

# **Everything I Need To Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content**

## **ABSTRACT**

*With the growing popularity of YouTube and other platforms for user-generated content, such as blogs and wikis, copyright holders are increasingly concerned about potential infringing uses of their content. However, when enforcing their copyrights, owners often do not distinguish between direct piracy, such as uploading an entire episode of a television show, and transformative works, such as a fan-made video that incorporates clips from a television show. The line can be a difficult one to draw. However, there is at least one source of user-generated content that has existed for decades and that clearly differentiates itself from piracy: fandom and “fan fiction” writers.*

*This note traces the history of fan communities and the copyright issues associated with fiction that borrows characters and settings that the fan-author did not create. The author discusses established social norms within these communities that developed to deal with copyright issues, such as requirements for non-commercial use and attribution, and how these norms track to Creative Commons licenses. The author argues that widespread use of these licenses, granting copyrighted works “some rights reserved” instead of “all rights reserved,” would allow copyright holders to give their consumers some creative freedom in creating transformative works, while maintaining the control needed to combat piracy. However, the author also suggests a more immediate solution: copyright holders, in making decisions concerning copyright enforcement, should consider using the norms associated with established user-generated content communities as a framework for drawing a line between transformative work and piracy.*

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When writer Lori Jareo self-published her novel *Another Hope* and listed it on Amazon.com (Amazon), she expected only her family and friends to see the page and consider purchasing a copy.<sup>1</sup> However, the novel also attracted a great deal of unwanted attention: from mocking bloggers, outraged fans, and Lucasfilms' lawyers.<sup>2</sup> *Another Hope* was not a wholly original work, but rather an unauthorized *Star Wars* "fan fiction" novel: a story using characters and settings from *Star Wars* without the consent of Lucasfilms, which owns the copyright to the *Star Wars* universe.<sup>3</sup>

Lucasfilms' lawyers sent a cease-and-desist notice to Jareo, who then removed the book's listing from Amazon.<sup>4</sup> While that was the only legal consequence of Jareo's obvious copyright infringement,

1. Posting of John Scalzi to Whatever, <http://www.scalzi.com/whatever/004162.html> (Apr. 21, 2006, 02:11).

2. See, e.g., *id.* ("I don't think being a fan means you suddenly have a license to be stupid . . . she should be thankful if she gets out of it without all of her assets, and the assets of her publishing company, encased in carbonite."); see also, e.g., Posting of Lee Goldberg to A Writer's Life, [http://leegoldberg.typepad.com/a\\_writers\\_life/2006/04/no\\_hope\\_for\\_thi.html](http://leegoldberg.typepad.com/a_writers_life/2006/04/no_hope_for_thi.html) (Apr. 20, 2006) ("Here's a sampling of some of the blog headlines: 'The Stupid Is Strong With This One,' 'Behold: The Greatest Story of Stupidity Ever Told,' 'I Bet She Finds Our Lack of Faith Disturbing,' 'Feel The Stupid,' 'The World's Stupidest Human,' 'Soooo Amazingly Stupid,' 'Good Lord, How Stupid Can A Person Be?' and 'Face Palm, Head Desk, and a Generous Smattering of WTF?'); Posting of The Pink Marauder and accompanying comments to JournalFen, [http://www.journalfen.net/community/fandom\\_wank/928529.html](http://www.journalfen.net/community/fandom_wank/928529.html) (Apr. 21, 2006, 03:18 UTC) (containing over 700 comments from fans, nearly all of which are negative).

3. Patrick Lee, *Star Wars Fanfic Still on Sale*, SCI FI WIRE, Apr. 25, 2006, <http://www.scifi.com/scifiwire/index.php?category=0&id=35724>.

4. *Id.*

the punishment that she received from the public was much more severe. When several well-known science fiction writers and bloggers latched onto the story, they all had strong negative opinions of Jareo's actions.<sup>5</sup> In April 2006, the story hit dozens of popular blogs, inspiring such mockingly clever titles as "The Stupid is Strong with this One," and "I Bet She Finds Our Lack of Faith Disturbing."<sup>6</sup>

Were it not for the Internet publicity concerning the Amazon listing, Lucasfilms may not have ever noticed it. In fact, the book was published nearly a year before the scandal erupted.<sup>7</sup> It was not intellectual property lawyers or the copyright holder that condemned Jareo; rather, it was her fellow fan fiction writers. Jareo broke a major rule when she tried to profit from her fan fiction, and other fans were there to point out her mistake—not only for the *faux pas* in the fan community but also for the potential attention she brought to the world of fan fiction, a world in which copyright law is largely untested.<sup>8</sup>

Although generally defined as fiction that borrows characters and settings that the author did not create, the term "fan fiction" implies a more specific set of characteristics that distinguishes the genre from, for example, retold folklore (such as the Disney versions of fairy tales) and published media tie-in novels (such as any of the authorized *Star Trek* novels published by Simon and Schuster).<sup>9</sup> One early law review article on the subject defined fan fiction as "any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as 'professional' writing."<sup>10</sup> Furthermore, fan fiction is understood to be

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5. See generally Posting of John Scalzi, *supra* note 1 (mocking Jareo for her blatant disregard for copyright law); Posting of Lee Goldberg, *supra* note 2 (noting the fan fiction community's negative reaction to Jareo's book).

6. Posting of Lee Goldberg, *supra* note 2 (listing blog entries that spoof dialog from *Star Wars*).

7. See Barnes & Noble, <http://search.barnesandnoble.com/booksearch/isbnInquiry.asp?isbn=1933456027> (last visited Feb. 16, 2008) (listing the paperback version of Jareo's *Another Hope* with a publication date of June 2005, though noting that the book is currently "unavailable").

8. See, e.g., Postings to Jedi Council Forums, Playing in George's Sandbox: Copyright Issues and Fan Fiction, [http://boards.theforce.net/fan\\_fiction\\_resource/b10304/23718939/p1/](http://boards.theforce.net/fan_fiction_resource/b10304/23718939/p1/) (last visited Feb. 8, 2008) (providing *Star Wars* fans' criticism and concerns that the Jareo incident may have negative repercussions for fandom as a whole).

9. See Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET, 62-63 (Karen Hellekson & Kristina Busse eds., 2006) (discussing the definition of fan fiction).

10. Rebecca Tushnet, Note, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997) [hereinafter Tushnet, *Legal Fictions*].

“unauthorized” and “not-for-profit.”<sup>11</sup> Though some may still use the term to refer to any derivative work—that is, a new work that incorporates elements from the original<sup>12</sup>—most definitions distinguish fan fiction from works based on books in the public domain.<sup>13</sup>

However, fan fiction is not the type of derivative work that is receiving most of the attention these days. With the growing popularity of YouTube, social networking sites, blogs, and other platforms for online user-generated content (UGC), copyright holders, such as Lucasfilms, have even more to fret about. As in the early days of Napster, suddenly everyone is talking about copyright law and anticipating epic courtroom battles.<sup>14</sup> The Digital Millennium Copyright Act (DMCA) takedown notices<sup>15</sup> streaming into YouTube from companies like Fox and Viacom are demanding the removal of not only videos that are obviously infringing copyright, such as full episodes of television shows, but also derivative works like fanvids—

11. Tranquility Amongst the Stars (TATS), Fan Fiction Glossary, <http://www.swtats.com/glossary.html> (last visited Feb. 16, 2008) (defining fan fiction as “[u]nauthorized, not-for-profit fiction about copyrighted characters, or the use of original characters in a copyrighted universe,” and noting that “[f]anfic can be in the form of vignettes, short stories, novels, scripts, or poetry”).

12. See Mary Ellen Quinn, Book Review, *BOOKLIST* (Sept. 1, 2006) (reviewing PAMELA AIDAN, *DUTY AND DESIRE: A NOVEL OF FITZWILLIAM DARCY, GENTLEMAN* (2006); JANET AYLMER, *DARCY'S STORY: PRIDE AND PREJUDICE TOLD FROM A WHOLE NEW PERSPECTIVE* (2006) (stating that “[t]hese two titles are just the latest in Darcy-inspired Jane Austen ‘fanfiction’”).

13. See, e.g., *id.* (noting that Pamela Aidan’s 2006 novel, *Duty and Desire: A Novel of Fitzwilliam Darcy, Gentleman*, builds largely upon Jane Austen’s 1813 novel, *Pride and Prejudice*); see also, e.g., GREGORY MAGUIRE, *WICKED: THE LIFE AND TIMES OF THE WICKED WITCH OF THE WEST* (ReganBooks 1995) (providing an alternative view of the characters and story first presented in L. Frank Baum’s 1900 children’s novel, *The Wonderful Wizard of Oz*).

14. See, e.g., Wendy N. Davis, *Downloading a File of Copyright Woes: Google’s Buyout of YouTube Shows Federal Law Still Lags Behind Technology*, 93 A.B.A. J. 10 (2007) (predicting that copyright infringement lawsuits were on the horizon before Viacom filed suit against Google); Chloe Albanesius, *Congress Stares Down YouTube*, *HDNet*, PC MAG., May 10, 2007, available at <http://www.pcmag.com/article2/0,2704,2128537,00.asp> (listing YouTube as one of the online video providers that sent representatives to speak to Congress concerning intellectual property rights on the Internet); Adam Cohen, *A Crisis of Content; It’s Not Just Pop Music. Every Industry that Trades in Intellectual Property—From Publishing to Needlework Patterns—Could Get Napsterized*, *TIME*, Oct. 2, 2000, at 68 (discussing the expansion of Napster-like services beyond music and movies); Lawrence Lessig, *Make Way for Copyright Chaos*, *N.Y. TIMES*, Mar. 18, 2007, at E12 (noting the importance of the upcoming *Viacom v. Google* lawsuit).

15. The Digital Millennium Copyright Act allows Web sites to escape liability for infringing material if they abide by takedown notices sent by the copyright holders. See 17 U.S.C. § 512 (2000).

user-made videos that edit together music and clips from television shows or movies.<sup>16</sup>

Big copyright holders are attempting to maintain as much control over the UGC issue as they can, perhaps wary of suffering the same fate as the post-Napster music industry.<sup>17</sup> However, they treat UGC as if it is some new construct, as if the line between “foster[ing] creativity” and “respecting the rights of copyright owners” is some new problem brought on by new technology.<sup>18</sup> In fact, fan fiction, like Jareo’s unauthorized novel, *is* user-generated content. Fans and writers have been appropriating bits and pieces of copyrighted works for their own use at least since the first *Star Trek* ’zines were published in the 1960s.<sup>19</sup>

Looking back on the copyright “crisis” of the years since Napster’s inception, law professor John Palfrey noted, “Technologies don’t infringe copyright; people do.”<sup>20</sup> User-generated content was not born with YouTube, and neither were the copyright issues surrounding it. By definition, UGC is created outside of one’s professional routine; it is something that people do in their free time, usually without monetary compensation.<sup>21</sup> For someone to devote free time to something voluntarily, a certain amount of interest must be involved; one might even say obsession. As one reporter writing on media fans stated: “It is a truth universally acknowledged: No matter how much one is obsessed with something, one can always find someone more obsessed—and increasingly[,] that person can be found

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16. See, e.g., Posting of Anonymous to Waterbender, <http://water-bender.com/archives/61> (Feb. 4, 2007, 12:04) (noting that Avatar fanvids were removed from YouTube due to Viacom’s demands on behalf of Nickelodeon); Posting of unrelatedwaffle to <http://www.tv.com/the-adventures-of-jimmy-neutron-boy-genius/show/6566/youtube-purge/topic/4286-649688/msgs.html> (Feb. 5, 2007, 17:37) (noting that Jimmy Neutron fanvids were removed); Posting of harlequin to <http://inheritanceforums.com/index.php?showtopic=28017&st=15> (Oct. 1, 2007, 23:40) (noting that YouTube removed fanvids for the movie *Eragon* at the request of FOX).

17. See generally User Generated Content Principles, <http://www.ugcprinciples.com/> (last visited Feb. 16, 2008) (setting out a series of principles, agreed upon by several major copyright holders, intended to “foster an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners”).

18. Press Release, Principles for User Generated Content Services, Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), [http://www.ugcprinciples.com/press\\_release.html](http://www.ugcprinciples.com/press_release.html).

19. Derecho, *supra* note 9, at 62.

20. John Palfrey, Op-Ed., *The Digital Copyright Crisis*, BOSTON GLOBE, Sept. 7, 2004, at A15.

21. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PARTICIPATIVE WEB: USER-CREATED CONTENT 4 (2007), available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf> [hereinafter PARTICIPATIVE WEB].

on the Internet.”<sup>22</sup> The same types of people who were obsessed enough with a television show to write stories about it are now obsessing over politics, news, music, and, of course, over more movies and television shows.<sup>23</sup>

Existing copyright law sometimes struggles to fit the problems presented by current technology within its established statutory framework, but there seems to be a large industry push towards changing the law to remedy this, particularly in terms of UGC.<sup>24</sup> If clarifications or additions to the law prove to be stricter on derivative works, it is possible that fan fiction, which has been largely left alone by copyright holders for the last forty years,<sup>25</sup> will also come under greater scrutiny, realizing the fears of Lori Jareo’s accusers.

However, there is another option. Current hosts of UGC, and perhaps even copyright law itself, could learn something from fandom. Whereas YouTube has only existed for a couple of years, fan fiction has had time to evolve, and the community surrounding it has developed a distinct set of social norms that govern behavior. Informal rules exist, such as the one against profiting from fan fiction, and fan fiction writers are internally policed through the “many slight and sometimes forceful sanctions that members of [the] community impose on each other.”<sup>26</sup>

This note argues that as copyright law evolves to take into account the new generation of UGC, it should use the existing social norms associated with fan fiction as a framework for dealing with derivative works. Part I of this note traces the history of fan fiction and copyright, along with the problems that they impose upon each other. It then discusses the relationship between the “copyright crisis” of new technology and the current problems with UGC. Part II describes the social norms associated with fan fiction and how they track existing Creative Commons licenses. Part III suggests a bridge

22. Mike Doherty, *Stranger Than Fiction; When Fans Write Stories Based on Their Favourite Movies; or TV Shows, It's Out of Love. Did They Ever Hear of Copyright?*, GLOBE & MAIL (Toronto), Apr. 26, 2001, at R1.

23. See generally HENRY JENKINS, CONVERGENCE CULTURE (2007) [hereinafter JENKINS, CONVERGENCE CULTURE] (discussing how consumers interact with media in a variety of different contexts, and including chapters on television shows, movies, books, and politics).

24. See generally Press Release, Principles for User Generated Content Services, *supra* note 18.

25. Tushnet, *Legal Fictions*, *supra* note 10, at 664 (“Copyright law in general has very little to say to noncommercial and noninstitutional actors because until very recently their activities have gone unnoticed.”).

26. LAWRENCE LESSIG, CODE VERSION 2.0, app. at 340 (Basic Books 2006) (defining social norms) [hereinafter LESSIG, CODE VERSION 2.0].

between those norms and current copyright law, and how it would apply to the new generation of UGC. Finally, Part IV concludes that, whereas an ideal solution exists in the form of Creative Commons licenses, practicalities suggest that copyright owners should consider embracing existing social norms when deciding how to enforce their copyrights.

## I. THE CURRENT STATE OF USER-GENERATED CONTENT

### A. *Fan Fiction*

The idea of fan cultures, or “fandoms,” cultivating fan fiction writers began at the earliest in the 1920s with societies dedicated to Jane Austen and Sherlock Holmes,<sup>27</sup> but took off in the late 1960s with the advent of *Star Trek* fanzines.<sup>28</sup> The negative stereotype of “fans” today is that of obsessed geeks, like “Trekkies, who love nothing more than to watch the same 79 installments over and over . . .”<sup>29</sup> However, this represents a core misunderstanding of what it is to be a fan: that is, to have the “ability to transform personal reaction into social interaction, spectatorial culture into participatory culture . . . not by being a regular viewer of a particular program but by translating that viewing into some kind of cultural activity.”<sup>30</sup> Henry Jenkins, a Massachusetts Institute of Technology professor and expert on fan culture, likens fan fiction to the story of *The Velveteen Rabbit*: that the investment in something is what gives it a meaning rather than any intrinsic merits or economic value.<sup>31</sup> For fans who invest in a television show, book, or movie, that investment sparks production, and reading or viewing sparks writing, until the two are inseparable.<sup>32</sup> They are not watching the same thing over and over, but rather are creating something new instead.

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27. Derecho, *supra* note 9, at 62; see Tushnet, *Legal Fictions*, *supra* note 10, at 655 n.14.

28. Derecho, *supra* note 9, at 62. A fanzine is “[a]n amateur-produced magazine written for a subculture of enthusiasts devoted to a particular interest.” TheFreeDictionary, *Fanzine*, <http://www.thefreedictionary.com/fanzine> (last visited Feb. 16, 2008).

29. Charles Leerhsen, *Star Trek’s Nine Lives*, NEWSWEEK, Dec. 22, 1986, at 66.

30. HENRY JENKINS, *FANS, BLOGGERS, AND GAMERS* 41 (2006) [hereinafter JENKINS, *FANS*].

31. HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 51 (Routledge 1992) [hereinafter JENKINS, *TEXTUAL POACHERS*]. “The value of a new toy lies not in its material qualities . . . , but rather in how the toy is used, how it is integrated into the child’s imaginative experience . . . .” *Id.* at 50.

32. JENKINS, *FANS*, *supra* note 30, at 41.

Though traced back to the early days of *Star Trek*, fan fiction has only gained the attention of the mainstream media since the popularization of the Internet in the mid-1990s.<sup>33</sup> As one irate commentator seeking to stamp out the “evils” of bad fiction put it, “fan fiction subculture has probably quietly existed since the time of Jane Austen,” but “[l]ike most subcultures, the net has given it critical mass.”<sup>34</sup> This is unsurprising since “fans” have often been early adopters of digital technologies and were early pioneers of the Internet.<sup>35</sup> This “critical mass” has since overflowed, reaching and connecting an enormous number of fans all over the world. The media attention surrounding the *Harry Potter* books, as well as the large number of Internet-savvy fans (largely a generation that has grown up with this technology), brought even more attention to fan fiction. Today, a Google search for “fan fiction” yields nearly 40 million results.<sup>36</sup> Fanfiction.net boasts more than 18,000 Star Wars stories and more than 300,000 Harry Potter stories (up from about 280,000 stories in the last year),<sup>37</sup> not to mention the hundreds of other fandom categories, from the unsurprising (nearly 7,000 *X-Files* stories) to the obscure (nine stories based on the television show *Alf*).<sup>38</sup>

With “copyright” and “piracy” as the new buzzwords in a post-Napster society, many wonder about the dubious legal status of the writings.<sup>39</sup> If copyright law gives authors exclusive rights to their

33. See, e.g., Cyndi Kibby, *In Slash Fiction, Love Is All Around*, ST. PETERSBURG TIMES, Aug. 30, 1996, at 6T (describing the “cyberspace world of slash fiction”); Jon Casimir, *How the Net Is Snaring TV Viewers*, SYDNEY MORNING HERALD, Jan. 13, 1997, at 2 (describing fan fiction sites and groups, such as the Alt.Startrek.Creative site, as “a dream come true” for some television fans).

34. Karl Mamer, *The Net: A Magnet for Bad Fiction*, TORONTO SUN, Oct. 6, 1996, at C15.

35. JENKINS, FANS, *supra* note 30, at 138 (“Within the scientific and military institutions where the Internet was first introduced, science fiction has long been a literature of choice. Consequently, the slang and social practices employed on the early bulletin boards were often directly modeled on science fiction fandom. Mailing lists that focused on fan topics took their place alongside discussions of technological or scientific issues. In many ways, cyberspace is fandom writ large.”).

36. Google Home Page, <http://www.google.com/search?hl=en&q=%22Fan+Fiction%22&btnG=Search> (last visited Feb. 16, 2008).

37. On October 18, 2007, Fanfiction.net listed 342,874 Harry Potter stories, see Fanfiction.net, <http://www.fanfiction.net/book/> (last visited Feb. 16, 2008), while an article published on January 27, 2007, listed Fanfiction.net as having only 280,000 Harry Potter stories, see Robert Colvile, *Boldly Go Where No One Has Gone Before. Imagine Harry Potter in a Clinch with James Bond: Welcome to the World of Fan Fiction*, DAILY TELEGRAPH (London), Jan. 27, 2007, at 21.

38. Fanfiction.net, TV Shows, <http://www.fanfiction.net/tv> (last visited Feb. 16, 2008).

39. See Colvile, *supra* note 37; Doherty, *supra* note 22 (“[F]an fictioneers produce great quantities of work, and in the process raise questions about appropriation of voice,

writings, then how can someone else come along and use their characters and their world without their permission? Should the law allow this outlet for creative expression?

### B. Copyright

Modern copyright law has its roots in English common and statutory law, which the Framers of the U.S. Constitution used as guidance.<sup>40</sup> The copyright clause of the Constitution gives the legislative branch the power to create patents and copyrights to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>41</sup> In this drafting, the Framers had “three main goals: the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author.”<sup>42</sup> Essentially, the Framers wished to encourage innovation by providing an incentive to create: an exclusive right to control and benefit from those creations.

Fan fiction falls into the gray area of copyright law. It is generally considered to be a “derivative work,” a concept that was defined in the 1909 Copyright Act as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>43</sup> Derivative works are transformative; basically, they incorporate copyrighted aspects of the original without being carbon copies of the original. Legally, only copyright owners have the right to prepare these works.<sup>44</sup> This applies to anything from the slightest modification to something so transformed that the original is hardly recognizable, and it pertains “not just to the commercial publisher but to anyone with a computer.”<sup>45</sup> Moreover, copyright law treats a

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authorial integrity, the validity of copyright, [and] the point at which private creation becomes public property.”).

40. Meredith McCordle, Note, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 438 (2003) (noting that the Statute of Anne provided the framework for United States copyright law).

41. U.S. CONST. art. I, § 8, cl. 8.

42. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261 (11th Cir. 2001).

43. 17 U.S.C. § 101 (2000).

44. 17 U.S.C. § 106(2) (2000).

45. LAWRENCE LESSIG, FREE CULTURE 138-39 (Penguin Press 2004) [hereinafter LESSIG, FREE CULTURE].

transformative work created without permission in the same way that it treats copyright infringement.<sup>46</sup>

Therefore, fan fiction is generally understood to be illegal, as fan fiction writers do not have the legal right to create derivatives of copyrighted works.<sup>47</sup> However, many legal scholars have argued that fan fiction should fall under the copyright doctrine of “fair use.”<sup>48</sup> Under this doctrine, copyrighted information can be used, in certain circumstances, “even against the will of [a] writer[].”<sup>49</sup> Recognizing the interest in maintaining a rich public domain and not stifling creativity with overprotection, Congress codified fair use as an exception to copyright protection in the Copyright Act of 1976.<sup>50</sup> The following factors determine whether the use of a work qualifies as fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>51</sup>

The question of whether or not fan fiction could be considered fair use has never been addressed by the courts, but some legal scholars have suggested that it should be a categorical exception.<sup>52</sup> While the public

46. *Id.* at 139.

47. Christina Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 435 (2006) (“Fan fiction qualifies as an unauthorized derivative work, and is therefore illegal.”); see also McCordle, *supra* note 40, at 445 (“[Y]es, writing fan fiction infringes on copyright protections.”); Tushnet, *Legal Fictions*, *supra* note 10, at 659 (“Copyright law later expanded its reach beyond duplication to looser forms of borrowing, including use of well-established characters.”).

48. See generally McCordle, *supra* note 40, at 457 (“In summary, the purpose and nature of fan fiction weigh mostly in the favor of a fair use finding, despite available arguments that the same purpose and nature could also cut against a fair use finding.”); Ranon, *supra* note 47, at 451 (“The best way to protect this useful, transformative category of creative works is through a categorical fair use exception for Internet fan fiction.”); Tushnet, *Legal Fictions*, *supra* note 10, at 684-85 (“The fair use doctrine may be used to protect audiences’ interests in creatively responding to what they see. Protecting the addition of creative labor as a fair use also protects copyright owners from the cumulative effects on the market of widespread pure copying.”).

49. *Folsom v. Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901).

50. See 17 U.S.C. § 107 (2000); Tushnet, *Legal Fictions*, *supra* note 10, at 661.

51. 17 U.S.C. § 107.

52. See Tushnet, *Legal Fictions*, *supra* note 10, at 664; see also Ranon, *supra* note 47, at 444-45.

generally believes that a distinction exists between commercial and noncommercial use with regard to copyright, this perception has never been accepted as law.<sup>53</sup>

Because “[t]he standards for invoking the fair use doctrine are so vague,” fear of litigation may chill the creation of fan fiction altogether.<sup>54</sup> Fan fiction came under the scrutiny of copyright holders as early as 1977.<sup>55</sup> More recently, Warner Brothers made headlines by sending cease-and-desist letters to teenagers running *Harry Potter* Web sites.<sup>56</sup> However, no fan fiction case has ever gone to court, either because copyright holders have decided to ignore them or because of fan authors’ inability to contest cease-and-desist demands.<sup>57</sup> In fact, most fan fiction writers would prefer to keep it that way. Like those concerned by Lori Jareo’s novel that placed fan fiction in the public eye, many fans prefer to remain unnoticed. Right now, fan fiction is a legal grey area and is highly self-regulated, but if the law were to come down on the side of the copyright holders, no amount of internal policing could protect fan fiction from the legal mess that would follow. Fan fiction writers, therefore, have reason to be increasingly wary in a post-Napster world, where changes to copyright law seem inevitable.

### C. The Copyright Crisis and the “New” User-Generated Content

The “copyright crisis” that began with Napster hit the music industry hard, leaving many thinking that the problem is not with new technology but with the state of copyright law itself.<sup>58</sup> Even so, with the Supreme Court’s decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,<sup>59</sup> standing on the shoulders of the twenty-year-old decision in *Sony Corp. of America v. Universal Studios, Inc.*,<sup>60</sup> copyright law does not seem to be moving forward at the same rate as

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53. Ranon, *supra* note 47, at 445.

54. *Id.* at 444.

55. McCardle, *supra* note 40, at 441. In June 1977, Paramount sent a cease-and-desist letter to the publishers of a *Star Trek* fanzine, but then dropped the case upon discovering that it was not a professional publication. *Id.* In 1981, the head of the Official *Star Wars* Fan Club sent a cease-and-desist letter to the publishers of a fanzine based on *Star Wars* characters, which then ceased publication. *Id.*

56. Ranon, *supra* note 47, at 421.

57. Tushnet, *Legal Fictions*, *supra* note 10, at 664.

58. Palfrey, *supra* note 20, at A15.

59. 545 U.S. 913 (2005) (holding the distributor of the file-sharing technology liable for infringement because the software did not have substantial noninfringing uses).

60. 464 U.S. 417 (1984) (holding that Sony was not liable for copyright infringement because the Betamax recorder did have substantial noninfringing uses).

the technology implicating it. Meanwhile, in the wake of the *Napster*<sup>61</sup> and *Grokster*<sup>62</sup> lawsuits, the music industry is still flailing, with sales falling each year.<sup>63</sup> As early as 2001, more blank CDs were sold annually than prerecorded discs.<sup>64</sup>

The film and television industries were not affected as quickly by the copyright crisis as was the music industry, one reason being that video files are much larger and, therefore, more difficult to download and share than music files.<sup>65</sup> Also, whereas listening to a pirated song on an MP3 player provides a nearly identical experience to listening to a store-bought CD, watching a pirated copy of a film on a computer screen does not mimic the experience of a movie theater, or even of a DVD on a television.<sup>66</sup> However, new technology has caught up with film and television, just as it did with music. With the introduction of BitTorrent, a file-sharing protocol that allows users to download very large files by using a networking scheme,<sup>67</sup> sharing large files has become increasingly less cumbersome; in fact, the more popular a file is, the quicker it is to download.<sup>68</sup> Likewise, technology such as Apple TV allows users to view content from their PCs on their televisions, and the restrictions that make Apple TV compatible only with iTunes, like most other Digital Rights Management (DRM) measures (that is, ways to enforce copyright terms, usually with encryption), can be circumvented by hackers.<sup>69</sup> Also, with popular new gadgets like Slingbox making it possible to watch TV from one's PC,<sup>70</sup> more devices to flip-flop that scenario are probably not far behind.

61. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

62. *Grokster, Ltd.*, 545 U.S. 913.

63. See WILLIAM FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 4-5 (2004); see also Jeff Leeds, *Plunge In CD Sales Shakes Up Big Labels*, N.Y. TIMES, May 28, 2007, at E1 (noting that CD sales dropped twenty percent between 2006 and 2007).

64. FISHER, *supra* note 63, at 4-5.

65. *Id.* at 5.

66. *Id.*

67. wiseGEEK, What Is BitTorrent, <http://www.wisegeek.com/what-is-bitTorrent.htm> (last visited Feb. 16, 2008).

68. Bernhard Warner, *File Sharing? It's Great Business*, THE GUARDIAN (London), Mar. 9, 2006, at 5.

69. Q&A: *What Is DRM?*, BBC NEWS, Apr. 2, 2007, <http://news.bbc.co.uk/1/hi/technology/6337781.stm> (defining and listing some problems with DRM); Posting of Ben Drawbaugh to Engadget, <http://www.engadget.com/2007/04/10/how-to-play-divx-and-xvid-on-your-apple-tv/> (Apr. 10, 2007, 12:04) (explaining how to hack Apple TV).

70. "Slingbox" is a commercial name for technology that "allows people to use the Internet to watch its TV shows from anywhere in the world, via their laptops or cellphones." Dawn C. Chmielewski, *TV May Be a Tougher Challenge*, L.A. TIMES, Jan. 10, 2007, at C1.

Not much time has passed since “file sharing” was a new and strange term, the president of the Recording Industry Association of America declared Napster a “temporary phenomenon,” and the media gnashed its teeth for the “epic battles” yet to come in courtrooms.<sup>71</sup> Now, big copyright holders are being diligent about spotting the next “crisis,” before DVDs and cable go the way of the music album. And the newest scare is UGC. In fact, many of the leading copyright holders have come together in an attempt to consolidate their efforts to eliminate infringement on UGC Web sites.<sup>72</sup>

“User-generated content” has become something of a buzzword. For most, it immediately brings to mind YouTube, the leading distributor of user-uploaded video content.<sup>73</sup> However, UGC is broader than that; it is the product of the movement towards a participative Web culture, cultivated by new technology that is accessible and affordable by the general public.<sup>74</sup> Other types of UGC include blog entries, social networking profiles, wikis,<sup>75</sup> discussion board postings, and podcasts.<sup>76</sup> However, not everything posted on the Internet is UGC, as clarified by its three central characteristics: “(1) content made publicly available over the Internet, (2) which reflects a ‘certain amount of creative effort’, and (3) which is ‘created outside of professional routines and practices.’”<sup>77</sup>

The first requirement excludes things like a personal e-mail or a short story that someone writes but never shows anyone. The second requires that users “add their own value to the work,”<sup>78</sup> which actually excludes the sort of infringement about which copyright holders are most concerned. Copying a portion of a television show

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71. Cohen, *supra* note 14.

72. See generally User Generated Content Principles, *supra* note 17 (stating that the first objective in coming together around their listed principles is “the elimination of infringing content on UGC Services”).

73. Eric Auchard, *YouTube Visits Larger than Rivals Combined: Survey*, REUTERS UK, June 28, 2007, available at <http://uk.reuters.com/article/technologyNews/idUKN2742598120070628?pageNumber=1> (describing survey findings that, as of May 2007, YouTube’s share of the online video market was 60.2%).

74. See *infra* text accompanying notes 75-80 (listing examples of affordable and participative technology).

75. A “wiki” is software that allows users to edit and create content on a Web page using only a Web browser. What is Wiki, <http://wiki.org/wiki.cgi?WhatIsWiki> (last visited Feb. 16, 2007).

76. The actual definition of user-generated content is often debated. See, e.g., Posting of Alx Klive to Alx Klive’s WorldTV Blog, [http://worldtv.com/blog/rants\\_raves/youtube\\_trends\\_report.php](http://worldtv.com/blog/rants_raves/youtube_trends_report.php) (Aug. 23, 2006, 11:09) (debating the definition of “user-generated content”).

77. PARTICIPATIVE WEB, *supra* note 21, at 4.

78. *Id.* at 8.

and posting it to YouTube is not UGC, whereas taking scenes from a television show and splicing them together into a music video is UGC, even if Viacom and similar copyright holders often treat the two situations as one in the same.<sup>79</sup> The third requirement addresses motivation—UGC is “produced by non-professionals without the expectation of profit,” (i.e., noncommercial use).<sup>80</sup> Creators may be motivated simply by the desire to express themselves, or to achieve fame or notoriety.<sup>81</sup>

Just as the Internet allowed for the explosion of fan fiction and Napster facilitated music piracy, it is new technology that has cultivated UGC into something ubiquitous. However, unlike Napster, Grokster, and even BitTorrent, there is no single technology responsible for the change. Simple blogging software, used on sites such as LiveJournal and Blogger, has given everyone a voice.<sup>82</sup> Wikipedia provided a platform for collaborative knowledge-building.<sup>83</sup> iPods and iTunes, along with affordable recording hardware, have paved the way for podcasting.<sup>84</sup> Affordable digital cameras have made it easier and cheaper to upload pictures onto the web than to develop them.<sup>85</sup> Simple editing programs such as iMovie and Windows Movie Maker, along with affordable digital video cameras and hosting sites such as YouTube, have changed how we think of “home movies.”<sup>86</sup> In 2001, scholar Lawrence Lessig predicted that “[t]echnology could enable a whole generation to *create*—remixed films, new forms of music, digital art, a new kind of storytelling, writing, a new technology for poetry, criticism, political activism—and then, through the infrastructure of the Internet, *share* that creativity with others.”<sup>87</sup>

79. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 144-45 (2007) [hereinafter Tushnet, *Payment in Credit*]; *supra* note 16 and accompanying text.

80. PARTICIPATIVE WEB, *supra* note 21, at 8.

81. *Id.*

82. LiveJournal, <http://www.livejournal.com> (last visited Feb. 16, 2008); Blogger, <http://www.blogger.com> (last visited Feb. 16, 2008).

83. Wikipedia, <http://www.wikipedia.org> (last visited Feb. 16, 2008).

84. See generally What Is Podcasting?, [http://www.podcastingnews.com/articles/What\\_is\\_Podcast.html](http://www.podcastingnews.com/articles/What_is_Podcast.html) (last visited Feb. 16, 2008) (defining podcasting as the process of “delivering audio content to iPods and other portable media players on demand, so that it can be listened to at the user’s convenience”).

85. See Adobe Digital Kids Club: Introduction to Digital Photography, <http://www.adobe.com/education/digkids/intro/> (last visited Feb. 16, 2008) (listing several advantages of digital photography, including its cost-saving benefits).

86. Posting of Rick Broida to Lifehacker, <http://lifehacker.com/software/digital-video/alpha-geek-video-editing-101-220595.php> (Dec. 11, 2006, 09:30 PST).

87. LAWRENCE LESSIG, THE FUTURE OF IDEAS 9 (Random House 2001).

Thanks to the technology available since that time, this is exactly what has happened.

However, on the flip side of the technology explosion is the other circumstance that has boosted UGC: the world is flush with content. Content is everywhere. Not only is it easy to copy, but it is also easy to change. Someone can write a blog entry with political commentary that contains an embedded video of a politician appearing on a television news program.<sup>88</sup> Someone else can take the songs from The Beatles' *White Album*, mix them up with the songs on Jay-Z's *The Black Album*, and create *The Grey Album*; this type of music mixing is known as a "mash-up."<sup>89</sup> Someone can take clips from the *Harry Potter* movies, splice them together with dialogue from the *South Park* movie, and create a parody viewed by over 6 million people.<sup>90</sup> However, Fox probably owns that news footage, two different record companies own *The White Album* and *The Black Album*, and Warner Brothers and Comedy Central respectively hold the copyrights to the *Harry Potter* films and *South Park*. Herein lies the problem.

Much of UGC is 100% original, but that is not what has the large copyright holders, such as Fox and Viacom, anticipating the next crisis. In addition to cases of pure copying that have been lumped together with UGC (such as the wholesale distribution of entire television episodes on YouTube), copyright holders are going after derivative works like those described above. One particular type of work is called a "fanvid," which involves taking footage from television or movies, re-editing it "to express [a] particular slant" on the original work, and "linking [the] series [of] images to music [that is] similarly appropriated from commercial culture."<sup>91</sup> Fanvids have been around nearly as long as fan fiction; however, only in recent years have they become much easier to make and distribute.<sup>92</sup> Henry Jenkins

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88. See, e.g., Posting of David Kurtz to Talking Points Memo, <http://talkingpointsmemo.com/archives/063381.php> (Jan. 10, 2008, 19:04) (providing a video clip of a news show accompanied by brief political commentary).

89. Sasha Frere-Jones, *1+1+1=1: The New Math of Mashups*, NEW YORKER, Jan. 10, 2005, available at [http://www.newyorker.com/archive/2005/01/10/050110crmu\\_music](http://www.newyorker.com/archive/2005/01/10/050110crmu_music).

90. See YouTube, South Park & Harry Potter, <http://www.youtube.com/watch?v=Z8mvFHeGsc> (last visited Oct. 18, 2007) (listing a view count of 6,443,545). Notably, the video has since been removed.

91. JENKINS, TEXTUAL POACHERS, *supra* note 31, at 225; see also Logan Hill, *The Vidder: Luminosity Upgrades Fan Video*, N.Y. MAG., Nov. 12, 2007, available at <http://nymag.com/movies/features/videos/40622/> (displaying examples of specific fanvids produced by a profiled creator).

92. See Posting of Henry Jenkins to Confessions of an Aca-Fan, [http://www.henryjenkins.org/2006/09/how\\_to\\_watch\\_a\\_fanvid.html](http://www.henryjenkins.org/2006/09/how_to_watch_a_fanvid.html), (Sept. 18, 2006, 00:00) (describing the laborious process that used to be required to create a fanvid nearly twenty

described the form as “ideally suited to demands of fan culture, depending for its significance upon the careful welding of words and images to comment on the series narrative.”<sup>93</sup> Several large copyright holders, including Viacom and Fox, have recently had users’ fanvids removed from YouTube, citing copyright violations in the use of clips from television shows and movies.<sup>94</sup> Fanvids have also been removed at the request of the music’s copyright holders.<sup>95</sup>

When a copyright holder complains about a video posted by a YouTube user, that video is removed from YouTube without warning.<sup>96</sup> Furthermore, repeat “infringers” have their accounts suspended and are permanently blocked from the site.<sup>97</sup> Fanvids and similar videos take large amounts of time, care, and creativity to make. The possibility that they could be removed from public viewing without warning is likely to have a chilling effect on this sort of creative effort, much like the threat of litigation on the production of fan fiction.

In fact, the copyright issues associated with fan fiction are the same as those associated with UGC. Because wholesale copying does not technically constitute UGC (there is no creative effort or “added value” to the content),<sup>98</sup> then arguably all UGC that is not completely original could be considered derivative works. The definition for derivative works has been only vaguely tested, and terms such as “abridgement,” “condensation,” “recast,” “transformed,” or “adapted” could certainly refer to the various uses of copyrighted content examined here.<sup>99</sup>

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years ago, and discussing how digital production tools and Web sites like YouTube have made fanvids much easier to create today).

93. JENKINS, TEXTUAL POACHERS, *supra* note 31, at 225.

94. See *supra* note 16 and accompanying text.

95. See Posting of Acastus to AvatarSpirit.net, [http://www.avatarspiritmedia.net/news\\_archive.php?month=11&year=2006](http://www.avatarspiritmedia.net/news_archive.php?month=11&year=2006) (Nov. 22, 2006, 04:19 EST) (stating that an anonymous source at Nickelodeon denied removing mashups from YouTube and suggested that record companies may be at fault).

96. See YouTube, Terms of Use, <http://www.youtube.com/t/terms> (last visited Feb. 16, 2008) (stating that, if notified, YouTube will remove any content that “infringes on another’s intellectual property rights,” and that YouTube “reserves the right to remove Content and User Submissions without prior notice”); see, e.g., Posting of Nathan Weinberg to InsideGoogle, <http://google.blognewschannel.com/?p=2295> (May 3, 2006) (describing how his videos were removed on YouTube without any warning); Posting of Rich Juzwiak to FourFour, <http://fourfour.typepad.com/fourfour/2007/02/flushed.html> (Feb. 12, 2007) (describing how his videos were removed and his account suspended without any warning).

97. YouTube Help Center, What Is Your Policy on Copyright Infringement?, <http://www.google.com/support/youtube/bin/answer.py?answer=55772&topic=10554> (last visited Feb. 16, 2008).

98. PARTICIPATIVE WEB, *supra* note 21, at 8.

99. 17 U.S.C. § 101 (2000).

Fan fiction itself fits all of the requirements of UGC—it is published, creative, and noncommercial.<sup>100</sup> The only real difference between YouTube and fan fiction communities is that the latter have been around decades longer. These communities have developed a set of social norms and depend on self-regulating behavior to deal with issues such as plagiarism, attribution, and unauthorized commercial use.<sup>101</sup> The sanctions imposed by fandom itself may be far more frightening to the potential Lori Jareos of the fan fiction world than any lawyers could be. Fans are not trying to subvert copyright holders; the plight of fans is to love something so much that they want to make something more from it.<sup>102</sup> Disney, Viacom, Fox, and the other copyright holders who wish to stamp out “all infringing user-uploaded audio and video content” without an exception for transformative works may benefit from taking a step back from “crisis” mode and considering what harm they are actually trying to avoid.<sup>103</sup> Fan fiction and copyright have peacefully co-existed for decades, and there is no reason why other types of derivative works cannot continue to do the same.

## II. THE SELF-REGULATING COMMUNITY: SOCIAL NORMS AND COPYRIGHT LAW

### A. *Fandom and Social Norms*

One of the reasons that fan fiction has managed largely to escape the notice of the big copyright holders is the cost-prohibitive reality of taking legal action. Such an endeavor would present the same logistical problems that music companies have had pursuing individual peer-to-peer downloaders, and without the security of knowing that the law will come out in the copyright holder’s favor.<sup>104</sup>

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100. See PARTICIPATIVE WEB, *supra* note 21, at 8 (listing the three central characteristics of UGC).

101. See *infra* Part II.A (providing examples of social norms in fan communities).

102. See JENKINS, TEXTUAL POACHERS, *supra* note 31, at 50-51 (comparing fan activities to the story of *The Velveteen Rabbit*).

103. See generally User Generated Content Principles, *supra* note 17 (noting that UGC services should have “the goal of eliminating from their services all infringing user-uploaded audio and video content”).

104. Tracking down individual Napster users has traditionally been difficult for law enforcement, and “police in many countries have often been reluctant to pursue copyright infringement cases because the penalties” do not present a deterrent. Edward Taylor, *Music Industry Is Developing Tool for Tracking Use of File-Sharing*, WALL ST. J., Feb. 16, 2001, available at <http://www.detritus.net/contact/rumori/200103/0319.html>.

Though growing in popularity, fan fiction still very much exists in a subculture;<sup>105</sup> there is little reason to send a “message” like the one the music industry sought to send to the general public to this limited group of fans. Moreover, these very fans represent the most enthusiastic consumers of the copyright holder’s content, and alienating them could only do more harm than good.

Another reason that many fandom communities have avoided the spotlight is because the participants prefer it that way. Most fan fiction writers realize that their works exist in a legal gray area and that the “wrong case” could bring about a legal judgment that would have far reaching implications for the entire community.<sup>106</sup> Whereas some may seek legitimacy, others see fandom activities as having value only within the community and prefer to keep it that way.<sup>107</sup> Not only would mainstream attention potentially attract the notice of the copyright holders, but it would also attract the unwanted criticism of those who might disagree with more “questionable” fan fiction content, such as stories containing erotic elements.<sup>108</sup> Furthermore, like those involved in other predominantly online activities, fan fiction writers usually operate entirely by pseudonym, often hiding their involvement from real-life friends and family.<sup>109</sup> Fandoms are extremely close-knit communities, and members protect themselves by operating under a specific set of self-regulating guidelines—their own social norms.<sup>110</sup>

105. Henry Jenkins, *Transforming Fan Culture into User-Generated Content: The Case of FanLib*, May 22, 2007, [http://www.henryjenkins.org/2007/05/transforming\\_fan\\_culture\\_into.html](http://www.henryjenkins.org/2007/05/transforming_fan_culture_into.html) [hereinafter Jenkins, *Transforming Fan Culture*] (noting some fans’ displeasure over Fanlib’s goal to bring fan fiction to the “mainstream”).

106. *Id.*

107. *Id.*

108. Though outside the purview of this note, writers of erotic fan fiction have been censored by some Web sites, sometimes due to outside pressure. See generally Leva Cygnet, *The Purity Police and Fanfic*, FIREFOX NEWS, May 30, 2007, <http://firefox.org/news/articles/407/1/The-Purity-Police-and-Fanfic/Page1.html> (describing how LiveJournal deleted several fan fiction communities that contained stories with themes such as incest); Fan History Wiki, FanFiction.net, <http://www.fanh歷史.com/index.php?title=FanFiction.Net> (last visited Feb. 16, 2008) (noting that in 2002, FanFiction.net banned all NC-17 stories from its site). It should be noted, however, that in the United States, *authors* do not have “moral rights” in their works—i.e., if a derivative work is fair use, the author has no legal recourse if they find the content to be questionable. Ronald B. Standler, *Moral Rights of Authors in the USA*, May 29, 1998, <http://www.rbs2.com/moral.htm>.

109. See Vanessa E. Jones, *The New Adventures of Old Skywalker: As Fan Fiction Gains Respect, Opportunities Expand for the Genre’s Writers*, BOSTON GLOBE, Oct. 16, 2007, at E1 (noting the stigma attached to fan fiction and the existence of pseudonyms in the fan fiction community).

110. Posting of Icarusancalion to LiveJournal, <http://icarusancalion.livejournal.com/626928.html> (May 20, 2007, 14:08 UTC) (noting that membership is an important

Consider the case of FanLib, one of the most blatant examples of the collision of UGC and fan fiction. This site launched in the spring of 2007 and purports to provide “a free service where entertainment fans come together to create and share stories, art, and other media related to their favorite movies, television shows, and books,” as well as partner with “media companies, publishers, and sponsors.”<sup>111</sup> On the surface, this seemed like a great idea, as it would build on the success of business models like YouTube while reaping the benefits of decades’ worth of existing fan fiction. The site owners even contacted established fan fiction writers and invited them to submit their work to the site.<sup>112</sup> It seemed like a win-win for all parties involved; the site would get free content while selling advertising, and the fans would be happy “just being recognized.”<sup>113</sup> However, in trying to revolutionize fandom, FanLib managed to ignore most of the community’s existing norms and succeeded in alienating the very fans they intended to court.<sup>114</sup> As MIT professor Henry Jenkins observed in his analysis of the problem,

FanLib had done its homework by the standards of the [virtual community] world: they had identified a potential market; they had developed a business plan; they had even identified potential contributors to the site; they had developed a board of directors. They simply hadn’t really listen to, talked with, or respected the existing grassroots community which surrounded the production and distribution of fan fiction.<sup>115</sup>

Fanlib’s plan to tap into an existing market seemed to have everything but actual knowledge about that market.

Some of the mistakes were obvious ones. For example, FanLib initially miscalculated both the gender and age of their key demographic.<sup>116</sup> More importantly, however, the fans accused the Web

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credential in the fan community, and discussing Fanlib’s failure to take into account existing norms).

111. Fanlib.com, About Us—Introduction, <http://www.fanlib.com/aboutUs.do> (last visited Feb. 16, 2008).

112. Posting of Icarusancalion, *supra* note 110.

113. Jon Fine, *Putting the Fans to Work*, BUS. WK., Mar. 13, 2006, available at [http://www.businessweek.com/magazine/content/06\\_11/b3975037.htm](http://www.businessweek.com/magazine/content/06_11/b3975037.htm).

114. See generally Posting of Icarusancalion, *supra* note 110 (summarizing the problems with FanLib from a fan’s perspective and providing links to over a dozen other negative commentaries regarding FanLib).

115. Jenkins, *Transforming Fan Culture*, *supra* note 105.

116. *Id.* With a board of directors composed entirely of men, Fanlib’s marketing seemed male-centric, featuring the transformation of fandom from a ninety-eight pound weakling to a muscular body builder—however, the overwhelming majority of fan fiction writers are women. See Posting of Icarusancalion, *supra* note 110 (“FanLib also failed to research the demographic of their writers, with a patronizing tone and site design aimed at teenagers, where many of the fanfiction writers they invited were professionals and university students in their 20s, 30s, and older . . .”).

site's creators of breaking the golden rule of fandom: "thou shalt not profit from fan fiction."<sup>117</sup> Many saw the business plan as blatantly exploitative of the writers, or at the very least a threat to the community's preference to stay out of the public eye.<sup>118</sup> One fan fiction writer highlighted the problem with FanLib's failure to take into account the existing community norms: "Probably as a result of past 'cease and desist' letters against them, fanfiction communities are close knit, where membership within the community is an important credential, one which FanLib lacks . . ."<sup>119</sup> Jenkins agreed, noting that FanLib's real misstep was touting fan traditions while treating fans as individuals rather than respecting the community as a whole.<sup>120</sup>

In fact, Jenkins argues that this inattention to existing traditions is the problem with the new wave of media fervor over UGC in general: "The industry tends to see these users in isolation—as individuals who want to express themselves, rather than as part of pre-existing communities with their own traditions of participatory culture."<sup>121</sup> These traditions, such as the "thou shalt not profit" rule, essentially function as constraints on the community. In the same way that law not only commands behavior but expresses the values of a community, so too do social norms, yet by constraining in a different way.<sup>122</sup>

117. Jenkins, *Transforming Fan Culture*, *supra* note 105 ("[Media producers] have adopted a stance of benign neglect—willing to turn a blind eye to the proliferation of fan fiction online as long as people aren't making money from it. As fans note, however, FanLib's efforts to commercialize fan fiction represented the worst case scenario: a highly publicized, for profit venture which left fan fiction writers even more exposed than they have before.").

118. *Id.* ("[A]s companies construct a zone of tolerance over certain forms of fan activities, they will use them to police more aggressively those fan activities that they find offensive or potentially damaging to their brand. Fans have long asserted their rights to construct and share fantasies that may not be consistent with the ideological norms of media companies."); *see also* Posting of Chris Vallance to BBC Pods & Blogs, [http://www.bbc.co.uk/blogs/podsandblogs/2007/05/fanlib\\_and\\_fan\\_fiction.shtml](http://www.bbc.co.uk/blogs/podsandblogs/2007/05/fanlib_and_fan_fiction.shtml) (May 23, 2007, 10:08) ("There were many concerns voiced by fanfic writers but a key issue seems to be that a commercial presence in fanfic will draw attention to a space that has operated as a close-knit community below the radar of copyright lawyers and rights holders."); Posting of Almostnever to LiveJournal, <http://almostnever.livejournal.com/572926.html> (May 14, 2007, 18:23 UTC).

119. Posting of Icarusancalion, *supra* note 110.

120. Jenkins, *Transforming Fan Culture*, *supra* note 105 ("FanLib's rhetoric seems to be caught between these two conceptions of the 'user,' talking about fan traditions but dealing with fans as isolated individuals and not respecting the community as a whole.").

121. *Id.*

122. LESSIG, CODE VERSION 2.0, *supra* note 26, app. at 340.

Social norms are the normative constraints imposed through the “many slight and sometimes forceful sanctions that members of a community impose on each other.”<sup>123</sup> Norms “govern[] socially salient behavior,” such that deviating from that standard makes one “socially abnormal.”<sup>124</sup> In discussing the “burgeoning privacy crisis” caused in part by the growth of the Internet, academic Steven Hetcher pointed out that, because the privacy crisis developed in a “legal vacuum,” in that there was little positive law speaking directly to the issue, “informal social norms [had] the potential to play” an important role in how the privacy issues developed.<sup>125</sup> A similar vacuum exists in the legal gray area of fan fiction, and norms play an extremely important role in the way that the community deals with copyright issues. The “thou shalt not profit” rule broken by FanLib does not exist merely to keep writers from being exploited, but also to protect the community as a whole against copyright claims. The majority of fan fiction writers are aware that the activity is legally dubious and that profiting from it would only attract negative attention.<sup>126</sup> As long as no money is being made, some assume that what they are doing is technically illegal but not truly wrong since it causes no harm to the copyright owners.<sup>127</sup> Others assume that fan fiction is a fair use and, thus, non-infringing.<sup>128</sup> The community as a whole has agreed that, either way, it should always be not-for-profit, and imposes sanctions on those that deviate from this norm.

The case of FanLib, where an outsider attempted to profit from fan fiction, is an unusual situation; most of the problems that arise are within fandom itself. The noncommercial norm is an important one within the community; fan fiction writers often begin their works with disclaimers that emphasize that these works are freely distributed and not-for-profit.<sup>129</sup> Deviations from this norm can have serious results for the offender—public ridicule, condemnation, and even banishment.<sup>130</sup> In the case of Lori Jareo, the self-published *Star Wars*

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123. *Id.* (defining social norms).

124. *Id.*

125. STEVEN A. HETCHER, NORMS IN A WIRED WORLD 243 (2004).

126. See Posting of Icarusancalion, *supra* note 110 (stating that fan fiction “lies in a legal gray area,” and warning that fan fiction could be threatened by FanLib’s attempt to gain profits from it); Posting of Cesperanza to LiveJournal, <http://cesperanza.livejournal.com/161806.html> (May 17, 2007, 08:43 UTC) (expressing opinion that fan fiction is not an illegal activity and warning fan fiction writers of the negative consequences of publicly claiming fan fiction is a form of copyright infringement).

127. Tushnet, *Payment in Credit*, *supra* note 79, at 141.

128. *Id.*

129. Ranon, *supra* note 47, at 423.

130. See *infra* notes 137-43.

writer, the attempt to profit from her work may have had more far-reaching effects than facing fandom scorn. She works in the publishing industry, and because of the enormous amount of controversy concerning her fandom *faux pas*, someone searching the Internet for information on her will come across the scandal first.<sup>131</sup> Perhaps fear of sharing Jareo's fate—a series of far-reaching public condemnations—provides even more incentive for potential copyright infringers to follow the rules than would the possibility of legal action.

In fact, such public displays of mockery have become more common in fandom in recent years. Because much of the fan fiction community has moved from usenet and mailing lists to blogging sites such as LiveJournal, fandom has become increasingly self-reflective—bringing the discussion of fandom, as well as its writers (rather than just their works), to the forefront of the community.<sup>132</sup> As such, members of the community have a built-in platform and audience for imposing the “slight and sometimes forceful sanctions” of the community’s norms.<sup>133</sup> Perhaps most notable is Fandom Wank, a group blog where fans post entries devoted to mocking fellow fans.<sup>134</sup> An observer describes the purpose of the blog as providing an outlet to “point and laugh at fans they consider ‘wanky’; that covers a multitude of sins, from daring to take your fandom seriously to just being dumb.”<sup>135</sup> As a spot for these “sinners” to be “harpooned and lampooned and humiliated,” Fandom Wank and its posts are a prime example of the social sanctions that members of a community can use to enforce norms.<sup>136</sup> For example, the post dedicated to Jareo’s self-published novel has over 700 comments, without a kind word in sight.<sup>137</sup>

131. A Google search of “Lori Jareo” produces a Wikipedia entry on Jareo (primarily about the *Star Wars* scandal) as the first hit, followed by a number of blog posts about the same. Google, <http://www.google.com/search?hl=en&q=lori+jareo&btnG=Google+Search> (last visited Feb. 16, 2008).

132. See generally Fan History Wiki, LiveJournal, <http://www.fanhistory.com/index.php/Livejournal> (last visited Feb. 16, 2008) (“LiveJournal fundamentally changed the way many fan fiction communities oriented, bringing the personal aspect of fen’s lives to a much central part of the fan fiction community.”).

133. LESSIG, CODE VERSION 2.0, *supra* note 26, app. at 340.

134. JournalFen, Fandom Wank, [http://www.journalfen.net/community/fandom\\_wank/](http://www.journalfen.net/community/fandom_wank/) (last visited Feb. 16, 2008).

135. Fandom Wank Wiki, Fandom Wank, [http://wiki.fandomwank.com/index.php/Fandom\\_wank](http://wiki.fandomwank.com/index.php/Fandom_wank) (last visited Feb. 16, 2008).

136. Fandom Wank Wiki, The Difference Between Fandom Wank and Groups Like Badficsupport, [http://wiki.fandomwank.com/index.php/The\\_difference\\_between\\_fandom\\_wank\\_and\\_and\\_groups\\_like\\_badficsupport](http://wiki.fandomwank.com/index.php/The_difference_between_fandom_wank_and_and_groups_like_badficsupport) (last visited Feb. 16, 2008).

137. Posting of The Pink Marauder, *supra* note 2.

Most fandom incidents do not go as far as Jareo's (whose story was picked up by some very popular mainstream bloggers), but the mocking on Fandom Wank or other venues is often enough to make someone leave the community, perhaps even giving up writing altogether. For example, in an attempt to profit from her fan fiction, a writer who was in the middle of an unfinished fan fiction novel asked her readers to donate money so that she could take time off from work in order to write full-time, the implication being that she would not complete the story if she was not paid for it.<sup>138</sup> What followed included mocking, name-calling, and parody, with more than one accuser alleging copyright infringement. One anonymous commenter wrote, "Let me take these characters, which ARE NOT MINE, and make money off of them. Unreal."<sup>139</sup> The writer in question subsequently deleted her journal.<sup>140</sup>

There have been many similar incidents, all with similar results. Even in cases where copyright law may not come into play, such as with "real person" fiction (in which there are no copyrighted characters involved) or instances where a writer is trading on fame more than directly profiting from the fiction, the norm is highly ingrained.<sup>141</sup> One irate fan in a community for "Fanfic Rants" summed up the issue in an open letter to other writers:

YOU DO NOT MAKE MONEY OFF OF FANFIC. EVER. Do you realize the trouble you could bring down on the fanfic 'industry', such as it is, if you did? No, of course you don't, 'cause you're special and copyright laws apparently don't apply to you, or something. So repeat after me until this is through your thick, fangirl skull. YOU DO NOT MAKE MONEY OFF OF FANFIC. Thank you for your attention to this important matter. Until the lawyers and courts get the copyright laws sorted out and redefined to properly cover or disallow fanfiction, keep your damn head down and don't draw attention to us. We could *all* get in trouble if

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138. Posting of Embitca to JournalFen, [http://www.journalfen.net/community/fandom\\_wank/776590.html](http://www.journalfen.net/community/fandom_wank/776590.html) (Aug. 10, 2005, 00:56 UTC).

139. Posting of Anonymous to JournalFen, [http://www.journalfen.net/community/fandom\\_wank/776590.html?page=2#comments](http://www.journalfen.net/community/fandom_wank/776590.html?page=2#comments) (Aug. 10, 2005, 16:11 UTC).

140. Posting of Embitca, *supra* note 138.

141. See, e.g., Posting of Dragonfangirl to JournalFen, [http://www.journalfen.net/community/fandom\\_wank/1005443.html](http://www.journalfen.net/community/fandom_wank/1005443.html) (Sept. 25, 2006, 23:11 UTC) (providing a story in which a writer sells Fullmetal Alchemist fan fiction, supposedly at cost, and sparks a copyright debate); Posting of Lunar\_wolf to LiveJournal, <http://community.livejournal.com/fanfircrants/973069.html> (July 28, 2005, 01:29 UTC) (providing an example of community members accusing a self-published novel of being Inuyasha fan fiction with the names changed); Posting of Viggorlijah to JournalFen, [http://www.journalfen.net/community/fandom\\_wank/152652.html](http://www.journalfen.net/community/fandom_wank/152652.html) (Sept. 1, 2003, 09:45 UTC) (describing a case in which a writer sold CD-ROMs with copies of her N\*Sync fan fiction on eBay); Posting of White\_serpent to JournalFen, [http://www.journalfen.net/community/bad\\_penny/11003.html](http://www.journalfen.net/community/bad_penny/11003.html) (Aug. 6, 2006, 23:29 UCT) (suggesting that a well-known fan fiction writer receiving donations from fans after her laptop was stolen was in effect profiting from her fan fiction).

someone with a copyright on something gets a bee up their ass about this. So knock it off.<sup>142</sup>

These thoughts exemplify both the highly ingrained noncommercial norm for fan fiction, as well as the general desire of fan fiction writers not to attract attention to themselves. Whatever attracted the ire of this commentator was likely not on a large enough scale to attract lawyers, as in Jareo's attempt to profit. However, being ridiculed in a public forum in such a way could be sufficiently embarrassing as to dissuade the alleged infringer from breaking the community rules again.

However, attempts to commercialize fan fiction are not the only thing that draws criticism from the fan fiction community. The other prevalent social norm related to copyright law within the community is one governing attribution and plagiarism.<sup>143</sup> In fandom, there are two situations in which attribution is particularly important: (1) attribution to the copyright owner (often negative attribution, by way of disclaimers of ownership interest in the pieces taken from the original work)<sup>144</sup> and (2) attribution to the creator (who, due to the noncommercial nature of the work, is paid in credit—for example, recognition or circulation of the work—rather than cash).<sup>145</sup>

The fan fiction community takes plagiarism very seriously.<sup>146</sup> Simply by being presented as fan fiction, these works are unlikely to be mistaken for original works, but it is still common practice to include disclaimers (generally something along the lines of “I do not own these characters, this person does, please do not sue me”).<sup>147</sup> Although disclaimers do not have an effect on potential legality, they showcase the respect that the community has for the original author.<sup>148</sup> Fan fiction authors concede that they are borrowing worlds and characters, but are always quick to note where those elements originated rather than taking any credit of their own.<sup>149</sup> Cases where

142. Posting of Yuuo to LiveJournal, <http://community.livejournal.com/fanflicrants/3449486.html> (Sept. 24, 2006, 00:30 UTC).

143. Attribution is the means through which a creator is credited for his or her work; the Copyright Office has found that “attribution is critically important to authors,” especially those who freely distribute their work. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 83 (2007).

144. Tushnet, *Payment in Credit*, *supra* note 127, at 154.

145. *Id.* at 152.

146. See Fandom Wank Wiki, Plagiarism, <http://wiki.fandomwank.com/index.php/Plagiarism> (last visited Feb. 16, 2008) (describing plagiarism as “one of the greatest sins in all of fandom”).

147. Tushnet, *Payment in Credit*, *supra* note 79, at 154.

148. *Id.*

149. *Id.*

fan fiction allegedly plagiarizes by wholesale copying or fails to cite source material have brought about some of the most severe sanctions within fandom.<sup>150</sup> In one well-known case in the *Harry Potter* fan fiction community, fans accused a popular fan fiction writer of lifting lines or scenes from various television shows and novels without proper attribution to the original sources.<sup>151</sup> The fall-out from this incident lasted more than five years and continued to haunt the author, even when she went on to publish original novels.<sup>152</sup>

Plagiarism is also taken very seriously when it occurs strictly within the community, such as posting someone else's fan fiction as your own or redistributing someone else's work without permission—basically a failure to attribute properly to the creator rather than to the original copyright owner.<sup>153</sup> The social sanctions are much the same as with the noncommercial norm, consisting largely of public ridicule and condemnation. For example, one popular fan fiction writer whose blog has a readership of over 2,000 fans threatened to reveal a plagiarist as a form of punishment:

If the links aren't dead by tomorrow morning, then I will post the links I was sent, and two thousand people will know what you did. I'd bet that will pretty much kill your cred in fandom, so please to be seeing this as, if you will, srs bznss. I can't speak for the other plagiarised authors, but I'm willing to guess that the flap you'll

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150. See Fandom Wank Wiki, Plagiarism and All That, [http://wiki.fandomwank.com/index.php/Plagiarism\\_and\\_All\\_That](http://wiki.fandomwank.com/index.php/Plagiarism_and_All_That) (last visited Feb. 16, 2008) (summarizing a set of plagiarism accusations that led to a well-known writer being banned from FanFiction.net; as another forceful form of ridicule, an anonymous person registered the domain of her name and redirected it to information about the scandal).

151. Posting of White\_serpent to JournalFen, [http://www.journalfen.net/community/bad\\_penny/8985.html](http://www.journalfen.net/community/bad_penny/8985.html) (Aug. 4, 2006, 13:46 UTC).

152. See generally Fan History Wiki, Cassandra Claire, [http://www.fanhistory.com/index.php?title=Cassandra\\_Claire](http://www.fanhistory.com/index.php?title=Cassandra_Claire) (last visited Feb. 16, 2008) (describing the alleged plagiarism in detail). The original accusations surfaced in 2001, and a lengthy account of the entire affair brought it back into the spotlight in 2006. See Posting of White\_serpent, *supra* note 151. Even after changing her name slightly, discussions of her newly published original novels among fans mentioned the scandal. See Posting of Seto\_fangirl to JournalFen, [http://www.journalfen.net/community/fandom\\_lounge/309198.html](http://www.journalfen.net/community/fandom_lounge/309198.html) (July 21, 2006, 14:15 UTC). Additionally, a Google search for the author's new name, Cassandra Clare, turns up several pages about the plagiarism issue on the first page of hits, such as the Fan History Wiki entry on Clare and postings to JournalFen about Clare and the scandal. See Google, <http://www.google.com/search?hl=en&q=Cassandra+Clare&btnG=Google+Search> (last visited Feb. 16, 2008).

153. The Stop Plagiarism community on LiveJournal exists for the "investigation into and condemnation of plagiarists," and provides fans with a place to post when they find that one fan has plagiarized the work of another. Stop Plagiarism, [http://community.livejournal.com/stop\\_plagiarism](http://community.livejournal.com/stop_plagiarism) (last visited Feb. 16, 2008).

get from them is not one tenth of the flap I could create with three URLs and the word “plagiarism.”<sup>154</sup>

This blog entry highlights both the perceived importance of maintaining credibility in fandom (if destroying it can be seen as a threat) and how plagiarism is indeed a taboo within the community. If the alleged plagiarist here decided to take down the story or to attribute the author correctly, it was not because of a threat of legal action but almost certainly because of the threat of community sanctions.

These two social norms, governing noncommercial use and attribution, demonstrate how the fan fiction community has organically dealt with copyright issues for decades. Although they do involve a desire for fandom to stay “under the radar” and away from the prying eyes of the law, they also demonstrate a respect for the original authors’ rights rather than an attempt to circumvent them.

#### *B. Noncommercial Use and Attribution: Tracking Creative Commons*

As it turns out, the norm of noncommercial use, as well as other norms in the fan fiction community, track copyright law’s fair use principles—such as the ideas of addition of new material and the concept of market effect.<sup>155</sup> Attribution, though not a fair use principle, also has its place in copyright law.<sup>156</sup> The Supreme Court has suggested that copyright law includes protection for an author’s interest in receiving credit for his work,<sup>157</sup> and the Copyright Office has stated that attribution can sometimes replace monetary compensation to legitimize an unauthorized use in the case of orphan works.<sup>158</sup>

154. Posting of Copperbadge to LiveJournal, <http://copperbadge.livejournal.com/1406645.html> (Aug. 23, 2007, 09:28 UTC).

155. Tushnet, *Payment in Credit*, *supra* note 79, at 142-45.

156. The following factors determine whether a work falls under fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use on the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2000).

157. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003).

158. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 110-12 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

The basic ideas behind fandom's treatment of copyright may track to fair use and basic copyright law, but it tracks even more closely to something else. Consider three key pieces together: the freedom to create derivative works, the requirement that the new work be not-for-profit, and the requirement that the work be attributed to the appropriate sources. This could be a description of the most frequently adopted type of Creative Commons license: Attribution-Noncommercial-ShareAlike.<sup>159</sup> Creative Commons (CC) is a non-profit corporation that provides freely available licensing tools for creative works.<sup>160</sup> According to one scholar, this is “[a] rebellion against broad copyright rights and the overly complex ownership system.”<sup>161</sup> The basic idea behind the movement is that not all copyright holders want to exercise all of the rights that intellectual property law provides them,<sup>162</sup> hoping to build “a layer of *reasonable* copyright on top of the extremes that now reign.”<sup>163</sup> CC licenses provide copyright holders with a way to tell the world “some rights reserved,” rather than the traditional “all rights reserved.”<sup>164</sup> They are designed to permit certain uses of creative works that would otherwise be available only to the original copyright owner under existing law.<sup>165</sup> All that is required to use one of these licenses is to select the one that suits your preference and include a statement of that license in your work.<sup>166</sup> Marking a work with a CC license does not waive copyright, but rather gives certain freedoms.<sup>167</sup> For example, Lawrence Lessig released his book *Free Culture* under a CC license that allowed anyone to distribute it freely.<sup>168</sup> Even though the

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159. As of June 13, 2006, By-NC-SA was the most commonly deployed license according to Yahoo queries, representing 29.01% of all CC licenses. Creative Commons Wiki, License Statistics, [http://wiki.creativecommons.org/License\\_statistics](http://wiki.creativecommons.org/License_statistics) (last visited Feb. 16, 2008).

160. Creative Commons, Frequently Asked Questions, [http://wiki.creativecommons.org/FAQ#About\\_Creative\\_Commons](http://wiki.creativecommons.org/FAQ#About_Creative_Commons) (last visited Feb. 16, 2008) [hereinafter Creative Commons, FAQ].

161. Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 273 (2007).

162. Creative Commons, FAQ, *supra* note 160.

163. LESSIG, FREE CULTURE, *supra* note 45, at 282.

164. Creative Commons, FAQ, *supra* note 160.

165. *See id.*

166. *Id.* Since a large number of CC licenses pertain to creative work posted online, CC provides “html” code for each type of license that will generate the “some rights reserved” button. *Id.*

167. LESSIG, FREE CULTURE, *supra* note 45, at 283.

168. Jem Finer, *Download Revolution*, GUARDIAN (London), July 14, 2004, at 19, available at <http://www.guardian.co.uk/comment/story/0,,1260735,00.html>.

book was available as a free download, the sales of traditional print versions of the book still exceeded the publisher's expectations.<sup>169</sup>

Creative Commons provides four conditions that can be mixed and matched to provide the most appropriate license for a given work: (1) "Attribution" requires that anyone making use of the work must give credit in the way the author requests; (2) "Noncommercial" means that any use of the work must be for noncommercial purposes only; (3) "No Derivative Works" allows only verbatim copies of the work, not derivative works based on it; and (4) "Share Alike" allows derivative works, but only if they are distributed under the same license that governs the original.<sup>170</sup> Therefore, an Attribution-Noncommercial-ShareAlike license, the one most frequently adopted, allows others to copy, distribute, display, or perform a copyrighted work and derivative works based on it, but only if they give appropriate credit, do not profit from it, and release it under the same license.<sup>171</sup> These choices establish a range of freedoms that not only go beyond the default of copyright law, but go beyond traditional fair use as well.<sup>172</sup>

The terms of a CC license might seem intuitively familiar to fan fiction writers, as the restrictions are the same ones that they apply to their own work. In fact, fandom norms are more restrictive than what is provided by the Attribution-Noncommercial-ShareAlike license because the license allows wholesale copying. However, user-generated content must have "value added," which in the case of fan fiction means not only derivatives allowed, but derivatives *only*.

### III. DEFENSES, LICENSES, NORMS, AND THE NEW GENERATION OF USER-GENERATED CONTENT

The fair use doctrine, Creative Commons, and the social norms associated with fan fiction all developed because of deficiencies in traditional copyright law that stifled the very creativity that the law was designed to promote.<sup>173</sup> It is not surprising, therefore, that they

169. *Id.*

170. Creative Commons, License Your Work, <http://creativecommons.org/about/license/> (last visited Feb. 16, 2008).

171. *See id.*

172. LESSIG, FREE CULTURE, *supra* note 45, at 283.

173. See HETCHER, *supra* note 125, at 243 (noting that social norms can play an important role in a legal gray area); Loren, *supra* note 161, at 272-73 ("The United States Constitution defines the purpose of the Copyright Act to be the promotion of knowledge and learning, yet certain aspects of the current contours of copyright law seem ill-fitted to best accomplishing that goal in the technological and cultural reality of today. . . . The rebellion . . . has spread to a movement known as the Creative Commons."); Tushnet, *Legal Fictions*, *supra* note 10, at 661 ("Overprotection stifles the very creative forces it's supposed to

have common elements, designed to encourage innovation and creativity, while respecting the rights of artists. The proposed solution in this note recognizes all three as providing partial solutions to the problem of how copyright holders can remain strict on serious copyright violations, while still allowing for appropriate transformative UGC.

Consider Lori Jareo and her unauthorized *Star Wars* novel. Her actions would probably not fall under fair use because of the commercial nature of her work and the potential negative market impact on the original copyright holder. Because Lucasfilms publishes authorized *Star Wars* novels of its own, her book would be in direct market competition with, as well as probably mistaken for, an "official" *Star Wars* publication. Likewise, if *Star Wars* were released under an Attribution-Noncommercial-ShareAlike CC license, Jareo's work would still be in violation of the terms of the license because of her commercial use and her maintenance of her own copyrights.<sup>174</sup> Moreover, Jareo's treatment by fans and bloggers speaks to how poorly she fared under the community's existing norms. It may have been traditional copyright law that ultimately brought her novel to a halt when Lucasfilms' lawyers sent a cease-and-desist letter, but these less restrictive notions of copyright may have eventually achieved the exact same effect. In fact, it is likely that the reason that there are not more cases like Jareo's is not merely fear of traditional copyright enforcement actions, but also fear of social sanctions in the fan fiction community. Alternately, social sanctions may solve the problem before copyright holders even hear about the issue.

Meanwhile, big copyright holders seem to be concerned that UGC on Youtube is the next wave in the "copyright crisis."<sup>175</sup> However, there is a spectrum of UGC. On one end is completely original material (no threat to copyright owners), and at the other end is wholesale copying (obvious infringement).<sup>176</sup> The problem for traditional copyright law, however, is what falls in the middle:

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nurture. The Supreme Court has even recognized that 'the sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of other authors.' Congress has therefore codified a 'fair use' exception to copyright protection in 17 U.S.C. § 107.").

174. Having been unable to obtain a copy of the book, I cannot say whether it contains any explicit attribution to George Lucas. The cover, however, does not. It reads "Another Hope: A Novel," but it does not indicate that it is a *Star Wars* novel. See Barnes & Noble, <http://search.barnesandnoble.com/booksearch/isbnInquiry.asp?isbn=1933456027> (last visited Feb. 16, 2008) (listing Jareo's book and displaying an image of the cover).

175. See User Generated Content Principles, *supra* note 17.

176. See Tushnet, *Payment in Credit*, *supra* note 79, at 144-45 (noting the difference between copying, such as transcription, and the added value of fan work).

transformative and derivative works. Some of these videos may fall under fair use and some may not. As with fan fiction, neither the copyright owners nor the creators will know where that line falls until there is positive law on the issue. Between the chilling effects resulting from big corporations having videos removed without warning and the cost-prohibitive nature of going to court, this may not happen for a long, long time.

The bottom line is that fear over UGC could lead to lobbying for stricter copyright laws. Fan fiction writers are justifiably concerned that if traditional copyright law does expand to give copyright owners definite control over transformative works on Web sites such as YouTube, then a closer look at all fan work will follow.<sup>177</sup> A crackdown on “new” UGC could end up affecting the same fan fiction community that has been around for decades. However, what about copyright holders who do not *want* control over transformative works? Just as many authors turn a blind eye to, or even encourage, fan fiction, some media corporations have publicly stated that they have no problem with fanvids and mash-ups.<sup>178</sup>

Creative Commons was specifically designed to aid copyright holders who are willing to release some of their rights. These copyright holders want to maintain their rights in the material, while allowing their fans the latitude to express themselves and their creativity. In fact, those artists who already utilize CC licenses often wish to inspire others with their works.<sup>179</sup> Many such artists acknowledge intellectual debts to other content creators and see allowing the transformation of their own works as more important than maintaining the complete control afforded to them by copyright law.<sup>180</sup>

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177. See, e.g., Postings to Jedi Council Forums, *supra* note 8 (indicating that fans feared that Jareo’s published fan fiction would bring negative attention to the community as a whole).

178. See Posting of Acastus, *supra* note 95 (noting that an anonymous source at Nickelodeon voiced approval of mashups on YouTube and denied having them removed); see also JENKINS, CONVERGENCE CULTURE, *supra* note 23 (indicating that Lucasfilms has traditionally encouraged fanvids).

179. See Minjeong Kim, *The Creative Commons and Copyright Protection in the Digital Era: Uses of Creative Commons Licenses*, 13 J. OF COMPUTER-MEDIATED COMM. 187, 202 (2007), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1083-6101.2007.00392.x> (“To [many CC licensors], allowing later authors to make derivative works from their original works under CC licenses was more important than exercising full control under copyright law. . . . Many create because of a love of creating, and many share their works because they believe in sharing.”).

180. *Id.*

However, as CC licensing currently exists, there is no “derivatives only” option,<sup>181</sup> perhaps because the organization is operating under the assumption that any derivative work would be transformative enough to be considered fair use. An Attribution-Noncommercial-ShareAlike-DerivativesOnly license would do away with any of the chilling effects of the fair use doctrine’s reliance on litigation and would give the copyright holder strict control over piracy and wholesale copying. In fact, such a license would perfectly track the current norms in fan communities, requiring attribution, noncommercial use, and avoidance of wholesale copying. Not only would it clarify some of the legal gray area surrounding fan fiction writers’ works, but it could produce goodwill towards copyright holders that adopted such a stance. This could result in more fan works, more publicity for the original work, and, ultimately, a positive market effect for those copyright holders. Additionally, if fan fiction were created from a work released under a ShareAlike license, then it would, by default, be released under that same license. The fan fiction writers themselves would then also have copyright protection.<sup>182</sup>

As it stands, however, media companies and publishers may not be ready to embrace CC on a large scale. Perhaps they should be encouraged by the fact that the proposed license in some form already exists—within the norms and rules of the fan fiction communities. Lucasfilms does not have to work too hard to police the fan fiction community to make sure that no one is profiting from derivative works based on *Star Wars* because the fans are doing that work for them. Likewise, J.K. Rowling probably does not have to worry about someone posting a story featuring *Harry Potter* characters and passing it off as his own original creation, because the odds are that it contains a disclaimer giving Rowling full credit for the original works. The creators of real UGC are not distributing copies of copyrighted content without permission; they are artists, writers, and filmmakers. “New” forms of UGC, such as the content on YouTube, are already benefiting from the same patterns of norms that fan fiction has developed over decades, and will likely continue to do so.<sup>183</sup> The media industry tends

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181. See Creative Commons, License Your Work, *supra* note 170 (listing the conditions creators can apply to their work, but lacking a “derivatives only” condition).

182. As it stands now, if, for example, someone attempted to profit from someone else’s fan fiction, the original fan fiction writer would probably not have a legal remedy, as they did not hold the copyright in their work in the first place. Copyright protection only exists for “original works of authorship.” 17 U.S.C. § 102 (2000).

183. See generally Tushnet, *Payment in Credit*, *supra* note 79, at 145-47 (discussing fanvids). Fanvids are one of the most prevalent types of transformative works on video sites such as YouTube, and arise from the same fan communities as fan fiction. See generally *id.*

to think of “content” as a commodity, “isolated from the social relations which surround[] its production and circulation.”<sup>184</sup> However, this material actually “emerges from a social network of fans” who have a great deal of respect for the content creators.<sup>185</sup> These are the fans that consume, that buy books, movies and music, and that keep the copyright holders in business. The keys are to encourage them, rather than to alienate them, and to eliminate any chilling effects that may stifle their creation of new works.

In previous legal treatments of fan fiction, the proposed solution to eliminating these chilling effects was a blanket exception within the fair use doctrine.<sup>186</sup> However, since fair use is a doctrine considered on a case-by-case basis, such an exception may not cover all types of UGC, particularly those new forms that will appear in the future. Technology will continue to present new kinds of content and new copyright problems at a rapid pace, and the law can only do so much to keep up with it. Moreover, whereas fair use means that you need no permission in theory, in practice the fear of being “litigate[d] . . . within an inch of your life” in a legal debate as to what is or is not a fair use can have a chilling effect on any transformative work.<sup>187</sup>

Alternately, the widespread adoption of Creative Commons licenses, or some other method of providing “*some* rights reserved” rather than “*all* rights reserved,” would be an ideal way to allow copyright holders to maintain the control that they desire while allowing them to accommodate their consumers and fans. The aim would be not to fight “all rights reserved” licenses, but “to complement them.”<sup>188</sup> The problem with much of copyright law is that although it made sense in the context of technology that existed when the law was created, it does not adequately address digital technology.<sup>189</sup> Creative Commons gives people a way to build new rules that make sense for them.<sup>190</sup> Such a change, however, would be a slow one. In the meantime, copyright holders still need to be able to weed out inappropriate uses of their works—in essence, to make the distinction between infringement and transformation without litigating every potential case of fair use.

184. Jenkins, *Transforming Fan Culture*, *supra* note 105.

185. *Id.*

186. For law review articles that suggest that fan fiction should be considered fair use, see Ranon, *supra* note 47, at 442-51, and Tushnet, *Legal Fictions*, *supra* note 10, at 654, 664.

187. LESSIG, *FREE CULTURE*, *supra* note 45, at 98-99.

188. *Id.* at 284.

189. *Id.*

190. *Id.*

Recognizing the reality of how long it could take for a widespread acceptance of a Creative Commons regime to take hold, there is another solution, one that also serves to eliminate the chilling effects caused by DMCA takedown notices and disappearing YouTube videos. The legal system does not have the resources to ensure that not a single fan fiction author is selling stories, that every embedded video in a blog is attributed to the correct source, or that every video posted on YouTube has “added value” rather than being a simple copy. However, the members of the communities themselves do have the resources—and the desire—to police such things. Given time, all communities of UGC may prescribe to social norms as strictly as the fan fiction community. Moreover, copyright holders who do not want to leave such things in the hands of the fan community could simply prescribe to the same set of norms when making their decisions about when to enforce copyright. Using the fandom norms as a framework, the copyright holder could spot a noncommercial, attributed, and transformative work, and could choose to leave it alone. Viacom and other big content holders may be panicked over UGC, but if they give transformative works, such as fan fiction and fanvids, a reprieve, then they can focus on copyright violations that can cause them more substantial harm, such as movie downloads and other wholesale copying.

#### IV. CONCLUSION

The fate of Lori Jareo’s unauthorized novel is just one example of how the fan community can police copyright violations so that the copyright holder does not have to. However, even with “new” UGC, the same rules could apply. If Jareo’s work had been a *Star Wars* film rather than a novel, and she was still charging people to view it, fans probably would have been just as outraged, if not more so. In fact, Lucasfilms is one copyright holder that has the right idea when it comes to transformative works—it tolerates and even encourages fan films, so long as they are not-for-profit.<sup>191</sup> Because this stance does not fit cleanly into copyright law, it is only an “unofficial” one. Yet, if a Noncommercial-Attribution-DerivativesOnly CC license existed, perhaps Lucasfilms would consider releasing its films under such a license. Meanwhile, the company likely does not have to devote many resources to finding commercial fan films; the legions of *Star Wars*

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191. Videomaker, Fan Films, <http://www.videomaker.com/article/12722/> (last visited Feb. 16, 2008) (“In fact, Lucasfilm[s] has teamed up with Atomfilms.com to create awards for the best *Star Wars* fan films each year.”).

fans would probably find them first. The social norms that exist within that community—such as the one stating that aspiring film makers absolutely cannot profit from their works—derive from the fans' respect for the copyright holder. The fans creating new content are transforming the original work, not copying it.

At the end of the day, big copyright holders' current panic over UGC is probably not over UGC at all, but over piracy. The fear is that YouTube is just the next Napster, but what big copyright holders do not realize is that much of what exists on YouTube has existed for decades in other mediums, such as fan fiction. Not all of it is pirated material. The copyright holders are trying to prevent direct piracy, but the problem is that copyright law treats that wrong and the "wrong" of transformation in the same way.<sup>192</sup> If content holders cannot make this distinction themselves, then perhaps they should trust the UGC creators themselves—their fans—to do it for them. If fan fiction could peacefully co-exist with copyright law for decades, then there is no reason why new forms of UGC should not be able to do so as well.

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192. LESSIG, FREE CULTURE, *supra* note 45, at 139.

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