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A VIEW OF COPYRIGHT FROM THE DIGITAL GROUND

*Andres Sawicki**

Professor Cathay Smith's *Beware the Slender Man: Intellectual Property and Internet Folklore*¹ seems at first to fit comfortably within the creativity-without-IP literature, which shows that creative practices can thrive outside of the institutions built up around intellectual property law. In areas as diverse as magic, tattoos, roller derby, pornography, stand-up comedy, and cuisine, scholars have described how creative activity is sustained even without the exclusivity that intellectual property law provides.² Similarly, Professor Smith here documents how individuals uninterested in copyright law's financial rewards nonetheless engaged in the creative activity of generating Internet folklore.

But Professor Smith takes a different—and intriguing—tack to the phenomenon. Much of the creativity-without-IP literature is industry-wide in scope; that is, scholars attempt to identify consistent patterns characterizing how typical participants in a creative field behave.³ Professor Smith instead emphasizes a single site of creative expression: the development of the horror myth of the Slender Man.⁴ While we can

* Professor of Law, University of Miami School of Law. Many thanks to the editors of the Florida Law Review for inviting me to submit this response and for their exceptionally helpful suggestions. This piece benefited significantly from commentary by Lili Levi. I am as always grateful to my wife, Jessica, who pushed me to make this contribution when I would just as well have kept it to myself.

1. Cathay Y. N. Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, 70 FLA. L. REV. 601 (2018).

2. See, e.g., CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 89, 142, 201 (Kate Darling & Aaron Perzanowski eds., 2017) (discussing creativity in fields like tattoos, roller derby, and pornography); KAL RAUSTIALA & CHRISTOPHER JON SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 165–66 (2012) (describing the impact of reuse and imitation on existing works in creative fields).

3. See, e.g., Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1790 (2008); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009). Although IP scholars typically use methodological approaches that obscure how individual works are created, this tendency is not universal. For two recent, notable (though by no means the only) exceptions, see JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 2–4 (2015) (using qualitative empirical approaches to explore the “intersection of intellectual property law on the one hand, and creative and innovative work on the other”); KATHERINE J. STRANDBURG, BRETT M. FRISCHMANN & MICHAEL J. MADISON, *The Knowledge Commons Framework*, in GOVERNING MEDICAL KNOWLEDGE COMMONS 9, 13–14 (2017) (applying an institutional analysis and development framework to the study of knowledge commons).

4. My characterization of the Slender Man as a “single site of creative expression” is contestable. After all, a key feature of the development of his mythology is that it proceeded by individuals acting without a central coordinator or organizational guidelines. See Smith, *supra* note 1, at 609. We could accordingly understand each of those individuals as operating within their own sites of creative expression. Still, there is something different about focusing on the set

draw lessons from this case as an instance of the wider field of Internet folklore, Professor Smith focuses on the granular details rather than the broader patterns. The resulting richly-textured description of one creative exercise reveals facets of its interaction (or not) with the legal system that can be difficult to see when scholars focus on generalities.⁵ In this brief response, I highlight how her approach reveals things that are otherwise obscured in some current debates about copyright law.⁶

I. MOTIVATING CREATIVITY

In many contexts, copyright's incentives are weak or irrelevant but creative activity nonetheless takes place.⁷ The irrelevance of copyright's incentives does not, however, necessarily mean that individuals engage in creative activity for no reason at all, and it is worth spending some time trying to understand the varied reasons why people participate in creative activity.⁸ Professor Smith's approach is particularly well-suited to this inquiry.

In some scenarios, non-legal mechanisms enable creators to obtain some degree of exclusivity in their work vis-à-vis plausible competitors; these creators look something like the creators in traditional copyright models, which suppose that individuals need financial rewards in order to engage in creative activity.⁹ Whether exclusivity is enabled by legal or non-legal mechanisms, however, it does not seem to loom large in creators' motivations for participating in the development of the Slender Man mythology.

In addition to financial rewards, individuals might care about non-financial rewards like social esteem.¹⁰ This seems a more helpful model

of stories, images, videos, and so on that have collectively coalesced into the Slender Man mythology as opposed to the practices typical of Internet folklore more generally because it is a cohesive, if somewhat loosely so, creative project rather than a set of entirely unrelated works.

5. This is not to say that one or another approach is necessarily preferable over the other, but simply that different aspects of a phenomenon become more or less visible as a function of the level of generality with which the analysis proceeds.

6. Professor Smith's analysis encompasses both copyright and trademark law. Smith, *supra* note 1, at 606–07. I limit my response to the copyright implications of her analysis.

7. See, e.g., RAUSTIALA & SPRIGMAN, *supra* note 2, at 98–99.

8. It is also possible that creativity arises more from unintended and unexpected interactions with cultural artifacts than from the kinds of intentional responses to stimuli described in traditional copyright models. See Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1178–83 (2007) (arguing that “[i]ndividual creators begin with situatedness and work through culture to arrive at the unexpected”).

9. See, e.g., Oliar & Sprigman, *supra* note 3, at 1794–95, 1812 (documenting social norms that punish stand-up comedians for telling jokes that are too similar to jokes told by other stand-up comedians).

10. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 43 (2006) (describing the “Joe Einstein” strategy of “giv[ing] away information for free in return for,” *inter alia*, “status [and] benefits to reputation”).

for thinking about the Slender Man story because, as Professor Smith demonstrates, community praise played a crucial role in Slender Man's development. An initial request by Gerogerigegege for "paranormal images" elicited eventually a story by Lord Dangleberry to accompany a previously posted image.¹¹ Victor Surge then posted a pair of images with accompanying captions that introduced a character recognizable as Slender Man; the positive reaction to those posts (e.g., "lost it this is going to give me nightmares") led Victor Surge to add more posts in the same vein.¹² He was praised again—"You are an amazing and terrible bastard, sir. Well played."—and other individuals then joined in.¹³ Social rewards thus seem to have played an important motivating role at the genesis of the Slender Man mythology.

Finally, many individuals engage in creative activity for a variety of internal reasons, including "compulsion, overflowing desire, and other excesses," unconnected to the financial or social rewards they might earn by engaging in creative activity.¹⁴ This framework also seems to apply here; Professor Smith shows that at least some individuals engaged in this creative experience because, in their own telling, they felt compelled to do so by some internal desire. LeechCode5, for example, states that "I've been seriously debating sharing these, but after *Victor Surge's* posts I feel I have to,"¹⁵ suggesting that a sense of obligation (of ambiguous origin) drove his participation in the creative process.

In short, Professor Smith's approach helps highlight the multi-dimensional factors that actually spark creativity. That, in turn, should help IP scholars build a more complete understanding of the varied impacts of IP law on creativity.¹⁶

II. ORGANIZING COLLABORATIVE CREATIVITY

Professor Smith's approach also allows her to direct much-needed attention to unsuccessful attempts at creative contributions. As she demonstrates, the "comments, criticism, and rejections" of efforts that "did not live up to the community's ideals" were important factors

11. Smith, *supra* note 1, at 610.

12. *Id.* at 612.

13. *Id.* at 612–13.

14. Tushnet, *supra* note 3, at 523; see also Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1949–51 (2006) (concluding that spiritual and inspirational sources, rather than economic incentive, are motivations for creativity).

15. Smith, *supra* note 1, at 613 (emphasis in original).

16. For an argument favoring models of copyright's impact on creativity that shifts copyright away from the central role it occupies in standard utilitarian economic models, see Cohen, *supra* note 8, at 1177 (advocating for copyright scholars to adopt a view of creativity that "incorporates multiple contributing factors and makes none primary").

shaping the development of the Slender Man.¹⁷ The question whether Slender Man should have tentacles coming out of his back, and how prominent any such tentacles should be, was the subject of continuous negotiation among community members as options were proposed, debated, and rejected until a rough consensus was reached; so too with the question of what kinds of settings he should appear in (incongruously in happy scenes or ominously in dark ones).¹⁸

Future scholars might profitably focus more attention on unsuccessful creative contributions. In a model in which financial rewards drive creative work, failures are perhaps boring—those who invested resources in unsuccessful contributions incur losses and the rest of us move on with our lives. So long as risk-neutral rational actors are investing consistent with the expected value of their contributions, there is not much to see in failures; the level of investment would be appropriate in light of the expectations and the fact of any given failure is simply the market's *ex post* judgment of the quality of the contribution.¹⁹

But in a model emphasizing collaborative creative activity that supposes all kinds of motives for attempting creative work and that assumes at least some of those attempts could undermine the collective effort, it is worth asking the question how exactly social mechanisms interact with failure.²⁰ Consider, for example, the possibility that too much of a negative communal response at critical junctures could have dissuaded potential contributors from trying their hand at the Slender Man myth, thereby preventing the narrative from picking up steam. Or the possibility that an overwhelming number of terrible suggestions could have buried the few gems, making it infeasible for potential contributors to sort through a trash heap of dead-ends for a viable Slender Man mythology. Or that the community could not reach even a rough consensus on which contributions were good and which were bad, leading the effort to collapse through in-fighting.

This is not to say that collaborative, distributed creative endeavors of this sort cannot succeed; to the contrary, Slender Man stands at least as a possibility proof. Instead, it is simply to say that there are likely to be interesting mechanisms to handle a world of creativity proceeding outside of the market mechanisms to which we are accustomed. And Professor Smith's approach to the development of Slender Man is likely to be

17. Smith, *supra* note 1, at 617.

18. *Id.* at 617–18.

19. I am of course setting aside the important questions of whether actors in this space are rational and, if so, what role risk (and perceived risk) plays in their decision making. Those questions are beyond the scope of this brief response, but the large literature on them is readily accessible to interested readers.

20. For an analysis of some causes of failure in collaborative creative activities and potential solutions to those causes, see Anthony J. Casey & Andres Sawicki, *The Problem of Creative Collaboration*, 58 WM. & MARY L. REV. 1793, 1808–09, 1813–14 (2017).

particularly helpful in identifying and understanding those mechanisms.

III. THE CONTESTED ROLE OF COPYRIGHT CONSTRAINT IN PROMOTING CREATIVITY

A recent debate has arisen over the possibility that copyright law might stimulate creativity not only by rewarding creators, but also by imposing constraints on subsequent creators.²¹ The basic intuition is that, to the extent that copyright law prevents individuals from slavishly imitating prior works, it pushes them to pursue novel ideas.²² Legal limitations on what creators can do might therefore function similarly to any number of limitations on artistic expression, like the I-IV-V chord progressions that define the blues or the arrival of a stranger in a frontier town that drives the plot of a Western.

It is an open question how often copyright constraints lead creators to more creative options than the ones they would have otherwise pursued; although *Star Wars* and *Super Mario Bros.* stand as notable examples supporting the possibility of generative constraints, it is unclear how representative they are.²³ Moreover, it is unclear how the frequency with which individuals create around copyright compares to the frequency with which people are simply deterred from participating in creative activity altogether for fear of incurring liability. Answering these questions is likely to be difficult because we would need some way of observing the many points in the creative process at which individuals make creative decisions, and those decisions are typically made far from the prying eyes of interested academics.

Still, Professor Smith's approach offers a potential way forward: By focusing her attention on a single site of creative activity, she is able to trace at least a non-trivial number of decisions that are made on the way to producing a creative work. Her description of the development of the Slender Man mythology suggests that most of the interesting characteristics were the result of (apparently) legally unconstrained aesthetic choices by the community.²⁴ Of course, we should not read too

21. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1337–38 (2015) (arguing in favor of the possibility of generative copyright constraints); Dan L. Burk, *The "Creating Around" Paradox*, 128 HARV. L. REV. F. 118, 122 (2015) (arguing that there is a paradox within the generative constraints theory because the scenarios which the theory contends might lead to "creating around" are precisely those in which follow-on creators would seek to license existing works); Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 HARV. L. REV. F. 125, 131 (2015) (doubting the relevance of copyright's constraints for most creators).

22. Fishman, *supra* note 21, at 1335 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

23. Burk, *supra* note 21, at 122; Tushnet, *supra* note 21, at 131.

24. See *supra* text accompanying notes 11–15 (identifying some critical creative decisions in the development of Slender Man that were not influenced by legal constraints).

much into this one case—perhaps the Slender Man is the outlier. But as individual studies accumulate, we might gain some confidence in our assessment of how the balance plays out.²⁵

More generally, Professor Smith’s analysis of the Slender Man as an instance of Internet folklore casts doubt on a common proposition: that a principal normative aim of copyright law ought to be the creation of new works or of works that are more different than those that came before. Participants in the Slender Man community derive value in part because they are contributing to a mythology that others have previously contributed to—the whole point is to participate in a shared, iterative creative enterprise.²⁶ If each participant were forced by copyright law to create her own mythical creature, the utility derived from a shared, iterative creative experience would be lost, and there is no *a priori* reason to think that it would be outweighed by the utility gained from new creative expressions. As a result, we may well derive less social utility from forcing these individuals to create Photoshops or vignettes of horrific creatures that bore no resemblance to the Slender Man than we would if we permitted free reuse of each contribution by other participants. While this is not the only scenario in which free reuse may produce greater value than encouraging new works, it adds another data point to challenge traditional understandings of appropriate normative aims for copyright law.²⁷

CONCLUSION

Professor Cathay Smith has identified a new specter to haunt copyright scholars. Her assessment of the scope of copyright protection in the Slender Man character, narratives, symbols, and larger mythology is crisp and clear. But, appropriately for this elusive horror villain, the story Professor Smith tells in *Beware the Slender Man* refuses to be pinned down precisely—her inquiry does more to complicate than resolve current debates about the relationship between copyright law and creative activity. Still, whatever conclusions we ultimately draw from her work, Professor Smith has made a significant contribution by identifying new terrain ripe for exploration by legal scholars. We will be learning from that exploration for years to come.

25. Cf. BRETT M. FRISCHMANN, MICHAEL J. MADISON & KATHERINE J. STRANDBURG, *Governing Knowledge Commons*, in GOVERNING KNOWLEDGE COMMONS 1, 2 (2014) (arguing for “aggregating case studies” to obtain “a more complete perspective on intellectual property (IP) doctrine and its interactions with other legal and social mechanisms for governing creativity and innovation”).

26. See Smith, *supra* note 1, at 616–18 (describing the community sharing ethos that produced the Slender Man mythology).

27. For a non-utilitarian consequentialist argument that copyright should do more to encourage interactions with existing cultural artifacts, see Cohen, *supra* note 8, at 1181–82.