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Fan Films and Fanworks in the Age of Social Media: How Copyright Owners Are Relying on Private Ordering to Avoid Angering Fans

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Fan Films and Fanworks in the Age of Social Media: How Copyright Owners Are Relying on Private Ordering to Avoid Angering Fans

Fandoms active in creating “fanworks” are increasingly able to leverage social media to coordinate and respond to owners of large media franchises who attempt to limit the creation and distribution of fan films. The resulting friction between these groups can be more efficiently addressed through private ordering rather than through formal legal reform.

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INTRODUCTION

Over the last two decades advances in technology have enabled fans of film and television franchises to create and distribute media content more easily and quickly than ever before.¹ These fans benefit from the technology-obsessed “remix culture” by producing and distributing media and video content to platforms that may be viewed by millions of people.² But such use arguably infringes on the rights of copyright owners. At times, courts and legislators have had difficulty adapting intellectual property law and policy to meet the exigencies of these technological improvements.³ Commentators have argued that copyright law must change in order to meet the demands of the changing environment.⁴ While these many parties struggle with the complications of updating intellectual property law and policy to meet such exigencies, rightsholders have adapted their approaches to copyright protection in response to the increasing friction

1. See Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 122–23 (2019) (discussing the growth of free and open software, free culture movements, access to knowledge, and “intellectual production without intellectual property” in recent decades); Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1869–70 (2009) (“Fan fiction and remix culture have been and are continuing to explode both in terms of social relevance and sheer quantity of new works produced and available.”).

2. See generally Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961 (2004) (arguing that remix culture is the essence of culture, and as technology evolves, policy and legal changes are necessary to support the “free culture” movement). One major video platform, YouTube, has over one billion users that upload over 400 hours of content every minute. See Kevin Tran, *Viewers Find Objectionable Content on YouTube Kids*, BUS. INSIDER (Nov. 7, 2017), <https://www.businessinsider.com/viewers-find-objectionable-content-on-youtube-kids-2017-11>; *YouTube for Press*, YOUTUBE ABOUT, <https://www.youtube.com/yt/about/press/> (last visited Mar. 20, 2019).

3. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004) (citing *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 1999)) (“Further, as we have observed, we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. . . . Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.”), *vacated and remanded*, 545 U.S. 913 (2005).

4. See Tomas A. Lipinski, *The Developing Legal Infrastructure and the Globalization of Information: Constructing a Framework for Critical Choices in the New Millennium Internet—Character, Content and Confusion*, 6 RICH. J.L. & TECH. 19, 22 (2000). But see Hetcher, *supra* note 1.

between themselves and fans. Nowhere is this adaptation more apparent than in the relationship between rightsholders and fans who produce fan films.

Fan passion drives the creation of fan films and other works based on existing media properties, such as Marvel, *Star Trek*, or *Harry Potter* franchises.⁵ Using these copyrighted materials, fans create a broad swath of amateur literary, visual, and auditory creations based on original works⁶ and include everything from novels attempting to build upon existing stories and characters, to films telling new stories set in fans' favorite universes, or to movie trailers that mash-up favorite characters. These "fanworks" utilize the common language of different media properties to build community and help fans connect with one another, thereby encouraging them to become more than "passive consumers of the cultural productions that have deeply affected them."⁷

Fan films—facilitated by the technological advancements that decrease the cost of film production—are a growing segment of these fanworks, which utilize established characters and adventures to tell new stories. For example, one fifty-two minute

5. See Henry Jenkins, *Fandom, Participatory Culture, and Web 2.0—A Syllabus*, CONFESSIONS OF AN ACA-FAN (Jan. 9, 2010) [hereinafter Jenkins, *Participatory Culture*], http://henryjenkins.org/blog/2010/01/fandom_participatory_culture_a.html ("Fandom refers to the social structures and cultural practices created by the most passionately engaged consumers of mass media properties."); Henry Jenkins, *When Fandom Goes Mainstream . . .*, CONFESSIONS OF AN ACA-FAN (Nov. 29, 2006) [hereinafter Jenkins, *When Fandom Goes Mainstream*], http://henryjenkins.org/blog/2006/11/when_fandom_goes_mainstream.html. While some fans of media properties may have an emotional investment, they are not always motivated to create works or participate in fan communities. Jenkins, *Participatory Culture*, *supra*.

6. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997); Jyme Mariani, Note, *Lights! Camera! Infringement? Exploring the Boundaries of Whether Fan Films Violate Copyrights*, 8 AKRON INTELL. PROP. J. 117, 122 (2015).

7. Tushnet, *supra* note 6, at 656–57; Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 378 (1992) ("Mass media imagery provides people who share similar social experiences with the opportunity to express their similarity by imbuing with emotional energy a range of cultural referents to which media communications have afforded them shared access. It also enables them to authorize their difference by improvising with those images to make them relevant to their social experiences and aspirations."). As media scholar Henry Jenkins wrote, "culture [cannot] be reduced to property nor exclusively controlled by a single group or individual. Rather, cultural producers always build upon what has come before." Henry Jenkins, *How the New Star Trek Fan Film Guidelines May Change Fandom*, CONFESSIONS OF AN ACA-FAN (Sept. 22, 2016) [hereinafter Jenkins, *Star Trek*], <http://henryjenkins.org/blog/2016/09/how-the-new-star-trek-fan-film-guidelines-may-change-fandom.html>.

fan film based on the *Harry Potter* franchise attempted to tell the origin story of Lord Voldemort and received millions of views on YouTube.⁸ Technology helped the production achieve visual effects that were “in many places, better than the multimillion-dollar Warner Brothers movies,” according to one reporter.⁹ Moreover, the ability to widely disseminate fan films through mainstream platforms like YouTube and other video sites has increased the visibility of such films.

Due to their availability on platforms like YouTube, fan films are more accessible to larger audiences than previous forms of fan-created content—such as lengthy written forms of fan fiction, or physical pieces of fan art—and the fans themselves are able to leverage tools like social media to pressure rightsholders when fans perceive their films to be legally threatened. Because these segments of consumers—called fandoms—are highly desirable target markets for film or literary franchise rightsholders, rightsholders have struggled with issues of policing what they see as misuse of their intellectual property without alienating and discouraging loyal customers.¹⁰ The social and economic pressures now faced by rightsholders in protecting their intellectual property, whether it be trademarks or copyrights, encourages rightsholders to explore various forms of intellectual property protection through legal and non-legal mechanisms.

8. Jack Shepherd, *Harry Potter Fan Film About Voldemort, Approved by Warner Bros, Released on YouTube for Free*, INDEPENDENT (Jan. 15, 2018), <https://www.independent.co.uk/arts-entertainment/films/news/harry-potter-fan-film-voldemort-youtube-free-warner-bros-approved-a8159831.html>.

9. Calla Wahlquist, *I Watched the Crowdfunded Harry Potter Spinoff. It Was . . . Good?*, GUARDIAN (Jan. 17, 2018), <https://www.theguardian.com/film/2018/jan/17/harry-potter-voldemort-origins-of-the-heir-review>; Kat Brown, *Voldemort: Origins of the Heir Review: A Fun-Free Harry Potter Fan Film Lifted by Magical Effects*, TELEGRAPH (Jan. 18, 2018), <https://www.telegraph.co.uk/films/0/voldemort-origins-heir-review-fun-free-harry-potter-fan-film/>. Another reporter wrote of the film that, “[r]ight from the off, the magic is impressive, and the film is littered with moving photos that give you a genuine jolt of joy. Hogwarts and the owls also look lovely.” Brown, *supra*.

10. See HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 62–63 (2006) [hereinafter JENKINS, CONVERGENCE CULTURE]. Of the top twenty highest grossing films (adjusted for inflation), five films in the *Star Wars* universe make the list—including the second highest: *A New Hope*. BOX OFFICE MOJO, <https://www.boxofficemojo.com/alltime/adjusted.htm> (last visited Mar. 31, 2019). When *Star Wars* was initially released, it generated over \$150 million in profits during its first four years. HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 83 (9th ed. 2015).

In an age of rampant fan content creation and fan leverage over rightsholders through social media, semi-flexible legal and social norms are better suited to order fan-rightsholder interactions than the current laws governing copyright. Rightsholders, particularly film and television studios, have incorporated and should continue to incorporate social norms of fandoms into clear guidelines that create a threshold under which fan creations are encouraged and copyright enforcement is suspended. Arguably, some fan films may have a claim for fair use.¹¹ But copyright law – specifically the fair use defense – is easily misunderstood by fan film producers and other fanworks creators.¹² Moreover, the fair use defense may be less applicable because fan films become more closely related to the original works as their production quality and stories begin to better resemble the original works and are thus less transformative.¹³ This Note does not attempt to argue whether or not fanworks – and particularly fan films – are protected under fair use principles, as that has been discussed at length by other scholars and commentators.¹⁴ However, recent case law suggests

11. *Fair use* refers to the affirmative defense for copyright infringement provided in 17 U.S.C. § 107. The factors considered include: the purpose and character of the work, the nature of the copyrighted work, the amount of the copyrighted work used in the work at issue, and the effect of the allegedly infringing work on the market value or potential market value for the original. 17 U.S.C.A. § 107 (West).

12. See 17 U.S.C.A. § 106 (enumerating the exclusive rights of copyright owners); 17 U.S.C.A. § 107 (codifying fair use); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994) (interpreting the first factor of fair use to focus on “whether and to what extent [the use of a work] is ‘transformative,’ altering the original with new expression, meaning, or message”); see also Jessica Vogele, *Where’s the Fair Use? The Takedown of Let’s Play and Reaction Videos on YouTube and the Need for Comprehensive DMCA Reform*, 33 *TOURO L. REV.* 589, 627–28 (2017) (“Many content creators do not understand fair use, and they believe that minimal commentary and editing are enough to protect themselves from allegations of copyright infringement.”); Cory Tadlock, Comment, *Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies Are Overreaching Their Copyright Protections*, 7 *J. MARSHALL REV. INTELL. PROP. L.* 621, 640 (2008) (arguing that, by ignoring copyright distinctions, copyright holders contribute to public misunderstanding of copyright law).

13. See *infra* Section I.A.2 (discussing fan films in detail); see also Howard Wen, *Want to Make Your Own Star Wars Movie? We Did*, *GUARDIAN* (Nov. 23, 2000), <https://www.theguardian.com/film/2000/nov/24/3> (“Once upon a time, fans had to be content with penning a fan-fiction . . . these days, they can create and distribute actual films that, in their special effects at least, are not so far behind what’s being releasing in cinemas.”).

14. See, e.g., W. Michael Schuster, *Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of the Commercialization of Fan Fiction*, 55 *S. TEX. L. REV.* 529, 551 (2014) (commercializing some fan fiction may decrease the availability of fair use arguments due to the expanse of licensing markets); Tushnet, *supra* note 6; Brittany Johnson,

that fair use may not generally be a valid defense for fan films, especially those that attempt to stay true to source material.¹⁵

Consequently, and regardless of copyright law,¹⁶ changes in technology and the increased involvement in fan culture enabled by social media will continue to encourage conflict between rightsholders and fans.¹⁷ Though the legal regime governing copyright has historically placed the power in the hands of rightsholders, these technological and societal changes are encouraging rightsholders to tolerate fans in their creations of fan films and other fanworks. Instead of relying entirely on legal mechanisms, rightsholders are adopting social norms already found within the fan community and establishing extralegal rules by which fans can continue creating fanworks without fear of litigation.¹⁸

This Note discusses the normative rules governing both rights enforcement and fan responses that have evolved as extralegal mechanisms for private ordering amidst the current tension arising out of modern fan behavior and the technological advances enabling fan film production. Fan responses are governed by both the fan film community and the culture that surrounds the greater fanworks community, which itself is driven by cultural changes influenced by technology. Part I discusses the culture of fandom and fanworks, including the distinctions that make fan films particularly troublesome for rightsholders, as well as the norms under which fans operate. Responses and coordination issues are discussed in detail in Part II, particularly those enabled by social media. Various rightsholders' attempts at legal and non-legal forms

Note, *Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law*, 100 MINN. L. REV. 1645 (2016).

15. See *Paramount Pictures Corp. v. Axanar Prods. Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *11 (C.D. Cal. Jan. 3, 2017); see also JENKINS, CONVERGENCE CULTURE, *supra* note 10, at 188 (quoting the chairman of the Electronic Frontier Foundation as saying, "Almost all 'fan fiction' is arguably a copyright violation. If you want to write a story about Jim Kirk and Mr. Spock, you need Paramount's permission, pure and simple.").

16. See generally Johnson, *supra* note 14 (arguing for changes in copyright to accommodate fanworks).

17. See Tushnet, *supra* note 6, at 654 ("If people consider a law to be silly and violate it routinely by performing activities that they feel are both harmless and central to their lives — telling others the stories they tell themselves — the law will not be respected.").

18. See generally Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 358–59, 361 (1989) (discussing how private parties are best positioned to order themselves due to advances in technology, rather than Congress).

of enforcement and protection against fan films are examined in Part III, while Part IV discusses the benefits of social norms for ordering interactions between fans and rightsholders. This Note then concludes by reviewing how rightsholders and fan film producers will have greater transparency and clearer expectations by utilizing social norms to order their interactions before relying on legal mechanisms.

I. FANDOMS AS CREATIVE COMMUNITIES

In order to understand the modern tension between rightsholders and fans, it is necessary to examine the technological and social factors that have increased the current conflict. Technologies such as cheaper cameras and more advanced visual effects software have encouraged the creation of fan films, which are more accessible and understood by larger numbers of people than other fanworks, like written fiction, comics, etc. Social factors evolving from the fan communities themselves have at once moderated the tension and encouraged it—mainly due to the incorporation of social norms inspired by intellectual property law and a community centered on gift economies.¹⁹ But while these factors are the sources of tension with established law, they stem from the more innate desire of fans to belong to a community. Recognizing the underlying desire to belong to a creative community is necessary to understand the changes in fanworks and social norms that have encouraged the current friction with rightsholders.

The passion of fans and their connection with a particular media franchise is a source of tension with rightsholders. To be a fan is to have the “ability to transform personal reaction into social interaction, spectatorial culture into participatory culture . . . not by being a regular viewer of a particular program but by translating that viewing into some kind of cultural activity.”²⁰ Instead of watching or participating in an *experience*—such as re-watching a film—fans are participating in a *community* by creating something

19. See Stacey M. Lantagne, *The Copymark Creep: How the Normative Standards of Fan Communities Can Rescue Copyright*, 32 GA. ST. U. L. REV. 459, 499 (2016). See generally Hetcher, *supra* note 1 (discussing the role of social norms and fair use analysis in fan fiction).

20. Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 735 (2008) (quoting HENRY JENKINS, *FANS, BLOGGERS, AND GAMERS* 41 (2006)).

new to contribute to that community, be it a short story, a film, or a piece of art.²¹ The communal aspect of fandom, even when based largely online, provides a sense of belonging and even a sense of equity in connection with a media franchise.²²

Fans come together and provide support and friendship to one another, sharing common interests. Perhaps because fans are sometimes characterized as “eccentric at best [and] delusional at worst,” and are often marginalized, they have found a sense of kinship and comradeship that fortifies and continually strengthens their communities.²³ Converging upon fanworks focused on popular cultural icons allows fans to communicate even when they are separated by language, cultural barriers, or other geographical limitations.²⁴ Franchise producers are actively embracing these features of modern fandom by creating more ancillary works, as fans have done for decades, in order to encourage greater participation.²⁵

While rightsholders desire to encourage fans to be active participants in media franchises—thereby increasing profits—tension arises when certain fanworks or fan behaviors infringe on protected rights and exploit others’ intellectual property. Certain fanworks may be more likely than others to cause concern to rightsholders, while communal behaviors may concurrently mitigate and increase those concerns.

A. *Defining Fanworks by Fan Communities*

Changes in what types of fanworks are being created and how they are distributed over the last two decades—including the ability to proliferate fanworks more widely across the world via the

21. See Tushnet, *supra* note 6, at 656–57. Some have even argued that a person is not really a fan unless he or she is actively participating in the fan community. See Karen Helleckson, *The Fan Experience*, in *A COMPANION TO MEDIA FANDOM AND FAN STUDIES* 74 (Paul Booth ed., 2018).

22. See Howard Rheingold, *Social Networks and the Nature of Communities*, in *NETWORKED NEIGHBORHOODS: THE CONNECTED COMMUNITY IN CONTEXT* 47, 49 (Patrick Purcell ed., 2006) (discussing the disintegration of traditional communities and their replacement by virtual communities).

23. Tushnet, *supra* note 6, at 655.

24. Henry Jenkins, *Quentin Tarantino’s Star Wars?: Digital Cinema, Media Convergence, and Participatory Culture*, in *RETHINKING MEDIA CHANGE: THE AESTHETICS OF TRANSITION* 287 (David Thorburn & Henry Jenkins eds., 2003) [hereinafter Jenkins, *Quentin Tarantino*].

25. Jenkins, *When Fandom Goes Mainstream*, *supra* note 5.

internet—have encouraged disputes between fans and rightsholders. Fanworks include fan art, fanvids (clips from videos or television shows cut together with different music), fan fiction (literary works), and fan films—all based to some extent on an existing media franchise or works.²⁶ Some of these works attempt to remain true to the source material while others endeavor to create new characters, plotlines, and themes.

Some genres of fanworks, and fan fiction specifically, attempt to reorient characters' sexuality (so-called "slash" fan fiction), replace characters with a "Mary Sue" (idealized character to better represent the fans' view), or rewrite stories to be more sexually explicit.²⁷ Fan writings, films, and artwork span a spectrum of being very close to the original source material—referred to as canon—or departing drastically from the original source material by either changing ages, storylines, or other attributes.²⁸ Importantly, fanworks are generally not produced as professional projects,²⁹ and some have defined the word "fanworks" to specifically mean "unauthorized and not-for-profit."³⁰ Indeed, fanworks have been generally tolerated by copyright holders so long as fanworks creators continue to maintain the works as a hobby and not as a for-profit endeavor.³¹

26. Casey Fiesler, *Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom*, 59 IDEA 65, 67 (2018); Kenneth R. L. Parker, *Gray Works: How the Failure of Copyright Law to Keep Pace with Technological Advancement in the Digital Age Has Created a Class of Works Whose Protection is Uncertain . . . and What Can be Done About It*, 21 J. INTELL. PROP. L. 265, 268 (2014).

27. Johnson, *supra* note 14, at 1650; Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007); Mollie E. Nolan, *Search for Original Expression: Fan Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533, 554 (2006).

28. Nolan, *supra* note 27, at 553–54; Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 436–37 (2003).

29. Tushnet, *supra* note 6, at 655.

30. Parker, *supra* note 26, at 279 (citing Fiesler, *supra* note 20, at 731–32).

31. Kate Romanenkova, Comment, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 184 (2014); John Jurgensen, *Rewriting the Rules of Fiction*, WALL ST. J. (Sept. 16, 2006), <https://www.wsj.com/articles/SB115836001321164886> (quoting one professor as saying rightsholders have a sort of "benign neglect" concerning fan fiction).

Fan fiction has previously been the most notable segment of fanworks, but the rising number of fan film productions and their more “user-friendly” nature has led to rightsholders having to reassess how they interact with fans and manage their relations with fan films.

1. *Fan fiction*

Fan fiction writers laid the groundwork for fan films by establishing the social norms that govern modern fandoms. Some writers attribute the first creation of fan fiction to authors reusing the Sherlock Holmes character in their stories during the 1890s, while others believe that the much earlier work of Virgil to continue Homer’s *Iliad* was the true origin.³² Although the origins of fan fiction are debatable, the practice of borrowing characters from one storyteller and placing them into a new setting, perhaps with new characteristics—or filling familiar fictional settings with new characters—was invigorated in the 1920s on the pages of science fiction magazines.³³ During that period, fan communities created fan-focused magazines and communicated through the letter to the editor sections, writing to and interacting with each other.³⁴

Over time, fan fiction communities evolved into modern fandoms that interacted with rightsholders and creators—most notably with the release of the series *Star Trek*. At the fan-organized Worldcon,³⁵ Gene Roddenberry screened the television series *Star Trek* and sparked a new fandom, which he allowed to create fan fiction and to excitedly discuss and explore the series without threatening copyright infringement suits.³⁶ By allowing fans to create fan fiction, Roddenberry implicitly sanctioned the creation of

32. Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. TECH. L. REV. 263, 265 (2015); Natasha Simonova, *Fan Fiction and the Author in the Early 17th Century: The Case of Sidney’s Arcadia*, TRANSFORMATIVE WORKS & CULTURES (2012), <http://journal.transformativeworks.org/index.php/twc/article/view/399/314>.

33. Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 42 (Karen Hellekson & Kristina Busse eds., 2006); Mark Peterson, *Fan Fair Use: The Right to Participate in Culture*, 17 U.C. DAVIS BUS. L.J. 217, 220 (2017).

34. Coppa, *supra* note 33, at 42.

35. In 1939, a group of fans organized the first World Science Fiction Convention, an event being held to this day—now christened Worldcon. *Id.* at 43.

36. *Id.*

fanworks using his series, laying the foundation for all the fanworks that would follow. After the second season of *Star Trek* in 1967, the fan base began to organize and coordinate itself more completely,³⁷ especially after the internet became widely available.³⁸ In the many decades since Roddenberry first screened *Star Trek* and sparked modern fandom, other rightsholders have turned a blind eye or even encouraged the writing of fan fiction, thus emboldening fan communities to continue creating derivative works.³⁹

Although there are many millions of fan fiction pieces, each particular work is usually viewed by a relatively small number of people. The number of views for individual works on fanfiction.net and archiveofourown.org, two of the most popular sites for fan fiction, ranges in the tens to the thousands, with only some reaching tens of thousands of viewers. Compared to the viewership of fan videos available on YouTube, the number of visitors to these niche sites is only a small fraction relative to the many people who watch fan films.

2. Fan films

Fan films differ from fan fiction in that they are available on widely visited platforms like YouTube and, because they are videos, they are more accessible and understandable to a greater number of people. As such, fan films create more difficulties for rightsholders because they might go viral and be viewed by millions of people, which has happened on a number of occasions. The virality of fan films aids fans in pressuring rightsholders through implicit and explicit reputational or economic threats to

37. Tushnet, *supra* note 6, at 655 & n.14 (citing Henry Jenkins, 'At Other Times, Like Females': Gender and Star Trek Fan Fiction, in SCIENCE FICTION AUDIENCES: WATCHING DR. WHO AND STAR TREK 196 (John Tulloch & Henry Jenkins eds., 1995)); Parker, *supra* note 26, at 279.

38. Peterson, *supra* note 33, at 221 ("Fan fiction owes its rising popularity to the internet."); Parker, *supra* note 26, at 279; Fiesler, *supra* note 20, at 736. Fan fiction has broadened to cover many different worlds and characters – one site lists over 800,000 stories set in the world of Harry Potter, 45,000 set in the Hunger Games universe, and 4,000 featuring Sherlock Holmes. See FANFICTION, <https://www.fanfiction.net> (last visited Mar. 31, 2019). These numbers do not include the thousands of crossover pieces of fan fiction.

39. J.K. Rowling has expressed a distaste for fanworks that are "pornographic or sexually explicit," but is otherwise flattered by fans who become passionate about her stories. Nolan, *supra* note 27, at 556.

allow fans to tell their own stories through film. Fans' films have consisted of their own stories, remakes, retellings, and parodies, with more films being produced as more fans become interested.⁴⁰

Since filmmaking requires a team of collaborators, the creation of fan films also strongly incorporates the technological and communal aspect of fandom and is enhanced by advances in technology. Fan films purportedly became popular in 1997 after fans parodied the television series *Cops* using *Star Wars* stormtroopers instead of police officers.⁴¹ But in reality, it began much earlier. For example, some *Star Wars* fans created fan films on Super 8 tapes when *A New Hope* was released in 1977.⁴² In another instance, three twelve-year-old boys who saw *Raiders of the Lost Ark*, released in 1982, were so inspired that they set out to create a shot-for-shot recreation of the film, finally finishing their version in 2015.⁴³ One of the teens involved, now-adult Chris Stropoulos, said they were motivated to create the film to "have fun and role play It wasn't to make money or sell it or do *anything* with it."⁴⁴ Their zeal and persistence in making their film demonstrates the attachment that fans feel for both the original source material and their desire to participate in the creation of something special as part of that attachment.⁴⁵

As illustrated by Chris Stropoulos, many fan films are created without the expectation of profit or remuneration, which sets them apart from studio reboots and other forms of rightsholders' works that attempt to reinvigorate older media properties.⁴⁶ Yet, while fans do not operate for profit, studios and major producers have

40. See, e.g., *id.* at 555; STAR TREK CONTINUES, <https://www.startrekcontinues.com/> (last visited Mar. 31, 2019).

41. Josh Rottenberg, *Inside the Increasingly Competitive World of Fan Filmmaking: Will \$1 Million Budgets Ruin the Fun?*, L.A. TIMES (July 20, 2016), <https://www.latimes.com/entertainment/movies/la-et-mn-comic-con-fan-filmmaking-20160713-snap-story.html>.

42. Jenkins, *Quentin Tarantino*, *supra* note 24, at 287.

43. Angela Watercutter, *See How Three Kids Remade Raiders of the Lost Ark Shot for Shot*, WIRED (June 10, 2016), <https://www.wired.com/2016/06/raiders-of-the-lost-ark-remake-gallery/>.

44. Rottenberg, *supra* note 41.

45. See Wen, *supra* note 13 ("For a small group of devotees, fandom is becoming a matter of participation rather than just spectacle.").

46. See Romanenkova, *supra* note 31, at 183 (citing the BBC series *Sherlock* and the CBS series *Elementary* as two modern retellings of Sherlock Holmes and distinguishing them from common fan films on the basis of their profit motive, which separates them from fan films and other fan fiction works).

recognized that fan films can stimulate continued fan interest in franchises – even when there are long breaks between new official installments in a series – and also stimulate profits.⁴⁷ This ability to maintain widespread fan interest in franchises sets fan films apart from fan fiction and other fanworks, which may stimulate interest only on a much smaller scale.

Fan films are enabled by advances in video technology and facilitated by changes in distribution platforms that have lowered the costs of video production, allowing more fans to participate in fan film creation.⁴⁸ Technology has empowered fans by allowing them to capture higher quality images on smaller, cheaper devices. Even professional productions and experienced Hollywood directors have begun using consumer devices such as cell phones to create feature-length theatrical films as the quality of the consumer devices begins to almost equal that of professional equipment.⁴⁹ Distribution advances such as online platforms Facebook, YouTube, and others, are also lowering the costs of content, allowing more people to participate.⁵⁰

YouTube and other online platforms have not only lowered the cost of distribution but have also increased the visibility of fan films. Viewers searching for a *Star Wars* trailer or a *Harry Potter* sketch from *Saturday Night Live* might be introduced to a fan film through a recommendation by the site's A.I. system or be pointed to it by a friend.⁵¹ The availability of fan films has perpetuated a model in which fans use conglomerates' and individuals' intellectual properties as "raw materials for telling their own stories and resources for forging their own communities," much as was

47. Kristin M. Barton, *Can't Stop the Sequel: How the Serenity-Inspired Browncoats: Redemption is Changing the Future of Fan Films*, in *FAN CULTURE: ESSAYS ON PARTICIPATORY FANDOM IN THE 21ST CENTURY* 18-19 (Kristin M. Barton & Jonathan Malcolm Lampley eds., 2013).

48. See Jenkins, *Quentin Tarantino*, *supra* note 24, at 286-87.

49. Sharon Swart, *Slamdance: Steven Soderbergh Talks Filming 'High Flying Bird' with an iPhone*, *HOLLYWOOD REP.* (Jan. 26, 2019), <https://www.hollywoodreporter.com/news/steven-soderbergh-interview-iphone-netflix-why-his-retirement-didnt-take-1179541>; Christi Carras, *12 Movies That Were Shot on an iPhone*, *VARIETY* (Mar. 22, 2018), <https://variety.com/2018/film/news/unsane-tangerine-films-iphones-1202730676/>.

50. VOGEL, *supra* note 10, at 50; see also *id.* at 86-89 (discussing how technology has changed the economics of the film industry).

51. See discussion *infra* Part III (examining the interconnectedness of fans).

done in previous centuries with folklore.⁵² Although their increased availability encourages tension with rightsholders' exclusive rights to create derivative works under copyright law, fan films allow fans to actively participate in fandom.

As technology and production quality between fan films and professional productions converge, it will become more and more difficult to distinguish professional and amateur productions.⁵³ This trend may be particularly troublesome when judges are asked to determine what media creations are worthy of public protection through copyright mechanisms.⁵⁴ While not without risks and trade-offs, technology has allowed for wider distribution of fan films and other fanworks, which in turn has "fostered a new excitement about . . . expression and creativity."⁵⁵ Accordingly, the developed social norms of fandom have also been incorporated by fans to govern fan film creation.

B. Social Norms in Fandom

As fanworks—both fan fiction and fan films⁵⁶—have proliferated over the internet, fan communities have developed shared social norms, which govern the interaction between fans and their relationships with the media franchises they love.⁵⁷ Normative rules allow fans to self-police their communities and

52. Jenkins, *Quentin Tarantino*, *supra* note 24, at 288; see also Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC NEWS (May 27, 2004), <http://news.bbc.co.uk/2/hi/entertainment/3753001.stm> ("The arrival of online means it has a greater visibility. Before the age of the internet, it was only circulated between fans.").

53. See Jenkins, *Star Trek*, *supra* note 7; Sarah Elizabeth Lerner, *Fan Film on the Final Frontier: Axanar Productions and the Limits of Fair Use in the Digital Age*, 28 TRANSFORMATIVE WORKS & CULTURE (2018), <http://dx.doi.org/10.3983/twc.2018.1429>.

54. See JENKINS, CONVERGENCE CULTURE, *supra* note 10, at 189 ("It surely demands close reconsideration as we develop technologies that broaden who may produce and circulate cultural materials. Judges know what to do with people who have professional interests in the production and distribution of culture; they don't know what to do with amateurs, or people they deem to be amateurs.").

55. Jenkins, *Quentin Tarantino*, *supra* note 24, at 287.

56. As it is difficult to fully isolate the culture of the fan film community from the norms of fan fiction and fanworks in general, there will be some assumptions concerning the applicability of legal and social science literature as well as social norms experienced within the fandoms. See Lantagne, *supra* note 19, at 498.

57. See Angelina I. Karpovich, *The Audience as Editor: The Role of Beta Readers in Online Fan Fiction Communities* in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 171 (Karen Hellekson & Kristina Busse eds., 2006) (discussing the emergence of the beta reader in fan fiction when fan communities began using the internet).

facilitate sharing and feedback mechanisms in order to appropriately assist the free exchange of ideas and stories in fan communities.⁵⁸ These rules attempt to identify and give credit to the creator of the original copyrighted work and regulate the community as a not-for-profit activity – encouraging creativity and content generation and also providing appropriate credit – while also inspiring a gift-giving ethos.⁵⁹

While not exhaustive, the rules discussed here are descriptive of fans' attempts to recognize the intellectual property rights of creators and rightsholders. However, while the social norms incorporated from intellectual property law have struggled to decrease friction with rightsholders, the gift-giving ethos of fans has actually increased tension through the use of crowdfunding, which may redirect revenues from rightsholders towards creators of fanworks.

1. Author attribution and disclaimers

Many of fandoms' normative rules have a basis in copyright and trademark law. While Robert Ellickson argues that “negative spaces” in the law (areas where the law is absent) are filled by social norms, it has been argued that social norms also order activities that may have a confusing legal status.⁶⁰ Because fans, courts, and academics disagree about the actual legality of fanworks⁶¹ – especially as each specific case of use is different – the gray area surrounding fanworks has been augmented by social norms. This confusion may also be due in part to an inherent understanding that “fan play and other forms of speech” are

58. See HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 272–73 (1992) (“Fan culture, like traditional folk culture, is transmitted informally and does not define a sharp boundary between artists and audiences. Fan culture, like folk culture, exists independently of formal social, cultural, and political institutions; its own institutions are extralegal and informal with participation voluntary and spontaneous.”); see also Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 123 (2017) (“Compliance with community norms, in turn, reinforces members’ sense of belonging.”).

59. Lantagne, *supra* note 19, at 498; Lerner, *supra* note 53.

60. Fiesler, *supra* note 26, at 83.

61. Peterson, *supra* note 33, at 252; Chander & Sunder, *supra* note 27, at 600 (arguing that “Mary Sue” characterization in fanworks constitutes fair use). *But see* Paramount Pictures Corp. v. Axanar Prod. Inc., No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *11 (C.D. Cal. Jan. 3, 2017).

desirable and should not be deterred,⁶² and thus fans may extrapolate that their use is authorized in most cases.

Fan communities and fan film creators have incorporated some elements of trademark law as informal guidance for differentiating their works. Similar to the “likelihood of confusion” standard in trademark law, a social norm within fandom is to attribute the creation of the characters or world to the original author.⁶³ This is consistent across fan fiction and many fan films and is even supported or required by some rightsholders through private ordering.⁶⁴ Many fans recognize that they are only borrowing characters owned by others and use author attribution and disclaimers to differentiate themselves from those owners.⁶⁵ For example, such disclaimers might include notice that the fanwork is not authorized by the original author or that the fanwork is only partly an original work and elements are specifically attributed to the original author.

The “requirement” to post disclaimers or author attribution notices may be due in part to rightsholders vigorously policing fan sites in previous decades. As an example, in the mid-1990s Fox was enthusiastically policing fan activities that they viewed as impacting the “creative integrity” of their television shows.⁶⁶ Fox sent cease-and-desist letters to forty-three fan sites devoted to *The Simpsons*, leading to twenty-seven of the sites shutting down entirely before Fox allowed the others to continue operating provided that they post disclaimers.⁶⁷ It continued threatening

62. *Conan Props. Int'l LLC v. Sanchez*, 17-CV-162 (FB), 2018 WL 4522099, at *34 (E.D.N.Y. June 8, 2018); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (noting that the public may have an interest in the publication of an infringing work); Tushnet, *supra* note 6, at 684 (discussing that the public validity of copyright law may rely in part on allowing fans to freely participate and interact with copyrighted characters and elements in popular culture).

63. See Lantagne, *supra* note 19, at 499.

64. See, e.g., B. Alan Orange, *Power Rangers Fan Film Returns After Copyright Dispute*, MOVIEWEB (Feb. 28, 2015), <https://movieweb.com/power-rangers-movie-fan-film-banned-online/>; Tryangle Films, *Voldemort: Origins of the Heir – An Unofficial Fanfilm (HD+Subtitles)*, YOUTUBE (Jan. 13, 2018), <https://youtu.be/C6SZa5U8slg>; *Fan Films*, STAR TREK, <http://www.startrek.com/fan-films> (last visited Mar. 31, 2019).

65. See Tushnet, *supra* note 6, at 678–80.

66. Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461, 515 (2006).

67. *Id.*

other fan sites like those dedicated to *The X-Files* and *Buffy the Vampire Slayer*.⁶⁸

The disclaimers posted by fans may be general or may be specific in delineating which characters were made by the fan and which were created by the original author.⁶⁹ While disclaimers may have assuaged the discomfort of rightsholders like Fox, the increasing number of disclaimers may have fatigued many fans. Due to the fanwork community being overwhelmed by disclaimers, there may be a trend towards foregoing disclaimers at the beginning of some fanworks.⁷⁰

But, in spite of implicit disclaimer requirements, fanwork creators still feel a sense of ownership over their creations even when they are using other authors' original works as their basis.⁷¹ The current copyright regime may favor rightsholders more strongly than it favors the public interest,⁷² and, as such, fan communities have unknowingly taken it upon themselves to use disclaimers as an attempt to rebalance the traditional purpose of copyright with the fans' desire to be active participants in the creation of stories utilizing other authors' copyrighted characters and works.⁷³ These rules have naturally evolved over time, and, although it is arguable whether the balance they strike is appropriate, they are utilized by broad swaths of the fan community across many different fandoms.

68. *Fox Wants Buffy Fan Sites Slain*, WIRED (Mar. 1, 2000), <https://www.wired.com/2000/03/fox-wants-buffy-fan-sites-slain/>.

69. Lantagne, *supra* note 19, at 499.

70. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135, 154 (2007).

71. See John Jurgensen, *supra* note 31 (quoting one fan fiction author as saying "There's a sense of guilt. I always feel that I should not be using somebody else's characters and should be doing my own writing. But then I remember I am doing my own writing.").

72. Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 205-06 (2013).

73. Lantagne, *supra* note 19, at 498; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."); Kevin Delaney, *Balancing in Light of the Purposes of Copyright: Whether Video Music Lessons Constitute Copyright Infringement*, 20 COMM. L. & POL'Y 261, 278-79 (2015) (discussing the purpose of copyright and the shift towards a natural law conception of copyright in the United States).

2. *Gift-giving ethos*

The second informal rule underlying fan communities is the gift-giving ethos. Central to fan communities is the importance of sharing and the gift economy.⁷⁴ Fans view fanworks as gifts to their community, facilitating growth and greater communal cohesion.⁷⁵ Importantly, it is generally understood that fans make their works available for free and create content as a hobby and not for profit.⁷⁶ The gift-giving ethos impacts and orders fan communities in two key manners: it encourages self-policing of commercial activity by fan creators, and it contributes to the popularity of crowdfunding within the fan community – which may, at first, seem at odds with the premise of the gift economy.

First, the gift-giving ethos of fans encourages them to self-regulate and police their communities. While the gift-giving ethos may not apply in all fanworks – for example, many fan artists sell their art⁷⁷ – it is a predominant driver in fan fiction, as evidenced by the backlash faced by writer Lori Jareo. Jareo wrote a *Star Wars* fan fiction novel titled *Another Hope*, which she posted for sale on Amazon.⁷⁸ Not only did she receive a cease-and-desist letter from Lucasfilm, but she also received scathing rebukes from bloggers and other fan fiction writers.⁷⁹ They argued that she not only broke

74. Lerner, *supra* note 53.

75. Lantagne, *supra* note 32, at 288–289; see also Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 527 (2009) (“With limited exceptions, [fanworks] circulate outside the money economy, shared freely with other fans.”); Morgan Leigh Davies, *A Brief History of Slash*, TOAST (Sep. 19, 2013), <http://the-toast.net/2013/09/19/brief-history-slash/> (“In much the same way that, hundreds of years ago, many women wrote extensively but typically only for private circulation amongst friends and acquaintances, fanfiction is part of an informal, communal cultural exchange, functioning not as a capitalistic enterprise but as a kind of gift economy. . . .”). The gift-giving ethos of fans also manifests itself in the form of offering feedback to one another on their creative works, building on the sense of community. See Rachel L. Stroude, Comment, *Complimentary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTELL. PROP. L. REV. 191, 197 (2010) (“A common practice for readers of participatory works is to offer feedback, constructive criticism, and editing remarks to the respective authors. Welcoming other fans’ contributions to the creation of participatory works allows the creation to be a community effort.”) (citation omitted).

76. Lantagne, *supra* note 19, at 501.

77. *Id.* at 502.

78. Fiesler, *supra* note 20, at 730 (citing John Scalzi, *The 2006 Stupidest FanFic Writer Award Gets Retired Early*, WHATEVER (April 21, 2006, 2:11 AM), <http://www.scalzi.com/whatever/004162.html>).

79. *Id.*

a major rule of fan fiction (selling her work), but she also brought the unwanted attention of Lucasfilm onto the community.⁸⁰

Author E.L. James's series *Fifty Shades of Grey* began as fan fiction utilizing Stephanie Meyer's *Twilight* characters, but it was edited to remove elements of *Twilight* before it was published.⁸¹ She has been criticized for many elements of her work, including how her success encouraged other fan fiction writers to have what one blogger termed a "mercenary attitude" toward fan fiction, removing their works from freely accessible sites and attempting to sell them instead.⁸² The negative reaction of other fan fiction writers to E.L. James and Jareo occurred because those two authors acted contrary to the community norms.⁸³ Many fan fiction writers view authors who sell their work as crossing out of the fan community and into the mainstream. Importantly, this pressure from the community also helps to regulate fan fiction writers by discouraging them from selling their work—the sale of which would dramatically increase unwanted legal attention from rightsholders.

Second, apart from encouraging self-policing in fan communities, the gift-giving ethos may contribute to the growing popularity of crowdfunding amateur productions.⁸⁴ While fan films are generally created by amateurs and made available for free, some fan films have attempted to crowdfund and raise money

80. *Id.*

81. See Bethan Jones, *Fifty Shades of Exploitation: Fan Labor and Fifty Shades of Grey*, 15 *TRANSFORMATIVE WORKS & CULTURE* (2014), <https://doi.org/10.3983/twc.2014.0501>; Jason Boog, 'Fifty Shades of Grey': Publishing's Sexiest Trend, NPR (Mar. 15, 2012), <http://www.npr.org/2012/03/15/148605287/fifty-shades-of-grey-publishings-sexiest-trend>; Anna Menta, 'Fifty Shades' E.L. James Still Profiting from 'Twilight' Fan Fiction with *Christian Grey Book*, NEWSWEEK (Oct. 10, 2017), <https://www.newsweek.com/el-james-fifty-shades-twilight-fanfiction-681855>.

82. Jones, *supra* note 81; see also Rachel Edidin, *Publishers Are Warning to Fan Fiction, But Can It Go Mainstream?*, WIRED (Feb. 24, 2014), <https://www.wired.com/2014/02/fanfic-and-publishers/> (discussing the issues of authors attempting to transition from fan fiction to mainstream publishing).

83. See Rosenblatt, *supra* note 58, at 124–25 ("People comply with community norms as a way of building a sense of belonging within that community; as a result, in communities without formal barriers to entry, individuals may be able to gain recognition and acceptance in a particular community by creating the sorts of works or inventions that the community values and by following the community's norms.")

84. See Lerner, *supra* note 53.

privately in order to produce their films.⁸⁵ Participation in a crowdfunding campaign “fosters a sense of belonging” by encouraging a personal connection with a particular project, its creators, and other donors.⁸⁶ The distinct approach of filmmakers is necessitated by the nature of filmmaking, which involves collaborating with other artists and filmmakers and utilizes specialized equipment, whereas a fan fiction author only needs a computer and time in order to create literary works.

Crowdfunding is categorized into four types: rewards-based, donation-based, equity-based, and debt-based.⁸⁷ While equity-based and debt-based crowdfunding lack wide appeal in the fan community, rewards-based and donation-based crowdfunding have been popular among fan film creators. Rewards-based crowdfunding may give participants a thank-you or access to the creation before the general public, while donation-based crowdfunding generally gives participants no such rewards.⁸⁸ Fan film creators may utilize crowdfunding to cover capital costs, build a fan base, or enlist others to help them with their work.⁸⁹ Crowdfunding also serves to create a community of “devoted followers” who network and build relationships.⁹⁰ Devoted followers and fans who cannot create content themselves may feel they can contribute to their fan communities by enabling others to create through donations, whether or not rewards are offered. In fact, the fans’ motivation to donate may have little to do with any

85. See Lantagne, *supra* note 19, at 502; Jack Shepherd, *Harry Potter Fan Film About Voldemort, Approved by Warner Bros, Released on YouTube for Free*, INDEPENDENT (Jan. 15, 2018), <https://www.independent.co.uk/arts-entertainment/films/news/harry-potter-fan-film-voldemort-youtube-free-warner-bros-approved-a8159831.html>; Andrew Liptak, *A Slick Film That Covers an Important Part of Harry Potter Lore*, THE VERGE (Jan. 14, 2018), <https://www.theverge.com/2018/1/14/16889008/harry-potter-voldemort-origins-of-the-heir-fan-film-watch>; *Origins of the Heir*, KICKSTARTER, <https://www.kickstarter.com/dmca/voldemort-origins-of-the-heir-submitted-by-warner-bros-entertain> (last visited Mar. 31, 2019).

86. Rosenblatt, *supra* note 58, at 108.

87. Tanya M. Marcum & Eden S. Blair, *Over- and Underfunding: Crowdfunding Concerns of the Parties Involved*, 16 DEPAUL BUS. & COM. L.J. 1, 3 (2017). Equity-based crowdfunding, which may be carried out through a broker, provides the investor in a campaign with an equity share of the business engaging in crowdfunding. *Id.* at 5. Debt-based crowdfunding is often referred to as crowdlending and functions as a loan with the expectation of full repayment but may offer more favorable terms than a traditional bank loan. *Id.*

88. *Id.* at 3.

89. See Henry H. Perritt, Jr., *Technologies of Storytelling: New Models for Movies*, 10 VA. SPORTS & ENT. L.J. 106, 190 (2010).

90. See Marcum & Blair, *supra* note 87, at 22.

rewards offered. Some fans may only be interested in receiving updates about the project.⁹¹ Unlike the social norms that discourage the sale of fanworks, the fan tendency to support crowdfunding of amateur projects is likely to increase tension with rightsholders.⁹²

While crowdfunding may increase that tension with rightsholders because it redirects fans' dollars from rightsholders to other fans, the gift-giving ethos encourages fans to self-police, to regulate commercial activities, and to contribute to fan film productions through crowdfunding. Fans have a history of self-policing, as illustrated by the experiences of E.L. James and Jareo, encouraging peers to follow these norms and correcting them in various cases.⁹³ Casey Fiesler has argued that self-policing in the fanworks community has worked for many years "because [the fan community] is a longstanding, close-knit community."⁹⁴ However, this may be inconsistent with the reality of fan films, which may have millions of views and involve more than just a "close-knit" community of true fans.⁹⁵ Regardless, the gift-giving ethos of fandom and support of crowdfunding by fan film filmmakers is a great source of conflict between fans and rightsholders. When such conflict arises, many fan communities have recognized their ability to fight legal pressure with social and economic pressure.

91. Professor Suzanne Scott wrote on University of Southern California professor Henry Jenkins's blog concerning one crowdfunding campaign: "I'll probably pull the trigger and donate to the Veronica Mars movie But it's not because I want a t-shirt, or a digital download of the finished product from Flixter, Warner Bros.' proprietary video platform." Suzanne Scott, *Kickstarting Veronica Mars: A Conversation on the Future of Television (Part Two)*, CONFESSIONS OF AN ACA-FAN (Mar. 26, 2013), <http://henryjenkins.org/blog/2013/03/kickstarting-veronica-mars-a-conversation-on-the-future-of-television-part-two.html>.

92. See *Paramount Pictures Corp. v. Axanar Prods. Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *11 (C.D. Cal. Jan. 3, 2017) (finding that the fair use defense was invalid in a summary judgement motion as it pertained to a *Star Trek* fan film that raised over one million dollars from crowdfunding campaigns).

93. Jenkins, *Star Trek*, *supra* note 7 ("Crowdfunding has allowed fans to back productions that matter to them, but in [Axanar's] case, that resulted here in massive amounts of money entering the system and some questionable business practices that even many other fan filmmakers found exploitative.").

94. Fiesler, *supra* note 26, at 84.

95. See generally *Star Wars Theory, Vader Episode 1: Shards of the Past – A Star Wars Theory Fan-Film*, YOUTUBE (Dec. 21, 2018), <https://www.youtube.com/watch?v=Ey68aMOV9gc> (over nine million views at the time of this writing); Tryangle Films, *supra* note 64 (over fifteen million views at the time of this writing).

II. FANDOMS AS ACTIVIST COMMUNITIES

The social norms of fan communities, such as posting disclaimers and gifting, at once calm and incite rightsholders, encouraging some of them to strenuously enforce their copyrights.⁹⁶ However, some rightsholders realize that fans have a positive impact on the bottom line and have thus attempted to balance or soften their efforts to police intellectual property infringement.⁹⁷ The importance of fans as a target market is not lost on the fans themselves. One fan wrote in a disclaimer:

This is a piece of (hopefully) original fan fiction, and in no way is meant to infringe on the copyrights of Chris Carter, Fox Television, and/or Ten-Thirteen Productions. And before they think about suing me, they should just realize that I'm in their most-valued viewing demographics, and if they take all my money away I won't be able to buy all that lovely merchandise.⁹⁸

As illustrated by this fan's comments, fans are important in extending the life of television shows and movies because they allow the works to flourish even when new episodes are not being produced.⁹⁹ Thus, the reality that vigorous enforcement of legal rules may decrease franchise profitability becomes an important consideration in the calculus of whether to actually litigate infringement or to instead avoid angering fans and seek for a different accommodation.

Fans recognize and utilize this economic pressure to affect rightsholders' decision-making processes and encourage non-legal approaches. Technology and the internet have provided fans with tools that allow them to respond to rightsholders in a manner that may influence the calculus that rightsholders use to determine whether to enforce intellectual property rights. Through social media, fans may respond to rightsholders in ways that may

96. See Vogeles, *supra* note 12, at 589 (“[Reaction videos and LPs] typically use copyrighted content from other individuals and companies without licenses, which turns them into targets for large companies, such as Nintendo, that vigorously police their copyrights.”).

97. See Barton, *supra* note 47.

98. Tushnet, *supra* note 6, at 669.

99. See Barton, *supra* note 47.

negatively impact business interests, even if rightsholders are protected by intellectual property law.

Fandoms have created rich online communities that have broadened their membership through the use of social media and the internet. Because of these technologies, fandoms' ability to operate as an organized group with more unified goals and interests has increased. Prior to the internet, copyright owners were more centralized and organized than fan communities. Fans, on the other hand, were decentralized and lacked coordination, and it was difficult for them to achieve the large coordinated efforts necessary to protest legislation or achieve other large-scale actions.¹⁰⁰ But developments in the internet and social media have enabled new forms of advocacy and have given leverage to individuals previously unable to participate in public discourse and conversation.¹⁰¹ Regardless of the legal status of fan films, fans will utilize this newfound leverage to continue to make fan films involving the characters and the stories they love.¹⁰²

Fans gain leverage through social media from the emerging trends of online "issue entrepreneurship."¹⁰³ As described by Philip Agre, "issue entrepreneurship" occurs when an individual publicly shares information about a specific issue to his or her network and continually expands the network to include like-minded individuals.¹⁰⁴ Individuals will usually network with those who have similar interests, whether they be ideological, local, or other similarities.¹⁰⁵ While Agre discussed issue entrepreneurship in the context of local, national, and global politics and ideologies, he noted that ideologies "rationalize and cement coalitions among

100. See Lev-Aretz, *supra* note 72, at 205-06 ("[C]opyright owners are a well-organized group with resources and clearly defined interests, while the public consists of decentralized groups suffering from collective action problems.").

101. See Christopher M. Mascaro & Sean P. Goggins, *Brewing Up Citizen Engagement: The Coffee Party on Facebook*, in COMMUNITIES & TECHNOLOGIES, PROCEEDINGS OF THE 5TH INTERNATIONAL CONFERENCE ON COMMUNITIES AND TECHNOLOGIES 11 (2011).

102. See sources cited *infra* note 178.

103. See Mascaro & Goggins, *supra* note 101, at 13; see also Lev-Aretz, *supra* note 72, at 232-33.

104. Philip E. Agre, *The Practical Republic: Social Skills and the Progress of Citizenship*, in COMMUNITY IN THE DIGITAL AGE 201, 211 (Andrew Feenberg & Darin Barney eds., 2004).

105. Mascaro & Goggins, *supra* note 101.

issue entrepreneurs” in which social networks “become the connective tissue.”¹⁰⁶

Social media users, as a network of decentralized issue entrepreneurs, have coordinated activities to encourage changes in larger centralized organizations. Communicating through various online networks, they enlist friends, family members, and colleagues to a cause. Companies like Verizon and Facebook have seen large protests in response to policy changes, even having to reverse the changes after the outcry became overwhelming.¹⁰⁷ The concept that social networks are connective tissue in which people of like mind and ideology can communicate and “cement coalitions” is illustrated by the activities of fans on forums and in creating fanworks.

A. *Global Fan Networks That Care for Each Other*

As surveillance and policing of fan fiction by rightsholders has increased in recent decades, fan communities have coordinated efforts to provide notice to each other of particularly active enforcers and their policies. After Paramount became the first documented company to use intellectual property law to police fan fiction in 1977, active enforcement of informal policies developed by rightsholders became a regular practice for many rightsholders.¹⁰⁸ Although enforcement has ebbed and flowed over the years, fans have worked together to notify each other of rightsholders who might not be amiable to their work.

At times, groups of fans have posted cease-and-desist letters online to make others aware of media companies’ actions to tamp down on fan films and to attempt to discourage those

106. Agre, *supra* note 104, at 211-12.

107. See Lev-Aretz, *supra* note 72, at 233 (describing the reversal of a Verizon “convenience fee” within twenty-four hours of announcing the implementation of the fee due to negative customer response through social media); Brian X. Chen & Ron Lieber, *Verizon Drops Plan for \$2 Fee on Some Bill Payments*, N.Y. TIMES BITS BUS. TECH. BLOG (Dec. 30, 2011), [http:// bits.blogs.nytimes.com/2011/12/30/verizon-backtracks-on-plan-for-2-convenience-fee/](http://bits.blogs.nytimes.com/2011/12/30/verizon-backtracks-on-plan-for-2-convenience-fee/); Andrés Sanchez, *The Facebook Feeding Frenzy: Resistance-Through-Distance and Resistance-Through-Persistence in the Societied Network*, 6 SURVEILLANCE & SOC’Y 275, 282-83 (2009).

108. See Katyal, *supra* note 66, at 514 (describing Paramount’s efforts to stop the publishing of a fanzine and the subsequent efforts of the Official Star Wars Fan Club to do the same).

companies' efforts.¹⁰⁹ In one instance, Warner Brothers attempted to shut down fan sites run by teens and tweens in Poland, but fans around the world came to the teens' aid.¹¹⁰ For example, when teenager Heather Lawver found out about her friends' fan sites being threatened, she organized "Defense Against the Dark Arts," a group that worked from across the world to defend the fans who had been contacted by Warner Brothers using petitions and talking with media outlets.¹¹¹ Lawver and fans like her communicated through online fan forums and websites. Although these channels were normally used for brainstorming creative obstacles, opining on character traits, role-playing, or dropping reviews for a particular fanwork, the same channels were (and currently are) used to organize and coordinate efforts in resisting rightsholders' actions.¹¹²

Fan fiction and fanworks engage people from all over the world because they allow for an outlet of creative expression with a built-in audience and immediate feedback.¹¹³ The feedback and community is strengthened by the interconnected network that exists among users and participants.¹¹⁴ Fan films utilize Facebook groups to keep users updated on fan film progress or solicit help from other creators.¹¹⁵ Active forum and social media groups provide strong relationships and a sense of community for the fans who participate. Active groups of fans also provide each other important resources for responding to rightsholders, as Warner Brothers discovered in the previous example.

109. JENKINS, *CONVERGENCE CULTURE*, *supra* note 10, at 189; *see, e.g.*, Rosemary J. Coombe & Andrew Herman, *Defending Toy Dolls and Maneuvering Toy Soldiers: Trademarks, Consumer Politics, and Corporate Accountability on the World Wide Web*, MIT, <http://web.mit.edu/comm-forum/legacy/papers/coombherman/coombeherman.html> (last visited Feb. 5, 2020).

110. JENKINS, *CONVERGENCE CULTURE*, *supra* note 10, at 186.

111. *Id.*

112. *See, e.g.*, FANFICTION, "Writers Anonymous" forum, <https://www.fanfiction.net/forum/Writers-Anonymous/2872/> (last visited Feb. 5, 2020); FANFICTION, "General Place to Vent Thread" forum, <https://www.fanfiction.net/topic/2872/137302745/1/General-The-Place-to-Vent-Thread> (last visited Feb. 5, 2020).

113. C.L. Foltermann, *Five Psychological Benefits of Writing Fanfiction*, FANFIC MAG. (Oct. 21, 2015), <https://fanslashfic.com/2015/10/21/five-psychological-benefits-of-writing-fanfiction/>.

114. *See* JENKINS, *CONVERGENCE CULTURE*, *supra* note 10, at 152.

115. *See, e.g.*, Star Trek Fan Films, FACEBOOK, <https://www.facebook.com/StarTrekFanFilms/>.

B. *Using Global Fan Networks to Respond to Rightsholders' Actions*

Fans have demonstrated that their networks can operate as coordinated groups to achieve unified goals. On a number of occasions, the fans of different shows have coordinated their activities to encourage television networks to bring back television shows that had been canceled from programming slates. Although fans have banded together in this way since the 1960s, the practice has become more common, and more effective, during recent years with the advent of social media.¹¹⁶ Fans demonstrated that they were ready for “instant mobilization” during 2018 when they rescued six broadcast television shows from being permanently canceled.¹¹⁷

Perhaps unsurprisingly, some fans go to great lengths to save shows about which they feel passionate. When NBC was debating whether or not to renew the show *Chuck* in 2009, fans of the show organized to buy sandwiches from Subway—a sponsor of the show—during the season finale. They also raised \$17,000 for the American Heart Association on behalf of NBC in a campaign titled “Have a Heart, Renew *Chuck*.”¹¹⁸ When *Jericho* was canceled by CBS, fans coordinated through internet chat rooms and CBS’s own comment boards to send almost 40,000 pounds of peanuts to executives in New York and California in reference to a line uttered by a character in the season finale.¹¹⁹ After NBC canceled the series *Timeless* after a Season Two cliffhanger, fans crowdfunded a publicity campaign that successfully encouraged the network to

116. See Bill Keveney, *From ‘Star Trek’ to ‘Timeless,’ Fan TV-Show Rescues Evolve, but Passion Remains Paramount*, USA TODAY (Dec. 3, 2018), <https://www.usatoday.com/story/life/tv/2018/12/03/fan-campaigns-save-our-tv-shows/2159748002/>. Fans coordinated efforts and mailed letters to television executives in order to encourage them to renew *Star Trek* for a third and final season. Sarah Sharpe, *From Banana Crates to Hashtags: A Brief History of TV Fan Campaigns*, TV INSIDER (July 2, 2017, 9:00 AM), <https://www.tvinsider.com/259525/a-brief-history-of-tv-fan-campaigns-downward-dog-timeless-wayward-sisters/>.

117. See Keveney, *supra* note 116.

118. Sharpe, *supra* note 116. Subway became a partner in Season Three through what was called an “innovative advertising partnership.” *Official NBC Announcement on Chuck Renewal with Subway as Major Sponsor*, TV BY THE NUMBERS (May 19, 2009), <https://tvbythenumbers.zap2it.com/broadcast/official-nbc-announcement-on-chuck-renewal-with-subway-as-major-sponsor/>.

119. Scott Mayerowitz, *Nutty ‘Jericho’ Fans Make CBS Reconsider Canceling Show*, ABC NEWS (June 6, 2007), <https://abcnews.go.com/Business/FunMoney/story?id=3214156&page=1>.

greenlight a two-hour movie to wrap up the series.¹²⁰ In another instance, fans of the football-themed *Friday Night Lights* sent petitions and mini-footballs to NBC when rumors surfaced that the network was considering canceling the series.¹²¹

The passion of these fans cannot be understated, but there are a number of fandoms that may be even more passionate in supporting content and media in their community. Fans of the series *Star Wars* tend to be particularly active in creating fan films and coordinating activities.¹²²

Since 2016, the YouTuber Toos has been posting *Star Wars*-related videos to his channel, Star Wars Theory.¹²³ These videos generally center on fan theories surrounding the *Star Wars* mythology, including discussions of canonical stories as well as of the Expanded Universe. The channel has since grown to almost 1.6 million subscribers and thousands of daily viewers.¹²⁴ In December 2018, Star Wars Theory released a fan film titled *Shards of the Past*.¹²⁵ Prior to creating his fan film, Toos had contacted Lucasfilm to ask if he could make the film, and he claimed he was given permission under two conditions: he could not monetize the film in any way and could not crowdfund to underwrite the production.¹²⁶

120. See Sharpe, *supra* note 116; Bryan Cairns, *Matt Lanter Previews Timeless' Possible Forever Ending Ahead of the Two-Hour Movie*, SYFY (Dec. 20, 2018), <https://www.syfy.com/syfywire/matt-lanter-previews-timeless-possible-forever-ending-ahead-of-the-two-hour-movie>.

121. *How DirectTV Saved "Friday Night Lights,"* FUELED, <https://fueled.com/blog/the-end-of-friday-night-lights-and-how-directv-saved-it/> (last visited Feb. 5, 2020).

122. Some *Star Wars* fans are staunch believers in the Force – hundreds of thousands even citing Jediism as their religion. John C. Lyden, *Whose Film Is It, Anyway? Canonicity and Authority in "Star Wars" Fandom*, 80 J. AM. ACAD. RELIGION 775 (2012), <https://www.jstor.org/stable/23250724>; see also *Doctrine of the Order*, TEMPLE OF THE JEDI ORDER, <https://www.templeofthediorder.org/doctrine-of-the-order> (last visited Feb. 5, 2020) (listing the tenets of Jediism).

123. Steven Asarch, *YouTube Star Wars Theory Has Vader Fan Film Struck Down by Disney Music Publisher (Update)*, NEWSWEEK (Jan. 15, 2019), <https://www.newsweek.com/star-wars-theory-disney-youtube-claim-copyright-reddit-1293172>.

124. See Star Wars Theory, *Channel Home Page*, YOUTUBE, https://www.youtube.com/channel/UC8CbFnDTYkiVweaz8y9wd_Q (last visited Feb. 5, 2020).

125. Asarch, *supra* note 123. Contrary to the social norms of fan films, *Shards of the Past* does not begin with a disclaimer as is customary. See Star Wars Theory, *supra* note 95.

126. Asarch, *supra* note 123; see Star Wars Theory, *Disney and Warner Chappell File CLAIM on Vader Fan Film and Are Making Money from It Now*, YOUTUBE (Jan. 14, 2019), https://www.youtube.com/watch?v=acFPu_UZWE.

Toos decided to produce the film at a personal cost of \$150,000 and forego any advertising revenue.¹²⁷ After the film was released, it was viewed over six million times and received over 40,000 “likes” before the Walt Disney Music Company and Warner Chappell issued an infringement claim on YouTube asserting that the music in the film, although scored by a hired composer, infringed on the *Star Wars* musical themes to which Warner Chappell owned the rights.¹²⁸ As part of the claim, YouTube placed advertisements on the fan film and distributed the revenue directly to the claimants.¹²⁹ In response to Star Wars Theory publicizing these events, fans responded on social media, driving a Reddit post about the issue to the front page of the site where it received over 90,000 upvotes.¹³⁰ After just two days, the massive fan response on social media criticizing Warner Chappell’s and Disney’s actions motivated Lucasfilm to step in and coordinate with Disney to retract the infringement claims and remove advertising from the video.¹³¹

By posting about his disappointment on YouTube when Warner Chappell first issued the infringement notice, Toos mobilized his fanbase into action without any explicit solicitation for help or any suggestion of a coordinated response against Warner Chappell. The fan reaction was organic, and momentum grew without any central figure driving or organizing the response. When individuals feel like they are going to be deprived of something they feel belongs to them and their community, they

127. Asarch, *supra* note 123.

128. *Id.*; Star Wars Theory, *supra* note 126; Star Wars Theory, *Disney and Warner Chappell Responded*, YOUTUBE (Jan. 15, 2019) [hereinafter *Disney Responded*], <https://www.youtube.com/watch?v=G3LOEuhryMo>.

129. Star Wars Theory, *supra* note 126.

130. Asarch, *supra* note 123; *Disney Responded*, *supra* note 128; see generally YouTubeArchivist, *Star Wars Theory Creates a Darth Vader Fan Film, Hires a Composer to Create Original Music, and Doesn’t Monetize the Video. Warner Chappell Is Falsely Copyright Claiming the Video’s Music and Monetizing It for Themselves*, REDDIT (Jan. 15, 2019), https://www.reddit.com/r/videos/comments/ag8ovy/starwarstheory_creates_a_darth_vader_fan_film (last visited Feb. 5, 2020).

131. Star Wars Theory, *Lucasfilm Steps In! Orders Them to Remove Claim! Justice!!*, YOUTUBE (Jan. 16, 2019), <https://www.youtube.com/watch?v=5wn2jYlmvy4>; Kevin Burwick, *Lucasfilm Saves Darth Vader Fan Film from Disney Copyright Claim*, MOVIEWEB (Jan. 16, 2019), <https://movieweb.com/star-wars-boycott-lucasfilm-returns-darth-vader-fan-film/>.

react even when they may generally be apathetic.¹³² The massive response was enough to attract the attention of Lucasfilm, who, within two days, was able to step in on the side of Star Wars Theory. The swift reaction by Lucasfilm likely would not have occurred but for the interest and actions of Star Wars Theory fans and their coordinated efforts.

Of course, not every fandom will have the numbers or coordination to evoke such a response. However, as illustrated by the many television show renewals in 2018 and earlier, the number of interested fans does not have to be many – though they must be vocal and active in enlisting friends. The ease of activism on social media may lessen the difficulty for smaller groups of fans to enlist others to their cause. With little more than a mouse-click, even non-fans of a particular franchise may participate in a coordinated response towards particular rightsholders in order to support their friends who are fans.

Alternatively, smaller groups still have the ability to sue rightsholders and rely on fair use and, possibly, free speech as a mechanism to continue their fanwork creations.¹³³ In many other cases, possibly where the media franchise around which a fandom is centered is small and there are few fans, the rightsholder may not be as active in policing fanworks due to both litigation costs and the costs of monitoring fan and video sites.

The efforts of fans to revive television shows and take ads off the Star Wars Theory fan film illustrate both the ability of fans to motivate responses by rightsholders and also the willingness of rightsholders to cater to fans' desires. As important segments of the market, fans are utilizing their importance and social media tools to leverage favorable treatment from rightsholders during disputes.

III. RIGHTSHOLDERS' ATTEMPTS TO RESPOND IN A NEW REALITY

The new reality faced by rightsholders is that fan communities have evolved with their own set of norms and behaviors, such as

132. See Lev-Aretz, *supra* note 72, at 209 (discussing the mobilization of people to defeat legislation governing internet usage when those people felt that they were at risk of losing social sharing privileges).

133. See Melissa Anne Agnetti, *When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment's Use as a Defense to Copyright Infringement Claims in Fan-Made Works*, 45 SW. L. REV. 115, 158 (2015).

crowdfunding, which may conflict with the rights that rightsholders have under intellectual property law. Even if rightsholders are justified in discouraging fan films through the invocation of copyright protections, the leverage wielded by large fanbases through the use of social media may deter some rightsholders from pursuing legal remedies to alleged infringement. Rightsholders may also adapt their approach to litigating infringement in ways that still permit the allegedly infringing acts. Paramount recently utilized a combination of legal enforcement and private ordering in an attempt to navigate the changing fanworks landscape while Warner Brothers has also attempted to utilize social norms to govern fanwork creations. Paramount's experience with the *Axanar* fan film and Warner Brothers' efforts with *Harry Potter* fan films are descriptive of what rightsholders will increasingly face moving forward.

A. *Litigating the Million-Dollar Star Trek Fan Film*

As one of the largest and most active fandoms in science fiction, the *Star Trek* fan community has generated astonishing amounts of fan fiction, fan films, and other fanworks.¹³⁴ Over the years, Paramount and CBS have produced thirteen feature-length films, seven television series (with yet more being contemplated), and many ancillary works to please the millions of *Star Trek* fans around the world.¹³⁵ As the copyright holders of *Star Trek* and its derivatives, Paramount/CBS¹³⁶ has varied its approach to fanworks over the years, particularly fan films, but has generally been strict in enforcing its rights.¹³⁷ But there has been an "explosion of [*Star Trek*] fan films in recent years," due to the changes in technology and crowdfunding that have enabled better productions.¹³⁸

Unfortunately, although Paramount has expressed that it is supportive of the fan community, *Star Trek* fan film productions in

134. Jacob Brogan, *CBS and Paramount Release New, Restrictive Rules for Star Trek Fan Films*, SLATE (July 1, 2016), <https://slate.com/business/2016/07/cbs-and-paramount-issue-rules-for-fan-films.html>.

135. See Complaint for Plaintiff at 1, *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506 (C.D. Cal. Jan. 3, 2017).

136. Hereinafter referred to only as Paramount.

137. Complaint for Plaintiff, *supra* note 135.

138. *Engage: The Official Star Trek Podcast*, RADIO.COM (June 28, 2016) (downloaded using iTunes).

recent years have participated in an “arms race” to attach more cast from official series or films, or raise more money through crowdfunding, creating a cottage industry that begins to compete with the official *Star Trek* franchises.¹³⁹ While Paramount wants to encourage fan interaction and creation, John Van Citters, Vice-President of *Star Trek* Brand Development, expressed that Paramount’s stance has always been that a fan creation is, and should be, non-commercial.¹⁴⁰ But the company has worried that in recent years some fans have blurred the line between non-commercial and commercial works.¹⁴¹ In its most recent set of fan film guidelines, Paramount states that “CBS and Paramount Pictures are big believers in reasonable fan fiction and fan creativity, and, in particular, want amateur fan filmmakers to showcase their passion for *Star Trek*.”¹⁴² While this statement may encourage and welcome fan creations using the *Star Trek* universe, whether a production is actually *amateur* is highly important to Paramount.

During the production of *Star Trek Beyond*, a sequel in the reboot series, another project set in the *Star Trek* universe was also in production.¹⁴³ The feature-length fan film called *Axanar*, and a companion 20-minute short film titled *Prelude to Axanar*, successfully crowdfunded over \$1.3 million on Kickstarter and Indiegogo, making it possibly the most expensive fan film project ever produced.¹⁴⁴ In 2015, Paramount filed a lawsuit against the producers of *Axanar*, saying that the project was “intended to be professional quality production” and infringed upon the *Star Trek* copyright in, among other things, the Klingon language, Vulcan

139. *See id.*

140. *Id.*

141. *Id.*

142. *Fan Films*, STAR TREK, <http://www.startrek.com/fan-films> (last visited Feb. 5, 2020).

143. Dan Solomon, *CBS and Paramount Have Official Guidelines for People Making “Star Trek” Fan Films*, FAST COMPANY (June 24, 2016), <https://www.fastcompany.com/3061242/cbs-and-paramount-have-official-guidelines-for-people-making-star-trek-fan-films>.

144. *See Axanar Productions, Star Trek: Axanar*, KICKSTARTER (July 25, 2014), <https://www.kickstarter.com/projects/194429923/star-trek-axanar>; Axanar Productions, *Axanar*, INDIEGOGO (July 21, 2015), <https://www.indiegogo.com/projects/axanar#/>; Axanar Productions, *Star Trek: Prelude to Axanar*, KICKSTARTER (Mar. 1, 2014), <https://www.kickstarter.com/projects/194429923/star-trek-prelude-to-axanar/updates>; Joe Otterson, ‘Star Trek’ Sets New Rules for Fan Films, WRAP (June 23, 2016), <https://www.thewrap.com/star-trek-sets-new-rules-for-fan-films/>.

ears, and characters from the original series.¹⁴⁵ Although *Star Trek* fan films and other fanworks had been produced for decades alongside the official properties, the quality of the work and the amount of money at issue motivated Paramount to litigate.

During the legal battle that ensued, Paramount issued fan film production guidelines, effectively establishing a safe harbor for fan films that were consistent with the new delineated standards.¹⁴⁶ After the court issued a summary judgement ruling against the producers of *Axanar*, rejecting their claims of fair use,¹⁴⁷ the case settled out of court, with the executive producer Alec Peters conceding that the *Axanar* project “crossed boundaries [of what is] acceptable to CBS and Paramount.”¹⁴⁸ Yet, the producers are still continuing production of the film with some modifications as part of their agreement with Paramount.¹⁴⁹

The escalation of enforcement and litigation by Paramount was not viewed favorably by fans or even industry professionals.¹⁵⁰ J.J. Abrams, director and producer of the most recent films in the *Star Trek* franchise, said of the litigation, “We started talking about it and realized this was not an appropriate way to deal with the fans. The fans should be celebrating this [*Axanar* production].”¹⁵¹ Some fans have vigorously supported *Axanar* and its executive producer

145. Complaint for Plaintiff, *supra* note 135; Eriq Gardner, *CBS, Paramount Settle Lawsuit Over ‘Star Trek’ Fan Film*, HOLLYWOOD REP. (Jan. 20, 2017), https://www.hollywoodreporter.com/thr-esq/cbs-paramount-settle-lawsuit-star-trek-fan-film-966433?utm_source=twitter.

146. See Otterson, *supra* note 144.

147. See *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *9 (C.D. Cal. Jan. 3, 2017) (holding that the prequel “Prelude to Axanar” served as a movie trailer and substitute for the planned feature-length fan film and defendants used that trailer to raise over a million dollars from fans who could have otherwise watched *Star Trek* on cable).

148. Nathan Mattise, *Post-Axanar, CBS Unveils First Official Filmmaking Initiative in Trek History*, ARS TECHNICA (Aug. 7, 2017), <https://arstechnica.com/gaming/2017/08/evidently-embracing-trek-fan-films-cbs-announces-star-trek-film-academy-course/>; Andrew Liptak, *Axanar Has Settled Its Lawsuit with Paramount over Its Star Trek Fan Film*, VERGE (Jan. 20, 2017), <https://www.theverge.com/2017/1/20/14340666/axanar-productions-settled-lawsuit-paramount-star-trek-fanfilm>.

149. Mattise, *supra* note 148. The *Axanar* production will move forward as two 15-minute episodes rather than a feature length film. Axanar, *Axanar Update # 4 03-05-2019*, YOUTUBE (Mar. 5, 2019), <https://www.youtube.com/watch?v=Pwu4UcsAbYg>.

150. See Anonymous, *Reader: Axanar Fractures Fan Community*, AXAMONITOR (Nov. 27, 2016), http://axamonitor.com/doku.php?id=reader_commentary; Mattise, *supra* note 148.

151. Mattise, *supra* note 148.

Alec Peters while others view his production as a pariah because of his attempts to over-fundraise.¹⁵²

The case of *Axanar* depicts a difficult conundrum for fans and rightsholders; it presents the issue of defining which works are authentic fanworks and which cross the line from fan creations to commercial endeavors when crowdfunding and professionals are involved.¹⁵³ As discussed previously, fandom operates within a gift economy that has been incorporated into the social norms of the community, and thus, crowdfunding is an integral part of fan culture.¹⁵⁴ And the nature of technological advances has allowed fan films to more closely mirror the quality of big budget Hollywood films. Hence, because quality is increasing and the gift economy of fandoms encourages crowdfunding, large fan films such as *Axanar* will become more common and rightsholders will have to establish mechanisms to address those occurrences, such as what Paramount attempted with its fan film guidelines.

B. *Paramount's Attempt at Private Ordering*

In light of the litigation with *Axanar's* producers, Paramount and CBS issued fan film guidelines to bring "fan films back to their roots."¹⁵⁵ Issued in June 2016, the ten guidelines¹⁵⁶ include conditions that props and costumes must be official merchandise, that the title cannot contain "*Star Trek*," that the film must have a subtitle stating "A STAR TREK FAN PRODUCTION," and that the production must not exceed fifteen minutes—unless it is in two parts, in which case it may be a total of thirty minutes.¹⁵⁷ While the time limitation was particularly derided by fans, three other rules also caused discord in the fan community.

152. The website <http://axamonitor.com> is based on the lawsuit and is not forgiving of the *Axanar* producers, while <https://fanfilmfactor.com/> is supportive and run by a defense witness.

153. See Lerner, *supra* note 53.

154. See *supra* Section I.B (discussing the social norms of the fan community).

155. CBS & Paramount, *Star Trek Fan Film Guidelines Announced*, STAR TREK (June 23, 2016), <http://www.startrek.com/article/star-trek-fan-film-guidelines-announced>.

156. While John Van Citters, VP of Product Development, described the guidelines as not being hard and fast rules, I will refer to them as rules because the fan community has treated them as such. See Engage, *supra* note 138.

157. *Fan Films*, *supra* note 142; CBS & Paramount, *supra* note 155.

First, rule five of the Fan Film Guidelines states:

The fan production must be a real “fan” production, i.e., creators, actors and all other participants must be amateurs, cannot be compensated for their services, and cannot be currently or previously employed on any *Star Trek* series, films, production of DVDs or with any of CBS or Paramount Pictures’ licensees.¹⁵⁸

Representing CBS, John Van Citters said in an interview on the official *Star Trek* podcast “Engage” that CBS and Paramount had become concerned with the “arms race” to attach cast and crew from *The Original Series* as well as other *Star Trek* properties.¹⁵⁹ He believed that the push toward attaching actors and other *Star Trek* professionals was raising a barrier to entry, dissuading some fans from participating in the production of fan films.¹⁶⁰ Barring *Star Trek* alumni from participating in future fan productions creates difficulties for some industry professionals who also wish to participate in fan film production.¹⁶¹ The prohibition also ends a beneficial collaboration between amateurs and professionals drawn together by a mutual love for a cultural icon.¹⁶²

Second, rule six of the guidelines codified the fanworks norm that the “fan production must be non-commercial.”¹⁶³ Subsections under the non-commercial rule state that no revenue can be derived from the exhibition of the film—whether online or in a theater buy-out, that it be shared digitally and not in any physical format, and that fundraising for the production be limited to \$50,000.¹⁶⁴ This rule demonstrates that Paramount—at least in its rhetoric—was attempting to recognize the participatory nature of *Star Trek* fandom and encourage fan activity while incorporating the social norm that the film be non-commercial. However, Paramount failed to consider the ownership fans felt over the *Star Trek* franchise.

158. *Fan Films*, *supra* note 142.

159. *Engage*, *supra* note 138.

160. *Id.*

161. See also Josh Rottenberg, *CBS and Paramount Pictures Announce New Guidelines on ‘Star Trek’ Fan Films*, L.A. TIMES (June 23, 2016, 1:01 PM), <https://www.latimes.com/entertainment/movies/la-et-hc-star-trek-fan-film-guidelines-20160623-snap-story.html> (providing examples of previous *Star Trek* cast members who have participated in fan film production).

162. Jenkins, *Star Trek*, *supra* note 7.

163. *Fan Films*, *supra* note 64.

164. *Id.*

Although the intellectual property legally belongs to Paramount, *Star Trek* fans feel a sense of ownership of the series. They have supported the Roddenberry family over the years, first pushing for the second and third seasons of the original series, and then actively promoting the series.¹⁶⁵ The imposition of specific rules that limited fan activities that had been going on for years disturbed fans.

Finally, the rules also state that the fan production must be “family friendly” and prohibit “profanity, nudity, obscenity, pornography, depictions of drugs, alcohol, tobacco, or any harmful or illegal activity, or any material that is offensive, fraudulent, defamatory, libelous, disparaging, sexually explicit, threatening, hateful, or any other inappropriate content.” This would ban any scene from occurring in a bar, a setting frequently used in *Star Trek* episodes and films.¹⁶⁶ As well as limiting plot lines, this restriction could theoretically prohibit any illegal violence from being depicted in fan films as well.

Yet, the fan film guidelines may not be entirely unreasonable. Arguably, some of the rules were warranted, such as the cap on crowdfunding. The line between fan production and full-scale feature film creation has blurred as fundraising has become easier, with fan film production budgets ranging from thousands of dollars to over one million dollars.¹⁶⁷ Although not perfect, Paramount’s election to allow some fanwork crowdfunding sets it apart from Warner Brothers and Lucasfilm, which do not allow any crowdfunding whatsoever.

Fan film creators have reacted differently to the fan film guidelines.¹⁶⁸ Some fans shut down large productions while others reworked their stories and runtimes in order to meet the

165. Chris Lough & Leah Schnelbach, *New Star Trek Fan Film Guidelines Have a Chilling Effect on Star Trek Fans*, TOR.COM (June 23, 2016, 4:23 PM), <https://www.tor.com/2016/06/23/new-star-trek-fan-film-guidelines/>.

166. Liz Shannon Miller, *‘Star Trek’ Wants to Regulate Fan Culture, but It’s Not Going to Be Easy*, INDIEWIRE (July 18, 2016, 6:58 PM), <https://www.indiewire.com/2016/07/star-trek-fan-films-guidelines-rules-cbs-axanar-1201707254/>.

167. Rottenberg, *supra* note 41.

168. Miller, *supra* note 166; Carlos Pedrazza & James Heaney, *Guidelines Aftermath*, AXAMONITOR, http://axamonitor.com/doku.php?id=guidelines_aftermath (last modified Apr. 24, 2018, 9:00 PM); see Joe Otterson, *‘Axanar’ Producer Responds to ‘Star Trek’ Fan Film Guidelines: ‘Very Disheartening’*, WRAP (June 23, 2016, 3:23 PM), <https://www.thewrap.com/axanar-producer-responds-to-star-trek-fan-film-guidelines-very-disheartening/>.

new standards.¹⁶⁹ Others continued producing their films in the original spirit of the franchise and genre and disregarded the new rules entirely.¹⁷⁰

Opponents to the guidelines believed that there would be a chilling effect such that fan production would be severely limited. According to Henry Jenkins:

Despite a warm and fuzzy prelude, the Fan Film Statement is apt to be read as a declaration of war on fan filmmakers. These guidelines are anything but 'reasonable' in that I can't think of any currently available fan films that would come anywhere near meeting the expectations here and the guidelines would prohibit many forms of practice that would be explicitly protected under current understandings of [f]ederal law regarding parody and transformative use.¹⁷¹

Jenkins argued specifically that the requirement that fan films be "family friendly" (with its many associated restrictions such as those on violence and illegal activities) would discourage fans from creating the types of works that would be most transformative—essentially acting as a form of censorship.¹⁷² He further argued that fan filmmakers may read the guidelines "as superseding fair use protections."¹⁷³ Indeed, there is the possibility that other rightsholders take the same tack in the future and release guidelines that dissuade fans from fully participating in fan culture.¹⁷⁴

169. Pedrazza & Heaney, *supra* note 168 (listing productions continuing under the guidelines or continuing as non-*Star Trek* productions in the wake of the *Paramount v. Axanar* case); see Miller, *supra* note 166.

170. Pedrazza & Heaney, *supra* note 168.

171. Miller, *supra* note 166.

172. Jenkins, *Star Trek*, *supra* note 7. For example, stories that depict revolutions may include violence and other harmful and illegal activities and would thus be prohibited by the guidelines even while they might be transformative under fair use principles. See also JENKINS, *CONVERGENCE CULTURE*, *supra* note 10, at 190 ("A story where Harry and the other students rose up to overthrow Dumbledore because of his paternalistic policies is apt to be recognized by a judge as political speech and parody, whereas a work that imagines Ron and Hermione going on a date may be so close to the original that its status as criticism is less clear and is apt to be read as infringement.").

173. Jenkins, *Star Trek*, *supra* note 7.

174. *Id.* ("While the producers insist that these guidelines apply only to fan films, they could have a chilling effect on all forms of grassroots fan culture and are apt to be mimicked by other franchise producers.").

But the predicted chilling effect does not appear to have occurred.¹⁷⁵ Within eight months of the guidelines going into effect, sixty productions were documented as under production by Fan Film Factor.¹⁷⁶ New fan films continue to be crowdfunded and released to the public via online video platforms, and *Star Trek* sets are still built and maintained for fan use throughout the country, often at great expense.¹⁷⁷ Though fans may have been upset by the guidelines, they continue to actively participate in the creation of fanworks.¹⁷⁸

Paramount's decision to issue fan film guidelines during the *Axanar* litigation demonstrates the continuing friction between intellectual property law, popular culture, and organized fandoms. Copyright provides legal protections for owners of intellectual property, but—as demonstrated by many *Star Trek* fan films—social norms are much more likely than formal mechanisms to influence fanwork creations.¹⁷⁹ By delineating the standards with which it would determine whether to send cease-and-desist letters and pursue legal remedies, Paramount created clear expectations and extra-legal norms, similar to those already practiced in fandom. The standards recognize the reality that, although copyright

175. Andrew Whalen, *What If 'Star Trek' Were Free?*, NEWSWEEK (Mar. 5, 2018, 5:41 PM), <https://www.newsweek.com/star-trek-discovery-movie-axanar-lawsuit-news-copyright-laws-creative-commons-831612>.

176. *Id.*

177. See, e.g., Jonathan Lane, *Ghost Ship Appears Out of Nowhere!* (Audio Interview with Joshua Irwin and Victoria Fox), FAN FILM FACTOR (Nov. 22, 2018), <https://fanfilmfactor.com/2018/11/22/ghost-ship-appears-out-of-nowhere-audio-interview-with-joshua-irwin-and-victoria-fox/>; Jonathan Lane, *Fan Film Friday—Interview with Ray Tesi (the New Owner of the Star Trek Continues Sets)*, AXANAR (Mar. 17, 2018), <https://axanarproductions.com/fan-film-friday-interview-with-ray-teshi-the-new-owner-of-the-star-trek-continues-sets/> (presenting interview with fan using his retirement fund to maintain studio facilities with replica *Star Trek* sets).

178. The rules issued by Paramount, although largely in line with fan culture, had the unintended—and arguably beneficial—effect of causing some fan filmmakers to remove all mentions of *Star Trek* and its characters from their productions, leading to the creation of original works. See Miller, *supra* note 166; see also Waters, *supra* note 52 (“Hopefully the fan fiction will help people become writers in their own right.”) (quoting J.K. Rowling’s spokesperson for the Christopher Little literary agency). In the aftermath of the *Axanar* case, some *Star Trek* fans are no longer participating in fan film creation but are instead collaborating with each other to create new works, themselves worthy of copyright protection, and possibly their own fan communities in the future.

179. Katyal, *supra* note 66, at 513 (discussing the systems of copyright formalities and social norms that “tie together various communities within the world of fan fiction and often underlie the interactivity that characterizes cyberspace in general”).

law may protect Paramount and CBS in litigation,¹⁸⁰ fans are an important target market and active fan participation should be encouraged.¹⁸¹

While Paramount's approach upset fans, the fan film guidelines provided useful standards to rightsholders and fanwork producers alike. First, utilizing a defined set of rules allows fans to be on notice and self-police. Second, allowing fans to crowdfund up to a defined amount demonstrates support for the fan community and fan participation in fan films. Finally, the rules set a clear precedent that—while still encouraging fans to actively participate in fan culture—may provide some public relations shielding when studios do decide to litigate certain fan creations that cross the line into commerciality. Fans may not like the guidelines, but they create some clarity on accepted behavior and largely incorporate norms and standards already consistent within fan culture.

C. Warner Brothers' Private Ordering

Paramount is not the only studio to set guidelines for fan creations. Warner Brothers has also been active and mostly supportive of fans seeking to create non-commercial works based on the *Harry Potter* franchise. J.K. Rowling, the author of the *Harry Potter* franchise, has expressed a distaste for fanworks that are “pornographic or sexually explicit,” but is otherwise flattered by fans who become passionate enough about her stories to create fanworks.¹⁸² While she and Warner Brothers are generally supportive of fanworks, the studio has been quick to act when a fanwork strays too close to being a commercial endeavor.¹⁸³ But when a fanwork or, more specifically, a fan film is non-commercial,

180. *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *11 (C.D. Cal. Jan. 3, 2017); see David Kluff, *The Pleads of the Many: 50 Years of Star Trek Lawsuits*, TRADEMARK & COPYRIGHT LAW (July 18, 2016), <http://www.trademarkandcopyrightlawblog.com/2016/07/the-pleads-of-the-many-star-trek-50-50-star-trek-litigations/>.

181. See JENKINS, CONVERGENCE CULTURE, *supra* note 10, at 62–63; Jenkins, *Star Trek*, *supra* note 7 (“Fan films represent particularly active ‘engagement.’”).

182. See Nolan, *supra* note 27, at 556.

183. Kristen De Groot, *Warner Bros. Crackdown Puts Dark Mark Over Potter Festivals*, ASSOCIATED PRESS (June 16, 2018), <https://www.apnews.com/77daf58afa7f4bf2a45f93a93a59cdc8>; see also Kevin Burwick, *Harry Potter Fan Film Gets Full Blessing from Warner Bros.*, MOVIEWEB (June 1, 2017), <https://movieweb.com/voldemort-origins-of-heir-fan-film-approved-warner-bros/>.

Warner Brothers has allowed it to thrive on video platforms.¹⁸⁴ Warner Brothers' attitude has typically been that fanworks created "by fans, for fans, for fun" (i.e., non-commercial) are acceptable – regardless of what the law says.¹⁸⁵

For example, the fifty-two minute Italian fan film *Voldemort: Origins of the Heir* follows Tom Riddle's origin story and is partly based on references made in the sixth novel, *Harry Potter and the Half-Blood Prince*.¹⁸⁶ Reportedly, the film was originally funded through a crowdfunding campaign – raising £15,000 – but Warner Brothers stepped in during the production, issuing an infringement claim on the crowdfunding platform.¹⁸⁷ Ultimately reaching an agreement with Warner Brothers to release the film for free, the producers released the film on YouTube on January 13, 2018, and by January 18 it had been viewed more than seven million times.¹⁸⁸ One reporter wrote that the visual effects "are, in many places, better than the multimillion-dollar Warner Brothers movies."¹⁸⁹ Another wrote, "[r]ight from the off, the magic is impressive, and the film is littered with moving photos that give you a genuine jolt of joy. Hogwarts and the owls also look lovely."¹⁹⁰

Warner Brothers' approach to fan films and copyright infringement claims has largely remained consistent. Fan films created by fans and distributed for free are tolerated while fans who attempt *any* form of monetization, crowdfunding or otherwise, are swiftly contacted with cease-and-desist letters. While the law

184. Burwick, *supra* note 183.

185. Doug Lichtman, *Fan Art and an Email from My Nephew*, MEDIA INST. (June 5, 2013), <https://www.mediainstitute.org/2013/06/05/fan-art-and-an-email-from-my-nephew/>.

186. Jack Shepherd, *Harry Potter Fan Film About Voldemort, Approved by Warner Bros, Released on YouTube for Free*, INDEPENDENT (Jan. 15, 2018), <https://www.independent.co.uk/arts-entertainment/films/news/harry-potter-fan-film-voldemort-youtube-free-warner-bros-approved-a8159831.html>.

187. Andrew Liptak, *Watch This Fantastic Harry Potter Fan Film, Voldemort: Origins of the Heir*, VERGE (Jan. 14, 2018, 11:00 AM), <https://www.theverge.com/2018/1/14/16889008/harry-potter-voldemort-origins-of-the-heir-fan-film-watch>; *Voldemort – Origins of the Heir [Submitted by Warner Bros. Entertainment Inc.]*, KICKSTARTER, <https://www.kickstarter.com/dmca/voldemort-origins-of-the-heir-submitted-by-warner-bros-entertain> (last visited Feb. 2, 2020); Wahlquist, *supra* note 9.

188. Wahlquist, *supra* note 9; Brown, *supra* note 9.

189. Wahlquist, *supra* note 9.

190. Brown, *supra* note 9. The ability of fans to create films similar in many respects to the original movies illustrates how technology has blurred the line between professional and amateur, a criterion used in Paramount's rules, and which may influence how judges see certain works in infringement cases. See discussion *supra* Part I.A.2.

supports this approach, fans are not able to fully participate in the *Harry Potter* fandom in the same way that fans of other franchises allowing limited crowdfunding can.

Threatening copyright enforcement of a \$25 billion franchise against fan films that crowdfund £15,000 demonstrates the leverage rightsholders have and utilize against fan communities.¹⁹¹ The gift-giving ethos of the fan community is integral to the fan experience and fosters a thriving fandom; when fans are displeased by not being able to contribute or are unhappy with a rightsholder's reaction, the uproar may mirror the fan response to the *Star Wars* fan film *Shards of the Past*. Yet the rightsholders maintain leverage against even large fan communities, only being swayed by the threat of reputational harm. If the fan community is small, it is unlikely to be able to influence rightsholders in any meaningful way.

But Warner Brothers' allowance of works "by fans, for fans, for fun" also allows for more creativity. Unlike Paramount, Warner Brothers does not have onerous rules or specify whether licensed costumes must be used in films or whether professionals can work on fan films. The lack of clarity may have a chilling effect on some fans, but other fans may be emboldened by the lack of defined rules.

Warner Brothers' lack of defined rules and reliance on social norms provides flexibility for fans, but legal mechanisms may severely limit the creativity of fans and inhibit their ability to participate in fanwork creation.¹⁹² For example, the court in *Axanar* found that even though the film was to be made available for free, it was possible that the creators would become popular or well-known as filmmakers and still benefit in a commercial manner from increased viewership.¹⁹³ As such, Warner Brothers' "for free"

191. See Nick Wells & Mark Fahey, *Harry Potter and the \$25 Billion Franchise*, CNBC, <https://www.cnbc.com/2016/10/13/harry-potter-and-the-25-billion-franchise.html> (last updated June 22, 2017, 11:29 AM).

192. Courts have found even transformative fanworks to infringe on copyright. See *infra* note 200 (illustrating differing treatments of fanworks).

193. *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *8 (C.D. Cal. Jan. 3, 2017) (quoting *Roy Exp. Co. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980), *aff'd sub nom*) ("This argument is unpersuasive because, even though Defendants do not profit directly from distributing the works, 'common experience suggests that [Defendants] stood to gain at least indirect commercial

approach of making fan films available to other fans for free can be less restrictive than how a court could react to a question of commerciality.

Warner Brothers' approach of simply stating that creations "by fans, for fans, for fun" are permissible may not be as defined as Paramount's approach, and suffers from some weaknesses, but it allows fans more flexibility to explore the *Harry Potter* universe. For many fans, the Warner Brothers approach is more transparent and readily understood. The differences between approaches may not create uniformity or equality across fandoms, but clarity and actual notice of fanworks' safe harbors in each franchise will help decrease current friction between rightsholders and fans.

IV. CLEAR RULES FOR FAN FILM CREATORS

Clarity for fans and rightsholders about the permissibility of fan films is achievable through copyright reform or a normative approach. While both approaches offer distinct benefits, the latter is already being utilized by various rightsholders and may even benefit fans more than the former.¹⁹⁴ The flexibility of non-legal rules and norms affords evolving fandoms clarity without being confined to one mode of operation. The participatory nature of fandom and recent changes in technology lead to innovation and transformation of the interaction between fans and fanwork creators, and a non-legal approach to ordering will allow for more resilience.

benefit from the [viewership] boost which [they] had reason to hope would (and in fact did) result from the' *Axanar Works.*"); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

194. The lack of clear guidelines may create difficulties for legal teams tasked with policing fanworks; however, company culture and involvement with fan communities may alleviate this problem as companies and fans become joint participants in fan culture. See Lichtman, *supra* note 185 ("Remember, Warner is full of people who have spent most of their adult lives bringing Harry Potter to the movie theaters; no surprise, then, that in their hearts these same people find joy and meaning when they hear about (say) sixth graders writing even unauthorized short stories about that boy wizard, and through that developing their own story-telling and writing skills.").

A. *Fair Use Lacks Clarity for Fan Films*

There is “a shadow of uncertainty” regarding what is copyright infringement and what is fair use in the fanworks community.¹⁹⁵ This uncertainty surrounding fan films and the complexity and cost of legal mechanisms create huge barriers to fans who want to participate in the creation of fanworks, placing the majority of leverage in the hands of rightsholders – especially those with large legal teams. As such, fans must either rely on (1) the current legal defense of fair use, or (2) the ability of Congress to modify current laws to allow for their activities. Although copyright holders cannot entirely preempt fans from creating fan fiction, fan films, and other creative works,¹⁹⁶ fans are not sure how far they can take their work when a legal framework is utilized.

The lack of clarity is due to the mixed outcomes when attempting to claim fair use in the fanwork and fan film context. Rebecca Tushnet, whose research covers fan fiction and copyright extensively, wrote, “Fan fiction should fall under the fair use exception to copyright restrictions because fan fiction involves the productive addition of creative labor to a copyright holder’s characters, it is noncommercial, and it does not act as an economic substitute for the original copyrighted work.”¹⁹⁷ While fanworks do generally meet these criteria, the *Axanar* case illustrates that the issue remains murky. The *Axanar* film was being made available for free, but it was deemed commercial because the creators could exploit its distribution in other ways.¹⁹⁸ Additionally, in examining the fair use factor concerning the amount and substantiality of the copyrighted material used, the *Axanar* court stated:

Defendants intentionally use elements from the Star Trek Copyrighted Works to create works that stay true to Star Trek canon down to excruciating details. These elements in Star Trek canon are important to Star Trek fans and hence to the success of any Star Trek work. They are an indispensable part of what makes Star Trek ‘Star Trek.’ . . . The elements from the Star Trek

195. Peterson, *supra* note 33, at 222.

196. See *Twin Peaks Prods., Inc., v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (“[T]he author of ‘Twin Peaks’ cannot preserve for itself the entire field of publishable works that wish to cash in on the ‘Twin Peaks’ phenomenon.”).

197. Tushnet, *supra* note 6, at 654.

198. See *supra* note 193 and accompanying text.

Copyrighted Works that Defendants use are qualitatively important because they give the *Axanar* Works the Star Trek feel and enable Defendants to stay true to the Star Trek canon.¹⁹⁹

As fan films attempt to stay as true to the original source material as possible, they stray away from fair use and towards outright infringement. And even if the fanwork is transformative, it still may not receive fair use treatment.²⁰⁰

Arguably, the lack of clarity in the current legal regime could be addressed through copyright reform by Congress. Some commentators argue that changes in copyright law and fair use analysis should include consideration of whether a work is participatory in nature as well as non-commercial.²⁰¹ While not without merit, these arguments fail to recognize that whether a work is commercial or not does not depend solely on whether it is made available for free, as some creators can gain commercial benefits beyond monetary compensation—a key point in the *Axanar* decision.²⁰²

An additional obstacle to achieving clarity in the legal rules that affect fan films is that making changes in copyright law to account specifically for fanworks would require fan coordination across various fandoms and constituencies. Furthermore, even if such changes were to take place, fans may still be unaware of those changes and be susceptible to aggressive enforcement by the large legal teams of rightsholders.²⁰³

In the case of fan films and other fan creations, fair use does not currently provide an adequate response toward creating clarity for fans, as some fans still receive different treatment than others under

199. *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *8 (C.D. Cal. Jan. 3, 2017) (citations omitted).

200. *E.g.*, *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008) (“[A]lthough the [fanwork] has a transformative purpose, its actual use of the copyrighted works is not consistently transformative.”). *But see, e.g.*, *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 372 F. Supp. 3d 1101, 1115–16 (S.D. Cal. 2019) (finding a *Star Trek* and Dr. Seuss mashup children’s book to be transformative and a fair use).

201. Peterson, *supra* note 33, at 249.

202. *See supra* note 193 and accompanying text.

203. Regardless of the claims of 1L property law professors, *constructive notice* and *actual notice* are different in practice, especially when many fans may be children.

the law.²⁰⁴ Additionally, while copyright reform could be pursued, it would not address the interactions between fans and rightsholders today. Thus, a normative approach towards ordering interactions between fans and rightsholders is warranted.

B. A Normative Approach to Fan Films and Other Fanworks

By setting clear normative rules for what they will and will not pursue legally, rightsholders provide clarity for fans who wish to create works based on rightsholders' intellectual property. Rightsholders have a vested interest in appealing to fanbases and thus may be in a better position to respond to the changing culture of fans through non-legal rules rather than relying on current copyright law or copyright reform. The prevalence of using self-help remedies based on the norms of smaller communities as opposed to relying on legal norms is growing, even for issues of intellectual property.²⁰⁵

While not perfect, the normative approach to ordering fan-rightsholder interactions offers distinct benefits. First, rightsholders can clearly state and update rules, thereby giving fans peace of mind. Second, fans will be able to organize and coordinate discrete instances of interference, i.e., disrupt rightsholders via lobbying and reputational pressures to change the overall rules. Finally, private ordering may improve the reputation and brand of rightsholders in the eyes of fans and thereby encourage more loyalty.

Normative rules allow rightsholders to clearly articulate and modify safe harbor provisions in a way tailored to the individual fandoms. Rightsholders are not obligated to cite these rules in any particular way, allowing them flexibility to adapt and address their various fanbases in the most efficient manner. While Paramount and Warner Brothers might both improve their guidelines for fan creations, their efforts to create clear standards and safe harbor for fans allow more clarity concerning what is permissible and what is not.

204. Unfortunately, fans who put more effort into making their fan films as "legitimate" or "professional-looking" as they can may be penalized for such efforts due to the fan films becoming more closely related to the originals.

205. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1457-59 (2019).

The distinct approaches of Paramount and Warner Brothers to establishing rules illustrate the flexibility of normative rules. Paramount established a specific enumerated list of allowed fan film activities while Warner Brothers operates under the simple rule that fanworks be “by fans, for fans, for fun.” Each approach offers unique advantages and disadvantages to the respective fandoms. But either way, having rightsholders delineate the rules gives fans more clarity than legal rules (often misunderstood or unknown to fans) that treat all fans equally, even if fans disagree with the rules established by the rightsholders.

The establishment of clear rules does not automatically lead to fairness and equity, however. Both Paramount’s and Warner Brothers’ normative approaches suffer from similar shortcomings: rightsholders may arbitrarily discriminate against some users and not others by using the threat of infringement actions.²⁰⁶ Paramount and Warner Brothers may choose to ignore the activities of certain fans that contradict the established rules while threatening infringement actions against others. The hazard of this threat is tempered by the ability of fans to then rely on legal mechanisms, if available, or, alternatively, to organize themselves and respond accordingly.

Under the normative approach, fans can organize themselves and influence the actions of rightsholders through economic and social pressures. As demonstrated by the examples of *Shards of the Past*, *Voldemort: Origins of the Heir*, and television series renewals, fans have successfully lobbied corporations for changes in actions and policies through social pressures. Using a social pressure approach, rather than relying solely on legal mechanisms, allows organic fandoms to rally together for short bursts of activity whereas changes in legal rules would require protracted negotiations with different stakeholders.

By banding together, fans are also able to exert pressure on rightsholders who may be acting in bad faith or severely limiting what they allow. Under a legal approach, fans would have to litigate individually and hope for rulings supporting fair use. But because advances in communications technology have enabled fan coordination, fans have and will continue to organize themselves in ways that encourage rightsholders to adapt rules such that the

206. See Peterson, *supra* note 33, at 217–18.

economics and reputation of a franchise are preserved. The leverage wielded by fans can also discourage rightsholders from pursuing legal remedies in discrete instances of conflict; the threat of bad publicity will encourage rightsholders to accept the normative rules of fandom and allow fans to more fully participate in franchises.

Finally, rightsholders may improve the loyalty of fans to a given franchise by ordering their interactions in a “fan-approved” manner.²⁰⁷ Rightsholders should recognize the culture of fandoms and their social norms before attempting to enforce their intellectual property rights. Intellectual property self-help is more economical and timely than lawsuits and may even have a “cool factor.”²⁰⁸ The “cool factor,” as described by Professors Amy Adler and Jeanne C. Fromer, is the ability to avoid “stodgy and intimidating cease-and-desist letter[s]” and “reputational damage” through the use of self-help remedies in an intellectual law context.²⁰⁹ Rightsholders may become participants in fan culture and become admired by fans, creating goodwill for their brand.²¹⁰

Rightsholders would benefit from clarifying rules for fandoms that create a safe harbor for activities that will not receive cease-

207. Arguably, using a normative approach may appear to limit the legal rights of content creators and franchise owners too greatly. However, rightsholders are incentivized by economic considerations as well as a desire to protect legal rights. As rightsholders improve relations with fans, economic and reputational pressures will likely decrease.

208. Adler & Fromer, *supra* note 205, at 1510. Adler and Fromer state that an advantage of self-help is the “ability to circumvent some of the notoriously uncertain doctrines that govern copyright and trademark laws.” *Id.* at 1521. Notably, copyright doctrines are being applied in music cases where even a similar “groove” may be found to be copyright infringement. See Raymond Shih Ray Ku, *The First Amendment Implications of Copyright’s Double Standard*, 17 VA. SPORTS & ENT. L.J. 163, 163 (2018). See generally, e.g., Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018); Jem Aswad, *Katy Perry’s ‘Dark Horse’ Case and Its Chilling Effect on Songwriting*, VARIETY (Aug. 6, 2019), <https://variety.com/2019/biz/news/katy-perry-dark-horse-lawsuit-joyful-noise-chilling-effect-on-songwriting-1203292606/>.

209. Adler & Fromer, *supra* note 205, at 1510. There is the fear that a company would renege on its self-imposed rules and begin bullying creators of fanworks; however, the danger of reputational harm to the company for acting against fans’ interests would mitigate that risk, while the ability of larger fanbases to coordinate would also act as another check. Unfortunately, smaller fanbases may not have the same resources or ability to influence large companies.

210. See *supra* Part III (discussing examples of rightsholders’ responses to coordinated efforts of fans).

and-desist letters and the threat of legal action.²¹¹ These rules should include already established normative rules of fandom such as the allowance for some amount of crowdfunding—incorporating and supporting the gift-giving ethos—and the use of disclaimers. Should rightsholders wish to create more stringent rules such as J.K. Rowling’s desire to avoid sexually explicit content, that is up to the individual rightsholder. A normative approach toward ordering interactions between fans and rightsholders will benefit both groups by creating clarity, allowing communication and exchange, and improving the reputation of the rightsholders while also encouraging fan creativity.

CONCLUSION

Active fandoms are passionate about participating in their chosen media franchise by creating fanworks, including written fiction, art, and films. These fandoms are able to exploit social media and coordinate their efforts in a manner not possible before the advent of current technologies. These technologies also allow fan film producers to mirror the quality of big-budget films, creating friction with rightsholders.

While legal mechanisms remain available, the participatory nature of fandom and the desire to create fan films and other fanworks encourage the use of social norms between rightsholders and fans to mitigate friction and improve relations. Rightsholders should recognize the gift-giving ethos of fandoms by allowing some amount of crowdfunding. They should also incorporate the recognized rules of the fanwork community and encourage self-policing among fans. Finally, by using normative rules—and establishing clear guidelines for fan film creations—rather than relying solely on legal mechanisms, rightsholders may avoid reputational harm. Although fans may not like restrictions, guidelines provide transparency for accepted behavior and safe harbor so there is less gray area within the realm of fanworks and copyright.

211. Of course, this approach would not address issues created by the Digital Millennium Copyright Act takedowns and how video platforms should handle the upload of such fan films through their automated review for copyright infringement. See generally Franklin Graves & Michael Lee, *The Law of YouTubers: The Next Generation of Creators and the Legal Issues They Face*, 9 *LANDSLIDE* 8 (2017) (discussing legal issues faced by YouTube and content creators).

As a participatory activity that is embedded in culture, creating fan films and other fanworks allows fans to share stories across cultural, linguistic, and ethnic borders. The similarities discovered through an affinity for a common media franchise or story serve to connect people and establish meaningful communities. Rightsholders are naturally a part of these communities and should police their intellectual property in a manner that recognizes both their own and fans' interests in these fandoms, thereby encouraging fan participation.

Kagen Despain