

PAYMENT IN CREDIT: COPYRIGHT LAW AND SUBCULTURAL CREATIVITY

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I

INTRODUCTION

Disclaimer: I don't own the rights to Chris (damn!), The X-Files, Millennium, Harsh Realm, The Lone Gunmen or any of the characters of those programmes. I don't own any of Chris's writings. In fact, I pretty much don't own any of the stuff written about, linked to, or shown on this site. Pretty much, all that's mine is the site itself, the art, and my own writings. All that other stuff belongs to Chris Carter, 1013 Productions, and Fox. Not mine. Please don't sue!¹

This quote comes from a fan site dedicated to celebrating a set of mass media creations organized around Chris Carter, a television producer and writer. The site includes commentary, trivia, and artwork created by the site owner featuring characters from the shows. It expresses love for the original as well as a sense of distance and separate ownership of the fan-created supplementary works. This article explores these dynamics, which are common among media fans. Creators who make new works based on copyrighted characters and situations conceive of the rights and responsibilities of authorship in ways distinct from standard models of creativity under copyright. Although U.S. copyright law presumes that authors will be compensated in money or in control, fan practices use attribution, or credit, as a separate metric.

Fans' relation to mass media is not simply that of amateurs to professionals. Nor, as the disclaimer above makes clear, do they reject the concept of authorship. Fan practices are hybrids, mixing and matching authors' and copyright owners' rights to control uses, to receive payment, and to receive attribution. This hybridity invites us to consider the relationships between

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This article is also available at <http://law.duke.edu/journals/lcp>.

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1. Chris Carter Central, <http://www.geocities.com/chriscentral/> (last visited Nov. 27, 2006).

various modes of production, both market and nonmarket. Different forms of creativity cooperate and compete, ultimately strengthening one another. Comparing law to fan practices offers insight into the multiple ways intellectual property ownership, attribution, and authority can be regulated, borrowing from ecology a recognition of the “fragile, complex and unpredictable interconnections between living systems.”²

As Jessica Litman points out, copyright owners find it incredibly useful to interpret current copyright doctrine to mean that the default is that any use of an existing work infringes unless specifically excepted.³ This view was enabled by a variety of changes, including the end of the notice requirement, term extension, the expansive definition of derivative works, and the technicalities of public display and reproduction on the Internet. From this perspective, which is sometimes used by copyright minimalists to rail against current law, copyright has generalized in favor of control, sweeping all sorts of works and uses into an economic model of property rights.

Copyright lawyers talk and write a lot about the uncertainties of fair use and the deterrent effects of a clearance culture on publishers, teachers, filmmakers, and the like, but we know less about the choices people make about copyright on a daily basis, especially when they are not working. Thus, this article examines one subcultural group that engages in a variety of practices, from pure copying and distribution of others’ works to creation of new stories, art, and audiovisual works: the media-fan community. Part II provides a brief overview of fan creativity. As Part III explains, fans justify their unauthorized derivative works as legitimate, no matter what formal copyright law says, with theories that draw on factors similar to those employed by fair use doctrine.

Part IV then discusses some differences between fair use and fan practices, focused around attribution as an alternative to veto rights over uses of copyrighted works. Part IV.A explains how different norms apply to different types of fan creations and how some norms distinguish between obligations regarding creations of fellow fans and obligations regarding creations from the outside, commercialized world. Fandom’s inside–outside distinctions operate as a sort of limited common property regime. Carol Rose suggests that limited common-property regimes offer a useful model for intellectual property law, a third way distinct from classic Western ideas of private property and from a freely exploitable commons.⁴ Although fandom’s norms have no formal legal sanction, they offer an example of what an intellectual property regime built from the ground up looks like, and how it interacts with other types of property regimes.

2. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 72 (Winter/Spring 2003).

3. Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 177 (Spring 2007).

4. See generally Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998).

Part IV.B explores ways in which fan practices may provide insights into moral rights. Moral-rights theory posits a deep and unique connection between author and text such that an insult to the text is an assault on the author. Moral rights thus seem inherently in conflict with fans' willingness to take liberties with source texts. Yet not all moral rights claims are inconsistent with fan interpretive practices. Although protection against *distortion* conflicts with much fan creative activity, moral claims to *attribution* are widely recognized in fandom, and attribution rights are far less disruptive to ordinary interpretive practices than other kinds of moral rights. At the same time, fan practices demonstrate that attribution can come from context, while the law has tended to assume that only explicit credit suffices to give authors proper acknowledgement. Fan concepts of proper credit for the underlying source, as distinct from whatever variations the fans create, suggest that attribution is an important and valuable tool for giving authors their just due, but no more than their just due.

Part IV.C takes up a related point about the fair use concept of transformation. Fan creators distinguish themselves from pirates by identifying themselves as authors who have expanded the meanings present in the original. Courts are more likely to find a use fair when it is in some way an exegesis of the underlying work: when it brings out in the open what was present in the subtext or context. Common fan understandings of good characterization are consistent with that idea. Many media fans value fan works that jibe with the canon, yet also take the characters in new directions.

When what fans add depends on what was already there, the original author is partly responsible for later interpretations, and fan creations are joint productions even if copyright law would not recognize them as jointly authored works. The same is true with transformative use, which requires the new work to cast light on elements of the old, often highlighting elements that copyright owners would prefer to ignore or mocking aspects they would prefer to venerate. Thus, a determination of transformative fair use is often a judgment that the original author did not have full control over the original text—that the text was not received in just the way she wanted it to be received. Although this is a perfectly standard result from the perspective of literary theory, the law has yet to make explicit what the fans have always known: meaning cannot be imposed by authors or owners but rather is negotiated among texts, authors, and audiences.⁵ Part IV.D briefly suggests some broader lessons about attribution as an alternative to control or compensation.

Part V goes beyond attribution and complicates the fan–mass media division, examining the role of commerciality and the rise of hybrid forms of partially or incompletely commodified, unauthorized but tolerated, creative

5. Part of cultural environmentalism is a recognition that ordinary people have theories of creativity, fair use, and fair attribution, even if they do not have an elaborate theoretical apparatus. Just as you don't need a weatherman to know which way the wind blows, you don't need a scholar to know that multiple interpretations of a text exist.

production. In particular, the commercialization of amateur content by third-party aggregators needs more attention in a theory of cultural commons.

In *Campbell v. Acuff-Rose Music, Inc.*, Justice Souter quoted the claim that “no man but a blockhead ever wrote, except for money.”⁶ That type of generalization, putting marketplace production ahead of other sources of creativity, has unduly dominated our ideas about what copyright needs to cover, what a moral right of attribution means, and what fair use should be doing. Fan understandings of the nature of authorship and the rights and responsibilities it confers provide useful evidence counterbalancing the “blockhead” theory, even though fan concepts do not provide the one true narrative with which all of copyright law can be made consistent. Nothing does. Because creativity is messy and unhomogenized, the tendency to generalize to ever-broader copyright rights is a problem. Using multiple models of intersecting creative practices, including fan reworkings and partially commercialized production, would provide a better basis for evaluating copyright’s effects on creativity.

II

FAN CREATIVITY AND ITS DISSEMINATION IN THE INTERNET ERA

Like multiple stagings of a Shakespeare play, fan texts rework and repeat familiar characters and situations in new contexts.⁷ These revisitings call attention to the choices made both by the official texts, which, for example, almost always treat heterosexuality as the default position for characters, and by fan creations, which often reverse the default. Fans’ creations are not necessarily liberating in a larger sense—they often adhere to romance-genre conventions and may be more about satisfying readers’ cravings than about changing their politics—but they do represent a vibrant subculture, one that inspires passion among thousands of people who find creative outlets in shared universes. Such communal creation and recreation is often unavailable through works presented as isolated and complete in themselves.

Creative fan cultures developed along with mass media entertainment over the course of the twentieth century.⁸ *Star Trek* and *The Man from U.N.C.L.E.*,

6. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting 3 BOSWELL’S LIFE OF JOHNSON 19 (G. Hill ed., 1934)).

7. See Francesca Coppa, *Writing Bodies in Space: Media Fan Fiction as Theatrical Performance*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 225 (Karen Hellekson & Kristina Busse eds., 2006) [hereinafter FAN FICTION].

8. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 656–57 (1997). I use “culture” here in the way that Christopher Kelty (not entirely approvingly) defines as “an unspecified but finely articulated set of given, evolved, designed, informal, practiced, habitual, local, social, civil, or historical norms that are expected to govern the behavior of individuals in the absence of a state, a court, a king or a police force, at one of any number of scales.” Christopher M. Kelty, *Punt to Culture*, 77 ANTHROPOLOGICAL Q. 547, 553–54 (2004). Cultures are changeable and contestable, but research into their existing and evolving norms can provide practical ways to resist top-down control by copyright owners. See *id.* at 556; see also Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391,

popular television shows of the late 1960s, spurred the development of media fandom, which was related to older science fiction fandom, but was notable for its largely female composition and interest in fan-created stories and artwork focusing on the relationships between the main characters.

Media fandom was sustained and transmitted by face-to-face interactions and small-scale publications known as “zines” that usually circulated among fans who knew each other. Media fans took advantage of new technology, mimeographing and photocopying their writings and art as soon as it was reasonably possible to do so. Following this pattern, media fans also quickly moved onto the Internet, establishing both enormous archives and small sites containing fan fiction.⁹

Not only has the Internet (and the widespread deployment of broadband access) increased accessibility to fan creations, but the available content has diversified. First, the amount of fan fiction online has exploded. In 1997, it was possible for a diligent person to attempt a comprehensive listing of hundreds of fan fiction sites covering every fandom, from *The A-Team* to *Zorro*.¹⁰ Today, Google lists over 1.2 million results for a search of the phrase “fan fiction.” Though there are small individual fandoms organized around less well-known texts, media fandom is not a small-scale endeavor. *Harry Potter* stories alone number in the hundreds of thousands,¹¹ fan fiction archives have received millions of visits,¹² and popular authors can expect thousands of readers.

Second, the quality of what is available varies wildly. In the bad old days, when fans distributed work via mimeographed or photocopied zines, editors usually reviewed content. Now anyone can post a story minutes after writing it, before even using a spellchecker. To put it more positively, today anyone can post a story on her own web page even if its content is not popular enough to support a zine. Third and relatedly, the people who participate and their reasons for doing so are quite varied, from twelve-year-olds just having fun sharing stories with their friends to published writers practicing their craft for a

409–10 (2005) (advocating basing fair use determinations on established patterns of acceptable uses within specific groups).

9. See Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION, *supra* note 7, at 41.

10. KSNicholas’s invaluable website is no longer available on its original AOL site. Its October 2003 version, the last before the fan fiction links were apparently taken down, is archived. See Internet Archive, <http://web.archive.org/> (last visited Jan. 22, 2006) (enter “<http://members.aol.com/ksnicholas>” in the “wayback machine” to retrieve the archived page).

11. See Books, <http://www.fanfiction.net/cat/202/> (visited Oct. 1, 2006) (showing 267,399 HARRY POTTER stories). The FanFiction.net statistics significantly underestimate the number of available stories because FanFiction.net does not accept sexually explicit stories.

12. For example, Gossamer, the main *X-Files* archive, receives from 6,000 to 20,000 hits on individual stories *each day*, down from a peak of 60,000 per day in 1998. See How Much Traffic does Gossamer Get?, <http://fluky.gossamer.org/local/basic.html#traffic> (last visited July 27, 2006). This level of traffic occurs even though the stories are part of the “Invisible Web,” not indexed by search engines. See Gossamer Policies, <http://fluky.gossamer.org/local/policies.html> (last visited July 27, 2006) (each Gossamer site uses robots.txt to prevent automatic indexing).

guaranteed audience.¹³ Fourth, now that text-only browsers are a fading memory and broadband access is increasingly available, the *types* of fan productions are more varied. Fan fiction is the most well-known type of fan derivative work and the type that has received the most scholarly attention, but fan drawings, photomanipulations, and music videos are also widely available.¹⁴

Aside from content, a major difference between older technologies of distribution and the internet is that search engines have made it simple for anyone, including copyright owners and non-fans, to find fan creations. The popular Television Without Pity website, for instance, has many user forums that include discussions of fan creations, and TV producers regularly read the forums,¹⁵ though they likely avoid the fan fiction discussions. An ordinary viewer who enjoys watching a show may thus slide easily into the world of fan-generated content, without any prior screening and without much effort.¹⁶ This accessibility means that a reader's view of Harry Potter or Sawyer from *Lost* may be altered by an unexpected encounter with a sexually explicit or graphically violent story about him, increasing copyright owners' anxieties about losing control of their characters' images.

This visibility has important effects. The online "community" is fragmented and shares fewer background assumptions in comparison to older pre-Internet fan cultures, which were transmitted person-to-person and thus had more cohesion and more ability to enforce behavioral norms.¹⁷ But community cohesion is not the only good. Accessibility benefits people who thought they were alone in their interests. Fans who find fan fiction, art, and videos often feel a sense of validation. At the same time, that these creations are no longer mimeographed and circulated among a circle of friends who already knew one another can create a greater sense of exposure and a fear that the powers that be might crack down if the fans are not careful. Visibility invites study, and sometimes legal threats by copyright owners.

13. See Kristina Busse & Karen Hellekson, *Introduction: Work in Progress*, in *FAN FICTION*, *supra* note 7, at 5, 13.

14. FanFiction.net is one large multifandom archive of fan fiction. In addition, a Google search combining "fan fiction" and a popular (or even rare) media text will generally return numerous examples. Similar searches for "fan art" and, with audiovisual texts, "fan videos" or "fanvids" will also produce results. Many fan videos are now available on video-sharing sites such as YouTube, searchable by the name of the original video source.

15. See Marshall Sella, *The Remote Controllers*, N.Y. TIMES MAG., Oct. 20, 2002, at 68.

16. See Busse & Hellekson, *supra* note 13, at 13–14.

17. See *id.* at 13 ("Fans may write and post fan fiction . . . without even knowing what it is or knowing that there are forums to do this in, and such fans naturally have no idea that they are part of a wider community [R]ules that seemed important in the old-model enculturation stage—for instance, the admonition to never, ever write slash [stories with homosexual content] based on real people rather than characters . . . have lost their meaning.").

III

FAIR USE AND FAN THEORIES OF INTELLECTUAL PROPERTY

A. Equitable Uses of Mainstream Works

Fan creators occasionally stop to think about whether what they are doing is legal under copyright law. Many fans assume that these creations are technically illegal, but not harmful to copyright owners and therefore not truly wrong, at least as long as fans keep relatively quiet about their creative practices.¹⁸ Others think that fan creations count as fair use, and thus as noninfringing, at least as long as no one is making any money from selling them.¹⁹ Either way, fans tend to see their legal status as similar to their social status: marginal and, at best, tolerated rather than accepted as a legitimate part of the universe of creators.²⁰

Shortly after I found online fandom, I wrote an article on the legality of fan fiction,²¹ which is now often cited in fan discussions and occasionally in discussions with skeptics who find fan fiction immoral and infringing. I concluded that most fan fiction, particularly that disseminated on the Internet, would be classified as fair use under U.S. copyright law.²² Since then, fan fiction has attracted more attention from “free culture” advocates who are concerned about copyright owners’ attempts to channel and control popular culture. Some copyright owners have also taken an aggressive stance against fan creativity, sending cease-and-desist letters threatening lawsuits to fan websites.²³

The formal legal landscape is more favorable to fans than it was ten years ago, as courts have been more willing to protect transformative unauthorized uses against copyright owners’ allegations of infringement. Like a book review that quotes a work in order to criticize it, a retelling of a story that offers the

18. See, e.g., Meljean Brook, The Fan Fiction FAQ, <http://www.meljeanbrook.com/fanficread.php?file=fanficfaq.html&title=The%20Fan%20Fiction%20FAQ> (last visited Dec. 13, 2005). Not incidentally, most fan creators are women. Carol Rose points out that we often do not notice limited common-property regimes because they are run by people “somehow deemed inappropriate to make claims of entitlement,” like women. Rose, *supra* note 4, at 141. Disvalued groups’ properties are deemed improper by those in power, and the combination of unusual communal claims and low social status prevents further inquiry into how such groups manage their expressive resources.

19. See, e.g., Judith Gran, *Fan Fiction and Copyright*, JUDITH GRAN’S FAN FICTION, August 1999, <http://www.alternateuniverses.com/judygran/copyright.html> (last visited Dec. 13, 2005).

20. For discussion of the ways in which media fans are, and perceive themselves to be, objects of derision and incomprehension, see HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 9–24 (1992). Though I will generalize about fan beliefs about fair use, that does not mean all media fans share these beliefs. Given that fair use is an unpredictable doctrine in the courts and that copyright owners claim rights against fan creations only rarely and unpredictably, it would be surprising if fans had reached a consensus that had eluded everyone else.

21. See Tushnet, *supra* note 8.

22. *Id.* at 683–86. My focus has been on U.S. law even though media fandom is a global phenomenon because U.S. law is unusually open-ended, whereas many other countries have limited exceptions to copyright for which fan creations are less likely to qualify, and also because U.S. copyright owners, like many other U.S. entities, are relatively swift to threaten lawsuits when they perceive an interference with their rights.

23. See, e.g., Cease and Desist Notices: Fan Fiction, <http://chillingeffects.org/fanfic/notice.cgi> (last visited Nov. 26, 2006) (hosting copies of cease-and-desist letters received by various fan sites).

villain's point of view or adds explicit sexual content can be a transformative fair use.²⁴ Recent cases emphasize that copyright owners cannot suppress unwanted interpretations of their works by asserting that such interpretations create unauthorized derivative works. The most notable litigation involved a book by Alice Randall, *The Wind Done Gone*, which retold the story of Margaret Mitchell's *Gone with the Wind* from the perspective of a new character, the mixed-race daughter of a slave and a master. A federal court of appeals held that Randall's book was likely to be a fair use, largely because of the ways in which it criticized the racism of the original.²⁵

Case law is not all that matters. When copyright owners aggressively allege infringement, threatening fans with massive civil penalties, fans may naturally choose to shut down or hide their activities rather than stand their ground.²⁶ The *Wind Done Gone* case involved a publisher-defendant whose monetary interests justified a full-scale defense. No similar cases from the fan community have been litigated. Fans and copyright owners have strong beliefs about the proper interpretation of the law but little actual precedent. Actual practice involves far more flying below the radar than it does a clear understanding on either side of what fans' fair use rights allow.

Despite the absence of litigated cases, fan concepts of what makes their creative works acceptable, not immoral, or not unfair resemble American copyright law's fair use principles. As to the purpose of the use, fans emphasize that their works are not made for profit, and, on the Internet, freely distributed, without even an attempt to recoup the cost of reproduction.²⁷ Fans condemn

24. *But cf.* Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 995–97 (2004) (discussing instances in which copyright owners are willing to license negative or transgressive versions of their works); e.g., BATMAN: I, JOKER (1998) (DC Comics graphic novel in which the usually villainous Joker is the hero and Batman is the evil enemy).

25. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001).

26. *See, e.g.*, Copyright Law for Internet Fans, <http://www.geocities.com/willowgirl95/copyright.html> (last visited Oct. 1, 2006) (noting claims in a cease-and-desist letter “might not be infringements if examined by a court, but webmasters like you and I hardly have the means to take Fox to court over our website that we do for free”).

27. There is an exception: fan art is occasionally sold on a limited-edition basis at fan conventions, sometimes for charity and sometimes for profit. By contrast, Internet distribution has largely supplanted sales of printed fan fiction, though some fanzines still remain; even with zines that cost substantial sums, many publishers claim that the price is set simply to recoup the cost of production, which is not the case with fan art. Noncommercial use is a technical concept in copyright law, but fans use as their measure of commercial fairness a concept something like “operating in such a way as to make the fan no better off, financially, than she would be in the absence of her fan creations.” *Cf.* Henry Jenkins, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 166–67 (2006) (fan sites were popular and vital to the success of the game *The Sims*, but that success “just about led to the extinction of the fan community because the most popular sites needed to pay massive bills for the bandwidths they consumed, until the company rewrote their terms of agreement so that the fans could charge modest fees to recover the costs of maintaining their distribution centers”). Thus, because physical printing requires significant monetary expenditure, fans historically considered it legitimate for the publisher to recoup those costs, but not to pay fan authors for their creative work. (Fan authors receive no payment from fanzine publishers, but they do generally receive free “contributor copies.”) Fans' willingness to allow fanzine publishers to participate on a small scale in the commercial economy

deviations from this norm, such as attempts to self-publish fan fiction for profit, even before copyright owners can react.²⁸ Because fan fiction on the Internet is noncommercial, fans do not believe that they are taking unfair advantage of the copyright owner. (Part V, *infra*, addresses ways in which this image of fandom as nonprofit endeavor is incomplete, but for essentially all fan creators, the flow of money is from fan to owner.)

The other key concept in assessing the purpose of the use is that fan creations require the addition of new material. This second point is even more important than the first: a fan writer is both fan and writer; she is a creator in her own right.²⁹ A Lockean theory of adding value through labor plays a role in fan concepts of their rights as artists.³⁰ Fans assert that their own creative contributions turn fan fiction and fan art into something new over which copyright owners can exert no veto. Especially given that mass media creations are designed to engage us, fans reason, it is fair to respond creatively to them.

Much intellectual property scholarship has criticized the idea of the romantic author who creates original works out of thin air,³¹ and fans posit a different kind of author. A fan author knows and celebrates that her works appear in a context of other, similar works, to which her works necessarily refer and from which they necessarily borrow. Her works are nonetheless products of her mind and differ in some measure from the works produced by other authors drawing from the same pool.³² Fan authors engage in the same recursive,

has echoes in their ready use of for-profit intermediaries such as video sharing sites, discussed *infra* Part V.

28. Wikipedia's entry on Lori Jareo, a fan author who briefly listed a *Star Wars* novel for sale on Amazon, describes this self-policing in action. See Lori Jareo, http://en.wikipedia.org/wiki/Lori_Jareo (last visited July 13, 2006). Unlike authors whose works appear in fanzines, Jareo was attempting to collect payment for her creative contribution, not pricing her work based on its physical production costs.

29. Although copyright law is supposed to avoid aesthetic judgments, there may be differences in the fair use analysis based on the type of work. Joseph Liu argues that fan fiction with a new storyline is probably fair use because of the authorship contributed, but a picture of Superman fighting Batman has a worse fair use defense. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 415–20 (2003). Yet there are better and worse drawings of Batman and Superman; the artist's talent will provide some of the value of the picture, so fan artists can make the same arguments as fan writers.

30. Cf. Andrew Herman et al., *Your Second Life? Goodwill and the Performativity of Intellectual Property in Online Gaming*, 26 CULT. STUD. 184, 199 (2006) (noting gamers evoke Lockean concepts to justify ownership of artifacts they have created within the game, though such other gamers contest those claims). A detailed discussion of Lockean theory as applied to copyright is beyond the scope of this article. See generally Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

31. See, e.g., James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 98 (1997) (“[T]he idea of the original author or inventor implicitly devalues the importance of the raw materials with which any creator works—the rhetorical focus on originality tends to undervalue the public domain. After all, the novelist who, as Paul Goldstein puts it, ‘craft[s] out of thin air’ does not need a rich and fertile public domain on which to draw.”).

32. Many discussions of fan fiction emphasize the distribution of authorship and the centrality of a community of interpreters, who are also authors. See, e.g., Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in FAN FICTION, *supra* note 7, at 61. Texts never make sense on their own, but must be read in context. In fan fiction, this fact is particularly salient, as readers are closely connected to writers through immediate feedback, constant discussions of underlying canon, and self-identification as members of a fandom based on particular source texts.

reflective processes familiar to writers of law review articles, but in the realm of fiction.

In the fan–author model, works can be stunningly original in the sense that they cause readers and other writers to recognize new possibilities, such as the transformation of the story of a boy band’s success into a fantastic exploration of gender roles,³³ and also in the sense that we believe that only one author could have combined familiar elements in that particular way. Though the idea of romantic authorship causes trouble when it leads law to reserve to one owner control of a work whose creation depended on multiple contributions and inputs,³⁴ fan authorship may be much less problematic. Without exclusive control, authorship norms need not have the negative distributional consequences with which they have been associated in copyright.

Other fair use concepts are also relevant: The market effect of their works, fans argue, is at least not harmful and may actually help sales of authorized works by increasing loyalty to the source.³⁵ Fan works, in part simply because they are not canonical, cannot substitute for the official versions; they can only whet the appetite for more.

As for the nature of the work, media fans almost by definition start with fictional works, so this factor does not enter into their equity analysis. Unpublished works receive more protection against unauthorized uses, but the flip side is that some fair use cases have weighed the nature of the work factor in a defendant’s favor when the work has been widely disseminated.³⁶ Fans make similar arguments: copyright owners put their works into public circulation and wanted audiences to love them; audiences did so, becoming fans; fan creativity is the result. Mass-market distribution is itself a reason to allow fans to react to the original by creating new works.

I have never seen mention of the amount of the work copied in fans’ discussions of equity, except when the statutory fair use factors are specifically invoked. Adding value is what matters to fans; a transcript of a show is not a work of fan fiction. Unlike copyright doctrine, fans focus on what has been added in the new work, not what has been copied from the original. Specifically,

33. See Coppa, *supra* note 9, at 56 (noting the explosion of creativity that followed a single foundational story “whose premise is explained by its famous and endlessly replicated opening line, ‘Somehow, in the night, Chris had turned into a girl.’”). Virginia Woolf’s *Orlando* uses the same unexplained premise, but fans had generally followed the fantasy–science fiction rule that they had to explain in the narrative the premises, whether scientific or magical, of their bizarre scenarios. Breaking that rule in a bold, well-written fan story expanded readers’ and later fan writers’ imaginations.

34. See Rosemary Coombe, *Left Out on the Information Highway*, 75 OR. L. REV. 237, 245–47 (1996).

35. See Tushnet, *supra* note 8, at 669; cf. Jordan Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, in SCRIPT-ed 544, 561–62 (2005), available at <http://www.law.ed.ac.uk/ahrb/script-ed/vol2-4/hatcher.asp> (noting that fansubbers make the same arguments that their activities are only technically illegal, but help copyright owners by building interest in shows and serving as advertising for the official versions).

36. See, e.g., *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (determining that plaintiff’s work was “a published work available to the general public,” and that the second factor thus favored defendant).

the idea that taking the “heart” of a work requires special justification does not have an analogue in fan considerations of equity. Good characterization, seeming true to the original, is usually valued, but that characterization has to be revealed by putting the characters in new situations, adding richness and nuance to the official versions. The borrowing serves as a backbone or framework. Fans can take as much as they want from the original as long as they also add value.

Fan videos, also known as fanvids, pose the most difficult fair use problems.³⁷ Their creators, popularly known as vidders, edit footage from TV shows or movies and synchronize the clips to a soundtrack, all of which are copied without permission. Vidders’ creativity comes purely from selection, arrangement, and editing, which can include visual and sound effects. As copyright law has long recognized by protecting compilations, those activities can be highly creative and valuable. Careful selection of video clips, in harmony or in contrast with accompanying music, can provide insights on the original source—mostly the video source, though occasionally the song as well.³⁸ Just as a couple might say “they’re playing *our* song” at a wedding, a good fanvid may create unalterable associations between a song and a set of characters.

Some examples: A fanvid set to *Razzle Dazzle*, from the film version of *Chicago*, brilliantly portrays, and parodies, Captain Kirk’s ability to seduce and outwit his foils on *Star Trek*.³⁹ Another fanvid uses Carly Simon’s *You’re So Vain* to send a slightly different message about Captain Kirk, casting the song as an expression of Mister Spock’s point of view.⁴⁰ Though most of the fanvid is simply funny, fans of *Star Trek* may feel deeper emotion as the expert use of clips and timing takes the characters from the original TV series to the later movies, when time and bad decisions have parted Kirk and Spock. Another fanvid combines a folk song with *The Lord of the Rings* to tell the story of two parallel ruling passions, Frodo’s for the One Ring and Aragorn’s for his kingship.⁴¹

37. For an extended discussion of the copyright implications of fan videos, see Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, CARDOZO ARTS & ENT. L.J. (forthcoming 2007).

38. One science fiction writer, Sherwood Smith, described the appeal of vids in language that resembles an analysis of transformative fair use: “Some [fanvids] are astonishing, even if you haven’t the remotest knowledge of the original storyline, and when you have, the effect is a powerdrive through the emotions, accelerated by the music and the images, setting off brainbombs of previous experience in the middle of this new one.” Fanon, <http://sartorias.livejournal.com/153912.html> (May 18, 2006, 06:47). Fan videos are related to the parody trailers for movies that are easy to find on sites like YouTube. Parodies using the format of *Brokeback Mountain* to suggest homosexual themes in other movies, such as *Brokeback Top Gun* and *Brokeback to the Future*, have been particularly popular. See, e.g., Bob Mondello, *Not Coming to a Theater Near You: Satire Trailers*, NPR, Feb. 10, 2006, <http://www.npr.org/templates/story/story.php?storyId=5200607>. Fanvids, by contrast to these individual parodies, are usually made by fans who have a long-term interest in the shows or movies they use and are produced in the context of a fan community, so they can be shared in forums dedicated to the “source” or to fan vidding generally.

39. See Video: *Razzle Dazzle* (Killa, T. Jonesy & Hafital) (on file with author).

40. See Video: *You’re So Vain* (T. Jonesy) (on file with author).

41. See Shalott and Melina, *The Mountain*, <http://www.intimations.org/vidding/> (last visited Feb. 23, 2006).

Fan videos have even been made about the nature of fan videos, including *Walking on the Ground*, a protest against copyright owners' attempts "to strangle all creativity and fair use, anywhere, and forever,"⁴² using clips from a large number of shows and movies, clips from other fan videos, and music from Sheldon Allman to tell the story of fans both fearing and embracing new technologies to create art. The vidders insist that creativity and freedom are their guiding principles, while mainstream content owners want everyone else to "kneel[] in obedient unison"⁴³ and to behave like sheep instead of independent thinkers. This fanvid insists that dedicated vidders will always find ways around digital-rights-management technologies and will always find ways to share their creations with others.

By linking fan fiction writers, hackers, Bittorrent users, vidders, and others, *Walking on the Ground* is one answer to James Boyle's call for metaphors and arguments that unite apparently disparate groups around the concept of the public domain, just as hunters, conservationists, and others united around the idea of the "environment."⁴⁴ *Walking on the Ground* is not a legal argument in the usual sense, but it does embody and promote a set of beliefs about law, and these beliefs shape actions. Here as elsewhere, nonlawyers' practices demonstrate the futility of copyright owners' fantasy of total control, but they are not simply articulating disrespect for property rights. Rather, they are asserting the value of creative freedom to make something new out of existing materials.

B. Fan Culture as Information Ecology

James Boyle's metaphor of cultural environmentalism leads to further metaphors, including niches: communities of practice that are local, and may best be governed locally, but also fit into the larger world.⁴⁵ Vicki O'Day and Bonnie Nardi have discussed libraries as ecological entities. Like the multiple diversities of ecosystems, libraries feature a diversity of aims, uses, and people.⁴⁶ Crucially, information ecologies are limited and local: they may have fuzzy boundaries, but it they are not unbounded.⁴⁷ O'Day and Nardi hold that size

42. Flummery, *Metavid Notes (Walking on the Ground)*, Oct. 14, 2005, <http://www.livejournal.com/users/flummery/22648.html#cutid1>.

43. *Id.*

44. See Boyle, *supra* note 31, at 108; see also *id.* at 110 (arguing that the environmental movement popularized once-technical concepts and turned the abstract concept of the environment into a legal and political force). *Walking on the Ground* concretizes the diffusion of authorship and the possibilities for unexpected innovations from creative appropriation using new technologies (and some old ones).

45. Cf. Rose, *supra* note 4, at 161 (suggesting that the interactive works available on the internet teach that "it may be the 'spaces,' rather than the products from these spaces, that most require a rethinking of intellectual property protection"; activities and processes are crucial to common property regimes, though we usually focus only on output in analyzing property rights).

46. See Vicki L. O'Day & Bonnie A. Nardi, *An Ecological Perspective on Digital Libraries*, in *DIGITAL LIBRARY USE: SOCIAL PRACTICE IN DESIGN AND EVALUATION* at 65, 74–76 (Ann Peterson Bishop et al. eds., 2003).

47. See *id.* at 76; cf. Rose, *supra* note 4, at 178–79 (discussing limited property commons regimes with fuzzy boundaries).

matters, because personal connections and shared values are necessary to maintain an information ecology. There is no need for physical interaction as long as there is stability in participation and practices.⁴⁸ As in ecosystems, neither participation nor practices are fixed for all time, but rather coevolve with changes in the overall information environment, including the available technology.⁴⁹ Yochai Benkler has added the important refinement that strong social ties are not necessary for a system of decentralized peer production of information to work; weakly shared values and single-purpose ties can be enough.⁵⁰

Fan creators and their audiences also form an information ecology. Though they are of varying nationalities, ages, sexual identities, classes, and races, among other differences, they share passions and values. More-experienced fans reach out to newer ones. Archivists and community maintainers play the roles of “keystone species,” linking people, tools, and practices, “filling gaps and helping the whole enterprise run well.”⁵¹

Because media fandom operates as an information ecology, its rules are local and will not necessarily generalize into broader contexts. Nonetheless, the practices of information ecologies that routinely generate large amounts of new creative works may be helpful in thinking about general policy. This investigation is less formal than some recent attempts to identify group norms and establish them as fair uses by setting forth best practices,⁵² but it may serve similar aims of establishing baselines for both copyright owners and users.

As part of the inquiry, it may be useful to contrast media fandom, as defined here, to other subcultures. Mark Schultz has explored the copying behaviors of fans of jambands—bands that encourage free copying and distribution of music from live shows while insisting that other performances (studio sessions and commercially released live shows) be purchased.⁵³ Allowing some shows to be freely copied while requiring payment for others seems fair—some performances are freely available, others are not, so the bands are sharing the wealth. This kind of openness triggers reciprocity norms among fans.⁵⁴ Fans

48. See O'Day & Nardi, *supra* note 46, at 76.

49. See *id.* at 78–81.

50. See Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 104 YALE L.J. 273, 342–43 (2004).

51. O'Day & Nardi, *supra* note 46, at 77 (arguing that librarians serve as keystones in libraries).

52. See, e.g., ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), <http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf>. According to Marjorie Heins and Tricia Beckles, principles developed by the affected groups “are better than negotiated guidelines because they reflect the consensus of a creative community and do not contain numerical limits that are inconsistent with the flexibility of fair use law.” MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 55 (2005).

53. See Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006).

54. Sharing copies for money is not enough to trigger those norms, even though both parties benefit from the transaction. Perhaps the market context overwhelms the gift aspect of the exchange so that the fans do not feel they are getting a little something extra, which is the grace note necessary to

have adopted jambands' preferences as their own norms and adhere to them on websites and discussion groups devoted to the bands.⁵⁵ Community enforcement occurs when administrators ban noncompliant users who are attempting to share or get copies of commercial recordings as well as when administrators and ordinary fan-participants supervise conversations and intervene to educate new members who do not seem to know the rules.⁵⁶

One significant difference between jamband fans and media fans is that the former focus on pure copying and the latter on alteration. Sometimes, copying may be more acceptable to artists than alteration, which can challenge the artist's own view of how the work should be treated.⁵⁷ But we should not assume that artists naturally demand tight control over others' versions. Some performing artists, including David Bowie and Nine Inch Nails, encourage fan remixes of some of their songs. There is even a commercial service, U-Myx, that provides software to allow fan remixes. U-Myx is now provided as an extra on CDs by artists such as New Order, Paul McCartney, Robbie Williams, and Robert Plant.⁵⁸ Moreover, creators of movies and, especially, television shows, rarely have complete creative control in any event. Alterations by network or studio officials are familiar territory to them. Unlike changes made by network standards and practices departments, the changes worked by fan creations have the benefit of not replacing the original versions.

Thus, it is understandable that mass media productions are trying some of the same outreach as jambands, offering added features, often freely, to fans who care enough to find them.⁵⁹ A short list of examples follows: DVD commentary tracks and "easter eggs"; the *Veronica Mars* alternate episode ending (available on AOL) and online "talk show" in which creator Rob Thomas talks about the negative viewer reaction to certain plot developments; *Battlestar Galactica* podcasts designed to be listened to as episode commentary, during which creator Ron Moore admitted that some episodes just did not work, along with deleted scenes available at the official website; *The L Word*'s contest for fans to write an episode; even *American Idol* with its viewer voting. Extras such as commentary tracks are readily available even to casual fans, and more serious fans can easily save, replay, and mine the extras for further

trigger reciprocity norms. See generally LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* (1983) (discussing the relationship between gift-giving and creativity).

55. See Schultz, *supra* note 53, at 677–80.

56. See *id.* at 681–88.

57. I thank Mark Lemley for pressing me on this point.

58. See U-MYX—Get Inside the Music, <http://www.u-myx.com/> (last visited July 27, 2006). U-Myx's remixes can only be played by others with U-Myx software, so it is not exactly a nonproprietary system.

59. See, e.g., Simone Murray, "Celebrating the Story the Way It Is": *Cultural Studies, Corporate Media, and the Contested Utility of Fandom*, 18 *CONTINUUM: J. OF MEDIA & CULTURAL STUDIES* 7, 7–8 (2004) (discussing movie studios' increasing willingness to engage with fans in pursuit of better sales). Fans' ability to see beyond the broadcast footage is not completely new, as "making-of" and "behind the scenes" featurettes have been common aspects of movie promotion for decades, but insights into the production process for almost any show or movie are becoming commonplace, in part as a way of adding value to DVD sets.

information. If Schultz is right, this may increase consumers' willingness to purchase authorized copies by making them feel friendlier towards the copyright owners,⁶⁰ even as it also encourages fan production of derivative works by making clear that the final version of any text is a matter of choice and collaboration rather than inevitability.

Schultz proposes that music fans see jambands as fair—taking only a fair share for themselves, not appropriating all the surplus value of their works the way perfectly efficient marketplace actors would. Thus music fans are willing to punish noncooperative people (who are also trying to appropriate all the surplus value).⁶¹ Media fandom norms, by contrast, are rarely based on the explicit permission of copyright owners. Fan-friendly shows and authors are always welcome, but not key to fandom. If an author is notably vocal about a distaste for fan creations and fans perceive her as likely to threaten litigation, there may be less publicly accessible fan creativity, and major on-line archives probably will not archive fan fiction based on that author's work,⁶² but generally approval or disapproval does not matter that much.⁶³ Factors such as noncommerciality and adding value rather than simply copying take the place of consent in media fans' ethics.

As a group that creates much of its own content, media fans are less dependent on the goodwill of the source-text copyright owners than are jamband fans. This may be connected with the relative tolerance in fan

60. Jambands' decisions to reach out to fans, to treat them as friends, reduces the social distance between band and listener and increases cooperation. See Schultz, *supra* note 53, at 60–61. The musicians seem sympathetic and knowable. Fans therefore identify with them and adhere to their reasonable requests about limiting copying. Cf. Krissi J. Geary-Bohm, *Cyber Chaos: The Clash Between Band Fansites and Intellectual Property Holders*, 30 S. ILL. U. L.J. 87, 118 (2005) (arguing that content owners should recruit fans and actively try to shape fandom norms to inculcate respect for copyright owners' claims); Murray, *supra* note 59, at 18 (describing an incident in which a fan site leaked photos of visual effects from the *Lord of the Rings* trilogy and the studio responded with a successful appeal to "fan community common interests," emphasizing how upset the visual effects director was with the leak; one fan commented, "It's one thing if the suits in Los Angeles [threaten] to sue you. But if you hear the guys in the trenches are saddened, it really gets to you.").

An ethic of equity can develop without contact between initial creators and audience. Sean Leonard's studies of English-speaking fans who translate and distribute Japanese anime reveals that such fansubbing groups routinely discontinue distribution of a translated anime series when a Japanese copyright owner announces that its own English translation will soon be marketed. See Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189 (2005); see also Hatcher, *supra* note 35, at 562; Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 149–50 (2003). Fansubbers devote significant creative energy to translating and captioning anime so they can share it with people who would otherwise lack access, but they believe that it is only fair to leave the field when the copyright owner invests in the English-speaking market as well.

61. See Schultz, *supra* note 53, at 58.

62. For example, Raymond Feist, Laurell Hamilton, Robin Hobb, and other individual authors have explicitly objected to fan fiction. See generally Fan Fiction Policies, <http://www.fanworks.org/writersresource/?tool=fanpolicy> (last visited Feb. 23, 2006) (listing various authors' and actors' attitudes towards fan fiction).

63. See Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1556–57 (2005) (discussing some notable failures of attempted suppression).

communities for downloading full episodes of TV shows, at least when the episodes are unavailable on local channels. Doing so does not require creative effort and yet it is encouraged by some fans, often as a means of introducing new people to the fandom. Media fans, like Americans in general, are divided on whether downloading music and video from unauthorized sources is acceptable.⁶⁴ Yet even fans who oppose unauthorized downloading as a substitute for purchase may read and write fan fiction or watch and create fan videos (with video source from downloaded episodes or decrypted DVDs), because those things are distinguishable from simple copying of existing media.⁶⁵

IV

ATTRIBUTION, CREDIT, AND RESPECT

A. Attribution in Law

Media fans who create their own derivative works reject the claim that copyright owners should have total control over use of their works, proposing instead theories of equity, mainly centered on attribution.⁶⁶ Because the law has also engaged with attribution, this section briefly reviews some recent legal developments before contrasting them to fan attribution practices.

In 2003, the Supreme Court decided *Dastar Corp. v. Twentieth Century Fox Film Corp.*,⁶⁷ which involved a videotape series about World War II that was mostly composed of footage from an earlier series; the earlier series was no longer protected by copyright. The Ninth Circuit had ruled that Dastar, the new series' producer, had violated federal trademark law by failing to attribute the footage to the (former) copyright owner, Fox, which had purchased the rights from Time-Life.⁶⁸ The Supreme Court disagreed, holding that using trademark law as a means to enforce attribution rights would threaten infinite battles over the true source of a work's ideas or expressions.⁶⁹ Some of the footage in the Time-Life series, for example, came from films made by servicemen for the U.S.

64. Cf. Hatcher, *supra* note 35, at 563 (noting that anime fans have varying views of the ethics of fansubbing, and some do not care if they are harming the copyright owner's markets). Some fans claim to purchase the DVDs as soon as they are available, downloading episodes only as a gap-filler to sustain obsessive rewatching. As iTunes and other sources make immediate authorized downloads ever more available, they will put such claims to the test.

65. As Hatcher notes about fansubbers, fans who write stories, draw pictures, or make music videos featuring copyrighted characters "often actively debate the ethics of what they do" and have some ideas about copyright law, though those ideas may be more or less accurate. Hatcher, *supra* note 35, at 561.

66. As with any group, fans exhibit a range of views about what it is fair to do with others' works, though some are more widely held than others. A recent fan convention held a panel on effort and ownership in fandom exploring some of the complexities. See Cofax, Escapade Panel Notes, Part 1, <http://cofax7.livejournal.com/320855.html> (Mar. 2, 2006).

67. 539 U.S. 23 (2003).

68. *Id.* at 27–29.

69. *Id.* at 38.

government.⁷⁰ Justice Antonin Scalia, engaging in unattributed borrowing from *Dastar*'s briefs,⁷¹ refused to require later creators to engage in a "search for the source of the Nile and all its tributaries."⁷² *Dastar* suggested that copyright law, not trademark, is the appropriate place to look for protection of authors' interests in getting credit for their work.⁷³

Another link between attribution and copyright came from the Copyright Office's recent report on orphan works—works whose copyright owners are unknown or unfindable. The report takes the position that attribution can be used instead of monetary compensation to make an unauthorized use legitimate. Although not many of the public comments on which the report was based addressed attribution,⁷⁴ the Copyright Office's legislative proposal nonetheless includes an attribution requirement. In order to claim protection against large damage awards and injunctive relief, users of orphan works would be required to offer attribution to the author and the copyright owner whenever reasonably possible and appropriate.⁷⁵

The Copyright Office did not invent an attribution requirement out of whole cloth. Significantly, the orphan works report referred to the experience of Creative Commons licenses, which usually allow unlimited free reproduction but explicitly demand that credit be attached to any reuse, as evidence of a powerful attribution norm shared by creators and secondary users.⁷⁶ The pervasive confusion of nonlawyers between copyright infringement and plagiarism is another indication that proper credit is an important equitable consideration in cases of copying. Attribution requirements are also found in

70. *Id.* at 26.

71. Jonathan Band & Matt Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 15 (2005).

72. *Dastar*, 539 U.S. at 36.

73. For scholarly responses to *Dastar*'s claims about the proper roles of copyright and trademark in regulating attribution, see, for example, Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademark Law*, 41 HOUS. L. REV. 263, 306–07 (2004); Laura A. Heymann, *The Birth of the Authoronym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1378 (2005); Greg Lastowska, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171 *passim* (2005).

74. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 82, 110 (2006) ("only a handful" of comments proposed an attribution requirement), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

75. See *id.* at 110–12.

76. See *id.* at 123; see also HEINS & BECKLES, *supra* note 52, at 28 ("Clay Shirky uses Creative Commons licenses, but he tries to stop outright plagiarism. 'One time, some guy from Singapore stole a bunch of my articles. It wasn't fair use, because it was the whole article. I went directly to the guy. And that was enough—it disappeared, because it was embarrassing to him. He was doing it to increase his credibility, not to derive money from it. And so if his credibility was damaged by being discovered, that was enough of a remedy.'"). Though the measurement methodology is unclear, see Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 401 n.85 (2005), Creative Commons reports that ninety-five percent of its licenses require attribution, see Neeru Paharia, *License Distribution*, <http://creativecommons.org/weblog/entry/5293> (Feb. 25, 2005). By contrast, one-third of such licenses prohibit derivative works. See *id.*

non-U.S. copyright systems. Many countries require attribution for some forms of fair dealing.⁷⁷

Attribution to the copyright owner, however, should be distinguished from attribution to the creator. Although copyright law usually deals only with copyright owners—who may be authors, employers, or their transferees—the orphan works proposal provides for attribution for both, when known. Information about the author may be easier to determine than information about a copyright owner who is a distant successor in interest. Moreover, attribution to the creator may be more important to satisfy a norm or moral principle of giving credit where credit is due. Attribution to copyright owners may be justified when orphan works are used as a means of giving notice to potential claimants, but Gershwin's heirs have no better claim to credit for his music than anyone else, and perhaps a worse one than the performers who bring it alive.

Credit here works, among other ways, as a financial metaphor. Creators are paid not in cash, but in credit.⁷⁸ The value of their works comes from circulation, dissemination, motion: credit benefits the creator only when some third party sees the new use.⁷⁹ Moreover, a credit-based transaction necessarily implies a continuing relationship between the parties. Credit is part of a conversation. It looks back to the past, when an obligation was created, and forward to the future, when it will be fulfilled by an audience's recognition of the first creator's contributions.⁸⁰

77. See, e.g., Copyright Amendment (Moral Rights) Act 2000 § 42 (Austl.) (amending Copyright Act 1968) (requiring "sufficient acknowledgment" for use of literary, dramatic, musical or artistic work for "reporting of news in a newspaper, magazine or similar periodical"); Copyright, Designs and Patents Act, 1988, ch. 48, § 30(1)-(2) (U.K.) ("Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement. Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement."); Copyright Act, R.S.C., ch. C-42, § 29.1-2 (1985) (Can.) (requiring for the purposes of criticism or review and news reporting that "(a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer's performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal" be mentioned).

78. I thank Francesca Coppa for this insight.

79. This is consistent with Henry Farrell's suggestion that norms of attribution and credit may even be in tension with commercial endeavors. For example, newspapers do not wish to acknowledge other papers' scoops for fear of losing business to them. See Posting of Henry Farrell to Crooked Timber, <http://crookedtimber.org/2006/05/30/norms-and-networks/> (May 30, 2006, 09:34).

80. Cash can do similar things; a continuing royalty is only valuable to the extent that audiences buy a work. The point is that the idea of "credit" makes the relationships between successive creators and their audiences over time particularly salient.

B. Attribution in Practice

1. Cash or Credit? The Just Rewards of Authorship

Attribution is not a necessary or natural part of legitimate use. The need for it is socially constructed. Some forms of art, such as clothing and textile design, often lack the mark of an individual creator, even when they have one. Historically, attribution was more limited still. Ellen Gruber Garvey's history of scrapbooking, defined as the collection and organization of clippings and quotations from various published works, reveals that collectors in the nineteenth century often extracted wisdom and relevant facts without making a record of the source.⁸¹ Scrapbooking was assisted by newspapers' practice of reprinting columns from other papers, a practice encouraged by a law that allowed papers to send copies to each other through the mail for free. Newspapers often omitted attribution, making it impossible for scrapbookers to provide the original source even if they had wanted to.

Blogs, a more recent version of the individual scrapbook, value attribution more highly, and, not unrelatedly, have technological advantages over scrapbooks in providing it. Blogs reflect a pervasive sense among different types of creators that credit can substitute for other indicia of authorship such as payment or control. To take a highly salient example, legal scholars, like other academics, are often far more concerned with credit than payment.⁸² Discussions with artists and nonlegal scholars about their perceptions of copyright law and fair use also revealed that many think of attribution as a legitimate substitute for payment in cases of nonprofit use. One woman, a playwright, theater director, and digital artist, explained her reasoning for using music, sounds, and verses without seeking permission: "I'm religious about giving attribution; and I figure that working for a little nonprofit, where 3,000 people are going to see the show, is really different from a commercial project with larger audiences."⁸³ Similarly, a study of French chefs, whose recipes are not protected by copyright law, found a norm of attribution as part of a community in which respect trumps legal notions of property.⁸⁴

81. See Ellen Gruber Garvey, *Scissorizing and Scrapbooks: Nineteenth-Century Reading, Remaking, and Recirculating*, in *NEW MEDIA, 1740–1915* (Lisa Gitelman & Geoffrey B. Pingree eds., 2003).

82. See, e.g., Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. art. 2, ¶ 11 (1995), http://www.wm.edu/law/publications/jol/95_96/lemley.html.

83. See HEINS & BECKLES, *supra* note 52, at 27; see also *id.* at 25 (quoting an assistant professor of visual and performing arts: "[I]f I'm not making money, then it's probably okay as long as I cite or I use things appropriately"; a photographer: "If somebody was to use my image and credit me, I'd be like, 'Thank you. No problem.' If they were to not credit me, then I'd start having a big problem because I would like to be recognized for it.").

84. See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* 17–18 (MIT Sloan Working Paper 4576-06, Jan. 2006), available at <http://ssrn.com/abstract=881781>. The culture among high-end American chefs, however, may be diverging, as restaurants put more of a premium on innovation; lacking copyright protection, some chefs are attempting to use patents and confidentiality agreements to protect their signature recipes.

2. Disclaimers, Credit, and Control in Fan Culture

Turning now to attribution in fandom, probably the most notable practice is negative attribution—disclaimer of ownership interests in characters and situations taken from other works. Disclaimer statements by fan authors were almost universal in zines, a practice that continued when fans made the transition to the Internet. The author would state that she did not own the copyright in the characters and situations, name the entity that did (or the original creator, who is usually not the copyright owner), and sometimes add a request that the copyright owner not sue her. The Chilling Effects website explains fan fiction disclaimers as follows:

Disclaimers explain the purpose and extent of the borrowing author's use and show that they recognize their "borrowing." Thus, disclaimers help appease original authors' fear that they will lose control over their works. The acknowledgment of the original source and ownership of the original work can reinforce the communal aspects of fandom and show that the borrowing authors respect original author's rights.⁸⁵

My strong impression is that disclaimers are less common today, though they have certainly not disappeared.⁸⁶ Some fans decisively abandon them: "No more disclaimers. They're as much mine as anyone else's, dammit. I, at least, give them snappy lines. So there."⁸⁷ When disclaimers are present, they may not seem all that much like pleas for forbearance. For example, the tone of a disclaimer discussed in Esther Saxey's essay on *Buffy the Vampire Slayer* fan fiction is casual enough that it is difficult to tell what is being disclaimed: "Joss [Whedon] moves in mysterious ways. But, damn his eyes, he owns the two lovlies and their auras. He created them, made them what they are, and I bow to you [sic]."⁸⁸

This informality in disclaiming ownership is tied to a sense of greater normalcy. Fan creators who participate in a global community of fellow fans are likely to expect that their readers will understand their basic premises. After four hundred disclaimers, the four hundredth and first is likely to seem a lot less important to the creative enterprise. Another likely related factor is that with the increasing variety and visibility of fan creativity, new fans are not always initiated by more experienced ones. They may not learn the norms of the

See Katy McLaughlin, "That Melon Tenderloin Looks Awfully Familiar," WALL ST. J., June 24, 2006, at P1.

85. See Frequently Asked Questions (and Answers) about Fan Fiction, <http://www.chillingeffects.org/fanfic/faq.cgi#QID305> (last visited Feb. 22, 2006); see also Stendell, *supra* note 63, at 1578 (suggesting that a disclaimer on a fan fiction story might be required as a precondition for a finding of fair use).

86. Archive websites may be more likely than individual fans' sites to carry disclaimers. For an example of an archive site (focused on the work of Stephen R. Donaldson) that requires archived stories to carry a specified disclaimer, see Forbidden Space: Submission Rules, <http://space.wizards.pro/submission.php> (last visited Feb. 22, 2006).

87. Francesca, *Moving On*, <http://www.trickster.org/francesca/movingon.html> (last visited July 7, 2006).

88. Esther Saxey, *Staking a Claim: The Series and Its Slash Fan Fiction*, in *READING THE VAMPIRE SLAYER* 187, 208 (Roz Kaveney ed., 2002).

preexisting community when they start sharing their own stories and art, including norms of explicitly disclaiming ownership.⁸⁹

Nonetheless, it is always easy to tell an authorized *Star Trek* novel from an unauthorized fan creation.⁹⁰ Disclaimers, when present, are directed at an imagined audience, the copyright owners and original creators. Witness the request quoted at the beginning of this article, “Please don’t sue.” Yet most fans never think that the copyright owner will actually read fan fiction or watch fan videos in the first place—the creators will never see the disclaimers.⁹¹

The ebbing of the disclaimer may indicate that fan creators feel less of a need to justify themselves and their hobbies, but it does not signal a sea change in fans’ attitudes towards authors’ rights. If I say that life is “A tale/Told by an idiot, full of sound and fury/Signifying nothing,” I don’t expect you to think I made up those words myself, even if I do not attribute the quotation. No more do fans expect other fans—their intended audience—to think that they created Superman or Captain Kirk.⁹² But fan creators are usually highly concerned with proper attribution. Plagiarism, that is, verbatim copying without attribution when the copier apparently expects to receive credit for the words or images as if they were her own, is one of the most serious offenses against the fan community, and when the plagiarism is discovered, fans are likely to publicly excoriate the plagiarist.⁹³ Stuart P. Green, reviewing academic and other concepts of plagiarism, suggests that people often regard plagiarism norms as more legitimate than intellectual property laws.⁹⁴ Fans may apply this principle distinctively because of their creative activities, but they are not unusual in distinguishing between plagiarism and properly credited appropriation.

89. See Rose, *supra* note 4, at 156 (noting that new entrants to expanded Internet communities may not be socialized in earlier participants’ norms).

90. The authorized one is the one with the footnote that says that Kirk and Spock were not lovers. See STAR TREK: THE MOTION PICTURE (authorized novelization).

91. Disclaimers in fan fiction are something like the “mouseprint” in ads, which is not really for consumers, who tend to skim over it, but which works as a signal to regulators and competitors that the advertiser is aware of various legal requirements.

92. See Lucy Gillam, *Poaching the Poachers*, THE FANFIC SYMPOSIUM, <http://www.trickster.org/symposium/symp156.html> (last visited Feb. 23, 2006) (noting that “no one thinks I [created] that” is a reasonable fan response to charges of plagiarism for copying from mainstream media); The Brat Queen, <http://thebratqueen.livejournal.com/244181.html> (Apr. 30, 2003, 11:24:00) (opining that copying from fellow fans is wrong because intrafan copying leads to false attribution; “Everybody knows a screenshot of Xander ultimately belongs to Mutant Enemy. You cannot be in the Buffy fandom without being aware of that. You can, however, be in the Buffy fandom without knowing [a particular fan artist’s] work when you see it. To show her work without giving her credit or, worse, flat-out claiming it for your own is to have stolen from her.”).

93. See, e.g., Ever After, <http://tired-eye.net/videos/everafter.php> (last visited Jan. 11, 2006) (“All video material has been heavily edited and manipulated, therefore using any part of my videos as source material in your own work will be classed as clip theft. Action will be taken against you through forum leaders and/or hosts, and your name will be published below.”); Posting of “Davy’s Wench Macbeth” to Fan Fiction Forum, <http://forum.mediaminer.org/index.php?t=msg&goto=620709&> (July 26, 2004, 23:39); The Lois & Clark Fanfic Archive FAQ, http://www.lcfanfic.com/faq_archive.html# plagiarism (last visited Dec. 13, 2005).

94. See Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 173, 239 (2002).

Fan authors and artists seek recognition from their peers for adding new perspectives and twists to the official texts.⁹⁵ They claim credit for their versions of particular characters and stories, like directors and actors putting on Shakespeare. Similarly, the multiple comics in the recent documentary *The Aristocrats* all told the same dirty joke, but made it their own through variations of content, tone, and performance.⁹⁶ As *The Aristocrats* showed, both audiences and creators can enjoy and distinguish variations on a theme, apportioning credit as necessary.

Like fan fiction authors who omit disclaimers, fansubbers who translate Japanese anime usually do not translate the names that appear in the credit sequences, but they do provide credit to everyone who participated in creating the fansub, even the person who simply provided the raw source.⁹⁷ One way to look at these practices—explicit credits for fan creators, but greater laxity for credits for non-fan copyright owners—is as a form of limited common-property regime, with different obligations to outsiders and insiders.⁹⁸ All insiders can exploit outsiders' works as long as it is obvious that the outsiders deserve initial credit, but insiders owe each other more formal acknowledgement and, quite possibly, consent to rework each others' creations. This reinstantiation of the author may not be all that surprising; Carol Rose notes that relying on informal norms could "lead straight back to individual property," since author-centered models were themselves derived from norm entrepreneurship in pre-copyright societies.⁹⁹

Fans even distinguish between different types of media: it may be acceptable to take another story's setup or original characters, though many fans think the

95. Cf. Fauchart & von Hippel, *supra* note 84 (discussing French chefs' attribution practices, which are internal to the chefs' community). Fan creators do not always get the credit they want, and the desire for more recognition is as common within fan cultures as without. One fan has suggested that young fans who only watch vids and do not create them do not have a sense that vids are made by particular authors, just as they do not have a sense that other works, like books and essays they study in school, have particular authors. These young fans' recognition of authorship is generally impaired. See Here's Luck, <http://heresluck.livejournal.com/23817.html> (Jan. 17, 2003, 18:13:00). The implication is that becoming a creator—even a fan creator making derivative works—is a way to learn about the duties and deserts of authorship, which are otherwise hard to discover in modern society.

96. Cf. Adrienne Russell et al., *Networked Public Culture*, http://netpublics.annenberg.edu/about_netpublics/networked_public_culture (last visited July 15, 2006) (referencing "a tacit understanding in the age-old practice of telling jokes: 'If you repeat it, you own it.'"). As Francesca Coppa has discussed, media fans' creative practices resemble performance, with its overt repetition and variation, much more than the kinds of individual texts literary theorists have usually analyzed. See Coppa, *supra* note 7, *passim* (2006).

97. See Hatcher, *supra* note 35, at 555, 564; cf. Farrell, *supra* note 79 (attribution among bloggers means that "when one has come across a particular piece of source material thanks to another blogger, one should credit the blogger in question"); Geary-Bohm, *supra* note 60, at 90 ("Some [fansite creators] wrongfully attribute another fansite where they obtained the copyrighted or trademarked materials rather than the true IP holders.").

98. See Rose, *supra* note 4, at 132 (defining limited common-property regimes as those in which property is held as a commons among members, "but exclusively vis-à-vis the outside world").

99. Rose, *supra* note 4, at 156; see *id.* at 156–57 ("[I]n the absence of effective formal copyright law, authors themselves cultivated a norm recognizing 'genius' in order to protect their own literary efforts."); cf. Murray, *supra* note 59, at 21 (discussing the "curiously proprietorial substratum of much libertarian fan 'poaching' rhetoric").

second-comer should get permission to reuse characters or write sequels,¹⁰⁰ but it is not acceptable to copy the editing of a fanvid. According to this reasoning, a reader can apportion credit for a new story relatively easily: these are characters created by the author, these are not. Copying edited clips from a fanvid is different, one fan explains, because “it is simply not possible to give proper credit on the same level that it would be in fan fiction. Trying to explain to the average viewer that the segment from this time to this time was taken from another vid, let alone what the original vidder might have done in the creation of that segment, requires a vocabulary that the casual vid viewer simply doesn’t have.”¹⁰¹ The vast majority of what the vidder *did not* do, such as hiring the actors and staging the scene, is quite clear, while the changes she did make are already hard to see; so it is important to give her credit for editing choices.¹⁰²

In some ways, this is the inverse of Carol Rose’s limited common-property regimes, which involve resources that are freely shared among insiders but treated as exclusive property as against outsiders.¹⁰³ fans need to credit—or, depending on the degree to which they distinguish intrafan morality from external morality, to get permission to use—other fans’ work,¹⁰⁴ whereas they feel free to mine the outside world for raw material, as long as the resulting works stay noncommercial.

3. Context-Specific Rules of Respect for Authorship

Similar dynamics may be at work in other subcultures. Jonathan Band and Matt Schruers point out that historical scholarship has norms that distinguish between the attribution owed when dealing with the in-group and attribution

100. Interestingly, French chefs have similar community norms: it is wrong to copy another chef’s creation exactly, but perfectly legitimate to develop a variation on that recipe. See Fauchart & von Hippel, *supra* note 84, at 16.

101. Gillam, *supra* note 92. Editing changes include altering timing, color, opacity, and numerous other attributes of the source, as well as adding transitions, overlaying different clips, and juxtaposing images.

102. See *id.*

103. See Rose, *supra* note 4, at 161.

104. Sometimes ownership claims are even made using the legal language of copyright and trademark. Murray notes that online fan fiction for the *Lord of the Rings* trilogy often contains the “©” symbol, various *Lord of the Rings* fansites claim trademark rights in their names, and disclaimers may simultaneously disavow infringement on the original source while claiming ownership of newly added content:

Copyrights and trademarks for the books, films, articles, and other promotional materials are held by their respective owners and their use is allowed under the fair use clause of the Copyright Law. Design and original photography however are © 1999-2003 TheOneRing®.net. TheOneRing® is a registered service mark with exclusive right to grant use assigned to The One Ring, Inc.

Murray, *supra* note 59, at 21 n.12. See also Geary-Bohm, *supra* note 97, at 114 (discussing a fansite whose operator asks fans to contact him for permission to use materials on his site, both ones he created and ones he copied from official sources). Copyright owners often say they fear an expensive lawsuit if a fan’s work happens to be similar to an authorized sequel, which is why they try to prohibit fan fiction. Cf. *id.* at 114–15 (identifying a fan who, while crediting a band with the lyrics of its songs—which may be inaccurate if the musical works was composed by another songwriter—claims rights to “the exact lyrics typed up on this site,” requiring a link back to the site if another fan wants to copy them).

acceptable when dealing with the out-group.¹⁰⁵ That is, historians expect that scholarly monographs will credit the work of other historians much more often and more specifically than popular historical works such as textbooks and encyclopedia entries.¹⁰⁶ Historians, who generally rely on reputation more than money as compensation for their contributions to the sum of knowledge, care more about proper attribution within the profession than outside it.

It is not just academics who have context-specific attribution norms. Chefs, moviemakers, political speechwriters, and other creative subcultures reason similarly.¹⁰⁷ One much-discussed case in the world of tattoo enthusiasts involves Amina Munster, who received copyright registrations for a large tattoo featuring a skull, crossed blades, and the words “Dead Men Tell No Tales.”¹⁰⁸ Munster registered her tattoo and the drawing it was made from after she discovered that another tattoo artist had copied it for someone else. The artist who inked her tattoo based his design on images from *Pirates of the Caribbean*. When Munster was charged with hypocrisy in attempting to assert rights against further copying, one sympathetic blogger responded with a passionate argument for recognizing exclusivity within the group even when creations are based on non-tattoo works:

For modern individuals, tattoos tell the story of their lives . . . , so pop culture references are not only common but required due to the saturation of that imagery in our world. So in order to wear a tattoo that accurately captures a person, often they actually need to borrow from and tell their stories using imagery from movies, advertising, corporate logos, and so on. It's not theft, it's truth.

However, there is something fundamentally different between copying a piece of print artwork and copying someone's tattoo. It's like the difference between speaking the same language (using the same words) and literally saying the same thing. In terms of the damage done to the wearer, it's identity theft. . . .

If Amina's “fan” had wanted a *Pirates of the Caribbean* chestpiece rather than Amina's literal chestpiece, it is true that he would have walked away with a very similar tattoo because both artists would have been working from the same sources.

105. See Band & Schruers, *supra* note 71, at 16–17.

106. American Historical Association, Statement on Standards of Professional Conduct, <http://www.historians.org/pubs/Free/ProfessionalStandards.cfm> (last visited Dec. 14, 2005) (“[I]n some contexts—such as textbooks, encyclopedia articles, broad syntheses, and certain forms of public presentation—the form of attribution, and the permissible extent of dependence on prior scholarship, citation, and other forms of attribution will differ from what is expected in more limited monographs. As knowledge is disseminated to a wide public, it loses some of its personal reference. What belongs to whom becomes less distinct.”).

107. See Fauchart & Von Hippel, *supra* note 84, at 27–28 (discussing French chefs and fashion designers; mass marketers in each field will copy from haute couture or cuisine, but unauthorized copying within the higher-status group violates community norms); Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 76–101 (2006) (discussing several examples of attribution regimes, including moviemaking, academic and scientific publishing, and politics, which have attribution norms that vary by context).

108. Copyright Registration for Tattoo, http://www.needled.com/archives/2006/03/copyright_registration_for_tat.php#more/ (last visited Mar. 14, 2006).

However, it would have been a fundamentally different tattoo, and comparing the two “thefts” is not valid.¹⁰⁹

These sorts of in-group–out-group distinctions have a long pedigree in copyright law. The U.S. refused to grant foreign nationals the same rights as American authors for over a hundred years.¹¹⁰

Sampling in rap and hip-hop music also has specific traditions of reference and respect, in which recognizability as a sample operates to provide credit and simultaneously establish the sampling artist’s membership in a community.¹¹¹

[T]he very point of taking the sound of James Brown’s scream or one of George Clinton’s riffs is to let audiences know that it is the *real* James Brown or George Clinton that they are hearing. Hence the taking may deny the rights of James Brown’s record company, but it also reclaims his output *for* James Brown—and for others who identify with his musical legacy.¹¹²

This relationship of reference and incorporation is complicated by the fact that most samples are licensed and thus do respect the rights of the record company, whether the listeners know it or not. Moreover, some samples are distorted and reworked, so that they may be unrecognizable or difficult for most listeners to recognize. The samplers’ motives then may still be to position themselves within a musical tradition, but the acknowledgement of others’ authorship in the work itself is less obvious. Reference of one kind or another is in any case a tool of individual authorship, a signal that an author is speaking—perhaps to another author, or perhaps not.

Fan practices reveal that proper attribution need not seek to trace the Nile to its innumerable tributaries. There can be a social consensus within a relevant community about how far to trace and when, providing the limiting principle that Justice Scalia felt was absent.¹¹³ Justice Scalia’s uncredited borrowing from a party’s legal brief escapes condemnation because the social context of his

109. Posting of Shannon Larratt to ModBlog, <http://modblog.bmezine.com/entries/200509250855.html> (Sept. 25, 2005, 12:55). Of course, this position is far from uncontested; some tattoo artists are happy to copy other tattoos as well as other cultural objects. *See, e.g.*, Posting of Shannon Larratt to ModBlog, <http://modblog.bmezine.com/entries/200509231728.htm> (Sept. 23, 2005, 21:28). Norms are rarely universal (and sometimes people cheat on them even if they purport to be bound by them).

110. A powerful criticism of that split regime is that the lack of protection for foreign works decreases incentives to produce a native or domestic literature because publishers will not pay native authors for rights to their works when they can freely reprint the works of a foreign author, and that books by foreign authors depress the overall market price native authors could demand. When, as with media fandom, the internal literature is produced by nonmarket incentives, that problem does not arise, though whether it exists in the tattoo market—which also features large amounts of standard tattoos, known as “flash”—is an interesting question.

111. *See* Anne Baron, *Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice*, 15 SOC. & LEG. STUDIES 25, 34 (2006) (“The [sampler] has to have a solid grasp of musical history, and this makes sampling ‘an extension more of fandom than of musicianship.’”) (citation omitted).

112. *Id.*

113. As Francesca Coppa pointed out to me, the social consensus about credit might be morally questionable, as when white performers take credit for popularizing African American forms of music, and a consensus might also change over time as political and social trends lead to different origin stories. This is another reason that using law to enforce credit-tracing norms might not be a good idea.

copying makes him a jurist, not a plagiarist.¹¹⁴ When it comes to mass media texts, fans are unlikely to know or care about the complex web of contracts and law that regulates relations between individual creators and the large corporations that usually own the rights to popular works.¹¹⁵ Though fans sometimes offer explicit disclaimers that refer to a creator such as Joss Whedon or a copyright owner such as Fox, the relevant information is that the fan makes no ownership or authorship claims to the characters and situations.

More generally, audiences value attribution in a different way than they value trademarks for ordinary goods like soda. A consumer's belief that a good or service is authorized by a particular source, the concern of trademark law, is different from an audience member's concept of authorship. Consider a copy of Tom Clancy's *The Hunt for Red October* published by a pirate publisher in India versus an authorized "Tom Clancy's Op Center" novel written by a ghostwriter, for which Clancy's name serves as a brand. Even if the pirate introduced a number of typographical errors into *The Hunt for Red October*, many of us would feel that the pirated book had a stronger claim to being a real Tom Clancy novel than the authorized book.

Fan texts are a third type of creation, neither pure copies of another author's work nor authorized additions to the original. Fan creations lack the authority of official texts. Because they are not canonical, fan stories can offer a thousand different ways that Mulder and Scully of *The X-Files* first slept together, none of which contradict the others, or one author can write "Five Things That Never Happened"—five alternate histories for a favorite character, all of which are, as the title states, repudiated by the author.¹¹⁶ Lack of authority, which stems from lack of authorization, allows a freedom unavailable to an official canon striving for internal consistency. It allows overlapping and playful authorship, for which (partial) credit is the only payment.

114. In Scalia's case, the important factor is less that the relevant readers generally know that courts often copy felicitous phrases from briefs (though we do know that), but that the fundamental business of courts is to render decisions and explain them. It is nice if the opinions are well written, but this is not necessary to the enterprise. He is not a plagiarist because his role is not about getting credit for his writing, which is also why scholars almost never discuss law clerks when they analyze judicial rhetoric—the *what* is generally far more important than the *who*. If a judge renowned as a prose stylist turned out to have a secret ghostwriter, that could fall into the category of plagiarism, but unsourced borrowing of bits and pieces from different briefs does not qualify.

115. The creator, in the romantic sense, and the corporate copyright owner may even have different beliefs about the legitimacy of unauthorized fan creations. Joss Whedon thinks of fan creations as a natural outgrowth of fans' love for the show, whereas Fox—which owns the copyrights—has no such sympathy. See Murray, *supra* note 59, at 11.

116. See Because AUs Make Us Happy, <http://strangeplaces.net/challenge/five.html> (last visited Dec. 13, 2005) (collecting "Five Things That Never Happened" stories, which are a type of alternate universe story in which five often mutually contradictory possibilities are explored by a single author); Susie Lute & Kristina Busse, "My Slash is More Canon Than Yours": *Negotiating Authority in Harry Potter Fan Fiction*, at 8 (unpublished paper, on file with author) ("[T]he writers of any given fandom collectively create a space that resurrects all potential meanings and interpretations and, by writing them all into being, allows them to coexist. . . . [T]he collective product is the fantext, a colossal work-in-progress that charts particulars and potentiality rather than foreclosing them with a voice of authority.").

C. “Death of the Author and All That”: Who Gets the Blame?

Related to attribution and to moral rights against distortion is the question of who is *responsible* for the interpretations of the original text provided by fan creators. Texts invite interpretation, and making a text available to the public necessarily cedes some control over it, though copyright law has struggled to deal with this truism. The cases suggest that, to be fair, a transformative use must ordinarily add new material or commentary that reflects critically on the original.¹¹⁷ According to the Supreme Court, a parody, by distorting elements of the original, causes readers to rethink the messages of the original. By contrast, a satire merely uses the original to “avoid the drudgery in working up something fresh” and does not challenge readers to reassess the original.¹¹⁸ Under the definitions used by fair use doctrine, a parody mocks the original specifically, like Weird Al Yankovic’s “This Song Is Just Six Words Long,” which is set to the tune of “I Got My Mind Set on You.” A satire borrows a familiar work to get its audience’s attention and to make fun of something other than the original, like a satirical song using a popular tune to lambaste a politician. Both parody and satire require the addition of creative labor to change a work into a caricature, but a parody is more likely to succeed on a fair use defense than a satire is because the parody has a better reason to copy from the original.

Although *Campbell* included a footnote insisting that a satire could be a fair use, courts using the parody–satire division as a guide find that a legitimate transformation exists when the new work makes overt that which was present in the original text covertly (at least as some readers saw it): transformative fair uses make subtext text.¹¹⁹ In two important parody cases involving the Barbie doll, for example, Mattel’s attempts to protect its doll’s image by using copyright law were thwarted by courts concluding that overtly sexualizing Barbie constituted commentary on Barbie *because Barbie already had sexual connotations*.¹²⁰

Even more telling is the discussion in the *Wind Done Gone* case about the relevance to fair use of homosexuality and miscegenation. The Mitchell estate

117. Using the original for an entirely different purpose, a datum in a larger collection, can also be transformative. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). But when a defendant’s claim is to have transformed a single work, courts look for something within that work that is highlighted or explored by the infringing use.

118. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

119. In *Campbell*, for example, the dissenting judge on the court of appeals wrote that the parody “reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers . . . have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.” 972 F. 2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting), *quoted in Campbell*, 510 U.S. at 582. Because of the later song, we can recognize that Orbison’s narrator always had the “same thing”—sex—on his mind as the later singers, even though he obscured his real desires with talk of wine and roses.

120. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801–02 (9th Cir. 2003); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 322 (S.D.N.Y. 2002) (“As a result of Barbie’s origins, Defendant argues, ‘sex is inherent in the doll . . .’ and . . . she is simply revealing this sexual nature by placing Barbie in a ‘modern erotic context.’”).

did not want *Gone with the Wind* to be associated with such controversial topics. The Eleventh Circuit Court of Appeals held that Alice Randall's insertion of homosexuality, in the form of a gay Ashley Wilkes, into the world of *Gone with the Wind* was an important part of what made her book transformative. The court quoted *Gone with the Wind*'s description of the Wilkes family as artistic and "queer,"¹²¹ a term already widely used to describe homosexuals when Mitchell wrote the novel,¹²² to show that a basis for Randall's changes was present in the original. (The similarities to "slash" fan fiction, which picks up on homoerotic elements in the original texts, are evident.)¹²³ In other words, the court held that transformation consists of making clear or exaggerated what was opaque or limited in the original text.¹²⁴

As a result, the legal defense of parodies and other literary transformations protects critics as creators in their own right only when they draw deeply from a preexisting well. The fair use test asks whether the critic has found something in the original or has simply added unrelated content to it. With respect to a book called *The Cat NOT in the Hat*, for example, another court concluded that using Seussian doggerel to describe the O.J. Simpson trial offered no commentary on Dr. Seuss's loveable feline rogue from *The Cat in the Hat*, so it was not transformative and not fair.

A court's determination that a work is critically transformative is therefore also a ruling that the original author is partly responsible for the content of the critical work, often content the author finds extremely objectionable. If adding new material were all that were required for transformative fair use, as many legal theorists believe it should be, then the parody-satire distinction would be unnecessary. The persistence of the parody-satire divide indicates that courts

121. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 n.26 (11th Cir. 2001). The court found insight into Randall's transformativeness by quoting Mitchell's novel:

Randall's parodic intent vis-à-vis Ashley becomes manifest when the two works are read side-by-side. Mitchell has Gerald describe Ashley Wilkes: "The Wilkes are different from any of our neighbors—different from any family I ever knew. They are queer folk, and it's best that they marry their cousins and keep their queerness to themselves. . . . And when I say queer, its not crazy I'm meaning . . . there's no understanding him at all . . . tell me true, do you understand his folderol about books and poetry and music and oil paintings and such foolishness?" Later, Mitchell describes how "Scarlett turned her prettiest smile on Ashley, but for some reason he was not looking at her. He was looking at Charles"

Id. (citations omitted). Despite what the court says, it is not reading the two works side by side. It is reading *Gone with the Wind* and seeing a subtext about homosexuality, which it then allows Randall to make explicit. The court observes that "Suntrust makes a practice of requiring authors of its licensed derivatives to make no references to homosexuality," *id.*, even as it has just suggested that reference to homosexuality is already present in the original.

122. See *DICTIONARY OF AMERICAN SLANG* 415 (Harold Wentworth & Stuart Berg Flexner eds., 1967).

123. For a fascinating discussion of the complexities of bringing meaning to texts as opposed to exposing subtextual meaning, see Ika Willis, *Keeping Promises to Queer Children: Making Space (for Mary Sue) at Hogwarts*, in *FAN FICTION*, *supra* note 7, at 153. Quite suggestively, Willis identifies fans' abilities to write "queer" versions of mainstream texts as an "immoral right," relying on Roland Barthes. *Id.* at 167, 168.

124. Miscegenation, the other taboo topic, is even more deeply buried in *Gone with the Wind*. One might say that, in a slave society, miscegenation is inevitably part of the context.

are concerned with giving proper credit—or proper blame—to authors whose works inspire others to react by altering the original: if there is no real relationship between an original and an unauthorized transformation, then it is not fair use to link the author with the new work.¹²⁵ Conversely, because of the deep connection between the original and a truly transformative use, attribution may be appropriate even when the original author is appalled by what has been done to a work. Like noncustodial parents forced to pay child support, authors may be connected to their illegitimate “children” over their objections.¹²⁶

Within fandom, the question of proper attribution often comes up as a question of characterization. Most fan creators are concerned to some extent with making the characters they use recognizable.¹²⁷ If they show Captain Kirk and Mister Spock having a sexual relationship, they want readers to see them as extensions of the canonical characters, not as two random men who happen to have the names “Kirk” and “Spock.” Readers may disagree about whether proper characterization has been achieved, but the goal itself is common. If a fan text’s characterization is successful, it seems to its audience to be related to the original, responding to something already immanent in the text. Fans, like courts analyzing transformative fair uses, see their work as inextricably related to the sources, bringing meaning out as much as they are putting meaning in. Attribution to the copyright owner, then, provides both credit and blame, control and absence of control, a way of exercising power over the author while disclaiming authority of one’s own.¹²⁸

In his excellent book on *Star Wars* fans Will Brooker argues that *all* extrapolations from the basic *Star Wars* texts are engaging in similar

125. A similar concern with unfair attribution led the founders of Creative Commons to consider a “disavowal clause,” allowing authors to require removal of their names from offensive reuses of their Creative Commons-licensed works. See Kelty, *supra* note 8, at 551–52.

126. A variant on this problem comes from comic-book writer Alan Moore’s staunchly antagonistic stance towards DC Comics, which owns the rights to two of his most successful projects, *Watchmen* and *V for Vendetta*. Upset over statements made by a producer of the *V for Vendetta* movie adaptation, Moore demanded that his name be removed from the film credits as well as from any reprints of his work DC might produce in the future. The film producers took his name off, but DC refused to agree, pointing out that the reprints weren’t derivative works or adaptations but the exact works Moore produced. See Dave Itzkoff, *The Vendetta Behind “V for Vendetta,”* N.Y. TIMES, Mar. 12, 2006, at 1. Moore does not want to be associated with DC in any way, but his contracts bind him (at least until thirty-five years have passed and he can reclaim his rights under the reversion provisions of the Copyright Act).

127. See Lute & Busse, *supra* note 116, at 3 (noting that many fans believe that fan fiction’s characterizations should “tilt” a canon character but should also make the connection to the canonical version clear). Not all fans use canonical characterization as a starting point. Some just want to play in what they consider a common playground, using characters whose attributes are recognizable enough that they will have an audience for their works.

128. See Fisk, *supra* note 107, at 49 (discussing the distinct credit and blame functions of attribution); Kristina Busse, *Rowling’s Ghost Effect: Reading and Authority in Harry Potter Fanfiction*, at 5 n.8 (June 15, 2005) (on file with author) (noting that the position of “author” in a world of intertextuality “is both empowering in that the author becomes founder of all that the initial text effects at the same time as it is disempowering insofar as the author cannot control or dictate these consequent works”).

interpretive practices, whether authorized or unauthorized, whether objectionable to the copyright owner or not:

Star Wars fan fiction of all genres is involved in the same practice as officially sanctioned fiction: extrapolating from the films, filling in spaces, daring to go off on tangents, but always using the primary texts as a baseline. On a formal level, I am arguing that an online fan story about Qui-Gon and Obi-Wan's romantic love does much the same thing with the existing *Star Wars* mythos as does [Timothy Zahn's authorized novel] *Shadows of the Empire* . . . ; it makes suppositions, suggests links, and provides background from the cues in the original film texts. Leia and Han kiss in *Jedi*, and Zahn proposes that they go on to have sex and to produce and bring up children. Qui-Gon strokes Obi-Wan's face at the end of *Phantom Menace*, and a host of slash writers propose that the two Jedi had a loving relationship. The process of deduction and invention is not fundamentally different.¹²⁹

These continuities challenge the distinction between transformative uses and derivative works to which the copyright owner has exclusive rights, and ultimately throw into question the propriety of assigning copyright owners derivative rights at all. The closer a fan work seems to an authorized work, the more uncanny it seems and the more it threatens the copyright owner's claim to special priority of interpretation.¹³⁰

Because attribution, whether implicit or overt, is the core value in fan concepts of authorship, fan practices do not kill the author and replace him with the reader. Rather, the author is always in dialogue with the reader, never entirely in control of the interaction even though the author's name is associated with the work at issue, as revealed by the following exchange between fans about whether fan writers can claim ownership of their stories, including withdrawing them from circulation:

Darthfox: The words belong to the writer, and we can't say we wrote them; but the universe and the characters belong to the writer, and yet we appropriate them for our own purposes. I know there are people who conscientiously don't write in fandoms where the creator has expressly requested that there be no fanfic. I respect that position, but I don't share it; once the characters are or have been out there, they belong to us, and we're not hurting them . . . by playing with them ourselves. Death of the author and all that.

Similarly, once a story is or has been out there, to a certain degree it doesn't belong to the writer anymore. . . . We retain the copyright on our own stuff, and we can insist that it not be redistributed without proper attribution, but we can't insist that it not be redistributed at all, I don't think. (Who are we, the RIAA?)

129. WILL BROOKER, USING THE FORCE: CREATIVITY, COMMUNITY AND STAR WARS FANS 133 (2002). Brooker recognizes that there are significant practical differences between authorized and unauthorized revisionings, including potential copyright problems as well as the stigma of writing "gay" fiction. *See id.*

130. Cf. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 59 (1959) ("[T]he more closely the impostor's performance approximates to the real thing, the more intensely we may be threatened, for a competent performance by someone who proves to be an impostor may weaken in our minds the moral connection between legitimate authorization to play a part and the capacity to play it.").

Meri_oddities: . . . But I still think of my stories as mine. I don't think I have control over them, once they are posted, but I do think they belong to me.¹³¹

Belonging is a sort of ownership, but without control or payment. Attribution is all that is left, and attribution may be given even when the author would rather not have the work circulating.

Part of what makes Darthfox's use of "death of the author and all that" funny is that media fandom's authors—both corporate and unofficial—are alive and kicking. As the disclaimer that began this article indicates, fandom is full of homages to auteurs from George Lucas to J.K. Rowling and equally full of fans who are, or who yearn to be, recognized by other fans for their genius. This pervasively distributed authorship exists on the level of credit rather than economics or control.

A common objection to unauthorized derivative works is that they may blur the definitions of favorite characters, destroying the very things that once made those characters attractive.¹³² If everyone gets to write her own Superman story, Superman will no longer stand for "truth, justice, and the American way." This is mistaken in two ways: it misdescribes copyright ownership as ensuring coherence, and misdescribes unauthorized creations as rewriting the originals rather than adding to them. As to the former, the Superman example is not accidental. The recent DC Comics-authorized *Superman Returns* movie changes the famous line to "truth, justice, and all that stuff," perhaps to be more palatable to a global audience.¹³³ Copyright owners routinely revamp, rewrite, and even blur their properties to attract new audiences. It was not fans who gave Superman a pet (Krypto, the Super-Dog) or Batman a tiny magical imitator (Bat-Mite). On the non-owner side, unauthorized creations are unlikely to destabilize official meaning. Unlike software code, stories can "fork" without destroying audiences' and authors' ability to communicate, as shown by the many versions of Santa, Hamlet, and Dracula, among others.¹³⁴

Rather than simply delight in destabilizing meaning, fans often feel a sense of ownership of canon. They are often better informed about the details of the characters' lives and settings than are many decisionmakers responsible for making new authorized works, so that, for example, fans will pick up on blatant continuity errors missed by the corporate copyright owners. This is moral ownership rather than economic ownership, a sort of reverse moral rights. Although DC Comics may be willing to pimp Batman out to make millions,

131. Meri_oddities, Fannish Entitlement (Part of Cereta's Notcapade), <http://meri-oddities.livejournal.com/57633.html?thread=703265#t703265> (last visited Feb. 27, 2006).

132. See, e.g., Justin Hughes, *'Recoding' Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 952–63 (1999) (suggesting that audiences have interests in stable meanings for texts that justify increased copyright owner control).

133. See Tatiana Siegel, *Superman Eschews Longtime Patriot Act*, HOLLYWOOD REPORTER, June 30, 2006, http://www.hollywoodreporter.com/thr/columns/film_reporter_display.jsp?vnu_content_id=1002764635.

134. See, e.g., Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO L.J. 1065, 1076–78 (2006); 43(B)log, <http://tushnet.blogspot.com/2006/03/recoding-and-audience-interests-in.html> (Mar. 20, 2006, 10:27).

hard-core fans may be outraged. This is not to say that fans should have any veto power, but, if we are concerned about moral rights against distortion, we might look into the interests of nonauthors—distortion may well be in the eye of the beholder.¹³⁵ The deep, personal connection that some authors feel to their creations, some fans feel towards them too. Fans' claims may be even stronger than those of authors' heirs, or, in the case of works for hire, claims made by corporations. When credit and blame are allocated, all the authors—and all their readers—deserve some of each.

D. Multiplying and Limiting the Privileges of Authorship

Low-protectionists tend to be wary of moral rights, including attribution rights, as ways that authors can try to control reception of their works and block off unwelcome recontextualizations. Fan practices cast a better light on attribution as an alternative to more restrictive controls. Recently, Niva Elkin-Koren asked whether Creative Commons licenses are a good way to resist copyright owners' push for ever more control over their works, or whether they may paradoxically support norms of total dominion.¹³⁶ Elkin-Koren is concerned, among other things, with the ninety-five percent of CC licenses that require attribution, since this type of license goes beyond the requirements of U.S. copyright law.¹³⁷

Fandom norms of attribution may provide a different perspective: fan practices accept the importance of authorship, but treat it as a question of *propriety*, while rejecting claims of control over creative work as *property*. Attribution and control do not have the same effects. In the ethic of propriety, ownership claims do not automatically or inevitably expand.¹³⁸ Fan creations show that when attribution is separate from permission, as is also the case with

135. See SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005) (arguing that audiences' reworkings and repurposing of celebrities' identities, like gay culture's appropriation of Judy Garland's image, might deserve as much protection as other cultural properties); Rosemary Coombe, *Author/Izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 388 (1992) ("Fans respect the original texts and regularly police each other for abuses of interpretative license, but they also see themselves as the legitimate guardian of these materials, which have too often been manhandled by the producers and their licensees for easy profits."); Murray, *supra* note 59, at 13 (discussing Tolkien fans' reaction to the in-production *Lord of the Rings* movie trilogy as "the orthodoxy-policing and globally co-ordinated gatekeepers, past which [director Peter] Jackson's production team attempts to sneak artistic innovation").

136. See Elkin-Koren, *supra* note 76, at 378 ("[I]n the absence of a shared sense of free access, reliance on property rights may strengthen the proprietary regime in creative works. It may actually reinforce the property discourse as a conceptual framework and a regulatory scheme for creative works.").

137. See *id.* at 405 (arguing that allowing licensors to impose extra-copyright requirements could support other license terms, some quite troubling).

138. See Green, *supra* note 94, at 177–78 (arguing that, because plagiarism has historically been recognized even in systems without copyright protection, authorship does not have to be connected to property rights); cf. Fisk, *supra* note 107, at 117 (arguing that, in a world full of works for hire and transfers of copyright, the law should recognize attribution rights and interests as separate from exclusive rights to control copying and economic exploitation).

Creative Commons licenses, extremely popular sources do not suppress diversity in creative content but rather enable it. Finding authorship everywhere turns out to have the same liberating effects as killing the author, and may be far easier.¹³⁹

Another small but perhaps significant point is that because attribution is about blame as well as credit, the proposal to require attribution as a condition of using orphan works carries risks to authors. Imagine an orphan sound recording used in a pornographic film or a political campaign whose owners eventually surface and are appalled to find themselves associated with the new use. Strong attribution rights, in other words, can conflict with strong integrity rights.

V

EMBEDDED AUTHORSHIP: FAN PRACTICES IN A COMMERCIALIZED WORLD

Attribution is an alternative way of respecting authorship, one that can replace, complement, or even compete with more familiar rights to control or demand compensation for uses. Just as forms of respecting authorship vary widely, so do other aspects of creative production. This section focuses on the varied ways that unauthorized derivative works participate in the formal market for creative goods, despite the dangers copyright law poses to them.

Today more than ever, successful works cross media, from movies to videogames to novels to plays and back again. This hybridity of form has echoes in hybridity of genre and, especially, hybridity of production, which increasingly brings nonmarket forms of creativity within the marketplace in new ways. Current copyright law does not contemplate these hybrid forms, neither obviously critical and thus within the protection of fair use nor standard derivative works within the scope of copyright owners' rights.¹⁴⁰

Copyright law, and fair use doctrine in particular, treats market production as crucial. This makes sense insofar as market production is mostly what needs copyright's support, and it is helpful to the fair use defense of the occasional nonmarket use that gets litigated. But the market focus encourages copyright law to discount nonmarket motives and activities pervasive throughout creative practice. Fan authors are not exceptional in their involvement with and use of copyrighted texts.¹⁴¹ Their creative inspirations may be especially identifiable,

139. See Séverine Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 285–86 (2006) (Creative Commons licenses demonstrate that authorship is not naturally linked to control; instead, they situate authors as participants in a conversation about the meaning of their creations); Elkin-Koren, *supra* note 136, at 387 (noting that Creative Commons licenses do not imply the return of the romantic author creating ex nihilo—rather, individual creators “are understood within a cultural context that gives them meaning and value”).

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

141. See generally Litman, *supra* note 3.

but creativity generally works through interaction with other people and other works, even when it turns professional.

Major media routinely mine amateur talent for trends and for particularly talented authors.¹⁴² The Austin Film Festival and the ABC Writing Fellowship, among others, sponsor television screenwriting contests, with cash and other prizes for the winners. Submissions must be scripts for a currently airing television show—must be unauthorized derivative works, in other words. This is standard practice in the television industry. Aspiring screenwriters need to show that they can write a “spec script” in the appropriate format, using preexisting characters, because those are the skills needed for television writing.¹⁴³ They are not designed to be sold to the specific television series itself; rather, they show off the writer’s television-writing skills, so they are neither straightforwardly commercial nor created merely for the joy of writing.¹⁴⁴

The closest litigated case on point involved an unsolicited script for a *Rocky* sequel. When the disappointed would-be screenwriter thought that a later *Rocky* film resembled his too closely, a court found that the owners of the *Rocky* franchise could not be liable for infringing his script because the screenwriter was himself an infringer.¹⁴⁵ That result is unnecessary and misguided. Good policy may dictate that aspiring screenwriters cannot sue shows for using stories similar to those in their spec scripts,¹⁴⁶ but that does not make spec scripts affirmatively infringing, especially when their main economic value is in proving talent to potential employers. In fact, producers’ communications with fans now include instructions on how to submit a spec script, further blurring the lines between fan and professional, authorized and unauthorized, fun and profit.¹⁴⁷ Fair use would find it difficult to categorize these hybrid, half-visible works, neither classically transformative nor capable

142. See Herman et al., *supra* note 30, at 193 (noting participatory cultures “continually appropriate and remake what is produced and circulated by media corporations, while media corporations continually try to incorporate consumer productivity and creativity into profitable commodity forms”).

143. See AL JEAN ET AL., WRITING FOR EPISODIC TV: FROM FREELANCE TO SHOWRUNNER 6–7, http://www.wga.org/uploadedFiles/writers_resources/ep1.pdf.

144. See Laura Brennan, Writing the TV Spec Script, <http://www.writing-world.com/screen/TV.shtml> (last visited Oct. 1, 2006).

145. See Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 26, 1989).

146. See Sobhani v. @Radical.Media Inc., 257 F. Supp. 2d 1234 (C.D. Cal. 2003) (holding that an aspiring commercial director could not use fair use as a sword in an infringement suit against the copyright owner when the copyright owner copied a spec commercial that combined new and old material).

147. See Coppa, *supra* note 9, at 235:

Newer shows (and older shows that have had time to evaluate the creative and economic value of their fan base) increasingly invite the creative participation of fans, and many seem to want to blur the lines between amateur and professional, fan and specialist. As an example, the Web site for the television series *The Dead Zone*, a show helmed by longtime *Star Trek* writer and producer Michael Hiller, offers to fans not only free copies of the aired scripts, but a writer’s guide for the show and explicit instructions on how to send in your teleplay for professional consideration.

of substituting for authorized versions—at a minimum, because it would usually be hard to get the actors to perform an unauthorized script.¹⁴⁸

Even without a clear answer from copyright law, the spread of the tools of production to increasing numbers of people has intensified collaboration and circulation between commercial and noncommercial sectors.¹⁴⁹ Video game companies sell amateur-created works and hire programmers who prove their merits by creating unauthorized derivative levels for games.¹⁵⁰ Major music labels now allow free downloads of some bands' songs on sites such as MySpace. Fan fiction authors turn professional using skills learned in the fan community, and sometimes even using their fan writings as evidence of their commercial potential.¹⁵¹

As jambands and other mass media performers vary the default of payment and control, moving away from complete commercialization, individual fan creators are moving towards the market. Some authors of unauthorized derivative works—though by no means all, or even a large number—openly speak of their desires to use initially free works to secure fame and fortune. One fan vidder used her *Forever Knight* vids to secure a commission to create music videos for the series' official DVD release.¹⁵² A *Star Trek* fan filmmaker considers his fan films an investment.¹⁵³ Jonathan Coulton, a singer-songwriter who puts much of his work up on the Internet free, hopes to make a living from his music through purchases and donations.¹⁵⁴ His offerings include cover

148. But it would not be impossible. See Chris Suellentrop, *To Boldly Go Where No Fan Has Gone Before*, WIRED, Dec. 2005, http://www.wired.com/wired/archive/13.12/startrek_pr.html (noting that Walter Koenig, the actor who played Chekov in the original *Star Trek*, is starring in an episode of an unauthorized fan-produced series).

149. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (elaborating ways in which market and nonmarket methods of production interpenetrate and complement each other); Busse & Hellekson, *supra* note 13, at 23; Henry Jenkins, *Quentin Tarantino's Star Wars?: Digital Cinema, Media Convergence, and Participatory Culture*, in *RETHINKING MEDIA CHANGE* 281, 305 (David Thorburn and Henry Jenkins eds., 2003), <http://web.mit.edu/cms/People/henry3/starwars.html> (“[A]mateurs test the waters, developing new practices, themes, and generating materials which may well attract cult followings on their own terms. The most commercially viable of those practices are then absorbed into the mainstream media, either directly through the hiring of new talent or the development of television, video, or big screen works based on those materials, or indirectly, through a second-order imitation of the same aesthetic and thematic qualities. In return, the mainstream media materials may provide inspiration for subsequent amateur efforts, which, in turn, push popular culture in new directions.”).

150. See JENKINS, *supra* note 27, at 164 (discussing fan communities as “training grounds for entry into the commercial media sector”; in video games, amateur-produced works are routinely now “taken up directly by commercial companies for distribution,” while “the line between amateur and professional production is blurring as smaller start-up companies may build their games through the use of these same tools [provided free to gamers by game companies] and subsequently license with the original company to enable their distribution”).

151. See John Jurgensen, *Rewriting the Rules of Fiction*, WALL ST. J., Sept. 16, 2006, at P1.

152. See Posting of Kristin1228 to LiveJournal, <http://community.livejournal.com/vidding/730741.html> (July 24, 2006, 22:09:00).

153. See Suellentrop, *supra* note 148 (noting that *Star Trek: New Voyages* creator calls his work “independent film” and, though he is a fan, plans to move on to other work if he cannot figure out how to make the *Star Trek* series pay). See <http://www.newvoyages.com/> for the episodes.

154. See Jonathan Coulton, <http://www.jonathancoulton.com/> (last visited July 26, 2006).

versions, thus reproducing and possibly publicly performing others' musical works, and even mash-ups of other songs. Coulton, like many other creators, is taking advantage of the Internet to reach new audiences without the formal backing of editors, record companies, or other intermediaries and without requiring an up-front payment.

Some noncommercial activities increasingly flirt with explicit authorization from copyright owners. Songs, commercials, and movie trailers all have authorized remixes.¹⁵⁵ The intertwining of fans with authorized production has definite implications for fair use law. For one thing, it makes less persuasive the claim that copyright owners will not license parody and other transformative uses.¹⁵⁶ In modern media culture, the transformative—merely derivative distinction is not sustainable as a descriptive account of the markets copyright owners are likely to exploit.¹⁵⁷ It only makes sense, and must be defended, as a normative judgment about how much control copyright owners should have.

If criticism and rejection by the copyright owner are not the defining features of a transformative fair use, what is? Consider the popular Television Without Pity ("TWP") website.¹⁵⁸ TWP is organized around detailed summaries—"recaps"—of popular television shows, with associated forums for fans to discuss the shows, the recaps, and related matter, including fan fiction, art, and videos. The recaps often incorporate significant portions of the dialogue and are plainly derivative works based on the source show, although they also include criticism and commentary along with their comprehensive retelling of the stories. Like fan fiction freed from the constraints of canon, TWP recaps are free to highlight what is good and what is terrible about shows. They can annotate the text, from explaining a cultural reference to identifying the other roles that bit actors have played. They can even digress about the reviewer's personal preferences. Much of this is orthogonal to the usual transformativeness analysis. Large portions of a recap are not designed to shed critical light on the original, but recaps also do not usurp the market for straightforward translations into another medium. TWP is about engagement, not analysis or replacement, though both those things could occur in particular instances.

155. See *supra* text accompanying notes 57–59; Stuart Elliott, *Going Unconventional to Market Movies*, N.Y. TIMES, Apr. 6, 2006, at c6; My Life in the Bush of Ghosts, http://bush-of-ghosts.com/remix/bush_of_ghosts.htm (last visited July 19, 2006) (David Bowie and Brian Eno's authorized fan remix site).

156. See Keller & Tushnet, *supra* note 24, at 997.

157. Thus, copyright owners are increasingly willing to tolerate fan creativity, even if they do not formally license it. This phenomenon leads to Murray's concern that fan practices are expanding only on copyright owners' sufferance. They may shut down the fans the moment it stops being profitable for them to have fans producing content. Murray, *supra* note 59, at 21. If we do not have a robust normative concept of fair use, copyright owners' earlier exploitation of fan-created works will show that a market for licensing such works exists and these works therefore fall within copyright owners' legitimate markets.

158. See Television Without Pity, <http://www.televisionwithoutpity.com> (last visited Oct. 1, 2006).

For some of the shows, such as *The West Wing* and *Buffy the Vampire Slayer*, screenplays and novelizations are commercially available. TWoP even recapped the movie *Serenity*, which was based on the failed TV show *Firefly* and which has both an authorized screenplay and an authorized novelization. Naturally, the screenplay and novelization are substantially similar to the recap. TWoP might in theory substitute for sales of these authorized auxiliary works. And, unlike individual fan productions, TWoP is a commercial enterprise, making money through ad sales and through TWoP merchandise, which almost always refers to one television show or another.¹⁵⁹

It might seem surprising that TWoP continues to exist, with a business model that is predicated on systematic creation of unauthorized derivative works. As noted above, TWoP is well known in the television industry.¹⁶⁰ Recently, characters on one fan-friendly show, *Veronica Mars*, were filmed in front of a poster advertising the made-up group “Teenage Women of Propriety” (acronym TWoP), as an in-joke. The “real” TWoP promptly responded to this free product placement by selling a Teenage Women of Propriety T-shirt.¹⁶¹ Meaning—and economic value—circulate between the show and the website. Copyright owners apparently refrain from going after TWoP because, as an independent website that both celebrates and criticizes its subjects, it makes the shows more engaging to fans. TWoP connects fans to other fans, encouraging them to spend time thinking and talking about the shows and thus increasing their commitment to the original. Official websites controlled by the show’s owners might not be able to maintain the same irreverent attitude towards their subjects; readers might not find authorized sites as credible, even if criticism were allowed; and they would not be able to take advantage of network-crossing fans.¹⁶²

Even if it is hard to fit TWoP into the formal legal category of fair use, it nonetheless deals fairly with its subjects—the recaps add significant expression, both critical and laudatory, to the original material. Copyright owners do not

159. TWoP pins and magnets, for example, feature TWoP’s Tubey television-shaped mascot, customized to fit various shows: Cigarette-Smoking Tubey for *The X-Files* (“I Went to Skyland Mountain and All I Got Was This Stupid Implant”), Idol Tubey for *American Idol* (“We Don’t Accept Mediocrity, We Produce It”), Robot Tubey for *Battlestar Galactica* (“I Am a Toaster . . . and I Have a Plan”), et cetera. See Deluxe Tubey Thingees, <http://www.glarkware.com/securestore/c188252p16349139.2.html> (last visited Feb. 22, 2006). The slogans and images are not directly taken from the shows but gain meaning from them.

160. As this article went to press, TWoP had just been purchased by Bravo, a major network whose shows are recapped on the site. See

Permission to scream “Bravo!” in an annoyingly loud voice? BRAVO!, <http://www.televisionwithoutpity.com/misc/bravo.html> (last visited Apr. 10, 2007) (“TWoP will still be TWoP—that is to say, we’ll be offering the same no-holds-barred commentary and critique we always have. Our new bosses dig what we do So, we’ll continue taking shots at Aaron Sorkin, and we’ll still be covering shows on FOX and CBS and so on.”).

161. See Teenage Women of Propriety, <http://www.glarkware.com/securestore/c188252p16749345.2.html> (last visited Feb. 22, 2006).

162. Joss Whedon’s shows, for example, were on three different networks but shared many of the same viewers.

have a strong claim to control TWoP, even though TWoP benefits commercially from fans' outpouring of freely offered creativity in its forums. Which leads to another issue: If we are concerned about creative commons, we should wonder whether TWoP is exploiting the fans, not just the copyright owners. Google, Amazon, YouTube, and other sites that aggregate individual contributions all do similar things.¹⁶³ They profit from fans' passions without owning the copyright to the underlying works that inspired the ratings, recommendations, playlists, stories, and art. People even pay some such sites to let them speak, such as blogging sites and the library catalog site LibraryThing, the latter of which lets users share book reviews. User-provided content makes the sites more attractive to other paying customers.

YouTube has begun to sign deals with large media companies, creating a blanket-type license for use in videos.¹⁶⁴ The blanket would be snatched away if a particular video were deemed offensive by the copyright owner. It is a form of almost-blanket licensing not contemplated by proponents of compulsory or voluntary mass licensing,¹⁶⁵ and one that holds real risks—as well as real benefits—for ordinary users. Music labels are willing to give up a substantial amount of authority as long as they get paid, whereas fans are willing to forego payment as long as they get to be authors.¹⁶⁶

When Google and TWoP profit from free content, low-protectionists (like me) have to date been relatively unconcerned about the commercialization of freely offered culture. Perhaps this is because the commercialization is only secondary, because Google sells ads, not blog posts. It is also nonexclusive, because Google does not prevent other ways of finding the same content and thus does not try to be the exclusive appropriator of value from that content. Perhaps large-scale aggregation is simply transformative, whether what is aggregated is commercially marketed content or fan fiction. Given the current debate over how much of what Google does can be explained by implied consent, though, we might well ask what it means that large numbers of creators apparently think it is fair for them to create unauthorized works and fair for Google to profit, however indirectly, from those unauthorized works, but not

163. Cf. Lawrence Lessig, *Creative Economies*, 2006 MICH. ST. L. REV. 33, 34–35 (discussing commercial ventures that exploit expressive works but do not depend on ownership of intellectual property rights, including used bookstores and Google).

164. See Kevin J. Delaney & Ethan Smith, *YouTube Model Is Compromise Over Copyrights*, WALL ST. J., Sept. 19, 2006, at B1.

165. Like Terry Fisher. See William Fisher, *Two Thoughts About Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 131 (Spring 2007).

166. Henry Jenkins has commented on the power disparities in this indirect negotiation: "As we confront the intersection between corporate and grassroots modes of convergence, we shouldn't be surprised that neither producers nor consumers are certain what rules should govern their interactions, yet both sides seem determined to hold the other accountable for their choices. The difference is that the fan community must negotiate from a position of relative powerlessness and must rely solely on its collective moral authority, while the corporations, for the moment, act as if they had the force of law on their side." JENKINS, *supra* note 27, at 166–67.

fair for the creators themselves to profit.¹⁶⁷ If Alice Randall were thought of as a fan of *Gone with the Wind*, we might conclude that it was wrong of her and her publisher to profit from *The Wind Done Gone*—but if she has something useful to say about *Gone with the Wind* and the Mitchell estate would never license it, why should she not be able to make money from it? It is disturbing that YouTube, under Google's leadership, is explicitly focusing on deals that will relegate individual creators to donors and will consolidate, rather than decentralize, cultural power and economic rewards.¹⁶⁸

Spreading fractional rewards to individual creators is also possible, though it too is problematic. Numerous major businesses, including Yahoo! to VH1, offer rewards for user-generated content.¹⁶⁹ A smaller but still popular website, EBaum's World, has begun offering monthly prizes up to \$1,000 for the best homemade creations. One recent winner was a trailer for the movie *Se7en*, recut with a voiceover and soundtrack that made it sound like a love story between the two lead actors.¹⁷⁰ Would Yahoo! allow an unauthorized derivative work of this sort such a prominent placement on its site? The movie's copyright owner might object, as might the owners of the rights in the musical works and sound recordings incorporated into the trailer—as to which the argument for parody is much weaker, since the songs are used to set the mood.¹⁷¹ There are also dangers of cooptation. Even assuming that copyright owners would

167. For insightful discussions, see Posting of David J. Edery to Game Tycoon, <http://www.edery.org> (Oct. 19, 2006, 02:37 PST); and Posting of Henry Jenkins to Confessions of an ACA/Fan, <http://www.henryjenkins.org> (Nov. 2, 2006, 00:00 EST). For critical takes on Google and the like, see Posting of Nick Carr to Rough Type, <http://www.roughtype.com> (Oct. 23, 2006, 00:01 EST) (“By putting the means of production into the hands of the masses but withholding from those same masses any ownership over the product of their work, Web 2.0 [companies like YouTube and MySpace] provide[] an incredibly efficient mechanism to harvest the economic value of the free labor provided by the very, very many and concentrate it into the hands of the very, very few.”); Siva Vaidhyanathan, *Me, “Person of the Year”? No Thanks*, Dec. 28, 2006, <http://www.msnbc.msn.com/id/16371425/> (“Google, for instance, only makes money because it harvests, copies, aggregates, and ranks billions of Web contributions by millions of authors who unknowingly grant Google the right to capitalize, or ‘free ride,’ on their work.”). For a defense—one that depends on the nonmonetized, but nonetheless economically measurable, benefits that MySpace's users receive from creating content—see Posting of Ed Felten to Freedom to Tinker, <http://www.freedom-to-tinker.com> (Dec. 20, 2006).

168. See Delaney & Smith, *supra* note 164 (“YouTube in the future will explore options for sharing online ad revenue with smaller, or amateur creators, [YouTube's chief executive] said. But ‘right now we’re building tools for record labels, TV networks and movie studios.’”). Even if those future plans eventually materialize, it is unlikely they will give proportionate rewards to creators of unauthorized derivative works.

169. See Richard Siklos, *Online Auteurs Hardly Need to Be Famous*, N.Y. TIMES, Mar. 13, 2006, http://www.nytimes.com/2006/03/13/business/media/13user.html?_r=1&oref=slogin&pagewanted=all. Similar issues are arising in multiplayer video games. See Herman et al., *supra* note 30, at 196 (discussing the online game *Second Life*'s commitment to allowing individual users to own and profit from content generated in the game). Can a player make and sell “Old Navy” or “Versace” outfits?

170. See *id.*; *Se7en Recut*, <http://www.ebaumsworld.com/videos/seven-recut.html> (last visited Mar. 13, 2006).

171. See Bob Mondello, *Not Coming to a Theater Near You: Satire Trailers*, NPR, Feb. 10, 2006, <http://www.npr.org/templates/story/story.php?storyId=5200607> (“The music is doing a lot of the work in these re-cuts. All the best trailer-makers play with the fact that in the right circumstances, familiarity can breed confusion. Most Hollywood films fit so neatly into genres that a music cue is all it takes to position them.”).

exercise no direct control over content (an unlikely assumption, contradicted by the YouTube deals), if fan productions became well-recognized gateways to legitimate fame and fortune, there might be a tradeoff between monetary and community-based incentives to create.¹⁷²

Copyright owners can surrender control and even allow derivative creators to profit without destroying the market-based component of creative production. In Japan, for example, the robust and profitable commercial manga (comics) sector includes robust and profitable markets for doujinshi (fan fiction).¹⁷³ Authorized and unauthorized versions complement each other, with doujinshi providing feedback, training grounds, and inspiration for large-scale publishers, even though the unauthorized versions are not segregated into noncommercial venues.

VI CONCLUSION

Hybrid creative practices that mix originality with copying and profit-seeking with volunteerism are likely to pose continuing legal puzzles even as they persist—and perhaps grow—in practical importance. Fan fiction is not small-scale. Hundreds of thousands of stories, read millions of times, make fan creations as popular as some commercial genres. That they are noncommercial makes it easy to think of them as less significant than their commercial counterparts, but this is no more true than thinking of childcare performed by parents as culturally and economically less significant than childcare performed by others for pay. And as with multiple sources of childcare, each source of creative effort affects the meaning and shape of the others.¹⁷⁴

When we evaluate copyright as a system, we need to look at its effects on both highly rewarded creators and devalued, ignored, or blocked creators, both publisher-intermediaries who invest in content and hosts of self-selected amateur content. Fair use's distinctions between commercial and noncommercial motives, transformative and nontransformative uses, valid and invalid licensing markets exist in constant tension, and a robust creative system would support them all rather than value one above the other, just as it would recognize multiple ways to respect authorship.

172. See Benkler, *supra* note 50, at 323–25 (2004) (discussing the crowding-out effects of commercialization on communities built around noncommodified production).

173. See Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155 (2002); Jennifer Granick, *Harry Potter Loves Malfoy*, Wired News, Aug. 16, 2006, <http://www.wired.com/news/columns/1,71597-1.html>.

174. Cf. VIVIANA ZELIZER, *THE PURCHASE OF INTIMACY* (2005) (discussing numerous ways in which affection and money are intertwined, and the distinctions between them nonetheless maintained).