Vanderbilt Journal of Entertainment & Technology Law

Volume 11
Issue 4 *Summer 2009*

Article 11

2009

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ABSTRACT

*In the United States, the line between the type and level of transformation required for a copyrightable derivative work and that required to constitute fair use has not been drawn clearly. With the rise of user-generated content, this question (which arises in two distinct copyright contexts) has become even more important. At the same time, copyright law has generally shied away from defining authorship as a legal concept, preferring instead to develop and rely on the related (but not identical) concept of originality. This has resulted in a low copyrightability threshold that does not adequately account for the fact that most creative works in some way rely on and build upon existing works that often were created by another person and are protected by copyright law.*

*This Article examines the consequences of such vagueness for user-generated content in an international and comparative context. Taking the U.S. position as a starting point, it examines the state of the law in other common law jurisdictions, including the United Kingdom, Australia, and Canada, and considers whether the legal rules in all these jurisdictions' treatment of derivative works and fair use comport*

* Professor of Law, Franklin Pierce Law Center. LL.B, National University of Singapore, Singapore, 1989; LL.M, Cambridge University, UK, 1991. The author is greatly indebted to Professor Steven Hetcher and her fellow participants in the 2008 User-Generated Content, Social Networking and Virtual Worlds Roundtable at Vanderbilt University Law School, and in particular Professors Estelle Derclaye and Lisa Ramsey for their detailed and helpful comments on an earlier draft. The author is grateful also to the organizers and participants of the Intellectual Property Scholars Conference at DePaul University in August 2007, where very preliminary versions of some of the ideas set forth in this paper were first presented. All errors and omissions remain, of course, my own.

*with the international treaty framework and related norms. The Article also discusses the ramifications of recent U.S. judicial applications of transformativeness in both the fair use and derivative works contexts, and proposes a clearer, more distinctive set of criteria that should serve to clarify the distinctions between these concepts, and that will also legally recognize the existence of authorship in transformative user-generated content.*

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The ways in which the Internet—and especially what has been termed "Web 2.0" technology—has changed traditional forms of communication, creation, and content manipulation, and the resulting implications for copyright law, have been well-documented, both by the popular media as well as legal scholars.[1] Digital tools are increasingly ubiquitous in our information-driven society, allowing just about anyone with a computer to reuse, recreate, and otherwise change all manner of literary and artistic works (including audio, video, text, photographs, software, and other creative "expressions"). Furthermore, these tools allow anyone with an Internet connection to disseminate the resulting content, which itself can engender further creation, use, and manipulation. Digital technology has unleashed a wave of user creativity that has been called a form of "semiotic democracy"[2] and a part of a new "participatory culture."[3] From the emergence of the "amateur" (as opposed to the pure "professional")

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1. Given the relative "newness" of Web 2.0 technology, legal commentary on the copyright issues posed by Web 2.0 technology and user-generated content is of recent vintage but is increasing. *See, e.g.*, Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235 (2008); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459 (2008). In addition, please consult the various papers resulting from the 2007 *Vanderbilt Journal of Entertainment and Technology Law* symposium on User-Generated Confusion: The Legal and Business Implications of Web 2.0, including Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841 (2008); Steven Hechter, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008); Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008).

2. The term was apparently coined by media studies professor John Fiske. *See* JOHN FISKE, TELEVISION CULTURE (Routledge Press 1989) (describing television viewers' ability to assign different meanings to images seen on the screen than intended by the content producers). The term has since expanded to mean the ability to engage with, rework and redistribute cultural products and images. *See* WILLIAM W. FISHER III, PROMISES TO KEEP (Stanford University Press, 2004). Professor William Fisher has also provided an insightful and detailed analysis into how semiotic democracy supplements political democracy. *See* William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998); *see also* Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L.R. 489 (2006) (pointing out the increasing ubiquity as well as the utopian nature of the phrase).

3. *See, e.g.*, Urs Gasser & Silke Ernst, *From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age*, BERKMAN CENTER FOR INTERNET & SOC'Y (Research Publcation No. 2006-05, June 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909223; *see also* HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (2006) (exploring the technological, social and cultural dynamics surrounding "convergence culture"). In addition, the term "participatory media" has also been used, in part because the phrase "user-generated content" was felt to be insufficiently expressive of this development. *See, e.g.*, PAT AUFDERHEIDE & PETER JASZI, UNAUTHORIZED: THE COPYRIGHT CONUNDRUM IN PARTICIPATORY VIDEO (Apr. 2007), *available at* http://www.centerforsocialmedia.org/files/pdf/rapporteurs_report.pdf.

creator and the disappearance of the traditional intermediaries of creative expressions such as recording companies and movie studios to the transformation of readers, viewers, and users from mere "passive" recipients to more "active" manipulators of content, the resulting works are now commonly categorized under the label "user-generated content" (UGC).

Since the audience for copyrighted works is now not only able but willing to use these works as a canvas for its own creations, such user activity inevitably strains and challenges traditional notions of copyright law. Where UGC is concerned, two questions arise: (1) how well-equipped is the doctrine of fair use—long the most general and flexible limitation on the exclusive rights granted by copyright law—to deal with the Web 2.0 world of UGC, and (2) how well-defined are the boundaries between an original and an infringing derivative work? A number of scholars have already pondered the first question,[4] and to a certain extent, the second;[5] I do not intend to repeat their arguments here. Instead, I would like to consider the question of fair use, transformative derivative works, and UGC in a more international and comparative context, by examining the scope of the transformativeness fair use factor in U.S. fair use doctrine in relation to its more limited equivalent in other major common-law countries such as the United Kingdom, Canada, and others with principles of "fair dealing," and by highlighting the differences between the more diffuse U.S. approach to derivative works and the more restrictive United Kingdom approach. Such a comparative approach seems particularly appropriate given the recent (2006) call in the United Kingdom *Gowers Review of Intellectual Property* (*Gowers Review*) for an amendment to the European Union's Copyright Directive of 2001 to deal expressly with "transformative uses,"[6] as well as the indication in 2004 by the Supreme Court of Canada that it may be possible to view

4. *See, e.g.*, Buckley, *supra* note 1; Kurt Hunt, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. 197 (2007); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS. 497 (2008); Lisa Veasman, *"Piggy Backing" on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups*, 30 HASTINGS COMM. & ENT. L.J. 311 (2008).

5. *See, e.g.*, R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008) (citing relevant sources).

6. ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY (2006), *available at* http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf. Mr. Gowers had been asked by the Chancellor of the Exchequer to conduct a review of the national intellectual property framework in light of challenges presented by the global knowledge economy.

the more restricted doctrine of fair dealing as a form of "user right."[7] Furthermore, the broader social implications of UGC point to a need to consider whether these developments indicate that modern copyright law ought to reexamine its existing categorization of fair use (and its equivalents) as merely a limitation (or exception) to the exclusive rights conferred by copyright. I argue that with a broader understanding of the nature of a user right, it may be possible both theoretically and practically to develop a notion of fair use/fair dealing that moves away from its traditional conception as a mere exception, and toward a larger role as equal to, and balancing the scope of, exclusivity otherwise reserved to a copyright owner.

Another substantive issue that directly affects questions of transformativeness (and thus fair use and derivative works) is the notion of "authorship." Unfortunately, the history of copyright law has been characterized by both the persistent influence of the author concept as well as its continued lack of definition.[8] Copyright law has instead evolved to embrace the notion of originality as the threshold for copyright protection.[9] In light of the active participatory element that is inherent in the Web 2.0 phenomenon, it makes sense to consider the role that originality plays in either allowing or restricting copyright protection for UGC based on preexisting works. I conclude that the originality requirement in copyright law has not to date fully accommodated the tension between preexisting works and their derivatives. I suggest that a more flexible approach toward copyrightability for derivative works be implemented, mirroring the broader approach I propose for fair use. Finally, I attempt to show that the hitherto-fuzzy nature of authorship can operate to the benefit of much UGC, and to the extent that its indeterminacy has aided in the development of authors' rights, so can it assist in the evolution of stronger, clearer legal recognition of at least those forms of UGC that can be considered socially valuable in some way.

I will consider each of these issues as follows: Part I will describe the social implications of UGC, particularly in relation to its role in furthering the vision of "good society" by facilitating the development of semiotic democracy and free culture. This Part will also consider the historical and current role of the concept of

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7. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.).

8. *See* MARTHA WOODMANSEE & PETER JASZI (EDS.), THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Duke University Press, 1994).

9. *See, e.g.*, Feist Publ'ns, Inc. v Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality.").

originality (as distinct from the "author" concept) and its application to derivative works. Part II will examine the concept of a "user right" in copyright law. In this context the appropriate legal categorization of fair use and its cousins will be considered, including the implications for the existing international legal framework of classifying them as "rights" rather than, as has traditionally been the case, as limitations or exceptions. Part III will take up the theme of "transformativeness" begun in the fair use analysis, comparing its development in the fair use context to its role in determining the copyrightability of a derivative work. Returning to the theme of originality, I will consider whether the user-right perspective can be helpful in developing an approach for the copyrightability of derivative works. Ultimately, my proposal is that a broader approach to transformativeness be taken under U.S. copyright law, both with respect to fair use and to copyrightability for derivative works, though not with respect to measuring transformativeness for purposes of infringement of the derivative work (adaptation) right. Such an approach would lend some needed clarity to these aspects of U.S. copyright law, which—as international attention turns toward possibly amending the framework for limitations and exceptions to copyright—might in turn provide some useful guidance for a reformulation, or at least a refinement, of concepts that are vital to the facilitation and protection of creative and culturally vibrant UGC.

## I. USER-GENERATED CONTENT AND THE FURTHERANCE OF PUBLIC POLICY: SEMIOTIC DEMOCRACY, FREE CULTURE, AND THE PROBLEM OF ORIGINALITY

### *A. Social Values and Copyright Law*

Several prominent scholars have noted the ability of digital technology to foster "semiotic democracy"—the decentralization of the power to remake cultural artifacts and the ability to construct new meanings therefrom.[10] The premise is that placing such power in the hands of an individual or a group of users would facilitate greater engagement with cultural and social life, and the consequent opportunities for self-expression would encourage greater freedom and democracy.[11]

10. *See, e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 37, 84 (2004).

11. Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L.R. 489, 489-91 (2006).

Closely aligned with the ideal effects of semiotic democracy, and arising also from the promise of engagement and participation that digital technology places in the hands of the user, is the notion of "free culture." Professor Lawrence Lessig, who has been described as the most "prominent and influential" copy-warrior in the intellectual, moral, and technological battle over the future of copyright,[12] describes free culture as the opposite of "permission culture," in which the original creator/right-holder must give permission prior to the use of her work.[13] Although free culture recognizes the necessity of intellectual property rights (in order to protect the original creator), it does so to only a limited extent and solely for the purpose of supporting (and hence protecting) the original creators. Furthermore, the word "free" is understood in the sense of free speech rather than zero-cost, and can thus coexist not just with the granting of property rights but also with the recognition that creators are to be compensated for their work.[14]

Both semiotic democracy and free culture emphasize the social benefits that can accrue from increased engagement and participation in cultural life; they also, when considered in light of the new digital tools that enable such engagement and participation, mesh well with what has been termed "remix culture," which results when "[peer-to-peer networking], inexpensive digital input devices, open source software, easy editing tools, and reasonably affordable bandwidth" are mixed together in an outpouring of creativity.[15] To the extent that free and remix culture view the use of another's work as a potentially legitimate activity, such that at least certain types of UGC can be viewed as culturally productive and socially desirable, the question arises as to *what* forms of UGC should be encouraged (including by the legal framework), and consequently *how* the legal framework—primarily copyright—should respond in order to implement the ends sought by semiotic democracy and like movements. In this regard, UGC runs directly into two of copyright's more abstract concepts that demand further exploration: (1) the pliability and purposes of the transformative analysis in fair use determinations; and (2) how

12. Lawrence B. Solum, *The Future of Copyright*, 83 TEX. L. REV. 1137, 1139 (2005) (reviewing LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004)).

13. LESSIG, *supra* note 12, at xiv.

14. *Id.*

15. Interview with Lawrence Lessig, Professor, Stanford Law School, in Santa Clara, Cal. (Feb. 24, 2005), *available at* http://www.oreillynet.com/pub/a/policy/2005/02/24/lessig.html.

unauthorized "derivative works" that have made transformative use of preexisting works are treated in copyright law.

In light of the potential relationship between copyright law, social policy, and democratic values, it is heartening to note the emergence of scholarship that highlights the need for copyright policy to account for broader considerations such as distributive and social justice, free speech and democratic values, and other non-economic public interests and social values.[16] Also, the ideals espoused by semiotic democracy and free-culture advocates are not unique to, nor did they develop as urgent needs because of, the digital society.[17] However, the digital tools and resulting UGC spawned by the Internet have clearly challenged the adequacy of the commonly accepted premise—at least in many U.S. copyright law circles—that utilitarian theory forms the fundamental basis for the current copyright system. Under this view, copyright (in the form of its various exclusive rights) is primarily instrumentalist in nature, providing—from an economic perspective—the necessary incentives for the kinds of creation and innovation that ultimately contribute to social, cultural, and developmental progress.[18] With the rise of UGC and remix culture, however, some legal scholars have argued that utilitarianism is incapable of comprehensively justifying intellectual property rights protection.[19] On the specific topic of fair use and its role in balancing the various public interests involved in copyright law, commentators have also argued that the increasingly economics-oriented focus of much copyright analysis unnecessarily narrows the scope of fair use and thus risks ignoring broader distributive concerns (especially non-market values) that lie at the heart of copyright law.[20]

There is also the related matter of philosophical differences between U.S. and other (primarily continental European and civil law)

16. *See, e.g.*, Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563 (2007); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006); Symposium, *Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563 (2007). *But see* Daniel Benoliel, *Copyright Distributive Injustice*, 10 YALE J.L. & TECH. 45 (2007) (arguing against incorporating distributive justice concerns into copyright policymaking).

17. *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

18. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989), *available at* http://cyber.law.harvard.edu /IPCoop/89land1.html.

19. *See, e.g.*, Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257 (2006).

20. *See, e.g.*, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

systems' view of the rationale for intellectual property protection. The constitutional foundation for U.S. patent and copyright law, coupled with the traditional dominance of an economics-based approach toward intellectual property analysis in the U.S. academy, has led to a divergence between the U.S. approach toward intellectual property protection and that of other countries and systems that adhere to a more natural rights-based approach.[21] Although some of the differences may be more apparent than real (partly as a result of the continuing harmonization of copyright standards and the fact that U.S. copyright law does contain some traces of recognizing a more natural rights-based, and less utilitarian, approach), and on certain fundamental issues there is some commonality (for example, the continued reliance on the "author" figure in both systems, as further discussed below),[22] with UGC as not simply a localized but rather an increasingly global phenomenon, there is a general "threshold" question as to the adequacy and coherence of the international copyright system in relation to the legal treatment of UGC.

In addition, copyright law continues to grapple with the persistent presence of that elusive creature: the "author," who, despite her long-lived existence, remains uncertain of her definition or true role in copyright policy. From the post-Enlightenment nineteenth-century attachment to the Romantic concept of authorship that influenced the development of copyright law[23] to post-structuralist and postmodern twentieth-century literary theories about the death of the author and the rise of the text,[24] copyright law has, through principles

21. *See, e.g.*, Dr. Michael D. Birnhack, *Copyrighting Speech: A Trans-Atlantic View*, in COPYRIGHT AND HUMAN RIGHTS 37 (Paul L.C. Torremans ed., 2004).

22. *See, e.g.*, Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549 (2006).

23. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY Chapter 6 (1996); Peter Jaszi, *Toward a Theory of Copyright: the Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991) (discussing how the Romantic notion of authorship influenced the expansion of intellectual property rights); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). Other commentators have traced the evolution of literary and copyright theory in various contexts. *See, e.g.*, Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, 30 REPRESENTATIONS 109 (1990); Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

24. *See* Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath ed., trans., 1977); Michel Foucault, *What is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979). For an analysis of the implications of such theories on copyright law, see Elton

such as ownership and the legal treatment of derivative works, acknowledged the primacy of initial authorship while studiously refraining from adopting such a diffuse concept as the standard for conferring legal protection (preferring instead to embrace the notion of "originality" in the Anglo-American model). At the same time, through grappling with legal issues surrounding parodies, "downstream" authors and adaptations, and the idea/expression dichotomy, copyright law has also had to come to terms with the fact that creativity is in some sense always derivative, with expressive output inspired and built by "standing on the shoulders of a giant."[25] The law has therefore come to accept that borrowing, reusing, recombining, adapting, and building upon existing work can and does result in richer and more progressive works.[26] In today's remix culture, examples abound of this type of creativity, from hip hop music[27] and digital mashups[28] to appropriation art[29] and machinima videos;[30] all highlight the vibrancy and breadth of participatory culture, and thus challenge the utilitarian perspective of traditional copyright law. A few of these examples are highlighted below to illustrate the problem that new forms of creativity—particularly those involving the digital manipulation of existing works—are posing to copyright law, starting with the "gatekeeper" role performed by the longstanding originality requirement.

### *B. Copyright and the Requirement of Originality: Distinguishing between Initial and Derivative Works*

In the nineteenth century, the concept of "originality" evolved as an individualistic, idealized underscoring of the relationship

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Fukumoto, Note & Comment, *The Author Effect After the "Death of the Author": Copyright in a Postmodern Age*, 72 WASH. L. REV. 903 (1997).

25. Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).

26. Litman, *supra* note 23.

27. *See* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006).

28. *See* MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD Chapter 4 (2007).

29. *See, e.g.*, William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000).

30. Machinima refers to "the convergence of filmmaking, animation and game development. Machinima is real-world filmmaking techniques applied within an interactive virtual space where characters and events can be either controlled by humans, scripts, or artificial intelligence." What is Machinima? - The Machinima FAQ, Academy of Machinima Arts & Sciences, http://www.machinima.org/machinima-faq.html (last visited Apr. 9, 2009).

between the author and her work, a form of ideology rather than a theory to justify copyright protection.[31] This ideology served as a convenient vehicle through which the rights appurtenant to copyright in both the United Kingdom and the U.S. came gradually to vest in the original author rather than, as historically had been the case, in the printer/publisher.[32] The ideological abstract gradually infused doctrinal development, such that by the time of the *Trade-Mark Cases* in the United States,[33] the constitutional mandate to protect the "writings" of "authors" was being interpreted to cover only those creations that were "original, and . . . founded in the creative powers of the mind."[34] At the same time, the actual substantive content of the originality concept was steadily being liberalized and minimized,[35] with the seminal case of *Bleistein v. Donaldson Lithographing Co.*[36] finally providing a conceptual basis for a low originality standard. The U.S. Supreme Court stated that basing copyrightability on aesthetic value and artistic merit was a "dangerous undertaking" and emphasized the "personal reaction of an individual upon nature [where even] a very modest grade of art has in it something irreducible, which is one man's alone."[37] Almost ninety years later, the Court again emphasized the low originality standard needed for copyrightability in *Feist Publications Inc. v. Rural Telephone Service Co.*,[38] interpreting it to require "only that the work was independently created by the author . . . and that it possesse[d] at least some *minimal* degree of creativity."[39] The *Feist* ruling is notable also for showing clearly the U.S. Supreme Court's concern with upholding the principle that "the primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts,'"[40] regardless of the unfairness that its application may produce

31. *See* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008).

32. *See, e.g.*, LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

33. 100 U.S. 82 (1879).

34. *Id.* at 94.

35. *Id.* at 53-62, 69-81. *See also* Bracha, *supra* note 31 (noting that market forces and a change in the judicial role - from privileged arbiters of social welfare to neutral logicians - were among the factors that contributed to a decline in the standard of originality).

36. 188 U.S. 239 (1903).

37. *Id.* at 250, 251.

38. 499 U.S. 340 (1991).

39. *Id.* at 345 (emphasis added).

40. *Id.* at 349 (quoting U.S. CONST. art. I, § 8, cl. 8).

(for example, in allowing others to use the results of someone else's labor without the need for permission or compensation).

The problem with a low standard of originality, however, is the possibility that a large number of works will satisfy this de minimis requirement and thus be copyrightable. The "thin" copyright that is awarded to factual compilations fulfilling the originality standard in their selection and arrangement is but one example.[41] Another involves methods of creativity unknown to the traditional copyright regime, such as visual or musical collages.[42] These types of UGC resemble "compilations" in that they often involve a new combination, use, or assemblage of existing works and forms, or rely on collective creativity and collaborations. To some extent, copyright law has already had to deal with these types of "borrowings"; in the U.S. case *Rogers v. Koons*, the Second Circuit found that copying a photograph in detail, by sculpting it as part of a larger work to comment on the banality of everyday items, was infringement rather than parodic fair use.[43] Later, a legal fracas arose between artist Joy Garnett and photographer Susan Meisalas when Meisalas accused Garnett of copyright infringement for copying in paint a fragment of a photograph originally shot by Meisalas.[44] The dispute blew over but caught the imagination of many artists and was featured on a number of blogs and websites.[45] Many artists used a digital image of Meisalas's photograph to create collages, reproduce it on websites, and make images and objects that functioned as anti-copyright "agitprops" in a collaborative project known as Joywar.[46]

Artists like Lisa Jevbratt take digital technology even further, using software and computational techniques to create dynamic data visualizations that are exhibited as art and can provoke intense emotional responses and experiences. Jevbratt's 1:1 and 1:1(2)

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41. *Id.* at 349.

42. *See* Valeria M. Castanaro, Note, *"It's the Same Old Song": The Failure of the Originality Requirement in Musical Copyright,* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1271 (2008) (arguing that the current originality threshold fails to take into account the "multitude of components" that make up a musical composition, and should be raised).

43. 960 F.2d 301, 310 (1992).

44. JOYWAR, http://www.firstpulseprojects.com/joywar.html (last visited Apr. 9, 2009).

45. An example is Rhizome.org, an online, community-based organization that is "dedicated to the creation, presentation, preservation, and critique of emerging artistic practices that engage technology . . . [and that] support artists working at the furthest reaches of technological experimentation as well as those responding to the broader aesthetic and political implications of new tools and media." *See* Rhizome, General Information, http://rhizome.org/info/ (last visited Apr. 9, 2009).

46. *See* Joy Garnett & Susan Meiselas, *On the Rights of Molotov Man,* HARPER'S MAG., Feb., 2007, *available at* www.silvacine.com/classreadings/molotov.pdf.

projects, for example, aim to map every single address on the world wide web. In Jevbratt's words,

> When navigating the web through [1:1] databases [and] interfaces, one experiences a very different web than when navigating it with the 'road maps' provided by search engines and portals. Instead of advertisements, pornography, and pictures of people's pets, this web is an abundance of inaccessible information, undeveloped sites and cryptic messages intended for someone else. Search-engines and portals deliver only a thin slice of the web to us, not the high-resolution image we sometimes think they do.[47]

Other artists use digital software and collaborative tools to create open-ended works that other people—viewers, passersby, and so on—are encouraged to continue, emphasizing the digital sharing culture as opposed to the Romantic individual author.[48] There are also online communities, exhibits, and collections based on recycled art[49] and works made largely of copyrighted material.[50] Outside of the art world, Wikipedia, enabled by open-source software, is perhaps the best-known example of user collaboration.[51]

What many of these projects have in common are the following: (1) they tend to be highly collaborative projects and not individual standalone works; (2) they do not necessarily have a finite, narrative beginning and end; (3) the collaboration can be very loose and organic, and can also be between the artist and the viewer through the latter's experience of the work; (4) they are enabled by the Internet and digital tools; (5) they are infused with social, political, or cultural commentary; and (6) a number of them are distributed under open-source and similar licenses.[52] While these characteristics and projects may not represent the bulk of UGC, they definitely fit well within the rubrics of free culture and semiotic democracy, as discussed previously.[53] The challenge is to find a place for such UGC within the traditional copyright framework; unfortunately, the originality

47. 1:1 [description], http://128.111.69.4/~jevbratt/1_to_1/description.html (last visited Apr. 9, 2009).

48. *See, e.g.*, Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996) (providing a discussion of how collaborative art projects, such as Bonnie Mitchell's Chain Art project, do not fit neatly into the copyright category of "joint works").

49. *See, e.g.*, Detritus, http://www.detritus.net/ (last visited Apr. 9, 2009).

50. *See, e.g.*, Illegal-art.org :: A Project of Stay Free! Magazine, http://www.illegal-art.org/ (last visited Apr. 9, 2009).

51. *See* Wikipedia, http://www.wikipedia.org/ (last visited Apr. 9, 2009).

52. For example, the content on Detritus.net is "copylefted" while its blog is licensed under a Creative Commons Attribution-Noncommercial-Share Alike license. Rhizome.org supports Creative Commons licensing for its hosted content. *See* Detritus, *supra* note 49; Rhizome, *supra* note 45.

53. *Supra* Part I.A.

concept may not be the optimal means of doing so. It is hard to imagine many of these creations failing the de minimis test for originality, yet they come up sharply against both the legal threat of infringement and the question of their own status as derivative works.

Other problems for UGC exist because of the low standard of originality. In the common law world outside of the United States, where originality is also the standard for copyrightability, there have been indications that, in the United Kingdom and Australia at least,[54] copyright protection may be granted to works created by the "sweat of the brow"—works that arguably would be denied protection under the *Feist* standard in the United States.[55] This means that UGC creators will have to think about originality in two different scenarios: the first relating to the need to obtain permission from rights-holders in minimally creative works so as to avoid infringement issues, and the second relating to the question of whether and how their own works can attract copyright protection, based as they are on underlying works already protected by copyright law.

In the United Kingdom, Judge Peterson stated in *University of London Press Ltd v. University Tutorial Press Ltd* that the word "originality" in the United Kingdom Copyright, Designs and Patents Act merely means that "the work must not be copied from another work" and "it should originate from the author."[56] An earlier case, *Walter v. Lane*, in interpreting the previous Copyright Act of 1842 (which made no mention of "originality" but granted copyright to the "author" of a book), had laid the groundwork by granting copyright in a verbatim report of an oral speech.[57] In doing so, a majority of the court seemed to emphasize that it was the reporter who had first reduced the speech to writing, rather than focusing on the nature or extent of the skill that was required to do so.[58] Although *Walter v.*

54. In contrast, Canadian courts have emphatically rejected the "sweat of the brow" doctrine, most notably for present purposes by the Supreme Court of Canada in the *CCH* case. *See* CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.). For a discussion of the implications of the *CCH* decision on originality and user rights, see discussion *infra* Part II.

55. *See, e.g.*, Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd (2002) 119 F.C.R. 491 (Austl.), *available at* 2002 WL 1005203; Nine Network Australia Pty Ltd v. IceTV Pty Ltd and Another (2008) 76 I.P.R. 31 (Austl.), *available at* 2008 WL 1995612; Walter v. Lane, [1899] 2 Ch. 749 (U.K.); Ladbroke (Football) v. William Hill (Football) Ltd., [1964] 1 W.L.R. 273 (Eng.).

56. [1916] 2 Ch. 601 608.b (U.K.).

57. [1899] 2 Ch. 749.

58. *See, e.g.*, Kathy Bowrey, *On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating "the Humble Grey Which Emerges as the Result of Long Controversy"*, [2008] UNSWLRS 58 (Austl.), *available at* http://www.austlii.edu.au/au/journals/UNSWLRS/2008/58.html.

*Lane* has been criticized as representing "the most extreme instance of judicial exploration of the limits of authorship and originality,"[59] it has been cited as still "good law" in a number of relatively recent cases in the United Kingdom.[60] Commentators have suggested that judges in cases such as *Walter v. Lane* used copyright as a vehicle to confer legal protection over unfair misappropriation at a time when no alternative legal mechanism existed,[61] or to preserve the inherent social value of making otherwise-inaccessible speeches available to the public.[62] More broadly, it has also been suggested that the United Kingdom courts' recognition of the labor expended by the creator as an aspect of originality, at least in cases involving direct competitors, is a means of compensating for a lack of a "roving concept" of unfair competition.[63]

Australian courts have perhaps gone the furthest in entrenching "sweat of the brow" effort into the originality standard. In 2002 the full Federal Court of Australia held, in *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, that copyright protection subsisted in a telephone directory such that wholesale copying of the pages constituted copyright infringement.[64] In reaching its conclusion, the Court distinguished *Feist* on the basis that Anglo-Australian authority showed that the word "original" in these countries did not require the intellectual spark deemed necessary by the U.S. Supreme Court in *Feist*.[65] More recently, in May 2008, the full Court handed down its opinion in *Nine Network Australia Pty Limited v. IceTV Pty Limited*,[66] finding copyright in a weekly television programming schedule, in part because of programming and scheduling decisions made in the process of preparing the tables, and reiterating that

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59. SAM RICKETSON, THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, DESIGNS & CONFIDENTIAL INFORMATION 7-70 (2d ed. 2001).

60. *See, e.g.*, Express Newspapers plc v. News (UK) Ltd., [1990] FSR 359.; Sawkins v. Hyperion Records Ltd., [2005] EWCA Civ 565. It has been suggested, however, that these two cases, despite their reliance on *Walter v. Lane*, can be explained on other grounds more consistent with a less extreme view of originality. *See* Nigel P. Gravells, *Authorship and Originality: The Persistent Influence of* Walter v. Lane, I.P.Q. 2007, 3, 267-293.

61. Gravells, *supra* note 60.

62. *See* HUGH LADDIE ET AL., THE MODERN LAW OF COPYRIGHT AND DESIGNS § 3.72 (3d ed. 2001).

63. *See* WILLIAM RODOLPH CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS (6th ed. 2007). Note, however, that in light of the European Union's Database Directive, copyright protection for "pure" informational databases in the United Kingdom is probably much less likely to succeed (at least, other than on the grounds of compilation). *See* Database Directive – Wikipedia, http://en.wikipedia.org/wiki/Directive_on_the_legal_protection_of_databases (last visited Apr. 9, 2009).

64. (2002) 119 F.C.R. 491, *available at* 2002 WL 1005203.

65. *Id.* ¶ 85.

66. (2008) 76 I.P.R. 31 (Austl.), *available at* 2008 WL 1995612.

*Desktop Marketing* was a true "sweat of the brow" case involving the collection of factual information.[67]

If the justifications proffered for the more minimal standard of originality in the United Kingdom and Australia are correct, it may be that in jurisdictions such as the United States, where alternative mechanisms and causes of action (including under state law) exist to enable aggrieved persons to seek redress from unfair competition and misappropriation, a stricter or higher standard of originality can be supported.[68] A higher originality standard, such as that which applies in the United States, does not, however, mean that significantly fewer creations are protected under U.S. copyright law, given the U.S. Supreme Court's emphasis in *Feist* that the requirement is "not particularly stringent" and that the "vast majority of compilations will pass this test."[69] In these major common law jurisdictions, therefore, a large variety and number of creations are likely to be permitted entry into the copyright realm, thus leading to potential difficulties with permissions, licenses, and fair use for subsequent users of such content. For derivative works, including UGC, where originality is at issue, the important originality question will be which standard will apply in determining copyrightability, given that they are based on preexisting works already protected by copyright law.

In the United States, well-known cases such as *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*[70] and *Gracen v. Bradford Exchange*[71] point to a lack of consensus among U.S. courts as to the specific standard of creativity that will be required of derivative works. Whereas in *Alfred Bell* the court required only that the change wrought by the second work be simply more than "merely trivial,"[72]

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67. *Id.* ¶ 92. The current Canadian position appears to lie in the middle between "sweat of the brow" and requiring creativity. *See, e.g.*, CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.); Carys J. Craig, *The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest*, 2 U. OTTAWA L. & TECH. J. 425 (2005); *see also* Daniel J. Gervais, Feist *Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949 (2002) (arguing, pre-*CCH*, that a *Feist*-like standard was emerging in both common and civil law jurisdictions).

68. *See, e.g.*, Ryan Littrell, Note, *Toward a Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193 (2001) (arguing that judicial inquiry into a work's creativity would be more appropriate for modern copyright law and result in reinvigoration of the public domain).

69. Feist Publ'ns, Inc. v Rural Tel. Serv. Co., 499 U.S. 340, 358, 359 (1991).

70. 191 F.2d 99 (2d Cir. 1951).

71. 698 F.2d 300 (7th Cir. 1983); *see also* WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 161-163 (Greenwood Press, 1994) (tracing the case law relating to the development of both standards).

72. *Alfred Bell*, 191 F.2d at 101 (quoting Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945)).

and thus recognizably the second author's own contribution, the *Gracen* court indicated that the subsequent author must have contributed a "substantially different" variation.[73] In this regard, Judge Posner's observations in *Gracen* are illustrative of the utilitarian perspective underpinning much of modern U.S. copyright law. He viewed the concept of originality as serving a "legal rather than aesthetic function . . . to prevent overlapping claims"[74] between the initial and subsequent authors, and as being "significant chiefly in connection with derivative works, where if interpreted too liberally it would paradoxically inhibit rather than promote the creation of such works by giving the first creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work."[75] Judge Posner's remarks raise the specter of dueling derivative markets and the practical impossibility of sorting out the rights and claims of rights-holders against further "downstream" uses. Worse, they also raise the possibility that if every "downstream" use can qualify—under a low originality standard—as protectable content, then the value (both economic and possibly moral) of the various owners' exclusive rights will be highly diminished.

Moreover, the application of a low standard of originality to a work that is based on a preexisting copyrighted work may, ironically, run contrary to the aims of semiotic democracy. The irony lies in the fact that the freedom and expressiveness that define much UGC would, as a result of conferring exclusivity to subsequent authors, be more restrictive of future reworkings, borrowings, and reuses. Additionally, once in the legal company of minimally copyrightable television listings and telephone directories, *less* legitimate UGC may result as later users seek to either work within or around the expanding copyright framework.

In light of the positive social outcomes and creativity that UGC is supposed to facilitate, copyright doctrines and policies that disincentivize creation should be avoided. The foregoing discussion

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73. *Gracen*, 698 F.2d at 305. To further complicate matters, the statutory language in the U.S. Copyright Act directs consideration of the extent to which the second work "recast[s], *transform[s]*, or adapt[s]" the initial work in order to satisfy the definition of "derivative work." 17 U.S.C. § 101 (2000) (emphasis added). I discuss the implications of the use of the word "transform[s]" in the statutory definition of a "derivative work" in light of the development of the transformative use factor in U.S. fair use cases in Part III of this Article, *infra*.

74. *Gracen*, 698 F.2d at 304.

75. *Id.* at 305. Similarly, in the earlier case of *L. Batlin & Son, Inc. v. Snyder*, cited in *Gracen*, the Second Circuit (sitting en banc) had ruled that the second author needs to show "substantial, not merely trivial originality." 536 F.2d 486, 490 (1976); *see Gracen*, 698 F.2d 300.

has shown that there may be sound policy grounds for applying a higher standard of originality to derivative works (including UGC) as compared to initial works that originate with an author. At the same time, copyright law must ensure that—just as initial authors are incentivized to contribute to the progress of science and the useful arts—the creativity of subsequent authors is not unnecessarily curtailed as a consequence. The single overarching problem created by derivative works is the fact that they do use—and in many cases alter and copy—preexisting work, thus creating an inevitable overlap between the two works and their markets. Given the relative dearth of case law (particularly outside the United States) in this area, it is far from clear whether differentiating between originality requirements achieves for derivative authors the utilitarian incentive or authorial acknowledgment traditionally associated with initial creators.

The originality requirement for derivative works may need to be expanded, or at least clarified, with respect to the factors that a court will consider in determining whether such works are copyrightable in their own right. I suggest one possible approach in Part III of this Article, based on the element of transformativeness in the context of UGC and the U.S. legal requirement that derivative works "recast, transform[], or adapt[]" their underlying works.[76] This approach is based substantially on developments in fair use jurisprudence, particularly in relation to the meaning and scope of transformativeness as the concept has evolved in many of the U.S. cases on fair use.

It may also be possible to fashion a more refined approach to originality by adopting a users' rights perspective, essentially viewing the derivative creator as simultaneously a user and an author—as someone who builds on the work of others and also participates in an ongoing creative process that depends on engagement with such others and their works. This viewpoint requires a consideration of what exactly is meant by a user right in copyright law.

76. 17 U.S.C. § 101 (2000).

## II. USER RIGHTS AND THE COPYRIGHT FRAMEWORK

### *A. Fair Use and Fair Dealing: Right, Exception, or Privilege?*

The possibility of recognizing user rights in copyright law has already been raised,[77] with a view to balancing the interests of the author/rights-holder with those of others desiring access to that work. It is necessary to caution, however, against using the word "rights" lightly. In a strictly Hohfeldian sense, a "right" must correlate to a "duty"—for example, if A has a particular right against B, then B has a corresponding duty toward A with respect to that particular right.[78] Hohfeld bemoaned the fact that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a *right* in the strictest sense."[79] Whereas a right (or, as he termed it, a "claim-right") necessarily involves a correlated duty, as in the example of A and B above, a privilege, in contrast, is "the mere negation of a duty" where the duty in question has the "content or tenor [that is] precisely *opposite* to that of the privilege in question."[80] "Privilege," in this sense, does not denote or imply any special legal or social status, but simply means the absence of a duty or, in other words, a type of "no-right." As such, Hohfeld also uses the word "liberty" interchangeably with "privilege." Thus, A can be said to have a privilege or liberty (rather than a right or claim-right) against B with respect to any particular act where B has no duty to refrain from doing that act. Further, Hohfeldian analysis would hold that B in this scenario would have no right against A, such that A will herself have no duty to perform that particular act. For Hohfeld, the imprecision of the general term "rights" meant that it could be divided into the four jural correlatives of right (or claim-right) set against duty, and privilege (or liberty) set against a "no-right."[81] Having a right meant one could not also, in relation to the same thing, have a "no-right," and having a privilege

77. *See, e.g.*, Abraham Drassinower, *Taking User Rights Seriously*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462 (Michael Geist ed., 2005), *available at* http://www.irwinlaw.com/PublicInterest/Three_02_Drassinower.pdf.

78. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 35-36 (1913).

79. *Id.* at 30 (emphasis added).

80. *Id.* at 32, 38.

81. For purposes of the current discussion, Hohfeld's jural correlatives relating to the "power" set rather than the "rights" set depicted in the main text are not discussed here.

also necessarily means one cannot have a duty with respect to that thing.

Hohfeld's classification of rights has greatly influenced the development of property law thought, including the now commonly accepted metaphor of property rights—including copyright—as a "bundle of sticks" (i.e., entitlements) rather than the older, possibly more simplistic, conception of property as absolute control in the Blackstonian form of an owner's "sole and despotic dominion" over particular things.[82] In the specific realm of copyright law, the Hohfeldian model of rights, duties, and privileges can be particularly helpful as part of an effort to clarify the relationship between "exclusive rights" (which avail to the right-holder, who is generally—though not always—the author, and who is also the "copyright owner"), and the various "limitations and exceptions" currently recognized by national laws and international standards.[83] Where UGC is concerned, reexamining the notion of permissible uses of copyrighted content in light of the Hohfeldian understanding of a "right" as opposed to a "privilege" can be especially illuminating in relation to the question of whether fair use—generally accepted to be the most important and flexible means of achieving balance between a copyright owner's interests and those of the public for whose ultimate benefit copyright exists—should, in light of the changing norms of creativity and Internet culture, be transformed from its current status into a "right."

Under the Hohfeldian model, would fair use in its current incarnation be classified as a "duty" or a "privilege"? It is likely to fit most comfortably into the Hohfeldian category of a "privilege," as unauthorized uses that under the doctrine are considered "fair" are thus legal, and obviate the need to seek permission from the right-holder/copyright owner. Equally, the copyright owner is under no corresponding duty to make her work available or to assist in the exercising of the privilege in any way.[84] In Hohfeldian terms, the

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82. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

83. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (as amended September 28, 1979), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs _wo001.html [hereinafter Berne Convention], which in relation to the reproduction right outlined in Article 9 then goes on to provide for possible exceptions (in Article 9(2)) and certain free uses of works (in Article 10). For an example of national legislation, see The Copyright Act, 17 U.S.C. §§ 101-810 (2000), where the exclusive rights set forth in Section 106 are expressly subject to the limitations contained in Sections 107 through 122.

84. *See* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007) (characterizing fair use in this way and arguing for the establishment of a clear set of fair use "safe harbors," including the reclassification of fair use as a Hohfeldian right with respect to technological protection measures and anti-circumvention).

copyright owner thus has a "no-right" against the fair user in such instances, unlike where there is unexcused infringement, in which case the unauthorized user is considered to be under a "duty" to the right-holder not to infringe. Viewed in this manner, it is clear that to speak of "rights" and "limitations and exceptions" in the common copyright sense can be misleading when the issue is considered through a Hohfeldian lens. It would be more accurate to say instead that the copyright owner has a right against a user only where that user has a duty not to act without authorization, but that the copyright owner has a no-right against the fair user. This viewpoint has the attraction of presenting the fair user as being on more of an equal footing with the copyright owner than would an approach that considers the fair user as a limited and exceptional case within the realm of the copyright owner's exclusive rights. From this perspective, copyright law should not be merely about protecting the property rights of copyright owners, but should equally be about conserving the liberties of protected users.

For instance, to the extent that copyright law "encourages authorship at least as much for the benefit of the people who will read, view, listen to, and experience the works that authors create, as for the advantage of those authors and their distributors,"[85] the fair use doctrine can be viewed as formulated largely to determine whether and when public, commercial uses could be deemed legitimate and hence fair; as such, it is inapt for use to determine whether and when personal uses too would qualify as fair.[86] Where reading, viewing, listening to, and experiencing copyrighted works are liberties that copyright law seeks to further, it may be that the copyright law (including those provisions granting rights and not just the fair use defense) should be interpreted to achieve a balance between a copyright owner's right to exploit her work and a user's liberty to enjoy and experience them.[87]

On the issue of personal use, it has been noted that the fair use doctrine has essentially been asked to deal with three fundamental problems: the first, what has been termed "productive" use;[88] the second, "pure personal use"; and the third, an in-between form of "personal productive use."[89] While there is general agreement that productive uses ought to be considered fair use (though there is little

85. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1882 (2007).

86. *Id.* at 1898.

87. *Id.* at 1909.

88. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984).

89. Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 394 (2005).

clarity as to what exactly constitutes a "productive" use),[90] there is considerable disagreement over whether pure personal use—even where its purpose is to enable the kinds of benefits sought by semiotic democracy such as personal autonomy—can fall within the scope of fair use.[91] However, the language and judicial application of fair use have thus far been unable to provide firm guidance as to when individual uses are fair, thereby highlighting the incoherence of determining individual fair uses against a statutory text that seems to mandate its measurement against the more general social needs served by copyright law.[92]

Originality, as much as fair use, can be about the relationship between an author and a user. Since copyright law prohibits a person from copying someone else's work, but not necessarily from drawing from it, copyright law "appreciate[s] that the author is herself a user, and that therefore the rights of users are not so much exceptions to the author's rights as much as themselves central aspects of copyright law inextricably embedded in authorship. Authorship is itself a mode of use."[93] As such, the concept of originality serves to distinguish between permissible and impermissible copying, while the notion of fair dealing—particularly given the Supreme Court of Canada's bald statement in the *CCH* case that fair dealing is a user right integral, and not merely a defense, to copyright[94]—is the means by which a defendant shows that her work is truly her own, and not merely a copy of the plaintiff's.

These scholarly calls for a rebalancing of copyright law to better account for the legitimate actions of user-authors must, however, be considered against a legislative and judicial backdrop that—except for a few rare statements such as those of the Supreme Court of Canada—has limited user rights by confining permissible behavior within a narrow list of exceptions[95] and by persisting in

90. *See* discussion *infra* Part III.A (contrasting "productive" with "consumptive" and comparing these with "transformative" uses).

91. Madison, *supra* note 89, at 393-94.

92. *Id.* at 403. Professor Madison's concerns seem validated by the comprehensive empirical study undertaken recently by Professor Barton Beebe, which demonstrated that Supreme Court and other appellate cases that are referred commonly by scholars and teachers do not always have a significant impact on lower court applications of the doctrine. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions 1978-2005*, 156 U. PA. L. REV. 549 (2008).

93. Drassinower, *supra* note 77, at 466.

94. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339 ¶ 48, 2004 SCC 13 (Can.).

95. *See, e.g.*, *Report to the Council, the European Parliament and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (Nov. 30, 2007),

categorizing lawful uses as exceptions and limitations, whether in treaty form[96] or legislation.[97] Thus, copyright law in policy and practice has had a tendency to undervalue the importance and role of the reader/listener/viewer, and has emphasized instead the importance of incentives and protection for the author/publisher.[98] This is perhaps not surprising, particularly in regimes with strong utilitarian overtones. Yet with the rise of participatory culture and Web 2.0, where the reader/listener/viewer is no longer just a passive consumer of content but is empowered to be an active participant and even a co-creator or collaborator, it is crucial that copyright law recognize the importance of the user/consumer of copyrighted content as well. A user-rights framework that does not elevate the user above the author, but that recognizes the importance and interrelationship of both in the copyright system, could prove a useful analytical structure for the copyright challenges posed by UGC and other derivative works.

### *B. Conceptualizing User Rights through the Lens of Authorship*

Authors are at "the heart of copyright,"[99] but they are also users, since their works build upon the ideas and works of others. It is arguable, therefore, that copyright protection—in some form—ought to extend also to users who in certain circumstances may themselves be considered authors. Professor Jane Ginsburg has deftly summed up the various features that have historically been valued as authorship by copyright law: (1) mind over muscle, (2) mind over machine, (3) originality (although in some countries "sweat of the brow" is considered authorship regardless of creativity),[100] (4) intention to be an author, (5) the absence of a requirement that

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*available at* http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/application-report_en.pdf (stating that the 2001 Copyright Directive of the European Union "does not provide for a right of private copying," and referring to a decision of the Paris Court of Appeal, which held that private copying is an exception and not a right).

96. *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

97. *See, e.g.*, H.R. REP. NO. 94-1976 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

98. *See, e.g.*, Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS., Spring 2007, at 175, 177; *see also* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005).

99. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064 (2003).

100. *See supra* Part I.B (providing a discussion of the U.S., United Kingdom, Australian and Canadian standards for originality).

authorship be consciously intended (although intent can help sort out equities between competing authorial claims), and occasionally, (6) economic control.[101] In essence, authorship in copyright law centers on human subjective judgment and personal autonomy, and these characteristics undeniably exist in UGC.

Not only is the UGC creator therefore an author in her own right, she is also far from the convenient, stereotypical user so often assumed by copyright law, though none of these stereotypes are accurate or compelling: the consuming Romantic user, the market-oriented economic user, or the indifferent postmodern user.[102] She is more likely to be what Professor Julie Cohen describes as the "situated" user—someone who:

> engages cultural goods and artifacts found within the context of her culture through a variety of activities, ranging from consumption to creative play. The cumulative effect of these activities, and the unexpected cultural juxtapositions and interconnections that they both exploit and produce, yield what the copyright system names, and prizes, as "progress"'[103]

Although not writing directly of participatory digital culture, Professor Cohen's "situated user" bears a remarkable resemblance to a creative UGC author. As such, Professor Cohen's evaluation of current fair use analysis as focusing on uses rather than users, and her plea for the copyright regime to be realigned so as to recognize the "situated, context-dependent character of both consumption and creativity, and the complex interrelationships between creative play, the play of culture, and progress,"[104] are important reminders of the significance of users in copyright law.

Using a perspective that locates and prizes the user allows for the possibility of classifying fair use and its equivalent doctrines as a "user rights" on par with the exclusive rights belonging to a copyright owner. If all authors are users of some sort, and if authorship means respecting the human element of autonomy and creation (if not necessarily creativity), then the law's recognition of fair users should not so much be a grudging exception to the original author's rights as much as an acknowledgment that such users are themselves central to copyright law, for their very existence and creation are inextricably embedded in authorship itself.[105] This view of fair use squares with the Supreme Court of Canada's statement in the *CCH* case that:

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101. *See* Ginsburg, *supra* note 99, at 1072-91 (discussing "Six Principles in Search of an Author").

102. Cohen, *supra* note 98, at 348-49.

103. *Id.* at 349.

104. *Id.* at 374.

105. Drassinower, *supra* note 77, at 466.

> [T]he fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[106]

If fair use, and copyright law more generally, is to be directed toward not just protecting the rights of the copyright owner but also safeguarding the liberties of the consumer/user, and further, if fair use is to reflect both permissible personal uses and desirable social outcomes, it is arguable that the U.S. doctrine, as codified in Section 107 of the U.S. Copyright Act,[107] is far better positioned than its common law counterparts to accomplish these ends. In the United Kingdom, Sections 29 and 30 of the Copyright, Designs and Patents Act (CDPA) state that fair dealings with a copyrighted work for the purposes of non-commercial research, private study, criticism, review and the reporting of news and current events are permitted acts in relation to those copyrighted works.[108] Similarly, the Australian Copyright Act contains provisions relating to fair dealings for purposes of research, study, criticism, review, news reporting, and—after an amendment in November 2006—parody and satire,[109] while the Canadian Copyright Act also contains exceptions pertaining to research, private study, news reporting, criticism, and review.[110]

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106. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339 ¶ 48, 2004 SCC 13 (Can.).

107. 17 U.S.C. § 107 (2000).

108. Copyright, Designs and Patents Act, 1988, 1988, c. 48, §§ 29, 30 (Eng.) (amended to implement the 2001 EU Copyright Directive), *available at* http://www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm [hereinafter CDPA]. There are conditions attached to some of these permitted acts, such as the need for an acknowledgment in relation to non-commercial research, criticism, and review; where criticism and review are concerned, the work must also have been made available to the public.

109. Copyright Act, 1968, §§ 40-42 (Austl.), *available at* http://www.wipo.int/clea/en/text_html.jsp?lang=EN&id=292. For the sake of completeness, though without any effect on the main argument, it should be noted that, unlike the United Kingdom, Australia uses "study" rather than "private study," does not specifically mention "current events," and does not require the acknowledgements and other conditions set by the CDPA in relation to the equivalent provisions. *Id.* Further, Section 40 of the Australian Copyright Act includes – for considerations relating to research and study – statutory factors that include the four fair use factors found in the U.S. Act; it also has a "deeming" subsection that sets out in percentage terms the amount of copying that will be taken to be a "reasonable amount" and hence fair dealing if the research or study purpose is made out. *See id.* § 40.

110. Copyright Act, R.S.C., ch. C-42, § 29 (1985) (Can.). Like in the United Kingdom, acknowledgement of source is required for some of these exceptions: criticism, review, and news reporting.

The fair dealing provisions of the United Kingdom, Australian, and Canadian copyright statutes therefore appear more limited than the U.S. fair use doctrine.[111] Moreover, they are all framed and titled as exceptions and/or limitations to the exclusive rights of a copyright owner. Nonetheless, as the Supreme Court of Canada has indicated, the apparent limitations of the statutory language do not necessarily bar the adoption of a liberal approach that considers the fair user as an equal counterpoint to the copyright owner;[112] in other words, even seemingly restrictive statutory language can allow the balancing of user rights against property ownership.

Adopting such a framework would not change the critical problem for UGC in the infringement context, which (if involving a copy, adaptation, or other use within the scope of the exclusive rights) remains one of fair use (or fair dealing, as applicable). However, it can be argued that viewing fair use as a user right will allow for—indeed, almost mandate—a consideration of broader societal values, cultural norms, and public interest concerns as part of the standard analysis. To a large extent, this would not just be a reminder that the fair use question cannot be answered by a simple, mechanical application of whatever statutory factors there may be (and then adding them up to a numerical balance) and that the issue cannot be resolved by simply emphasizing the economic costs to the original author at the expense of more intangible non-economic factors. Perhaps the best argument is that *fairness* lies at the heart of the doctrine, whether it is known as fair use or fair dealing. As such, in every case where an alleged infringement of an exclusive right may be a legally permissible use, the most important consideration is whether the use is fair (or not, as the case may be). In addition, every such inquiry must be bilateral in nature; not only does fair use impose limits on a copyright owner's rights, but it must also limit the kinds of uses that a subsequent user can make of the copyrighted work. This second limit may be measured by the extent to which the purpose of the use reflects the subsequent author's authorial engagement with the work, and even then, only to the extent reasonably necessary to achieve such engagement.[113] In balancing the interests and needs of both the initial and subsequent authors, recognizing their integral roles as both

111. *See* Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309 (2008) (noting that in terms of case law outcomes, all three approaches have tended to yield largely similar results).

112. *See, e.g.*, CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.

113. Drassinower, *supra* note 77, at 471.

authors and users in a copyright system can thus affirm the interwoven nature of the creative process.

### *C. The International Legal Framework of Limitations and Exceptions to Copyright*

Notwithstanding the arguments outlined in the previous section, a quick glance at the leading copyright treaties—the 1886 Berne Convention (as subsequently amended)[114] and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that was finalized as part of the negotiations setting up the World Trade Organization (WTO)[115]— indicates that copyright law is framed as a set of relatively broad exclusive rights balanced by a narrower and somewhat more specific set of limitations and exceptions thereto. In fact, TRIPS Part II, Section I, which deals with copyright and related rights, expressly titles Article 13 as "Limitations and Exceptions," and in endorsing the "three-step test" (taken from Article 9(2) of the Berne Convention), exhorts member states to "*confine* limitations and exceptions" to only those situations falling within the "three-step test."[116] In comparison, Article 9(2) of the Berne Convention states that these situations "shall be a matter for legislation in the countries of the Union to *permit*."[117]

The breadth and scope of the "three-step test" has been the subject of just one WTO dispute.[118] There is therefore scant "hard law" guidance on the matter, and this particular panel decision regarding the U.S. "homestyle" copyright exception, while indicative, is not necessarily comprehensive or dispositive. Although it emphasized the need for the "certain special cases" in the first step of the test to be limited to definable situations, the Panel seemed also to indicate that normative and not just economic considerations are also relevant, particularly to the other two steps of the test—what might constitute "normal exploitation" of the work and what the right-

114. Berne Convention, *supra* note 83.

115. TRIPS, *supra* note 96. Article 9(1) of TRIPS requires WTO members to comply with Articles 1 through 9 of the Berne Convention, thereby importing the substantive standards and norms of the Berne Convention into the international trade framework. *See id.* art. 9.

116. *Id.* art. 13.

117. Berne Convention, *supra* note 83; *Cf.* TRIPS, *supra* note 96, art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

118. Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf.

holder's "legitimate interests" might be.[119] Unfortunately, the Panel did not further explain what those normative interests might be, and this exhortation seems particularly problematic in regards to the Panel's application of the third step of the test; in considering when these interests might be "unreasonably prejudice[d]," it chose to focus largely on economic harm.[120]

It is also not entirely clear whether the U.S. fair use doctrine is compliant with the "three-step test," particularly if the Panel decision is interpreted to indicate in a more restrictive reading of the test.[121] In any case, neither the language of Section 107 nor the word "fair" appears in either Berne Article 9(2) or TRIPS Article 13. Despite this facial incongruity, Professor Ruth Okediji has argued that this ought not to prevent the development of an international fair use doctrine that takes into account social welfare principles and preserves the public interest objectives of copyright law.[122] She notes that the 1996 World Intellectual Property Organization (WIPO) Internet Treaties[123] contain an Agreed Statement to the effect that contracting states were to be permitted to develop national limitations and exceptions appropriate to the digital era, and contends that while an Agreed Statement is not "hard law," it nonetheless represents an international consensus that would be a useful starting point for norm-setting in relation to limitations and exceptions and, in particular, developing a more flexible fair use doctrine.[124]

Two types of norms influence copyright lawmaking: marketplace norms and authorship norms, with the former dominant in the Anglo-American legal tradition and the latter more prevalent in the civil (European) law system.[125] These can lead to occasional conflict—where a marketplace norm might dictate a narrower scope of protection (leading to the optimal point at which incentives will maximize market efficiency), an authorship norm might point toward

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119. *Id.* ¶ 6.97.

120. *Id.* ¶ 6.265. Admittedly this was likely because the parties largely adduced evidence based on economic concerns.

121. Panel Report, *supra* note 118.

122. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 84, 89 (2000).

123. *E.g.* World Intellectual Property Organization: Performance and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

124. RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES 20-23 (2006), *available at* http://www.unctad.org/en/docs/iteipc200610_en.pdf.

125. *See* Paul Edward Geller, *Toward an Overriding Norm in Copyright: Sign Wealth*, 159 REVUE INTERNATIONALE DU DROIT D'AUTEUR 3 (1994), *available at* http://www.criticalcopyright.com/Geller-Norm_Copyright.htm.

a broader sphere of protection in order to fully facilitate self-expression or account for moral rights, and some national and regional differences in approach can be explained accordingly. Nonetheless, despite the undeniably European origin of the international copyright system,[126] Professor Okediji's cautious optimism is perhaps not misplaced. To the extent that the Berne Convention exists as a set of compromises necessitated by different national policies and approaches,[127] it also correspondingly allows for flexibility in its implementation and preserves some deference for national sovereignty. The WIPO Internet Treaties also reflect a similar approach.[128] As such, and if the words of the Supreme Court of Canada in *CCH* are heeded, countries such as the United States (in applying a liberal interpretation of fair use) and Canada[129] may take the lead in developing the types of international norms and standards referred to by Professor Okediji. Should one or two influential common law countries with similar principles and provisions adopt a broader normative approach, it is possible—perhaps even likely—that

126. *See* OKEDIJI, *supra* note 124, at 1. *See also* SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (2d ed., 2006) (analyzing the history and interpretation of the major international treaties relating to copyright).

127. *Id.*

128. This can be seen in the so-called "umbrella solution" devised with respect to the right of communication to the public in Article 8 of the WIPO Copyright Treaty (WCT) and in the text of the Agreed Statement to Article 10 of the WCT and Article 16 of the WIPO Performances and Phonograms Treaty. *See* Dr. Mihály Ficsor, World Intellectual Property Organization [WIPO], National Seminar on Copyright, Related Rights, and Collective Management, *Copyright in the Digital Environment: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, WIPO/CR/KRT/05/7 (Feb. 2005), *available at* http://www.wipo.int/edocs/mdocs/arab/en/wipo_cr_krt_05/wipo_cr_krt_05_7.pdf.

129. It is therefore somewhat unfortunate that the Canadian government seems to have regressed from the potential path carved by *CCH*. In June 2008, a copyright reform bill was proposed, and instead of expanding the existing fair dealing exceptions along the line of a general fair use principle, several highly specific additional exceptions to deal with particular situations (e.g. time-shifting) were introduced instead. *See* Bill C-61, An Act to Amend the Copyright Act, *available at* http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3570473&file=4. While Bill C-61 passed its first reading in the Canadian House of Commons in June 2008, the calling of a federal election in September 2008 meant the Bill died on the order paper. As of this writing, the Canadian government has stated that it intends to reintroduce the Bill, though this has not yet occurred. It should also be noted that the Australian government, in 2006, chose to add specific fair dealing exceptions rather than adopt a U.S.-style fair use exception. See the Issues Paper on Fair Use and Other Copyright Exceptions by the Australian government (May 2005) (seeking public comment on options to amend the fair dealing provisions of the Australian Copyright Act), *available at* http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005; see also the current Australian Copyright Act (No. 63, 1968) (published Nov. 13, 2008).

other countries with a similar system will follow, thereby creating a fairly substantial set of international norms.

A boost to such efforts might come in the near future. In March 2008 Brazil, Chile, Nicaragua, and Uruguay proposed that WIPO develop an instrument that would mandate minimum exceptions (i.e., user rights), particularly with regard to "educational activities, people with disabilities, libraries and archives, as well as exceptions that foster technological innovation."[130] Although it is too early at this stage to even speculate on the nature and scope of such an instrument, especially as the WIPO Standing Committee on Copyright and Related Rights (SCCR) has only just begun to discuss the matter,[131] the possibility of an international document setting forth mandatory minimum exceptions in the form of user rights is an exciting one. At the very least, the upcoming process of discussion and negotiation at WIPO will provide fair use advocates with the opportunity to argue their case. Additionally, and although the government of the United Kingdom has not yet taken up the recommendation made by the *Gowers Review* to press for an amendment to the European Union's Copyright Directive that would expressly include transformative fair use as one of the recognized exceptions,[132] a concerted effort and open discussion at WIPO about the broader significance of mandating some form of mandatory minimum users' rights could also pressure the government, and possibly the European Commission and European Parliament, to consider a more concrete role for transformative use. Should that be the case, hopefully some of the modest proposals set forth in this Article can be of some assistance.

## III. TRANSFORMATIVE UGC, FAIR USE, AND DERIVATIVE WORKS

The conceptualization of fair use and fair dealing as forms of user rights does not answer the question of what forms of UGC can be

130. WIPO, *Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related to Exceptions and Limitations*, SCCR/16/2 (July 17, 2008), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf. A prior proposal along similar lines had been made in 2005 by Chile. *See* WIPO, *Proposal by Chile on the Analysis of Exceptions and Limitations*, SCCR/13/5 (Nov. 22, 2005), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf.

131. At its November 2008 session, the SCCR conducted information sessions on exceptions relating to the visually impaired, automated rights management systems, libraries, and archives. *See* Standing Committee on Copyright and Related Rights, Seventeenth Session, http://www.wipo.int/meetings/en/details.jsp?meeting_id=16828 (last visited Apr. 9, 2009).

132. Gowers, *supra* note 6, at 68.

considered a fair use/fair dealing when incorporating another's preexisting work. It seems patently unnecessary to contradict the statement that "only authors, but not copycats, should be entitled to the fair use privilege,"[133] but the evolution in the United States of a fair use test that relies heavily on the transformative nature of the use raises the further question of whether transformativeness equals authorship in the derivative work context.[134] The scope of transformativeness, however, is subject to much indeterminacy and uncertainty; reliance on this doctrine could prejudice not just the fair use prospects of socially valuable UGC, but also complicate its status as copyrightable work. There is also a "double appearance" of the "transformative" inquiry in U.S. copyright law—as part of the first statutory factor in a fair use analysis,[135] and again as part of the definition of a derivative work.[136]

Moreover, transformativeness is not a prerequisite for fair use; indeed, it is not even expressly referenced in the statutory factors listed as relevant for courts to consider.[137] It is also conceivable that certain forms of UGC will not be transformative of the underlying content. Finally, given the many and varied types of copyrightable works and the many emerging technological means for manipulating content and creating derivative works, overly emphasizing transformativeness as a prerequisite for either fair use or copyrightability in UGC may also turn out to be a limiting rather than an enabling factor.[138] As such, while transformativeness is likely to be an extremely useful, and for many forms of UGC a highly significant, measure of authorial contribution sufficient either to favor a defendant in a fair use inquiry, or to base a copyrightability inquiry

133. Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 371 (1997).

134. In *Campbell v. Acuff-Rose Music, Inc.*, the U.S. Supreme Court ruled that the extent to which the defendant's work transformed the plaintiff's is relevant as part of the enquiry into the first fair use factor (the purpose and character of the defendant's use), and that the more transformative the use, the less significant other factors such as commerciality may be. 510 U.S. 569, 579 (1994).

135. *Id.*

136. The U.S. Copyright Act defines a "derivative work" as including a "form in which a work may be recast, *transformed* or adapted." 17 U.S.C. § 101 (emphasis added).

137. The four factors that a court "shall" consider are "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

138. I am grateful to Professors Christine Haight-Farley and Niva Elvin-Koren for highlighting these points at the 2008 User-Generated Content, Social Networking and Virtual Worlds Roundtable at Vanderbilt University Law School.

upon, it should not be the only factor determining either question in all cases.

### *A. Transformativeness and Fair Use under U.S. Copyright Law*

The ascendancy of the role of transformativeness in a fair use inquiry is generally acknowledged to be a result of Judge Pierre Leval's influential 1990 article in the *Harvard Law Review*,[139] containing the famous formulation that has since been adopted by the U.S. courts:

> The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; . . . it would merely "supersede[] the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[140]

The fundamental idea seems to be that if the use will advance knowledge and enable progress (in the constitutionally mandated manner), it may be fair and thus permissible, subject to the other factors in the case; more specifically, such a use could be transformative in that it does more than "supersede the objects" of the original work—it also generates new and socially desirable knowledge.[141] However, such a notion of transformativeness must in a number of cases necessarily involve a subjective, even normative, assessment. As restated by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music Inc.*[142] just a few years later, the inquiry—conducted as part of an analysis of the "purpose and character" fair use factor[143]—requires the judge to ask if the defendant's use has added

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139. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). Judge Leval suggests in his article that lack of transformativeness should arguably end the fair use analysis (at 1116). Other intriguing suggestions include his rejection of the defendant's good (or bad) faith as a relevant factor (at 1126), and his note that the Supreme Court may have over-emphasized the primacy of the fourth statutory factor in the *Harper v. Row* decision (at 1124).

140. *Id.* at 1111 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.)). Notably, the Supreme Court recognized parodies as potentially fair use in *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

141. Leval, *supra* note 139, at 1111.

142. 510 U.S. 569 (1994).

143. *See* Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 594 (2000) (noting that as Justice Souter also mentioned transformativeness in relation to the fourth factor, it would seem as though transformativeness is relevant in that context as well).

"something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[144]

Where Judge Leval was seeking to clarify the role that "productive" uses play in fair use by explaining it in terms of "transformative" use, it is not always entirely clear what the exact differences are between the two.[145] It stands to reason that the two concepts are not precisely identical, and scholars have suggested that while transformative uses are typically also productive uses, the reverse is not necessarily the case.[146] Previously, in *Sony v. Universal City Studios*,[147] the U.S. Supreme Court had discussed the differences between productive and non-productive uses, with the majority noting that while classifying a particular use in this manner might help in "calibrating the balance" between competing interests, it is not necessarily dispositive.[148] Interestingly, the majority had indicated that a productive use meant the reproduction of the plaintiff's work was "for its intrinsic use,"[149] such as quotation for the purposes of criticism or a teacher's copying of a work for classroom purposes. In contrast, Justice Blackmun for the dissent seemed to consider productive use from a broader perspective, even as he assumed that it included reproducing the plaintiff's work; he stated that such reproductions could be productive where they resulted in "some added benefit to the public beyond that produced by the first author's work . . . . The fair use doctrine, in other words, *permits works to be used for 'socially laudable purposes.'*"[150]

In his judicial role, Judge Leval seems to take a more restrictive view of productive uses than even the *Sony* majority, whose remarks can be interpreted as being concerned with the facts of the case, i.e. the taping of television programs with VCRs. As such, the *Sony* Court was presumably not attempting to craft a full test for all types of permissible uses.[151] In *American Geophysical Union v. Texaco Inc.*,[152] he stated that the word "productive" is

144. *Campbell*, 510 U.S. at 579 (citing Leval, *supra* note 139, at 1111).

145. *See, e.g.*, Kudon, *supra* note 143, at 590-91 (noting that while Judge Leval considered productive use an essential part of the doctrine, he also modified it when proposing his standard for transformativeness).

146. *See, e.g.*, Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permissions Systems*, 5 J. INTELL. PROP. L. 1, 31 n.130 (1997).

147. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

148. *Id.* at 455 n.40.

149. *Id.* at 427 n.9.

150. *Id.* at 478-79 (emphasis added) (citation omitted).

151. *Id.* at 442. In considering whether the Betamax was "capable of commercially significant noninfringing uses," the majority stated that "we need not explore *all* the

> not necessarily an ideal description of the line of authorities because it risked the *misconception that it encompassed any copying for a socially useful purpose.* In fact . . . what the early authorities had meant was a secondary use that was productive in that it produced a new purpose or result, different from the original . . . use that transformed, rather than superseded, the original.[153]

In light of his academic elucidation in 1990 of transformative use along similar lines,[154] the reasonable conclusion is that Judge Leval equates productive and transformative purposes. However, it is not entirely clear whether he means to include within productive uses those that involve reproducing the original work, or whether he might have included them only where such copying contributed toward creating more works. Still, his view of productive uses aligns better with an economic-utilitarian perspective of copyright law, which extends legal recognition only where it would be instrumentally necessary to do so, rather than with a broader theory of distributive justice or social policy.

Given the uncertainty over the meaning of the word "productive" and its relationship to "transformative," and the further caution in *Campbell* that fair use is not easily susceptible to "bright-line rules,"[155] Judge Leval and the U.S. Supreme Court's subsequent articulation in *Campbell* of the transformativeness concept is then perhaps at best a helpful guideline for judicial determinations of fair use since it does not provide much detail as to how the transformativeness inquiry is to be conducted, nor clarify what the line (if any) is between a transformative fair use and a transformative derivative work.[156] Such a formulation of the transformativeness question and its application by the courts to date also solidifies the lack of a positive role for the user in copyright law. A focus on the defendant's use (what she did to the plaintiff's work) and on the purpose(s) of such use thus currently involves considering whether the defendant's variations, revisions, editing, additions, and changes are legally justifiable incursions into the plaintiff's property rights. The problem with this approach is that it tends to cast the defendant-user in a somewhat negative light from the outset.

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different potential uses of the machine and determine whether or not they would constitute infringement." *Id.* (emphasis in original).

152. 802 F. Supp. 1, 11 (S.D.N.Y. 1992).

153. *Id.* at 27 (emphasis added).

154. *See* Leval, *supra* note 139.

155. Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 577 (1994).

156. *See, e.g.*, Kudon, *supra* note 143, at 592 (noting that "Leval's transformative use test virtually mirrors [Professor Paul] Goldstein's definition of a derivative work").

It may be more useful (albeit possibly no less indeterminate or subjective)[157] and better serve the understanding of the integral role of users in copyright law to approach the transformativeness question by instead asking what the plaintiff's work has *become* as a result of the defendant's additions and changes. This would not exclude a query into the purpose of the defendant's use—the wording of the first factor in Section 107 mandates that the court consider both the "purpose" and the "character" of such use—but rather represent a further consideration in overall fair use analysis.[158] Requiring the court to also look at the result of the defendant's actions, and not just the substance and purpose of those actions, would highlight cases where the defendant has made a substantive change to the plaintiff's work, and minimize instances where the defendant is a mere copycat. It could also underscore the objective of the transformativeness inquiry, as elucidated by Justice Story (in *Folsom v. Marsh*), Judge Leval (in his 1990 article), and Justice Souter (in *Campbell*)—namely, to evaluate whether in fact the defendant did ultimately transform the plaintiff's work by giving it a new meaning, information, or expression and thereby adding to progress and the advancement of learning.[159] In other words, the transformativeness inquiry would go directly to the fundamental objective of the fair use analysis, and ask not just whether there has been transformation per se, but whether any such transformation serves the broader public interest purpose of dissemination of works.[160] To date, however, the U.S. courts seem to have adopted a narrower approach to transformativeness than that

157. *See* Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 419 (2005) (noting that judges "cannot avoid making copyright policy in fair use cases" and suggesting that they do so with specific reference to fundamental principles of copyright itself rather than engaging in cost-benefit analysis or normative judgments).

158. 17 U.S.C. § 107 (2000).

159. *See* Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 19 (2001) (asserting that judges do engage in aesthetic critiques in a number of situations and suggesting that, for transformative fair use analysis, "it should not be sufficient that the plaintiff's work is merely transmitted, essentially unchanged, to a different audience; the copyrighted work should rather be altered in substance, in a new derivative work that requires independent creativity by the defendant user").

160. *See* Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After* Campbell, 7 COMM. L. & POL'Y 1, 21-22 (2002) (arguing that Judge Leval's emphasis has been misplaced, and that because fair use is not a "taking" of a copyright owner's natural property right, it is also not something the user has to justify by earning it through hard work); Jisuk Woo, *Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 74-77 (2004) (arguing for a more expansive view of transformative use that would include a user's creation of new works).

proposed here. Judge Leval had described transformative use as use either "in a different manner *or* for a different purpose"[161] and as occurring where the original work is "used as raw material, transformed in the creation of new information";[162] the *Campbell* court had restated Judge Leval's test as an inquiry into whether the second work "adds something new, with a further purpose *or* different character."[163] Subsequent courts, however, have tended to focus largely on the purpose of the defendant's use, rather than the result thereof.[164]

This renewed emphasis on what the transformativeness analysis seeks to accomplish highlights its continued importance to, and in some ways fundamental role in, analyzing what constitutes fairness between the rights-holder, the user, and the general public. Judge Leval himself highlighted the role of fair use in a way that reminds policymakers and judges to view it as an integral part of copyright law, rather than as a singular exception, when he wrote that fair use should be seen

> not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law . . . . [It] should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly.[165]

By returning to the reasons for incorporating transformativeness into the fair use analysis, we can realign the positioning of the roles and relative importance of the plaintiff and the defendant in a way that contributes toward anchoring the user in copyright law, allowing clearer recognition for the kind of UGC that does in fact transform the original work.[166]

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161. Leval, *supra* note 139, at 1111 (emphasis added).

162. *Id.*

163. Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 579 (1994) (emphasis added).

164. *See* Reese, *supra* note 5.

165. Leval, *supra* note 139, at 1107, 1110. Essentially, this also seems to reflect the Supreme Court of Canada's concern in the *CCH* case, which was to better integrate users and copyright owners into the overall copyright framework.

166. This proposal is not intended to cover situations where the plaintiff's work has been reproduced specifically for purposes of commentary or parody, for example, which require verbatim quotation or similar copying. Instead, this proposal is meant to supplement and complement that approach, and in those UGC cases where verbatim or direct copying may not be immediately apparent to the casual viewer/listener/recipient/consumer, it may also be a more appropriate standard. *See* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L.R. 969, 970, 972 (2007) (noting that courts do not generally focus on whether the use in question is socially beneficial and arguing that they should not do so; also suggesting that they should instead employ a harm-based standard, particularly as current prevailing theories of fair

Professor Laura Heymann has recently suggested another perspective from which to analyze the transformativeness analysis—that of the reader/viewer of the work.[167] Borrowing from literary theory (specifically, reader-response theory), Professor Heymann proposes that transformativeness be examined not as a binary concept, but as a question of degree, looking at the amount of interpretative distance created by the defendant's use of the plaintiff's work.[168] This approach would entail moving away from the purposive inquiry hitherto focused on by the courts, with the result of the transformativeness factor of fair use to depend on how successfully the defendant has created a "distinct and separate discursive community" around her work, since a discursive community arises around a work once it is created and released.[169] Professor Heymann further notes that the *Campbell* court's restatement of Justice Leval's transformativeness query signaled a subtle, but significant, shift away from contextualizing the defendant's use (via reader response) and toward a focus on the defendant's actions.[170] Although in some ways my analysis of how the transformativeness inquiry should be conducted diverges from Professor Heymann's, we share common ground in attempting to discern its true role in fair use.

Professor David Lange and Jennifer Lange Anderson have also emphasized the importance of the user and the fundamental importance of fair use in their proposal for an affirmative presumption of fair use in cases of what they term "transformative critical appropriation."[171] They argue that contemporary culture relies increasingly on appropriation as a means of critical expression and that this is due to more than mere "incidental interplay" between technology and culture; further, that appropriation flourishes even as copyright continues to be important, such that the relationship between appropriation and the law is also changing.[172] Their proposal is not intended to dismantle the existing copyright framework or take away property rights vested by copyright ownership, but to achieve

use (i.e., market failure and the balancing approach) do not fully achieve the purpose of copyright law).

167. Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008).

168. *Id.* at 449-50.

169. Among other examples, Professor Heymann points to appropriation art as illustrating this process. *Id.* at 458-59.

170. *Id.* at 452.

171. David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation* (Conference on the Pub. Domain at Duke Law Sch., Working Paper), *available at* www.law.duke.edu/pd/papers/langeand.pdf.

172. *Id.* at 138.

recognition of "true parity [between fair use and the] exclusive rights that Section 107 allows."[173] Given the increasing importance of appropriation both as self-expression and critical commentary, principles of fairness and decency would thus seem to require that copyright law limit the ability of a copyright owner to rely on her exclusive rights in such a way as to block these kinds of transformative appropriations. While their paper does not explore the meaning of transformativeness in this context, it highlights the cultural changes that have arisen in contemporary society where the user manipulates copyrighted content in ways that should be legitimized rather than excoriated by copyright law.

To the extent that a reconceptualized notion of transformativeness would succeed in bringing into copyright's focus the defendant-user (in my analysis), a less binary perspective (in Professor Heymann's proposal), and a stronger recognition of contemporary user culture (according to Professor Lange and Ms. Lange Anderson), a richer understanding and more flexible application of transformativeness as an important tool in fair use analysis could result. Such an approach would also highlight the vital part played by the user—in many respects as much an "author" as the initial creator—in copyright and in contributing to a vibrant culture of knowledge creation. This approach would also dovetail with possible recognition of fair use as a type of user right in balance with the exclusive rights of ownership. For UGC, however, a further substantive question remains: does its very creation constitute copyright infringement of the derivative work right?

### *B. Derivative Works in Comparative Context*

Section 101 of the U.S. Copyright Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, . . . abridgement, . . . or any other form in which a work may be recast, transformed, or adapted."[174] The types of creations that can constitute a derivative work, as defined, are therefore not confined to specific examples. Section 103 states that derivative works may be copyrightable, although Section 106(2) makes clear that the right to prepare derivative works is an

173. *Id.* at 155.

174. 17 U.S.C. § 101 (2000); *see also* Micro Star v. Formgen Inc., 154 F.3d 1107, 1110 (9th Cir. 1998) (Kozinski, J.) (decrying the statutory formulation of "derivative work" as "hopelessly overbroad").

exclusive right reserved to the copyright owner.[175] A creator of a derivative work under the U.S. copyright scheme therefore has to navigate between being a potential infringer under Section 106(2) if she does not seek prior permission to use the original author's work and claiming copyright in her own work regardless of whether permission was sought or given. On the latter issue, Section 103 further provides that any copyright in the derivative work does not extend to any part of it that "unlawfully" uses the underlying work, such that the copyright in the derivative work subsists only in those portions that represent the deriver's own contributions.

In the United Kingdom, the statutory framework that applies to derivative works (called "adaptations") is structured rather differently. Whereas Section 106(2) of the U.S. Copyright Act does not limit subject matter with respect to an author's exclusive derivative works right, the adaptation right under the CDPA applies only to literary, dramatic, and musical works—arguably only those works where words, numbers, characters, notes, and symbols constitute some form of "text" which can be "read."[176] This right is triggered by a rendering of the adaptation into a material form, at which point all of the other exclusive rights (such as copying, communicating it to the public, or performing it in public) will apply in the same way as to the original work on which the adaptation was based.[177] It goes without saying that these rights naturally accrue to the copyright owner whose right it was to make the adaptation in the first place.

There are obviously substantial differences between the scope of the adaptation right in the United Kingdom and the corresponding (but not identical) right under U.S. law to prepare a derivative work. First, there is the fact that the United Kingdom's adaptation right does not apply to pictorial, graphic, or sculptural works (all "artistic works" in the language of the CDPA), nor to audiovisual works or sound recordings.[178] Secondly, although the United Kingdom's adaptation right is, like the U.S. derivative work right, a separable and independent exclusive right, the copyright law of the United Kingdom bestows expressly on the resulting adaptation all of the other exclusive rights (including, presumably, the right to make yet a further adaptation, to which all the exclusive rights will then apply,

175. 17 U.S.C. § 106(2) (2000) (stating that the copyright owner has the exclusive rights "to prepare derivative works based upon the copyrighted work").

176. CDPA, *supra* note 108, § 21(1) ("The making of an adaptation of the work is an act restricted by the copyright in a literary, dramatic or musical work. For this purpose an adaptation is made when it is recorded, in writing or otherwise.").

177. *See id.* § 16(1)(e).

178. *See* 17 U.S.C. § 101 (2000).

and so on).[179] Therefore, the adaptation right in the United Kingdom is simultaneously narrower (in the types of derivative works it covers) and broader (in the scope of exclusivity once an adaptation has been made) than its U.S. cousin[180].

The first major difference between the United States and the United Kingdom in relation to their respective definitions of derivative works and adaptations, is that the United States does not limit "derivative works" to specific types of subject matter. The United Kingdom's CDPA, however, specifically defines "adaptations" differently for different media, and these can be summarized as follows:

- For literary works other than computer programs and databases, adaptations are translations.
- For computer programs and databases, adaptations are translations, arrangements, or altered versions.
- For dramatic works, adaptation are conversions to a non-dramatic form (and vice versa, i.e., dramatizing a non-dramatic work).
- More generally, adaptations also include versions of the original work in the form of pictures that can be reproduced in a book, newspaper, magazine, or other periodical.[181]

Thus, whereas the United Kingdom statute clearly restricts the type of work that would even be considered an adaptation in the first place, the U.S. definition is much more open-ended. Nonetheless, in addition to a broader conception of what qualifies as a derivative work, U.S. copyright law also expressly recognizes that a derivative work is copyrightable if the subsequent author made contributions that recast, transformed, or adapted the underlying work, provided that the resulting legal protection does not extend to any parts of it

179. *See* CDPA, *supra* note 108, § 16(1)(e) (recognizing expressly that, in relation to an adaptation, a copyright owner may do any of the other acts listed as within her exclusive rights: copy the adaptation (subsection (1)(a)), issue copies to the public (subsection (1)(b)), rent or lend it to the public (subsection (1)(ba)), perform or show it in public (subsection (1)(c)), or communicate it to the public (subsection (1)(d))).

180. Interestingly, the Canadian Copyright Act seems to have a similarly narrow list of adaptations that are considered within the scope of a copyright owner's monopoly, but does not have a provision, similar to that in the United Kingdom, that extends all exclusive rights to such adaptations. *See* Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.).

181. *See* CDPA, *supra* note 108, § 21(3).

that illegitimately used preexisting content.[182] This is a clearer attempt to distinguish between the copyrightable components—and hence the resulting rights—of the initial and the subsequent work. On the other hand, there may be a lesser need to make such a distinction under the law of the United Kingdom, since it categorically limits the types of creation that can qualify as adaptations, and reserves the rights appurtenant to these to the initial copyright owner.[183] The United Kingdom approach also has the appeal of a certain structural neatness that the more indeterminate U.S. approach seems to lack.

The United Kingdom also seems more precise in clarifying the point at which a secondary or a derivative work can arise in the legal sense. Whereas the CDPA contains a specific list of what types of works will be considered adaptations, the U.S. statutory definition of a derivative work requires (for those creations not already specifically listed as such) a substantive determination—presumably judicial if it comes to it—that the subsequent work has "recast, transformed, or adapted" the underlying work so as to qualify as a copyrightable derivative work.[184] This exercise raises two questions of overlap in the United States: first, the proper relationship between the language of "recast, transformed, or adapted" and the requirement of originality; and secondly, the interplay between that same statutory phrase with the test of transformativeness for fair use.

Where the first question is concerned, and if, as the case of *Gracen v. Bradford Exchange* indicates,[185] U.S. law requires a higher standard of originality for derivative works than for initial works,[186] then UGC that fails to reach that higher standard will not be protectable under U.S. law as derivative works. However, that should not be the purpose of the originality inquiry where derivative works are concerned. It is my contention that, just as in the fair use analysis the objective is to discover the point of fairness between the initial copyright owners and the user-author of the UGC, the focus when considering the copyrightability of transformative derivative works should similarly be on whether and how the UGC creator has changed (i.e., "transformed") the original author's work, such that the second work is thereby capable of standing on its own as a copyrightable creation.

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182. 17 U.S.C. §§ 101, 103(b) (2000).
183. *See* CDPA, *supra* note 108, §§ 16(1), 20(1).
184. 17 U.S.C. § 101 (2000).
185. 698 F.2d 300 (7th Cir. 1983).
186. *See supra* Part I.

This analysis would mean that the nature—and not just the purpose—of the transformativeness inquiry for copyrightability of derivative works would, as I proposed with respect to fair use,[187] need to pay greater attention to the result wrought by the defendant's acts. Since the statutory definition gives scant guidance on what the phrase "recast, transformed, or adapted" means, a court tasked with determining this issue could consider not just the purpose behind the second author's appropriation (as it already does in a fair use analysis); it could also consider elements such as Professor Heymann's suggestion of the interpretative distance created by each of the two works,[188] and Professor Lange's and Ms. Lange Anderson's reminders of the cultural changes that engender a more socially important role for acts of appropriation.[189] Under an approach that more fully considers the transformative result of the second author's work, the second work will qualify for copyright as a derivative work if it has sufficient social value in its own right to be protected, despite having appropriated someone else's work. This approach would have the benefit of accommodating the accepted rationale behind a strong derivative work right while still preserving the derivative market to the initial author; since that author's secondary markets extend only up to the point where the second author has succeeded in creating what is in effect a "new" work, then it is perhaps justifiable to refuse legal rights over exploitation of that new work.[190] Overall, the objective is to determine what the second author has done to the original author's work, with a view toward assessing the final result for transformativeness, and not engaging in an originality inquiry that takes place in a vacuum without consideration of the public policy goals of copyright law. In these situations, those goals should be concerned not only with securing justifiable secondary markets for the initial author, but also with encouraging creativity—and thereby progress—through protection of derivative creations that represent a substantive change from the initial work.

While this approach may attract critique for overly emphasizing the role of transformativeness in a copyrightability inquiry for derivative works, it should be noted that under U.S.

187. *See supra* Part II.B.

188. *See* Heymann, *supra* note 167.

189. *See* Lange & Lange Anderson, *supra* note 171.

190. A similar problem arises in the fair use inquiry in terms of the interplay between the first factor (including transformativeness) and the fourth factor (analyzing market value and impact). While such a determination is beyond the scope of this Artcle, it should be noted that these are problems that exist in the current application of the fair use and derivative works tests.

copyright law the *sine qua non* of a copyrightable derivative work is that it "recast[s], transform[s], or adapt[s]" existing material,[191] suggesting a relationship between the statutory definition of a derivative work and the concept of transformative use as it has developed through fair use jurisprudence. The statutory definition additionally recognizes certain types of works expressly as derivative works; the suggested approach should not be interpreted as diminishing the copyrightability of those works that, because they are specifically listed in Section 101,[192] require no inquiry into their transformativeness.

Returning then to the distinction between United Kingdom and U.S. law in relation to the categories of derivative works, it is noteworthy that the specificity of the list of adaptations in the CDPA makes unnecessary the substantive inquiry into derivative work copyrightability required in the United States. This means, however, that consideration of what, exactly, makes derivative works socially and culturally valuable would not arise in the United Kingdom. This is perhaps unfortunate, since the CDPA does not provide any guidance for copyrightability with respect to those derivative works that do not satisfy the statutory definition (and hence do not fit within the sphere of monopoly reserved to the initial copyright owner under the United Kingdom's copyright law).[193] How will a court in the United Kingdom determine whether a work that is based on a preexisting one and that does not fall within the statutory definition should enjoy its own copyright? If such a work is found to be copyrightable, to what extent is it so? The fact that the copyright system in the United Kingdom is not tied to any statutory requirement of transformativeness may be liberating, as may be the knowledge that even "sweat of the brow" efforts can fulfill the originality requirement. Nonetheless, there is little on the face of the CDPA that can guide a court in navigating those waters, whereas the U.S. statute at least requires a consideration of the extent to which the later work "recast, transformed, or adapted" the earlier work.[194]

However, the U.S. formulation potentially hobbles the kind of UGC and subsequent creations that can be protected by requiring transformativeness (possibly measured by the *Gracen* standard of substantial variation), and thus limits the types of secondary works

191. 17 U.S.C. § 101 (2000).

192. *Id.*

193. *See* CDPA, *supra* note 108, § 21(3) (providing an exhaustive definition of "adaptation" that relates specifically and only to certain forms of work based on literary, dramatic, or musical works, or databases or computer programs).

194. 17 U.S.C. § 101 (2000).

that it allows into the copyright sphere. In contrast, countries with statutory setups similar to that of the United Kingdom may find it easier to accommodate more forms of protectable derivative works. In this regard, one major attraction of the United Kingdom regime is that it actually allows for the existence—and legal protection—of derivative works that fall outside the initial copyright owner's scope of control; whereas the initial copyright owner has every right to control, all other derivatives remain "fair game" for subsequent authors—if they otherwise satisfy originality and other requirements—to claim as their own.

So does the U.S. transformativeness requirement pose an unjustifiable hurdle for the copyrightability of derivative works (and in particular UGC) when compared with the more specific law of the United Kingdom? The answer to this question may lie in an analysis of the different meanings of transformativeness in U.S. copyright law. Determining the scope of legitimate UGC involves examining the separate question of what constitutes infringing derivative works, taken up in the proceeding sections. Will works be considered infringing only when they copy or incorporate elements of earlier works, or will those that are based on works without incorporating any substantial portions escape the net of infringement?

### *C. Different Conceptions of Transformativeness in Fair Use and Derivative Works under U.S. Law*

Because U.S. copyright law considers transformativeness as relevant both to fair use and the copyrightability of derivative works, an inevitable question is whether transformativeness means the same thing in both of these analyses. The case law on this issue is not necessarily uniform.[195] In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the U.S. Court of Appeals for the Second Circuit clearly thought that the two concepts need not be identical, stating that "[a]lthough derivative works . . . transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not 'transformative.'"[196] On the other hand, in *Clean Flicks v. Soderbergh*, the defendants claimed that their editing of the plaintiffs' movies constituted fair use because, among other reasons, it was

195. The reader is referred to the thorough empirical examination of U.S. fair use cases by Professor Barton Beebe, *supra* note 92, and the analysis of the U.S. appellate cases on transformative use by Professor Tony Reese, *supra* note 5, for a fuller discussion that is beyond the scope of this Article.

196. 150 F.3d 132, 144 (1998).

transformative but did not amount to creating derivative works; the plaintiffs argued that the defendants' edits had resulted in a derivative work that was also not transformative for fair use purposes.[197] The U.S. District Court for the District of Colorado was of the view that the question of transformativeness is the same for both derivative work and fair use purposes such that the parties were taking "inconsistent" positions on this question.[198]

Whether the meaning of transformativeness is the same for fair use and derivative works can be an important question, as under the *Clean Flicks* view a positive determination under the fair use analysis would automatically mean that the work is also copyrightable (at least, for those parts of it that are not the original author's work). If, however, "transformativeness" for fair use purposes is not the same as for the purpose of defining a derivative work—and particularly if the test for transformative fair use takes into account social and cultural factors—then even those works that are found to be fair use because of their transformative nature could still be in "copyright limbo" in regards to copyrightability and the consequent conferment of exclusive rights. Arguably, the aims of semiotic democracy, free culture, and the like are best served by a copyright regime that admits less works into its protective pantheon, facilitating greater freedom to access, use, and remix content generally so as to justify having two different standards of "transformativeness" for two very different purposes. This argument is likely to appeal particularly to those who favor a more utilitarian and incentive-based theory of copyright law, including the justification of an adaptation/derivative work right because it "enables prospective copyright owners to proportion their investment in a work's expression to the returns expected not only from the market in which the copyrighted work is first published, but from other, derivative markets as well."[199] However, a real parity between fair use and exclusive rights makes it more difficult to justify the inconsistency of having two types of transformation.

If the broader approach to transformativeness urged above is adopted for fair use,[200] then arguably a great deal of UGC found to be transformative would also qualify for derivative work copyrightability,

197. Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006).

198. *Id.* at 1241.

199. Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 216-17(1983); *see also* Robert J. Morrison, *Deriver's Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 CHI.-KENT J. INTELL. PROP. 87 (2006) (suggesting, as the title suggest, a statutory licensing scheme for derivative works).

200. *See supra* Part II.B.

even under the stricter *Gracen* standard. After all, it seems logical that if social welfare, distributive justice, and other broad public interest values are factored into the fair use inquiry, they should be equally relevant in determining whether, in potential detriment to the interests and wishes of the original author, a later work that relies on and uses part of the earlier work should be recognized as copyrightable in its own right. It is doubtful, however, that U.S. courts will adopt such a broad approach in fair use analysis.

The approach of the Second Circuit in the *Castle Rock* case seems typical of many U.S. courts, in that they bifurcate transformativeness for fair use from that for derivative works.[201] Even where a defendant may have arguably transformed some of the plaintiff's content, many courts nonetheless have found the changes not transformative for fair use purposes, as the defendant's *purpose* was not itself transformative.[202] In *Castle Rock*, a trivia quiz book titled the Seinfeld Aptitude Test (or "The SAT") and based on the characters and plot of *Seinfeld*, a popular television comedy series, was said to possess only "slight to non-existent" transformativeness. The court ruled that "[a]lthough a secondary work need not necessarily transform the original work's expression to have a transformative purpose . . . the fact that *The SAT* so minimally alters *Seinfeld*'s original expression in this case is further evidence of *The SAT*'s lack of transformative purpose."[203]

In distinguishing between a transformative fair use and a transformative derivative work, the court in *Castle Rock* stated that while derivative works may

> transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not transformative . . . . [I]f the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright in the original work.[204]

In summary, *Castle Rock* provides that: (1) transformation of content (expression) is not indicative of a transformative purpose (and thus

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201. *See* Reese, *supra* note 5 (supporting this observation by analyzing the cases that have discussed transformative fair use).

202. *Id.*

203. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142-43 (2d Cir. 1998).

204. *Id.* at 145 & n.9 (citing MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 3.01 (1997) (stating that "a work will be considered a derivative work only if it would be considered an infringing work" if it were unauthorized)). The "substantially similar" test seems to reflect an assumption that a derivative work must incorporate some part of the protected expression of the underlying work. *See infra* text accompanying notes 216-231 (discussing the implications of the *Micro Star* case).

fair use), although a more than minimal content transformation can indicate a transformative purpose; and (2) transformation of content rather than purpose is the key to a derivative work, provided that the transformation results in a "new mode of presentation," even if it is for a non-transformative purpose. What the *Castle Rock* court did *not* clarify, however, is whether the transformation required for an infringing derivative work is the same kind required for a derivative work (infringing or otherwise) to have copyright protection in its own right. In other words, does the conferment of copyright protection on a derivative work depend on any *additional* recasting, transforming, or adapting—beyond the more than minimal transformation of content required under Section 106(2)?[205]

U.S. courts have also found transformative purpose favoring fair use in factual situations where there was no transformation of the underlying content,[206] further sealing the normative difference in the minds of U.S. judges between transformation for fair use and transformation for derivative works, and creating in effect a substantive difference between the two. Unfortunately, except for *Castle Rock*, no appellate courts have yet discussed the relationship between the two concepts or their reliance on transformativeness. Therefore, the boundaries (if any) between the two remain unclear in U.S. law.

Thus, even if the relatively higher standard for derivative works made by a person other than the original author, as championed by cases such as *Gracen*,[207] is adopted, it is not entirely clear what amount or type of substantial variation of the preexisting material would be required, particularly given the *Castle Rock* admonition that a lack of substantial similarity between the two works will then disqualify the later work from being a derivative.[208] Therefore, the lack of clear judicial guidance as to what exactly qualifies a secondary work as a derivative work at most suggests that the second author has to change more than just a little of the content (since her purpose and intent is not relevant for a derivative work analysis); she also has to be careful not to change too much lest her creation stray too far to be considered a derivative work. In addition to this rather vague spectrum of possibility, she may have to contend

205. *See* 17 U.S.C. § 106(2) (2000).

206. *See* Reese, *supra* note 5 (providing a thorough study of the different types of factual situations that demonstrate the U.S. appellate courts' approach to transformative fair use, and noting that, for the most part, it is transformative purpose that concerns each court).

207. 698 F.2d 300 (9th Cir. 1983).

208. 150 F.3d 132 (2d Cir. 1998).

with a different analysis if the issue is not whether she has created a derivative work, but rather if she has infringed either the reproduction or the derivative work right of the original author.

Although the economic benefits that a broad derivative work right reserves to the original author are clear, such benefits may accrue at a substantial social cost.[209] Copyright owners may, for instance, produce too few adaptations, and there seems to be no empirical evidence to show that the existence of a derivative work right encourages the production of more rather than fewer adaptations. Further, the possibility of a lucrative secondary market might simply be one of many motivations for creating a copyrightable work. The conventional explanation for the derivative work right is rooted in incentive theory, i.e. the ability to control derivatives allows for the maximization of returns through secondary markets for the work[210]. The derivative work right thus complements the reproduction right. In the U.S. copyright regime, however, the two rights also overlap,[211] with the reproduction right proving both robust and expansive,[212] covering, for example, not just literal,[213] but also subconscious, copying.[214] While the economic rationale might be relevant in jurisdictions that have minimal overlap between the reproduction and adaptation rights, or where, as in the United Kingdom, the adaptation right is both more constricted for limiting what constitutes an adaptation and a close complement to the reproduction right, it remains troubling that U.S. case law has yet to clarify the distinction between the two exclusive rights. The question remains as to whether and how a defendant must have reproduced a substantial part of the plaintiff's work in an action based on the derivative work right (rather than the right of reproduction).

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209. *See, e.g.*, Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005) (exploring a theory of rent dissipation in relation to both the reproduction and derivative work rights).

210. *Id*, at 326-330.

211. "The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords ..." *See* H.R. REP. NO. 94-1476 (1976), at 62.

212. *Id.* at 332-35.

213. This restriction was recognized and explained by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

214. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

### *D. The Overlap between the Reproduction and Derivative Works in U.S. Law*

The legislative reports accompanying the passage of the U.S. Copyright Act expressly state that "to constitute a violation of Section 106(2), the infringing work must *incorporate* a portion of the copyrighted work *in some form*."[215] This does not necessarily mean that the second work must substantially copy (in the sense required to violate the reproduction right) the first. In other words, while a violation of Section 106(1) would require copying, it is possible to violate Section 106(2) without the kind of copying contemplated by Section 106(1). The key to understanding the difference lies in the definition of a "derivative work" in Section 101—it must have "recast, transformed, or adapted" the underlying work.[216] As such, the congressional direction should be read as referring to a perceptible link—whether by copying or some other method—between the copyrighted work and the allegedly infringing derivative work.[217]

The U.S Court of Appeals for the Ninth Circuit's decision in *Micro Star v. Formgen Inc.* is one example as how courts have since approached the issue.[218] In discussing the plaintiff's claim that the defendant had infringed the derivative work right, Judge Kozinski held that "[a] work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work."[219] What needs to be clarified is whether, and if so the extent to which, later works that satisfy the statutory definition (by "recast[ing], transform[ing], or adapt[ing]" an underlying work)[220] by incorporating some form—but without copying a substantial part—of the underlying work[221] would

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215. H.R. REP. NO. 94-1476, at 62 (1976) (emphasis added); S. REP. NO. 94-473, at 58 (1975).

216. 17 U.S.C. § 101 (2000).

217. Indeed, the U.S. Register of Copyright had made a similar point in a supplementary report to Congress in 1965, stating that the derivative work right should be broad enough to cover instances where the "dependence on the copyrighted source may be so great as to constitute infringement." *See* REGISTER OF COPYRIGHTS, SUPPLEMENTARY REPORT ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW: 1965 REVISION BILL 18 (House Comm. Print 1965).

218. 154 F.3d 1107 (9th Cir. 1998).

219. *Id.* at 1113 (quoting Mirage Editions v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988)).

220. 17 U.S.C. § 101 (2000).

221. I am grateful to Professor Daniel Gervais for highlighting this issue at the 2008 User-Generated Content, Social Networking and Virtual Worlds Roundtable at Vanderbilt University Law School.

still be considered derivative works for purposes of infringement under Section 106(2). The answer to this question is still, unfortunately, unclear.

A very recent case that neatly illustrates the overlap between the question of copying and the creation of a derivative work is *Warner Bros. Entertainment, Inc. v. RDR Books*, where the plaintiffs alleged violations of both Section 106(1) and 106(2).[222] The U.S. District Court for the Southern District of New York found that there was sufficient substantial similarity between the defendants' *Harry Potter*-based encyclopedia and J.K. Rowling's books, both qualitatively and quantitatively, for a prima facie case of copying under Section 106(1).[223] Where Section 106(2) was concerned, however, the court considered that, while the companion encyclopedia contained a substantial amount of the plaintiff's material, the acts of "condensing, synthesizing and organizing" such material did not merely recast the plaintiff's narrative in a different medium; they gave the plaintiff's copyrighted material another purpose, which was to guide the reader through the "voluminous" fictional world created by the plaintiff author.[224] Interestingly, in a footnote to this finding, the court, citing the *Castle Rock* decision, noted that this particular distinction is "critical to the difference between derivative works, which are infringing, and works of fair use, which are permissible,"[225] thereby potentially signaling that it recognized an overlap between not just the Section 106 rights, but also that fair use can apply to all of exclusive rights, including those in Section 106(2). The court did not discuss the *Micro Star* case, but its decision raises an interesting question: what else besides copying would be required to render the second work an infringing derivative work? In this regard, by ruling that the defendants' encyclopedia was not a derivative work, the *RDR Books* court seemed to imply that recasting, transforming, or adapting an underlying work to create a derivative work is not the same as having a transformative purpose. By possessing this transformative purpose, the defendants' encyclopedia did not fall within the realm of derivative works that would have required the plaintiff's permission to create.

The *RDR Books* case reminds us that something else is required by Section 106(2) in order to maintain a real and substantive distinction between it and Section 106(1).[226] As Judge Patterson,

222. 575 F. Supp. 2d 513 (S.D.N.Y. 2008).
223. *Id.* at 537-38.
224. *Id.* at 539.
225. *Id.* at 539 n.18.
226. *Supra* note 215.

writing for the court, stated, it is not enough for the subsequent work to be merely "based on" the preexisting work; something more, in the nature of recasting, transforming, and/or adapting the earlier work, is also required.[227] Yet he ruled that in condensing, rearranging, and synthesizing the many voluminous elements of the *Harry Potter* books into a useful reference guide, the defendants' encyclopedia no longer "represent[ed] the original work of authorship" and therefore was not an infringing derivative work.[228] Comparing this result with the *Castle Rock* decision, although both courts found copyright infringement and ruled against the defendant on fair use (with the *Castle Rock* court considering there to be "slight to non-existent" transformativeness and the *RDR Books* court finding inconsistent transformativeness), the ruling in *RDR Books* that the defendants had not created a derivative work seems to be the opposite of the *Castle Rock* court's view of the trivia quiz book at issue there. Although the *Castle Rock* court did not expressly rule on Section 106(2) (presumably because it would have made no difference to the result), its judgment hints strongly that the transformative changes to the content of the underlying television series could constitute a derivative work (albeit an infringing one).[229]

The *Castle Rock* decision was at least consistent in distinguishing between transformativeness for fair use and derivative work purposes. It also did not preclude an infringing derivative work from enjoying copyright in its own right, where the inquiry would turn on the proper standard to determine whether sufficient transforming changes have been made. It is of course unclear what else, besides that transformation of content (rather than purpose), is required. The defendant's work in *RDR Books* would at first blush seem to fall into that category of works described by *Castle Rock* as ceasing to be a derivative work at all because of the scope of the changes that were made; in other words, there can be little substantial similarity, and thus correspondingly no infringing derivative work, where the changes made by the defendant are that extensive. In *RDR Books* however, Judge Patterson found that there was substantial similarity between the two works and yet went on to rule that the defendant's encyclopedia was nonetheless not an infringing derivative work.[230]

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227. *RDR Books*, 575 F. Supp. at 539.

228. *Id.* at 538.

229. *Castle Rock*, 150 F.3d at 144 (noting the distinction between transforming an underlying work into a new mode of expression and copying a work for transformative purposes).

230. *RDR Books*, 575 F. Supp. 2d at 537-40.

The reason for such apparent inconsistency can be traced to the assumption in cases such as *Micro Star* that an infringing derivative work must incorporate (i.e., copy) some part of the protected expression of the original work.[231] This overlap between the Section 106(1) and 106(2) has the advantage of checking the potential breadth of the Section 106(2) right. The consequence, however, as hinted at by *Castle Rock*,[232] is that UGC that violates the reproduction right will also likely violate the derivative work right, unless the latter right can be interpreted in such a way as to excuse certain types of derivatives. Given the existing framework of the U.S. Copyright Act, the best means for such interpretation must be a more robust approach to fair use. This could involve a clearer and broader interpretation (such as that proposed previously)[233] for transformativeness. The *RDR Books* case, unfortunately, is not promising in this regard, as it hews closely to the prevailing approach of considering transformativeness by measuring it largely through the defendant's purpose in taking and using the plaintiff's material in creating and compiling a new work.[234]

With respect to the actual books upon which the encyclopedia was based, Judge Patterson ruled that the defendants' transformative purpose lay in the objective of preparing a reference work rather than the aesthetic and entertainment purposes for which the plaintiff author originally wrote her novels.[235] However, with respect to the plaintiff author's companion volumes that were also taken and used by the defendants, Judge Patterson found the purpose there to be much less transformative since the plaintiff's companion volumes also had a reference function.[236] Nevertheless, he ruled that the defendants' work added a "productive purpose to the original material by synthesizing it within a complete reference guide" and hence was slightly transformative, being a "productive purpose for a different purpose than the original works."[237]

Judge Patterson's use of both the words "productive" and "transformative" reflects his view that the former can be a subset of—but not necessarily identical to—the latter, thus conforming to the prevailing scholarly view that the two do not mean the same thing.[238] It is somewhat frustrating, however, that the definition of a

231. Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998).
232. *Castle Rock*, 150 F.3d 132 (2nd Cir. 1998).
233. *See supra* Part II.B.
234. *See* the analysis undertaken by Reese, *supra* note 5.
235. *RDR Books*, 575 F. Supp. 2d at 513.
236. *Id.* at 515.
237. *Id.*
238. *See, e.g.*, Reese, *supra* note 5.

productive use remains unclear—although Judge Patterson's opinion clearly places the synthesis of original source material within the scope of a larger, more complex project, his use of the word "productive" without further definition or explanation could result in continued confusion over its role in transformative fair use.

The *RDR Books* court also took pains to distinguish the facts before it from, among others, the *Castle Rock* case by stating that, unlike the defendants' trivia quiz book in *Castle Rock*, the defendants' encyclopedia did not merely repackage the original material.[239] Further, and again unlike the book at issue in *Castle Rock*, the defendants in *RDR Books* added the occasional insight and new meaning to the plaintiff's work.[240] On the other hand, the court went on to note that the transformative nature of the encyclopedia was not consistent—it was diminished when it did not serve its reference purpose.[241] Ultimately, this lack of consistency contributed to the court's ruling that the encyclopedia overall did not constitute fair use of the plaintiff's work.

### *E. Transformativeness and its Relationship to Market Harm in U.S. Fair Use Analysis*

What then can the *RDR Books* case teach us about the current role of transformativeness in both the fair use and derivative copyright analyses? Judge Patterson's detailed and thoughtful opinion confirms for us that in judicial eyes transformativeness is not the same for both inquiries, such that a transformative use for fair use purposes does not automatically or necessarily mean the defendant's work is also transformative for derivative work purposes. Secondly, the transformativeness required for fair use seems largely focused on the defendant's purpose in using the plaintiff's work, not an entirely surprising fact given the general weight of authority on this point.[242] It is interesting, however, to speculate whether my proposal of a broader approach to fair use that would focus on the result—rather than the purpose or process—of the defendant's work could have resulted in a different conclusion from that reached by the *RDR Books* court. To the extent that the defendants in *RDR Books* copied a substantial amount of the plaintiff's copyrighted material, it is possible that even under the broader approach, the same decision would result, particularly as Judge Patterson himself recognized the

239. *See RDR Books*, 575 F. Supp. 2d 513.
240. *Id.* at 515.
241. *Id.*
242. *See, e.g.*, Campbell v Acuff-Rose Music Inc., 510 U.S. 569, 588 (1994).

wider public interest in encouraging secondary reference works, as long as they did not take more than a reasonable portion of the underlying source material.

Even under a broader approach that emphasizes social concerns, therefore, transformativeness does not always follow, nor is a finding of fair use inevitable where the secondary user encroaches unduly on the original author's prerogative by being more of a copycat than author herself. This is consistent with Professor Lange and Ms. Lange Anderson's emphasis that a fair use presumption (which they advocate) should apply only to those derivatives that "critically appropriate" a work for socially expressive reasons that society should encourage.[243] It also means that the broader approach does not endorse every form of UGC, only those where the creators are truly "authors" in the sense that they have created something of cultural and/or social value to the community. Even free culture and semiotic democracy cannot go so far as to promote all types of UGC, particularly where much of the use made of the underlying source material can be considered excessive.

Despite this theoretical neatness, the result in the *RDR Books* case can still be problematic, since one major implication of the decision is that even fan tributes[244] and undeniably useful secondary works that serve to enlighten and inform the public can be restrained by the copyright owner of the underlying work. The case illustrates perhaps the most difficult scenario in the UGC context: where a secondary work not only draws upon a preexisting work but by its nature necessarily incorporates a fair to substantial amount of the underlying material, where is the line for fair use to be drawn? In such cases, the one clear way to resolve this question in favor of those creators whose secondary works are acknowledged to be socially valuable despite the copying might lie in the *Campbell* approach toward parody. In short, where the U.S. Supreme Court recognized that the nature of parody "necessarily springs from recognizable allusion to its object" such that "quotation of the original's most

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243. *Supra* note 146, at 131.

244. This Article does not attempt to examine the issues presented by fan fiction, websites, and other creative tributes, as a formidable amount of scholarship, both longstanding and recent, on the topic already exists. *See, e.g.*, Rebecca Tushnet, *User-Generated Discontent*, *supra* note 4; Rebecca Tushnet, *Copyright Law, Fan Practices, and the Rights of the Author*, *in* FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD (Jon Gray et al. eds., 2007). On the possibility that the governing social norm of non-commerciality in fan fiction could serve as a useful framework for derivative works and UGC, see Casey Fiesler, Note, *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 (2008).

distinctive or memorable features, which the parodist can be sure the audience will know" is required,[245] it may be that a fan's guide to the complex *Harry Potter* universe will also require such conjuring up of the original, including a certain amount of copying. The question then becomes, as Justice Souter reminds us in *Campbell*, how much more may be considered reasonable to take, and this will depend in part on "the likelihood that the [secondary work] may serve as a market substitute for the original. But using some characteristic features cannot be avoided."[246]

Even if such an argument were to succeed in non-parody cases, however, the result in *RDR Books*—as with the reasoning in *Campbell*—also points to the uncertain relationship between transformativeness (and more generally, the first fair use factor) and the fourth factor of market harm. Within the specific context of the *RDR Books* case, it would appear that Judge Patterson placed substantial emphasis on the amount of material that was copied by the defendants, such that—even despite the acknowledged public interest in encouraging the creation of reference guides to works of literature—the use (which the judge likened to "plunder") could not be considered fair, at least not "without paying the customary price."[247] While this last statement can be taken as a hint that the courts will frown on commercial uses that are not highly transformative, it again raises the specter of the unsettled relationship between the first and fourth fair use factors.[248] In addition, Judge Patterson's statements regarding the fourth factor can be interpreted as somewhat troubling; although he ruled that the encyclopedia could not be considered a market substitute for the original novels, and that just because a potential derivative market exists does not mean a plaintiff is entitled to exploit them, he went on to find that the encyclopedia could potentially harm the plaintiff author's market in her own companion volumes, particularly since in this specific regard the encyclopedia was only "marginally transformative."[249] This aspect of the fourth

245. Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 588 (1994).

246. *Id.*

247. Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 516, 551 (S.D.N.Y. 2008) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) and referring to the crux of the commerciality inquiry, i.e. whether the defendant stands to profit from her unauthorized use of the copyrighted work).

248. *See* Beebe, *supra* note 92 (noting a strong correlation between findings on these factors and the outcome of the fair use determination, and a fairly strong correlation between these two particular factors in all federal cases that made substantial use of the four-factor test in their opinions).

249. *RDR Books*, 575 F. Supp. 2d at 550.

factor analysis alone resulted in that factor favoring the plaintiffs over the defendants.

It is perhaps unfortunate that the *RDR Books* court did not engage in as detailed and nuanced a breakdown of the fourth factor as it did with transformativeness. Although the respective inquiries under each of the statutory fair use factors are entirely different, Judge Patterson might have at least weighed each of the alleged market harms that he had already considered against each other, so as to expressly consider whether the harm presented to the companion volumes could be outweighed by the lack of injury to the original source novels. It is also regrettable that Judge Patterson went on to view favorably the possibility—unsupported by any testimony—that the plaintiff author might conceivably license out the songs and poems she composed and included in her novels, and which the defendants reproduced in their encyclopedia.[250] Although Judge Patterson obviously felt that the inconsistency and nature of the defendant's various transformative uses could not overcome the combined effect of the creative nature of the plaintiff author's fictional work (the second factor), the "plundering" of the plaintiff's copyrighted material (the third factor), and the existence of some market harm to some of the plaintiff's potential market (the fourth factor),[251] the result might have been even more interesting had the court considered the fourth factor in a more nuanced and balanced fashion.

As it is, the outcome in *RDR Books* may be troubling for UGC because, even given the broader approach proposed in this paper, the case demonstrates that the fourth factor (which the Supreme Court in *Harper & Row v. Nation Enterprises*, pre-*Campbell*, had considered the most important aspect of the fair use analysis)[252] still has the potential to trump transformativeness, at least in cases where the latter is found marginal or, post-*RDR Books*, inconsistent. Thus, UGC that is only slightly or somewhat transformative could run the risk of failing the fair use analysis, unless it can be shown that it definitely does not harm any potential market of the plaintiff's. Short of parody situations, however, and given the unfavorable results in *Castle Rock* and *RDR Books*, as long as courts continue to give weight to even some slight possibility of market harm, even a more flexible and expansive approach to transformativeness may not assist much UGC in crossing the fair use threshold.

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250. *Id.* at 550-51.

251. *Id.* at 540-51.

252. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). *But see* Beebe, *supra* note 92 (noting a continued reliance by district courts on the *Sony* consideration that a commercial use is presumptively an unfair use).

### *F. Transformativeness and Derivative Works in Comparative Context*

Much of the foregoing discussion has focused on the judicial approach toward transformativeness in the United States. This is because the U.S. courts have, since *Campbell*, consistently considered transformativeness as part of their fair use inquiries. Moreover, under the existing U.S. legislative framework, a consideration of transformativeness is also relevant—indeed, mandated—in any determination as to whether a copyrightable derivative work has been created, whereas in fair use transformativeness is not necessarily present in every case. Also, the legislative language relating to fair use equivalents in major common law jurisdictions outside the United States is somewhat more restricted, and, further, the derivative work right is more limited in terms of what types of creations are considered derivative works (adaptations) within the scope of that particular exclusive right. For instance, the *Gowers Review* makes clear that in the United Kingdom there is currently no express or mandated consideration of transformativeness as an element in fair dealing.[253] Similarly, and despite the Supreme Court of Canada's delineation of fair dealing as a user right in *CCH*, the Canadian Copyright Act does not at present allow explicitly for the type of transformative uses that have been recognized as fair use under U.S. law—for example, parodies.[254] The extent to which transformativeness is an important element to be considered in fair dealing is thus unclear under current Canadian law.

The lack of an expansive derivative work right in the Canadian Copyright Act also means that transformativeness is not clearly relevant to the Canadian right to make specific forms of adaptations.[255] Moreover, Canadian cases have refused to extend the

253. *See* Gowers, *supra* note 6, ¶¶ 4.85-.87.

254. *See* Canwest Mediworks Publ'ns, Inc. v. Horizon Publ'ns, Ltd., [2008] B.C.J. No. 2271 (Can.) (ruling that parody is not a defense to a copyright claim). *But see* D'Agostino, *supra* note 111 (arguing that this may need to be reconsidered as a result of the *CCH* case). Although the U.S. Copyright Act also does not explicitly allow for parodies as fair uses, the Supreme Court's decision in *Campbell* has made it abundantly clear that parodies may in appropriate circumstances be considered fair uses.

255. Section 3(1) of the Canadian Copyright Act provides that the exclusive rights of a copyright owner "includes the sole right (a) to produce, reproduce, perform or publish any translation of the work, (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work, (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise, (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed, [and] (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work." Copyright Act, R.S.C., ch. C-42, § 3(1) (1985).

adaptation right to secondary uses of copyrighted material that do not otherwise fall within the reproduction right, calling the U.S. derivative work right "particularly expansive" and rebuffing attempts to read into Canadian law "the general words 'recast, transformed, or adapted' as a free-standing source of entitlement," considering the remedy for such cases to lie "in Parliament, not the courts."[256] The Canadian position is thus similar to that of the United Kingdom, in that a narrow adaptation right complements a broad conception of the reproduction right,[257] although their exact boundaries remain somewhat elusive and imprecise.[258]

This framework naturally invites the question of whether the adaptation right in the United Kingdom and Canada, despite being a separable stand-alone right, is technically a subset of the primary right of reproduction. This question stems from the historical development under English law of both rights—where the reproduction right initially prohibited just the actual copying of the protected work, the adaptation right evolved to cover situations that did not fall within the scope of the narrow reproduction right, such as translations and dramatizations.[259] With the gradual expansion of the reproduction right, including clarifying its application to reproductions in any material form (including electronic copies), an overlap between the two rights developed. In the United Kingdom, this overlap has yet to be comprehensively settled by either the courts or legislation. Meanwhile, the Supreme Court of Canada has considered—and rejected—a broad approach to adaptations that would have brought Canadian copyright law closer to that of the United States, while disagreeing over precisely what it means to make a "reproduction [of a copyrighted work] in a material form."[260]

As a practical matter, outside the doctrinal and theoretical inquiry as to where one right stops and the other begins, the result of

256. Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336, 2002 SCC 34, ¶¶ 71, 73, *available at* http://csc.lexum.umontreal.ca/en/2002/2002scc34/2002scc34.html.

257. Section 3(1) of the Canadian Copyright Act speaks of the right to "produce or reproduce the [underlying] work . . . in any material form whatsoever," and Section 16(1) of the CDPA refers to the exclusive right to "copy the work," with copying including "reproducing the work in material form". Copyright Act, R.S.C., ch. C-42, § 3(1) (1985); CDPA, *supra* note 108, § 16(1).

258. *See* Orit Fischman Afori, *Copyright Infringement Without Copying: Reflections on the* Théberge *Case*, 39 OTTAWA L. REV. 23 (2008).

259. *See* LADDIE ET AL., *supra* note 62 (providing an authoritative account of this development).

260. Théberge, [2002] 2 S.C.R. 336 ¶¶ 64, 135, 146, 148. In a 4-3 majority, the Supreme Court of Canada ruled that the ink transfer of a physical poster to canvas by means of a chemical process did not result in a new copy of the work. *Id.*

the combined reproduction and adaptation rights in countries such as the United Kingdom and Canada is that if an act is not covered by the narrower adaptation right, it is possible—even likely in some cases—that it will nonetheless be caught by the breadth of the right to make a copy of the work "in any material form."[261] What remains unclear, however, is whether the courts in the United Kingdom and Canada would share the U.S. view that a derivative work must also incorporate parts of the underlying work. In this respect, it is perhaps unfortunate that the Supreme Court of Canada declined the opportunity presented in 2002 by *Théberge v. Galerie d'Art du Petit Champlain Inc.* to explore the relationship between the reproduction and adaptation rights.[262] It should be noted, however, that the majority of the Court agreed that a chemical transfer of all the ink (and hence the content) from a lawfully purchased physical poster copy of a piece of artwork onto a piece of canvas did not fall within the scope of the reproduction right.[263] Further, the Court also declined to extend the adaptation right to apply to this fact situation.[264] Finally, it may well be that it is simply unnecessary under United Kingdom and Canadian law to delineate the differences between the two rights, given the relative differences in scope between them.

In the United States, in contrast, the reproduction right is not paralleled by a significantly narrower derivative work right. Since both can be considered broad rights, U.S. copyright law can thus be said to go the furthest, in comparison with two of its closest (geographically and historically) common law cousins, in protecting the derivative work rights of an initial author.[265] While the reason for this may lie in the strong economic-utilitarian rationale underlying U.S. copyright doctrine, its effect where UGC and today's Web 2.0 world is concerned has been to render uncertain the freedom and

261. Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.); CDPA, *supra* note 107, § 17(2); *see also* Théberge, [2002] 2 S.C.R. 336, 338.

262. Théberge, [2002] 2 S.C.R. 336, ¶ 73 (Can.) ("To the extent, however, that the respondent seeks to enlarge the protection of s. 3(1) by reading in the general words 'recast, transformed, or adapted' as a freestanding source of entitlement, his remedy lies in Parliament, not the courts.").

263. *Id.* at 336-39.

264. In its decision, the majority referred to U.S. cases that had considered the question—within the derivative work right –of whether transferring physical copies of the copyrighted work to a different medium would fall within the scope of infringement. *Id.* (noting the conflicting decisions in Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988) and Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997)).

265. This may be so even if the derivative work right continues to be interpreted as requiring some copying of the underlying work, as a broad construction of copying would suffice for such a purpose. As such, cases similar to *Mirage Editions* and *Lee v. A.R.T. Co.*, where there was no copying of the work within a change of medium, are likely to be rare.

ability of later authors to use, remix, and manipulate original content. Should U.S. copyright law heed the call in this Article and adopt the standards for transformative derivative works in relation to infringement and copyrightability, however, it may encourage a more inclusive approach toward UGC and other transformative, socially valuable derivative works.

Currently, given the narrow categories of derivative works for which the initial authors are granted further exclusive rights in the United Kingdom, and the relatively restricted types of works that would qualify as such under Canadian law, it may be that these two jurisdictions have greater leeway for protecting works based on preexisting ones, possibly under a low standard of originality. While this may be excellent news for creators of UGC insofar as copyrightability is concerned, its benefits may be counteracted somewhat by the narrower categories of fair dealing in the United Kingdom and Canada, such that UGC that uses some portion of a preexisting work could find itself more vulnerable to infringement risks than under U.S. fair use.

Considering the recent call in *Gowers Review* to add transformative uses to the list of exemptions in the European Union's Copyright Directive and an exception for parody in the CDPA, as well as the ongoing copyright reform process in Canada, policymakers in both these countries have the opportunity to ensure greater protection and facilitation of transformative UGC. Unfortunately, neither country has gone as far as this: the United Kingdom has so far only begun considering changes to those exceptions dealing with educational uses— though a parody exception is also under consideration[266]—and the Canadian government's recent attempt to introduce much-needed copyright reform in June 2008 only added a number of highly specific exceptions, permitting acts like format shifting of digital music.[267] To date, neither country has indicated any intention of broadening its fair dealing exceptions to cover generally transformative uses, nor—perhaps more significantly—has either made any move to amend its legislative framework to allow for a broader, more flexible form of fair dealing more closely analogous to that of the United States.

266. *See* UK INTELLECTUAL PROPERTY OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: PROPOSED CHANGES TO COPYRIGHT EXCEPTIONS (Nov. 2007), *available at* http://www.ipo.gov.uk/consult-copyrightexceptions.pdf.

267. Bill C-61: An Act to Amend the Copyright Act, S.C. Bill C-61, introduced in the House of Commons of Canada on June 12, 2008.

### *G. Reconciling Transformative Derivative Works and Transformative Fair Uses*

As evidenced by the examples discussed in this Article, in approaching transformative fair use U.S. courts have emphasized, by looking primarily to the purpose for which the defendant used the plaintiff's work, only one of the various ways that a use might conceivably be considered transformative. Professor Tony Reese supports this assertion in his recent analysis of the U.S. appellate cases on fair use that were decided after *Campbell,* concluding that, in analyzing transformative fair use, courts have tended to focus on the defendant's purpose rather than any transformation of the actual content of the plaintiff's work.[268] He notes also that U.S. appellate courts have so far "not applied fair use transformativeness in ways that significantly implicate the scope of the copyright owner's derivative work right."[269] The *RDR Books* decision, decided after he made these conclusions, does not appear to contradict them.

The importance of transformative purpose in fair use analysis is also illustrated by Professor Barton Beebe's empirical study of U.S. fair use cases, which demonstrates that transformative use (in those cases that relied on it as part of the fair use analysis) "exerted nearly dispositive force, not simply on the outcome of factor one but on the overall outcome of the fair use test."[270] As Professor Reese points out, however, the current U.S. approach leaves a number of important questions unanswered, such as how to ascertain the defendant's purpose, which purposes ought to be considered transformative, and how this branch of the inquiry relates to the fourth fair use factor of market impact.[271] While my proposal regarding broadening the transformativeness inquiry in Part III.A of this Article may not answer all these questions, it could nonetheless alleviate some of the problems associated with a primary focus on the defendant's purpose in the first factor of the fair use test. The purpose of the defendant's use will (and must) continue to be relevant, but it should by no means be the primary factor on which a finding of transformativeness hinges.

What then of the role of transformativeness in derivative works? As noted previously, this issue really involves two sub-questions, the first having to do with the element of transformativeness required to render a work a derivative work under

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268. Reese, *supra* note 5.
269. *Id.* at 471.
270. Beebe, *supra* note 92, at 604-05.
271. Reese, *supra* note 5, at 494-95.

Section 106(2) (an infringement issue), and the second relating to the element of transformativeness required for a secondary work to gain copyright protection in its own right even though it is a derivative work (a copyrightability question). There is uncertainty regarding both these aspects since U.S. courts have not examined either of these two issues in great detail, particularly in relation to any possible overlap between them. I suggest that the same broad approach to transformativeness I advocate also be applied to both fair use and the copyrightability of derivative works (although this would require U.S. courts to adopt a different analysis than they have to date). I do not, however, propose that this approach also be used to determine transformativeness for infringement purposes under Section 106(2) for two reasons. First, this would usurp the role of transformativeness in fair use analysis, which applies just as much to Section 106(2) as it does to Section 106(1). Secondly, it would have the effect of enlarging the initial copyright owner's Section 106(2) rights such as to allow her to clamp down and control secondary uses of her material, including UGC.

Instead, I propose the U.S. courts' current bifurcated approach to transformativeness in fair use and derivative works analyses as a basic framework. Where transformativeness for fair use purposes is concerned, whether in relation to Section 106(1), Section 106(2), or indeed any other relevant right, the broader approach outlined in Part III.A of this Article ought to be adopted, thereby enlarging the courts' focus from just transformative purposes to a more expansive examination of other aspects of transformativeness. Where transformativeness of derivative works is concerned, a distinction must be made between an inquiry made for infringement purposes and one for copyrightability purposes. For the former, transformativeness should be relevant only to the extent necessary for the court to decide if a threshold derivative work has been created (possibly relying on the *Castle Rock* court's view of infringing derivative works), regardless of the type or level of transformativeness further required for copyrightability. If the answer to the infringement inquiry is yes, a broader transformativeness inquiry for fair use purposes can then be undertaken, using the broad approach described. For the additional query as to the copyrightability of derivative works, the same broad approach as for transformative fair use should then be adopted.[272]

272. *See supra* Part III.A (providing further discussion of the reasoning behind this point).

The advantage of such a framework is that it does not require the U.S. courts to change their basic approach to transformative fair use, mandating only that they enlarge the scope to encompass more than just transformative purpose. At the same time, it emphasizes the distinction between an infringing derivative work and one that qualifies as fair use in part because of its transformative nature; it also clarifies the boundaries between an infringing derivative work that only transforms an underlying work to a small extent, and a derivative work that (infringing or otherwise) sufficiently and additionally transforms a preexisting work so as to enjoy copyright protection in its own right.

For the courts of the United Kingdom and Canada, however, adopting this approach could prove more difficult. Where fair dealing is concerned, transformativeness has not yet played a significant or explicit role. It may be up to both the legislatures (as each country seeks to update and refine its copyright laws) and the courts (as they begin to consider the Supreme Court of Canada's call in *CCH* to recalibrate fair dealing as a user right) to take bold steps to incorporate a transformativeness inquiry into fair dealing analysis. With respect to derivative works, the existing legal frameworks in these countries seem to leave little room for a similar development; however, it may be that the narrow list of adaptations that currently fall within the scope of a copyright owner's exclusive rights will have the result of conferring copyrightability on more and different forms of derivative works.[273] These countries may then have to deal with the question of whether a different standard of originality should apply to derivative works. If that is the case, then the broader approach to transformativeness suggested in this Article may prove helpful.

## IV. CONCLUSION

This Article has tackled some issues that lie at the heart of copyright law, particularly the lack of detailed judicial and policy analysis regarding the scope and role of transformativeness with respect to both fair use and copyrightability of derivative works. These issues are not new to UGC, nor do they arise because of the development of Web 2.0 technology; however, the nature of UGC, especially its facilitative participatory aspects and its centrality to free/remix culture in our digital era, means that these persistent and simmering issues have resurfaced with particular urgency. The dovetailing of the positive social welfare characteristics of UGC with

273. *See* discussion *supra* Part III.B.

the goals of semiotic democracy has also created the opportunity for policymakers, legislators, and judges to reconsider the traditional framing of copyright as a broadening bundle of exclusive rights set against a narrow list of exceptions. I have suggested acknowledging the interdependency of author and user as a conceptual tool. I have also argued in favor of recalibrating the copyright balance to consider both authors and users (who are sometimes one and the same) as equal and integrated members of a healthy copyright system rather than opposing poles where the existence of one diminishes the scope of the other.

To this end, it may be helpful if the international copyright framework comes to recognize (perhaps through the work on limitations and exceptions being undertaken at WIPO) that flexible doctrines like fair use and its fair dealing cousins ought not to be narrowly viewed as specific exceptions, but rather as user rights, as this would encourage a more liberal and adaptable interpretation of fair use and similar doctrines. With respect to transformativeness, both the purpose of the deriver's use and the nature of the resulting changes should be important aspects of the inquiry. This additional element would allow courts to view the otherwise-competing works in context and apply a more nuanced analysis of derivative use, which would constitute a substantive contribution to learning and progress.

Of course, this Article should not be taken as an exhortation to focus only on transformativeness in determining whether a new work is either a fair use or copyrightable in its own right. Rather, it is intended to provide clearer guidelines for deciding these issues when transformativeness is in question, as is often the case with UGC; not all UGC and derivative works transform (in the copyright sense) an underlying work. A transformativeness inquiry, however, does not mean that other considerations do not also come into play.[274]

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274. In traditional U.S. fair use analysis, transformativeness has always been measured against commerciality. It is an open question as to whether commerciality in the creation of UGC ought to militate against its recognition as copyrightable content, but legal scholars have suggested that noncommerciality should be given significant weight. *See, e.g.*, Tushnet, *supra* note 4 (noting the increasing incidence of hybrid creative forms that mix originality with copying and volunteerism with profit-seeking, in ways that do not fit well within the traditional copyright/fair use paradigm). To this end, the European Union's approach to private use of copyrighted material may also be instructive. Article 5(2)(b) of the European Union's Copyright Directive allows for exceptions to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation . . . ." Council Directive 2001/29/EC, art. 5(2)(b), 2001 O.J. (L 167), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML.

My proposal for a broader approach to transformativeness applies to determining fair use and copyrightability for works that arguably have either a transformative element, either in purpose or by their nature. In an age where the reproduction right is no longer just about literal copying and economics-based arguments in favor of an expansive derivative work right lack empirical proof, it seems unnecessary to protect the market control and related incentives that accrue to the initial author through a broad derivative work right for the initial work. The situation in the United Kingdom and Canada fortifies this view; a narrower adaptation right has long been recognized such that only a certain few types of derivatives are considered adaptations and part of the initial author's secondary markets.

Adopting any of these proposals will be no easy matter, involving as they do either changes to long-held perceptions about authors' rights and the role of limitations and exceptions or changes to application, interpretation, and practice regarding basic doctrine. Nonetheless, it is only by beginning to consider such changes in framework, mindset, and practice that modern copyright law can engage seriously with important policy questions raised by the digital era. A notable set of legal and literary scholars have shown the way by setting themselves the task of understanding the complex cultural implications of user creativity; it is up to policymakers to take up their challenge.