

NINTH ANNUAL TENZER LECTURE 2002

INNOVATING COPYRIGHT*

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At a recent conference in Durham, North Carolina, Yale Law School Professor Jeb Rubinfeld told the story of a struggle to speak that he had a very large role in winning. The context was a book set in the antebellum south, published in 1936 by the single hit author Margaret Mitchell. *Gone With The Wind*¹ tells a story about the south before and after the war. It builds a telling of that extraordinary history in an extraordinarily charitable way. That telling earned Margaret Mitchell millions of dollars. The book has been translated into over thirty languages, and has sold more copies than any other book, save the Bible.

Rubinfeld's account — always brilliant and itself a dramatic work — was of another American who had a very different story to tell. This book too was about life in antebellum American south. This author was a woman named Alice Randall who wrote a book called *The Wind Done Gone*.² This was the story of Margaret Mitchell's story, but told from the perspective of the African slaves. It's a less heroic account. Less apologetic. It uses some of the same images, relies on some of the same characters, but it actually copies very little from Margaret Mitchell's text. In the way that lawyers have come to speak, the book was a "parody" of Mitchell's book. But to call this book a parody is to insult the seriousness of its topic. Randall's book was a counter-story, a retelling of the story that Margaret Mitchell had constructed, but counter to the point to which Margaret Mitchell aimed.

When Randall's publisher, Houghton Mifflin, was about to release the book, it was contacted by lawyers representing the Mitchell estate. Randall's story, these lawyers said, was not a counter-story or a parody. Randall's story was a sequel. And as the copyright to Mitchell's book had not yet expired, Randall needed the permission of the Mitchell estate before she would be allowed to embar-

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¹ MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

² ALICE RANDALL, *THE WIND DONE GONE* (2001).

rass Mitchell's story. That permission, the lawyers added, just to be complete, was not granted.

For those of us who have been blessed with an understanding of this regulation we call copyright, the lawyers representing the Mitchell estate were uttering something completely understandable. A sequel is a derivative work. The owner of a still live copyright, that is, one that has not yet expired, controls the rights of others to produce derivative works. To write and publish a counter-story to Margaret Mitchell's, you need the permission of the Mitchell estate. Not the author—she's sadly long dead—but the estate. At least until that copyright expires, though the idea of copyrights expiring seems itself an expired idea.

Had Mitchell's copyright expired on its original schedule, it would have fallen into the public domain in 1993. Had it expired in 1993, Randall would have been free to write her book without any restraint from the legal system. But Congress has turned against this idea that copyrights expire. It is drunk on the idea that it can extend "limited terms" as often as it wants. In fact, eleven times in the last forty years, Congress has extended the term of subsisting copyrights. Its latest extension was in 1998, extending existing terms 20 years. On its present schedule, Mitchell's work will be free to the public domain in 2032, 170 years after the battle was fought in blood, and almost 100 years after Mitchell set the battle to words.

Mitchell's lawyers demanded that Randall stop her publication. And when the lawyers learned that there were actual copies of Randall's book in print, they focused their demand in a form that inspired Rubinfeld's fury. Their prayer for relief from this infringement on their property right asked the federal district court in Atlanta to order Randall's book burned.³

Burned. Could it really be, Rubinfeld asked, that in the 21st century, a United States federal district court has the power to order books burned? Can it really be that a story could become so much the property of an individual estate that counter-stories must be destroyed? Could the judicial power really be so expressed, consistent with the First Amendment, such that texts expressing a story counter to a tradition can be ordered to be destroyed?

Davis Guggenheim is a film director. He has produced a range of movies, some commercial, some not, most of them documentaries; for his passion, like his father's before, is to tell stories about the world. His most recent documentary, *The First Year*, is about

³ See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

public school teachers in their first year of teaching, a kind of *Hoop Dreams*⁴ for public education.

In the process of making a film, a director must clear rights. A film based on a copyrighted novel must get the permission of the copyright holder. A song in the opening credits requires the rights of the artist performing the song. These are ordinary and reasonable limitations imposed on the creative process by a copyright system. They make possible an extraordinary range of creativity because of the protection they grant. Without such a system, we could not have anything close to the creativity that directors such as Guggenheim have produced.

But what about the stuff that appears in a movie incidentally? Posters on a wall in a dorm. Coke cans held by the smoking man. An advertisement on a truck driving by in the background. These too are creative works. Does a director need the permission of anyone to have these in his or her film?

Ten years ago, Guggenheim explained to me, if an incidental art work was recognized by a common person, then you would have to get permission to use it in your film. But today things are very different. Now, “[i]f any piece of art work is recognizable by anybody, then you have to clear the rights of that work and pay to use it in the film. Almost every piece of art work, any piece of furniture or sculpture has to be cleared before you can use this.”⁵

So picture what this actually means. As Guggenheim describes it, before you shoot you have this set of people on your payroll who are submitting everything you’re using to the lawyers. The lawyers check the list and they say what can be used, what can’t be used. If you can’t find the original piece of art work, you cannot use it. Even if you can find it, often the permission will be denied. The lawyers thus decide, Guggenheim explains, what’s allowed in the film. They decide what can be in the story.

Lawyers insist on this degree of control because the legal system has taught them how costly less control can be. The film *Twelve Monkeys*⁶ was stopped by a court twenty-eight days after its release because an artist claimed a chair in the movie resembled a sketch of a piece of furniture that he had designed. The movie *Batman Forever*⁷ was threatened because the Batmobile drove through an allegedly copyrighted courtyard and the original architect demanded payment before the movie could be released. In 1998, a

⁴ HOOP DREAMS (Kartemquin Films 1994).

⁵ This example is drawn from LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 3 (2001).

⁶ TWELVE MONKEYS (Universal 1995).

⁷ BATMAN FOREVER (Warner Bros. 1995).

judge stopped the release of *The Devil's Advocate*⁸ for two days because a sculptor claimed his art was used in the background of the film.

These events teach lawyers that they must control the filmmakers. They convince studios that creative control is ultimately a legal matter. And this control in turn creates a burden not just in expense. As Guggenheim explained, "the cost for me is creativity." Suddenly the world you're trying to create is completely generic and void of the elements that you would normally create. "It's my job," he says, "to conceptualize and create a world and to bring people into that world that I see. That's why they pay me as a director."

"And if I see this person having a certain lifestyle, having this certain art on the wall and living in a certain way, it is essential to the vision I am trying to portray. Now I somehow have to justify using these images in my work and that is wrong."

And what of the future? What advice can Guggenheim give to the wannabe filmmaker? "Well," he says, "I would say to an eighteen-year-old artist, you're totally free to do whatever you want, but here I would give a long list of things he can't include in a movie because these would not be cleared, legally cleared. And then he would be able to produce this without paying." "So there's the freedom," Guggenheim says. "You're totally free to make a movie in an empty room with your two friends. That's the freedom we have today."

Brewster Kale is a hero of mine. He's something of a genius, and also quite wealthy. Brewster is one of the early Net innovators who was smart enough to escape the Net in time, with money. That money he now devotes to building one of the largest libraries ever in the history of civilization. He wants to become the Andrew Carnegie of the Internet, building libraries for the Internet that are free and available to everyone. His best-known work is a project called "The Internet Archive," which since 1996 has been making copies of the Internet. These copies are then indexed and fed into a technology called the "Wayback Machine." With the Wayback Machine you can basically set the dates you want to search the Internet for, and then search the Internet as of this date.

In its first public demonstration at the end of September, Brewster set the date to September 1996. He then went to the White House Web page⁹ and there on the White House Web page,

⁸ THE DEVIL'S ADVOCATE (Warner Bros. 1997).

⁹ [Http://www.whitehouse.gov](http://www.whitehouse.gov).

circa 1996, was a list of press releases. On the White House announcements for September 10th, 1996 President Clinton was reported to have sent to Congress a brand-new program for airport security. Clinton promised this program would end terrorist threats at our airports. That was 1996.

This is the scariest feature of the Internet, the part George Orwell would have understood best: The sense in which Net has no real history. A page can be changed without anybody noticing. It gets updated but no marks are left. Remembering the past is not a part of the original architecture of this Net. Remember the editors in *1984*¹⁰ constantly rewriting the past? Those editors are the Internet. For at any moment, we have no way of knowing what went before. But Brewster's machine changes that. You can track and watch how Web pages have changed.

But that's not the end of Brewster's ambition. Someday Brewster wants his pages to link to an archive of books. An archive of texts made available for free to people everyone on the Net. In a recent filing before the Supreme Court, Brewster described how of the 10,027 books published in 1930, only 174 are still in print. Brewster wants to take the 9,853 books from that year and every other year he can get and put them on the Net for free. He has the technology. He has the money. He has the business plan. All that's needed now is the permission of the lawyers to go ahead and take the books. Not just the books from 1930, but from every year possible.

But the permissions will not come. Not because anyone really objects, but because those with the power to grant the permissions must first be found. The law punishes publication without permission of the copyright owner. To publish these 9,853 books not in print from 1930 would require finding the 9,800 or so authors who hold the rights. And no doubt not just the authors, but in most cases their heirs as well. For each book, it could cost thousands of dollars to clear these rights, to make what is now invisible to most, visible to the world again.

And so it's not done. These works fall into a black hole of legal regulation, at last until their copyright expires. But again, when will that be? Again, apparently copyrights don't expire any more. Don't, because Congress extends them over and over again. Thus the works from 1930 will not fall into the public domain now until 2026 — unless Congress extends the term again. They won't expire, and no doubt the vast majority will not be licensed. And

¹⁰ GEORGE ORWELL, 1984 (1949).

hence these books will long be burned, not by a court, but by libraries that can't afford to carry them anymore.

Two great trends that mark our time. One is technological, the other is legal. The technological trend is towards decreasing costs of creativity, increasing the range of the possible: An explosion of digital technologies that makes it possible to create and distribute works in a way nobody had ever imagined. Not just text, which now can be published anywhere on the Net for close to nothing, but movies and images and digital film — creativity that can be more cheaply made. Creativity that can be increasingly made free.

The legal trend pushes in the opposite way, towards more law that makes much less free: A push towards control that increases the costs of creativity; a push to lock more up, or to lock more up tightly, or to lock more up for longer.

The technological trend means that more is possible with less. The legal trend means that less is allowed than before. The technological trend could give the power to create to an extraordinary range of citizens. The legal trend means that the right to create is increasingly held in a smaller and smaller circle.

Anyone can write and publish a counter-story to Margaret Mitchell's book, but for at least one more generation to do it easily, with the backing of a publisher, would require the permission of an estate. Anyone can take a digital camera and film aspects of his friend's life, but to show it publicly requires the clearance of the legal censors. Any millionaire could aspire to give free books to the world, but to do so requires the permission of people who don't even remember that they hold legal rights. Just as the tools make creativity increasingly like the air, the law learns how to carve up and sell the air.

Now of course these opposite trends are related. The obsession about controlling content grows as the ability to spread content grows. The explosion in legal regulation flows from the valid and sensible fear that the Internet will be the death of copyright. Technology makes stealing easier. The law increases the punishment for stealing. An arms race spins out of control with no sense on either side of how it might stop.

And so it doesn't stop. Congress passes legislation making the transfer of copyrighted material on the Net a felony.¹¹ A company called Napster gets born to enable individuals to share their music

¹¹ No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678.

with their ten thousand best friends. A court shuts Napster down.¹² New services emerge to take their place. Three times the music today gets shared in these underground technologies than at the height of Napster, and the trend is growing.

And then real companies, not just Internet start-ups, jump into the fray. Think about Apple Computer. Here's a computer company that has fought like hell to stop others from "stealing their ideas." In the late 1980s, it sued Microsoft for Microsoft's technology, Windows, which, Apple complained, Microsoft had stolen from it,¹³ after it had stolen it from Xerox. Fortunately for the world, Microsoft won that lawsuit, but now Apple has become the driver of a revolution of free exchange of content. Or at least the driver of a revolution in devices for this free exchange of content. And to fuel this revolution, it has offered the world a very simple message: "Rip, mix, burn. It's your music. Burn it on the Mac."

Apple has been in the revolution business for a long time. What's striking about the modern Mac revolution is its in-your-face-ness of this very simple, but to modern legal ears, radical claim: "Rip, mix, burn. After all, it is your music." As if the law really does, without limit, permit you to "rip," meaning to take from others, "mix," meaning add to it without their permission, and "burn," meaning permission to burn it for others to hear. As if it really were your music.

And so in response to this new outrage of a company selling the idea that people are free to do what they want with the culture that surrounds them, new legislation gets added into this spiral, making it illegal to make a device that is capable of ripping, mixing or burning any content without the permission of the content owner. This is the SSSCA, written by Senator Ernest Hollings of North Carolina, requiring computer manufacturers to embed technology to block watermarked content.

Now to non-Americans there's something very familiar about this cycle. It is the cycle of prohibition: The policy dance where as regulation increases, deviation increases, inspiring more regulation, inducing more deviation, until the costs of the system of regulation far exceed any possible benefit.

It is the character of a punitive society that it can't focus itself on moderation or balance. It is the character of this war. It is like the war on alcohol during Prohibition. It is like the current war on

¹² See *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001).

¹³ See *Apple Computer, Inc. v. Microsoft Corp.*, 709 F. Supp. 2d 925 (N.D. Cal. 1989).

drugs. It is a new war waged against the idea of free culture. And this war, like the last two, begets its own extremism. In a world where most convicted rapists serve less than ten years in prison, we threaten a Russian programmer who wrote a bit of code to unlock an Adobe E-book with many years in a federal penitentiary.

It is the job of an academic in times of craziness to point to sanity. The role of the academy is to provide balance and perspective. We should not be paid by either side in this battle. Of course, increasingly we are, and that's a sad fact about our discipline. But we shouldn't. Our job, and for this we are well-paid, is to be that part of a political culture that is reflective and knowing. We don't deserve power. Indeed, power is the last thing anyone should give to an academic. But if we do our job well, we do deserve a hearing to remind a culture of the different parts in its past.

This is especially so now in the middle of this war about free culture. For in our binary way, we Americans have forgotten our past. In this escalation to war we have erected barriers to the other side. There isn't understanding, there are only partisans. And each side, with the self-righteousness that should terrify everyone, insists that the other side is the devil's own work.

We have left the space in the middle to no one. The middle is boring. The middle doesn't sell well. But being boring is our job. Books that don't sell well is our forte. And so in the few minutes that I have left, let me lull you to sleep with a timid picture of reason in this time of a certain lunacy.

This conflict over control is the product of changing technology: New technologies for enabling the creation and distribution of content. But we have suffered changes in technology affecting content before. That much is not what's new. What's new now is the law's response to these changes.

Rather than patience, rather than hesitation, rather than caution and deference, the law has raced to the fore to right every Hollywood wrong. This is the image of the Napster case. But balance and understanding requires putting Napster into context.

Think about the last great Napster in technology's history. Not a technology to permit everyone to share music with their friends, but a technology to enable people in rural areas to watch television. This was cable television, an industry that was born "stealing" the content of others. Cable deployed a new technology to capture the content of broadcasts; it streamed that content to its customers. It steals those broadcasts and sells them to their customers. It thus Napsterized broadcasting.

For twenty years content owners argued to the courts that this

“Napsterization,” if we can anachronize a bit, was theft. That the law should stop this theft because theft is not the American way. But twice the Supreme Court rejected that claim. Thus for twenty years this industry took off by stealing other people’s content. And when finally Congress sat down to address this struggle, it struck a balance between content owners and technologists that sets a model that we should look to today.

Congress said of course, copyright owners must be paid for their content. Thus cable companies had to pay for the broadcasts that they took. But on the other hand, cable companies had the right to get access to this content through a compulsory licensing right. Congress was afraid the broadcasters would leverage control over the past into control over the future. So Congress gave cable companies a right to protect against this leveraging. Separating compensation for the artists from control over access was a technique to make sure that the future was not held in the hands of the past.

The same year that that compromise went into effect, a different war over a different type of Napster was launched. In 1976, Universal and Disney filed a lawsuit against a company called Sony.¹⁴ Sony had a technology called the Betamax. This was VCR technology. And these companies claimed this technology was Napsterizing their content. People were recording free TV and watching this TV later without watching the commercials. Sometimes they even kept copies of the movies and built a library. All of this copying, Disney and Universal said, was happening without the copyright owner’s permission, and Sony in turn, therefore, was going to make a lot of money out of this technology for stealing.

Eight years later, the Supreme Court said tough.¹⁵ It was “Congress that had been assigned the task of defining and limiting monopoly that the copyright holders have.”¹⁶ These monopolies Congress has changed. This change is often occasioned by changes in technology. But the court said it is Congress that is charged with responding to these changes in technology.¹⁷

“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted material.”¹⁸ Because it is “Congress that has

¹⁴ Universal City Studios, Inc. v. Sony Corp. of America, 429 F. Supp. 407 (C.D. Cal. 1977).

¹⁵ See 64 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984).

¹⁶ *Id.* at 429.

¹⁷ See *id.*

¹⁸ *Id.* at 431.

the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."¹⁹ Courts should be more patient. Congress, a legislative process, a determination made at the table of bargaining and competing interests.

Now of course, copyright holders think it insulting to have to fight battles to defend "their property" in Congress. After all, it is "their property." Why should its owners have to get new favor from Congress to protect what is already theirs?

But as the law has long understood, a "copyright" is "property" in a very special sense of that term, property. It is a protection against some uses, not a protection against all uses. As the Court wrote in the *Sony Betamax* case, copyright law "has never accorded the copyright owner complete control over all possible uses of his work."²⁰ How the rights that the owner has been granted, as the *Betamax* case shows, as the cable TV cases show, as the piano roll cases show, how those rights get modified in the face of new technologies, is to be decided, *Sony* holds, by Congress.

This is the real message of a case that set a tone for limited intervention in the process of innovation. This is also the message that courts seem to have forgotten. The Supreme Court did not say in the *Sony* case that it had weighed up all possible uses of the VCR technology and decided that on balance the VCR would do more good than harm to the industry of copyright. It didn't pretend any such omniscience. Instead, the Court simply identified just two possible uses of this new technology that would clearly be permitted under copyright law as it then existed. Two out of a list of many uses, many other uses which would clearly be illegal. These two permitted uses on their own were enough. They were not balanced against unpermitted uses. The balance between permitted and unpermitted uses was for this Court irrelevant. Balancing beyond this minimum was a task left for Congress. The Court's job was simply to test the minimum.

But this is not how *Sony* lives in the courts today. Rather than asking, is there a legitimate use for this new copyright affecting technology, courts instead are asking, in effect, whether, on balance, the expected use of this new technology will harm copyright owners generally.

The consequence of this subtle shift is profound in the market for innovation. To launch a new product today, in this market reg-

¹⁹ *Id.*

²⁰ *Id.* at 432.

ulated by this form of copyright, you must be prepared to defend against a lawsuit launched against you. This lawsuit will force you to defend this new technology, to defend it against its potential threat to copyright owners.

To defend it you must offer expert testimony, proof that the tool will do less harm than good, an economic story about how, on balance, this is not harmful to the market. And then a federal district court judge must, like a Soviet planner but with better lighting, weigh the costs and benefits and decide whether this new technology will be allowed.

This is not the rule of *Sony* and the tradition from which *Sony* emerges. Rather, it is the opposite of that permissive rule. And the damage that this inversion will do to the future of creativity is only something that we are beginning now to glimpse. For the consequence is something truly new in our history. And this consequence is only exacerbated by a feature of the current context that we have just begun to reckon.

This feature is the extraordinary concentration in media and hence, extraordinary concentration in copyrights, and hence, the extraordinary concentration in the power to direct how the future for innovation and creativity will develop.

The dimensions of this control are many. First is copyright's duration. In *Sony*, the Court promised that "[s]ince copyright is not perpetual, the number of works in the public domain necessarily increases each year."²¹ Wrong. It doesn't. When Congress is permitted to extend the term of existing copyrights retrospectively, and again, here's the slogan of the talk — as it has done eleven times in the past forty years — works do not pass into the public domain. Instead, the concentration of holdings of the most significant copyrights from our cultural past just grows. Never in the history of American culture have fewer controlled more of American culture. Never in our history has the control of the development of culture been as concentrated as it is right now.

The second dimension is copyright's scope. The slow accretion of rights held within the hands of this smaller and smaller set give them an increasingly strong power to say how these bits of our past get used in the future, how they get added to, how they get transformed. Increasingly, rights confront the struggle Alice Randall faced in this world of concentrated control. Increasingly, burdens control the creativity that they otherwise were designed to induce.

²¹ *Id.* at 443.

Add this duration to this scope of highly concentrated media interests and the consequence is a result well-known in these quarters. The danger in works for hire that Professor Hamilton has described.²² The dangers in the closed media architecture that Professor Price has made clear.²³ These dangers predict a great loss in the potential for freedom and something different that these technologies of freedom, these originally different forms of creativity promised and could allow.

This concentration of legal regulation quickly transforms into a concentrated power to protect the old against the new. To control how the future develops so as to assure it doesn't displace the Soviets of the past.

The boring middle position here says *balance*. It is the legal tradition that says change is the province of Congress. That transition is not the end of the world. That industry always learns a different architecture of revenue in the face of different technologies. That we should embrace and encourage transformations that build a wider space for innovation and creativity, that the old should die young.

We can translate this idea into a parallel that captures something of the tension at stake.

There are two ideas that reign within our culture. We are a house divided by these two ideas. Think about the division that divides my state between north and south. In the north of my state, California, people believe culture and ideas should be free. Not free in the sense of free beer, but free in the sense that they should flow freely with minimal legal control. Long before the Internet, this was the magic that distinguished Silicon Valley from Route 128. That law would stand back from controlling every idea. That the free flow induced prosperity.

In the south of my state, there's a very different idea. In the south they believe culture can be owned. That it is property. That it is controlled by property holders (hoarders) of culture. These holders of culture have the right to set how this culture gets used. Large numbers of artists (slaves) sell their soul to these culture makers in exchange for the right to sell their music to the future of music. They sell their soul forever in exchange for this right. And

²² Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, in 5 OCCASIONAL PAPERS IN INTELL. PROP. 4 (Benjamin N. Cardozo School of Law, Yeshiva Univ.) (1999).

²³ Monroe E. Price, *Free Expression and Digital Dreams: The Open and Closed Terrain of Speech*, 22 CRITICAL INQUIRY 64 (1995).

these holders/hoarders/plantation owners run this system of cultural production in a way that says our rights are absolute.

Our problem as a culture is that each of us has a bit of the north and a bit of the south inside us. It's easy for all of us in some sense to believe that culture should be free and that's what we assert when we don't have money behind it. There's part of all of us that believes that ideas and culture are the property of some and they should always be the property of the some. Disney produced Mickey Mouse. Why shouldn't Disney own Mickey Mouse forever? Forgetting, of course, that much of the revenue of Disney comes from ideas that they got from other people for free. *Grimms' Fairy Tales*,²⁴ *The Hunchback of Notre Dame*,²⁵ *Pocahontas*,²⁶ stories which they translated for our times, beautifully in a way that made the old better.

We as a culture can't see the irony in the stance of a company that insists on perpetual control over their ideas, ideas that they have built on others before. But we must. We must come to understand this boring middle position of balance. One that insists that ideas flow freely after limited protection of control. We have to free ourselves from the idea that our culture is the property of others. We as creators, as people empowered by digital technologies in ways no one ever imagined before, should have the right to build, to add, to rip, mix and burn this culture in ways that our framers would have found fantastic.

This is our task. And we as lawyers must teach the rest of the world this boring middle position of limited control, and the freedom that entails.

²⁴ GRIMM'S FAIRY TALES (Jacob Grimm ed., Grosset & Dunlap 1995).

²⁵ VICTOR HUGO, THE HUNCHBACK OF NOTRE DAME (Walter J. Cobb & Phyllis La Farge trans., Penguin Signet Classic ed. 1965).

²⁶ INGRID D'AULAIRE, POCAHONTAS (Beautiful Feet Books 1998).

