursued the issue beyond expressing irritation to close colleagues. One protested to an editor after seeing whole pages of a manuscript the researcher had sent to a colleague reproduced in that colleague's next book. This researcher described the violation as an act of "intellectual rape," a description that resonates with the comments of another senior researcher who had also been plagiarized:

> I had submitted a grant proposal . . . and on one of those submissions I got a review back that didn't match the quality of the science, it was much more negative than it should have been, the science was good and I rebutted it, the thing was ultimately funded. But then I got to review myself a grant from another investigator submitted to [a foundation] a very prominent investigator, someone I knew, whom I compete with but I knew not to be a very honest broker, and in his proposal verbatim were sections from my proposal . . . and basically all I did, although I was pretty animated about it at the time, was decide that you only end up smelling when you get in a fight with a skunk. (interview with senior researcher)

He didn't want to be known for that complaint, he said, but for his work. Several other researchers who felt they had been plagiarized

expressed similar concerns. "My experience is that people who make a big stink about these things are considered to be hotheads," said one (interview with senior researcher). Indeed, there is something unseemly about accusing another of plagiarizing your work, for it implies a degree of desperation. A really creative scientist does not need to control one idea—she has others. She can also, in theory, rely on an informal enforcement network: three researchers expressed the expectation (and, in some cases, the experience) that plagiarizers eventually acquire a bad reputation. In the meantime, the victim must take care to protect her own good name.[11]

Sociality

Against this background, we can begin to understand Judge Pollack's argument. In a gift economy, objects are meaningful in the context of relationships. The judge seemed to suggest that because Weissmann and Freeman had coauthored numerous "scholarly scientific works" they had established a system of mutual exchange as well as a position in the wider gift culture of research and scholarship (1315). Weissmann's attempt to claim the revised syllabus as her own signaled a denial of that exchange relationship.

Gift logic also explains the court's focus on reputation. The logic of the gift inextricably binds persons to things. The court began from the standpoint that Freeman had invested his reputation in the syllabus, and that that investment was as important as the actual writing. Having invested reputation—imbued the syllabus with his spirit—Freeman remained bound to it, and "trivial" modifications could not sever that relationship.

A gift culture model also explains the sense of moral outrage that infused Judge Pollack's opinion. Gifts must be permitted to circulate; the gift cannot be withdrawn from circulation (i.e., transformed into capital) without losing its status as a gift. Weissmann's effort to treat the syllabus as property by claiming copyright ownership was, in a gift context, immoral. Implicit in the court's reasoning was a claim that Freeman had given her a gift—the use of his reputation. "It was the defendant who opened the doors for Dr. Weissmann," Judge Pollack

observed, "making all of her research and writing possible and professionally recognized" (1258–59). By claiming a sole property right in what the court saw as the product of a set of mutual obligations, Weissmann had transformed the gift into capital.

In the final paragraph of the opinion, Judge Pollack at last referred directly to the unpardonable sin of academic life. In claiming that she wrote the entire piece, Weissmann was, he argued, accusing Freeman of plagiarism: "Plainly the overbroad position she took resulted in a grave insult to her mentor and professional colleague. Dr. Freeman had neither motive nor need to plagiarize, considering his preeminent grasp of the subject" (1263). This, Judge Pollack suggested, was an attack on Freeman's reputation, and the judge's concern for it marks a final invocation of the gift rhetoric to resolve a contest for private property.

In short, faced with an outrageous transgression of the gift/market boundary, Judge Pollack deployed the language of the gift to resolve the dispute and thereby restabilize that border. Judge Pollack's importation of gift rhetoric into a body of law organized around the production and protection of commodities depended on and exposed the identity-work relation upon which both gift and market economies of knowledge are partially founded. Reproduced as well was a vision of scholarly creation as a space of sociality rather than of private property. The work remained a gift in the eyes of the court, imbued with the spirits of both Dr. Freeman and Dr. Weissmann.

There was a deep irony to Judge Pollack's reasoning, however, for at the end of the day, gift rhetoric was ultimately used to secure Freeman's *property* right in the work—his right to use, enjoy, and commodify the work. In this regard, it would seem that this process of translation was also, as perhaps it had to be, a process of betrayal, and what was betrayed was the very gift culture Judge Pollack seemed to want to defend. The gift did not remain a gift, but rather was transformed into an object of private property rights.

Betrayal signifies revelation as well as treachery, and we might want to ask what is revealed about gift and market knowledge economies in this border dispute. Joint authorship doctrine exemplifies copyright law's refusal to take account of collaborative cultural production (Jaszi

1994). To the extent that Judge Pollack set claims of sociality above those of the individual author-subject, his opinion might be celebrated as a resistant approach to collaborative authorship. If so, the court wrote a cautionary tale.

Credibility and Status

The case, for Judge Pollack, began and ended with status. The dispute, he declared, had to be understood in light of "the parties' relationship, the stature of the defendant . . . defendant's supervision, guidance and control [of Weissmann's career]" and Freeman's role as principal investigator on the joint projects in the context of which the syllabus developed. Weissmann was the "developing junior member of the association." Freeman was its supervisor, "lending credibility . . . by his standing, reputation, knowledge, perception and experience"(1251). Authority, in this discursive formation, is the crux of authorship.

Judge Pollack's reasoning acknowledged that while gift cultures may be communitarian in some respects, they are not egalitarian. In fact, gift giving is one of the principal strategies for recreating hierarchy—one's gifts mark one's rank, as does the ability to accept a gift. The worth of both gift and donor is constructed in and through repayment—an uncited work, for example, has less value and accrues little honor for its maker. The risk, however, is that the repayment may impoverish the donor. If another researcher takes the work and refutes or transcends it, her gift may trump the original gift, and her status will improve, while that of the donor will drop. "Political and individual status . . . and rank of every kind, are determined by the war of property" (Mauss 1967, 35). Chiefs exchange with other chiefs, family leaders with other family leaders, and with every exchange risk losing status through the inability to repay.

As Weissmann's "chief," Judge Pollack argued, Freeman was ultimately responsible for the gift. The junior associate's effort to transform it into her property disrupted the hierarchy that responsibility implies. No wonder the court was shocked at Heidi Weissmann's lawsuit. Indeed, in his evaluation of damages the judge reemphasized that the suit could only have been motivated by some kind of malice. The court took the extraordinary step of stating, for the record, its

desire to know why Weissmann had brought the suit. "Judging by the hostility evident in Weissmann's demeanor and testimony," the court observed, "the answer has to be that this action was brought for personal reasons." The case, the court concluded, was an "unfortunate lapse of judgment" on Weissmann's part (1258). But the case can also be read as a tactic of subversion, an effort to resist dependence. A decision in Weissmann's favor would have suggested that mentor and mentee were equal and autonomous individuals (property owners), thereby necessarily undermining a trust relationship based on dependence and obligation. In the face of the contest for the meaning of scholarly production this assertion engendered, Judge Pollack reconstructed the university as a site of collaboration—but also of hierarchy.

III. Out of the Guild and into Modernity?

In its report on the first phase of the Weissmann case, the *Chicago Tribune* referred to Judge Pollack's opinion as a prime example of the "chilly reception" students, research assistants, and other junior scholars suing for copyright infringement could expect from the courts. The same article pointed to the subsequent appellate opinion, written by Judge Cardamone for the Second Circuit Court of Appeals, as the first step in a long delayed transition in the academy from feudalism to modernity. Summarizing this and several other cases involving junior and senior academic authors, the *Tribune* declared that the "serfs" might be poised to "topple the lords."

Judge Cardamone rejected Judge Pollack's evolutionary theory of authorship, arguing that coauthorship of preexisting works did not automatically confer authorship in subsequent works. "If such were the law," argued Judge Cardamone, "it would eviscerate the independent copyright protection that attaches to a derivative work" (1317). The issue, then, was intention and content of the work. With regard to the former, the court invoked Judge Learned Hand's famous rule that all contributors must "plan an undivided whole [in which] their separate interests will be as inextricably involved, as are the threads out of which they have woven the seamless fabric of the work."[12] Weissmann clearly did not intend for this particular work to be jointly authored; she neither submitted the syllabus to Freeman for comments

nor published the syllabus under both names. The authors could not have intended for the work to remain "forever indivisible," Judge Cardamone continued, because scientific research, by definition, "is a quest for new discoveries"(1319). Weissmann, as a scientist, had embarked on such a quest and left her mentor behind. In so doing, she had made the new product "her own."

Having dispensed with intent, Judge Cardamone turned to originality to determine whether Weissmann's revisions were sufficient to make the piece a derivative work. Citing Fyodor Dostoyevsky and John Stuart Mill as authorities, he asserted "originality is and always has been rightly prized" (1321). Credibility does not determine originality, Judge Cardamone noted; changes must merely be nontrivial. Weissmann's changes must have been nontrivial, else Freeman would not have copied the syllabus but used an earlier version of the work.

In sum, the Second Circuit treated scientific authors like any other joint authors. More directly, it treated the lawsuit as it would treat a commercial dispute, ignoring the gift economy model of the university and the status of the defendant. One would expect, therefore, that the decision marked a fundamental disconnect between legal and academic representations of authorship. A closer examination of the context of authorship suggests, however, that scientific authors do indeed look as much like property owners as donors, and the knowledge economy looks as much like a market as a community of devotees.

Individuation and Investment

Copyright law is often criticized for its refusal to acknowledge or accommodate collaborative practice and, as noted, joint authorship doctrine is considered a case in point (Jaszi 1994; Lunsford and Ede 1994; Boyle 1996). Yet scientific discourse itself produces authors as autonomous individuals competing in a market, as even proponents of the gift model of exchange concede. Hagstrom, for example, notes that academic recognition "is awarded to the individual . . . who freely selects problems and methods and who evaluates the results" (1965, 69). It is awarded, in other words, to the individual who looks the most like a fully autonomous rational liberal subject. In academic science as

in law, then, collaborative ownership of an object of knowledge depends on the individuation of subjects of knowledge.

As market theorists of academic exchange observe, these rational liberal subjects operate very much like commercial entities. Scientists, argue Latour and Woolgar (1979), are like corporations, and their curriculum vitae are like annual budget reports. Authorship credit, they suggest, is defined as credibility—recognition of an "ability to do science" rather than simply a "job well done." This credibility, or scientific capital can be accumulated and then invested in support of someone else's work, in research proposals, or in getting subsequent work accepted. If it is invested wisely, it will garner a return in the form of, for example, research funding. Wise investments are those that respond most effectively to the laws of supply and demand. Scientists are figured as both employers and employees: their funding sources remain the ultimate power in this market over which they have limited control.

Successfully invested, scientific capital creates more capital in the form of authorship credit on publications to which one has, or, as Judge Pollack put it, "lent authority." Students and professors often describe this investment in nonfinancial terms—as a matter of time spent discussing research directions, editorial feedback, problem formulation, even writing. Nevertheless, intellectual and financial investments are closely linked. One professor stated that she would not let a student put out a paper without her name on it "because I had to bring in money for that student," adding that her approach was "an unspoken rule of the culture" (interview with senior researcher). Another professor (I'll call him Professor Richards) described his irritation when another faculty member (I'll call him Professor Colling) was listed as a fellow coauthor on a student's paper. Professor Richards said he had "fed" the student "intellectually" and given the student financial support as well. The student had admitted to Richards that Colling had had little input on the paper but the student "wasn't in a position to assert." Richards's discomfort was mitigated, however, by the fact that Colling had provided significant financial support early in the student's career, before Richards "took it over" (interview with senior researcher). Clearly, financial investment counts as a contribution.

One student put the issue rather more starkly. His advisor, he said,

had given him little or no intellectual support. Why was the advisor still listed as an author?

> He is providing money for me so it's a little difficult to say "hey, you're not getting on this paper." . . . He needs his name on papers to get more research grants coming in . . . Tenure is completely based on whether they're bringing in money. In order to bring in money you have to have a huge list of papers you've published. (interview with doctoral student)

Several other students echoed these comments, though most felt that funding was not the only reason for listing their advisors as coauthors. "[Publications are] the real mechanisms for demonstrating to [sponsors] that you've spent their money and actually done something with it" said one student. "Everybody has a vested interest in it, it's just sort of part of the game, of the system" (interview with doctoral student).

The *Chicago Tribune* characterized the academic architecture of human relations as feudal: in exchange for minimal financial support, the "serfs" till the soil while the "lords" reap the profits. Scientific authorship more closely parallels corporate authorship, whereby corporations claim copyright in works produced under their auspices. The presumption is that the work was produced under the direction of the corporate body: the corporation, then, is the point of origination. Ill-paid students, as "employees," are permitted to claim authorial status, but must also be sure to acknowledge their professors as points of origination, providing their professors and their professors' sponsors with a profit.

Although he did not refer to it, this practice gives sense to Judge Cardamone's refusal to treat scientific authorship as special. Perhaps the *Tribune*'s hyperbolic celebration of the academy's entrance into "the modern" was right on target, at least to the extent that modernity can be taken to denote the ascendance of a rhetoric of creativity that assumes and affirms private property rights. The appellate court's opinion dislodged the gift economy model of academic scholarship in favor of a market-oriented model. In so doing, it replicated the academy's own production of scientific authors as individualized, morally autonomous property owners who are legally if not structurally equal—a creation that exists simultaneously with the gift model of

authors as communitarian, hierarchical, morally constrained gift givers and receivers. A more modern academy was thereby produced and normalized. Or was it?

IV. The Specter of the Gift

In a final twist, the specter of the gift continued to haunt the case, providing the means for a partial reconciliation of competing visions of scientific authorship. Having resolved the question of ownership, the Second Circuit was faced with another question: Even if Weissmann could legitimately claim copyright in the work, did Freeman's use of it for educational purposes constitute a fair use, that is, a reasonable exception to copyright rules? Judge Pollack had paid comparatively little attention to this issue in the first phase of the case, but Judge Cardamone did not. Four factors determine fair use: (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 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.[13] Judge Pollack had argued that the syllabus was intended for nonprofit "educational use." Further, because the piece was "factual and scientific," the law was predisposed to facilitate its free dissemination over, for example, "works of fiction or fantasy." Because it was not in fact used in the class, moreover, the syllabus had "no market value" and its use could have no market effect (1262).

Again, the Second Circuit Court of Appeals came to a rather different conclusion, and the logic of that conclusion rested upon a conceptualization of the community of scholarship in both gift and market terms. "Monetary gain is not the sole criterion" of profit, Judge Cardamone argued:

> Dr. Freeman stood to gain recognition among his peers in the profession . . . he did so without paying the usual price that accompanies scientific research and writing, that is, by the sweat of his brow. Particularly in an academic setting, profit is ill-measured in dollars. Instead what is valuable is recognition. (1324)

Judge Cardamone's assertion that monetary gain was irrelevant to academic work was contradicted, somewhat, by his insistence a few sentences later on the importance of the economic incentives of copyright protection to scientific production. Truly curious reasoning, however, emerged in Judge Cardamone's assessment of the "market value" of the syllabus. "The particular market at issue here—namely, the world of scientific research and publication" he said, operates to encourage the circulation of scientific work through incentives of promotion and advancement. Recognition, in this formulation, was the "fruit of one's labor"(1326). The syllabus was a way of producing recognition for Weissmann; thus it had a market value aside from any direct monetary remuneration. In short, the Second Circuit located the academic setting outside of the money economy and simultaneously reconstructed that setting as a market.

The Academic Market and the Professor as Celebrity

The ramifications of this double movement come into relief if we look closely at existing legal parallels for the Second Circuit decision. The economic rights the court identified are not, of course, entirely new in the history of the professions (Larson 1977). What is startling, however, is the construction of "recognition," or reputation, as "the fruit of one's labor" and, therefore, a form of intellectual property. More directly, what is startling is the application of such reasoning to the professoriate. In the United States, it has been more often found to apply to celebrities within the regime of publicity rights.

Put simply, the right of publicity is the right of a person to control the commercial use of his or her identity. The courts have reasoned that celebrities, like private persons, have a right of protection from unauthorized commercial intrusion. In addition, since celebrities invest time, labor, and money in the construction of their public selves, they have a moral right to reap "the fruits of their labor" while others have a moral obligation not to "reap where they have not sown" (Nimmer 1954). In the past several decades, the right has become a "real" private property right: "fully assignable and descendible, as well as potentially perpetual" (Gordon 1993, 153 n. 14). In addition, the scope of publicity rights has been dramatically extended. Initially, publicity rights were narrowly construed, covering only name, likeness, photograph, voice, and signature. In California at least, publicity rights now cover evocations of identity, including advertising slogans, objects associated with a celebrity (e.g., a car), singing styles, and so forth.[14]

Publicity rights take the creator-work relation a step further: the work is the star persona, the objectification of the author's self. In essence, publicity rights inhere in elements of identity so distinctively personal that they can be alienated. In *Weissmann*, it is a scientist's reputation that is considered sufficiently personal to be produced as a kind of commodity.[15]

As it happens, scientific authors, particularly those actively involved in education as well as research, might learn lessons from celebrities. The ability to claim ownership in reputation has enabled movie stars to gain firmer control over the circulation of performances. A central struggle to define the academy in an information economy turns on control of academic labor. Educators in the sciences and the humanities argue that they must assert and defend their copyright in their lectures and other written works to prevent the appropriation of that work by university administrators, distance-learning corporations, and other private entities bent on "commercializing" that work (Noble 1997; Leatherman 1998). Increasingly conscious of a lack of control over the conditions of their labor, professors, like stars, seek mastery through the assertions of intellectual property rights. Judge Cardamone's reasoning indicates one possible mode of assertion.

Yet there is a price to be paid for this strategy, one that reminds us of the broader implications of Cardamone's decision. The moral force of publicity rights rests upon the "unquestionable truth" of individual labor. In other words, publicity rights work to reinforce the same individuated creator-work relation upon which gift and market economies of knowledge are founded. And the question is, or should be, what kinds of labor, performed by whom, are construed as valuable, by whom, and for what purposes? Like Judge Cardamone, jurists deciding publicity rights cases consistently treat fame as a product of individual achievement; celebrities "painstakingly build" their public personalities through years of effort, "assiduously cultivating" their reputations.[16] One court declared in 1970 that "a celebrity must be considered to have

invested his years of practice and competition in a public personality."[17] Yet it is not clear why, exactly, a celebrity or an academic must be considered to have done so (Madow 1993).

One effect of this focus upon individual labor is that it obscures the work of technicians, assistants, and audiences (or a community of scholars) to produce valuable reputations. Fame is conferred by others—one does not become famous on one's own (Madow 1993). Audiences themselves labor, making selections among potential and alternate meanings, and their selections influence the reproduction of authorized identities. In his study of the construction of the star persona, Richard Dyer (1986) notes that fan clubs, fan magazines, and audience research techniques channel practices of reception into practices of production. The work of audiences is even more evident in academic science, where the value of the work (hence the value of the scientist's reputation) depends on reading practices (e.g., noting order of authorship), experimental testing, and citation. Further, this focus on individual labor obscures the activities of corporate entities from the University of California to the Disney Corporation to construct and profit from fame.

Thus, Judge Cardamone's support of Weissmann's right to profit from her reputation both exposed and reinforced a fundamental shared premise of gift and market models of creative exchange: the assumption that creative work can and should be individuated. That individuation engenders a sharply impoverished view of knowledge production and legitimates a broader discourse whereby, as critical legal theorist Bernard Edelman (1979) puts it, "the claim to describe [the author] becomes the practice of the owner" (25).

V. The Gift, the Market, and the Information Economy

> In what ways and with what effects can the university, both inside and outside the market economy, useful and useless, function as a surplus that the economy cannot comprehend?
>
> —Robert Young

My intention in this essay has been to partially answer Young's query so as to reframe it. The *Weissmann* case indicates a need to ask: In what ways and with what effects can the market economy comprehend the university precisely because of its uselessness, that is, its location outside of the realm of economic interest? How is the boundary between gift and market models of academic exchange disrupted and maintained?

Set against the background of academic practice, authorship as a concept appears to be deeply embedded in competing visions of scholarly work, yet flexible enough to circulate between these notions. These competing visions are never reconciled. Rather, they maintain an uneasy coexistence. Heidi Weissmann's lawsuit challenged this uneasy accord because its resolution seemed to demand the displacement of the gift in favor of the market. Faced with this visible transgression, the district court sought to reinscribe a gift model of scientific authorship. The appellate court recognized the impossibility of this strategy and repositioned Weissmann and Freeman as proper liberal subjects, autonomous property owners. Yet Judge Cardamone, too, was finally unable to leave the gift behind, choosing instead to awkwardly knit the two models together. In a final turn that is symptomatic as well as productive of scientific authorship's multivalence, he constructed gift and market as both opposed and hopelessly intermingled in the space of a few sentences.

This confusion of meaning adds a touch of poignancy to the *Chicago Tribune*'s search for signs of modernity in the academy, if we keep in mind Latour's (1993) observation that "the modern world has never happened" in the sense that its central tenets have never been fulfilled (39). That is, modernity is not built on dichotomies, such as that between gift and market. Rather, modernity is built on hybrids "made possible by absolute investment in dichotomies," its social arrangements stabilized by the concepts that intermediate between them.

To make all of this activity work, however, these hybrids have to be concealed. One of the things that helps authorship mediate gift and market economies is the shared assumption that the two models do not share important assumptions. This is what was challenged in *Weissmann*. The case highlighted the productive tensions between gift and market economies and perhaps even the dangerous incursion of a market mentality into the public domain of the gift. Read against the grain, however, another threat can be discerned: that the hybridity of scientific authorship might be exposed.

Heidi Weissmann's property claim, as an extraordinary instance of boundary crossing, demanded an equally extraordinary feat of reconstruction. The district court's argument was the first effort in this direction, but its importation of the gift model into a property context threatened the foundational opposition between gift and market. The Second Circuit's final argument was a more significant rescue operation, one that simultaneously recognized academic authors as private property owners and reconstructed the academic knowledge system as a gift economy. This rescue was made possible by the final betrayal it encapsulated: the very complex of shared assumptions it attempted to conceal.

Notes

1. The original version of this essay appeared in Corynne McSherry, *Who Owns Academic Work? Battling for Intellectual Property* (Cambridge, Mass.: Harvard University Press, 2001). Reprinted by permission of the author and publisher.
2. A few words on the methodology of the empirical study: I used snowball sampling to generate a list of staff, students, and researchers located at two research centers in a major university on the West Coast. In interviews lasting one to two hours, I asked my respondents to tell me about the preparation of research articles and conference papers, how they decided who should be named as an author in a given publication, in what order, and who was and was not included in that decision-making process. In most of the interviews, we also discussed experiences with secrecy and plagiarism. Two-thirds of the interviews discussed here were conducted at a small research unit, only a few years old and populated primarily by electrical engineers. I chose to focus on the field of electrical engineering because, as an applied science with a tradition of relatively close ties to private industry and concomitant anxiety about its status as "science," academic engineering's investment in boundary maintenance is particularly visible. Several of the professors interviewed had worked in private industry prior to being recruited to the university, all held Ph.D.'s, all had numerous publications, and most were senior researchers, meaning they held tenure. The students were all doctoral candidates in electrical engineering or computer science with one or more publications on their curricula.

   The second site was a large computing research facility populated by electrical engineers but also biologists, neuroscientists, computer scientists, and physical scientists who, for various reasons, use advanced computing technologies in their research. I chose the latter site in part because my conversations there gave me a chance to compare practices in electrical engineering with those in other fields. Authorship practices vary across fields and subdisciplines, of course, and the comments included here should not be taken as perfectly representative of "techno-science" as a whole. Nor should they be taken as representative of academic authorship in toto—writers in the humanities, for example, are more likely to publish as sole authors and engage in different dynamics of attribution. Please see McSherry, *Who Owns Academic Work?*, for further methodological details.
3. *Syllabus*, in this context, means a paper reviewing the recent literature in a given field, rather than simply a listing of topics to be covered in a course. This kind of syllabus accompanies lectures given in a course and is used by students to study for medical board exams.
4. Clinical trials of new drugs, for example, are validated in part by the scientific integrity of the laboratories conducting the trials. Investment decisions are based in large part upon faith in the results of those trials, and the university recognizes this in its careful policing of the use of its name for advertising purposes. More broadly, basic research in academic science is expected to generate unexpected inventions and commercially useful data precisely because it is not always concerned with the bottom line. Or, as an executive of a major oil company put the matter to a researcher looking to move to the private sector: "You're worth a lot more to us working in the university coming up with good ideas," the executive said, "than you'd be on our research staff being forced to work on projects that have already been decided by management" (interview with senior researcher).
5. 684 F. Supp. 1248 (1988).
6. 868 F. 2d 1313 (1989).
7. The Anglo-American tradition of literary property was founded upon the idea that authorship involved "imprinting . . . an author's personality" on a thing; a process verified by the thing's "originality" (Rose 1993, 114). This process of imprinting involved individual mental labor, carried on "separated . . . from the rest of mankind" (Daniel Defoe in Rose, 39). Labor, argued William Enfield in 1774, "gives a man a natural right of property in that which he produces: literary compositions are the effect of labor; authors have therefore a natural right of property in their works" (in Rose, 85). Creative individuals, through investment of labor, created something that had not previously existed.
8. *Childress v. Taylor*, 945 F. 2d 500, 1991. See P. Jaszi, *On the Author Effect II: Contemporary Copyright and Collective Creativity*, in *The Construction of Authorship: Textual Appropriation in Law and Literature*, eds. M. Woodmansee and P. Jaszi (Durham and London: Duke University Press, 1994).
9. A derivative work is one that transforms, adapts, revises, or otherwise modifies a preexisting work such that the new product represents an original work of authorship.
10. Recognition carries with it the burden of responsibility. Mario Biagioli has argued that the gift economy of scientific authorship depends upon the credit/responsibility dualism. Credit for a new discovery attaches to a scientist's name, but that named scientist is also, theoretically, responsible for the truth of that claim. The practice of granting "courtesy" author-

ship to individuals only loosely associated with the project undermines this form of responsibility, as a rash of cases of scientific fraud in biomedicine have illustrated (Biagioli 1998; LaFollette 1992).

11. These norms, and their informal enforcement, are not confined to technoscience. Consider, for example, a scandal that took place at Texas Tech, in which a history professor was exposed as a dedicated plagiarist. Several of his writings, including a book manuscript, were revealed to have been plagiarized. The professor was denied tenure, but little further action was taken. The book manuscript was published, with few revisions. The professor was later hired to evaluate other people's research as a grant monitor for the National Endowment for the Humanities. His plagiarism did at last become "public" when reviews of the published book called attention to it (one of the people asked to review the book was the same person who had exposed the suspicious passages in the first place—the historian who wrote the work that had been copied). Despite the scandal and a subsequent accusation of plagiarizing yet another work, the professor kept his job at the NEH for several years (Mallon 1989).
12. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (2d Cir. 1944), at 267.
13. 17 U.S.C. § 107.
14. In 1974, the Ninth Circuit declared that an ad showing a race car with distinctive markings was sufficient to evoke the identity of race car driver Lothar Motschenbacher. *Motschenbacher v. R. J. Reynolds*, 498 F. 2d 821 (9th Cir. 1974). The decision in *John W. Carson v. Here's Johnny Portable Toilets*, 698 F. 2d 831 (6th Cir. 1983), affirmed Johnny Carson's right of publicity claim in the phrase "Here's Johnny" (used nightly by Ed McMahon to introduce Carson). A few years later, courts accepted arguments from Bette Midler and Tom Waits that commercials that used "sound-alikes" had infringed on their right of publicity. *Midler v. Ford Motor Co.*, 849 F. 2d 460 (9th Cir. 1988) cert. denied; *Waits v. Frito-Lay, Inc., and Tracy Locke Inc.*, 978 F. 2d 1093 (9th Cir. 1992).
15. As yet, the academic persona does not seem to be fully alienable (as is the star persona), and this is a crucial distinction. It took only two decades to make this shift in Hollywood, however, and it is not improbable that as the academic economy of knowledge is reconstructed on market terms, professors will find it lucrative to license their names.
16. *Lombardo v. Doyle*, 396 N.Y.S. 2d 661, 664 (1977); and *Hirsch v. SC Johnson and Co.*, 280 N.W. 2d 129, 134–35 (1979).
17. *Uhlaender v. Henriksen*, 316 F. Supp. 1277, 1282 (1970), cited in Madow 1993, 183.

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