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The Bridge and Playful Thunder of Keith Aoki

It is my great honor to participate in this tribute Symposium to Keith Aoki, a very special man. For me, Keith was a bridge. I'm not sure how Keith would like being compared to a bridge—a tangible object. After all, I am commodifying him, thingifying him. But Keith was acutely aware of how metaphors can convey powerful and memorable meanings, and so I think he would appreciate my metaphor.

But the metaphor is not actually mine. It belongs first to Professor Shubha Ghosh. One of the last symposia in which Keith participated was organized by Professor Ghosh and published in the *Wisconsin Law Review*. The symposium focused on intergenerational equity and includes Keith's article, "Food Forethought: Intergenerational Equity and Global Food Supply—Past, Present, and Future."¹ It is a piece that built on his deep interest and significant passion for cautioning against the enclosure movement in plant genetic resources and in undoing some of the legal rules surrounding corporate control over agriculture. Keith's interest in that field previously led him to publish *Seed Wars*² with Carolina Academic Press, the only textbook of its kind to examine domestic and international legal controversies regarding intellectual property protections for plant genetic resources.

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¹ Keith Aoki, *Food Forethought: Intergenerational Equity and Global Food Supply—Past, Present, and Future*, 2011 WIS. L. REV. 399.

² KEITH AOKI, *SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY* (2008).

The 2011 symposium issue of the *Wisconsin Law Review* is dedicated to Keith. In the beginning, the organizer of the symposium, Professor Shubha Ghosh, discusses the impact of Keith and his scholarship:

Keith was a bridge, spanning the gap between thinking like a lawyer and communicating like an artist, between intellectual property and social justice, between senior and junior scholars, between³ acting like a professional and being a genuine, caring human being.

Keith definitely was a bridge for me. At first he was a bridge into the academy. I began my teaching career in 1996 at Lewis & Clark Law School in Portland, Oregon. I moved my family—husband, five-year-old twin daughters, and a one-year-old son—from Ann Arbor, Michigan, to Portland, Oregon. While the move was not as daunting as the journey undertaken almost two centuries earlier by Meriwether Lewis and William Clark,⁴ it was still scary, exciting, and risky.

It was also devastating for my parents—I took their only grandchildren away from them and moved over two thousand miles away. Luckily my father was still speaking to me, and after about a month on the job he e-mailed me and told me to contact this law professor who he knew at the University of Oregon. I was completely shocked that my father knew *any* law professors other than me (but I didn't self-identify as a law professor, yet). But for him to know one in Oregon when he had lived his whole life in Michigan—that was just downright strange. My father is an artist.⁵ He hangs around with artists, not law professors. But he gave me the e-mail address for Keith—and I contacted him.

The first thing Keith said to me was: “I remember you—I’ve met you before. You were a snot-nosed ten-year-old in pigtails.” Three immediate thoughts ran through my head:

1. One of the few law professors who might know me, outside of those from my alma mater and those from my new employer, knows me as a snot-nosed kid. Great.
2. Why would he have met me when I was ten years old?
3. Who *is* this guy?

³ Shubha Ghosh, *Why Intergenerational Equity*, 2011 WIS. L. REV. 103, 109.

⁴ See generally STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST (1996).

⁵ My father is the artist, Jim Pallas, one of the first electronic kinetic sculptors. See generally David Charles, *Jim Pallas—A World in Motion*, FINE ART REGISTRY (Oct. 16, 2006), http://www.fineartregistry.com/featured_artist/pallas_jim_10-16-2006.php; FRANK POPPER, ART OF THE ELECTRONIC AGE 106 (1993).

It turns out that Keith had visited my father's studio in a suburb of Detroit, Michigan, to collaborate on an art project. Before attending law school, Keith was a musician and an artist in the avant-garde scene in the 1970s in Detroit and, subsequently, in New York City. He oozed creativity, through his music and his dark yet playful comics, including *Wings over Nudetown* featuring Marcel Duchamp in Detroit. My father thought that Keith liked the absurd alliteration of the juxtaposition—Duchamp in Detroit! My father liked Keith's message about being an artist in Detroit. Many years ago Keith let my father post that comic on his website.⁶

I didn't remember meeting Keith, but if I had, I probably would have been intimidated. But when I contacted Keith in 1996, he was so disarming and warm that I was anything but intimidated. Instead, I had found a friend, perhaps even a guide, helping me over the bridge from practice into academia, the bridge to becoming an IP intellectual at a time when the world was changing drastically and rapidly.

Less than a year before I arrived in Portland, the University of Oregon had hosted a very important conference⁷ that Keith organized. Keith wrote in an introduction to that symposium that “[w]ith respect to the digital networked environment, we are in a situation analogous to that faced by Dorothy in *The Wizard of Oz* when she said, ‘I don’t think we’re in Kansas anymore.’”⁸ That is certainly how I felt in 1996—and here was this man, helping me over the bridge into this strange new world.

That symposium brought together a who's who of IP intellectuals: law professors Maggie Chon,⁹ Rosemary Coombe,¹⁰ Michael Fromkin,¹¹ Peter Jaszi,¹² Lisa Kloppenberg,¹³ Jessica Litman,¹⁴ and

⁶ Keith Aoki, *Wings over Nudetown*, JIM PALLAS, <http://www.jpallas.com/aoki/> (last visited May 15, 2012).

⁷ The symposium was held in November 1995. Keith Aoki, *Innovation and the Information Environment: Interrogating the Entrepreneur*, 75 OR. L. REV. 1, 4 (1996).

⁸ *Id.* at 1.

⁹ Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996).

¹⁰ Rosemary J. Coombe, *Left out on the Information Highway*, 75 OR. L. REV. 237 (1996).

¹¹ A. Michael Fromkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49 (1996).

¹² Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299 (1996).

¹³ Lisa A. Kloppenberg, *The Public Interest in the Work of the Courts: Opinions and Beyond*, 75 OR. L. REV. 249 (1996).

¹⁴ Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996).

Fred Yen.¹⁵ But Keith also included practitioners: Gary Glisson,¹⁶ Dhruv Khanna,¹⁷ Lee Tien,¹⁸ (now a senior staff attorney at the Electronic Frontier Foundation), and E. Walter Van Valkenburg.¹⁹ Wisely, Keith also invited technologist and founder of the free software movement Richard Stallman.²⁰ And in very Keith style he included two artists: Barry Schrader²¹ and Vibeke Sorensen.²² Through that symposium Keith actively bridged the gap between thinking like a lawyer and communicating like an artist. He thought deeply about this brave new world, and brought together different disciplines to have important, productive, and profound conversations about the future in the digital world that was rapidly evolving around us.

In 1996, Keith was also completing work on a seminal article that focused on what he termed the “nascent interdisciplinary cartographic project,” from a poststructuralist remapping of “the space of the printed word to political geographic remappings of contested public and private spaces produced at different times by varying juridical regimes.”²³ Among his goals for this piece, published in the *Stanford Law Review*, Keith sought to explode the myth of the romantic (and often solitary) author as a basis of a property right in expression and highlight the privatized corporate empire of authorship.

At a time when the promise of globalization brought on by the rise of the Internet held the potential of vast democratization of expression, Keith recognized that it also held the risk of, in his words, “[t]he crystallization of ever-greater legal protections for intellectual property occur[ring] around the figure of the originary romantic author, which [Keith pointed out was] ironic because increasingly

¹⁵ Alfred C. Yen, *Entrepreneurship, Copyright, and Personal Home Pages*, 75 OR. L. REV. 331 (1996).

¹⁶ Gary W. Glisson, *A Practitioner’s Defense of the White Paper*, 75 OR. L. REV. 277 (1996).

¹⁷ Dhruv Khanna & Bruce M. Aitken, *The Public’s Need for More Affordable Bandwidth: The Case for Immediate Regulatory Action*, 75 OR. L. REV. 347 (1996).

¹⁸ Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996).

¹⁹ E. Walter Van Valkenburg, *The First Amendment in Cyberspace*, 75 OR. L. REV. 319 (1996).

²⁰ Richard Stallman, *Reevaluating Copyright: The Public Must Prevail*, 75 OR. L. REV. 291 (1996).

²¹ Barry Schrader, *Electronic Studio Art and the Internet*, 75 OR. L. REV. 339 (1996).

²² Vibeke Sorensen, *Thoughts of a Computer Artist*, 75 OR. L. REV. 309 (1996).

²³ Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1303 (1996).

intellectual properties underwrite the ‘private’ sovereignties of multinational corporations.”²⁴ He argued that “[t]he embedded figure of romantic authorship embodied in the trend toward ‘international’ standards of intellectual property protection serves both to legitimate stronger protection and to unbundle notions of national sovereignty.”²⁵ In 1996, Keith was fighting for copyright’s future with the thunderous voice of a scholar’s mighty pen.

It is typical in these types of tribute Symposium pieces to focus on the scholarship of the person being honored. But Keith was so much more than a legal scholar. He was a creative individual who had a tremendous impact on the communities of which he was a part. One of those communities was the Detroit art scene, an exciting place when Keith was there in the 1970s. There were many creative spirits coalescing around an avant-garde monthly magazine and a hot music community with several clubs. Keith was a part of all of that. He participated in a big event of performance works in the majestic North Court of the Detroit Institute of Arts with its soaring ceilings and marble walls.²⁶ My father tells the story of an indelible image of Keith, stripped to the waist, sweating rivulets as he shook a large sheet metal “thunder tin” in unison with a dozen other young men, creating a deafening, frightening rumble in those hallowed halls.

As a law professor, Keith continued to shake those large metal sheets of thunder tin—seeking to focus attention on significant problems in the law of intellectual property. Among other established cannons, he took on the pervasive trope of the romantic author through his participation in a symposium on intellectual property law theory published in the *Chicago-Kent Law Review*.²⁷ Keith noted, citing Jamie Boyle, that the author-centered reasoning is so resilient because “it manages to do a fairly good job of suppressing the messiness of the world.”²⁸

Keith emphasized a point made by Rosemary Coombe that “the consumption of commodified representational forms is productive

²⁴ *Id.* at 1305.

²⁵ *Id.*

²⁶ The Detroit Institute of Arts is a world-class art museum. Founded in 1885, it flourished in the heyday of the automobile, funded significantly by the wealth of the industry. See *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited May 15, 2012).

²⁷ Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights—Comment on Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,”* 68 CHI.-KENT L. REV. 805 (1993).

²⁸ *Id.* at 821.

activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas.”²⁹ And he argued, “Authorship as a justification for granting exclusive monopoly-type rights (in the midst of a system such as ours, which is supposedly premised on competition) disables our ability to recognize the contribution of ‘sources’ . . . and discounts the interpretative and other interests of ‘audiences’ and other downstream uses”³⁰ He persuasively argued that “[a]uthorship must be accounted for if it is to be criticized and reformulated.”³¹ Keith recognized that creativity is not a solitary activity but is instead one engaged in with others, past, present, and future.

In his Stanford piece, he shakes the metal tin and produces the thunder heard throughout the courts:

Our fixation on protecting the boundaries and sovereignty of authorial property obscures the lessons of the legal realists and ignores important factors, including the growing irrelevance of territorial boundaries to information flows, the spatial and economic effects of the discourse of “globalization,” the general move towards a service economy, and the increasing relativization of most common forms of property.³²

The seemingly inevitable march toward a global system of copyright protection in which “one size fits all,” Keith argued, contributes to the hardening of intellectual property rights into stronger traditional property rights. Keith warned that such hardening fails to learn any lessons of the legal realists. Instead, this hardening produces a world of unequal access to, ownership of, and distribution of informational resources. The spatial bifurcation of our cities, regions, and nations mirror this inequality. This, Keith argued, is the cultural geography of authorship.

In his more recent articles he continued the theme, exploring the distributive effect of both domestic and international intellectual property regimes, including in his piece, “Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development).”³³ In this article, he uses

²⁹ *Id.* at 810 (quoting Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991)).

³⁰ *Id.* at 823.

³¹ *Id.*

³² Aoki, *supra* note 23, at 1331–32.

³³ Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717

concrete examples to explore relationships between race, labor, creative genius, and U.S. intellectual property law. Keith asked important questions, not just about copyright law but about all forms of intellectual property, such as, “Why should discrete modern innovations to agricultural crops be protected by forms of IP law while the contributions of hundreds of generations of farmers, including those in the present day, go unacknowledged and uncompensated?”³⁴

Keith urged a broader look at creative and inventive activity with an eye always on the distributive justice of the legal rules that continue to evolve. But he was also interested in concrete solutions. In his piece, “‘Free Seeds, Not Free Beer’: Participatory Plant Breeding, Open Source Seeds, and Acknowledging User Innovation in Agriculture,”³⁵ he suggested that, in light of the pervasive colonization of global industrial agriculture through intellectual property controlled by large multinational agrochemical entities, open source license principles might help farmers and plant breeders cooperate in creating decentralized spaces for participatory plant breeding. He acknowledged the irony of using “private” contracts and licenses to leverage greater and more open “public” access to plant varieties and the genetic resources they contain.³⁶

Sometimes I think of Keith as a farmer, a kind of caretaker of a type of space. Perhaps it was his interest in plants and seeds, or in geography and spaces, that led me to this view of Keith. But I think this image of Keith crystalized when I saw this drawing he had created for the wildly successful and important comic book, *Bound by Law?*:

(2007). Keith embraced the definition of syncretism as the “[r]econciliation or fusion of differing systems of belief, as in philosophy or religion, especially when success is partial or the result is heterogeneous.” *Id.* at 720 n.2 (quoting *Syncretism Definition*, ANSWERS.COM, <http://www.answers.com/topic/syncretism> (last visited May 15, 2012)).

³⁴ *Id.* at 719.

³⁵ Keith Aoki, “Free Seeds, Not Free Beer”: *Participatory Plant Breeding, Open Source Seeds, and Acknowledging User Innovation in Agriculture*, 77 *FORDHAM L. REV.* 2275 (2009).

³⁶ *Id.* at 2293–2305.



64

His collaboration with James Boyle and Jennifer Jenkins to create this comic book³⁷ was an attempt to be part of a solution utilizing a nonconventional approach.³⁸ This comic aims to not only help

³⁷ KEITH AOKI ET AL., DUKE CTR. FOR THE STUDY OF THE PUB. DOMAIN, *TALES FROM THE PUBLIC DOMAIN: BOUND BY LAW?* (2006), available at <http://www.law.duke.edu/cspd/comics>.

³⁸ A comic book is nonconventional for a law professor, but not for Keith. He had previously published works, in law reviews no less, that included his drawn images. See, e.g., Keith Aoki & Garrett Epps, *Dead Lines, Break Downs & Troubling the Legal Subject* or "Anything You Can Do, I Can Do Meta," 73 OR. L. REV. 551 (1994). While in law

everyday citizens understand copyright law, but to emphasize the rights that we all have to reuse existing material in an “increasingly digital world of remixed culture.”³⁹ By educating people about their rights, Keith and his coauthors seek to ensure that those rights do not become locked up as part of a kind of cultural enclosure movement.⁴⁰

Keith was also wonderful at play, and he was confident at play. Play for him included creative play as well as intellectual play. His enthusiasm was welcoming and infectious, and evident in his scholarship. He mentored many junior colleagues such as myself, writing countless tenure review letters, including one for me when I came up for tenure over a decade ago.

He took those tenure review letters very seriously. The letter he wrote for me was over ten pages long. Reading it gave me a confidence in my own work that I had been fearful to embrace. But he made it okay, he encouraged all of us to embrace whatever talents we have. In true Keith fashion, the tenure review letter he wrote for me concluded with a paragraph about the importance of “the play of intelligence.”

Keith was, for so many of us, an intellectual and creative playmate—a companion who welcomed us, challenged us, and engaged us. Whether he was writing about the importance of understanding the contributions of others that came before in the creation of new expressive works or in the various strains of agricultural seeds, he emphasized connections—connections between the past and the present, the present and the future—from farmer’s selective breeding to audience recoding.

Keith provided a bridge into a world of ideas so that we could join in the very important play of exploring the way law affects us and shapes us all.

school Keith had published *Casual Legal Studies* with his law school classmate Luke W. Cole. See KEITH AOKI & LUKE W. COLE, *CASUAL LEGAL STUDIES* (1989). At the time of his death, Keith had two more comic book style publications in the works: Keith Aoki, *Pictures Within Pictures*, 36 OHIO N.U. L. REV. 805 (2010) and KEITH AOKI ET AL., *THEFT! A HISTORY OF MUSIC FROM PLATO TO HIP-HOP* (forthcoming).

³⁹ Back cover to AOKI ET AL., *supra* note 37.

⁴⁰ The pairing of images on pages sixty-two and sixty-four of this work illustrates the parallel to the environmental movement and concepts of sustainable development, noting that “[i]n the cultural realm, we need to have a similar balance between what is owned and what is free for everyone to use.” *Id.* at 64. The filmmaker character fills in the label: “A cultural environmentalism.” *Id.*

