

# WHEN THE NEEDS OF THE MANY OUTWEIGH THE NEEDS OF THE FEW<sup>1</sup>:

## HOW LOGIC CLEARLY DICTATES THE FIRST AMENDMENT’S USE AS A DEFENSE TO COPYRIGHT INFRINGEMENT CLAIMS IN FAN-MADE WORKS

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### I. INTRODUCTION

Thousands gather every year at conventions dedicated to their favorite shows, games, and comics.<sup>2</sup> Among those in attendance are a mixture of “geeks,” “nerds,” and “gamers”<sup>3</sup> alike —aficionados highly devoted to a vast array of interests and diversions.<sup>4</sup> These conventions, which typically last for several days, serve to unite those with similar passions and promote solidarity within the fandom<sup>5</sup> community.<sup>6</sup> And while attendees engage in activities

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1. See *STAR TREK II: THE WRATH OF KHAN* (Paramount Pictures 1982) (“Logic clearly dictates that the needs of the many outweigh the needs of the few.”). Spock’s famous phrase is uttered in various ways throughout the film, but most climactically in his final scene in which he sacrifices himself for the sake of the Enterprise and her crew. *Id.*

2. See *Conventions*, GEEK CITY GUIDES, <http://www.geekcityguides.com/Conventions.aspx> (last visited Jan. 3, 2015).

3. See ETHAN GILSDORF, *FANTASY FREAKS AND GAMING GEEKS: AN EPIC QUEST FOR REALITY AMONG ROLE PLAYERS, ONLINE GAMERS, AND OTHER DWELLERS OF IMAGINARY REALMS* 51 (2009). These terms are not meant to pigeonhole, but are used here as general parameters. “Geeks” and “nerds” are those who identify as someone who expresses passion for a particular subject matter or hobby. “Gamers,” who may or may not necessarily be either a geek or nerd, are dedicated players of anything from board games to video games. *Id.*; see also Kathryn Westcott, *Are “Geek” and “Nerd” Now Positive Terms?*, BBC NEWS MAG. (Nov. 15, 2012), <http://www.bbc.com/news/magazine-20325517>.

4. See GILSDORF, *supra* note 3.

5. See *infra* Part II(A). Fandom is, at its core, a sense of community in which those of like-minded passions form a collective around a single object of obsession. *Id.* According to the *Oxford Dictionary*, fandom is classified as “the fans of a particular person, team, fictional series, etc. regarded collectively as a community or subculture.” OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/us/definition/english/fandom> (last visited Feb. 26, 2015).

6. See *Conventions*, *supra* note 2. See generally Paul Mullins, *Performing Fan Culture: The Material Experience of Fandom and Conventions*, *ARCHAEOLOGY & MATERIAL CULTURE* (Jul. 4,

that uniquely express their devotion to a particular genre, none expect to have their activities suppressed with threats of legal action. Yet this was exactly the case for one man in Atlanta, Georgia, whose attempt to create an unprecedented costume design aroused the ire of one copyright holder.<sup>7</sup>

Harrison Krix is a prop-builder and avid costume designer.<sup>8</sup> Under the moniker of Volpin Props, Krix rose to prominence within the prop-building community for his skill in creating replicas of weapons and armor from video game titles.<sup>9</sup> In 2013, he attended the annual Dragon Con convention, hosted in the Atlanta Marriott Marquis.<sup>10</sup> Initially organized in 1987, Dragon Con, a multi-genre convention, schedules full-day events and programs for more than 60,000 attendees and fans of science fiction and pop-culture.<sup>11</sup> In creating a costume for the event, Krix designed fabric that appeared identical to the patterned rug in the hotel.<sup>12</sup> Complete with a matching helmet and prop gun, Krix's bizarre, multi-colored costume was meant to resemble the unique design of the *Marriott's* rug, effectively camouflaging him while lying parallel to the floor.<sup>13</sup>

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2013), <https://paulmullins.wordpress.com/2013/07/04/performing-fan-culture-the-material-experience-of-fandom-and-conventions/>.

7. See Timothy Geigner, *Cosplayer Sent Cease & Desist by Carpet Company for Hotel Carpet Camouflage*, TECHDIRT (Sept. 23, 2013), <https://www.techdirt.com/articles/20130923/04074424621/cosplayer-sued-carpet-company-because-lawyers.shtml>; Cory Doctorow, *DragonCon Cosplayers Who Dressed Up As Marriott Carpet Get a Cease-and-Desist for their Fabric Offering*, BOINGBOING (Sept. 21, 2013), <http://boingboing.net/2013/09/21/dragoncon-cosplayers-who-dress.html>.

8. Geigner, *supra* note 7; see Norman Chan, *Maker Profile: Catching Up with Volpin Props' Harrison Krix*, TESTED (Dec. 11, 2012), <http://www.tested.com/art/makers/451576-maker-profile-catching-volpin-props-harrison-krix/>.

9. See Chan, *supra* note 8; *Cosplay, Copyright, and Carpet*, NERDS IN COURT (Sept. 24, 2013), <https://nerdsincourt.wordpress.com/2013/09/24/cosplay-copyright-and-carpet-analysis/> [hereinafter NERDS IN COURT]. See generally VOLPIN PROPS, <http://www.volpinprops.com/aboutvolpinprops/> (last visited Mar. 1, 2015).

10. See Gavia Baker-Whitelaw, *Carpet Designer Threatens Cosplayers With Legal Action*, DAILY DOT (Sept. 20, 2013), <http://www.dailydot.com/fandom/marriott-hotel-carpet-cosplay-legal-action/>; see also NERDS IN COURT, *supra* note 9; Geigner, *supra* note 7; Doctorow, *supra* note 7.

11. *History*, DRAGON CON, <http://www.dragoncon.org/?q=history> (last visited Mar. 1, 2015); see *Dragon Con 2014 Draws Record Attendance*, EXHIBIT CITY NEWS (Sept. 3, 2014), <http://www.exhibitcitynews.com/dragon-con-2014-draws-record-attendance/>; *Fall Festivals*, ATLANTA.NET, <http://www.atlanta.net/events/festivals/fall/> (last visited Mar. 1, 2015).

12. Mark C. Palmer, *Cosplayers Face Copyright Legal Action . . . Over Marriott Carpet?*, TRAVELBLAWG (Sept. 22, 2013), <http://travelblawg.boardingarea.com/cosplayers-face-copyright-over-marriott-carpet/>; Geigner, *supra* note 7; NERDS IN COURT, *supra* note 9.

13. Luke Plunkett, *Cosplayer Cops Legal Threat From . . . Carpet Company*, KOTAKU (Sept. 23, 2013), <http://www.kotaku.com.au/2013/09/cosplayer-cops-legal-threat-from-carpet-company/>; *Dragon Con: Prop Designer Who Made Outfits to Blend in with Venue's Carpet Given Cease and Desist Order*, CAPITAL BAY (Sept. 22, 2013), <http://www.capitalbay.com/latest-news/1/386249-dragon-con-prop-designer-who-made-outfits-to-blend-in-with-venue-s-carpet-given-cease-and->



**Fig. 1 Krix (and a Friend) in His Homemade Camouflage Costume<sup>14</sup>**

His design proved to be immensely popular with fellow convention-goers, so much so that he decided to make the fabric pattern available through an online retailer.<sup>15</sup> Those who wanted to design their own camouflage outfit could easily buy the pattern directly from the website.<sup>16</sup> However, his actions caught the attention of the carpet's original designer, Couristan, Inc.<sup>17</sup>

As part of its multi-million dollar renovation of Atlanta's Marriott Marquis, design company tvsdesign selected Couristan to custom-design carpeting for approximately 18,000 square yards of flooring throughout the hotel.<sup>18</sup> Determining that the pattern available online was an infringing, commercial use of its carpet design, Couristan forwarded a cease and desist letter to both the online retailer and Krix.<sup>19</sup> The retailer immediately removed the design from its website, while Krix was left baffled at receiving a cease

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desist-order.html; *see* Palmer, *supra* note 12; Geigner, *supra* note 7; NERDS IN COURT, *supra* note 9.

14. Geigner, *supra* note 7.

15. SPOONFLOWER, <http://www.spoonflower.com/welcome> (last visited Mar. 1, 2015). Spoonflower is a website that allows its users to create and share custom fabric designs online. *Id.*; *see* Victoria McNally, *Cosplayers Finally Facing Copyright Legal Action . . . Except It's Over a Carpet*, MARY SUE (Sept. 20, 2013), <http://www.themarysue.com/cosplay-carpet/>; Amy Ratcliffe, *Dragon Con Carpet Cosplayers Get a Cease and Desist for Selling Patterned Fabric*, FASHIONABLY GEEK (Sept. 23, 2013), <http://fashionablygeek.com/costumes/dragon-con-carpet-cosplayers-get-a-cease-and-desist-for-selling-patterned-fabric/>.

16. *See* Palmer, *supra* note 12; Geigner, *supra* note 7; NERDS IN COURT, *supra* note 9.

17. Matthew David Brozik, *Covering Your Assets*, LIKELIHOOD OF CONFUSION (Sept. 24, 2013), <http://www.likelihoodofconfusion.com/covering-your-assets/>; Geigner, *supra* note 7; Doctorow, *supra* note 7.

18. *Prestige Installations, Project: The Atlanta Marriott Marquis, Atlanta, Georgia*, COURISTAN, <http://www.couristan.com/Hospitality-Concepts/The-Atlanta-Marriott-Marquis-Hotel/cms.aspx/Guid/1c40bf05-21fa-4814-891a-2a11651c6ba6/EntryNumber/5> (last visited Jan. 3, 2014).

19. Ratcliffe, *supra* note 15; *see* Baker-Whitelaw, *supra* note 10.

and desist order from, of all places, a carpet company.<sup>20</sup> Having commercially recreated replicas of video game items over the course of his career, he had not once been ordered to cease production.<sup>21</sup> Ultimately, Krix conceded to Couristan's claims and did not pursue the matter further.<sup>22</sup>

As the copyright holder, Couristan was well-within its rights under federal law to protect its intellectual property. While clothing is considered a "useful article," and thus lacking copyright protection,<sup>23</sup> fabric designs using a particular configuration of shapes and styles are "writings," and thus worthy of protection.<sup>24</sup> But although Krix's pattern was purposefully designed to mimic the carpet pattern, it was intended for comedic effect.<sup>25</sup> Under "built-in First Amendment accommodations," the public is, in theory, given "considerable latitude" for parodies.<sup>26</sup> But would fair use have protected Krix in this situation? Unfortunately, the question is already moot since the issue was not litigated.<sup>27</sup>

Regrettably, this incident exposes the chilling effect that follows from the enforcement of exclusive rights provided to copyright holders. Such an effect threatens the quintessential purpose of the First Amendment. Copyright law confers a "limited monopoly" on copyright holders, enabling censorship on expression and intolerable restraints on free speech.<sup>28</sup> While copyright promotes the advancement of literary and artistic works through the endowment of exclusive rights, this interferes with the most important objective of the First Amendment in allowing for unconstrained speech to promote individual autonomy.<sup>29</sup>

To illustrate further, this paper will examine the disconnect between copyright law and the First Amendment, specifically focusing on the impediment facing the fandom community. Section II will introduce fandom and its growing importance in society. Additionally, this section will explore

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20. See Palmer, *supra* note 12; NERDS IN COURT, *supra* note 9.

21. See McNally, *supra* note 15; Palmer, *supra* note 12; NERDS IN COURT, *supra* note 9.

22. See Palmer, *supra* note 12.

23. 17 U.S.C. § 101 (2012); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995).

24. U.S. CONST. art. I, § 8; *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 762-63 (2d Cir. 1991).

25. See Geiger, *supra* note 7; NERDS IN COURT, *supra* note 9.

26. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003); see, e.g., *Campbell v. Acuff Rose Music, Inc.*, 10 U.S. 569 (1994).

27. See Palmer, *supra* note 12.

28. See Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 844 (2010); *Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 882 (S.D. Fla. 1978); see also Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1188 (2007).

29. See Bauer, *supra* note 28, at 843; see also Garfield, *supra* note 28, at 1170.

the differences surrounding copyright and the First Amendment. Its ultimate conclusion will argue that fair use is not an adequate defense for protecting artists within the fandom community. Inherent protections within copyright law are not always sufficient safeguards. Section III will analyze this theory by exploring fan-made works, and explain how the need for a stronger defense is necessary in order to protect the fans and allow for the advancement of even more artistic creation. Use of the First Amendment as a defense will not only defend against a chilling effect amongst members of the fandom community, but will also promote the public interest in allowing fans a forum in which to express themselves. This section will conclude with a proposed solution that may offer both fans and copyright holders a way to resolve this tension.

## II. BACKGROUND

Under copyright law, rights holders are provided with the exclusive privilege to prepare and distribute derivative works based on their original creations.<sup>30</sup> However, most fan-made works, by their very nature, adopt elements from the original source material to create new products.<sup>31</sup> While fair use may protect some fan creations from infringement allegations, these proceedings are handled on a sporadic, and oftentimes unreliable, case-by-case basis throughout the court system.<sup>32</sup> Even if handled correctly, fan-made works are inherent venerations of the original source; they rarely parody or criticize the source held in such high esteem.<sup>33</sup> Nor are these creations highly transformative, leaving fans without recourse should a suit take place.<sup>34</sup>

Copyright law, as it stands today, is in violation of First Amendment protections.<sup>35</sup> It is used regularly by rights holders to not only suppress speech, but to create a chilling effect on public expression.<sup>36</sup> The First Amendment imposes, in theory, limits upon copyright owners' claims of exclusivity in intellectual property, going so far as to strip Congress of its

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30. 17 U.S.C. §§ 106(2), 106(3) (2012); Jonathan Bailey, *The Messy World of Fan Art and Copyright*, PLAGIARISMTODAY (May 13, 2010), <https://www.plagiarismtoday.com/2010/05/13/the-messy-world-of-fan-art-and-copyright/>.

31. Bailey, *supra* note 30; see Lauren Davis, *Are Fan Fiction and Fan Art Legal?*, IO9 (Aug. 12, 2012), <http://io9.com/5933976/are-fan-fiction-and-fan-art-legal>.

32. See *infra* Part II(B)(3); see also Bailey, *supra* note 30; Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 20-21, 21 n.76 (2001).

33. Bailey, *supra* note 30.

34. *Id.*

35. Mike Masnick, *Copyright and the First Amendment*, TECHDIRT (Apr. 10, 2009), <https://www.techdirt.com/articles/20090406/1527374409.shtml>.

36. See generally DAVID LANGE & JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009).

power to restrict free expression for that of property rights.<sup>37</sup> Although the constitutional intellectual property clause is not entirely repealed by the First Amendment's limitations, copyright law cannot authorize the private commodification of the public domain.<sup>38</sup>

A. *The Thing About Changing the World . . . Once You Do It, the World's All Different*<sup>39</sup>: Introduction to Fandom.

Most individuals are “fans” of something, whether it be of a television program, musical composition, or even a particular artist.<sup>40</sup> Yet fandom is more than merely being a fan of something; it represents a way of life, a collective effort by like-minded individuals to form communities dedicated to the analytical interpretation of popular mass media.<sup>41</sup> The fan culture is sustained through active participation in creating and circulating new content.<sup>42</sup> As a vehicle for the audience's own activities or performances, fandom is often used as either a “pleasurable subversion”<sup>43</sup> or as the

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37. See *id.* at 277; see U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”). But see Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1196–1200 (1970) (stating that there are only a few possible situations in which free speech considerations would trump copyright interests).

38. See generally LANGE & POWELL, *supra* note 36.

39. Joss Whedon, *The Long Way Home: Part One*, BUFFY THE VAMPIRE SLAYER, VOLUME ONE: THE LONG WAY HOME 1 (Scott Allie ed., Dark Horse Comics 2007); see Marni Stanley, *Buffy's Season 8, Image and Text: Superhero Self-Fashioning*, in READING JOSS WHEDON 253 (Rhonda Wilcox, Tanya R. Cochran, Cynthia Masson & David Lavery eds., 2014). The eponymous slayer reflects on her team's defiance of tradition by sharing the power of one girl in every generation to all who might have the potential to become slayers. See Nadine Farghaly, *Patriarchy Strikes Back: Power and Perception in Buffy the Vampire Slayer*, in BUFFY CONQUERS THE ACADEMY: CONFERENCE PAPERS FROM THE 2009/2010 POPULAR CULTURE/ AMERICAN CULTURE ASSOCIATIONS 29 (U. Melissa Anyiwo & Karoline Szatek-Tudor eds., 2013).

40. See N.Y. UNIV., FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD 1 (Jonathan Gray, Cornel Sandvoss & C. Lee Harrington eds., 2007).

41. See *id.* at 2; JOHN FISKE, UNDERSTANDING POP CULTURE 59, 112, 116 (1989).

42. See Xiaoli, *Fan Culture: Definition and Genres*, GRASSROOTS AND FAN CULTURE (Feb. 10, 2010), <http://youtubecommm.wordpress.com/2010/02/12/fan-culture/>; HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 285 (2006); accord Cinda Gillilan, *War of the Worlds: Richard Chaves, Paul Ironhorse, and the Female Fan Community*, in THEORIZING FANDOM 184 (Cheryl Harris & Alison Alexander eds., 1998) (“Fandom is information-rich: Participants research and dissect aspects of the narrative, the characters, and the performers, and incorporate what they learn into their stories, essays, discussions, presentations, videos, games, art, and so on.”).

43. See Cornel Sandvoss, *The Death of the Reader?: Literary Theory and the Study of Texts in Popular Culture*, in FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD 41 (Jonathan Gray, Cornel Sandvoss & C. Lee Harrington eds., 2007); KATHERINE LARSEN & LYNN S. ZUBERNIS, FANGASM: SUPERNATURAL FANGIRLS 10 (2013) (“Fans become psychologically

concourse for community discussion.<sup>44</sup> And while their experiences may differ, all participants enter into fandom in search of acceptance—to ultimately find a place where they belong.<sup>45</sup>

Fandom, in its traditional sense, originally applied to athletic sports and theatrical arts.<sup>46</sup> It wasn't until its adoption by science fiction enthusiasts that it developed into the familiar composition seen today.<sup>47</sup> The first media fandom emerged in 1966, although there is a dispute over which television show was at its centerpiece.<sup>48</sup> Regardless, those who built the early media fandoms were educated, well read, and scientifically literate.<sup>49</sup> Initial fans not only participated in critical discussions, but also devised creative responses, thus enhancing their overall experience with these shows.<sup>50</sup> As the concept of fandom began to grow, the influence of the collective mindset began to develop as well.<sup>51</sup> For instance, the original *Star Trek* television series was cancelled after seventy-nine episodes in 1969.<sup>52</sup> Avid fans then began a letter-writing campaign to the network, NBC, requesting the show's return.<sup>53</sup> After being pressed by these insistent fans, the network decided to air the original

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absorbed with a celebrity as a way of establishing their own identity and finding emotional fulfillment.”).

44. See generally FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD, *supra* note 40; LARSEN & ZUBERNIS, *supra* note 43, at 14 (“Fandom offers the possibility of laying aside the whispering—or worse, the complete silence—that is usually the burden of the closet fan. It offers up community, support, friendship, reassurance, and fun.”).

45. See LARSEN & ZUBERNIS, *supra* note 43, at 15.

46. See Francesca Coppa, *A Brief History of Media Fandom*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 42 (Karen Hellekson & Kristina Busse eds., 2006); HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 12 (2013).

47. See Coppa, *supra* note 46.

48. See *id.* at 43-44. According to Coppa, conventional wisdom has it that the first media fandom centered around *Star Trek* (1966-1969). However, many science fiction fans who enjoyed *Star Trek* were previously fans of another series: *The Man from U.N.C.L.E.* (1964-1968). *Id.*; See also Anissa M. Graham, *A New Kind of Pandering: Supernatural and the World of Fanfiction*, in FAN CULTURE: ESSAYS ON PARTICIPATORY FANDOM IN THE 21ST CENTURY 132 (Kristin M. Barton & Jonathan Malcolm Lampley eds., 2014).

49. See Coppa, *supra* note 46, at 45.

50. See *id.* at 45. Early incarnations of expression came in the form of “fanzines.” These magazines were dedicated to popular shows and featured works of art created by the fans, such as “poems, songs, stories, drawings, and teleplays.” *Id.* at 42, 45; accord MICHAEL ASHLEY, GATEWAYS TO FOREVER: THE STORY OF SCIENCE FICTION MAGAZINES FROM 1970-1980, at 356-59 (2007).

51. See Elizabeth Thomas, *Live Long and Prosper: How Fans Made Star Trek a Cultural Phenomenon*, in FAN PHENOMENA: STAR TREK 11 (Bruce E. Drushel ed., 2013).

52. *Id.*; see STEVE KELLEY, STAR TREK: THE COLLECTIBLES 10 (2008); MATTHEW W. RAGAS & BOLIVAR J. BUENO, THE POWER OF CULT BRANDING: HOW 9 MAGNETIC BRANDS TURNED CUSTOMERS INTO LOYAL FOLLOWERS (AND YOURS CAN, TOO!) 34 (2002).

53. See Thomas, *supra* note 51; KELLEY, *supra* note 52.

episodes by way of syndication.<sup>54</sup> Through their efforts, fans were able to harness interest in the show and keep the characters alive, “even when there was no starship *Enterprise* making the leap to light speed.”<sup>55</sup>

The late 1990s saw the rise of online technologies, which provided greater access into media fandom.<sup>56</sup> The use of the Internet allowed fans to communicate with one another through “virtual communities.”<sup>57</sup> These communities provided an outlet for creativity, allowing fans the opportunity to directly participate in fandom activities.<sup>58</sup> For example, fans of the “Buffyverse” (pertaining to the television series’ *Buffy the Vampire Slayer* and *Angel: The Series*) would “discuss, digest, and deconstruct each episode” on these virtual communities after the shows originally aired.<sup>59</sup> Still today, fans connect online to read *Buffy* and *Angel*-centric stories (fan fiction), attend conventions, and purchase the series’ continuation in comic book form.<sup>60</sup> It is through the energy and engagement of fans, supported by the growth of the Internet, that fandom communities are maintained.<sup>61</sup>

In the past few decades, fandom has grown exponentially.<sup>62</sup> Due to the economic and cultural impact of fan culture, media companies are taking notice and adapting to consumers’ interests.<sup>63</sup> Gone are the ideal consumers who simply watched television and bought products without saying a word.<sup>64</sup> Today’s consumer builds up the reputation of the show and helps to promote the brand.<sup>65</sup> Media companies now generate new content and form

54. See Thomas, *supra* note 51; Lincoln Geraghty, *The Star Trek Franchise*, in THE CULT TV BOOK 131 (Stacey Abbott ed., 2010).

55. See Thomas, *supra* note 51, at 12.

56. See Coppa, *supra* note 46, at 54.

57. See Mary Kirby-Diaz, *Buffy, Angel, and the Creation of Virtual Communities*, in BUFFY AND ANGEL CONQUER THE INTERNET: ESSAYS ON ONLINE FANDOM 18 (2009). Virtual communities are real-time chatrooms, also known as fan boards or fan forums. *Id.*

58. See *id.* at 22; see, e.g., Antonella Mascio, *Asynchronous Text-Based Community: Proposals for the Analysis*, in VIRTUAL COMMUNITY PARTICIPATION AND MOTIVATION: CROSS-DISCIPLINARY THEORIES 25 (Honglei Li ed., 2012) (describing how Italian fans of *Gossip Girl* contribute to the show’s growing success). According to Mascio, “[i]n the on-line spaces dedicated to it . . . users discuss plots, the characters’ development, their respective relations and lifestyles.” *Id.*

59. Kirby-Diaz, *supra* note 57, at 20.

60. *Id.* at 22; see also ELANA LEVINE & LISA PARKS, UNDEAD TV: ESSAYS ON BUFFY THE VAMPIRE SLAYER 10 (2007).

61. See Kirby-Diaz, *supra* note 57, at 23.

62. See generally Henry Jenkins, *Afterword to FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD* (Jonathan Gray, Cornel Sandvoss & C. Lee Harrington eds., 2007).

63. See *id.*; JENKINS, *supra* note 42, at 73.

64. Jenkins, *supra* note 62; JENKINS, *supra* note 42, at 73.

65. Jenkins, *supra* note 62; STEVEN VAN BELLEGHEM, THE CONVERSATION MANAGER: THE POWER OF THE MODERN CONSUMER, THE END OF THE TRADITIONAL ADVERTISER 102-03 (2010).

relationships with their consumers in order to better sell their product.<sup>66</sup> The growth of fandom has led to a new shift in power where fans can effectively alter the playing field through the integration of shared agendas and interests.<sup>67</sup> The following section will introduce the four main areas typically associated with fandom activities, providing a landscape of the present culture and an insight into the creativity and ingenuity of those devoted to a shared, common interest.

## 1. Cosplay

Cosplay, short for “costume play,” is a type of performance art in which participants create and wear elaborate costumes in order to adopt the appearance of fictional characters.<sup>68</sup> Although initially originating with the youth of Japan’s “Harajuku”<sup>69</sup> subculture, cosplay is today considered a worldwide phenomenon.<sup>70</sup> In recent years, cosplay has become one of the most popular activities at conventions,<sup>71</sup> with individuals often competing in contests judging craftsmanship and performance.<sup>72</sup> Interestingly, the

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66. VAN BELLEGHEM, *supra* note 65.

67. Jenkins, *supra* note 62. Fans can come together to rally in support of a television show on the brink of cancellation. But, fans also have the power to turn against those media companies that threaten to damage their “shared investment of the property.” *Id.*; see also Jennifer Dondero, *Dark Hero Rising: How Online Batman Fandom Helped Create a Cultural Archetype*, in FAN PHENOMENA: BATMAN 32 (Liam Burke ed., 2013) (“For a fictional character to become a permanent archetypal fixture in culture, you need more than canon material and authorial intent about that character. You need fans, and you need those fans to celebrate and spread the ideas they love about their character until these ideas seep into our cultural consciousness.”).

68. See Kane Anderson, *Becoming Batman: Cosplay, Performance, and Ludic Transformation at Comic-Con*, in PLAY, PERFORMANCE, AND IDENTITY: HOW INSTITUTIONS STRUCTURE LUDIC SPACES 105, 105-06 (Matt Omasta & Drew Chappell eds., 2015); see also PARKER WADE SMITH, GETTING STARTED WITH COSPLAY: A SIMPLE GUIDE TO CREATE YOUR OWN ARMOR 1 (2014).

69. LARISSA HJORTH, GAMES AND GAMING: AN INTRODUCTION TO NEW MEDIA 80 (2011); see also Anne Cooper-Chen, CARTOON CULTURES 69 (2010). Harajuku, a design district in Japan, has over the years become inextricably linked with youthful culture. Teens especially would flock to the district to get a glimpse of the latest fashion trends from stylists based in the area. Beginning in the late 1990s, Japan’s youth, in seeking a new identity counter to those dictated by social norms, adopted a new trend by pairing traditional Japanese outfits with designer pieces and secondhand clothing. See TIFFANY GODOY, STYLE DEFICIT DISORDER: HARAJUKU STREET FASHION-TOKYO 10-13 (2007); MARI BOLTE, HARAJUKU STYLE: FUN FASHIONS YOU CAN SKETCH 3 (2013).

70. See HJORTH, *supra* note 69.

71. See Kristi Brownfield, *Cosplay and Fandom*, in ENCYCLOPEDIA OF SOCIAL DEVIANCE 148, 149-50 (Craig J. Forsyth & Heath Copes eds., 2014). Cosplay has grown in popularity at conventions. Two of the world’s largest conventions (the *San Diego Comic-Con* and the *World Cosplay Summit* in Nagoya, Japan) host venues specifically designated for cosplay. *Id.* at 149.

72. Brownfield, *supra* note 71, at 149; Purple Duckie Cosplay, *What is Cosplay?*, COSPLAY TUTORIAL (Aug. 10, 2014), [http://cosplaytutorial.com/guides/cosplay\\_whatish.php](http://cosplaytutorial.com/guides/cosplay_whatish.php).

costumes themselves run the gamut of intensity levels.<sup>73</sup> Some designs are intricately sewn together, creating detailed replicas of the source material.<sup>74</sup> Others are more causal, evoking the general sense of the character while lacking the same attention to detail.<sup>75</sup> Yet regardless of skill, creating these costumes is a considerable testament to the love and devotion expressed by cosplayers for their fandom.<sup>76</sup>



**Fig. 2: Examples of Cosplay in the *Street Fighter*, *Batman*, and *Pokémon* Fandoms<sup>77</sup>**

The concept of cosplay extends far beyond that of mere costume making.<sup>78</sup> Cosplay is a social activity, where fans seek to discard their usual, mundane lives for those of larger-than-life personas.<sup>79</sup> For some, the art of

73. See Melia Robinson, *An Introduction Into the Wild World of Cosplay*, BUS. INSIDER (Oct. 13, 2013), <http://www.businessinsider.com/what-is-cosplay-2013-10>.

74. Brownfield, *supra* note 71, at 149; see Jeanette Atkinson, *Engagement and Performance: Created Identities in Steampunk, Cosplay and Re-Enactment*, in *THE CULTURAL MOMENT IN TOURISM* 119 (Laurajane Smith, Emma Vaterton & Steve Watson eds., 2012).

75. Brownfield, *supra* note 71, at 149.

76. See Melissa de Zwart, *Cosplay, Creativity and Immaterial Labours of Love*, in *AMATEUR MEDIA: SOCIAL, CULTURAL AND LEGAL PERSPECTIVES* 173 (Dan Hunter ed., 2013).

77. Pixel Pete, *39 Stunning Costumed Cosplay Girls*, SNAPPY PIXELS (Jul. 24, 2013), <http://www.snappypixels.com/interesting/39-stunning-costumed-cosplay-girls/>; Alex Mangulabnan, *Harley's Joker*, COSPLAY CLOSET (Aug. 15, 2012), <http://students.expression.edu/beardsandbowties/2012/08/15/harleys-joker/>; Eric Kwun, *Eye Candy: Hands Down, The Greatest Team Rocket Cosplay of All Time*, IGEEKTROOPER (Mar. 25, 2011), <http://www.igeeektrooper.com/2011/03/team-rocket-cosplay/#more-4620>.

78. See Molly McIsaac, *What Is Cosplay and Why Do People Do It?*, IFANBOY (Dec. 6, 2012), <http://ifanboy.com/articles/what-is-cosplay-and-why-do-people-do-it/>.

79. See Atkinson, *supra* note 74; Anderson, *supra* note 68.

cosplay can even transcend reality.<sup>80</sup> But why do some fans feel the need to spend hours (and hundreds of dollars) to look and act like someone else?<sup>81</sup> For many, it's love for and appreciation of the characters portrayed in the media.<sup>82</sup> For others, it is the attention received at conventions and positive reactions from their peers.<sup>83</sup> According to Jonathan DeRosa, when a fan dresses up in these types of outfits (*Star Wars* ensembles in particular), they are making the statement, "This is who I am[;] This world is a part of me."<sup>84</sup> Their apparel expresses to others just how much this fandom phenomenon changed their lives.<sup>85</sup>

## 2. Fan Art

Fan art is the visual depiction of characters or scenes based upon pre-existing, original sources.<sup>86</sup> As with cosplay, the level of skill varies, from quick pencil sketches to stunning illustrations.<sup>87</sup> Additionally, such works can take various forms, from drawings and paintings to photography and digital art.<sup>88</sup> And while fan art remains a popular activity within many fandom communities, there is a divergence of opinion as to its overall artistic

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80. See Randy Constan, *The Home Page of Peter Pan*, PIXYLAND, <http://www.pixyland.org/peterpan/> (last visited Sep. 2, 2015). Constan gained notoriety as a Peter Pan impersonator after posting his cosplay pictures on his personal website.

81. See McIsaac, *supra* note 78; Alex Abad-Santos, *Cosplay: Why People Dress Up Like Comic Book Characters*, VOX (Jul. 10, 2015), <http://www.vox.com/2014/7/23/5916509/cosplay-explained>.

82. See McIsaac, *supra* note 78; see also Candace Lowry, *28 Heartwarming Reasons Why Cosplayers Choose Their Characters*, BUZZFEED (Jun. 9, 2014), <http://www.buzzfeed.com/candacelowry/heartwarming-reasons-cosplayers-choose-their-characters#.bp8zB1pN6G>.

83. See McIsaac, *supra* note 78.

84. Jonathan DeRosa, *Fashion From a Galaxy Far, Far Away*, in *FAN PHENOMENA: STAR WARS* 20, 26 (Mike Elovaara ed., 2013).

85. *Id.*; see also Molly McIsaac, *Cosplay Saved My Life . . . Or At Least My Sanity*, IFANBOY (Apr. 18, 2013), <http://ifanboy.com/articles/cosplay-saved-my-life-or-at-least-my-sanity/>.

86. BARBARA J. GUZZETTI, KATE F. ELLIOTT & DIANA WELSCH, *DIY MEDIA IN THE CLASSROOM: NEW LITERACIES ACROSS CONTENT AREAS* 61 (2010); see *What Does deviantART Consider "Fan Art" to Be?*, DEVIANTART, <http://help.deviantart.com/572/> (last visited Sep. 2, 2015).

87. GUZZETTI, ELLIOTT & WELSCH, *supra* note 86. See generally Ramón Ignacio Bunge, *Use a Tablet to Create Stunning Comic Book Fan Art Illustrations*, TUTSPLUS (Mar. 24, 2010), <http://design.tutsplus.com/tutorials/use-a-tablet-to-create-stunning-comic-book-fan-art-illustrations--psd-6674> (explaining the process of taking an ordinary pencil sketch and transforming it into a digital illustration).

88. GUZZETTI, ELLIOTT & WELSCH, *supra* note 86, at 62; see COLIN LANKSHEAR & MICHELE KNOBEL, *NEW LITERACIES: EVERYDAY PRACTICES AND SOCIAL LEARNING* 101 (2011); Gareth Schott & Andrew Burn, *Fan-Art as a Function of Agency in Oddworld Fan-Culture*, in *VIDEOGAMES AND ART* 238, 246-47 (Andy Clarke & Grethe Mitchell eds., 2007).

value and merit.<sup>89</sup> There are those that see fan art as merely a copy of an original model.<sup>90</sup> For instance, many art teachers discourage students from sharing their fan art within the classroom, choosing instead to focus on copying styles rather than compositions.<sup>91</sup> Following that logic, a student may mimic the impressionist style of Monet or Renoir, yet is forbidden to do so using the image of Princess Leia. In contrast, many fan conventions offer freelance artists an area where they can display their portfolios and sell commissioned pieces directly to fans.<sup>92</sup> These pieces are most often unlicensed depictions of popular superheroes and pop culture figures.<sup>93</sup> And yet despite the unofficial status, these works are among the most popular merchandise sold at fan conventions.<sup>94</sup>



**Fig. 3: Examples of Fan Art in the *Doctor Who*, *Legend of Zelda*, and *Star Wars* Fandoms<sup>95</sup>**

89. Compare Marjorie Cohee Manifold, *When Wands Become Brushes: Painting the Magical Real*, in PHOENIX RISING: COLLECTED PAPERS ON HARRY POTTER 520, 527-28 (Sharon K. Goetz ed., 2008), with Christy Gray, *Originals and Copies: The Fans of Philip K. Dick, Blade Runner and K.W. Jeter*, in THE BLADE RUNNER EXPERIENCE: THE LEGACY OF A SCIENCE FICTION CLASSIC 142, 143-44 (Will Brooker ed., 2005) (quoting JENKINS, *supra* note 46, at 248).

90. See Manifold, *supra* note 89.

91. See *id.*; see also Clara Lieu, *Ask the Art Professor: What Should You Include in an Art Portfolio for Art School or College?*, ART PROFESSOR (Mar. 19, 2013), <https://claralieu.wordpress.com/2013/03/19/ask-the-art-professor-what-should-you-include-in-an-art-portfolio-for-art-school-or-college/>.

92. Ross A. Hersemann, *Fan Art at Fan Conventions: Just Your Friendly Neighborhood Copyright Infringement*, LOADING LAW (May 21, 2014), <http://loadinglaw.com/fan-art-at-fan-conventions-just-your-friendly-neighborhood-copyright-infringement/>.

93. See *id.*; *Artist Categories*, COMICARTCOMMISSIONS, <http://comicartcommissions.com/#> (last visited Sep. 3, 2015).

94. See Hersemann, *supra* note 92; Adron Buske, *Protecting Artist Alley*, ROCKETBOT (Mar. 9, 2012), <http://rocketbot.com/user/adronbuske/blog/2012-03-09/protecting-artist-alley>.

95. Tanner Greenring, *The 30 Very Best Pieces of Fan Art of 2013*, BUZZFEED (Dec. 8, 2013), <http://www.buzzfeed.com/awesomer/the-best-pieces-of-fan-art-of-2013>.

Fan art was and, in some respect, continues to play an integral role within the fandom community.<sup>96</sup> For example, fans of J.R.R. Tolkien's *The Lord of the Rings* series create their own artistic works based upon their unique interpretation of the characters and geography of the land of Middle-earth.<sup>97</sup> It has become an expected activity at Tolkien-related conventions for artists to sell their works to fellow fans in attendance.<sup>98</sup> Likewise, for those in the *Harry Potter* fandom, participating in the creation of fan art can lead to a newfound appreciation of the original text.<sup>99</sup> The characters and scenery envisioned by author J.K. Rowling were fully realized within the novels' pages, allowing artists to capture the essence of their beloved magical world down to the smallest of details.<sup>100</sup> Ultimately, the creation of visual artwork strengthens fandom's communal bond, providing an outlet for artists to collaborate with others and develop their techniques among those who share in a like-minded passion.<sup>101</sup>

### 3. Fan Videos and Fan Films

Fan videos and films are unauthorized audiovisual works based upon characters and situations originally depicted in pre-existing sources.<sup>102</sup> Fan videos (or "fan vids") are created by individuals who take scenes from their favorite movies or television shows and edit the videos, together with the soundtrack of a popular musical composition, in order to tell a unique story.<sup>103</sup> Using a complex montage of scenes from the original source, creators (or "vidders") juxtapose dramatic imagery with the soundtrack's lyrics, decontextualized from the primary narrative.<sup>104</sup>

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96. See JENKINS, *supra* note 46, at 248; Kristi Lee, *Fan Art*, in J.R.R. TOLKIEN ENCYCLOPEDIA: SCHOLARSHIP AND CRITICAL ASSESSMENT 189, 189-90 (Michael D.C. Drout ed., 2007).

97. See Lee, *supra* note 96, at 189; *Fan Art*, ONE RING, <http://www.theonering.com/galleries/fan-art/fan-art> (last visited Sep. 10, 2015).

98. See Lee, *supra* note 96, at 190.

99. See ERIN ANNE PYNE, *THE ULTIMATE GUIDE TO THE HARRY POTTER FANDOM* 132 (2010).

100. See *id.*; see also JULIA ECCLESHARE, *GUIDE TO THE HARRY POTTER NOVELS* 16 (2002).

101. GARRY CRAWFORD, *VIDEO GAMERS* 132 (2012).

102. See CLIVE YOUNG, *HOMEMADE HOLLYWOOD: FANS BEHIND THE CAMERA* 4 (2008); Marc Joly-Corcoran & Sarah Ludlow, *Fans, Fics & Films . . . 'Thank the Maker(s)!'* in *FAN PHENOMENA: STAR WARS* 28, 32 (Mika Elovaara ed., 2013).

103. See Logan Hill, *The Vidder: Luminosity Upgrades Fan Video*, NEW YORK (Nov. 12, 2007), <http://nymag.com/movies/features/videos/40622/>. [hereinafter *Luminosity*].

104. See JAMIE SEXTON, *MUSIC, SOUND AND MULTIMEDIA: FROM THE LIVE TO THE VIRTUAL* 19 (2007); JENKINS, *supra* note 46, at 225 ("[N]either the sights nor the sounds found in most videos originate with the fan artists; the creator's primary contribution, in most cases, comes in the imaginative juxtaposition of someone else's words and images.").

For the vidder, the visuals from the pre-existing work take supremacy over the lyrical composition; the imagery serves as the central motivation and focus of the video itself.<sup>105</sup> For example, popular fandom vidder Ash48<sup>106</sup> was inspired by the symbolic cinematography in *Supernatural*.<sup>107</sup> To emphasize a particular character's inner turmoil, she used scenes from an episode in which that character fights his way out of his own grave.<sup>108</sup> To demonstrate the long journey traversed by the heroes, depictions of road trips in their iconic 1967 Chevy Impala were incorporated into her videos.<sup>109</sup> And yet although these videos are created by appropriating visuals from the original media source, for the fan, enjoyment comes from seeing these familiar images taken out of their initial context and given an alternative meaning.<sup>110</sup>

Similarly, fan films are derivative works based on existing movies, television shows, or video game series.<sup>111</sup> However, the main difference between fan films and fan videos is that the films do not appropriate existing footage from the original source.<sup>112</sup> These works instead are actual films produced and directed by fans using established characters and locations.<sup>113</sup> And while the quality of the production greatly varies, from filming in one's backyard<sup>114</sup> to using actual Hollywood actors to portray comic book heroes,<sup>115</sup> fan films enable enthusiasts to show their love and support for a

105. See SEXTON, *supra* note 104, at 26.

106. See Ash4897, YOUTUBE, [https://www.youtube.com/channel/UCc1rAji964LQ\\_CLBYqIKrXA](https://www.youtube.com/channel/UCc1rAji964LQ_CLBYqIKrXA) (last visited Sep. 3, 2015). According to her YouTube profile, her full username is Ash4897.

107. Interview with Ash48, *Fan Appreciation no. 1, Ash48: The Vidder*, in FAN PHENOMENA: SUPERNATURAL 56, 63-64 (Lynn Zubernis & Katherine Larsen eds., 2014) [hereinafter Ash48].

108. Ash48, *supra* note 107; *Supernatural: Lazarus Rising* (CW television broadcast Sep. 18, 2008).

109. Ash48, *supra* note 107, at 64.

110. JENKINS, *supra* note 46, at 227.

111. MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY 422 (2011).

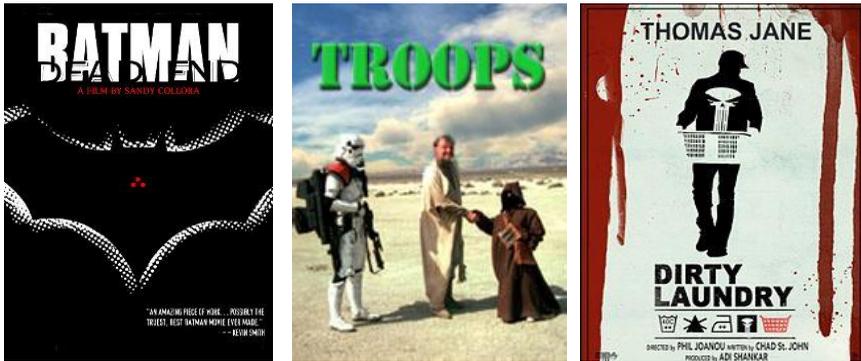
112. *Id.*; see also PETER DECHERNEY, HOLLYWOOD'S COPYRIGHT WARS: FROM EDISON TO THE INTERNET 193 (2012).

113. RAJAN, *supra* note 111; see also Daryl G. Frazzetti, *Distinct Identities of Star Trek Fan Film Remakes*, in FEAR, CULTURAL ANXIETY, AND TRANSFORMATION: HORROR, SCIENCE FICTION AND FANTASY FILMS REMADE 199, 211 (Scott A. Lukas & John Marmysz eds., 2009); Chuck Tryon, *Fan Films, Adaptations, and Media Literacy*, in SCIENCE FICTION FILM, TELEVISION, AND ADAPTATION: ACROSS THE SCREENS 176, 181 (Jay Telotte & Gerald Duchovnay eds., 2012).

114. Jim Windolf, *Raiders of the Lost Backyard*, VANITY FAIR (Mar. 2004), <http://www.vanityfair.com/news/2004/03/raiders200403>. See generally ALAN EISENSTOCK, RAIDERS!: THE STORY OF THE GREATEST FAN FILM EVER MADE (2012).

115. See, e.g., Adi Shankar, *The Punisher: Dirty Laundry [Bootleg Universe]*, YOUTUBE (Jul. 15, 2012), <https://www.youtube.com/watch?v=bWpK0wsnitc>.

series through innovative and captivating storytelling.<sup>116</sup> Through the sheer number of fans involved in the film production to the amount of views it has received online, these projects serve as a reminder to networks and studios that there remains an active fan base demand for more stories to be told.<sup>117</sup>



**Fig. 4: Examples of Fan Films in the *Batman*, *Punisher*, and *Star Wars* Fandoms<sup>118</sup>**

#### 4. Fan Fiction

Fan fiction (or “fanfic”) is a term used for written works created by individuals using source material created by other authors.<sup>119</sup> Writers often take the characters and plot lines of established works and reimagine those creations to build their own narrative.<sup>120</sup> Stemming from a need to “fill the gaps” in commercial works, fan fiction can be seen as an, albeit unauthorized,

116. See Frazzetti, *supra* note 113, at 202.

117. See Kristin M. Barton, *Can't Stop the Sequel: How the Serenity-Inspired Browncoats: Redemption Is Changing the Future of Fan Films*, in *FAN CULTURE: ESSAYS ON PARTICIPATORY FANDOM IN THE 21ST CENTURY* 9, 14 (Kristin M. Barton & Jonathan Malcolm Lampley eds., 2014).

118. See Agent47Chris Official, *Batman Dead End HD*, YOUTUBE (Apr. 2, 2010), <https://www.youtube.com/watch?v=3j7d3IIAkes>; TheForce.Net, *Troops – A Star Wars Fan Film*, YOUTUBE (Feb. 6, 2012), <https://www.youtube.com/watch?v=LvswNDAAZCU>; Shankar, *supra* note 115.

119. See Deb McAlister-Holland, *Copyright Myths from the World of Fan Fiction*, BUS. 2 COMMUNITY (Aug. 19, 2013), <http://www.business2community.com/entertainment/copyright-myths-from-the-world-of-fan-fiction-0588594>; See Xiaoli, *Fan Culture: Definition and Genres*, GRASSROOTS AND FAN CULTURE (Feb. 12, 2010), <http://youtubecomm.wordpress.com/2010/02/12/fan-culture/> (last visited Jan. 6, 2015).

120. See McAlister-Holland, *supra* note 119; Nicola Balkind, *Consumption Becomes Production: Fan Creations and The Hunger Games*, in *FAN PHENOMENA: THE HUNGER GAMES* 133 (Nicola Balkind ed., 2014).

expansion of media franchises.<sup>121</sup> Yet although these authors cannot legally reproduce their works, their stories and contributions are part of the social glue that helps to maintain the fandom experience.<sup>122</sup>



**Fig. 5: Examples of Fan Fiction in the *Supernatural*, *Buffy the Vampire Slayer*, and *Harry Potter* Fandoms<sup>123</sup>**

Sustaining fandom communities is inextricably connected to the production and consumption of culture.<sup>124</sup> Fan fiction stories help build interest in the original source material by attracting those with similar literary inclinations.<sup>125</sup> When the 1980s version of *Battlestar Galactica* ended its run on network television, fans kept the show alive by writing their own episodes—a way in which to answer questions still left in the narrative.<sup>126</sup>

121. Balkind, *supra* note 120 (quoting Henry Jenkins, *Transmedia Storytelling* 101, CONFESSIONS OF AN ACA-FAN (Mar. 22, 2007), [http://henryjenkins.org/2007/03/transmedia\\_storytelling\\_101.html](http://henryjenkins.org/2007/03/transmedia_storytelling_101.html)).

122. See Mary Kirby-Diaz, *Ficcors and 'Shippers: A Love Story*, in *FAN PHENOMENA: BUFFY THE VAMPIRE SLAYER* 38, 40 (Jennifer K. Stuller ed., 2013).

123. See Esther, *Cursed Dawn: Supernatural Fanfiction*, WATTPAD, <http://www.wattpad.com/story/16218474-cursed-dawn-supernatural-fanfiction> (last visited Sep. 3, 2015); Emmie G., *Thought You Should Know*, FANFICTION.NET, <https://www.fanfiction.net/s/4888828/1/Thought-You-Should-Know> (last visited Sep. 3, 2015); Bex-chan, *Isolation*, FANFICTION.NET, <https://www.fanfiction.net/s/6291747/1/Isolation> (last visited Sep. 3, 2015).

124. Kirby-Diaz, *supra* note 122, at 39; see JENKINS, *supra* note 42, at 20 (“[I]f such affiliations encourage more active consumption, these same communities can also become protectors of brand integrity and thus critics of the companies that seek to court their allegiance.”).

125. Kirby-Diaz, *supra* note 122.

126. See generally Richard Berger, *GINO or Dialogic: What Does “Re-Imagined” Really Mean?*, in *BATTLESTAR GALACTICA AND PHILOSOPHY: MISSION ACCOMPLISHED OR MISSION FRACKED UP?* 317 (Josef Steiff & Tristan D. Tamplin eds., 2008).

Originally distributed and sold at conventions, the stories eventually made their way to the Internet, providing a much broader distribution amongst fans of the show.<sup>127</sup> The proliferation of fan fiction not only kept the show alive, but demonstrated that there was still a dedicated fanbase still eager for more.<sup>128</sup> Ultimately realizing that there was a demand for the product, a restyled version of the television series was created in 2003.<sup>129</sup> Ironically, the creators of the reimagined series were influenced by the written works of fans.<sup>130</sup> By expanding upon the original material, fans are able to reimagine the worlds left to their disposal and bring a sense of legitimacy to their continued use.<sup>131</sup> However, this unauthorized use may be to the chagrin of the initial creators.<sup>132</sup>

*B. “So This Is How Liberty Dies . . . With Thunderous Applause”<sup>133</sup>:  
Legal Landscape*

Underneath the veil of uniformity lies a growing tension between the copyright doctrine and the fundamental right to freedom of expression.<sup>134</sup> Yet on the surface, both laws appear to operate in a similar, harmonious fashion; “the subject of both is the same: communication by both speech and writing.”<sup>135</sup> At the time of its constitutional ratification in 1789, the

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127. *Id.*; GALACTICA FANFIC, <http://galacticafanfic.com/bsg-page.html> (last visited Sep. 3, 2015).

128. Berger, *supra* note 126; Suzanne Scott, *Authorized Resistance: Is Fan Production Frakked?*, in *CYLONS IN AMERICA: CRITICAL STUDIES IN BATTLESTAR GALACTICA* 222 (Tiffany Potter & C.W. Marshall eds., 2008).

129. Berger, *supra* note 126; LYNNETTE R. PORTER, DAVID LAVERY & HILLARY ROBSON, *FINDING BATTLESTAR GALACTICA: AN UNAUTHORIZED GUIDE* 31 (2008); Robert L. Strain Jr., *Galactica’s Gaze: Naturalistic Science Fiction and the 21st Century Frontier Myth*, in *SITH, SLAYERS, STARGATES, AND CYBORGS: MODERN MYTHOLOGY IN THE NEW MILLENNIUM* 51, 54 (John Perlich & David Whitt eds., 2008).

130. Berger, *supra* note 126.

131. *See* Joly-Corcoran, *supra* note 102, at 29.

132. *Id.*; *see infra* Part III(A)(4).

133. *STAR WARS: EPISODE III – REVENGE OF THE SITH* (Lucasfilm 2005). Senator Padmé Amidala’s ominous statement as she listens to Emperor Palpatine address a cheering Senate whom he had just stripped of power to form his new Galactic Empire.

134. *See* Bauer, *supra* note 28, at 833; Garfield, *supra* note 28, at 1169; Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

135. L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215, 308 (2009); *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (“The Copyright Clause and the First

Copyright Clause's primary focus was the promotion of "the progress of [s]cience . . ." <sup>136</sup> With the adoption of the Copyright Act of 1976, all works "fixed in a tangible medium of expression" were made available for federal protection. <sup>137</sup> In preserving these works, copyright law grants to the owner, author, or copyright holder several exclusive rights for a "limited" duration. <sup>138</sup> By granting exclusivity, Congress presumed that those assured of protection would be incentivized to create more meaningful and innovative works of art. <sup>139</sup>

Likewise, the First Amendment, incorporated into the Constitution in 1790, shares copyright's goal of enhancing the creation and dissemination of artistic works. <sup>140</sup> However, the amendment's main concern is focused on safeguarding uninhibited speech, deemed necessary for societal expansion. <sup>141</sup>

In order to promote public welfare, the First Amendment allows access to a full range of information, including communications in the arts and entertainment. <sup>142</sup> By recognizing such rights as fundamental, Congress is effectively upholding the advancement of self-fulfillment and the realization of individualized autonomy. <sup>143</sup>

While it may appear that, facially, the laws work in tandem, there is an underlying inequality stemming from the blatantly disparate treatment afforded by the judicial system. <sup>144</sup> According to Professors Mark A. Lemley and Eugene Volokh, "Copyright law restricts speech: it restricts you from

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Amendment, while intuitively in conflict, were drafted to work together to prevent censorship; copyright laws were enacted in part to prevent private censorship and the First Amendment was enacted to prevent public censorship." )

136. U.S. CONST. art. I, § 8, cl. 8; *see* Bauer, *supra* note 28, at 840. "Science" used in this clause embodied both literature and the arts. In contrast, "useful Arts" was a term connoting subject matter in the realm of patent law. *See id.* n.30; Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-up and Breaking-up*, 43 IDEA: J. OF L. & TECH. 272 (2003).

137. 17 U.S.C. § 102 (2012).

138. 17 U.S.C. § 106 (2012). These exclusive rights include the right to reproduce, to prepare derivative works, to distribute, to perform, to display, and to perform by means of transmission.

139. *See* Bauer, *supra* note 28, at 840.

140. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."); *see also* Bauer, *supra* note 28, at 837-38.

141. *See* Bauer, *supra* note 28, at 842; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting).

142. *See* Birnhack, *supra* note 136.

143. Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1089 (2010); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963). *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

144. *See* Bohannon, *supra* note 143, at 1084-85; Edmund T. Wang, *The Line Between Copyright and the First Amendment and Why Its Vagueness May Further Free Speech Interests*, 13 U. PA. J. CONST. L. 1471, 1471 (2011).

writing, painting, publicly performing, or otherwise communicating what you please.”<sup>145</sup> And yet when this issue arises, the courts remain steadfast in their refusal to admit otherwise.<sup>146</sup> But why is this so? Outside of copyright litigation, courts continue to enforce the traditional analysis for First Amendment challenges.<sup>147</sup>

Laws that regulate the content of speech must be justified by a compelling governmental interest, using the least restrictive means necessary in order to achieve that interest.<sup>148</sup> For example, in *FCC v. Pacifica Foundation*, the Court held that forbidding the use of indecent speech is a content regulation.<sup>149</sup> Even though it was emphasized that broadcasting, due to its pervasive qualities, is granted limited First Amendment protections, the majority still performed a full strict scrutiny analysis.<sup>150</sup> Ultimately, the law was upheld since the government demonstrated a compelling interest in protecting children from indecent broadcasting transmissions.<sup>151</sup> Yet quizzically this logic seems to fail the courts once copyright issues come into play.<sup>152</sup>

Courts have consistently denied adoption of the First Amendment as a viable defense to copyright infringement claims, and thus refuse to analyze

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145. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998).

146. John Tehranian, *Whither Copyright? Transformative Use, Free Speech and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1204 (2005) (“[T]he courts appear to have taken a different view of the intersection of First Amendment and intellectual property rights by systematically dismissing the existence of any clash between the two bodies of law.”); see Bohannan, *supra* note 143, at 1086 (“Despite the obvious conflict between copyright law and the First Amendment, the Supreme Court has rejected the plea for First Amendment protection for most uses of copyrighted works.”); Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM. & ENT. L.J. 588, 588 (“Courts almost always reject the assertion that the First Amendment places limits on the scope of copyright rights.”); see *infra* Part II(B)(2).

147. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (applying First Amendment scrutiny to a defamation cause of action).

148. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Content-neutral restrictions are subject to a lesser, but by no means less demanding, form of scrutiny. See, e.g., *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180 (1997) (upholding FCC must-carry rules as protecting important governmental interests).

149. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); John C. Quale & Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content Onto Direct Broadcast Satellite*, 60 FED. COMM. L.J. 37, 50 (2007).

150. *Pacifica*, 438 U.S. at 748–49.

151. *Id.* at 749.

152. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 7 (2002) (“Copyright proceeds as if possessed of a magic free speech immunity, with most courts, including the Supreme Court, explicitly declining to subject copyright to any independent First Amendment review.”).

the issue separately.<sup>153</sup> Instead, they use the same tired, continuous rhetoric to explain away any concerns—that inherent mechanisms within copyright offer adequate First Amendment protection.<sup>154</sup> Most recently, in *Eldred v. Ashcroft*, the Court held that “copyright law contains built-in First Amendment accommodations.”<sup>155</sup> Recognized as (1) the fair use doctrine and (2) the idea/expression dichotomy, the Court held that “further First Amendment scrutiny is unnecessary.”<sup>156</sup> But the amount of speech restricted compared to that which is supposedly encouraged by copyright has changed dramatically over the past few decades.<sup>157</sup> In choosing to expand the durational length of protection and by inconsistently applying its internal mechanisms, the courts have allowed copyright to grow into a monopoly, shunning would-be creators from participation.<sup>158</sup>

### 1. Enormous Growth of the Duration Period

Prior to its revision in 1978, copyright law seemed to provide a more level playing field for both rights holders and public individuals. Authors of new works needed to comply with formalities and a registration requirement in order to receive protection, or else risk losing their rights to the public domain.<sup>159</sup> Originally, the founders only provided an initial fourteen-year protection for rights holders.<sup>160</sup> Nearly a century later the fourteen-year period was extended to twenty-eight years, provided the rights holder renewed in a timely manner.<sup>161</sup> Since renewal demanded a fee, almost 85%

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153. L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987) (“[C]ourts have consistently and almost without exception rejected the free speech defense in copyright infringement actions.”). *See, e.g.,* *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) (“First Amendment concerns in copyright cases are subsumed within the fair use inquiry.”); *United Video v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (stating that there are no First Amendment rights to use another person’s copyrighted works); *Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980). *But see* *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001) (holding that a preliminary injunction was an unlawful prior restraint at odds with both the First Amendment and copyright’s “shared principles”).

154. The two most important internal mechanisms under copyright law are the idea-expression dichotomy and the fair use doctrine. *See* Bauer, *supra* note 28, at 847.

155. 537 U.S. 186, 221 (2003).

156. *Id.*; *see* Wang, *supra* note 144, at 1476. For purposes of brevity, this paper will not discuss the idea/expression dichotomy. Suffice to say, since most fandom works take more than just mere ideas from pre-existing works, this mechanism will not be triggered.

157. David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1396 (2009).

158. *See* Tehranian, *supra* note 146, at 1213; Bauer, *supra* note 28, at 846-47.

159. *Id.* at 1407-08.

160. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

161. Copyright Act of 1870, ch. 230, § 90, 16 Stat. 198 (repealed 1909).

of copyrighted material was abandoned to the public domain.<sup>162</sup> The Act was again altered, this time in 1909, with the expansion of both the initial and renewal terms.<sup>163</sup> The terms were increased to twenty-eight years each, bringing the total amount of protection to, potentially, fifty-six years.<sup>164</sup>

According to David Olson, for most of U.S. history before 1978, “(1) many works of authorship were never covered by copyright at all, and (2) the vast majority of copyrighted works lost copyright protection within fourteen to twenty-eight years.”<sup>165</sup> However, with the revision of the Act in 1978, protection was extended exponentially—to all works in *any* tangible medium.<sup>166</sup> In addition, the renewal period was drastically altered when, in 1992, it was made automatic.<sup>167</sup> Copyright holders no longer needed to go through formalities to ensure their works were protected.<sup>168</sup>

Furthermore, through judicial interpretation and subsequent legislation, the courts have contributed to copyright’s surge of growth.<sup>169</sup> For example, in *Eldred v. Ashcroft*,<sup>170</sup> the majority upheld the constitutionality of the 1998 Copyright Term Extension Act (CTEA)<sup>171</sup>, lengthening the existing term of copyright protection for an additional twenty years.<sup>172</sup> In upholding the CTEA’s constitutionality, the duration of an owner’s exclusive copyright protection essentially exists for works created since 1923.<sup>173</sup> With some narrow exceptions, no work since 1998 has entered the public domain.<sup>174</sup> However, as Justice Breyer identifies in his dissent, the CTEA effectively

162. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 519 (2004); see William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1640–41 (2004) (“Not only did renewal provide notice of subsisting copyright, but experience with the requirement of renewal had established that works that have no commercial value are unlikely to be renewed, thus increasing the size of the public domain.”).

163. Copyright Act of 1909, Pub. L. No. 60-349, § 2, 35 Stat. 1075 (1909).

164. DEBORAH BOUCHOUX, *INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS* 225 (3d ed. 2009).

165. Olson, *supra* note 157, at 1408.

166. 17 U.S.C. § 102 (2012); BOUCHOUX, *supra* note 164, at 182.

167. Copyright Renewal Act of 1992, Pub. L. No. 102-307, Title I, § 102(a) & (d), 106 Stat. 264, 264–66 (1992).

168. Olson, *supra* note 157, at 1408.

169. Bauer, *supra* note 28, at 845.

170. 537 U.S. 186 (2003).

171. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

172. See *Eldred*, 537 U.S. at 222; see also Michael B. Reddy, *Supreme Court Upholds Copyright Term Extension Act: Public Domain Remains Frozen for Next 16 Years*, AALL SPECTRUM MAG., July 2003, at 10-13, 24; Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW (Mar. 5, 2002), [http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html).

173. So long as the copyright holder timely filed his registration and properly renewed. See *Eldred*, 537 U.S. at 222.

174. See Bauer *supra* note 28, at 865.

amounted to a grant of perpetual copyright protection; “The economic effect of this 20-year extension—the longest blanket extension since the Nation’s founding—is to make the copyright term not limited, but virtually perpetual.”<sup>175</sup> Likewise, Justice Stevens, dissenting, stated that a focus on compensation for rights holders will only result in frustrating those members of the public who wish to make use of the creation in a free market.<sup>176</sup>

Finally, the Court’s decision to uphold the URAA’s constitutionality continues the judicial trend to extend rights holders’ dominance over copyright protection.<sup>177</sup> In *Golan v. Holder*,<sup>178</sup> the majority upheld the constitutionality of Section 514 of the Uruguay Round Agreement Act (URAA),<sup>179</sup> allowing foreign works, which had entered the United States public domain, to be restored copyright status.<sup>180</sup> The Court heard arguments against the statute’s constitutionality, contending that the statute violated the free-speech rights of those who had come to rely on the freely available works.<sup>181</sup> However, the Court dismissed the arguments, stating that nothing in the Constitution’s copyright clause indicated that the public domain was “inviolable.”<sup>182</sup> In his dissent, Justice Breyer argued that the law did not satisfy the constitutional copyright clause since it did not encourage the creation and dissemination of new works.<sup>183</sup> Instead, the law provided added compensation to works that had already been created decades before, thus providing no monetary incentive for authors to produce anything new.<sup>184</sup>

While copyright creators were conferred exclusive rights to encourage production, the intended beneficiaries were the members of the public; “The monopoly created by copyright thus rewards the individual author in order to benefit the public.”<sup>185</sup> However, the significant expansion of the duration

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175. See *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting) (“How will extension help today’s Noah Webster create new works 50 years after his death?”); *id.* at 255.

176. See *id.* at 226-27 (Stevens, J., dissenting).

177. Rodney A. Smolla, *Copyright Clause Trumps Free Speech Clause*, MEDIA INST. (Apr. 30, 2012), <http://www.mediainstitute.org/IPI/2012/043012.php>.

178. 132 S.Ct. 873 (2012).

179. Uruguay Round Agreement Act, 17 U.S.C. § 104A (2012).

180. See *Golan*, 132 S.Ct. at 894.

181. See *id.* at 884.

182. See *id.* at 886; see also Karen Dhadialla, *Golan v. Holder and the URAA’s Impact on the Public Domain*, BOLT (Apr. 9, 2012), <http://btlj.org/2012/04/09/golan-v-holder-and-the-uraa-impact-on-the-public-domain/>.

183. See *Golan*, 132 S.Ct. at 900 (Breyer, J., dissenting).

184. See *id.*; see also Jessica W. Rice, “The Devil Take the Hindmost”: *Copyright’s Freedom From Constitutional Constraints After Golan v. Holder*, 161 U. PA. L. REV. ONLINE 289 (2013).

185. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting).

period disrupts the balance between the owners and public users.<sup>186</sup> Many unauthorized works are subjected to infringement liability, “suffocat[ing the] free flow of information and knowledge.”<sup>187</sup> In recent years, there has been extensive lobbying from powerful copyright owners securing legislation that strengthens their own interests.<sup>188</sup> If not for the CTEA’s increase of twenty additional years, *Steamboat Willie*<sup>189</sup> would long since be public property.<sup>190</sup> But was the CTEA the final extension? With the cartoon classic’s copyright protection set to expire on January 1, 2024,<sup>191</sup> and along with it Mickey Mouse himself, will the *Walt Disney Company* be so willing to relinquish its hold? More importantly, will the Court continue to perpetuate *Disney*’s monopoly?

## 2. Fair Use Doctrine

First articulated in *Folsom v. Marsh*,<sup>192</sup> the fair use doctrine is a defense to copyright infringement claims, currently codified in section 107 of the 1976 Copyright Act.<sup>193</sup> Requiring courts to balance four separate factors,<sup>194</sup> the doctrine potentially affords a privilege for would-be infringers to make

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186. JERRY JIE HUA, TOWARD A MORE BALANCED APPROACH: RETHINKING AND READJUSTING COPYRIGHT SYSTEMS IN THE DIGITAL NETWORK ERA 17 (2014).

187. *Id.* at 18; MICHAEL EDWARD LENERT, THE FREE FLOW OF INFORMATION: MEDIA LAW AND FREEDOM OF EXPRESSION IN THE UNITED STATES 260 (2014).

188. HUA, *supra* note 186, at 17-18; *see* DONNA L. FERULLO, MANAGING COPYRIGHT IN HIGHER EDUCATION: A GUIDEBOOK 15 (2014).

189. STEAMBOAT WILLIE (Walt Disney Productions 1928).

190. *See* Karl Smallwood, *Why Isn’t Mickey Mouse in the Public Domain?*, MENTAL FLOSS (Jun. 17, 2012), <http://mentalfloss.com/article/30946/why-isnt-mickey-mouse-public-domain>.

191. Stephen Carlisle, *Mickey’s Headed to the Public Domain! But Will He Go Quietly?*, NOVA SOUTHEASTERN U. (Oct. 17, 2014), <http://copyright.nova.edu/mickey-public-domain/>.

192. 9 F. Cas. 342, 345 (C.C.D. Mass. 1841). Delivering the opinion of the court, Justice Story redefined the term “infringement,” which would later become known as the fair use doctrine.

193. *See* 17 U.S.C. § 107 (2012).

194. *Id.* Considerations include: (1) the *purpose and character* of the defendant’s use; (2) the *nature* of the copyrighted work; (3) the *amount and substantiality* of the portion used; and (4) the *effect* of the use upon the potential market. The first factor examines whether a user’s appropriation of the copyrighted material was absolutely necessary to his or her purpose, or whether the user could have taken other, less incorporating measures. The second factor is usually interpreted to find in favor of fair use should a work of fact be at issue, in contrast to the copyright holder’s favor when an entertainment work (fiction) is involved. Under the third factor, courts consider whether the portion used is reasonable to conjure the image and feel of the original work. Finally, the fourth factor evaluates the interference of the user’s work upon the market for the copyright holder’s creation. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 664-78 (1997); Christina R. Evola Nowakowski, *The Next Generation of Costumes and Conventions: Is Cosplay Copyright Infringement?*, 19-25 (May 5, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=2200348>.

use of otherwise copyrighted expression.<sup>195</sup> Courts have often dismissed First Amendment concerns, finding adequate protection within the shelter of fair use's protection.<sup>196</sup> For instance, in *Harper & Row Publishers v. Nation Enterprises*, the Court refused to broaden the reach of fair use, stating that "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, . . . we see no warrant for expanding the doctrine of fair use . . ."<sup>197</sup> But by invoking a fair use defense, courts are given a carte blanche in applying the doctrine's four factors on a case-by-case basis.<sup>198</sup> This allowance has led to highly subjective and all-too-often inconsistent treatment across the circuits, thus creating a threatening chilling effect on First Amendment speech.<sup>199</sup>

Unfortunately, reliance on the judicial system has left the public with an often confusing and inconsistent application.<sup>200</sup> According to Professor Melville Nimmer, "the almost infinite elasticity of each of the four factors, [results in] their concomitant inability to resolve the difficult questions."<sup>201</sup>

195. See Netanel, *supra* note 32, at 20.

196. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) (stating that the fair use doctrine was one of copyright's "built-in First Amendment accommodations"); *Urantia Found. v. Maaheerra*, 895 F. Supp. 1329, 1334 (1995) ("Furthermore, First Amendment concerns are addressed through the 'fair use' doctrine, which recognizes 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'") (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985)); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (stating that parody photographs of a Barbie doll "[have] 'socially significant value as free speech under the First Amendment'" (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997))).

197. 471 U.S. 539, 560 (1985); see also *Eldred*, 537 U.S. at 221 ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.").

198. See, e.g., *Ty, Inc. v. West Highland Publ'g, Inc.*, No 98-C-4091, 1998 WL 698922, at \*15–16 (N.D. Ill. Oct. 5, 1998) (rejecting claims of fair use and ultimately finding that a book containing photographs of *Beanie Babies* stuffed animals harmed the copyright owner's market for derivative works); *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (holding that trivia books based on characters and events from the television show *Seinfeld* were infringements upon the copyright owner's potential market). In both of these cases, the respective courts placed great emphasis on the fourth fair use factor (effect on the market), but, as noted by Christina Bohannon, the evidence of harm was "purely speculative." Bohannon, *supra* note 143, at 1101.

199. See Bauer, *supra* note 28, at 861; Wang, *supra* note 144, at 1473 ("The conventional wisdom . . . is that courts' trust in copyright's internal free speech safeguards is misplaced—the supposed safeguards relied upon are simply too uncertain in application to effectively prevent copyright from encroaching on free speech.").

200. Netanel, *supra* note 32, at 20–21.

201. 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13-05[A][5][c], at 13–207 (2015); see William W. Fischer, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1695 (1988) ("The current fair-use doctrine, far from aiding in the effort, helps perpetuate the problem, by reinforcing the impression that, when confronted with a question of

The courts' application of fair use has been notoriously unpredictable,<sup>202</sup> resulting in a profuse amount of jurisprudence that is not only difficult to understand, but even harder to reconcile.<sup>203</sup> Interestingly, and of most concern to First Amendment proponents, is the courts' seeming shift in focus in determining liability.<sup>204</sup> The courts have expanded copyright to be, in effect, a proprietary interest in which rights holders have the power to control the conduct of individuals seeking to use their work(s).<sup>205</sup> Consequently, fair use has followed suit; courts no longer look to the quality of the "infringing" uses, but to the quantity appropriated.<sup>206</sup> And as copyright's proprietary interest continues to grow, so too does the barrier barring public access and use.<sup>207</sup>

Thus, while fair use has been promulgated as a vehicle to uphold free speech and expression, it has fallen short of its goal.<sup>208</sup> By transforming copyright into a plenary property interest, the Copyright Act, by way of judicial interference, has granted greater deference to owner's private interests over that of the public need.<sup>209</sup> And yet ironically, copyright never intended to preclude all uses that could potentially earn a profit.<sup>210</sup> Indeed, copyright never bestowed upon the rights holder complete control over each possible use; "This protection has never accorded the copyright owner complete control over all possible uses of his work."<sup>211</sup>

Fair use has ultimately helped to expand the copyright monopoly, and, as a consequence, has unwittingly promoted public self-censorship.<sup>212</sup> This

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public policy, we can do no better than "balance" inconsistent claims derived from conventional, incommensurable premises.").

202. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990).

203. JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 154 (2011).

204. Tehranian, *supra* note 146, at 1210; John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 484-87 (2005).

205. L. Ray Patterson, *Copyright in the New Millennium: Resolving Conflict between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703, 704-05 (2001).

206. Tehranian, *supra* note 146, at 1210 ("Thus, the emphasis of courts in determining infringement liability has shifted from what *use is made of* a copyrighted work (acknowledged only in the first fair use factor) to *how much is taken from* a copyright work (assessed through the last three fair use factors).").

207. Patterson, *supra* note 205, at 708.

208. *See id.* at 732 ("Proprietary rights in information and learning not only reduce free speech rights to the status of an empty slogan, they also make a mockery of the limited copyright monopoly that the framers empowered Congress to grant."); Tehranian, *supra* note 146, at 1212-13.

209. Patterson, *supra* note 205, at 706-07.

210. *Id.* at 710.

211. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984).

212. Tehranian, *supra* note 146, at 1215-16 ("Potential infringers will be unwilling and unable to bear the substantial costs of litigation as well as the risk of liability, even where it does not or should not exist.").

poses a crippling impediment for fandom. As a participatory culture, fandom requires that its members actively contribute to the community collective.<sup>213</sup> What would happen if there were no one to share in the discussion, no one to promote the brand? In an age in which media companies are being shaped by the increasing visibility of consumer participants,<sup>214</sup> would the strict enforcement of their copyrights actually do them harm? According to Eugene Volokh and Brett McDonald, “Copyright law is a serious restriction on speakers’ ability to express themselves the way they want.”<sup>215</sup> As such, it is imperative that courts keep First Amendment interests always at the forefront in their decision-making process.<sup>216</sup>

### III. ANALYSIS

It is important to acknowledge that the First Amendment does not provide limitless protection against infringement claims—nor should it. Copyright law is an important and useful device, allowing owners to defend their copyrights from blatant plagiarism and actual harm to their market shares (real or potential).<sup>217</sup> However, fandom activities, for the most part, do neither. Seeing themselves as guardians of the media they obsess over,<sup>218</sup> fans assert their own rights to interpret, evaluate, and “construct cultural canons,” using the original material as a starting platform.<sup>219</sup> In this vein, specifically in regards to fan-made works,<sup>220</sup> copyrights’ internal mechanisms for protection are inadequate. This section will explore each of the four main areas of fandom participation,<sup>221</sup> offering examples of fandom activities unnecessarily suppressed due to seemingly frivolous infringement claims. It will then continue with an argument and plea for courts to abandon their narrow view of “built-in accommodations” held within fair use and to begin fully incorporating a separate First Amendment analysis. This section will then conclude with a look at offered solutions to the widening divide between

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213. JENKINS, *supra* note 42, at 222.

214. *See generally* Jenkins, *supra* note 62.

215. Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2434 (1998).

216. Olson, *supra* note 157, at 1423.

217. *See* Tushnet, *supra* note 194, at 686.

218. *See* Henry Jenkins, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, in 5 CRITICAL STUD. IN MASS COMM. 85, 100 (1988).

219. JENKINS, *supra* note 46, at 18.

220. “A ‘fan work’ is any work by a fan, or indeed by anyone other than the content owner(s), set in such a fictional world using such pre-existing fictional characters.” AARON SCHWABACH, *FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION* 8 (2011).

221. *See supra* Part II(A).

copyright and free speech principles, suggesting that one in particular may be most desirable for both copyright holders and their loyal fans.

A. *When You Have Seen As Much Of Life As I Have, You Will Not Underestimate The Power Of Obsessive Love<sup>222</sup>: Why Fair Use Is Not An Adequate Defense In The Case Of Fan-Made Works*

The massive evolution of technology over the past few decades has made disseminating copyrighted material easier than ever before.<sup>223</sup> Consequently, this exposure has increased the likelihood of challenges from copyright owners.<sup>224</sup> However, as Judge Kozinski cautioned, creativity would be non-existent if not for the rich and diverse contributions to the public domain.<sup>225</sup> Virtually no work produced was ever truly original, with most having at some point copied a previous work<sup>226</sup>; If William Shakespeare's<sup>227</sup> copyrights were still in effect, would *West Side Story* be simply dismissed as an infringement upon *Romeo and Juliet*? If so, then surely *The Lion King* would fare no better, being a derivative of *Hamlet*. The following illustrations span across each of the four main areas of fandom-related activities: cosplay, fan art, fan videos/films, and fan fiction. Each serve to identify copyright's monopolistic control over expression and, in the cases in which litigation was pursued, how the fair use defense failed to accommodate the speaker's expressive rights.

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222. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 186 (2005). In the novel, Harry's potions teacher, Professor Slughorn, educates his students on one potion's ability to create a powerful infatuation.

223. See Bauer, *supra* note 28, at 878.

224. See Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 21 WASH. U. J.L. & POL'Y 11, 22 (2006); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 285-86 (1996) (suggesting that the rise of new forms of technologies has provided a greater incentive for copyright owners to act against individuals).

225. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissent) ("Overprotection stifles the very creative forces it's supposed to nurture.").

226. See *id.*; Anthony R. Mills, *Buffyverse Fandom as Religion*, in *FAN PHENOMENA: BUFFY THE VAMPIRE SLAYER* 136 (2013).

227. Interestingly enough, Shakespeare himself was known to have copied from pre-existing works. *Romeo and Juliet* was based on the poem by Arthur Brooke, *The Tragical History of Romeus and Juliet*, while *Hamlet* was allegedly taken from an earlier play entitled *Ur-Hamlet*. See *How Romeus Became Romeo: A Comparison of Arthur Brooke's "Romeus and Juliet" and Shakespeare's Romeo and Juliet*, AMERICAN REPERTORY THEATER, <http://americanrepertorytheater.org/inside/articles/articles-vol4-i3-how-romeus-became-romeo> (last visited Mar. 17, 2015); *Shakespeare's Sources for Hamlet*, SHAKESPEARE ONLINE, <http://www.shakespeare-online.com/sources/hamletsources.html> (last visited Mar. 17, 2015); see also Mike Masnick, *Would Shakespeare Have Survived Today's Copyright Laws?*, TECHDIRT (Feb. 15, 2011), <https://www.techdirt.com/articles/20110215/11165113112/would-shakespeare-have-survived-todays-copyright-laws.shtml>.

## 1. Cosplay

### *The (Un)Social Network: Facebook's Alleged Attack on Cosplayers*

In August 2012, dozens of cosplayers were shocked to find that their Facebook pages, containing their personal in-costume photographs, had been purged by the site without warning.<sup>228</sup> Although Facebook does reserve the right to remove accounts using false aliases, the deletion of accounts using the name “cosplay” seemed to have been a targeted attack.<sup>229</sup> Although claiming to have deleted the cosplayers’ accounts because they failed to use their real names, there are still plenty of very popular fake accounts using assumed monikers, such as “Jesus Christ,” “God,” and “Abraham Lincoln.”<sup>230</sup> Facebook appeared to have been targeting cosplayers based on infringement concerns, and in a “riskphobic” response, chose to delete the accounts before it received takedown notices.<sup>231</sup> The site has been known to give heed to intellectual property owners notorious for the aggressive, litigious protection of their copyrights.<sup>232</sup> If true, there is great concern regarding the suppression of the free expression. If Facebook did in fact delete the pages to avoid upsetting copyright owners, it would set a bad precedent. Infringement claims, and more importantly the fair use defense, depend on the court system and judicial interpretation.<sup>233</sup> If Facebook were suddenly allowed to pick and choose what it believed to be infringing images, it would risk alienating its users by violating their First Amendment rights.<sup>234</sup>

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228. See Lauren Rae Orsini, *Facebook Purges Cosplay Accounts*, DAILY DOT (Aug. 21, 2012), <http://www.dailydot.com/news/facebook-purges-cosplay-accounts/>; David Cohen, *Facebook Quietly Deletes Cosplay Profiles*, SOCIALTIMES (Aug. 22, 2012), [http://allfacebook.com/cosplay-profiles-deleted\\_b97891](http://allfacebook.com/cosplay-profiles-deleted_b97891); Claire Connelly, *Facebook Cosplay Accounts Deleted Without Warning*, NEWS.COM.AU (Aug. 22, 2013), <http://www.news.com.au/technology/facebook-cosplay-accounts-deleted-without-warning/story-e6frfro0-1226455731318>; see also Angel Rodriguez, *Facebook Cosplay Profiles Deleted!*, NYCTALKING (Aug. 24, 2012), <http://nyctalking.com/facebook-cosplay-profiles-deleted/> (according to one cosplayer affected, “Facebook has destroyed the entire cosplay community with this move. They should of [*sic*] at least warned us. I had a lot of friends, pictures and posts that I lost because of this.”).

229. See Connelly, *supra* note 228; see also Lauren Faits, *Facebook's Fake Account Purge: The Cosplay Perspective*, GEEK GIRL CHI. (Aug. 22, 2012), <http://www.chicagonow.com/geek-girl-chicago/2012/08/facebooks-fake-account-purge-the-cosplay-perspective/>.

230. See Connelly, *supra* note 228.

231. See *id.*; see also CanuDoitCat, *Facebook DELETED Cosplayers! Is Cosplay Breaching Copyright?*, YOUTUBE (Aug. 26, 2012), <https://www.youtube.com/watch?v=FxNbxNcWPwc>.

232. See Connelly, *supra* note 228. Such owners include *Marvel Worldwide Inc.* (for its comic book characters) and *The Walt Disney Company* (for its cartoon characters). *Id.*

233. See *supra* Part II(B)(2).

234. But see Faits, *supra* note 229. While Facebook does not allow aliases on actual accounts, it does allow users to set-up “fan pages.” Interestingly, this was not the first time Facebook had purged accounts it believed to be fake. See Barbara Ortutay, *Real Users Caught in Facebook Fake-*

*Sudden But Inevitable Betrayal: The Jayne's Hat Saga*

As the previous example illustrated, the way in which one describes his or her work (in this case, a product to sell), is extremely important. In a direct action instigated by the copyright owner, 20<sup>th</sup> Century Fox issued a cease and desist letter to sellers on the popular website Etsy.<sup>235</sup> The sellers were offering knitted wool caps that had appeared in one, unaired episode of the long-since-cancelled television series, *Firefly*.<sup>236</sup> The cap had become an unofficial symbol for *Firefly* fans, collectively known as “Browncoats.”<sup>237</sup> In the years after the show was cancelled, fans began to create merchandise of their own, since no official products were made available.<sup>238</sup> However, after 20<sup>th</sup> Century Fox learned of the massive underground following, it officially licensed the “Jayne’s Hat” replica.<sup>239</sup>

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*Name Purge*, SFGATE (May 25, 2009), <http://www.sfgate.com/business/article/Real-users-caught-in-Facebook-fake-name-purge-3231397.php>.

235. See Leah Yamshon, “I Almost Got Sued For Knitting a Firefly Hat:” *The Legal Risks of Pop-Culture Fan Art*, TECHHIVE (Jul. 19, 2013), <http://www.techhive.com/article/2044685/i-almost-got-sued-for-knitting-a-firefly-hat-the-legal-risks-of-pop-culture-fan-art.html>; Robo Panda, *Serenity Now: ‘Firefly’ Fans Making Jayne Hats Get Cease and Desist Orders (Plus a Cosplay Gallery)*, UPROXX (Apr. 11, 2013), <http://uproxx.com/gammasquad/2013/04/firefly-jayne-hats-cosplay/>.

236. See Miss Cellania, *The Jayne Hat Saga*, NEATORAMA (Apr. 10, 2013), <http://www.neatorama.com/2013/04/10/The-Jayne-Hat-Saga/>.

237. See Yamshon, *supra* note 235; Panda, *supra* note 235; Ellie Hall, “Firefly” Hat Triggers Corporate Crackdown, BUZZFEEDNEWS (Apr. 9, 2013), <http://www.buzzfeed.com/ellievhall/firefly-hat-triggers-corporate-crackdown>.

238. See Yamshon, *supra* note 235; Panda, *supra* note 235; Hall, *supra* note 237.

239. See Yamshon, *supra* note 235; *Jayne’s Hat*, THINKGEEK, [http://www.thinkgeek.com/product/f108/?itm=customlabel0T-](http://www.thinkgeek.com/product/f108/?itm=customlabel0T-Shirts_%26_Apparel_%7C_Hats_Scarves_Belts_%26_More&rkgid=1453730121&cpge=ogplatee)

[Shirts\\_%26\\_Apparel\\_%7C\\_Hats\\_Scarves\\_Belts\\_%26\\_More&rkgid=1453730121&cpge=ogplatee](http://www.thinkgeek.com/product/f108/?itm=customlabel0T-Shirts_%26_Apparel_%7C_Hats_Scarves_Belts_%26_More&rkgid=1453730121&cpge=ogplatee)

[1&source=google\\_tees&adpos=1o1&creative=50718226725&device=c&matchtype=&network=g](http://www.thinkgeek.com/product/f108/?itm=customlabel0T-Shirts_%26_Apparel_%7C_Hats_Scarves_Belts_%26_More&rkgid=1453730121&cpge=ogplatee)  
[1&source=google\\_tees&](http://www.thinkgeek.com/product/f108/?itm=customlabel0T-Shirts_%26_Apparel_%7C_Hats_Scarves_Belts_%26_More&rkgid=1453730121&cpge=ogplatee)



**Fig. 6: Firefly Wool Cap—Original Cap as seen in the Television Show (Left), The Officially Licensed Version (Center), and a Hand-made Version (Right)<sup>240</sup>**

And, in addition, sent cease and desist letters to those individuals “illegally” selling hand-made versions.<sup>241</sup> While 20<sup>th</sup> Century Fox was within its rights to protect its copyright from products that infringed upon its market value, it seems unfair to the fans involved.<sup>242</sup> The original idea for marketing the hats came directly from the fans themselves.<sup>243</sup> Those who made a living from selling the hats were now out of luck.<sup>244</sup> Fair use likely would not have protected these sellers, since those being sold were a direct copy of the hat worn in the show. Likewise, sales from the *Etsy* store sellers were competing with, and threatening to affect, 20<sup>th</sup> Century Fox’s market.<sup>245</sup>

240. *Jayne’s Hat – Knitting Pattern*, SONGS OF SUNSET BLOG (Jan. 24, 2013) <https://songsofsunset.wordpress.com/2013/01/24/jaynes-hat-knitting-pattern/>; *Can’t Stop the Serenity*, *supra* note 239; CutesyFaery, *Not-Jayne Hat, Knit Earflap Hat With Pom-Pom*, ETSY, [https://www.etsy.com/listing/113255371/not-jayne-hat-knit-earflap-hat-with-pom-pom?utm\\_source=google&utm\\_medium=cpc&utm\\_campaign=shopping\\_us\\_geekery-accessory-hat-low&ione\\_adtype=pla&ione\\_creative=54906759995&ione\\_product\\_id=113255371&ione\\_product\\_partition\\_id=89326543475&ione\\_store\\_code=&ione\\_device=c&ione\\_product\\_channel=online&ione\\_merchant\\_id=101439227&ione\\_product\\_country=US&ione\\_product\\_language=en&gclid=CjwKEAjwKSoBRCZ5oyy87DimEcSJADiWsvg7W1FVC3Vxc7RAIvaqX-mOhXT\\_yMow3bz4D8DdFraNRoCmczw\\_wcB](https://www.etsy.com/listing/113255371/not-jayne-hat-knit-earflap-hat-with-pom-pom?utm_source=google&utm_medium=cpc&utm_campaign=shopping_us_geekery-accessory-hat-low&ione_adtype=pla&ione_creative=54906759995&ione_product_id=113255371&ione_product_partition_id=89326543475&ione_store_code=&ione_device=c&ione_product_channel=online&ione_merchant_id=101439227&ione_product_country=US&ione_product_language=en&gclid=CjwKEAjwKSoBRCZ5oyy87DimEcSJADiWsvg7W1FVC3Vxc7RAIvaqX-mOhXT_yMow3bz4D8DdFraNRoCmczw_wcB) (last visited Mar. 17, 2015).

241. See Yamshon, *supra* note 235; Hall, *supra* note 237.

242. See Leslie Kasperowicz, *Firefly Fans Angered After Fox Cracks Down on Jayne Hat Sellers*, CINEMABLEND, [http://www.cinemablend.com/television/Firefly-Fans-Angered-Fox-Cracks-Down-Jayne-Hat-Sellers-54513.html#disqus\\_thread](http://www.cinemablend.com/television/Firefly-Fans-Angered-Fox-Cracks-Down-Jayne-Hat-Sellers-54513.html#disqus_thread) (last visited Jan. 7, 2015).

243. See Yamshon, *supra* note 235.

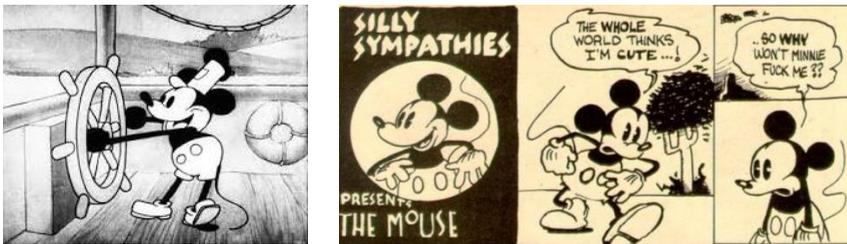
244. See Jill Pantozzi, *Are You A Firefly Fan Who Makes Jayne Hats? Watch Out, Fox Is Coming For You*, MARY SUE (Apr. 9, 2013), <http://www.themarysue.com/jayne-hats-fox/>.

245. See Beth Hutchens, *We Are Just Too Pretty to Get Sued for Infringement*, IPWATCHDOG (Apr. 23, 2013), <http://www.ipwatchdog.com/2013/04/23/we-are-just-too-pretty-to-get-sued-for-infringement/id=39451/>.

## 2. Fan Art

### M-I-C-You In Court: Walt Disney Co. & The Air Pirates

The fair use doctrine purports to protect otherwise infringing uses that are categorized as parodies.<sup>246</sup> However, as witnessed in the Ninth Circuit’s decision in *Walt Disney Productions v. Air Pirates*,<sup>247</sup> fair use is not a dependable defense. The *Air Pirates* decision came at a time of great social change in America, requiring the courts to determine the role of parody and the First Amendment.<sup>248</sup> The case centered on a team of cartoonists using exact copies of Disney characters in their satirical comic books.<sup>249</sup> Not only did the work feature copyrighted characters, but it placed these characters in adult situations—far different than the wholesome portrayal envisioned by Disney.<sup>250</sup>



**Fig. 7: Walt Disney’s “Steamboat Willie” (Left) and *Air Pirates*’ “The Mouse” (Right)<sup>251</sup>**

246. 17 U.S.C. § 107 (2012); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“Suffice it to say now that parody has an obvious claim to transformative value . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one”).

247. 581 F.2d 751 (9th Cir. 1978).

248. See Valerie Bodell, *Why is the Walt Disney Productions v. Air Pirates Case Important?*, AMALGAE, <http://amalgae.org/airpirates.html> (last visited Mar. 17, 2015); see also BOB LEVIN, *THE PIRATES AND THE MOUSE: DISNEY’S WAR AGAINST THE COUNTERCULTURE* (2003) (“It became one of the longest and most absurd in the history of attempts to use copyright to stifle artistic expression in America.”).

249. See Betsy Gomez, *Disney’s Bloody Attack on The Air Pirates*, CBLDF (May 6, 2013), <http://cblfd.org/2013/05/disneys-bloody-attack-on-the-air-pirates/>.

250. See LEVIN, *supra* note 248; Michael Ryan, “Escape From Tomorrow” and The Air Pirates, SOUND ON SIGHT (Jan. 23, 2013), <http://www.soundonsight.org/escape-from-tomorrow-and-the-air-pirates/>.

251. See Aaron Hillis, *Who is Steamboat Willie?*, OPENINGCEREMONY (May 19, 2014), <http://www.openingceremony.us/entry.asp?pid=9654>; Robynne Raye, *Mouse vs. The Pirates*, ROCKPAPERINK (Jun. 6, 2013), <http://archives.rockpaperink.com/content/column.php?id=580&cid=13>.

Disney sued the cartoonists for, among other causes of action, copyright infringement.<sup>252</sup> The cartoonists defended, stating that their focus was on an “aesthetic and political criticism of a deeply serious nature.”<sup>253</sup> The cartoonists also claimed First Amendment protection.<sup>254</sup> They argued that the character of Mickey Mouse was part of the country’s “collective unconscious”; the initially “innocent” character had now become a “reactionary force [devoted to] Establishment values.”<sup>255</sup>

In 1978, the Ninth Circuit ruled unanimously that the cartoonists infringed Disney’s copyrighted characters.<sup>256</sup> The court stated that the cartoonists had other avenues in which to express themselves, thus preventing the First Amendment to be used as a defense.<sup>257</sup> The defendants, the court argued, “crossed the line” separating fair use and infringement, yet refused to state where the line should be drawn.<sup>258</sup> This case is a prime example of the trouble surrounding fair use. Where should the line be drawn? How much copying is too much? Here the legal battle spanned the course of ten years.<sup>259</sup> And while Disney ultimately settled, *Air Pirates* creator, Dan O’Neill, agreed never to use the Disney characters again, directly assaulting free-speech rights.<sup>260</sup>

#### Gotta Sue ‘Em All: 3D Printing, Pokémon, and Copyright Infringement

Additionally, owners of copyrighted materials have been known to extend their control in ever more encroaching ways, especially when it comes to new technologies. 3D printing, while originally created in the 1980s, has increased in prominence within the last few years.<sup>261</sup> Its technology allows users to create virtually any object and is accessible to everyday consumers.<sup>262</sup> However, with the increased use of this technology comes concern over its impact on intellectual property—and more importantly,

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252. *Air Pirates*, 581 F.2d at 754.

253. See LEVIN, *supra* note 248.

254. *Air Pirates*, 581 F.2d at 758-59.

255. See LEVIN, *supra* note 248; Gomez, *supra* note 249.

256. *Air Pirates*, 581 F.2d at 754, 760.

257. *Id.* at 759; Gomez, *supra* note 249.

258. See LEVIN, *supra* note 248.

259. See *id.*

260. See Ryan, *supra* note 250; Gomez, *supra* note 249.

261. Pagan Kennedy, *Who Made That 3-D Printer?*, N.Y. TIMES MAG. (Nov. 22, 2013), <http://www.nytimes.com/2013/11/24/magazine/who-made-that-3-d-printer.html>; Shane Hickey, *Chuck Hull: The Father of 3D Printing Who Shaped Technology*, GUARDIAN (Jun. 22, 2014), <http://www.theguardian.com/business/2014/jun/22/chuck-hull-father-3d-printing-shaped-technology>.

262. Jennifer Walpole, *The Future Is Here: Create 3D Scans of Virtually Any Object*, AM. GENIUS (Sept. 29, 2014), <http://agbeat.com/tech-news/future-create-3d-scans-virtually-object/>.

claims of copyright infringement.<sup>263</sup> 3D printing has the potential for unlimited manufacturing of copyrighted objects, leaving copyright owners without the means to detect or control its use.<sup>264</sup> As a result, many copyright holders have taken action against fan artists' infringing, yet transformative, uses.<sup>265</sup>

This past summer, artist Claudia Ng purchased a 3D printer to create a *Pokémon*-themed planter.<sup>266</sup> Although initially created as a gift for a friend, her design quickly grew in popularity.<sup>267</sup> She uploaded her model to the 3D printing website, Shapeways, which allows users to create and share designs.<sup>268</sup> Although Ng never included any reference to *Pokémon* directly, those familiar with the brand knew which character the model was based upon.<sup>269</sup> However, Shapeways received a cease and desist notice from The Pokémon Company International claiming infringement and requesting all revenue associated with the project.<sup>270</sup> And while this issue will likely never make it to court, it is troublesome. The planter does, admittedly, bear some similarity to the overall design of the Bulbasaur character, but not by much.

263. See John Paul Titlow, *Why 3D Printing Will Be the Next Big Copyright Fight*, READWRITE (Feb. 20, 2013), <http://readwrite.com/2013/02/20/3d-printing-will-be-the-next-big-copyright-fight>; John Hornick, *Some Thoughts on Copyright and 3d Printing*, 3D PRINTING INDUSTRY (Sept. 13, 2013), <http://3dprintingindustry.com/2013/09/13/some-thoughts-on-copyright-and-3d-printing/>.

264. See Steve Henn, *As 3-D Printing Becomes More Accessible, Copyright Questions Arise*, NPR (Feb. 19, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/02/19/171912826/as-3-d-printing-become-more-accessible-copyright-questions-arise>.

265. See, e.g., Mike Masnick, *Left Shark Bites Back: 3D Printer Sculptor Hires Lawyer to Respond to Katy Perry's Bogus Takedown*, TECHDIRT (Feb. 9, 2015), <https://www.techdirt.com/articles/20150209/11373729960/left-shark-bites-back-3d-printer-sculptor-hires-lawyer-to-respond-to-katy-perrys-bogus-takedown.shtml> (Alleged copyright infringement actions against artist who took the "Left Shark" character from Katy Perry's Super Bowl XLIX half-time show and created a 3D sculpture).

266. Ben Kuchera, *Nintendo Uses Copyright On Best Pokémon Fan Project. It's Super Effective*, POLYGON (Aug. 18, 2014), <http://www.polygon.com/pokemon/2014/8/18/6031683/bulbasaur-planter-missed-your-chance>.

267. Davide Sher, *Pokémon Bulbasaur Look-alike Planter Model Removed from Shapeways for Copyright Violation*, 3D PRINTING INDUSTRY (Aug. 19, 2014), <http://3dprintingindustry.com/2014/08/19/pokemon-bulbasaur-look-alike-planter-model-removed-shapeways-copyright-violation/>.

268. Shawn Taylor, *Bulbasaur Planters Taken Down By The Pokémon Company*, NINTENDO NEWS (Aug. 18, 2014), <http://nintendonews.com/2014/08/bulbasaur-planters-taken-down-pokemon-company/>.

269. See Alec, *A Fan's 3D-printed Pokémon Planter faces Nintendo Copyright Claim*, 3DERS (Aug. 19, 2014), <http://www.3ders.org/articles/20140819-a-fan-3d-printed-pokemon-planter-faces-nintendo-copyright-claim.html>.

270. James Plotkin, *Gotta Catch 'Em All: Nintendo Pulls the Plug on 3D Printed Pokémon Planters*, LINKEDIN (Aug. 19, 2014), <https://www.linkedin.com/pulse/20140819145724-43330467-gotta-catch-em-all-nintendo-pulls-the-plug-on-3d-printed-pokémon-planters>.

Ng's design lacks the familiar green spots and red eyes that appear in *Pokémon*'s concept. Likewise, there are no officially-licensed products in the market that would directly compete and siphon revenue from the company.<sup>271</sup> With the way courts have decided fair use, this may not bode well for Ng's innovative product.



**Fig. 8: The Pokemon Company International's "Bulbasaur" (Left) and Claudia Ng's Planter (Right)<sup>272</sup>**

*Just A Puppet: Final Fantasy and 3D Printing Infringement*

Similarly, artist Joaquin Baldwin uploaded designs for high-quality figurines based on the popular video game series, *Final Fantasy*.<sup>273</sup> In total, he had reproduced twenty-six different figurines, depicting his favorite characters.<sup>274</sup> Also offered through Shapeways, the design was vastly popular amongst "die-hard" fans.<sup>275</sup> However, the developer of the series, Square-Enix, was less than impressed.<sup>276</sup> The company sent a takedown notice to the website, which promptly removed the products from sale on the artist's

271. Timothy Geiger, *Nintendo Goes Copyright on Woman Making Pokémon-Inspired Planters*, TECHDIRT (Aug. 19, 2014), <https://www.techdirt.com/articles/20140819/10013428255/nintendo-goes-copyright-woman-making-pokemon-inspired-planters.shtml>.

272. See *Bulbasaur #001*, POKÉMON, <http://www.pokemon.com/us/pokedex/bulbasaur> (last visited Aug. 31, 2015); Colette, *Nintendo Stunts Growth for This Cute Bulbasaur Planter With Copyright Infringement*, MYNINTENDONEWS (Aug. 19, 2014), <http://mynintendonews.com/2014/08/19/nintendo-stunts-growth-for-this-cute-bulbasaur-planter-with-copyright-infringement/>.

273. See Owen Good, *Square-Enix Puts 3D-Printed Final Fantasy Figures Out of Business*, KOTAKU (Aug. 17, 2013), <http://kotaku.com/square-enix-puts-3d-printed-final-fantasy-figures-out-o-1160491860>.

274. See Kevin Lee, *Here's the Entire Cast of Final Fantasy VII 3D-printed Into Real Life*, TECHHIVE (Aug. 16, 2013), <http://www.techhive.com/article/2046833/here-s-the-entire-cast-of-final-fantasy-vii-3d-printed-into-real-life.html>.

275. Bryan Bishop, *Square-Enix Stops Fan From Selling 3D-printed Final Fantasy VII Figures*, VERGE (Aug. 17, 2013), <http://www.theverge.com/2013/8/17/4629764/square-enix-stops-fan-from-selling-3d-printed-final-fantasy-vii-figures>.

276. See Good, *supra* note 273; Bishop, *supra* note 275.

profile page.<sup>277</sup> Baldwin was forced to offer refunds to those fans who had already placed orders.<sup>278</sup> Although Square-Enix has created a market for merchandise sales stemming from video game memorabilia,<sup>279</sup> would Baldwin's figurines have made an effect? Unlike Ng's Bulbasaur planter, Baldwin's figurines bear a striking resemblance to *Final Fantasy VII*'s in-game character depictions. But for all of the merchandise the company sells, it has never once produced figurines based on its early computer graphics.<sup>280</sup>



**Fig. 8 : Square-Enix's Final Fantasy VII Character (Left) and Joaquin Baldwin's Sculpture (Right)<sup>281</sup>**

### 3. Fan Videos and Films

#### Buffy the Copyright Slayer

As alluded to earlier in this section, owners have every right to bring an infringement action when there has been an exact reproduction of their

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277. Nick Statt, *Print Chop: How Copyright Killed a 3d-printed Final Fantasy Fad*, CNET (Aug. 16, 2013), <http://www.cnet.com/news/print-chop-how-copyright-killed-a-3d-printed-final-fantasy-fad/>.

278. Brooke Kaelin, *Square Enix Nixes Final Fantasy Prints At Shapeways*, 3D PRINTER WORLD (Aug. 21, 2013), <http://www.3dprinterworld.com/article/square-enix-nixes-final-fantasy-prints-shapeways>.

279. Square-Enix: *Online Store*, SQUARE-ENIX, <https://store.na.square-enix.com/action-figure> (last visited Mar. 17, 2015).

280. *Id.*

281. Johnny Thai, *3D Printing Final Fantasy VII*, 3D DIRECT (Nov. 5, 2013), <https://www.3ddirect.com/3D-printing-Final-Fantasy-VII>.

original work.<sup>282</sup> But what happens when those owners overstep their boundaries by bringing fraudulent claims? In 2009, Jonathan McIntosh uploaded a video onto *YouTube* entitled, “*Buffy Versus Edward: Twilight Remixed*.”<sup>283</sup> In this six-minute video, McIntosh parsed together scenes edited from the movie, *Twilight* and the television series, *Buffy the Vampire Slayer*, to create a critique on the vampire subculture.<sup>284</sup>



**Fig. 9: *Buffy Versus Edward: Remixed*—Using scenes from *Buffy the Vampire Slayer* (Left) and *Twilight* (Right).<sup>285</sup>**

The video, which had been viewed over three million times, and which was nominated for a *Webby*<sup>286</sup> award, portrayed *Twilight*'s main character in a negative light.<sup>287</sup> Through selective editing, McIntosh reworked the scenes to make it appear as if Edward, the vampiric face of the *Twilight* franchise,

282. See *supra* Part III.

283. Jonathan McIntosh, *Buffy vs Edward: Twilight Remixed – [original version]*, YOUTUBE (Jun. 19, 2009), <https://www.youtube.com/watch?v=RZwM3GvaTRM>; Daniel Nye Griffiths, *Copyright In the Twilight Zone: The Strange Case of Buffy Versus Edward*, FORBES (Jan. 15, 2013), <http://www.forbes.com/sites/danielnyegriffiths/2013/01/15/copyright-in-the-twilight-zone-the-strange-case-of-buffy-versus-edward/>.

284. Griffiths, *supra* note 283. McIntosh used the video as an opportunity to speak out against stalking and its danger signs. *Id.*

285. RebelliousPixels, *Buffy v. Edward (Twilight Remixed)*, BLIP, <http://blip.tv/rebelliouspixelscom/buffy-vs-edward-twilight-remixed-2274024> (last visited Sep. 1, 2015).

286. *Vote for Buffy vs. Edward At the Webby Awards!*, BUFFYFEST (Apr. 15, 2010), <http://buffyfest.blogspot.com/2010/04/vote-for-buffy-vs-edward-at-webby.html>; *I'm Helping Buffy vs Edward Win!*, FEMINIST FATALE (Apr. 24, 2010), <http://www.feministfatale.com/tag/buffy-v-edward/>.

287. Griffiths, *supra* note 283.

was stalking the eponymous slayer.<sup>288</sup> This video is a prime example of fair use.<sup>289</sup> Used as an exemplar at the 2012 U.S. Copyright Office hearings, this film short was a critique on abusive relationships—It was not intended to be viewed as the actual works themselves and received no commercial revenue.<sup>290</sup>

However, McIntosh was sent a notice from YouTube informing him that it had detected audiovisual content within the video that was owned by copyright holder, Lionsgate.<sup>291</sup> While YouTube kept the video on its site, it added commercial advertisements to the video, the proceeds of which went directly to Lionsgate.<sup>292</sup> McIntosh, upset over the attachment of advertisements on his work, protested, claiming his video was “critical and transformative,” under fair use.<sup>293</sup> Although YouTube initially rejected his contention, Lionsgate released their claim on his video.<sup>294</sup>

Almost immediately thereafter, McIntosh received yet another notification, this time claiming his work contained “visual” content belonging to Lionsgate.<sup>295</sup> His video was removed from the site altogether, while he was denied access to his account.<sup>296</sup> In order to regain access, McIntosh was ordered to take a copyright class and pass a test, thus acknowledging his understanding of the law.<sup>297</sup>

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288. *Id.*

289. *Id.*; Bryan Bello, *Online Video Takedowns: What Happened to Buffy vs. Edward?*, CMSI (Jan. 31, 2013), <http://www.cmsimpact.org/blog/question-month/online-video-takedowns-what-happened-buffy-vs-edward>.

290. Griffiths, *supra* note 283.

291. *Id.*; see Kofi Outlaw, *Lionsgate Acquires Summit: Twilight & Hunger Games Now Under One Roof*, SCREEN RANT (Jan. 13, 2012), <http://screenrant.com/lionsgate-summit-entertainment-merger-deal-kofi-147096/>.

292. Griffiths, *supra* note 283; Jonathan McIntosh, *Lionsgate Censors Remix Video That the Copyright Office Itself Used As an Example of Fair Use*, TECHDIRT (Jan. 10, 2013), <https://www.techdirt.com/articles/20130110/01515121624/lionsgate-censors-remix-video-that-copyright-office-itself-used-as-example-fair-use.shtml>.

293. Griffiths, *supra* note 283; McIntosh, *supra* note 292.

294. See Owen Gallagher, *Lionsgate Entertainment Abuses Copyright Law By Removing Buffy vs Edward From YouTube*, CRITICAL REMIX (Jan. 10, 2013), <http://www.criticalremix.com/home/2013/01/10/lionsgate-entertainment-abuses-copyright-law-by-removing-buffy-vs-edward-from-youtube/>.

295. Griffiths, *supra* note 283; Gallagher, *supra* note 294.

296. Griffiths, *supra* note 283; Jonathan McIntosh, *Buffy vs Edward Remix Unfairly Removed By Lionsgate*, ARS TECHNICA (Jan. 9, 2013), <http://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/>.

297. Cory Doctorow, *Lionsgate Commits Copyfraud, Has Classic Buffy vs Edward Video Censored*, BOINGBOING (Jan. 11, 2013), <http://boingboing.net/2013/01/11/lionsgate-commits-copyfraud-h.html>.

Although the issue was ultimately settled after three months,<sup>298</sup> the contention between copyright's authorized monopoly and expressive freedoms is further highlighted by this episode. Copyright perpetuates the owner's right to exclude others from speaking out against the owner's works.<sup>299</sup> McIntosh deftly summarizes the worrisome nature of the conflict:

It's worrying because I had to acquire a lawyer and file [five] separate disputes, appeals or notices over [three] months to have my clearly fair use remix reinstated. But what about all the remixers, vidders and vloggers out there who don't know their fair use rights or who don't have access to a legal help? What about the users who just accept the monetization shakedown deal because they are too scared of losing [*sic*] their videos or having their whole channel deleted? How many other fair use YouTube videos have fallen victim to these types of practices?<sup>300</sup>

Copyright has the potential to chill speech; many are easily intimidated and refuse to carry on litigation.<sup>301</sup> Yet even with legal aid and recognition from the Copyright Office,<sup>302</sup> there was still no way to be sure his work would have passed under the fair use balancing test. His only original contribution was the stylistic editing of the video; the entirety of his video was appropriated from both the movie and television show.<sup>303</sup>

### 50 Shades of Gray: Copyright And Fan Films

In addition, fan films, like most other fan-made works, exist in a "legally gray area."<sup>304</sup> These films are produced by amateur filmmakers using copyrighted material for inspiration.<sup>305</sup> And while most of these videos are non-profit, rights holders have been divisive in their approach to these works.<sup>306</sup>

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298. Griffiths, *supra* note 283.

299. See Bauer, *supra* note 28, at 846-47.

300. Griffiths, *supra* note 283.

301. See Bauer, *supra* note 28, at 855.

302. McIntosh, *supra* note 292; Gallagher, *supra* note 294.

303. See McIntosh, *supra* note 283; *Annotated Captions of Buffy vs Edward (Twilight Remixed) in English*, DOTSUB, <https://dotsub.com/view/747b4a01-fb8e-4ed6-958f-ced1f48fba4/viewTranscript/eng> (last visited Sep. 3, 2015).

304. KEVIN ROEBUCK, VIRTUAL ASSISTANTS: HIGH-IMPACT EMERGING TECHNOLOGY – WHAT YOU NEED TO KNOW 251 (2011).

305. See *id.* at 249.

306. Ben Kendrick, *3 Reasons Why Studios & Creators Should Love Bootleg Universe Short Films*, SCREEN RANT (Mar. 5, 2015), <http://screenrant.com/best-fan-films-power-rangers-online-saban/>.

There are some media copyright owners that have accepted fan-created videos using their work as a source for inspiration.<sup>307</sup> For example, filmmakers for an unofficial feature centered on characters from the popular novel and movie franchise, *Lord of the Rings*, have “reached an understanding” with New Line Cinema and the Tolkien estate.<sup>308</sup> So long as they remain a non-profit film, they may commence production.<sup>309</sup> According to the filmmakers, the media copyright holders “are supportive of the way fans wish to express their enthusiasm.”<sup>310</sup> Similarly, DC Comics has taken the same approach.<sup>311</sup> According to Paul Levitz, then-President of the company, DC Comics was “not against things where people use [DC’s] assets if they don’t do anything monetarily with them.”<sup>312</sup>

There are other companies, however, that proactively shutdown attempts at filmmaking before production even begins.<sup>313</sup> In 2013, project creator Massive State commenced a Kickstarter<sup>314</sup> campaign to raise funds for a film based on the popular Nintendo video game, *Metroid*.<sup>315</sup> Since no feature film had ever been released, the creators sought to make their own version instead, specifically emphasizing that the roughly ten-minute short was strictly not for profit.<sup>316</sup> However, a few days later, Nintendo sent a DMCA notice to Kickstarter asserting its ownership to the *Metroid* brand.<sup>317</sup> After having

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307. Robin Anne Reid, *The Hunt for Gollum: Tracking Issues of Fandom Cultures*, TRANSFORMATIVE WORKS AND CULTURES [3.2] (2009), <http://journal.transformativeworks.org/index.php/twc/article/view/162/123>.

308. *See id.*; Mike Masnick, *Lord of the Rings Fan Film To Debut . . . Raising Some Copyright Questions*, TECHDIRT (May 1, 2009), <https://www.techdirt.com/articles/20090501/0312444716.shtml>.

309. Reid, *supra* note 307.

310. *See* Tim Masters, *Making Middle-Earth on a Shoestring*, BBC NEWS (Apr. 30, 2009), <http://news.bbc.co.uk/2/hi/entertainment/8022623.stm>.

311. *See* Mark Julian, *Opinion Poll: The Greatest Fan Films of All Time*, COMICBOOKMOVIE (Sept. 24, 2011), <http://www.comicbookmovie.com/fansites/GraphicCity/news/?a=47002>.

312. *See id.*; ROEBUCK, *supra* note 304.

313. *See* Bubbawheat, *This Film Is No Longer Available Due To Copyright Infringement*, FLIGHTS, TIGHTS, & MOVIE NIGHTS (Oct. 27, 2013), <http://flightstightsandmovenights.com/2013/10/27/this-film-is-no-longer-available-due-to-copyright-infringement/>.

314. *What Is Kickstarter?*, KICKSTARTER, <https://www.kickstarter.com/hello?ref=footer> (last visited Sep. 3, 2015).

315. Mitch Dyer, *Nintendo Copyright Claim Kills Metroid Fan Film on Kickstarter*, IGN (Aug. 23, 2013), <http://www.ign.com/articles/2013/08/23/nintendo-copyright-claim-kills-metroid-fan-film-on-kickstarter>.

316. *See* Owen Good, *Someone’s Making a \$90,000 Metroid Movie Without Nintendo’s Permission*, KOTAKU (Aug. 11, 2013), <http://kotaku.com/someones-making-a-90-000-metroid-movie-without-ninten-1101287941>.

317. *See* Dyer, *supra* note 315; Good, *supra* note 316.

raised more than \$20,000, the website removed the project due to copyright infringement allegations.<sup>318</sup>

*Mighty Morphin' Copyrighted Rangers*

Most recently, Saban Brands, owner of the *Power Rangers* franchise, requested that YouTube remove a fan film involving their copyrighted characters.<sup>319</sup> The film was a darker, grittier version of the classic childrens television show, mainly geared for the adult fanbase.<sup>320</sup> After becoming a viral sensation on YouTube, the website was forced to take the video down after a copyright complaint was issued by Saban.<sup>321</sup> According to the film's music video director, Joseph Kahn, "I think it gave them a lot of publicity and revived its pop culture awareness. Instead of supporting the good will of the fans, they've turned it into a legal issue. It doesn't sound like they're thinking of the fandom at all."<sup>322</sup> Created as a non-profit, the twelve-minute film was meant as an homage to the original series.<sup>323</sup> However, since the characters and names belong to Saban, the owner was able to successfully assert its rights.<sup>324</sup> The issue was ultimately settled, with the filmmakers agreeing to place age restrictions on the video and a disclaimer advising of its unofficial capacity.<sup>325</sup> Yet this is another example of how a media company's first reaction is to vigorously enforce its rights, even if unfounded,

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318. Fidel Martinez, *Nintendo Yanks Metroid Fan Film from Kickstarter*, DAILY DOT (Aug. 26, 2013), <http://www.dailydot.com/entertainment/metroid-fan-film-kickstarter/>.

319. Shankar, *supra* note 115; Amanda Kooser, *Bloody Power Rangers Fan Film Returns With Age Restriction*, CNET (Mar. 2, 2015), <http://www.cnet.com/news/bloody-power-rangers-fan-film-returns-but-not-for-everyone/>.

320. Kooser, *supra* note 319; Eric Goldman, *Power Rangers Fan Film From Producer Adi Shankar and Starring James Van Der Beek and Katie Sackhoff Gets "Dark and Gritty,"* IGN (Feb. 24, 2015), <http://www.ign.com/articles/2015/02/24/power-rangers-fan-film-starring-james-vander-beek-and-katee-sackhoff-gets-dark-and-gritty>.

321. See James Luxford, *Power Rangers Fan Film Shows Muscle As It Deflects Rights Holders' Assault*, GUARDIAN (Mar. 4, 2015), <http://www.theguardian.com/film/filmblog/2015/mar/04/power-rangers-fan-film-influential-rights-holders>.

322. David Robb, Anita Busch & Dominic Pattern, *Power Rangers Fan Video Yanked From YouTube; Filmmakers Vow to Fight*, DEADLINE (Feb. 26, 2015) ("The audience will pay for the franchise, but they want to play with it as well. If you want the support of the modern fandom, you need to let them participate"), <http://deadline.com/2015/02/power-rangers-youtube-video-removed-joseph-kahn-1201382423/>.

323. Jacob Kastrenakes, *Gritty Power Rangers Short Pulled From YouTube, Producer Calls It "Infringement On Freedom of Expression,"* VERGE (Feb. 27, 2015), <http://www.theverge.com/2015/2/27/8120047/power-rangers-short-pulled-youtube-producer-responds>.

324. *See id.*

325. Kooser, *supra* note 319.

when faced with the prospect of someone else using its work. This threatens to suppress creativity by disavowing legitimate exercises of expression.

#### 4. Fan Fiction

##### Harry Potter and the Case Against Fair Use

Like the fan activities described previously, fan fiction has also seen its share of legal issues. In *Warner Bros. Entertainment, Inc. v. RDR Books*, J.K. Rowling, author of the best-selling childrens series, *Harry Potter*, brought suit against Steven Vander Ark.<sup>326</sup> For roughly eight years, Vander Ark maintained a website entitled, *The Harry Potter Lexicon*.<sup>327</sup> The lexicon catalogued every minute detail entrenched in all seven novels, serving as an online encyclopedia for all things *Harry Potter*.<sup>328</sup> However, it wasn't until he sought to publish the encyclopedia that both Rowling and Warner Brothers<sup>329</sup> initiated suit.<sup>330</sup>

During the trial, Judge Patterson suggested the parties reach a settlement, acknowledging the murky and often uncertain waters of fair use; "The parties ought to see if there's not a way to work this out, because there are strong issues in this case and it could come out one way or the other. The fair use doctrine is not clear."<sup>331</sup> However, when both parties continued on with the litigation, he rendered his decision in favor of finding, unsurprisingly, infringement.<sup>332</sup> According to Judge Patterson, the encyclopedia copied

326. 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

327. *Why J.K. Rowling Won the Harry Potter Lexicon Lawsuit*, OUT-LAW (Sept. 9, 2008), <http://www.out-law.com/page-9413>; THE HARRY POTTER LEXICON, <http://www.hp-lexicon.org> (last visited Sep. 4, 2015).

328. *See id.*; David Ardia, *Judge Rejects Fair Use Defense in Harry Potter Lexicon Case, J.K. Rowling Recovers Her Plums*, DIGITAL MEDIA LAW PROJECT (Sept. 9, 2008), <http://www.dmlp.org/blog/2008/judge-rejects-fair-use-defense-harry-potter-lexicon-case-jk-rowling-recovers-her-plums>.

329. *See* Joe Nocera, *Who Owns How Much of Harry Potter?*, N.Y. TIMES (Warner Brothers holds the license to create *Harry Potter* movies), <http://www.nytimes.com/2008/02/09/business/worldbusiness/09iht-wbjoe09.4.9893157.html?pagewanted=all> (last visited Sep. 4, 2015).

330. *See* John Eligon, *Rowling Wins Lawsuit Against Potter Lexicon*, N.Y. TIMES (Sept. 8, 2008), <http://www.nytimes.com/2008/09/09/nyregion/09potter.html>.

331. Dan Slater, *Judge in Potter Trial Calls on Parties to Settle*, WALL ST. J. (Apr. 15, 2008), <http://blogs.wsj.com/law/2008/04/15/judge-in-potter-trial-calls-on-parties-to-settle/>.

332. *Rowling Wins Book Copyright Claim*, BBC NEWS (Sept. 8, 2008), <http://news.bbc.co.uk/2/hi/entertainment/7605142.stm>. The court stated that the lexicon was not transformative enough and took away Rowling's market to exploit. However, the court did hold that authors do not have an automatic right to control what is written about their works. *See The Harry Potter Decision*, GROKLAW (Sept. 9, 2008), <http://www.groklaw.net/article.php?story=20080909014304275>.

“fictional facts” created by Rowling in her novels.<sup>333</sup> Although Vander Ark’s work was transformative, it was not consistently so—the amount that was copied far surpassed what was necessary.<sup>334</sup> Questionably, the judge, in applying the second fair use factor, claimed that because Rowling’s work was so creative and fanciful, it deserved greater protection.<sup>335</sup> And yet, as stated in *Bleistein v. Donaldson Lithographing Co.*, the aesthetic quality of the work should not be taken into account.<sup>336</sup> Ultimately, Vander Ark was able to publish the lexicon, but not before making substantial changes to its content.<sup>337</sup>

### *Interview With A Copyright Holder*

Should, then, an author be allowed to dictate when or how her characters are used, especially if they are not being used for commercial purposes? Author Anne Rice,<sup>338</sup> best known for a series of books collectively entitled *The Vampire Chronicles*, vehemently discourages fan fiction.<sup>339</sup> On her website, Rice posted a message to her fans specifically refusing to endorse or accept works created by fans using her characters; “I do not allow fan fiction. The characters are copyrighted . . . I advise my readers to write your own stories with your own characters.”<sup>340</sup>

And yet unlike other authors who have been vocal about their dislike of fan fiction,<sup>341</sup> Rice has been known to publicly harass those who do not respect her wishes.<sup>342</sup> In addition to expressing her opinion, she demanded a popular website purge all works featuring her characters.<sup>343</sup> Fans allegedly

333. See Ardia, *supra* note 328.

334. See *id.*; Eligon, *supra* note 330.

335. See Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008).

336. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (holding that the aesthetic quality of the circus posters should not be taken into account in determining whether the work was protected under copyright).

337. See SCHWABACH, *supra* note 220, at 131.

338. ANNE RICE, <http://annerice.com> (last visited Mar. 17, 2015).

339. Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J. (June 14, 2012), <http://www.wsj.com/articles/SB10001424052702303734204577464411825970488>.

340. *Anne’s Messages to Fans*, ANNE RICE (Sept. 14, 2009), <http://annerice.com/ReaderInteraction-MessagesToFans.html>.

341. See Emily Temple, *Abusing the People of Westeros: Famous Authors on Fan-Fiction*, FLAVORWIRE (Apr. 19, 2012), <http://flavorwire.com/281936/abusing-the-people-of-westeros-famous-authors-on-fan-fiction/>; Natalie Bochenski, *George R.R. Martin: Hands Off My Characters*, SYDNEY MORNING HERALD (Nov. 8, 2013), <http://www.smh.com.au/entertainment/books/george-rr-martin-hands-off-my-characters-20131108-2x6fb.html>.

342. *Croatoan Fanfic: Where Has Anne Rice Fanfiction Gone?*, ANGELFIRE (Oct. 26, 2014), <http://www.angelfire.com/rant/croatoan/> (last visited Oct. 26, 2014) [hereinafter *Croatoan Fanfic*].

343. Michelle Pauli, *Fan Fiction*, GUARDIAN (Dec. 4, 2002), <http://www.theguardian.com/technology/2002/dec/05/internet.onlinesupplement1>.

received e-mail threats, discouraging them from attempting to repost the stories, as well as claims that personal information was divulged and used as part of the harassment.<sup>344</sup> Fans, fearing no legal recourse, went into hiding.<sup>345</sup> For years, any form of fan fiction was considered unacceptable—although recently, she may have taken a less drastic approach in her views.<sup>346</sup>

According to actor and executive producer Paul Gross, “If you’re willing to bring [the character] into people’s houses every week, the [fans] are entitled to certain liberties, wherever their imagination is carried by those characters.”<sup>347</sup> In fan fiction, creators may use copyrighted characters, but they themselves create a different world in which those characters exist.<sup>348</sup> For example, the immensely popular erotica *Fifty Shades of Grey* was originally fan fiction based on the movie *Twilight*.<sup>349</sup> Unedited, using the names “Bella” and “Edward,” would have almost certainly led to litigation.<sup>350</sup> Yet because E.L. James changed the names of the main characters, suddenly her work was worthy to be published.<sup>351</sup> Especially in regards to stories written that will never impact the author’s market shares, copyright should never be used as a vehicle to suppress free speech—particularly if quelling speech comes through fear of unwarranted persecution.

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344. See *Croatoan Fanfic*, *supra* note 342.

345. See *id.*

346. *How Fan Fiction is Conquering the Internet and Shooting Up Book Charts*, METRO (Nov. 11, 2012), <http://metro.co.uk/2012/11/11/how-fan-fiction-is-conquering-the-internet-and-shooting-up-book-charts-617396/>.

347. Cynthia Brouse, *Internet Authors Put TV Buddies in Unusual Romances*, TORONTO GLOBE & MAIL, Aug. 8, 1998, at C6.

348. See SCHWABACH, *supra* note 220, at 42.

349. See Marah Eakin, *Holy Crow! Fifty Shades of Grey Is Crazy Similar To Its Twilight Origin Story*, A.V. CLUB (Feb. 12, 2015), <http://www.avclub.com/article/holy-crow-fifty-shades-grey-crazy-similar-its-twil-215185>; Jason Boog, *The Lost History of Fifty Shades of Grey*, GALLEYCAT (Nov. 21, 2012), <http://www.adweek.com/galleycat/fifty-shades-of-grey-wayback-machine/50128>.

350. See Neda Ulaby, *Christian Grey Began His Fictional Career As a Vampire*, NPR (Feb. 8, 2015), <http://www.npr.org/2015/02/08/384695847/christian-grey-began-his-fictional-career-as-a-vampire>.

351. See *id.*

*B. And We Ripped Up The Ending And The Rules . . . Leaving Nothing But Freedom And Choice*<sup>352</sup>: *Allowing The First Amendment To Be Used As A Defense To Copyright Infringement Claims.*

Promoting the First Amendment as a proper defense under copyright law will combat the unnecessary chilling effect preventing new ideas from developing and entering the marketplace. Likewise, upholding First Amendment principles will advance public interest through unfettered use of copyrighted material. As demonstrated above,<sup>353</sup> the courts' current perception of fair use is too speculative, with circuits unevenly applying the factors when faced with infringement claims. For fandom in particular, this is problematic.

According to Henry Jenkins, “[f]ans construct their cultural and social identity through borrowing and inflecting mass culture images, articulating concerns which often go unvoiced within the dominant media.”<sup>354</sup> Yet fandom activities would never be allowed to thrive under the courts' current restrictive interpretation of fair use. To protect social discourse, courts need to stop reiterating the damaging misconception that First Amendment ideals are fully protected under fair use concepts, and instead focus on separately analyzing the amendment as its own defense.

1. First Amendment Principles Protect Against A Chilling Effect

One of the detriments of fair use is its potential to chill speech.<sup>355</sup> As mentioned previously,<sup>356</sup> there is an obvious disconnect among the circuits in applying fair use's factors to determine liability.<sup>357</sup> Courts are notorious for analyzing the same facts under fair use's balancing test and reaching differing conclusions.<sup>358</sup> For example, in *Harper*, the Supreme Court reversed the lower court's ruling simply because the majority believed the factors were improperly addressed.<sup>359</sup> Consequently, the balancing test is highly

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352. *Supernatural: The Man Who Would Be King* (CW television broadcast May 6, 2011). Spoken by the angel Castiel, recalling how he and the main protagonists averted the Apocalypse simply by choosing free will.

353. See *supra* Part II(B)(2).

354. JENKINS, *supra* note 46, at 23.

355. See Bauer, *supra* note 28, at 861.

356. See *supra* Part II(B)(2).

357. See cases cited *supra* note 196.

358. See Bauer, *supra* note 28, at 854-55; Leval, *supra* note 202, at 1132 (“Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges.”).

359. *Harper & Row Publ'rs., Inc. v. Nation Enters.*, 471 U.S. 539, 560, 569 (1985). The Court held that the Court of Appeals had erred in concluding that the use was not an infringement. In finding for the copyright holder, the Court exclaimed that the lower court had overlooked the

subjective; any evidence offered is likely to be based on “biased, ambiguous, or inconclusive” interpretations.<sup>360</sup> As a result of the great difficulty in predicting when fair use applies, potential users are often discouraged from entering the market and creating unauthorized new works.<sup>361</sup>

Additionally, potential users, fearing the nebulous and uncertain fair use standards, will be unwilling or unable to bear the financial burden of litigation.<sup>362</sup> Under copyright law, the amount of statutory damages that can be awarded to successful litigants is staggering.<sup>363</sup> If held liable for willful infringement, an infringer may be sanctioned to pay up to \$150,000 per act.<sup>364</sup> The amount alone would deter even those most convinced of legitimacy.<sup>365</sup>

Under a First Amendment heightened scrutiny analysis, courts will be forced to actively determine whether copyright’s provisions truly burden more speech than is essential.<sup>366</sup> In order to strengthen individual autonomy, heightened scrutiny should serve as a check to account for societal interests—for those speech beneficiaries who remain underrepresented in the political process.<sup>367</sup> Especially within the fandom community, where powerful copyright holders lobby for greater legislative strength in order to constrain speech,<sup>368</sup> the First Amendment’s principles will ensure fairness within public discourse and impartiality in expressive diversity.<sup>369</sup>

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unpublished nature of the pre-existing work and placed too little emphasis on the qualitative importance of the copied portions of text. *Id.* at 569.

360. Garfield, *supra* note 28, at 1195.

361. William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 52 (2008) (the “lethal combination of uncertain standards with lengthy and costly litigation creates a classic chilling effect upon the unlicensed use of trademarks to facilitate speech, even when such uses are perfectly lawful.”).

362. Tehranian, *supra* note 146, at 1215-16; Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 24 (2000); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1867-68 (1991); Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587, 612-13 (1997).

363. See Tehranian, *supra* note 146, at 1216; Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 6 (2010).

364. See generally R. Buck McKinney, *Guardrail to Guardrail: Statutory Damage Awards in Copyright Infringement Litigation*, LANDSLIDE, May/June 2010.

365. But see *BMW v. Gore*, 517 U.S. 559, 562-63 (1996).

366. See Netanel, *supra* note 32, at 86.

367. See *id.* at 62.

368. See HUA, *supra* note 186, at 17.

369. See Netanel, *supra* note 32, at 63.

## 2. First Amendment Principles Protect Public Interest

Furthermore, free speech principles should prevail over those promoted under copyright's regime when there exists a strong public interest in freely creating and disseminating copyrighted material.<sup>370</sup> Public interest is perhaps the most compelling concern envisioned within the First Amendment's protection.<sup>371</sup> And yet rather than factoring in this consideration, courts focus instead on the copyright holder's interests and the commercial nature of the infringing use.<sup>372</sup>

Although refusing to recognize the First Amendment as a sufficient defense in copyright actions, the courts have acknowledged the importance in allowing greater access to expressive works.<sup>373</sup> For example, in *Abend v. MCA, Inc.*, although finding that the movie's re-release was a copyright violation, the court refused to enjoin further distribution of *Rear Window* due to First Amendment considerations.<sup>374</sup> According to Justice Pregerson, there were compelling interests in both the overall artistic achievements of, and public interest in viewing, the movie.<sup>375</sup>

First Amendment values would prevail in situations for which public interest allowed for the free use of copyrighted works.<sup>376</sup> Not only would it give value to the speaker in allowing him or her to comment, criticize, and disseminate the original work, but it would also enhance the value to society by providing an opportunity to see and hear new forms of expression.<sup>377</sup> According to Joseph Bauer, "[i]t is particularly important to permit unauthorized, as well as permitted, uses of the original expression with respect to topics of discussion and controversy in the public arena."<sup>378</sup> This comports inherently with the fandom experience. Fandom is a participatory

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370. Bauer, *supra* note 28, at 855; *see also* Olson, *supra* note 157, at 1413.

371. Bauer, *supra* note 28, at 855, 855 n.112 (contending that "the public interest in allowing unauthorized copying or other use of a work, even in situations where the fair use doctrine might not apply, is a key factor in determining whether First Amendment considerations should trump copyright claims.").

372. *See id.* at 856; Tehranian, *supra* note 146, at 1210.

373. Bauer, *supra* note 28, at 885. *See, e.g.*, *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Authors Guild, Inc. v. HathiTrust*, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998); *Warren Publ'g. Co. v. Spurlock*, 645 F. Supp. 2d 402 (2009); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471 (2d Cir. 2004).

374. 863 F.2d 1465, 1478 (1988) ("Compelling equitable considerations weighed against enjoining distribution of the movie").

375. *Id.* at 1478.

376. Bauer, *supra* note 28, at 885.

377. *See id.*; *see also* Tehranian, *supra* note 146, at 1208, 1212.

378. Bauer, *supra* note 28, at 884-85.

culture in which people come together to enjoy, discuss, and reimagine pre-existing works.<sup>379</sup> The social relationship between spectatorship and consumption allows for an evolving influence on culture, one in which fans receive a benefit just by creating and sharing within the larger fandom community.

### 3. Possible Solution To Lessen The Tension

Observing the current trend in jurisprudence, it is more than likely that courts would quickly dismiss on all-out dismemberment and revision to copyright law. Nor would they look kindly on proposals to outright disregard a copyright owner's rights, even if to promote free speech ideals. So how exactly can there be a resolution between copyright and the First Amendment? Over the years, there have been scholarly debates on reform, seeking to address the ever-expanding copyright regime.<sup>380</sup> There have been proposals spanning a multitude of ideas and theories, from creating renewable copyrights<sup>381</sup> to increasing copyright protection on a sliding scale, as the right grows older.<sup>382</sup> While each has its own merit, there is one in particular that may offer the best solution, especially in regards to fandom.

This proposal is actually a combination of two ideas previously set forth in scholarly articles.<sup>383</sup> As Christina Chung explained, fan-made works are goods created by fans to fill the void created by copyright holders due to a lack of supply.<sup>384</sup> Demand for fan-made works exists because the owners have failed to place sufficient, adequate merchandise in the market.<sup>385</sup> Chung suggests that the market would be more efficient if fans were allowed to sell their own wares to other fans more-than-willing to purchase these

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379. See also Owain Gwynne, *The Fandom Is Out There*, in *FAN CULTURE: ESSAYS ON PARTICIPATORY FANDOM IN THE 21ST CENTURY* 100 (Kristin M. Barton & Jonathan Malcolm Lampley eds., 2014) (quoting JENKINS, *supra* note 42, at 10).

380. See, e.g., WILLIAM W. FISHER, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 *HARV. J.L. & TECH.* 1 (2003); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 *COLUM. L. REV.* 1600 (1982).

381. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 *U. CHI. L. REV.* 471 (2003).

382. See Joseph P. Liu, *Copyright and Time: A Proposal*, 101 *MICH. L. REV.* 409, 410-12 (2002).

383. See Christina Chung, *Holy Fandom, Batman! Commercial Fan Works, Fair Use, and the Economics of Complements and Market Failure*, 19 *B.U. J. SCI. & TECH. L.* 367, 399-402 (2013); Tehrani, *supra* note 146, at 1239-42.

384. See Chung, *supra* note 383, at 399.

385. See *id.* at 401.

products.<sup>386</sup> Since fans have a better understanding of what their fandom is looking for, more so it seems than the copyright owners themselves, it is highly probable that they would be better equipped to respond to the market.<sup>387</sup> As she surmises, “[i]f copyright owners are unwilling or unable to capitalize on this growth, then fans should be able to.”<sup>388</sup>

Finally, since fans are using copyrighted material, courts may be more inclined to allow infringement if done through a profit-sharing model. Law professor John Tehranian suggests the need for intermediate liability through the use of transformative works.<sup>389</sup> Should the derivative work be transformative and properly registered on its own, the work should be given protection, without the need for consent from the owner.<sup>390</sup> According to Tehranian, “[e]ach of these activities draws upon copyrighted works to create a new work of art imbued with new expressions that criticize or illuminate our values, assess our social institutions, satire current events, or comment on our most notorious cultural symbols.”<sup>391</sup> Again, since these transformative works rely on pre-existing material, the copyright holder would be entitled to receive half of the profits resulting from this “commercial exploitation.”<sup>392</sup>



**Fig. 10: *My Little Pony*—Hasbro’s Fluttershy (Left), SuperFan Christophe Vidal’s Fan Art (Center), and Final 3D Sculpture (Right).**

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386. *See id.*

387. *See id.*

388. *See id.* at 402.

389. Tehranian, *supra* note 146, at 1239.

390. *See id.* at 1240.

391. *See id.* at 1242.

392. *See id.* at 1255-56. For example, as illustrated in the author’s article, if one were to write an election satire based on the familiar characters of *Star Wars*, one would be allowed, so long as a disclaimer advised of its unofficial status. However, since George Lucas is the copyright holder and retains the rights to those characters used, he would be entitled to fifty percent of the earnings. *Id.* at 1246.

An example of this can be seen with toy manufacturer Hasbro. The company has united with its fanbase to produce 3D-printed products through Shapeways.<sup>393</sup> Helmed by its vastly popular *My Little Pony* and *Transformers* franchises, Hasbro encourages its fans to create and submit fan art designs to be produced into 3D works of art.<sup>394</sup> While only a few have been selected, these fans were granted a license to create art that would become product offerings.<sup>395</sup> While Hasbro must clear each design, the artists have free reign to not only create, but to also set the prices of the designs.<sup>396</sup> This interaction between the fans and the media source not only encourages creativity and community, but enhances the fandom experience by inviting fans to participate.

#### IV. CONCLUSION

Although theoretically copyright and the First Amendment coexist to promote the furtherance of creative expression, there is a very real conflict underlying this belief.<sup>397</sup> Copyright's ever-increasing monopoly threatens the core values of First Amendment protection: societal enlightenment and the free flow of ideas.<sup>398</sup> Free speech and discussion thereof are the very basis for liberty and freedom,<sup>399</sup> and must not be so carelessly subsumed within copyright's internal mechanisms. Courts must acknowledge and properly

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393. See *SuperFanArt*, SHAPEWAYS, <http://www.shapeways.com/superfanart/mylittlepony> (last visited Mar. 17, 2015); see also Duann, *Hasbro & Shapeways Enable 3D Printing Fan Art With SuperFanArt*, SHAPEWAYS (Jul. 21, 2014), <http://www.shapeways.com/blog/archives/16759-hasbro-shapeways-enable-3d-printing-fan-art-with-superfanart.html>.

394. See TJ McCue, *Hasbro Offers Artwork for 3D Printing At Shapeways*, FORBES (Jul. 31, 2014), <http://www.forbes.com/sites/tjmccue/2014/07/31/hasbro-offers-artwork-for-3d-printing-at-shapeways/>; Scott J. Grunewald, *Shapeways & Hasbro Let Fans Sell Fan-Made Transformers and My Little Pony Products on SuperFanArt*, 3D PRINTING INDUSTRY (Aug. 28, 2014), <http://3dprintingindustry.com/2014/08/28/shapeways-hasbro-let-fans-sell-fan-made-transformers-little-pony-products-superfanart/>.

395. See *SuperFanArt*, *supra* note 393.

396. See Marc Graser, *Hasbro Lets Consumers Design Their Own Toys Through 3D Printing*, VARIETY (Jul. 21, 2014), <http://variety.com/2014/biz/news/my-little-pony-hasbro-lets-consumers-design-their-own-toys-through-3d-printing-1201265593/>; Elyse Betters, *Hasbro Okays Artists to Design and Sell 3D Printed Toy Art for Fans on Shapeways*, POCKET-LINT (Jul. 21, 2014), <http://www.pocket-lint.com/news/129990-hasbro-okays-artists-to-design-and-sell-3d-printed-toy-art-for-fans-on-shapeways>.

397. See David L. Hudson Jr., *Copyright & the First Amendment*, FIRST AMENDMENT CTR. (Aug. 5, 2004), <http://www.firstamendmentcenter.org/copyright-the-first-amendment>.

398. Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547 (2009); see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 350 (1996).

399. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

address this concern if First Amendment axioms are to be upheld. Failure to do so could lead to social deprivation—directly debilitating the fandom culture.

Fandom is, by its very nature, socially participatory.<sup>400</sup> For fans, social interaction and group membership revolving around a particular subject is not only empowering, but also rewarding.<sup>401</sup> According to actor Misha Collins, “[t]hey spend more time at their computers, more time reading books, more time *imagining* . . . For them, this fandom has served as a conduit to finding one another—it has helped them forge community . . . [I]n a nutshell, that feeling of community is what makes fandom so powerful.”<sup>402</sup> This intense devotion must be allowed to flourish if our society’s continued existence is to progress.

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400. See generally Mills, *supra* note 226, at 140.

401. See Katherine L. Fleming, *Participatory Fandom in American Culture: A Qualitative Case Study of DragonCon Attendees*, 1, 20 (2007) (unpublished M.A. thesis, University of South Florida) (on file with the University of South Florida Scholar Commons).

402. Misha Collins, *Life Changing: Supernatural and the Power of Fandom*, in FAN PHENOMENA: SUPERNATURAL 104 (2014) (emphasis added).

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