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Copyrighting *Twilight*: Digital Copyright Lessons from the Vampire Blogosphere

Jacqueline D. Lipton *

Abstract

In January of 2010 a United States District Court granted an injunction against a Twilight fan magazine for unauthorized use of copyrighted publicity stills¹. No surprise there. Intellectual property laws deal effectively – some would argue too effectively – with such cases. Nevertheless, recent Web 2.0 technologies, characterized by user-generated content, raise new challenges for copyright law. Online interactions involving reproductions of copyrighted works in blogs, online fan fiction, and online social networks do not comfortably fit existing copyright paradigms. It is unclear whether participants in Web 2.0 forums are creating derivative works, making legitimate fair uses of copyright works, or engaging in acts of digital copyright piracy and plagiarism. As online conduct becomes more interactive, copyright laws are less effective in creating clear signals about proscribed conduct. This article examines the application of copyright law to Web 2.0 technologies. It suggests that social norms must take on greater significance because of the community-oriented nature of much of today’s online conduct. The discussion is organized around four case studies based on the popular Twilight book and movie franchise. These case studies illuminate the relationship between copyright norms and laws in the Web 2.0 context. The author draws lessons from these case studies that might inform future developments in copyright law and policy that would better align laws with expectations of Web 2.0 participants. Twilight is chosen as the focal point because of the complex online relationships that have developed in recent years between the various copyright stakeholders: the book author; movie directors; producers and distributors of the books and movies; actors and production crews; and, the fans.

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¹ *Summit Entertainment v Beckett Media*, 2010 WL 147958 (C.D. Cal.); Not Reported in F. Supp. 2d.

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Introduction

“I did not want my readers to experience Midnight Sun before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author As the author of the Twilight Saga, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public Unfortunately, with the Internet, it is easy for people to obtain and share items that do not legally belong to them. This has been a very upsetting experience for me, but I hope it will at least leave my fans with a better understanding of copyright and the importance of artistic control.”²

These are the words of Stephenie Meyer, the author of the popular *Twilight* books, about the leak of a draft manuscript and its dissemination over the Internet. While production was underway on the film adaptation of the first book (*Twilight*), Meyer was working on a new project (*Midnight Sun*) that retold the story of *Twilight* from a different perspective. *Twilight* is narrated by the series’ heroine, Bella Swan, while *Midnight Sun* retells the same events from the perspective of her love interest, the vampire Edward Cullen. Meyer had released early drafts of *Midnight Sun* to some of the people involved in production of the *Twilight* movie. The manuscript had been leaked and had reappeared on the Internet. Meyer was extremely upset. She subsequently posted her own “official” version of the *Midnight Sun* manuscript on her website. Along with the posting, she urged her fans not to read any versions of the uncompleted

² Stephenie Meyer, *Midnight Sun: Edward’s Version of Twilight* (available at The Official Website of Stephenie Meyer, <http://www.stepheniemeyer.com/midnightsun.html>, last viewed on January 12, 2010).

text. However, she noted, if fans felt compelled to read any version, they should read the version that she had posted³.

New Web 2.0 participatory technologies, such as blogs and online social networks (OSNs), enable consumers more readily to interact with digital works online⁴. These technologies enable original creators of works, such as Meyer, to communicate with their fans about their works. Meyer actively maintains digital contact with her fans, cross-linking to their blogs⁵, and updating them on her work⁶. She also routinely comments on how she would like her work to be experienced. Her request about avoiding unauthorized versions of *Midnight Sun* is an example of this approach. She has also asked fans not to post "spoilers" about forthcoming works⁷, and to remove specific materials from their websites at certain times so as not to interfere with the release of new movies and books⁸. The relationship between Meyer and her fans is an example of the way in which Web 2.0 technologies enable today's authors and artists actively to engage in discourse with their fans⁹. These communications take place in forums such as blogs, wikis and OSNs. Authors can communicate with their audiences about how they would like their works to be experienced, and fans can respond in kind through media such as text, mash-up videos, and fan fiction¹⁰.

One advantage of these forums for copyright law and policy makers is the amount of anecdotal data they incorporate about emerging social norms and expectations surrounding copyright works from a variety of perspectives. Previously, commercial publishers, producers, and distributors took center stage in debates about appropriate legal protections for copyrighted

³ *id.* ("I'd rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes. But how do I comment on this violation without driving more people to look for the illegal posting?")

⁴ DAVID KESMODEL, *THE DOMAIN GAME: HOW PEOPLE GET RICH FROM INTERNET DOMAIN NAMES*, 126 (2008) ("Web 2.0 was a buzz word used to describe a new wave of Web businesses that leveraged social networking, user-generated content, and other forms of collaboration and information-sharing on the Internet."); JANET LOWE, *GOOGLE SPEAKS: SECRETS OF THE WORLD'S GREATEST BILLIONAIRE ENTREPRENEURS*, SERGEY BRIN AND LARRY PAGE, 294 (2009) (defining "Web 2.0" as "A term used to describe an evolving generation of a participatory Web. Web 2.0 describes the proliferation of interconnectivity and social interaction on the World Wide Web.")

⁵ See http://www.stepheniemeyer.com/ts_fansites.html, last viewed on January 30, 2010.

⁶ See <http://www.stepheniemeyer.com/index.html>, last viewed on January 30, 2010.

⁷ See, for example, <http://www.stepheniemeyer.com/breakingdawn.html> ("Speaking of spoilers, I want to ask you guys for a favor. As we saw with *Eclipse* (not to mention that last Harry Potter book), there is always the potential for copies of the book to be leaked early. My publisher is doing everything they can to prevent this, but there is only so much that can be done. This is the favor: if someone, somewhere, somehow, gets a copy early, I'm asking you to please not post any spoilers on the internet. And if you see something, please don't spread it around. *Breaking Dawn* was meant to be experienced in a certain way, and I would hate for someone to get that experience ruined by seeing something online they didn't want to see. My fans have been super cool about this in the past—last year in particular you guys went above and beyond to protect *Eclipse* until the release date—and I hope that we'll have the same positive experience this year."), last viewed on January 30, 2010.

⁸ *id.* ("Another thing you may notice close to the release of *Breaking Dawn* is that the message boards on several fansites will be taken down. They are doing this as a favor to me because I want to protect you all from stumbling upon something that could ruin the book for you. There will be plenty of time to discuss all the details of the book after August 2nd."), last viewed on January 30, 2010.

⁹ KESMODEL, *supra* note ____, at 126; LOWE, *supra* note ____, at 294 (definitions of Web 2.0 technologies).

¹⁰ Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387 (2009) (discussion of the interaction of fan fiction with copyright law).

works¹¹. Today, multiple stake-holders' perspectives are widely available, including the views of authors and other original artists, as well as views of their fans. The lines between consumers and creators have also blurred. Consumers have increasingly become creators¹². The ability of consumers to themselves create, and to communicate with original authors, profoundly alters the matrix of norms and expectations surrounding uses of copyrighted works online. While previous online intellectual property battles focused on preventing digital copyright piracy in the face of early digital technologies, Web 2.0 issues are more nuanced and complex.

Web 2.0 technologies implicate activities of new groups of copyright users in new contexts. Web 2.0 forums, including OSNs¹³, blogs¹⁴, wikis¹⁵, and virtual worlds¹⁶, have supported the development of online communities of consumer-creators. These communities are developing their own norms and expectations relating to the use of creative works online¹⁷. Much Web 2.0 conduct does not fit neatly within existing intellectual property paradigms. Copyright law, for example, aims to incentivize artistic innovation by prohibiting free-riding on the works of others, usually in the commercial arena¹⁸. Newer online consumer-creator communities generally engage in conduct that is not motivated by commercial profit. The rewards of much of this conduct lie in communicative and reputational value rather than making

¹¹ See, for example, *Summit Entertainment v Beckett Media*, 2010 WL 147958 (C.D. Cal.); Not Reported in F. Supp. 2d (action by movie studio against unauthorized fan magazine for copyright infringement).

¹² LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY, 108 (2008) (noting the capacity that remix technologies give the new generation of digital natives in terms of the potential to remix text, images, film and music) [hereinafter, REMIX]; JOHN PALFREY and URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES, 131-132 (2008) ("The most creative young people are interacting with news, works of entertainment, and other information in ways that were unimaginable a few years ago. These young people are not passive consumers of media that is broadcast to them, but rather active participants in the making of meaning in their culture. Their art form of the remix, where digital files are combined to create a new video or audio file, is already having an effect on cultural understanding around the world.")

¹³ Such as Facebook and MySpace (see www.facebook.com, www.myspace.com, last viewed on January 30, 2010). See also LOWE, *supra* note ___, at 292 (defining "social networking" as "Websites that allow people to share ideas, information, and images and to form networks with friends, family, or other like-minded individuals".)

¹⁴ LOWE, *supra* note ___, at 288 (2009) (defining "blog" as "Short for *Web log*, or a string of journal entries posted on a web page"); PALFREY and GASSER, *supra* note ___, at 345 (defining "blogs" as "Online journals written by individuals, ordinarily the unedited voice of a single person. The term derives from "*web log*." Blogs are becoming an increasingly popular source of news. More and more people, young and old, are writing and reading blogs.")

¹⁵ LOWE, *supra* note ___, at 294 (defining "wikis" as "A collection of Web pages that enables anyone who accesses them to contribute or modify content, using a simplified computer language.")

¹⁶ PALFREY and GASSER, *supra* note ___, at 28-29 (describing the operation of virtual worlds, like Second Life, as online environments where participants can form their own identities and interact with others pseudonymously).

¹⁷ Steven Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009) (examining positive aspects of allowing social norms to function as a regulator of fan fiction activities online)

¹⁸ MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW, 24-25 (4 ed, 2005) ("On the one hand, copyright law provides the incentive to create information and a shelter to develop and protect it. On the other hand, the copyright monopoly is a limited one – limited in time and scope by such doctrines as idea/expression, originality, and fair use. Viewed in this way, copyright law represents an economic tradeoff between encouraging the optimal creation of works of authorship through monopoly incentives, and providing for their optimal access, use, and distribution through limiting doctrines.")

unjust profits from someone else's work¹⁹. It is unclear whether, and to what extent, copyright law can – or should – impact some of this conduct.

This article argues that copyright law and policy makers should now take full advantage of the exponentially increasing amount of information currently available in the blogosphere about emerging norms and expectations governing the use of copyright works online. It utilizes four case studies involving the *Twilight* book and movie franchise to illustrate the kinds of norms that appear to be emerging amongst a variety of copyright stakeholders (no pun intended). Part I provides a general outline of the challenges posed to existing copyright paradigms by Web 2.0 technologies. Part II presents four case studies involving the interaction of copyright law and online norms in the context of the *Twilight* book and movie franchise. Part III extrapolates lessons from the case studies that might guide future developments in Web 2.0 law and policy. Part IV sets out some conclusions about the future of copyright law in the digital age.

I. Copyright and Web 2.0 Forums

Because of their interactive and largely non-commercial nature, Web 2.0 technologies raise new challenges for the legal system. These challenges are particularly pronounced in the case of intellectual property laws which have tended to focus on the protection of economic rights²⁰. Web 2.0 participants – such as bloggers and participants in OSNs – are not typically motivated by financial reward. Fans share information about copyrighted works online. They often also post short movie clips or video mash-ups on blogs and other online forums. They are very different groups of people with a very different set of motivations for their conduct than the copyright pirates at whose conduct existing laws are aimed.

Online fans are also likely to be widely dispersed geographically, thus raising another set of challenges for copyright law. The domestic nature of copyright law, even as augmented by international agreements²¹, creates jurisdictional limitations. It can also be difficult to identify an

¹⁹ For example, the pseudonymous author Cassandra Clare parlayed her popularity in the fan fiction world into contracting for her own series of popular commercial novels. See http://en.wikipedia.org/wiki/Cassandra_Clare, last viewed on February 1, 2010 ("Cassandra Clare is the pseudonym of the bestselling author of the young adult trilogy *The Mortal Instruments*. . . . She started working on her novel *City of Bones* in 2004, inspired by the urban landscape of Manhattan. . . . Prior to the publishing of *City of Bones*, Clare was known for writing fan fiction under the similar pseudonym Cassandra Claire. Her main works were *The Draco Trilogy* (*Harry Potter*) and *The Very Secret Diaries* (*The Lord of the Rings*). Claire was considered a Big Name Fan and was covered in several newspaper articles about fan fiction: *The Draco Trilogy* was described by *The Times* as a "gem of such superlative quality that it enhances one's appreciation of the Harry Potter series" and *The Daily Telegraph* called *The Very Secret Diaries* a "cult classic". However, she has also been accused of plagiarism from within the fan fiction community, and became embroiled in a long lasting controversy.")

²⁰ LEAFFER, *supra* note ___, at 22 ("By implication, the Constitution recognizes that copyright law plays an important role in our market economy. Rather than encouraging production of works by governmental subsidy, or awards or prizes, the author is given, through the limited monopoly of copyright law, a private property right over his creation, the worth of which will ultimately be determined by the market. The underlying policy of this constitutional provision is to promote the public welfare through private market incentives.")

²¹ Berne Convention for the Protection of Literary and Artistic Works (text available at <http://www.wipo.int/treaties/en/ip/berne/index.html>, last viewed on January 30, 2010); WIPO Copyright Treaty (text available at <http://www.wipo.int/treaties/en/ip/wct/>, last viewed on January 30, 2010); WIPO Performances and Phonograms Treaty (text available at <http://www.wipo.int/treaties/en/ip/wppt/>, last viewed on January 30, 2010); Trade Related Aspects of Intellectual Property (TRIPs) (text available at http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm, last viewed on January 30, 2010).

alleged wrongdoer in an online forum²². If the alleged infringer can be identified, it may be difficult for a copyright holder to assert jurisdiction over her. Even if jurisdiction can be established, there is the additional problem of bad publicity where copyright owners and licensees bring actions against their own customers²³.

Because of the geographically dispersed nature of much online conduct, and the new set of stakeholders involved in Web 2.0 forums, commentators have suggested the need to develop multi-modal approaches to regulating online conduct, both in the intellectual property area and in other areas. In the early days of the Internet, Professor Lessig famously promoted system architecture, or software code, as a key regulator of online conduct²⁴. He also identified other important regulatory modalities, including market forces and social norms²⁵. Other commentators have identified additional modes of regulation, including public education, and the use of non-profit institutions to develop effective regulations for online behavior²⁶.

Because the focus of this article is on online communities organized around particular artistic works, the key modes of regulation considered here are legal rules and social norms. This is because social norms are an extremely important form of regulation within cohesive communities²⁷. Norms can, in fact, be more powerful regulators than laws because the sanctions for infringing norms can be more immediate and more consistently enforced than the sanctions for infringing laws. The problem with norms in the online context, particularly with respect to Web 2.0 forums, is that many norms are in their infancy because of the newness of the technologies and of the communities developing around them. As the communities become more well established, norms will be more easily identifiable and may become more entrenched and more consistently enforced.

A major advantage of modern Web 2.0 technologies is that they enable identification of norms and expectations from multiple perspectives, including those of authors, creators, consumers, producers, and distributors. Many of these groups have not previously been well represented in intellectual property debates. Looking at the complete matrix of perspectives will help regulators to enact and enforce laws that better meet the needs of the larger community, rather than focusing on the one or two interest groups that have the greatest lobbying power. In other words, Web 2.0 technologies enable more voices to come to the regulatory table, if regulators are willing to listen.

²² See, for example, *In re Verizon Internet Services, Inc.* 257 F. Supp. 2d 244 (D.D.C. 2003) (copyright holders seeking identities of alleged digital copyright infringers from Internet service provider).

²³ Of course, on occasion copyright holders do take legal actions directly against their customers. See, for example, *BMG Music v Gonzalez*, 2005 U.S. App LEXIS 26903 (7th Cir. 2005) (copyright holder bringing action against individual file sharer for copyright infringement).

²⁴ See LAWRENCE LESSIG, *CODE 2.0*, 5 (2006) ("In real space, we recognize how laws regulate – through constitutions, statutes, and other legal codes. In cyberspace we must understand how a different "code" regulates – how the software and hardware (i.e., the "code" of cyberspace) that make cyberspace what it is also regulate cyberspace as it is.") [hereinafter, *CODE*]

²⁵ Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 *HARVARD L REV* 501, 507 (1999) [hereinafter, *Law of the Horse*].

²⁶ See, for example, Jacqueline Lipton, "We, the Paparazzi": *Developing a Privacy Paradigm for Digital Video*, forthcoming, *IOWA LAW REVIEW*, 2010 [hereinafter, "We, the Paparazzi"].

²⁷ Lessig, *Law of the Horse*, *supra* note ___, at 513 ("In a small and closely knit community, norms might be the optimal mode of regulation...")

It is also important for regulators to remember that laws have an *expressive* function as well as an enforcement role²⁸. Where possible, what the law expresses should conform in some measure to society's expectations about permissible and impermissible uses of copyrighted works. While different stakeholders' views about copyrighted works will not always align, it is important that legal regulators give some thought to the balance between competing interests in these works. One-sided laws run the risk of being honored more in the breach than in the observance²⁹. Copyright has proved particularly problematic in this context because of its emphasis on the protection of economic rights often to the detriment of free speech³⁰ and sometimes even to the detriment of the author's own rights in a work she has created³¹.

II. Copyrighting *Twilight*: Four Case Studies in Web 2.0 Norms

A. Why *Twilight*?

Twilight presents some excellent case studies for an examination of the interaction between Web 2.0 norms and copyright laws. Because of the popularity of the series, there is a significant amount of online activity surrounding the books and films³². The *Twilight* series also appeals to a wide cross section of people, including the younger and very tech-savvy digital natives³³, as well as older digital immigrants³⁴. While it is probably true to say that the franchise appeals more to women than men, this may not matter for the purposes of an early attempt at identifying interactions between Web 2.0 norms and copyright laws. However, it is possible that a work that appeals more directly to men could raise a different series of norms. A discussion of gender - and for that matter racial - differences in the online context is beyond the scope of this article. However, it may be a fruitful avenue for future research.

²⁸ Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009) ("Law has an important expressive character beyond its coercive one. Law creates a public set of meanings and shared understandings between the state and the public. It clarifies, and draws attention to, the behavior it prohibits. Law's expressed meaning serves mutually reinforcing purposes. Law educates the public about what is socially harmful. This legitimates harms, allowing the harmed party to see herself as harmed. It signals appropriate behavior. In drawing attention to socially appropriate behavior, law permits individuals to take these social meanings into account when deciding on their actions. Because law creates and shapes social mores, it has an important cultural impact that differs from its more direct coercive effects.")

²⁹ LESSIG, REMIX, *supra* note ___, at 44 (2009) ("Even the good become pirates in a world where the rules seem absurd.")

³⁰ David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 UPA L REV 673 (2000) (exploring the delicate balance between copyrights and First Amendment guarantees).

³¹ For example, where the author has assigned copyright to a third party and later objects to the way in which the copyright holder chooses to exploit the work. One example of this has been the case of colorization of films originally made in black and white, where the copyright owner who seeks to colorize the films is not the original author: see LEAFFER, *supra* note ___, at 376, n. 423.

³² See, for example, a list of *Twilight* websites officially recognized by the series' author, Stephenie Meyer: http://www.stepheniemeyer.com/ts_fansites.html, last viewed on January 30, 2010.

³³ PALFREY and GASSER, *supra* note ___, at 346 (defining "digital native" as "A person born into the digital age (after 1980) who has access to networked digital technologies and strong computer skills and knowledge. Digital Natives share a common global culture that is defined not strictly by age but by certain attributes and experiences related to how they interact with information technologies, information itself, one another, and other people and institutions.")

³⁴ *id.* (defining "digital immigrant" as "A person who has adopted the Internet and related technologies, but who was born prior to the advent of the digital age.")

Twilight is also a useful focal point for this discussion because the author of the novels, Stephenie Meyer, is an active participant in the blogosphere herself. She maintains a blog where she both updates her readers on developments with her work, and also links to fan websites³⁵. She actively participates with her fans in discussions of her work. She cites comments of her readers on her blog³⁶, and shares outtakes from her early draft novels with her fans³⁷. She has also been actively involved in the development of the movies adapted from her novels, including taking a small cameo role in the first *Twilight* film. Meyer is in an interesting position as a creator who communicates and collaborates regularly with her audience as well as with the upstream translators of her work into new media. Meyer is obviously not the first copyright creator to communicate online with fans and commercial adaptors of her work³⁸. However, the immense popularity of her work and the scope and scale on which she communicates with other stakeholders creates a significant amount of information about emerging copyright norms.

The *Twilight* franchise has also generated a huge volume of online fan commentary because so many different aspects of the books and films have attracted a fan base. Fans have been attracted to the original books, and then subsequently have been intrigued by the adaptations of the books into movies. Fans have become obsessed with a number of the actors and directors involved in the film franchise and there are now large numbers of unauthorized fan websites devoted to the lead actors, Kristen Stewart, Robert Pattinson, and Taylor Lautner³⁹. The franchise has also spawned significant amounts of online fan fiction, where fans retell the stories from different characters' perspectives, or tell different aspects of the stories in their own voices⁴⁰. Again, this fan activity inherently provides a variety of perspectives on appropriate uses of copyrighted works in the blogosphere.

Twilight is also a very current example of attitudes to copyrighted works online. The books were published between 2005 and 2008⁴¹. The first movie was released in November of 2008, the second in November of 2009, and the third is scheduled for June of 2010. Thus the information about emerging online uses of the copyrighted material is very up-to-date and can be derived from fan websites⁴², Stephenie Meyer's official blog⁴³, and websites administered by the movie production company, Summit Entertainment⁴⁴.

³⁵ See www.stepheniemeyer.com, last viewed on January 30, 2010.

³⁶ See http://www.stepheniemeyer.com/twilight_reviews.html, last viewed on January 30, 2010.

³⁷ See http://www.stepheniemeyer.com/twilight_outtakes.html, last viewed on January 30, 2010.

³⁸ For example, Cassandra Clare, author of the popular *Mortal Instruments* trilogy has a website where she answers questions from fan and discussed possible movie adaptations of her work: <http://cassandraclare.com/cms/home>, last viewed on January 30, 2010.

³⁹ See, for example, www.kristenstewart.com (Kristen Stewart fan website, last viewed on January 30, 2010); <http://www.taylorlautner.org/> (Taylor Lautner fan website, last viewed on January 30, 2010); robsessedpattinson.com (Robert Pattinson fan website, last viewed on January 30, 2010).

⁴⁰ See, for example, <http://www.fanfiction.net/book/Twilight/> (Twilight fan fiction website, last viewed on January 30, 2010).

⁴¹ STEPHENIE MEYER, *TWILIGHT* (2005); STEPHENIE MEYER, *NEW MOON* (2006), STEPHENIE MEYER, *ECLIPSE* (2007), STEPHENIE MEYER, *BREAKING DAWN* (2008).

⁴² See, for example, a list of *Twilight* websites officially recognized by the series' author, Stephenie Meyer: http://www.stepheniemeyer.com/ts_fansites.html, last viewed on January 30, 2010.

⁴³ See www.stepheniemeyer.com, last viewed on February 1, 2010.

⁴⁴ See <http://www.twilightthemovie.com/>, last viewed on February 1, 2010.

The franchise is also notable for the variety of Internet issues that have arisen recently about intellectual property rights associated with the books and movies. Some of the more salient of these issues form the basis of the following discussion. The first case study presented here relates to the leaking of Stephenie Meyer's *Midnight Sun* manuscript. The second case study examines the phenomenon of fan mash-up videos⁴⁵ posted on popular web hosting services such as YouTube, and often also reproduced on fan blogs. The third case study examines an incident in a movie theater in Illinois in which some *Twilight* fans hosted a birthday party which included attending a screening of *New Moon*. The sister of the birthday girl made a video recording of the party, which included capturing a few minutes of footage of the film on video⁴⁶. She was detained in jail for two days with the possibility of facing a larger jail term for criminal copyright infringement⁴⁷.

The final case study is an interesting example of turnabout in digital copyright law. While many copyright disputes involve commercial copyright holders – often music and movie producers – taking action against smaller players, including fans, for unauthorized uses of their protected works, this case study involves fans taking action against a commercial movie producer. The complainants were fans who run a website devoted to one of the leading men in the *Twilight* movies, Robert Pattinson. While a variety of unauthorized fan websites have appeared in recent years following Pattinson's work, the administrators of the "robsessedpattinson.com" blog were particularly irritated that a commercial DVD production company had cut and pasted information about Pattinson from their blog to promote an unauthorized commercially released DVD documentary on Pattinson's career. The owners of "robsessedpattinson.com" framed their complaints against the *Robessed* DVD makers in terms of plagiarism, rather than copyright infringement. While their strategy ultimately worked in practice, in that the DVD makers removed the offending material from their website, the plagiarism terminology employed by the complainants may tell us something about the level of awareness and effectiveness of copyright law in Web 2.0 communities.

B. Case Study 1: *Midnight Sun*

As noted above, *Midnight Sun* was Stephenie Meyer's attempt to retell the story of her first *Twilight* novel from an alternate character's point of view. While *Twilight* recounts the tale from Bella Swan's viewpoint, *Midnight Sun* was intended to tell the story from the perspective of her love interest, the vampire Edward Cullen. As described by Meyer, *Midnight Sun* started out as "an exercise in character development that got wildly out of hand"⁴⁸. While editing on some of her later books, she had become interested in the idea of exploring how Edward reacted to first meeting Bella, given that there was so much more in terms of character development going on for Edward at the point where the two characters first become aware of each other than there is for Bella⁴⁹. At this point in the narrative, Bella only knows that "an incredibly gorgeous boy is

⁴⁵ Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1509 (2008) (defining "mashups" as "works that incorporate - i.e., "mashup" or "remix" - portions of copyrighted material from elsewhere into their works.")

⁴⁶ Eric Ditzian, *Chris Weitz Says "New Moon" Bootlegging Arrest is "Terribly Unfair"*, available at <http://www.mtv.com/movies/news/articles/1627907/story.jhtml>, last viewed on February 2, 2010.

⁴⁷ *id.*

⁴⁸ See <http://www.stepheniemeyer.com/midnightsun.html>, last viewed on February 1, 2010.

⁴⁹ *id.*

looking at her funny.”⁵⁰ Edward, on the other hand, has one hundred years’ worth of passively wandering through life as a vampire completely altered when he first encounters Bella, or, as Meyer puts it, “Edward is suffering through one of the most momentous days of his very long life!”⁵¹

In 2006, Stephenie Meyer posted a draft of the first chapter of *Midnight Sun* on her website for her readers to enjoy. She explained in an accompanying note that: “this is an unedited rough draft. It is full of typos and all the other flaws that unedited manuscripts have. Enjoy it for what it is, but know that the final copy will be infinitely superior.”⁵² That was the only official thing Meyer posted on her blog about *Midnight Sun* until a message to her fans was reproduced on her website in June of 2008 assuring readers that the completion of *Midnight Sun* would be her next project⁵³. She continued working on the manuscript in 2008 and, around this time, released confidential drafts of what she had written so far to actors and others involved in production of the first *Twilight* film to assist with character and plot development for the movie⁵⁴.

Subsequently, various unauthorized drafts of the manuscript started appearing on the Internet. Meyer was extremely upset, and responded in an interesting way. Despite the fact that she was fairly sure she knew who had leaked the manuscript, she did not take any formal legal action, nor did she name anyone she thought may have been involved. In a blog post on her website in August of 2008, she noted that: “I have a good idea of how the leak happened as there were very few copies of *Midnight Sun* that left my possession and each was unique. Due to little changes I made to the manuscript at different times, I can tell when each left my possession and to whom it was given. The manuscript that was illegally distributed on the Internet was given to trusted individuals for a good purpose. I have no comment beyond that as [sic] I believe that there was no malicious intent with the initial distribution.”⁵⁵

While she notes that the Internet distribution was “illegal” in terms of infringing her copyright, she also notes the significance of the intentions of the people who inadvertently leaked the manuscript. Meyer interestingly attaches significance to the *intentions* of those infringing her copyrights, despite the fact that copyright law involves strict liability⁵⁶. It turns out that the notion of intention seems fairly significant in terms of copyright infringement in the blogosphere, as the next case study also demonstrates⁵⁷. Under our present legal system, intention is only relevant to certain forms of secondary liability – notably contributory liability⁵⁸.

⁵⁰ *id.*

⁵¹ *id.*

⁵² *id.*

⁵³ *id.* (“June 2008 Update: In response to the outrageous number of emails that I have received with questions concerning *Midnight Sun*, I talked to Stephenie this weekend and she asked me to let everyone know that *Midnight Sun* is her next project.”)

⁵⁴ *id.*

⁵⁵ *id.*

⁵⁶ NIMMER ON COPYRIGHT, § 13.01 (“Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant.” In other words, the plaintiff does not have to establish intent on the part of the defendant.)

⁵⁷ See Part II.C.1, *infra*.

⁵⁸ NIMMER ON COPYRIGHT, § 12.04[A][3][a] (“A party “who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory

It is not currently an element of a direct infringement action⁵⁹. The examples drawn from the *Twilight* blogosphere suggest that perhaps Congress should consider revisiting the role of intention in digital copyright infringement.

Another interesting aspect of Meyer's response to the illegal posting of her work was her decision to publish her own more official version of the current draft on her blog⁶⁰. She accompanied this version with an explanation of her motives: "I'd rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes. But how do I comment on this violation without driving more people to look for the illegal posting? It has taken me a while to decide how and if I could respond. But to end the confusion, I've decided to make the draft available here This way, my readers don't have to feel they have to make a sacrifice to stay honest"⁶¹.

These comments are instructive on the author's feelings about copyright and authorial integrity. Again, Meyer uses words and phrases that relate to the intentions of her fans with respect to her copyrights. She talks about the "violation" of her rights and her fear that if she comments on this violation she will drive her fans to look for illegal postings. Her own posting of the draft is a solution that she feels will allow her readers the opportunity to enjoy her work and to "stay honest." In many ways, the current copyright system leaves the author in an extremely difficult position. The more she talks about her rights under the system, the more she alerts people to the availability of the illegally distributed work. Thus, her rights do not really help her in the Web 2.0 context unless she is willing to personally bargain with - or take legal action against - every website where the illegal copies are posted. And even if she has the time, the wherewithal, and the desire to do so, more websites are likely to spring up every day, and many will be outside the jurisdictional reach of domestic copyright laws. Additionally, their proprietors may be difficult to locate in practice.

Alternatively, she could attempt to bring actions against search engines as parties potentially secondarily liable for these direct infringements. However, this is a costly and time consuming process, and the law is unsettled about the liability of search engines for secondary liability in these kinds of cases⁶². In the case of an unpublished work, like *Midnight Sun*, there is no commercial publisher or distributor with deep pockets who might shoulder some of the burden of bringing legal actions against unauthorized online distributors of the work. This may be contrasted with online copies of clips from the *Twilight* films found from time to time on

infringer.' " Thus, if there is knowledge that the work in question constitutes an infringement, then one who causes another to infringe will himself be liable as an infringer").

⁵⁹ LEAFFER, *supra* note __, at 522 ("In general, infringement with innocent intent is *not* a defense to a finding of liability. Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.")

⁶⁰ See <http://www.stepheniemeyer.com/midnightsun.html>, last viewed on February 1, 2010.

⁶¹ *id.*

⁶² NIMMER ON COPYRIGHT, § 12.04[A][3][a] (noting current inconsistencies in application of secondary liability law for copyright infringement to Internet intermediaries such as Internet search engines and online payments systems); Anne Flahvin, *Online Copyright Battle Just Beginning with Landmark Case*, THE AUSTRALIAN (February 5, 2010), available at <http://www.theaustralian.com.au/business/legal-affairs/online-copyright-battle-just-beginning/story-e6frg97x-1225826898277>, last viewed on February 5, 2010) (noting that Australian court just controversially held ISP not to be liable for copyright infringements of its users).

websites like YouTube, but quickly removed as a result of copyright claims by legal departments at the deep-pocketed movie studio.

Meyer's comments also illustrate her feelings towards her fans. She understands that they are interested in her work and want to hear the *Twilight* story as she is planning to tell it from Edward Cullen's point of view. She wants her fans to be able to enjoy her work and to "stay honest" in the process. However, she would prefer to have more control over when and on what terms her fans enjoy particular works. She hopes her fans will respect her wishes and not read anything before she is ready to share it, but she understands how strongly her fans feel about keeping on top of her work and likely also how much she owes her fans in terms of her success. Thus, she tries to come up with a compromise that caters in some way to her fans' desires, but does not impinge too greatly on her artistic integrity. Copyright law does not really help her to achieve any of this. She has to set out her own preferred terms of access and use for the work and to hope that her fans respect them. She does this against the backdrop of copyright ownership in the manuscript, but the copyright law does not give her any rights that she can use meaningfully to redress the specific wrong – the authorial artistic violation – she feels that she has suffered.

The way in which she describes this wrong is interesting because it says more about how she feels about her authorial autonomy and integrity than it does about her desire to exploit economic rights in her work in progress. Her words imply a mismatch between the objectives of copyright law and her own personal interests in her work. She blogs:

"I did not want my readers to experience *Midnight Sun* before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author, not to mention me as a human being. As the author of the *Twilight Saga*, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public; this is the same for musicians and filmmakers. Just because someone buys a book or movie or song, or gets a download off the Internet, doesn't mean that they own the right to reproduce and distribute it. Unfortunately, with the Internet, it is easy for people to obtain and share items that do not legally belong to them. No matter how this is done, it is still dishonest. This has been a very upsetting experience for me, but I hope it will at least leave my fans with a better understanding of copyright and the importance of artistic control."⁶³

While her comments are framed in terms of copyright, the overriding concern seems to be with the integrity of the authorial process and the honesty or dishonesty of copyright audiences. Both of these issues are foreign to modern copyright law. Copyright law is aimed at facilitating innovation by providing economic rewards to authors and artists to incentivize innovation⁶⁴. However, Meyer describes the unauthorized dissemination of *Midnight Sun* as a violation of her rights as an author and her rights as a human being. She is speaking of personal

⁶³ See <http://www.stepheniemeyer.com/midnightsun.html>, last viewed on February 1, 2010.

⁶⁴ LEAFFER, *supra* note ___, at 24 (4 ed, 2005) ("copyright law provides the incentive to create information and a shelter to develop and protect it.")

rights to integrity of her work and autonomy in controlling her literary creation, rather than rights to control economic benefits derived from her work. Her concern with the dishonesty or honesty of her readers is linked not to their incursions on her economic property rights but to their intrusions on her personal autonomy as an author and an individual.

This situation may be an example of a failure of copyright law to address the needs of creators of artistic works, as distinct from the more commercially oriented producers and distributors. Legal action against direct and secondary copyright infringers would be time consuming, cost ineffective, and distracting for the unpublished author. More to the point, it would not effectively protect the rights with which the author is most directly concerned – those related to her own integrity as an artist and of her fans' integrity as consumers of her work. Furthermore, copyright law is doing nothing here to incentivize innovation. The upshot of the *Midnight Sun* debacle was that the author decided not to proceed with the project because her heart was not in it after the perceived violation of her rights. In August 2008, she suspended work on the project indefinitely⁶⁵.

One might argue that in fact copyright law could have prevented this outcome if the author had used it appropriately. In other words, if Meyer had brought at least some legal actions – or sent some letters of demand – to key websites posting *Midnight Sun* illegally, she would have sent an effective message against copyright piracy, and might have obtained some injunctions and maybe pecuniary damages. This may have deterred others from illegally posting the material and might have encouraged some people who had posted the manuscript to remove it from their websites. Thus, one could argue that there is nothing wrong with copyright law here. The practical limitations are the time, cost and jurisdictional difficulties associated with bringing actions against often anonymous, globally dispersed, and impecunious defendants in online forums. This may suggest that if any revision is needed to copyright law those revisions should be aimed at procedural difficulties with enforcing copyrights, rather than at the substantive provisions of the law.

Nevertheless, Meyer's focus on authorial integrity as well as on the intentions - honesty versus dishonesty - of her fans suggest that there may be something more going on here. There may be some important values playing out in the Web 2.0 creator-consumer culture that copyright law is currently missing. Copyright law and policy makers could think about whether the United States needs to adopt something akin to a broader moral rights law to better protect authors' personal rights, as distinct from copyrights, in their works. Moral rights protect aspects of an authors' work such as the authors' right to be identified with the work (attribution right)⁶⁶ and the authors' right to have some say in the way in which the work is presented to the public

⁶⁵ See <http://www.stepheniemeyer.com/midnightsun.html>, last viewed on February 1, 2010 ("So where does this leave *Midnight Sun*? My first feeling was that there was no way to continue. Writing isn't like math; in math, two plus two always equals four no matter what your mood is like. With writing, the way you feel changes everything. If I tried to write *Midnight Sun* now, in my current frame of mind, James would probably win and all the Cullens would die, which wouldn't dovetail too well with the original story. In any case, I feel too sad about what has happened to continue working on *Midnight Sun*, and so it is on hold indefinitely.")

⁶⁶ NIMMER ON COPYRIGHT, § 8D.03 ("The first major moral right concerns attribution. Conceptually, it falls into two poles - requiring use of the author's name, and forbidding that usage.")

(integrity right)⁶⁷. Moral rights are more popular in European countries than in the Anglo-American copyright tradition⁶⁸. Copyright holders often oppose moral rights because authors who retain moral rights are in a position to impede downstream copyright holders' abilities to commercially exploit relevant works⁶⁹.

However, the *Midnight Sun* incident suggests that maybe some American authors are more concerned with the integrity of their artistic creations than with their economic rights. Of course, it must be conceded that in the *Midnight Sun* example, moral rights law may not have helped Meyer with her concerns in practice. Like copyright law, moral rights litigation suffers from the same practical limitations as copyright – in terms of time, cost and jurisdictional issues. Thus, it is arguable that even if an author would like a specific right to the integrity of her creation, copyright law basically gives her all that she requires in practical terms. It may be that emerging social norms in relation to respect for an author's expressed preference about online uses of her work could become a more important tool in practice to protect against violations of authorial integrity than any form of legal regulation.

C. Case Study 2: Mashup Videos

1. The Remix Culture

While the *Midnight Sun* case study focuses largely on the author's views about her right in her creative works, the second case study focuses on the consumer-creators' - or fans' - views. With *Twilight*, as with many other popular works of fiction, fans in the Web 2.0 universe like to utilize aspects of copyright works and remix them for their own expressive purposes⁷⁰. These remixes can take the forms of parody or criticism, but very often are simple expressions of ways in which fans relate to the works. Fans may want to experiment with attaching particular musical tracks to images from movies, or they may prefer to mix movie images with their own artwork. Fans may also want to experiment with combining aspects of different movies or television shows to create something new⁷¹.

Much is being written in the legal literature about the extent to which these kinds of remixes constitute copyright infringement and, if so, what kinds of defenses may be available to

⁶⁷ Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298 (2003) ("Integrity rights enable the artist to prohibit alterations to his work by subsequent owners of the physical objects to the extent that such alterations are injurious to his honor or reputation - such instances of manipulation of his artistic vision are as offensive as direct assaults to his person.")

⁶⁸ See LEAFFER, *supra* note ___, at 376, n. 421, 422 (description of French moral rights law).

⁶⁹ Ong, *supra* note ___, at 305 (discussing common objections to integrity rights on the basis that they place restrictions on what a property/copyright owner can do in terms of exploiting a protected work); LEAFFER, *supra* note ___, at 387 (noting that moral rights also potentially interfere with contract rights over copyrighted works in lucrative markets such as the motion picture industry).

⁷⁰ Lee, *supra* note ___, at 1461 ("Informal copyright practices have developed, most notably, for UGC. Whether in blogs, fan fiction, videos, music, or other mashups, many users freely use the copyrighted works of others without prior permission and even beyond our conventional understandings of fair use.")

⁷¹ See, for example, <http://www.bing.com/videos/watch/video/buffy-vs-edward-twilight-remixed-original-version/7A42AE7D5299962DA2667A42AE7D5299962DA266>, viewed on January 20, 2010 (mashup of scenes from *Buffy, the Vampire Slayer* and *Twilight* retelling the narrative as if Buffy has met and fallen in love with Edward Cullen from *Twilight*.)

the remixers in certain contexts⁷². The fair use and implied license defenses from copyright law take on particular significance in the remix context. What is interesting about this case study is the gap between what the law actually says and what the remixers think it says, or should say. Members of the Web 2.0 consumer-creator culture who develop remixes often attach labels to their work stating either that the work does not infringe copyright or is fair use of the copyrighted material⁷³, or that no copyright infringement was intended⁷⁴.

With respect to the assertion that a particular remix does not infringe copyright or is a fair use, that statement does not make much sense under American copyright law. Because of the vague, equitable rule of reason approach to fair use in American law⁷⁵, a determination of fair use cannot be definitively made until a case is litigated. No one can affirmatively state *ex ante* that their use of a given work is a fair use with any certainty⁷⁶. These statements by consumer-creators might be taken to mean that they did not *intend* to infringe copyright and that they assume that their creation is a fair use. However, the mere assertion that a particular use is a fair use does not automatically make it so.

Likewise, the remixer's stated intention not to infringe copyright is irrelevant to a determination of copyright liability. Consumer-creators who state that they did not intend to infringe copyright, and make no particular assertion about fair use are perhaps being more realistic in that they are saying nothing about whether their use does in fact infringe copyright. However, the statement is not particularly meaningful as a matter of copyright law because intention is irrelevant to a claim for direct copyright infringement⁷⁷. There may be various explanations as to why remixers attach these statements to their work. They might honestly think that their intentions are relevant to a copyright claim. They might additionally think,

⁷² See, for example, Lee, *supra* note ____.

⁷³ See, for example, <http://www.bing.com/videos/watch/video/buffy-vs-edward-twilight-remixed-original-version/7A42AE7D5299962DA2667A42AE7D5299962DA266>, viewed on January 20, 2010.

⁷⁴ See, for example, <http://www.youtube.com/watch?v=9Wj7Nmox0T4> ("THIS VIDEO IS PURELY FAN-MADE. I OWN NOTHING, NO COPYRIGHT INFRINGEMENT INTENDED. EVERYTHING BELONGS TO THEIR RIGHTFUL OWNERS.")

⁷⁵ LEAFFER, *supra* note ____, at 469 ("Although codified in the 1976 [Copyright] Act, the doctrine of fair use has retained its nature as an equitable rule of reason to be applied where a finding of infringement would either be unfair or undermine "the progress of science and the useful arts."")

⁷⁶ Lee, *supra* note ____, at 1464 ("Copyright law does not exist in a vacuum. It influences and is influenced by how people use copyrighted works in practice. Yet, in discussions of copyright law, copyright practices are often ignored as if they had no bearing on the formal law of copyright. Under this formalist understanding, the law operates from the "top down." The Copyright Act establishes the "rules," which, in turn, limit what practices can develop. Practices outside the "rules" are deemed infringing. This simplistic, yet pervasive understanding of copyright is misguided, however. It presumes that formal copyright has no gray areas, but instead provides clear guidance *ex ante* to the public on the legality of uses of copyrighted works in most factual scenarios. Of course, nothing could be further from the truth. Copyright law is riddled with ambiguities. Against such a backdrop, informal copyright practices are vital to the functioning of the entire copyright system."); 1468 ("Given the lack of clear rules for fair use and misappropriation, knowledge of copyright law is often no better than ignorance of copyright law. Even though I am an expert of copyright law, my prediction of what is a fair use probably is no better than the person on the street - or it could be even worse, given that a jury will not typically be comprised of copyright experts and judges often are not well versed in copyright law.")

⁷⁷ LEAFFER, *supra* note ____, at 522 ("In general, infringement with innocent intent is *not* a defense to a finding of liability. Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.")

equally erroneously, that a remix is a fair use under copyright law. On the other hand, they may suspect that they are in fact infringing copyright, but that stating their intentions not to do so might temper the response of copyright holders. In other words, a copyright holder who sees that the remixer was not intending to infringe copyright might decide to stop with a letter of demand rather than proceeding to litigation.

To the extent that consumer-creators have erroneous notions of what fair use is and how copyright liability works, maybe public education is the answer. However, that begs the question whether copyright law should regulate fans' remixes in the first place, particularly those that are noncommercial in nature and do not likely interfere with the copyright holder's economic rights. In fact, these remixes might enhance the value of copyrighted works by increasing online discourse about them, and therefore increasing general interest in the works. The remixes and associated online discourse keep the works in the public eye and in the public mind, perhaps making it more likely that people will go and see a film or rent/stream a video for a second time, or purchase an associated product like a soundtrack, wall calendar, or other merchandise associated with the work.

Some copyright holders have taken advantage of opportunities to allow fans to utilize their works online subject to certain conditions of use. With respect to the *Star Wars* franchise, for example, George Lucas' company, Lucasfilm, has allowed fan mashups and fan fiction relating to his work – and has even provided unique content to fans creating such works – provided that his company takes ownership of the resulting works⁷⁸. This may suit some fans who only intend to use the works for expressive purposes and have no commercial motivations. Joss Whedon is another example of a creator who encourages his fans to create works related to his own material. When he produced *Dr Horrible's Singalong Blog*⁷⁹, he actively encouraged fans to film their own videos related to the storyline. He then incorporated a selection of those videos on the DVD release of the short movie⁸⁰.

2. Remixing and Fair Use

Regardless of what fans want, or what they say they want, the law has its own limitations with respect to video mashups and fan fiction. In today's cut and paste culture, presumably a prima facie copyright infringement is relatively easy to establish in cases where clips of music,

⁷⁸ HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE, 156-157 (2006) ("In 2000, Lucasfilm offered *Star Wars* fans free Web space (www.starwars.com) and unique content for their sites, but only under the condition that whatever they created would become the studio's intellectual property.")

⁷⁹ See <http://www.imdb.com/title/tt1227926/>, last viewed on February 1, 2010.

⁸⁰ See http://www.amazon.com/Horribles-Sing-Along-Blog-Patrick-Harris/dp/B001M5UDGS/ref=sr_1_1?ie=UTF8&s=dvd&qid=1265043525&sr=8-1, last viewed on February 1, 2010 ("If you've already watched or downloaded *Dr. Horrible's Sing-Along Blog*, a number of bonus features might entice you. There are two commentary tracks: Harris, the three Whedons, Tancharoen, Day, and Fillion recorded a spirited track discussing the movie, and there's also "Commentary! The Musical" in which they ignore the movie and sing about the writers' strike and each other (e.g., Fillion sings "I'm Better than Neil")--the songs aren't as good as the *Horrible* songs, but it's good silly fun. A 20-minute making-of discusses the cast, the recording sessions, and how the movie became a phenomenon, and 10 videos (a half-hour total) were recorded by fans who want to join the *Evil League of Evil*.")(emphasis added). A number of fan videos are also available at: <http://www.wonderflonium.com/>, last viewed on February 1, 2010.

video or text have been taken directly from an original source and inserted into a new consumer creation. Copying does not get much more direct than this. However, applicable defenses are not such an easy question. Whatever fans think they know about the fair use defense, for example, judicial applications of the defense to the mashup video context would likely not lead to many clear cut answers.

The fair use defense, as currently set out in § 107 of the copyright act provides in relevant part that:

“the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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 amount and substantiality of 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.”

This defense is not intended to create a clear rule delineating precisely when a particular use of a copyrighted work will be excused from liability. Rather, it is intended to operate as an equitable rule of reason, as the defense operated at common law prior to its incorporation into the 1976 copyright act⁸¹. Thus, courts apply the various elements of the defense with flexibility and discretion. Application of some elements of the defense to the fan video mashup context would be relatively easy. For example, it would be difficult for a fan to argue that a mashup was created for any of the purposes listed in the first paragraph of the defense: that is, criticism, comment, news reporting, teaching, scholarship, or research. Of course, these are not exclusive fair use categories. Other uses may be considered fair uses outside this list.

In some cases, a mashup might actually count as criticism or comment depending on the nature of the mashup. Some video mashups might include critiques of the works on which they

⁸¹ NIMMER ON COPYRIGHT, § 13.05 (“The Copyright Act of 1976 for the first time accorded express statutory recognition of this judge-made rule of reason. However, this codification was “intended to restate the present [*i.e.*, pre-1978] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” Therefore, in determining the scope and limits of fair use, reference must be made to pre- as well as post-1978 cases. One case calls this obscure doctrine of fair use “the most troublesome in the whole law of copyright.” Another notes that the “doctrine is entirely equitable and is so flexible as virtually to defy definition.” Nonetheless, fair use is unique in that the U.S. Supreme Court has repeatedly addressed its contours. Whereas the vast majority of copyright issues remain unaddressed by the nation’s highest tribunal, landmark decisions from 1984, 1985, and 1994 treat fair use at great length. The malleability of fair use emerges starkly from the fact that all three cases were overturned at each level of review, two of them by split opinions at the Supreme Court level.”)

are based⁸². Moviegoers are increasingly making their own online video reviews of new movies, including clips from the movies themselves. This kind of mashup might be regarded as a criticism or comment under the fair use defense. It is also possible that a mashup that provides a particular artistic take on the work on which it is based could be regarded as commenting on that work for the purpose of the fair use defense. For example, one might put together a montage of female vampires from the *Twilight* movies attacking other vampires, and perhaps mix it with examples of Buffy from *Buffy, the Vampire Slayer* also attacking vampires, and then accompany the video with a music track like "Sisters are Doing it For Themselves." This might be regarded as a feminist comment or critique on the source material. On the other hand, it may simply be regarded as a general comment on feminism or "girl power" rather than a specific comment on the underlying works sampled in the mashup.

Assuming that a particular mashup either falls within the comment or criticism area, or that a court finds the mashup to be otherwise generally within the scope of a potential fair use defense, the court then has to apply the four factor test for fair use. With respect to the first factor, mashup videos shared over online services such as YouTube and Facebook are generally not being used for commercial purposes, nor are they for nonprofit educational purposes. Thus the second prong of the first factor is largely irrelevant in the mashup context. However, the first limb of the first factor has often been judicially characterized as embodying the concept of a transformative use of a protected work⁸³. This judicial gloss on the words of the statute has been developed from the underlying policy determination that copyright law is supposed to be about encouraging innovation and enhancing the store of information and ideas within society⁸⁴. Some judges have opined that purely consumptive uses of copyright works should be given less deference under the fair use defense than uses that transform the work in some way⁸⁵. The rationale is that transformative activities contribute to artistic innovation in a way that purely consumptive activities do not⁸⁶.

If transformative use is an important aspect of the first fair use factor, then a court would have to look at each case of a mashup video to ascertain how transformative the particular mashup might be. Some remixes of copyrighted works are likely to be extremely transformative: for example, a video remix that aggregates elements from different copyright works to create a new work with a new message. This is similar to the case of rap music that routinely aggregates snippets of earlier compositions to make something new. In fact, these kinds of transformative

⁸² See, for example http://www.youtube.com/watch?v=Jk0UW_nvCb4, last viewed on February 1, 2010 (video review of the movie *Twilight*).

⁸³ NIMMER ON COPYRIGHT, §13.05[A][1][b] (discussion of "transformative" and "productive" use terminology employed by courts in applying the first fair use factor).

⁸⁴ *id.* ("In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court characterized the "central purpose" of the investigation under the first fair use factor as determining whether "the new work merely supersedes the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, "whether and to what extent the new work is 'transformative.'" Conceding that "such transformative use is not absolutely necessary for a finding of fair use," the Court nonetheless ruled that "the goal of copyright ... is generally furthered by the creation of transformative works," adding that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." Whatever the label, therefore, productive use is now of crucial importance to the fair use analysis")

⁸⁵ *id.*

⁸⁶ *id.*

remixes have been very common throughout the history of music⁸⁷. They are also becoming more common in other fields online.

Mashup maps, for example, are a recent online trend, and various services have been established combining the works of Google Maps with other information – such as property listings, and locations of crimes⁸⁸. While many of these uses probably do technically infringe copyrights held by Google in their maps – or at least in their mapping software – norms have developed under which Google welcomes these uses rather than attacks them. This is because Google ultimately obtains more good publicity and potentially more advertising revenue from allowing these kinds of uses of its works. Google also allows other entities freely to embed its maps in their online applications, which again is a good source of advertising for Google⁸⁹.

An online video mashup review of a movie, book, or television show, incorporating clips from the copyrighted work may meet the criterion of being a transformative use, as well as presumably being criticism or comment under § 107's preamble to the fair use factors. Thus, while many mashups while not be for nonprofit educational purposes as contemplated in fair use factor one, they will nevertheless likely satisfy the "transformative use" requirements often incorporated by courts into applications of the first fair use factor. Therefore, the first fair use factor in fan mashup cases will tend to cut in favor of the defendant consumer-creator⁹⁰.

The second fair use factor – relating to the nature of the copyrighted work – will generally cut in favor of the copyright holder in cases involving mashups of popular movies and other artistic works. The most common subjects of fan mashups are movies, television shows, and music videos. These are the typical creative works that lie at the heart of copyright protection. They may be contrasted with, say, newspapers, non-fiction works, computer software, and databases, all of which are less central to copyright's predominant aims of promoting artistic innovation⁹¹.

⁸⁷ Olufunmilayo Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L. J. 277 (2006) (discussion of history of borrowing from previous works in musicological history).

⁸⁸ Lisa Veasman, "Piggy Backing" on the Web 2.0 Internet: *Copyright Liability and Web 2.0 Mashups*, 30 HASTINGS COMM. & ENT. L.J. 311, 317 (2008) ("a programmer constructed the mashup HousingMaps from the Google Maps API and from "screenscraping" craigslist.org's housing listings. This mashup allows Internet users to search for available housing by viewing available housing listings and a map of those listings' locations side-by-side."); JEFF JARVIS, WHAT WOULD GOOGLE DO?, 33-34 (2009) (describing innovative mashup uses of Google maps).

⁸⁹ Veasman, *supra* note ____, at 316 (noting that Google currently licenses out maps for others to use on their websites).

⁹⁰ There may naturally be cases in which a mashup is used for a commercial purpose, and this may change the analysis of the first fair use factor. The above discussion has assumed that most fan video mashups are available on noncommercial, publicly available video sharing websites such as YouTube. Where such remixes are made available on commercial websites – that is, websites that charge fees for access or that subsidize their activities with online advertising – the result may well be different. Thus, even though most applications of the first fair use factor to video mashups will cut in favor of the consumer-creator, not all will.

⁹¹ NIMMER ON COPYRIGHT, §13.05 [A][2][a] ("Under [the second fair use] factor, the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense. "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.")

The third fair use factor - the amount and substantiality of the portion used in relation to the copyrighted work as a whole – may cut either way depending on the specific mashup video. The amount and substantiality criterion can be applied quantitatively or qualitatively⁹², so the fact that a consumer-creator only made a four minute re-mix will not help her case if what she has taken from the original work is deemed to be qualitatively substantial. If a remixer uses, say, a key scene from a movie, or an entire song from a movie, that may be regarded as a substantial taking for the purposes of the third fair use factor.

The application of the fourth fair use factor - the effect of the use upon the potential market for or value of the copyrighted work – may well cut in favor of the consumer-creators in many cases. Remixes are unlikely to negatively impact the copyright holder's current or future markets. They may, in fact, create some positive market effects⁹³. It is unlikely that mashup videos could ever serve as a market substitute for the movies or other media on which they are based⁹⁴. Thus, consumer-creators are unlikely to negatively affect a copyright holder's market by way of substituting its product for that of the copyright holder. At the same time, one might argue that the existence of free online movie mashups affect the copyright holder's market positively because they generate more interest in the original work. They are arguably a form of free advertising that should be welcomed by the copyright holders.

Copyright holders might argue that some mashups affect their markets in a negative way. For example, a particularly scathing video mashup review of a movie may deter people from going to see the movie or from renting, streaming, or buying the DVD of the movie. However, this is not generally the kind of effect on the market at which the fourth fair use factor is aimed. The fair use defense is supposed to be copyright law's attempt to balance free speech against proprietary copyrights⁹⁵. Thus, one would hope that a video mashup movie review is treated much as a review in a newspaper or in any other news media. Such reviews are typically excused as a fair use to the extent they copy material directly from the work being reviewed.

At the end of the day, factors one and four in most video mashup cases are likely to cut in favor of the consumer-creator, while factor two will generally cut in favor of the copyright holder. The third factor – amount and substantiality of the portion of the copyright work used – will depend on the context of a given case. If the fair use defense was routinely applied using a simple mathematical formula, it might be possible to say that most fair use cases will work out in favor of the consumer-creators. This is because two factors will generally fall in their favor⁹⁶,

⁹² *id.*, at § 13.05[A][3] (“The proper analysis [under the third fair use factor] includes a determination of not just quantitative, but also qualitative substantiality. Thus, it is too much to quote “what was essentially the heart of the book” even if it only amounts to verbatim copying of 300 words out of 200,000 words in plaintiffs work, or a few key pages out of 20,000 total, or one minute and fifteen seconds from plaintiffs’ one hour and twelve minute motion picture. On the other hand, it has been held fair to copy a whole magazine cover as part of comparative advertising.”)

⁹³ Hetcher, *supra* note ___, at 1883-4 (noting that fan originated remixes generally will not cause any economic harm to a copyright holder and may, in fact, bring benefits).

⁹⁴ *id.*

⁹⁵ David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 UPA L REV 673 (2000) (exploring the delicate balance between copyrights and First Amendment guarantees).

⁹⁶ *ie* Factors 1 and 4 (purpose and character of the use, effect of the use on the market)

one will fall against them⁹⁷, and one will vary from case to case⁹⁸. However, this is not how the defense is applied in practice. A court may give particular weight to, say, factor two if it is particularly interested in preserving incentives to innovate in areas that go to the heart of copyright protection.

In summary, the fair use defense may prove problematic for remixers⁹⁹. The fact that the creators of video mashups assert fair use and say that their work is not infringement does not automatically make it so. Of course, it is a time consuming and costly proposition for copyright holders to bring – or even to threaten – judicial proceedings against remixers. Additionally, copyright holders may be happy to allow a certain amount of online remixing of their work because of the potential financial benefits these activities could bring as free advertising. This has certainly proved to be the case with respect to remixes of online properties such as Google Maps¹⁰⁰. Perhaps these new online norms might tell us something about how copyright law should work in the Web 2.0 age with respect to uses of works that are not specifically authorized by copyright holders, but may be beneficial to them.

3. Remix Liability and Internet Intermediaries

Copyright holders who object to remixing and who do not want to bring actions against individual remixers may, of course, decide to take action against services that host mashup videos, such as YouTube and Google Video. Depending on the way the relevant web service is set up, there would be some question as to whether these services might be direct infringers, or could only be secondarily liable for direct infringements of others. For example, where a search engine like Google only links to content on other websites and does not reproduce the content itself, the chances are that it would only be exposed to secondary liability claims, and not to claims for direct copyright infringement¹⁰¹. Current precedents on secondary liability are not

⁹⁷ ie Factor 2 (nature of the copyrighted work).

⁹⁸ ie Factor 3 (amount and substantiality of the portion taken).

⁹⁹ Lee, *supra* note ___, at 1509-1510 (“the more problematic category of UGC from the perspective of copyright law are mashups, which are works that incorporate - i.e., "mashup" or "remix" - portions of copyrighted material from elsewhere into their works. These mashups raise copyright issues because the UGC has borrowed from other copyrighted works, often without permission from the copyright holders. Such unauthorized use of portions of copyrighted material might infringe the copyright holder's exclusive rights of reproduction, adaptation, distribution, public performance, and public display. On the other hand, the borrowing might be fair use, de minimis, or simply not misappropriation under the test of infringement.

A copyright traditionalist or formalist might view all user-generated mashups as copyright infringement, even if they are noncommercial. By taking portions of the work and remixing them into another work, the mashups infringe at least the author's right to copy or make derivative works.

This simplistic view is misguided. Even in the commercial context, the law allows some borrowing of content from copyrighted works, while not allowing others.... [T]here is no easy way to draw the line between what is permissible copying and what is not. The line may be even harder to draw in the noncommercial context, since so few reported cases ever involve noncommercial uses of copyrighted works.”)

¹⁰⁰ JARVIS, *supra* note ___, at 33-34 (describing popular mashup uses of Google maps).

¹⁰¹ *Perfect 10 v Amazon.com, Inc.*, 508 F.3d 1146, 1162-1163 (2007) (Google not directly liable for infringing copyrights where it does not itself hold or reproduce copies of the protected images).

terribly clear¹⁰², and they do rely on the establishment of primary liability somewhere else. Thus, to succeed in a claim for contributory or vicarious liability against a search engine like Google, a copyright holder would still have to convince a court that the remixers whose work is indexed by Google are infringing copyrights in the first place.

Direct infringement might be easier to establish in the case of a video hosting service like YouTube or Facebook. These services do host content on their own servers that has been posted by their users. Generally, their terms of service attempt to contract out of copyright liability by extracting contractual warranties from users that nothing will be posted in breach of copyright¹⁰³. Of course, remix artists who assert fair use will feel that they have satisfied these terms. In fact, one reason that many remixers put "no copyright infringement" notices on their work might be to convince themselves and the online service providers that they are not in breach of the web host's terms of use.

In any event, most popular online services that host others' content are quick to respond to copyright takedown notices they receive from copyright holders, and will leave it to the poster of the alleged infringing work subsequently to establish fair use¹⁰⁴. The copyright act has been amended in the digital age to create a safe harbor for Internet intermediaries who respond quickly to such notices¹⁰⁵. Thus, the law effectively leans towards the protection of copyright holders, and puts a lot of power in the hands of those who own copyrights to decide the fate of mashups involving their work. Even where there is some question about whether a given mashup might be a fair use, the ability of the web hosting service to avail itself of the safe harbor on receipt of a takedown notice will likely encourage the web host to err on the side of caution and remove the posting. Thus, web services like YouTube might remove much material that is not infringing copyright. It may be difficult for the initial poster to establish fair use in the absence of litigation determining that the use is, indeed, excusable under § 107. This is a high cost burden for an individual remixer to bear.

The current availability of mashups online might suggest that many copyright holders are not too worried about remixing. This apparent lack of concern may be because copyright holders

¹⁰² NIMMER ON COPYRIGHT, § 12.04[A][3][a] (noting current inconsistencies in application of secondary liability law for copyright infringement to Internet intermediaries such as Internet search engines and online payments systems); Flahvin, *supra* note ____ (describing recent Australian case in which Internet service provider was held not to be secondarily liable for copyright infringement under Australia's "authorization" based test for secondary copyright liability).

¹⁰³ See, for example, Clause 6.B. of YouTube's Terms of Service, available at <http://www.youtube.com/t/terms>, last viewed on February 1, 2010 ("You shall be solely responsible for your own User Submissions and the consequences of posting or publishing them. In connection with User Submissions, you affirm, represent, and/or warrant that: you own or have the necessary licenses, rights, consents, and permissions to use and authorize YouTube to use all patent, trademark, trade secret, copyright or other proprietary rights in and to any and all User Submissions to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service.")

¹⁰⁴ See, for example, YouTube's instructions for Copyright Claim Disputes, available at <http://www.google.com/support/youtube/bin/answer.py?answer=59826&query=counter&topic=&type=>, last viewed on February 1, 2010 ("When we receive a notification of alleged copyright infringement, we remove the posting that is the subject of the notification. If we remove one of your videos, we email you, and place a note in your account").

¹⁰⁵ 17 U.S.C. § 512(c).

do not want to aggravate their fan bases. Additionally, copyright holders may be happy for remixing activities to generate additional interest in their works. The availability of remixes online therefore depends in large measure on the attitudes of copyright holders. The singer, Prince, for example, is very quick to assert copyright ownership with respect to mashup videos posted online¹⁰⁶, while the owners of copyrights in the *Twilight* franchise do not seem so concerned – at least judging by the number of *Twilight* related mashups currently available on YouTube.

This result may be as it should be. If we assume that copyright holders should have the right to decide what is done with their work online, then the fact that some copyright holders allow remixing and others do not is not a problem. However, if we assume that the majority of remixing does not in fact infringe copyright – or at least may be excused in many cases under the fair use defense – there is a potential problem. The copyright holders are arguably taking too much control in situations where they effectively dictate what web hosting services like YouTube do with mashup videos. Given that YouTube, Facebook, MySpace and other OSNs want to avoid copyright liability, they will err on the side of responding to takedown notices received from copyright holders, to the detriment of fans engaging in remixing activities.

There may be a number of solutions to this potential problem. Free market advocates would favor a solution that allows the market to sort itself out without regulatory intervention. This is happening in other Web 2.0 scenarios involving online copyrights – such as mashups of Google maps with other services¹⁰⁷. Commentators are increasingly arguing that smart businesses in the Web 2.0 age will open themselves up to online interactions with their consumer bases and will let consumers participate in online business activities¹⁰⁸. While much of this literature has been about businesses focused more on traditional goods and services¹⁰⁹, there is no reason why the same reasoning could not be applied to arts and entertainment businesses. Indeed, Joss Whedon's general receptiveness to involving his fan base in the development of his works is a good example of this theory in action in the entertainment context¹¹⁰.

¹⁰⁶ See, for example, LESSIG, REMIX, *supra* note ____, at 1-5 (2008) (describing aggressive stance taken by Prince on unauthorized use of snippets of his long *Let's Go Crazy* in a YouTube video).

¹⁰⁷ JARVIS, *supra* note ____, at 33-34 (describing popular mashups involving Google maps).

¹⁰⁸ *id.*, at 98 ("Collaboration with customers is the highest and most rewarding form of interactivity, for that is when the public tells you what they want in a product before you've made it. If you're lucky, they'll take ownership in the product you create together. They won't just buy it, they'll also brag about it.")

¹⁰⁹ See, for example, JARVIS, *supra* note ____,; DON TAPSCOTT and ANTHONY D WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (2006).

¹¹⁰ For example, Joss Whedon has included fan videos on the commercial release of the DVD of *Dr Horrible's Singalong Blog*: see http://www.amazon.com/Horribles-Sing-Along-Blog-Patrick-Harris/dp/B001M5UDGS/ref=sr_1_1?ie=UTF8&s=dvd&qid=1265043525&sr=8-1, last viewed on February 1, 2010 ("If you've already watched or downloaded *Dr. Horrible's Sing-Along Blog*, a number of bonus features might entice you. There are two commentary tracks: Harris, the three Whedons, Tancharoen, Day, and Fillion recorded a spirited track discussing the movie, and there's also "Commentary! The Musical" in which they ignore the movie and sing about the writers' strike and each other (e.g., Fillion sings "I'm Better than Neil")--the songs aren't as good as the *Horrible* songs, but it's good silly fun. A 20-minute making-of discusses the cast, the recording sessions, and how the movie became a phenomenon, and 10 videos (a half-hour total) were recorded by fans who want to join the *Evil League of Evil*.")(emphasis added).

For those who prefer regulatory solutions, it may be worth revisiting the application of certain aspects of the copyright act to the mashup video context. The two most salient provisions of the act implicated in this context are the fair use defense and the safe harbor provisions for online service providers. With respect to the fair use defense, it seems that one of the key challenges raised by mashup videos is that it is unclear whether, and to what extent, particular mashup videos would qualify as fair uses of copyright material. The answer to this question is also very relevant to questions about the safe harbor for Internet service providers, because if there is a clearer answer to the fair use question, web hosts have greater guidance as to whether a copyright infringement notice relating to a mashup is reasonable or not.

As noted in the preceding discussion, the biggest disadvantage for those consumer-creators asserting fair use in their mashup videos is that a determination of fair use cannot be made until a court determines a given issue. The ability of a remixer – and her web-hosting service provider – to have a better *ex ante* idea of fair use would be very helpful in practice. Obviously, the mere assertion by the mashup artist of a fair use defense is not enough. Some third party guidelines would be very useful here. Some commentators have suggested approaches to copyright law that take an *ex ante* approach to fair use¹¹¹. This would be a useful step forward particularly in the video mashup context. Alternatively, the issuance of some guidelines by, say, the Copyright Office, or some other expert agency on fair use in the mashup context would be very helpful¹¹². That way, remixers could say more than “no copyright intended.” They could, in fact, assert fair use and reference an authoritative or at least persuasive guideline to support their claim.

4. *Remixing and Implied Licenses*

Outside of the fair use defense, some remixers might try and refute claims of copyright infringement by relying on an implied license from the copyright holder. While most video mashups that include copyrighted material tend to say either “no copyright infringement intended” or to assert fair use, few refer explicitly to a license. This may be because an implied license defense would be difficult to sustain in cases where a consumer-creator has taken material from a source work that includes clear copyright notices: for example, a movie or DVD that starts with a copyright notice, including descriptions of penalties for copyright infringement. However, in cases where what is remixed is taken from other sources – like promotional websites for movies that incorporate publicity stills – an implied license defense may be available.

In *Summit Entertainment v Beckett Media*¹¹³, an unauthorized *Twilight* fan magazine was unsuccessful in its assertion of an implied license defense against the movie studio holding

¹¹¹ Jerome Reichman, Graeme Dinwoodie, and Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyright Works*, 22 BERKELEY TECH L J 981 (2007); Jacqueline Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA’s Anti-Device Provisions*, 19 HARVARD JOURNAL OF LAW AND TECHNOLOGY 111 (2005).

¹¹² See, for example, American University Center for Social Media, Code of Best Practices in Fair Use for Online Video (available at http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video/, last viewed on February 1, 2010).

¹¹³ 2010 WL 147958 (C.D. Cal.); not reported in F. Supp. 2d.

copyright in the *Twilight* movies. However, the defendant’s lack of success was attributable to the fact that it exceeded the scope of a license with respect to the publicity stills. The defendant had displayed altered versions of the images with knowledge that the movie studio’s publicity website clearly stated that users of the stills “will not edit, alter or modify any of the Content without Summit’s prior written approval”¹¹⁴. The defendant fan magazine had also used photographs that were not available on Summit’s publicity website. Thus, if a mashup video artist only used publicity stills that were freely available under an express or implied license and did not extend or alter images in breach of license terms, she might successfully defend against a copyright infringement action on this basis.

This might be a useful lesson for remixers to learn – where to find content that they are allowed to use. Movie studios and other copyright holders might also like to think further about which content – and how much content – they make available under open license terms. Copyright holders may not want their audiences to sample indiscriminately from their complete works, but they may decide to make more material available for public use than is currently the case. For example, clips from movie trailers – as distinct from movie clips not appearing in the trailers – might be an obvious example of material that copyright holders could make available for public use. Many *Twilight* mashup videos do, in fact, sample from the movie trailers. A number of mashups are actually attempts at fan made trailers. In other words, the fans are showing the copyright holders what they think the trailers should look like. This may be useful information for the copyright holders in terms of marketing appropriately to their likely audience.

In particular, fans often make mashup trailers for movies that have not yet been made or released. For example, if one searches for “video clip *Twilight Eclipse*” on Google Video or YouTube, one can find a variety of fan made trailers for the third *Twilight* movie, *Eclipse*. This movie has been filmed but not yet released. The fan made trailers use material from the previous films and music that they think is appropriate to the story to suggest ways in which they think the third movie should be marketed. This may be useful information for savvy copyright holders. They might learn from their fans the best and most effective ways to develop trailers to attract the interest of their potential audiences. In the future, some copyright holders might release video footage and music tracks from forthcoming films and create competitions for fans to develop trailers for the forthcoming movie before the studio develops its own trailer. Many fans would be delighted to have this opportunity and would not require any compensation for doing so. Thus, movie studios could potentially save money on marketing by simply turning to their fan base and asking for help in promoting their forthcoming works.

D. Case Study 3: *New Moon* Video Clip and the Criminal Aspects of Copyright Law

In November of 2009, a twenty-two year old woman, Samantha Tumpach, was arrested in a Chicago movie theater for incidentally videotaping three minutes of footage of the newly released film in the *Twilight* saga, *New Moon*¹¹⁵. She recorded the snippets of the movie while

¹¹⁴ *id.*, at para 3.

¹¹⁵ Amanda Bell, *Charges Against Accused ‘The Twilight Saga: New Moon’ ‘Pirate’ Dropped*, (examiner.com, December 11, 2009), available at <http://www.examiner.com/x-4908-Twilight->

filming her sister's birthday party, during the course of which the party-goers went to see the movie. The theater management notified the on-site police officer of the taping in compliance with the anti-piracy guidelines issues to movie theaters by the Motion Picture Association of America (MPAA)¹¹⁶. Tumpach was detained and ultimately spent two days in jail before being released and having the charges against her dropped. Prior to her release, she potentially faced a three year jail term, and was by all accounts traumatized by the incident¹¹⁷.

While the director of *New Moon*, Chris Weitz, questioned whether the arrest was justified¹¹⁸, there was little he could do about it. He did not hold copyright in the film. He was quoted as saying: "There is, needless to say, a difference between trying to protect the copyright of a film and making an unfair example of someone who clearly seems not to have any intentions towards video piracy"¹¹⁹. However, the criminal law of copyright, bolstered by the zero tolerance policy adopted by the MPAA¹²⁰, left little room for discretion in enforcement. Even if Tumpach had wanted to engage in video piracy, the video was not of sufficient length or quality to do so. The audio track was obscured by her talking throughout the three minutes of film¹²¹.

The actual copyright holder, Summit Entertainment, was in a difficult position. Summit is a relatively new movie studio that has only recently gone into the business of making and marketing its own films¹²². The *Twilight Saga* has been its first big success story. On the one hand, the studio owes much of its recent success to its fans – suggesting that it may not want to see them jailed on charges of criminal copyright infringement. On the other hand, it has to take a stand against digital copyright piracy or it puts its own commercial future at risk. Summit's official statement appeared to be an attempt to tread the very fine line between taking a stand against video piracy and not alienating its fan base:

"In regards to the situation with Samantha Tumpach, we applaud Muvico [the movie theater] for upholding the zero tolerance policy on piracy The pirating of films is a very serious issue and we all need to remain vigilant to protect the art of film and the myriad of businesses that the film industry supports. We believe that the attention that this incident has drawn, has served as a reminder to us all

[Examiner-y2009m12d11-Charges-against-accused--The-Twilight-Saga-New-Moon-pirate-dropped](#), last viewed on February 1, 2010 [hereinafter, *Charges Dropped*]

¹¹⁶ *id.*

¹¹⁷ *id.*

¹¹⁸ Amanda Bell, 'New Moon' Director Chris Weitz Defends Perp in Piracy Case, Should She Really Receive Jail Time? (examiner.com, December 9, 2009), available at <http://www.examiner.com/x-4908-Twilight-Examiner-y2009m12d9-New-Moon-director-Chris-Weitz-defends-perp-in-piracy-case-should-she-really-receive-jail-time>, last viewed on February 1, 2010 [hereinafter, *Jail Time?*]

¹¹⁹ *id.*

¹²⁰ Bell, *Charges Dropped*, *supra* note ____.

¹²¹ Bell, *Jail Time?*, *supra* note ____.

¹²² See http://en.wikipedia.org/wiki/Summit_Entertainment, last viewed on February 1, 2010 ("Summit was originally founded in the early 1990s ... as a production, distribution, and sales organization. In 2006, it became a fully independent film studio, Summit Entertainment,After a string of flops including *P2*, *Penelope*, *Never Back Down* and *Sex Drive*, Summit finally found success in November 2008 with the release of *Twilight*, a teen romance about vampires based on the best-selling book of the same name by Stephenie Meyer that made \$383,530,753 worldwide.")

that any form of film piracy, or perceived piracy, will be treated with the utmost seriousness.

Summit is pleased that all charges against Ms. Tumpach have been dropped and appreciate the efforts of the police and the prosecutors in this outcome."¹²³

Summit is "pleased" that the charges were dropped, but makes no apologies for the initial arrest, nor for taking no apparent public action to set the matter straight. In fact, Summit reserves its praise for the actions of the police and prosecutors. In other words, it looks like Summit is saying that it wants to take a "hands off" approach to these matters, leaving resolution to the criminal justice system. One could argue that copyright holders should take a more active role in these situations, particularly where, as here, some of their key creative personnel – such as a movie director – are speaking out against a given police action.

While Tumpach's video was never intended to be publicly distributed, the story surrounding her arrest and release were very quickly and publicly disseminated over the blogosphere. Web 2.0 technologies that enable the public to comment on these kinds of situations might be of concern to copyright holders, particularly those who want to maintain good relations with their customers. Presumably, Tumpach's arrest will not prevent die-hard *Twilight* fans – often referred to as *Twihards*¹²⁴ - from watching *Twilight* films and buying the DVDs and soundtracks. However, some of them may think twice about seeing other films produced by Summit.

The executives at Summit may have engaged in a cost-benefits analysis and realized that they probably would not lose much, if any, audience share by supporting the zero-tolerance policy in this instance. It was therefore likely more important to them to support the MPAA's stance against copyright piracy than to protect one fan who was careless enough to record in a movie theater despite posted signs warning against recording in the theaters. Maybe the outcome here is as it should be, if one takes the view that theater patrons are clearly notified that recording movies is an offense and will be penalized. On the other hand, perhaps a reasonable theater patron could interpret those warnings as prohibiting recording entire films, as opposed to random – and commercially unusable - snippets. Similar interpretative uncertainties seem to be arising here as with interpretation of the fair use defense in the video mashup context¹²⁵. As there is no clear *ex ante* guidance as to whether a particular mashup will be fair use or not, there is arguably also no clear guidance as to when a recording in a movie theater is sufficiently *de minimus* not to attract criminal copyright liability.

Perhaps copyright distributors and movie theaters should be required to make their warnings against recording in theaters more clear than they currently are. Alternatively, police could be given more discretion about when to detain a person for recording snippets, but this would also require clearer – or at least different – guidelines than currently exist. Perhaps in cases like the Tumpach scenario, police could be given the clear discretion, supported by an

¹²³ Bell, *Charges Dropped*, *supra* note ____.

¹²⁴ Urban Dictionary defines a "Twihard" as a "serious/obsessive reader of the Twilight Saga by Stephenie Meyer", available at <http://www.urbandictionary.com/define.php?term=Twihard>, last viewed on February 1, 2010.

¹²⁵ See Part II.C.2, *supra*.

MPAA statement, to confiscate the physical recording – or perhaps even the recording device - but to excuse the individual who made the recording.

E. Case Study 4: *robessedpattinson.com* Bloggers versus *Robessed* DVD Producers

The consumer reviews section on Amazon.com for a documentary entitled *Robessed* - about actor Robert Pattinson who plays Edward Cullen in *Twilight* – contains some interesting data. Amazon's consumer reviews incorporate feedback from customers about products and services available on Amazon. Amazon encourages customers to rate their past purchases from one to five, one being the lowest and five being the highest recommendation for a product. A summary of customer rankings is presented in a bar graph on Amazon's webpage for the item, accompanied by a series of full text customer reviews. Each product's bar graph generally conforms with one of two basic configurations. Either customers agree on the ranking, so the ranking clusters around one or two consecutive numbers, or the rankings come out more in the shape of a curve representing a small number of responses from people who like the product the least, a majority of responses clumped in the middle, and a small number of rankings on the high end from people who really love the product.

A generally popular product may receive rankings purely in the 4-5 range, while the rankings for an unpopular product may clump around the 1-2 range. For products with split consumer support, there may be a wider smattering of rankings, say, all the way between 1 and 5, but with a majority of the rankings somewhere in the middle – around 2 or 3. By way of example, the customer rankings for Dan Brown's most recent novel, *The Lost Symbol*, were relatively evenly spread. Amazon's consumer review section for the book, including the bar graph, is reproduced in Table 1.

Table 1: Amazon Customer Reviews for *The Lost Symbol*, as of January 21, 2010¹²⁶

Amazon.com: The Lost Symbol (9780385504225): Dan Brown: Books - Mozilla Firefox

Customer Reviews

2,150 Reviews

5 star: (430)
4 star: (319)
3 star: (427)
2 star: (498)
1 star: (482)

Average Customer Review
★★★★☆ (2,150 customer reviews)

Share your thoughts with other customers:
Create your own review

ADVERTISEMENT

Because it's connected TO THE WEB, there are UPDATES to the printer that download THEMSELVES™ A Whole Lot of Nothing (Nov 19th, 2009)

Ad feedback

Most Recent Customer Reviews

★★★★★ Perfect and Fast
I am always amazed with finding the book or CD I want so fast and receiving it so promptly.
Thank you so much for both.
Granny from Centralia
Published 41 minutes ago by Vivian V. Haney

★★★★★ Outstanding Book, his best so far
I have read every one of Dan Brown's books. This one is his best by far. This book was fast paced, very well researched, and kept you on your toes throughout the book.
Read more
Published 5 hours ago by E. Brown

★★★★★ Its a Dan Brown novel

Most Helpful Customer Reviews

1,639 of 1,776 people found the following review helpful:

★★★★☆ A Fair Review and Some Advice, September 18, 2009
By Justin Lee (New York, NY USA) - See all my reviews
I want to be fair to Dan Brown.
Elitist literary critics say that Brown is not a good writer, and that his stories are bland. I personally think that if you manage to genuinely entertain and awe your audiences, then you have accomplished something worthy of reading. I also think that "The Da Vinci Code" was nearly an impossible act to follow. People will have all sorts of crazy expectations for your next book that you won't be able to fulfill. As such, I write this review as fair as I can, trying to assess it on its own merits, but comparisons are inevitable.
The Lost Symbol isn't a bad book, but it is a letdown. I didn't like this one for the same reason I didn't like Angels and Demons as much. Also, Brown doesn't advance the story at a good pace. A good two-thirds of the book (I'm not exaggerating, I counted the pages) was filled with variations on such a scene:
Character A: Have you heard of X?
Character B (usually Langdon): Yes, but I thought that was just a myth.
Character A shows or tells B something.
Character B reacts with shock.
Then, insert scenes of people walking from one place to another, being chased.
Then, insert the sentence "Suddenly everything made sense." At least for the next ten pages.
Repeat.
After reading this, I had to wonder whether Brown is a writer on Lost, where people can't seem to give straight answers, and where scenes never resolve any questions.
Here's my advice to Dan Brown:
1. Fire your editor. There were some whole passages, even chapters, that served no purpose other than to inflate your book to an unnecessary size. I don't mind reading big books, but I do mind reading through unnecessary words. Ch. 69, for example, is unnecessary. If your editor didn't ask you to take it out, then he should be fired. Sorry.
2. We don't need to know exactly how every character moves from one location to the next, which turn they took, what street they walked across. If it serves the plot, if the geography is important (as it was in Angels and Demons), then fine. Geography was crucial at certain moments in this book, but many times, the passages when you describe how someone moves from one part of a house to another part, what door they opened and closed, all that is boring and tedious.
3. Don't write your novel like a screenplay. Whether you've done it consciously or not, your short chapters read as if you had in mind exactly what camera shots you expect out of an inevitable movie adaptation. Leave that to the screenwriter. If they can adapt a book like "Naked Lunch," they can surely adapt your book as well. Write your novel as

Similarly, Amazon's customer rankings for the boxed set of *Twilight* books is set out in Table 2. Unlike *The Lost Symbol*, the rankings here are clustered around 5, indicating the high popularity of the series.

126

See http://www.amazon.com/Lost-Symbol-Dan-Brown/dp/0385504225/ref=sr_1_1?ie=UTF8&s=books&qid=1264118731&sr=1-1, last viewed on January 21, 2010

Table 2: Amazon Customer Reviews for the boxed set of *Twilight* novels, as of January 21, 2010¹²⁷

The screenshot shows the Amazon.com website for the Twilight Saga Collection (9780316031844) by Stephenie Meyer. The page displays customer reviews, including a star rating breakdown, average review score, and several detailed reviews. An advertisement for the BlackBerry Curve 8520 is also visible.

Customer Reviews
2,011 Reviews

5 star	(1,757)
4 star	(129)
3 star	(39)
2 star	(17)
1 star	(69)

Average Customer Review
★★★★★ (2,011 customer reviews)

Most Helpful Customer Reviews

335 of 352 people found the following review helpful:
★★★★★ The Complete Hardcover Twilight Saga, October 17, 2008
 By **J. Evans** (Los Angeles, CA) - [See all my reviews](#)
TOP 1000 REVIEWER REAL NAME VINE VOICE
[Amazon Verified Purchase \(What's this?\)](#)
 This set includes all the books from the Twilight Saga, which includes: Twilight, New Moon, Eclipse, and lastly Breaking Dawn. The books themselves are exactly like the ones you find at any bookstore, in hardcover. The case it comes in has all the book covers displayed on each side minus the names of each book. What is included that you couldn't normally get by buying each one individually elsewhere are 4 5x7-ish cards that have the cover picture on one side, then quotes from the corresponding book written on the other. For example: one 5x7 has a picture of the twilight cover, hands holding a red apple, then the other side it says, "About three things I was absolutely positive. First, Edward was a vampire. Second, there was a part of him--and I didn't know how dominant that part of him might be--that thirsted for my blood. And third, I was unconditionally and irrevocably in love with him." (I included some pictures so you can get a better idea of what they are)
 I would recommend this set to those who do not already own the twilight collection (like me) and would like to own all the books (I borrowed them all from a friend). Or of course obsessed twilight fans. There's nothing truly remarkable about the set so I wouldn't go buying this if you already own all the books.
 I am very happy with my purchase nonetheless. This saga is one of my favorites.
 Comments (17) | [Permalink](#) | Was this review helpful to you? Yes No [\(Report this\)](#)

106 of 115 people found the following review helpful:
★★★★★ Gorgeous keepsake collection of all four books in the Twilight series!, November 7, 2008
 By **z.hayes** (plano,texas) - [See all my reviews](#)
TOP 500 REVIEWER VINE VOICE
 This is a value buy for those who are contemplating sinking their teeth [pun intended] into Stephenie Meyers' Twilight series as it not only offers all four books, i.e. Twilight, New Moon, Eclipse and Breaking Dawn for a great price, they all come housed in a gorgeous keepsake box. I have all four of the books in hardcover, but I purchased them individually as they were released, and am seriously contemplating getting this boxed set which I can keep as a souvenir, and then use the other books as my reading copies.
 Well, for those who are new to the series, the books are in the following order:
 Twilight - Bella Swan moves to a small town near Seattle called Forks and meets Edward Cullen, an enigmatic student at her high school who turns out to be a vampire and lives with his clan in a magnificent mansion. As the romance between Bella and Edward blossoms, they have to face obstacles such as the physical 'constraints' of being in a mortal-vampire relationship, fierce criticism from their respective families, and threats from other vampire species.

Most Recent Customer Reviews

★★★★★ Excellent value
 I am very pleased with my purchase. The book case and hardcover books are very nice and definitely well worth the price. Amazon had the best price around by far.
[Read more](#)
 Published 6 hours ago by B. Tribble

★★★★★ Christmas gift for Daughter
 This was a great Christmas present----the books arrived in time and was a hit with my daughter---she has read the books several times and they are very durable---...
[Read more](#)
 Published 1 day ago by Edith Bunker

★★★★★ Great Series!
 This series of books is more than I expected, even after hearing what others think of it. I've read the first book and started the

These examples demonstrate how customer reviews tend to either spread or cluster. What was interesting about the reviews for the *Robessed* DVD is that they did not follow either pattern. The reviews comprised a large group of fives, nothing in the middle, and then a large group of ones. Amazon's consumer review section for the DVD is set out in Table 3.

¹²⁷ See http://www.amazon.com/Twilight-Saga-Collection-Stephenie-Meyer/dp/0316031844/ref=sr_1_1?ie=UTF8&s=books&qid=1264119088&sr=1-1, last viewed on January 21, 2010.

2010¹²⁸ **Table 3: Amazon Customer Reviews for the *Robessed* DVD, as of January 21,**

Customer Reviews

79 Reviews

5 star: (24)
4 star: (0)
3 star: (0)
2 star: (1)
1 star: (54)

Average Customer Review
★☆☆☆ (79 customer reviews)

Share your thoughts with other customers:
[Create your own review](#)

Most Helpful Customer Reviews

17 of 20 people found the following review helpful:

★☆☆☆ **Nothing You Haven't Already Seen. Why Spend \$18 When You Get Rob Info Online for FREE?**, October 9, 2009
By [DeadBunnyDip "Bunny in a Blender"](#) (The Land of the Over Yonder) - [See all my reviews](#)
Being a true fan. It upsets us that companies would want to milk the situation and profit from it. Several reviews have stated that this DVD has NO personal interviews with the subject, and has mostly second/third-hand information. We don't want to hear about what other people want to say about him. We want to see and hear the real deal. Besides, there are a lot of bootleg copies online, so we'll probably just torrent it. OR get it for free, and burn multiple copies of it, and distribute it FOR FREE... :D So, unless Rob Pattinson gets royalties from the MILLIONS of dollars this dvd will make from clueless fans, consider this NOT SOLD.
STOP MAKING MONEY OFF OF POOR ROB.
[Comment \(1\)](#) | [Permalink](#) | Was this review helpful to you? Yes No ([Report this](#))

57 of 76 people found the following review helpful:

★☆☆☆ **Stolen Material and Rip-off**, October 8, 2009
By [BroLo](#) (Philadelphia) - [See all my reviews](#)
Stay away from this DVD! Do not support a company that blantly steals work from fan sites: WORD FOR WORD. No permission granted, just stole blog posts and pictures to promote their video.
SHAME ON YOU.
[Comments \(3\)](#) | [Permalink](#) | Was this review helpful to you? Yes No ([Report this](#))

43 of 57 people found the following review helpful:

★☆☆☆ **Not worth your money**, October 8, 2009
By [K. Rielly](#) (Northern, New York) - [See all my reviews](#)
Seeing this is an unauthorized biography - much of the information is stuff we already know or information you could obtain for free off many of Rob's wonderful fan sites that already exist on the internet! Having been a teen during Leo-Mania when Titanic was the rage and having bought unauthorized dvd's like these, if I knew then what I know now about the money that goes into these things for company gain without any profit for the actor - I say fail. Do not buy this dvd.
Transferring data from spe.ardnt.com...

Most Recent Customer Reviews

★☆☆☆ **Not Worth It**
Mostly re-hashed old photos and interviews with people you've never heard of from Pattinson's early amateur theatre days. No new first-hand interviews or footage.
Published 3 hours ago by [The Old One](#)

★☆☆☆ **A rip off.**
This DVD is a rehash of pictures (still photos) and video already seen. Most are poor quality. It had no pictures that were interesting. [Read more](#)
Published 2 days ago by [Ellen R. Muggle](#)

★☆☆☆ **Disappointing**
Got this as a Christmas gift and was very disappointed. A few great photos splashed between TONS of loooooong, dry, dull interviews. Ugh.

A quick look at the first few customer comments below the graph in Table 3 provides an indication of why the graph looks like this. It is apparent from the reviews that the producer of the DVD, Revolver Entertainment, had taken a lot of material from others, including taking work from fan sites and copying it with no permission or attribution. The people who ranked the video highly presumably knew nothing of the copying allegations (or didn't care about them), while those who were knowledgeable about Revolver's activities were extremely upset and ranked the product accordingly.

One of the key blogs from which Revolver copied material was an unauthorized Robert Pattinson fansite, *robessedpattinson.com*¹²⁹. The bloggers on this website were upset when Revolver Entertainment cut and pasted material verbatim from their website to advertise the

¹²⁸ See http://www.amazon.com/Robessed-Robert-Pattinson/dp/B002OKK2B6/ref=sr_1_cc_1?ie=UTF8&qid=1264119259&sr=1-1-catcorr, last viewed on January 21, 2010.

¹²⁹ See <http://www.robessedpattinson.com/2009/10/thank-you.html>, last viewed on February 1, 2010.

DVD on its own website. Revolver gave no attribution to the bloggers. The bloggers sent a home-grown cease and desist letter to Revolver. Revolver later removed the offending material from its website, with no express acknowledgment that it had received the letter¹³⁰.

This episode is illuminating on a number of fronts. For one thing, it is an example of a small group of bloggers bringing a complaint against a commercial production company. More typically, copyright actions have historically involved the opposite dynamics – a commercial enterprise proceeding against individuals who have copied its work without permission. This example illustrates that fact that when Web 2.0 technologies empower consumers to become creators, those consumer-creators seek to protect their own creations just as surely as commercial producers of valuable copyrighted works do.

Another notable aspect to this scenario was the fact that, unlike deep pocketed commercial copyright holders with their own teams of legal advisors, the bloggers had to make do with their own understandings of the law. Their initial description of what happened, still available on their website, does not mention copyright infringement at all, despite the fact that, to an intellectual property lawyer, copyright infringement was clearly what was going on here. The bloggers describe Revolver's conduct in terms of plagiarism¹³¹ – which of course is also an accurate description of their conduct, but generally not one that gives rise to a legal remedy¹³². The bloggers also describe plagiarism as a crime which, at least in legal terms, it is not¹³³.

Another of the bloggers' stated concerns was the desire to protect their idol, Robert Pattinson, from unauthorized commercial exploitation. On their blog, they note that: "Our stand on the DVD is still the same. It's unauthorized, Robert Pattinson is not getting a dime from it and they [Revolver Entertainment] managed to anger us, the fan base by stealing"¹³⁴. The bloggers clearly drew a distinction between their own activities and those of the makers of the unauthorized DVD. They see nothing wrong with their own online activities – non profit public discourse about Pattinson including text, photos and videos. However, they draw the line at unauthorized *commercial* exploitation.

There are some interesting parallels between the bloggers' conception of their legal rights and what the law actually says. There are also some interesting points of divergence between the two. This is therefore a useful case study to illustrate the extent to which current online social norms align with intellectual property law and whether we can learn anything about future directions for the law based on the norms, or vice versa. With respect to the bloggers' complaint about plagiarism, maybe the fact that participants in the blogosphere do not understand the difference between plagiarism and copyright does not matter in practice. In this instance, Revolver ultimately changed its website faced with the cease and desist letter. Whether a letter of complaint is framed in terms of plagiarism or copyright infringement may be irrelevant if it

¹³⁰ *id.*

¹³¹ *id.*

¹³² NIMMER ON COPYRIGHT, §8D.03[A][2][c] (noting that while plagiarism is an ethical wrong, it does not ground a legal action).

¹³³ See <http://www.robsessedpattinson.com/2009/10/thank-you.html>, last viewed on February 1, 2010; see also <http://madisonian.net/2009/12/11/more-on-digital-copyright-norms-and-twilight/>, last viewed on February 1, 2010.

¹³⁴ See <http://www.robsessedpattinson.com/2009/10/thank-you.html>, last viewed on February 1, 2010.

results in the desired action from the complaining party's point of view. On the other hand, some of the comments on the blog might lead a lawyer to wonder whether someone should be doing a better job of educating the public about copyright law, particularly now that members of the public are increasingly becoming creators themselves in Web 2.0 forums.

One particular statement on the *robsessedpattinson.com* blog might be a good example of where public education could be helpful: "Plagiarism is an awful crime and we should always stick together to fight it."¹³⁵ While plagiarism is obviously dishonest, it is not a crime¹³⁶. There is also little guidance as to how we can "stick together" to fight it. Maybe if the law was easier to understand and if consumer-creators had a better sense of where they might obtain legal assistance, the copyright system would create fairer results. Blogs themselves could actually be a great source of such public education if people with the relevant information were blogging more about these issues.

For example, the author of this article posted on an intellectual property law blog about the *Robessed* scenario¹³⁷. One of the bloggers from the fansite saw the entry and entered into an online discussion about her legal rights¹³⁸. This may be an example of the way in which Web 2.0 technologies enable norms and laws to interact. If lawyers and non-lawyers blog together about legal issues, the non-lawyers obtain a better understanding of their legal rights and the lawyers learn more about emerging online norms. Of course none of this goes directly to the official law and policy makers – Congress and the judiciary – unless they are also trolling the blogosphere for information, or are encouraging their aides and judicial clerks to do so.

Interestingly, it did not seem to have dawned on the *robsessedpattinson.com* bloggers that they might have a common law trademark corresponding with their domain name and that Revolver entertainment may have infringed or diluted the mark. If the bloggers had wanted to bring a trademark-related action against Revolver, they may have succeeded in obtaining an injunction against distribution of the DVD. This does not appear to be what the bloggers wanted. They seemed happy with simply having their own text removed from Revolver's website. However, that may be because they did not realize the full extent of their legal rights.

Of course, a trademark action may be difficult to maintain in the case of an unregistered mark where the mark has not been associated with a commercial product or service. If blogs are seen as predominantly noncommercial speech forums, it might be difficult to establish an unregistered mark in a relevant domain name. However, one might take the view that the bloggers are providing an information service to fans of Robert Pattinson. There is some authority in the trademark law context – mainly in the case of Internet domain name disputes – that anything that happens on the Internet can be described as sufficiently "in commerce" for the

¹³⁵ *id.*

¹³⁶ NIMMER ON COPYRIGHT, §8D.03[A][2][c] (noting that while plagiarism is an ethical wrong, it does not ground a legal action).

¹³⁷ See <http://madisonian.net/2009/12/11/more-on-digital-copyright-norms-and-twilight/>, last viewed on February 1, 2010.

¹³⁸ *id.*

purposes of trademark infringement and dilution¹³⁹. Admittedly, these judicial comments are largely aimed at determining whether a *defendant's* activities are sufficiently in commerce for trademark purposes, rather than whether the *plaintiff's* use of a mark is operating as a commercial source identifier¹⁴⁰. Nevertheless, the notion that anything happening on the Internet is automatically "in commerce" might have broader application.

If "robsessedpattinson.com" operates as a trademark, it is possible that the use of a substantially similar phrase, *Robessed*, as the title for a commercial DVD comprises trademark infringement or dilution by blurring¹⁴¹. A trademark infringement action might be successful in these circumstances because it is hinged on the defendant confusing consumers as to the source or origin of a particular product or service¹⁴². As the *Robessed* movie title bears a striking similarity to the "robsessedpattinson.com" domain name, and the DVD is aimed at a very similar market to the fan website – that is, fans of Robert Pattinson – Revolver Entertainment might well be liable for trademark infringement. Consumer confusion is not a necessary element of a trademark dilution action¹⁴³. Thus, if the bloggers had a trademark in their domain name, they would not need to establish confusion to mount a dilution action, although they would have to assert that their trademark was sufficiently "famous" as required by the dilution statute¹⁴⁴. This may be difficult for a fan website in practice.

¹³⁹ *Planned Parenthood Federation of America v Bucci*, 42 U.S.P.Q. 2d 1430, ___ (S.D.N.Y. 1997) ("defendant's [cybersquatting] actions affect plaintiff's ability to offer plaintiff's services, which, as health and information services offered in forty-eight states and over the Internet, are surely "in commerce." Thus, even assuming ... that defendant's activities are not in interstate commerce for Lanham Act purposes, the effect of those activities on plaintiff's interstate commerce activities would place defendant within the reach of the Lanham Act ... Second, Internet users constitute a national, even international, audience, who must use interstate telephone lines to access defendant's web site on the Internet. The nature of the Internet indicates that establishing a typical home page on the Internet, for access to all users, would satisfy the Lanham Act's "in commerce" requirement.")

¹⁴⁰ Mark Davison and Frank Di Giantomasso, *Use as a Trademark: Avoiding Confusion When Considering Dilution*, 2009 EUR INT PROP REV 443 (2009) (noting difference between a defendant's and a plaintiff's use of a mark in commerce under trademark law in the dilution context).

¹⁴¹ 15 U.S.C. § 1125(a) (infringement of unregistered trademark); § 1125(c)(1) (dilution action); § 1125(c)(2)(B) (definition of "dilution by blurring").

¹⁴² 15 U.S.C. § 1125(a)(1)(A) ("Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... *is likely to cause confusion*, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person ... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.") (emphasis added)

¹⁴³ GILSON ON TRADEMARKS, §5A.01[1] ("the public policy underlying dilution law stands in sharp contrast to that underlying the law of trademark infringement. Under the latter, the twin policy reasons behind the law are to protect the good will and property rights of the trademark owner and the corresponding right of the public to be free from confusion, deception and mistake. Dilution law, on the other hand, protects only a private interest, and a narrow one at that: the distinctiveness and reputation of famous trademarks. At least in cases where there is no simultaneous likelihood of confusion, there is no identifiable benefit to the public.")

¹⁴⁴ 15 U.S.C. § 1125(c)(1) ("Subject to the principles of equity, the owner of a *famous mark* that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.") (emphasis added)

III. Copyright Lessons from the Vampire Blogosphere

While the case studies presented here comprise a somewhat eclectic mix of scenarios involving intellectual property rights in the Web 2.0 generation, it is possible to extrapolate some general trends relating to copyright law and policy in the Web 2.0 context. The case studies also nicely illustrate some of the emerging interactions between online norms, copyright laws, and to some extent market forces¹⁴⁵. Importantly, these case studies shed some light on the attitudes of those who are often under-represented in intellectual property policy debates - notably individual authors, and their consumer-creator fan bases. At least three significant points can be drawn from the case studies that would be useful areas for future debate and development in copyright law and policy. They comprise: (a) the relevance of *intention* to Web 2.0 copyright law and enforcement policies; (b) the varying perspectives on copyright protections of different stakeholders including original authors and their fans; and, (c) the problematic application of the fair use doctrine within the Web 2.0 remix culture. Each of these issues is discussed in some detail in the following sections.

A. The Role of Intention in Copyright Infringement

The second and third case studies are good illustrations of the relevance of intention within the Web 2.0 copyright context. The second case study focused on fan mashups of copyrighted works, while the third involved criminal infringement of copyright with respect to snippets of a film incidentally recorded at a birthday party. In each case, there is an apparent mismatch between how potential copyright infringers think that the law works – or should work – and how the law actually works. The fans creating mashup videos and the young woman taking the video in the movie theater felt that their intentions not to infringe copyright should count for something¹⁴⁶. However, the strict liability basis of copyright law does not take account of intention.

We might draw two distinct conclusions about the relevance of intention in copyright policy. The first conclusion is that copyright infringers are simply ignorant of copyright law and need to be better educated so they know that copyright infringement involves strict liability. The second possible conclusion is that there is something wrong with current copyright law and policy. Under this second view, the law is not sufficiently tailored to the realities of consumer uses of works involving modern digital technologies. While strict liability may have made sense in previous times when technology was less sophisticated, it arguably now causes harm to society’s ability to express itself using these new more interactive technologies. In this sense, copyright could be working counter to its underlying aims of encouraging innovation and artistic expression¹⁴⁷.

There is some merit to the first conclusion – that copyright policy works just fine and consumer-creators need to be better educated. This policy has developed over the years to

¹⁴⁵ For example, the MPAA’s zero tolerance policy on digital copyright piracy discussed in Part II.D, *supra*, is an example of a market force in this context.

¹⁴⁶ See discussion in Parts II.C and II.D, *supra*.

¹⁴⁷ LEAFFER, *supra* note ____, at 24 (“copyright law provides the incentive to create information and a shelter to develop and protect it”)

protect copyright holders against unauthorized uses of their works for good reason. On this view, consumer-creators need to be aware not only that copyright infringement involves strict liability, but they also need to be better educated as to how to mount effective defenses to infringement claims. And there's the rub. As noted previously, the most obvious defense for copyright infringement in the consumer-creator context is fair use. The contours of the defense are simply too vague for consumers to know with any degree of certainty whether their activities – mashup videos, private recordings, fan fiction - comprise fair use in any given case. Additionally, there is little *ex ante* guidance as to whether a particular use will be regarded as a fair use. Thus, potential infringers would need to be prepared to defend against a copyright infringement action to establish their defense. In this sense, a consumer-creator will always be on the defensive. There is no affirmative action an individual can take to establish a fair use. A mere assertion on a YouTube video that the video is a fair use or that no copyright infringement was intended will not be determinative of fair use.

Another wrinkle to relying on the first conclusion – that copyright policy is fine as it is – is that when criminal cases are considered alongside civil actions, the law becomes even more confusing. It is currently unclear whether intent is an aspect of criminal copyright law. Nimmer has noted that American courts have generally required proof of intent or willfulness to be established by the prosecution on the part of the alleged infringer in a criminal copyright case¹⁴⁸. However, it is unclear whether this means intent to *copy* or intent to *infringe*¹⁴⁹. When applied to a situation like the third case study – involving potential criminal action for incidental videotaping of a snippet of a film – it is not clear how an intent inquiry might play out. Tumpach, the potential criminal defendant, probably did not intend to *infringe* copyright law, but she may have intended to *copy* snippets of the movie, particularly if intent is interpreted as incorporating consciously pointing a video camera in the general direction of a movie screen and pressing the “record” button.

Where intention is perhaps more relevant in the criminal context is the requirement, clearly downplayed or overlooked by the police in the Tumpach situation, that the defendant acts with a commercial profit motive¹⁵⁰. In this respect, the Tumpach case study evidences the need for better education of those enforcing criminal copyright law, rather than better education of copyright consumers. If commercial profit motive is a requirement of a criminal copyright prosecution, then Tumpach should never have been detained, given that three minutes of film footage with her own voice obscuring the audio track could clearly never be the basis of a commercial profit enterprise.

In sum, the difficulties inherent in accepting that copyright should always attract strict liability is the amount of uncertainty this view generates in practice. It leaves consumers struggling with confusing issues as to the availability of the fair use defense. It also leaves those enforcing copyrights in the criminal sphere struggling with the extent to which criminal liability should differ from civil liability in terms of intent, if at all. If intent were to become an aspect of

¹⁴⁸ NIMMER ON COPYRIGHT, § 15.01[2].

¹⁴⁹ *id.* (“Some courts have suggested that “willful” for these purposes may mean only an intent to copy, not to infringe.”)

¹⁵⁰ *id.* (“the historic requirements for criminal infringement, beyond those required for the civil variety, have been willfulness and commercial advantage.”)

copyright law, then some of these problems may be alleviated. Adopting an intent requirement in copyright law would also better meet the realities of Web 2.0 society as evidenced by online discussions, including comments by original authors, and their fans¹⁵¹.

None of this is to say that a true copyright infringement should be excused on the basis of someone posting a "no intent to infringe" notice on her derivative work. The idea here is that maybe intent could capture some of the more salient aspects of copyright infringement *ex ante* – especially the question whether the potential infringer had a commercial profit motive that might compete with the copyright holder's commercial exploitation of the work. Considering this issue in the context of the initial infringement question might be a better approach than relegating the commercial competition point to the fair use defense¹⁵². In the latter context, the intent question might get lost in the balancing of the other fair use factors. Allowing the intent factor to stand on its own in the initial infringement inquiry might better focus market participants, and ultimately courts, on the realities of Web 2.0 interactions. In other words, it may be better to bring copyright law more in line with existing aims and expectations of copyright stakeholders than to educate those parties about laws and policies that are out of touch with the realities of modern online interactions.

B. What Creators Want: Autonomy versus Profit

The first and fourth case studies illustrate what we might learn from the blogosphere about the desires and motivations of authors with respect to their own original creations, as distinct from the needs of their commercial producers and distributors. The first case study involved Stephenie Meyer's views on the unauthorized online dissemination of her uncompleted work, *Midnight Sun*. The fourth case study involved the unauthorized Robert Pattinson fan bloggers' complaint about a commercial DVD producer that misappropriated its web content. Unlike the focus of traditional copyright discourse involving commercially motivated producers and distributors, the individual authors in these two case studies were more concerned with interests traditionally associated with moral rights. In neither case were the authors openly concerned about the impact of the wrongdoer's conduct on their own ability to commercially profit from their work. Rather, Meyer was concerned about her ability to control the form in which readers ultimately experienced her work, and the bloggers were concerned that their work was taken without their consent. They might possibly have consented if they had been asked or if their work had been attributed to them.

With respect to Meyer's concerns, even though she expressed herself on her blog as being concerned about copyright infringement, her key complaint seemed to relate to what a European lawyer might describe as a moral right - notably the right of integrity¹⁵³. This is the right to control the form in which a work is exposed to the public¹⁵⁴. In jurisdictions with moral

¹⁵¹ See discussion in Parts II.B, II.C and II.D, *supra*.

¹⁵² ie in the context of the fourth statutory fair use factor – "the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. § 107(4)).

¹⁵³ Ong, *supra* note ___, at 298 ("Integrity rights enable the artist to prohibit alterations to his work by subsequent owners of the physical objects to the extent that such alterations are injurious to his honor or reputation - such instances of manipulation of his artistic vision are as offensive as direct assaults to his person.")

¹⁵⁴ *id.*

rights law, the right of integrity subsists in the author independently of copyright. The copyright may be assigned to another person, but the right of integrity remains in the hands of the author and is sometimes exercised in tension with the rights of the copyright holder¹⁵⁵. Thus, for example, a copyright holder may want to display a work of art in a particular way: say, by printing copies on a tee shirt. While copyright ownership may allow this, an author could object to the use under the right of integrity. The United States has enacted only very limited moral rights legislation, under the Visual Artists' Rights Act¹⁵⁶. These rights do not extend to authors such as Meyer¹⁵⁷.

The United States has argued that copyright law, augmented by trademark and unfair competition law does much of the work in the United States that moral rights law does in other jurisdictions¹⁵⁸. Alongside exercising some control through copyright – where the author holds copyright in a work she has created – the author may also be a trademark holder with respect to her work because her name is a source indicator with respect to the work¹⁵⁹. Thus, if someone else makes a use of the work in commerce in a misleading, deceptive or confusing way or, perhaps more to the point, in a way that dilutes the author's name as a mark, that person could be subject to trademark liability. So, for example, an author might argue that the presentation by someone else of her work – particularly in a form in which she would not have released the work – dilutes her name as a mark in the commercial book market.

Interestingly, on her blog, Meyer does not assert trademark interests in this way, but speaks only of copyright infringement¹⁶⁰. There are likely a variety of reasons for this. Meyer did not want to bring an action against those who released her draft manuscript for *Midnight Sun* over the Internet. Thus, in many ways it does not matter what right she asserts here, because she is not intending to bring an action. As an expressive matter – to express issues relating to the rights of an author over her work – copyright probably makes more sense in this context than trademark. At least copyright is the law nominally aimed at author's rights, while trademark law is aimed at commercial markets. As a corollary to this point, in order for an author to bring a

¹⁵⁵ *id.*, at 305.

¹⁵⁶ NIMMER ON COPYRIGHT, § 8D.06 (“In 1990, Congress revisited the issue of moral rights that had played so prominently in the BCIA’s declaration of absolute neutrality on the questions of attribution and integrity. After receiving extensive testimony from the affected industries, Congress abandoned neutrality in favor of federal legislation implementing moral rights in a limited sphere, *viz.* in the realm of certain visual arts. Outside that sphere, however, Congress made clear its antipathy to the expansion of copyright law to embrace general moral rights. The new law, entitled the Visual Artists Rights Act of 1990, became effective on June 1, 1991.”)

¹⁵⁷ *id.*, 8D.06[A][1] (“The Visual Artists Rights Act of 1990 begins by defining a new category: “work of visual art.” Works meeting the statutory definition include a “painting, drawing, print, or sculpture.” Any such item that exists solely in a unique original meets the statutory criteria.”)

¹⁵⁸ DANIEL CHOW and EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS, 254 (2006) (“For the most part, the U.S. has resisted any formal recognition of moral rights for authors [T]he U.S. has taken the position that other federal and state laws outside of copyright approximate the moral rights of integrity and attribution required by the Berne Convention.”)

¹⁵⁹ See, for example, *Hillary Rodham Clinton v Michele Dinoia*, National Arbitration Forum Claim Number FA0502000414641, March 18, 2005 (available at <http://www.adrforum.com/domains/decisions/414641.htm>, last viewed on February 2, 2010) (holding that then-Senator Hillary Clinton held an unregistered trademark right in her personal name partly on the basis of having authored books under her name, and partly on the basis of her political career).

¹⁶⁰ See <http://www.stepheniemeyer.com/midnightsun.html>, last viewed on February 2, 2010.

successful trademark infringement or dilution action, the defendant has to have used the author's mark in commerce. Where anonymous online bloggers have posted an unauthorized early draft of someone else's work online, it is not clear that those bloggers have acted in commerce as required by trademark law. While some courts have taken the view that anything posted online could be in commerce for trademark purposes¹⁶¹, other courts have not accepted this view¹⁶².

Another challenge for Web 2.0 copyright law in the context of individual authors is lack of education about how copyright law works, or rather lack of a better – or more tailored – legal avenue to get at what those authors really want. While Meyer probably does understand at least the basic elements of copyright law, she uses it as the closest legal analog she can find for rights she wants to assert in her work. Even if her concern is with integrity of the work, rather than economic rights, copyright does technically give her the legal right to control what others do with the work without her permission.

In the fan blog context, on the other hand, the bloggers themselves seemed to have little to no grasp of the nature of their legal rights. They had a sense that they had been wronged by the producer of the *Robbed DVD*, but they were unable to put their finger on their exact legal rights. They framed their initial complaint in terms of the crime of plagiarism. A letter to the DVD producer framed in these terms appears to have achieved their desired end of putting a stop to the unauthorized misappropriation of their work. However, the bloggers at the time of their complaint had no clear knowledge of their legal rights. In fact, as described in Part II.E.1, the bloggers' legal rights were probably much more extensive than they realized. They may have had grounds for successful copyright and trademark infringement claims against the DVD producer. They might have secured an injunction and potentially also a damages award. While the bloggers stated that they were not interested in money, and they just wanted Revolver to stop making unauthorized use of their content¹⁶³, it is possible that their initial views would have been different if they had a better awareness of their potential legal rights.

These Meyer and "robbedpattinson" scenarios suggest a couple of things about the role of individual authors in the Web 2.0 copyright matrix, particularly now that consumer-creators like fan bloggers are beginning to attempt to assert legal rights in their work. For one thing, these case studies suggest that more has to be done in terms of public education so people know what their rights are in relation to works they create online. A corollary to this is that perhaps

¹⁶¹ *Planned Parenthood Federation of America v Bucci*, 42 U.S.P.Q. 2d 1430, ___ (S.D.N.Y. 1997) ("defendant's [cybersquatting] actions affect plaintiff's ability to offer plaintiff's services, which, as health and information services offered in forty-eight states and over the Internet, are surely "in commerce." Thus, even assuming ... that defendant's activities are not in interstate commerce for Lanham Act purposes, the effect of those activities on plaintiff's interstate commerce activities would place defendant within the reach of the Lanham Act Second, Internet users constitute a national, even international, audience, who must use interstate telephone lines to access defendant's web site on the Internet. The nature of the Internet indicates that establishing a typical home page on the Internet, for access to all users, would satisfy the Lanham Act's "in commerce" requirement.")

¹⁶² *Bosley Medical Institute v Kremer*, 403 F.3d 672, 679 (2005) (holding in the cybersquatting context that: "The Lanham Act, expressly enacted to be applied in commercial contexts, does not prohibit all unauthorized uses of a trademark.")

¹⁶³ Comment from blogger "Godze" at <http://madisonian.net/2009/12/11/more-on-digital-copyright-norms-and-twilight/>, last viewed on February 2, 2010 ("We weren't after monetary compensation/gain, after they stopped copying our blog and apologized that was enough for us. We have no ill will towards Revolver Entertainment.")

mechanisms should also be developed to make access to enforcement of those rights easier than is currently the case. For example, if the letter of demand had not worked for the Pattinson fan bloggers, they may not have been able to afford the costs of litigation against Revolver and thus knowledge of their legal rights may have been of little practical use.

These case studies also demonstrate that copyrights are often only a proxy for what many authors really want in terms of control of their literary and artistic works. Despite the disdain of many economically developed countries for moral rights, it might be worth reconsidering that position in the Web 2.0 context. Web 2.0 technologies allow more to be done with the works of others without their authorization. Thus, rights to attribution and integrity arguably take on a greater importance. Of course, the downside to creating more rights of authorship in this context, is that those wanting to utilize existing works to create mashups online may run into trouble against rights of attribution and integrity. While attribution may not be much of a problem in practice if a good faith remix artist is prepared to acknowledge her sources publicly, integrity could be a problem if an original artist objects to the content of the remix. Thus, even if a remixer obtains copyright permission to create the remix, or successfully asserts a fair use defense, she could still face difficulties if the author of a source work independently asserts an action based on the moral right of integrity.

Regarding the emergence of Web 2.0 technologies as a potential reason to revisit the moral rights question in the United States necessitates considering a balance of moral rights of authors against others participating in the Web 2.0 culture. This balance may not be easy to strike in practice, and it may be that ultimately the costs of adopting moral rights outweigh the benefits in terms of facilitating creativity online. However, the moral rights debate has not yet played out in the Web 2.0 context in the United States. Even if moral rights are ultimately rejected in this context, such discussions may lead to a greater awareness as to how copyright, trademark, and unfair competition law might apply in Web 2.0 forums to protect the rights of individual authors while not unnecessarily impinging on commercially neutral remixing activities.

C. Fair Use in the Blogosphere

The second case study – and to some extent, the fourth – raise questions about whether the fair use defense to copyright infringement is working – or indeed can work – effectively in the Web 2.0 context. The second case study involved fan remixes of copyright works while the fourth focused on an unauthorized Robert Pattinson fan blog. The challenge for the fair use defense in the Web 2.0 context relates to aspects of the defense that have always existed, but that come into sharp focus because of the sheer number of downstream consumer-creators online making derivative works¹⁶⁴. The American fair use defense takes an equitable rule of reason approach to excusing copyright infringements on the basis of a number of factors now set out in

¹⁶⁴ 17 U.S.C. § 101 (defining “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.)

§ 107 of the copyright act¹⁶⁵. This differs from the position in most other countries where more clearly delineated rules for fair dealing have been established¹⁶⁶. The American approach has both advantages and disadvantages. The advantages inhere in its flexibility of application to new situations. The disadvantages are that the application of the defense in any given scenario is inherently uncertain, and no clear determination on fair use can be gleaned outside actual litigation. Thus, there is no *ex ante* guidance as to whether a particular use of a copyrighted work will be a fair use or not.

This can be particularly challenging in the Web 2.0 context because of the sheer number of people who might assert fair use online, the geographical mix of regions in which those people might reside, and the variety of activities engaged in by the remix culture. Previously, most fan uses of copyrighted works involved verbatim copying for purely consumptive personal use¹⁶⁷. Today, consumers become creators as a result of the cheap and easy accessibility of recording and remixing technologies. Thus, consumer-creators’ relationships to copyrighted works tend to be more interactive and the resulting creations more transformative. American courts have made much in the past of the need for a transformative use of a copyrighted work under the first fair use factor in § 107 to support a fair use defense¹⁶⁸.

While fans’ creations are more transformative than ever before, more voluminous than ever before, and are disseminated across national boundaries at a rate never before possible, the vagueness of the American fair use defense becomes infinitely more problematic. Particularly troublesome is the fact that no individual user can know in advance either whether a copyright holder will object to a given remix, or whether a viable fair use defense is available. Ultimately, it might only take one or two copyright holders threatening litigation to chill a large amount of online creation by fans.

There are a number of possible approaches to this difficulty. Law and policy makers could think about amending § 107, or at least releasing guidelines to clarify the scope of the section with respect to typical Web 2.0 remixing activities. In particular, guidance about the application of the fair use defense to typical *noncommercial* remixing activities would be useful. As noted in Part II.C.2, it may be that case that many noncommercial activities would, in fact, be found to be fair uses if the cases were ever litigated in court. This is because of the significance that tends to be attached by courts in applying the fair use defense to the first and fourth fair use factors – the nature and purpose of the use, and the likelihood of the defendant’s activity to encroach into a market of the copyright holder. The first and fourth fair use factors are the ones that tend to go to the heart of most copyright holders’ complaints. This is because copyrights have become predominantly economic rights in modern markets and most complaints by commercial copyright holders are aimed at protecting their profits.

¹⁶⁵ LEAFFER, *supra* note ____, at 469.

¹⁶⁶ See, for example, Copyright, Designs, and Patents Act, 1988 (Eng.), Chapter III.

¹⁶⁷ For example, audio recordings of songs, video recordings of TV shows on pre-digital media that was difficult to remix.

¹⁶⁸ NIMMER ON COPYRIGHT, §13.05[A][1][b] (discussion of “transformative” and “productive” use terminology employed by courts in applying the first fair use factor).

If most noncommercial remixes and blog posts are likely to fall under the rubric of fair use, it may be a good idea for Congress or the Copyright Office to adopt a clear guideline to this effect. This may be easier to achieve than waiting for a judicial determination because it gives clear *ex ante* guidance to participants in the blogosphere, and Web 2.0 society generally, as to the scope of legitimate activities involving copyrighted works. Some commentators have suggested other avenues to create *ex ante* guidance about the scope of fair use rights in general, and these thoughts could be usefully applied in the Web 2.0 context¹⁶⁹.

IV. Conclusions

This article has utilized a series of case studies revolving around the *Twilight* book and movie franchise to illustrate some of the challenges inherent in applying intellectual property law to Web 2.0 forums. While the *Twilight Saga* has no special significance with respect to intellectual property, the combination of its global popularity and the open relationship between its author and her fans creates an extremely useful backdrop for discussions of Web 2.0 intellectual property issues. Meyer and her fans have proved to be very articulate in voicing the concerns of authors and consumer-creators with respect to appropriate online uses of copyrighted works.

While no one stakeholder's views should necessarily outweigh those of others in debates about online intellectual property protection, the discourse up until now has focused largely on the economic needs of commercial producers and distributors of copyrighted works. Web 2.0 technologies not only raise challenges to the existing balance of interests, but also create a forum from which it is possible to extract information about the interests of groups whose voices have previously been rarely heard in debates on copyright policy. The case studies presented in this article are intended as an illustration of how this anecdotal data can be used to identify directions for future debates about digital copyright policy.

From these case studies, we can extract information about issues like the difficulties of identifying the role of intention within civil and criminal copyright law, and of identifying the boundaries of the fair use defense online. Additionally, we can obtain useful and detailed information about the rights that individual authors want to assert with respect to their works, as distinct from rights that commercial producers and distributors seek to enforce. Web 2.0 technologies also facilitate interactions between the different stakeholder groups with respect to online copyrights. These increased interactions between creators, commercial producers, and fans could assist in the development of more effective norms and market practices in relation to copyrighted works in the future.

This article has not attempted to resolve challenges currently facing copyright policy in the age of Web 2.0 technologies. Rather, it has suggested that information gleaned from online forums might create a useful starting point for debates about future directions in copyright law. The blogosphere is a salient, and often overlooked, source of information about balancing

¹⁶⁹ Jerome Reichman, Graeme Dinwoodie, and Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyright Works*, 22 BERKELEY TECH L J 981 (2007); Jacqueline Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARVARD JOURNAL OF LAW AND TECHNOLOGY 111 (2005).

competing interests in copyright works. Law and policy makers might use this information to great advantage at very little cost when further updating copyright law and policy.