

User-Generated Discontent: Transformation in Practice

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Fair use is the province of creators, not lawyers. That is the thrust of a number of initiatives designed to make fair use salient to ordinary people in their capacities as creators. Copyright myths and legends are, of course, widespread. What this paper focuses on, however, are organized or semi-organized attempts to articulate fair use principles, usually centered on the concept of transformativeness, from the perspective of individual creators who routinely expect to criticize, comment on, or just quote existing copyrighted materials as part of their new works. User-generated fair use principles can be informed by case law, but they are not limited by it. Reciprocally, nonlawyers' concepts of transformativeness could enrich legal understandings of the appropriate boundaries of fair use.

Siva Vaidhyanathan has argued that everyone “who reads, writes, watches, photographs, listens, and sings”—that is, everyone—should have a basic idea of what fair use means.¹ Those with expertise in copyright law have a duty to help the rest of the universe of creators shape a digital fair use agenda. User-generated theories of fair use offer substantial opportunities for copyright owners as well, because theories of fair use are also theories of unfair use. Remix cultures, while requiring substantial tolerance for unauthorized uses, can help participants develop internal codes of ethics about intellectual property.² Norms of credit and—in the

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1. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 253-54 (2001). See also Peter Jaszi, *Recut, Reframe, Recycle: An Interview with Pat Aufderheide and Peter Jaszi (Part Two)*, Feb. 8, 2008, http://henryjenkins.org/2008/02/recut_reframe_recycle_an_inter.html:

As distinctions between teachers, students, makers, users and distributors continue to blur, we are all becoming more and more dependent on fair use -- whether we know it or not. ... [Y]oung people are learning about media from one another, by taking advantage of all the new tools that permit them to be makers rather than mere consumers of content. This is a powerful social development, but it also is a fragile one. Nothing threatens it more than inappropriate applications of copyright discipline. The last lesson we want to teach young people as a society is that it is wrong to participate actively in one's own culture, and that the choice they face is between compliance and transgression. Whichever choice they make will represent destructive mislearning.

Tara McPherson, *A Rule Set for the Future*, in DIGITAL YOUTH, INNOVATION, AND THE UNEXPECTED 14 (Tara McPherson ed. 2008) (“[L]ack of sustained engagement with policy issues by youthful early adopters was a major factor in the shutting down of the democratic potential of earlier media.”).

2. See HENRY JENKINS ET AL., CONFRONTING THE CHALLENGES OF PARTICIPATORY CULTURE: MEDIA EDUCATION FOR THE 21ST CENTURY 10 (2007) (“[Y]oung people who create and circulate their own media [including remixes] are more likely to respect the intellectual property rights of others because they feel a greater stake in the cultural economy”); Rebecca Tushnet, *Payment in Credit*:

right circumstances—compensation or control are much more powerful constraints than unpopular, confusing, and unevenly enforced positive laws.³

One response to expansive copyright claims has been to organize, especially when significant amounts of money are at issue for those hoping to rely on fair use. The Documentary Filmmakers' Statement of Best Practices in Fair Use is the most prominent recent attempt to make clear the centrality of fair use to the practices of a creative community. The statement was developed after a year of deliberations among members of five filmmaker organizations.⁴ Relying on the concept of transformativeness as developed in the courts, the statement centers on four common issues for filmmakers and asserts that each will routinely constitute fair use: "quoting media in order to critique or analyze it; quoting media to make a point about the culture; incorporation of copyrighted works in the process of filming something else; and quoting to make a historical point."⁵

The statement was released in November 2005 and has proved successful enough that "all major insurers of documentary film now routinely accept fair use claims that a lawyer asserts are backed by the statement."⁶ Pat Aufderheide and Peter Jaszi report that similar attempts to develop best practices are underway for film scholars, art teachers, and dance professionals.⁷ Moreover, the Electronic Frontier Foundation, on behalf of itself and other concerned organizations, has released "Fair Use Principles for User Generated Video Content."⁸ Chillingeffects.org maintains a publicly accessible database of cease-and-desist letters from intellectual property owners against various internet posters, along with educational materials addressing common copyright questions and setting forth basic principles of fair use. The Brennan Center for Justice has proposed a fair use clearinghouse with sample replies to cease-and-desist letters and Digital Millennium Copyright Act (DMCA) takedown notices, along with other forms of

Copyright Law and Subcultural Creativity, 70 LAW & CONTEMP. PROBS. 135 (2007) [hereinafter Tushnet, *Payment in Credit*].

3. Jennifer Rothman criticizes reliance on custom to define the scope of copyright rights because customs are often created to avoid litigation and not to define the appropriate normative boundaries of copyright. She suggests, however, that aspirational norms are more worthy of respect than litigation-avoidance norms. See Jennifer E. Rothman, *The Questionable Use of Custom In Intellectual Property*, 93 VA. L. REV. 1899, 1971 (2007).

4. As Pat Aufderheide and Peter Jaszi explain, "The theory behind [the] Statement is that courts respect the views of responsible professionals about what kinds of uses are fair in their area of practice." Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELLECTUAL PROPERTY TODAY, Oct. 2007, available at <http://www.iptoday.com/articles/2007-10-aufderheide.asp> (internal citation omitted). For cautionary notes on relying on best practices statements of this kind, see Rothman, *supra* note 3.

5. Aufderheide & Jaszi, *supra* note 4.

6. *Id.*

7. *Id.*

8. <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen> (last visited May 2, 2008). One key component of the EFF's principles is the proposition that automated filters should not be used to block content unless both audio and video are matched as coming overwhelmingly from the same source, thus requiring human review for typical mashups and other remixes. The principles contrast "nontransformative verbatim copying" with copying for purposes of "comment, criticism, reporting, parody, satire, or scholarship, or as the raw material for other kinds of creative and transformative works." *Id.*

legal support for ordinary internet users who encounter copyright conflicts.⁹

Meanwhile, the MacArthur Foundation is investing tens of millions of dollars in research to improve education in new digital spaces, including guidance for teachers whose students expect to participate in remix culture. Part of the challenge for educators is to help students think critically about their practices and enable them to “meaningfully sample and remix media content.”¹⁰ Though these digital learning initiatives are not focused on fair use specifically, their baseline assumption is that appropriation is often a valuable and legitimate way for people to engage with the world around them. Such educational initiatives, focused on when and how appropriation, or copying, benefits students, thus are part of a process of working out the boundaries of transformative fair use.¹¹

User-generated fair use principles offer their own definitions of transformation, both implicit and explicit, that draw not only on formal copyright law but also on the practices of specific creative communities.¹² Most people ripping, mixing and burning have given little thought to the legitimate boundaries of creative appropriation.¹³ When they do, however, they can articulate good reasons that not every possible use of a copyrighted work should require the consent of, or payment to, the copyright owner, even when a license might theoretically be available. These insights into transformativeness in practice should reciprocally influence formal copyright law.

I. TRANSFORMATION IN CONTEXT: COMMUNITY-BASED PRACTICES

The filmmakers’ best practices were developed within relevant filmmaker communities, not in close consultation with other interest groups and specifically not in consultation with non-documentary filmmaker copyright owner groups.

9. MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 55, 57 (2005) (proposing a clearinghouse on fair use and related issues, including guidance for recipients of cease-and-desist letters and DMCA notices, along with *pro bono* legal support).

10. JENKINS ET AL., *supra* note 2, at 4.

11. This is still very much a work in progress. *See id.* at 17:

One important goal of media education should be to encourage young people to become more reflective about the ethical choices they make as participants and communicators and the impact they have on others. We may, in the short run, have to accept that cyberspace’s ethical norms are in flux: we are taking part in a prolonged experiment in what happens when one lowers the barriers of entry into a communication landscape. For the present moment, asking and working through questions of ethical practices may be more valuable than the answers produced because the process will help everyone to recognize and articulate the different assumptions that guide their behavior.

12. *See id.* at 33-34 (listing several programs that systematically encourage young people to create unauthorized derivative works for educational purposes as examples of what ought to be done to take advantage of the learning potential of new media environments).

13. *See* PAT AUFDERHEIDE & PETER JASZI, THE GOOD, THE BAD, AND THE CONFUSING: USER-GENERATED VIDEO CREATORS ON COPYRIGHT 2 (2007) (“Unlike more seasoned professionals, many of the new makers are thinking about [copyright] questions for the first time, if at all. . . . For those interested in the health of the economic platforms and also those interested in the public health of the body politic and social, this is a critical moment, when new speech habits are being established”).

Jennifer Rothman criticizes best practices statements developed by particular communities as one-sided,¹⁴ but nonetheless recognizes that “the different economic and political power of parties in IP markets means that the customary practices [that emerge from multilateral interactions] do not fairly represent the parties but instead skew toward the interests of the most powerful IP owners.”¹⁵ Indeed, Rothman is unable to identify examples of mixed groups that produced useful guidelines, as opposed to contracts that bind only those who agree to them, like Creative Commons licenses.¹⁶ Bringing everyone to the table almost certainly would have led to the same results as similar attempts in the past – “guidelines” offering crabbed interpretations of fair use that would not satisfy anyone, especially not the filmmakers.¹⁷

The aim of the guidelines—successful, to date—was not to reach global consensus or elevate custom over everything else. Rather, the guidelines made the argument that documentary filmmakers’ principles were normatively desirable understandings of fair use, even in the absence of agreement from commercial copyright owners. Developing fair use guidelines from within a practice community makes sense as a matter of copyright doctrine. Asking permission is not a requirement for fair use,¹⁸ and copyright owners cannot acquire rights in transformative uses simply by being willing to license such uses.¹⁹ At least in some cases, copyright owners’ opinions about transformation are simply irrelevant. While copyright owners’ interests must not be ignored, and wholesale, commercial copying is extremely unlikely to constitute fair use, creative communities recognize these principles and are capable of respecting copyright’s legitimate scope while preserving space for transformation.

The filmmakers’ statement also highlights the importance of organization. Not all practice communities are as well-organized as the filmmakers were. In particular, amateur creators whose works are completely noncommercial lack the immediate incentives to organize that the filmmakers had: The filmmakers wanted to be able to rely on fair use and still get liability insurance for their documentaries. But it is important to recognize that the documentary best practices were created by a self-organized group of filmmakers. These filmmakers solicited opinions within the community as widely as possible, but they did not elect a Fair Use Council. The Center for Social Media facilitated the work of norm entrepreneurs who were also documentary filmmakers. Similar practices can work for other groups, even

14. See Rothman, *supra* note 3, at 1972.

15. *Id.* at 1907.

16. From her perspective, of course, this just makes the point that custom is a poor guide for copyright law.

17. See HEINS & BECKLES, *supra* note 9, at 6-7 (detailing the limits of compromise guidelines); *id.* at 55 (“statements of best practices are better than negotiated guidelines because they reflect the consensus of a creative community and do not contain numerical limits that are inconsistent with the flexibility of fair use law”); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001) (criticizing negotiated guidelines for systematically favoring copyright owners and contracting fair use).

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

19. *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 617 (2d Cir. 2006).

less well-defined ones.²⁰

Amateur creators need not be left to their individual resources (or lack thereof). Affinity groups can organize outside the marketplace. In the United States, nonprofit tax-exempt organizations routinely participate in public life; they can aggregate individual interests and stand against the state and profit-seeking corporations. Groups acting together can define and defend fair use from the perspective of individual creators.²¹ This is the theory behind the Organization for Transformative Works, a new nonprofit dedicated to protecting and preserving noncommercial fan-created works such as fan fiction and fan art based on existing copyrighted materials—what I will call “fanworks.” (Disclosure: I am a board member.)

This isn’t just about custom, or formalizing custom. Custom itself may be morally neutral or even poisonous. Michael Madison’s concept of patterns of embedded social and cultural fair use practices offers a way of understanding why self-conscious organizing is a useful counterbalance to ever-expanding claims by copyright owners.²² Some patterns reflect fundamental values that we as a society should consciously endorse, such as active participation in cultural and political dialogue. Organized and self-reflective thinking by fair users helps make the case that a consistent, socially beneficial set of practices exists that should be recognized by the law.²³

As Madison argues, successful fair use patterns have a “pedigree of tradition and

20. See PAT AUFDERHEIDE & PETER JASZI, *RECUT, REFRAME, RECYCLE: QUOTING COPYRIGHTED MATERIAL IN USER-GENERATED VIDEO* 17 (2008) (proposing steps towards a code of best practices for fair use in online video). This code is currently in progress under the auspices of the Center for Social Media.

21. See PAT AUFDERHEIDE & PETER JASZI, *UNAUTHORIZED: THE COPYRIGHT CONUNDRUM IN PARTICIPATORY VIDEO, A CONVENING REPORT* 6-7 (Apr. 2007):

Fair use in areas of established practices also needs to be better understood, and better explained by new creators. Existing knowledge needs to be consolidated so that, as new habits and customs develop, they also depend on solid established practice. . . . [T]hose who see the free speech issues and emerging business opportunities as important need to prepare for the possibility that both fair use and [section] 512 [immunity for ISPs] will come under attack by overzealous content providers and their allies. They need to develop a political plan for action in the event of such attack.

HEINS & BECKLES, *supra* note 9, at 55:

A major force contributing to the erosion of fair use is the culture of gatekeeper-intermediaries—publishers, broadcasters, distributors, and many ISPs – who care less about legal niceties or the rights of users than about avoiding expensive lawsuits. This structural problem means that proponents of fair use must not only educate, advocate, and litigate; they must promote alternative technologies that eliminate media bottlenecks. Open access academic journals, open source distribution for creative products, and independent ISPs that are willing to resist DMCA take-down letters are some of the innovations that can help liberate fair use from clearance-culture gatekeepers.

22. See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623 (2004) (arguing that fair use determinations should assess whether a challenged use is part of a “recognized social or cultural pattern”).

23. *Id.* at 1625 (arguing that a fair use pattern will involve identifiable individual and institutional roles, identifiable goals, and rule-based relationships among individuals and institutions); see also *id.* (“[I]n most cases, the central distinguishing feature of such a pattern will be a norm, convention, or practice that involves some form of reciprocal or donative interest or obligation.”).

history such that the practices embedded in the pattern are characteristically recognized as ‘creative’ or at least as tending to promote some form of ‘progress’ that does not depend on the market economy.”²⁴ This reference to the market economy is both crucial and dangerous. It is crucial in that many fair use situations, especially those involving transformativeness, involve a breakdown of the usual copyright logic that monetary incentives are necessary and sufficient to drive creative production. It is dangerous in that market logic can always be deployed to suggest a theoretical market transaction, so that *all* forms of “progress” come to depend on the market economy. As I will argue below, the drive to assimilate every creative act to the formal market economy is a mistake both of fact and of value. Money isn’t everything, and it can prove destructive to particular creative practices. Attention to the actual conditions of creative production could make the law better at encouraging creativity and even could improve the notorious unpredictability of fair use.²⁵

The Organization for Transformative Works, therefore, is attempting to document the decades-long history of creative practices in overlapping fan communities, establishing their persistence, vitality, and evolving aesthetic conventions. This does not mean that only fanworks created within an existing fan community are fair uses. Fanworks are routinely and spontaneously generated by fans who discover for themselves the concept of telling new stories featuring their favorite characters. But this continuing discovery process fits into a history in which other fans have done the same things.²⁶

In his discussion of valid practices, Madison suggests that “storytelling” used to be a recognized pattern, but now is more likely to appear to involve the infringing creation of unauthorized derivative works.²⁷ Defending fanworks involves reasserting the continuing value—and the continuing practice—of asking “what happened next?” and “what if?” In a commercialized culture, this requires explaining why people would tell each other stories without hoping to make money from doing so. The next part of this paper examines storytelling—whether by means of words, images, sounds, or some combination—as fair use.

24. *See id.*

25. Cf. Zahr Said Stauffer, ‘Po-mo Karaoke’ or Postcolonial Pastiche? What Fair Use Analysis Could Draw from Literary Criticism, 31 COLUM. J.L. & ARTS 43, 89 (2007):

[C]reators of works of art are arguably more familiar with literary criticism than judicial opinions since many writers and artists are also art critics. Literary criticism is thus likelier to align with creative works’ purposes and motivations than judicial analysis. In turn, judicial opinions incorporating literary concepts or criticism may create more predictable outcomes for authors of secondary works, whose intentions may sometimes be shaped in response to concepts embedded in literary criticism.

(internal citation omitted).

26. Certain tropes are so common in fanworks by new fans that they are recognized subgenres, such as the Mary Sue story in which a new female character—usually understood to represent the writer’s self-insertion—comes on the scene and steals the show.

27. *See* Madison, *supra* note 22, at 1659-60.

II. TRANSFORMATION IN FANDOM: MORE THAN MEETS THE EYE

Fanworks have existed for decades.²⁸ With the ever-increasing dissemination of technologies of production, fanworks have expanded from mostly text-based, with occasional graphic art, to include music and video.²⁹ These works add new characters, stories, or twists to the existing versions. They are primarily noncommercial and nonprofit. And they give credit to predecessors and originators, whether implicitly or explicitly. Rather than displacing sales of the original, fanworks encourage and sustain a vibrant fan community that helps authorized versions thrive—*Harry Potter*, *CSI*, *Star Trek*, and other successful works are at the center of enormous creative fandoms containing hundreds of thousands of fanworks. These characteristics, in combination, make fanworks fair use.³⁰

Transformativeness in fanworks takes many forms, from critique to celebration to reworking a text so that it better addresses the concerns of a specific audience. For example, fanworks based on television shows often rework the canonical versions to focus on the aspects that interest the female audiences disdained by network television. In general, noncommercial fan communities routinely reward what might be called transformation by excavation – new works that succeed creatively by illuminating something about the originals.³¹

One particularly interesting example comes from a machinima (a digital movie created using a video game engine) set in the popular game *World of Warcraft*. A popular and controversial machinima told the Romeo-and-Juliet story of the forbidden love between a troll and a human. The reason this story “specifically drew attention to issues of creative ownership of the story world” was that the programmers had intended trolls and humans to be engaged in “relentless and unremitting conflict.”³² Indeed, they had implemented this intention by making it impossible for trolls and humans to communicate “in-game.” Trolls and humans could not chat together; speech by one group was garbled by the game interface into gibberish instead of presented to the other group; and the software even filtered out “subversive attempts to communicate by embedding text in descriptive

28. See, e.g., JOAN MARIE VERBA, *BOLDLY WRITING: A TREKKER FAN AND ZINE HISTORY, 1967-1987* (2d ed. 2003).

29. See, e.g., Rebecca Tushnet, *Creating in the Shadow of the Law*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 251 (Peter Yu ed., 2007); Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 *CARDOZO ARTS & ENT. L.J.* 647 (2008); WizardRock.org, <http://wizardrock.org/about/> (presenting a musical genre based on J.K. Rowling’s *Harry Potter* series).

30. Rothman identifies nonprofit, online fan communities as providing norms requiring (1) the addition of creative effort, (2) noncommerciality, and (3) credit in order to legitimize unauthorized uses. See Rothman, *supra* note 3, at 1925-26. Though Rothman is suspicious of custom, she suggests that fan norms are less subject to legal distortion, and thus perhaps more worthy of judicial recognition, than practices in more formalized sectors of the economy.

31. See Tushnet, *Payment in Credit*, *supra* note 2.

32. Henry Lowood, *Found Technology: Players as Innovators in the Making of Machinima*, in *DIGITAL YOUTH, INNOVATION, AND THE UNEXPECTED* 188-89 (Tara McPherson ed., 2008).

gestures, known as ‘emotes.’”³³

Such extremes of denial can be expected to produce resistance from audiences and participants. The story of love across boundaries – and the massive collaboration between troll and human players required to film the movie – showed that the players had a different view of the inevitability of conflict. As the credits said, “Even without leet speak you cannot take away our love!”³⁴

At the same time, the film was made using only materials that the game made available. Tristan Pope, the creator, simulated sexual situations “through character positions and camera angles in the video.”³⁵ He was *incapable* of changing the server-based program. It was thus in one sense inarguable that

[A]s Pope argued with a wink, . . . he had merely showed ‘what WoW’s pixels imply ©.’ Even sexual imagery, therefore, was nothing more than a rearrangement of what Blizzard’s artists had drawn, or more accurately, what its game engine generated during gameplay. Rather than asserting his right to subvert the game’s content, Pope reasoned that he had in fact not created anything on the screen, merely captured it.³⁶

So this film was deeply transformative—bringing out what always had the potential to exist in the original—by being pure reuse.

Transformation can also occur when someone remakes a work to make it more meaningful to herself and uses it as a lens to interpret the world, even without the kind of critical commentary exalted by the case law. Every retelling offers the possibility of new meaning.³⁷ Children learn by using their own imaginations to connect to stories already circulating in popular culture.³⁸ They tell and retell superhero stories as a way to make sense of the world.³⁹ In the modern,

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See JENKINS ET AL., *supra* note 2, at 33:

Appropriation may be understood as a process that involves both analysis and commentary. Sampling intelligently from the existing cultural reservoir requires a close analysis of the existing structures and uses of this material; remixing requires an appreciation of emerging structures and latent potential meanings. Often, remixing involves the creative juxtaposition of materials that otherwise occupy very different cultural niches Mapping their emotional issues onto pre-existing characters allows young writers to reflect on their own lives from a certain critical distance and work through issues, such as their emerging sexualities, without facing the stigma that might surround confessing such feelings in an autobiographical essay. These students learn to use small details in the original works as probes for their own imagination, overcoming some of the anxiety of staring at a blank computer screen.

38. See Kelly Chandler-Olcott & Donna Mahar, *Adolescents’ Anime-Inspired “Fanfictions”*: An Exploration of Multiliteracies, 46 J. ADOLESCENT & ADULT LITERACY 556 (2003) (fan fiction can help students become more aware of the elements of composition by giving them well-understood starting points).

39. See A.H. DYSON, WRITING SUPERHEROES: CONTEMPORARY CHILDHOOD, POPULAR CULTURE, AND CLASSROOM LITERACY (1997). See also Rebecca W. Black, *Access and Affiliation: The Literacy and Composition Practices of English Language Learners in an Online Fanfiction Community*, 49 J. ADOLESCENT & ADULT LITERACY 118, 123-24 (2005):

Fan authors often construct hybridized identities that are enacted through their texts. It is not uncommon for authors to insert themselves into their fictions as characters that possess a

commercialized environment, the concrete forms of those stories are likely to be owned and sold by others. But imagination trumps ownership on the playground, and this freedom should continue even on digital playgrounds.⁴⁰

Accounts of artistic creativity often focus on authors' intrinsic motivations,⁴¹ but they routinely assume that such creativity results in works of romantic authorship, freestanding and unrelated to existing works.⁴² Yet the drive to create a transformative work can be just as powerful as the drive to paint the landscape outside the window.⁴³ For example, a popular and commercially successful fantasy author, Steven Brust, wrote a novel starring characters from the TV series/movie *Firefly/Serenity*. But it wasn't an authorized tie-in; he wrote it and released it online under a Creative Commons license.⁴⁴ Why? Because, he said, "I couldn't help myself."⁴⁵

Unauthorized, unplanned creativity has immense value even at the most instrumental level: beginning with popular sources gives young creators a place to start, heightens their enthusiasm for writing, and provides them with an eager and

mixture of idealized and authentic personality traits. . . . There are also many fictions in which the author essentially hybridizes his or her identity with that of a preexisting media character to express interests, issues, or tensions from his or her own life. For example, many of the texts on *fanfiction.net* depict the characters from the Card Captor series dealing with issues that are never raised in the anime or manga, such as teen pregnancy, school violence, and suicide. Through these hybrid characters, fanfiction authors are able to use literacy skills to articulate and to publicly enact concerns from their daily lives.

40. See David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139, 146 (1992):

What I really have in mind is our innate emotional hunger for creative play, and our considerable incapacity to resist indulging it. The child playing in the sand on the beach builds castles, which no one but a monster would imagine forbidding a second child to imitate at will. Creative play in childhood becomes the adult fantasy that we recognize in authorship, and it is no less monstrous to limit authorship among adults than it is among children. Nor, for that matter, is it possible, except in circumstances amounting to physical exclusion.

41. See, e.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) (setting forth various accounts of the non-economic sources of creative works).

42. Cf. Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007) (arguing that copyright doctrine should pay more attention to the specific and material bases of creativity, which regularly include significant copying as part of creating new works).

43. For a powerful argument that prior creative works can operate as the "environment" in which a creator lives and to which she has no choice but to react, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1569 (1993) ("Some poems, some ideas, some works of art, become 'part of me' in such a way that if I cannot use them, I feel I am cut off from part of myself.") (emphasis added) (internal citation omitted).

44. STEVEN BRUST, MY OWN KIND OF FREEDOM: A FIREFLY NOVEL (2008), available at <http://dreamcafe.com/firefly.html>.

45. Webmaster, *Steven Brust Unofficial "Firefly" Novel Review*, SERENITYSTUFF.COM, May 29, 2006, available at http://www.whedon.info/article.php3?id_article=15938. See also LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 144 (1983) ("[T]here are few artists who have not had this sense that some element of their work comes to them from a source they do not control."); *id.* at 146 ("[T]he artist often feels compelled, feels the desire, to make the work and offer it to an audience.").

helpful audience.⁴⁶ The social value of hundreds of thousands of unauthorized *Harry Potter*-inspired stories rests not merely in the stories' critical potential in challenging the sexual, racial and political assumptions of the original,⁴⁷ but also in the skills that fans learn while writing, editing, and discussing them.⁴⁸ The benefits of other forms of fan-based creativity, including video editing and music production,⁴⁹ are similar. The transformation here is mainly of the creators and the audiences, and it should be recognized as a legitimate type of transformation. Using a work as a building block for an argument, or an expression of the creator's imagination, should be understood as a transformative purpose, in contrast to consuming a work for its entertainment value.⁵⁰

III. TRANSFORMATION IN FREEDOM: THE SOCIAL MEANING OF NONCOMMERCIALITY

Copyright law in recent years has persistently expanded into previously uncovered spaces, licensing uses that used to be uncontrolled. Is unconstrained storytelling an obsolete phenomenon, or should it be preserved even if it could be brought to heel? This part argues that noncommercial fanworks will remain fair uses despite potential expansions of the monitoring and licensing of fan activities. There are two intertwined arguments. First, by its very independence from the incentives of formal markets, noncommerciality signals the presence of expression tied to a creator's personhood, which deserves special consideration in any analysis of fair use that is sensitive to free speech concerns. Second, the market changes what it swallows: the proposition that all these forms of creativity could persist in a world in which the formal, monetized market was everywhere is empirically mistaken.

Outsiders often view noncommercially motivated creators as quixotic. Justice

46. See, e.g., Henry Jenkins, *Why Heather Can Write*, TECHNOLOGY REVIEW, Feb. 6, 2004, available at <http://www.technologyreview.com/Biztech/13473/>; JENKINS ET AL., *supra* note 2 (setting forth the ways in which reading, writing, and commenting on fan fiction promotes language acquisition and provides a supportive learning environment; volunteer proofreading and peer review are common in fanfiction communities, where shared enthusiasm for a source leads more experienced readers and writers to invest in helping newer writers).

47. See Madhavi Sunder & Anupam Chander, *Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007).

48. See Steve Vosloo, *Fan Fiction: Improving Youth Literacy*, THOUGHT LEADER, Jan. 22, 2008, <http://www.thoughtleader.co.za/stevevosloo/2008/01/22/fan-fiction-improving-youth-literacy/> ("Fanfic communities represent youths who self-organise and voluntarily engage in narrative writing, reviewing and metatalk about writing. Fanfic sites scaffold the development of these literacy skills. . . . [E]ducators should at least recognise the catalytic aspects of the informal, voluntary world of fan fiction and apply those to school-based literacy instruction.").

49. *Harry Potter*, for example, has produced a genre of music known as Wizard Rock. See *supra* note 29.

50. See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 101, 118 (2008) ("In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant's *purpose* in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the *content* of the underlying work.") (emphases in original).

Souter expressed a common attitude in *Campbell v. Acuff-Rose* when he quoted Samuel Johnson's statement that "[n]o man but a blockhead ever wrote, except for money."⁵¹ No one who has ever made up a story to amuse a child should accept this characterization. And yet copyright law's incentive model treats speech just like another kind of widget to be provisioned by the free market.

As a result of its flattening of creative incentives, copyright's exclusive rights/incentive model finds noncommercial creative work difficult to assimilate, which has implications for fair use. The relationship between fair-use transformation and commerciality is not simply that noncommercial uses require less in the way of critical transformation than commercial uses before they should be deemed fair use. Noncommerciality is of course an independent factor favoring fair use.⁵² But more important is that noncommercial creative uses, precisely because they are not motivated by copyright's profit-based incentives, are more likely to contain content that the market would not produce or sustain, and thus should be more readily recognized as transformative, even without the generally recognized markers of criticism or parody often found in commercial works found to be transformative.

Yochai Benkler has theorized extensively on the noncommercial production of information goods in a digital economy. He argues that noncommercial production is not just detached from monetary exchange; it can be subject to crowding out—noncommercial motives can be eliminated when money is on offer, leading to less overall creativity and less social benefit.⁵³ Benkler is, however, less concerned with whether different incentives produce different types of works and more concerned with the overall amount, because many of the examples on which he focuses deal with classes of works that have generally been produced for profit in the modern era—news, software, encyclopedias, and the like.⁵⁴

51. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (internal citation omitted); see also Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. ___ (forthcoming 2008) (“[T]echnological advances have greatly reduced the costs of creating and distributing new works of authorship. Thanks to that deflation, we can increasingly count on authors who care little about the lucre of copyright—‘blockheads,’ as Samuel Johnson called them—to supply us with original expressive works.”).

52. This is true both in the case law, see, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and in common understandings of remix culture, see AUFDERHEIDE & JASZI, *supra* note 13, at 8.

53. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 94-95 (2006):

Across many different settings, researchers have found substantial evidence that, under some circumstances, adding money for an activity previously undertaken without price compensation reduces, rather than increases, the level of activity. . . . The results of this empirical literature strongly suggest that across various domains some displacement or crowding out can be identified between monetary rewards and nonmonetary motivations.

54. See *id.* at 92-96 (discussing the effects of different incentives designed to produce the same activity); cf. Bell, *supra* note 51:

Some percentage of authors will at least sometimes share their expressive works for very little or no pay. A rare author, eager for attention or burning with artistic passion, may even pay others to hear her message. We need not specify what motivates such authors (though . . . they are seldom fools). We need only observe that . . . non-monetary incentives sometimes suffice to

Sociologist Viviana Zelizer's analysis of the social meaning of money helps explain why there are qualitative as well as quantitative differences in nonprofit creative works. Defining an activity as noncommercial, even if it takes place in spaces where other people are making money (such as YouTube), changes how people feel and reason about it.⁵⁵ "Earmarking" – treating value differently depending on the social context in which it is exchanged – is pervasive, not just for money but for everything from "tokens and commercial paper to art objects, and even including kitchen recipes or jokes—anything, in fact, that is socially exchangeable."⁵⁶ Earmarking is an excellent way of "[e]stablishing or maintaining individual or group identity."⁵⁷ In the context of noncommercial creativity, works created by authors who think of themselves as creating for free—for the joy of sharing with other people—will think differently about their works from authors who hope to sell their output in the open market. And their works, as a result, will be different.⁵⁸

Zelizer's work ties into Lewis Hyde's analysis of creative works as gifts. Hyde does not deny the attractions and benefits of market exchange. He is concerned with how to negotiate the creation of art in a consumer-oriented world. Art can be sold as a commodity, but it should be done with rules, respect and, most importantly, with something that the artist and the audience understand to be "extra," operating outside the market.⁵⁹ Hyde considers art transformative, in the sense of changing audiences and subsequent artists, only when it contains some

inspire authorship.

(internal citation omitted); John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT L.J. 203, 219 (2008) (following Benkler's focus on the motivations of open source programmers as "exemplif[y]ing" amateur creators).

55. See generally VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994). As Zelizer explains, even direct payments mean different things depending on how they are defined. People treat gift money and salaries in distinct ways; "money is not really fungible." *Id.* at 5. Because we keep our mental accounts segregated, the presence of money in a relationship will have different effects depending on the other social features of the relationship. See *id.* at 18-19:

[P]eople earmark different currencies for many or perhaps all types of social interactions

And people will in fact respond with anger, shock, or ridicule to the 'misuse' of monies for the wrong circumstances or social relations, such as offering a thousand-dollar bill to pay for a newspaper or tipping a restaurant's owner. Money used for rational instrumental exchanges is not 'free' from social constraints but is another type of socially created currency, subject to particular networks of social relations and its own set of values and norms.

56. *Id.* at 29.

57. *Id.* at 26.

58. Because of the social meaning of money, direct monetary incentives for creation can be inconsistent even with non-altruistic motives like the desire for acclaim within a community. See Quiggin & Hunter, *supra* note 54, at 231 ("In a non-market context, careful calculation of costs and benefits and an insistence on exact reciprocity is generally deprecated. By contrast, in market contexts, the first rule is never to give more than you get There are a whole range of sales tricks designed to exploit, among other things, altruism, friendship, and desire for self-expression. Hence, to prosper in a market context, it is necessary to adopt a view that 'business is business,' and to (consciously or otherwise) adopt a role as a participant in the market economy that is quite distinct from what one might be conceive his or her 'real self.'") (internal citations omitted).

59. See HYDE, *supra* note 45, at xiii, 9-10, 21. Hyde advocates paying artists who seek compensation, but argues that such payments are reciprocal gifts rather than bargained-for transactions in the ordinary marketplace. See *id.* at 107.

non-market, gift component. Hyde suggests that the ultimate response to an artistic gift is to create art oneself, because “[p]assing the gift along is the act of gratitude that finishes the labor.”⁶⁰ And some creative communities must resist commercialization if they are to remain viable. Money exchange creates boundaries between people that work against certain other types of valuable exchanges.⁶¹ In gift economies, rewards come in the form of credit, not cash.⁶²

Claims that certain endeavors need insulation from marketplace pressures have, of course, been used to justify exploitation, particularly of women’s work. Though Hyde does not argue that artists should be forced to labor for free, he contends that

[I]f we could factor out the exploitation, something else would still remain; there are labors that do not pay because they, or the ends to which they are directed, require built-in constraints on profiteering, exploitation, and—more subtly—the application of comparative value with which the market is by nature at ease Gift labor requires the kind of emotional or spiritual commitment that precludes its own marketing.⁶³

Money must subsidize art somehow, but there are different ways of relating the two. Their social meanings—and effects on the resulting content—will vary.

This insight is one of Neil Netanel’s main arguments for copyright’s role in maintaining a democratic civil society. Netanel argues that the works produced by copyright’s incentives—that is, funded based on a business model requiring relatively small payments from many people—will be systematically different from works produced under government or elite patronage. Works produced by a patronage system are less likely to challenge existing hierarchies; he who pays the piper calls the tune. Copyright supports the creation of works that reflect a public opinion formed outside of established institutions.⁶⁴

60. *Id.* at 47.

61. *See id.* at 61, 77.

62. *See id.* at 77; *see also id.* at 89 (suggesting that a gift economy organized around specific concerns, such as the promotion of scientific knowledge, can be large and impersonal and yet successful).

63. *Id.* at 106-07.

64. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 353-56 (1996). Netanel is concerned with the role of copyright for authors who want or need to be paid for their creative works:

[I]n the absence of copyright, authors *who seek remuneration for their work* will be heavily dependent on vendors who, in effect, distribute creative expression for free in order to sell services, advertising, and ongoing customer relationships. Such a scenario could have dire consequences for expressive autonomy and diversity. . . . [O]ften the content deemed best suited to selling the related products is not what audiences would otherwise pay to receive. As has been convincingly demonstrated with respect to television advertising, broadcast content tends to be weighted toward specific advertiser needs, such as putting audiences in a buying mood and offering attractive lead-ins to commercials, and targeted towards audience segments that are likely to buy advertiser products.

Id. at 361 (emphasis added). He concludes that copyright remains necessary in the modern digital environment, and I agree. The emergence of new business models founded on search rather than screening, however, means that authors who do not depend for their livelihoods on selling their works can maintain a diversity of expression and—in the absence of DMCA notices, at least—make their creations available even if they aren’t good at selling widgets.

Extending Netanel's argument, consider also how the growing practice of paid product placement affects the content of mainstream television, movies, and the like. A change in the economic relations of individual authors to sponsors—the addition of a paid advertising component—routinely changes the ultimate content, though we can only predict generalities (the resulting works will present consumption of the sponsoring products in a positive light).⁶⁵ It is this very malleability of content that has led to calls for greater regulation of product placement. Conditions of production matter.⁶⁶

For similar reasons, works produced outside the market system will be systematically different from works produced by copyright's incentives. As media scholar Catherine Tosenberger argues, noncommercially generated works are often “unpublishable,” and this is a virtue of the form:

Because fanfiction circulates unofficially, it isn't bound by the conventions and limitations of institutionalized publishing. And that's a big deal; it allows people to stake claims over texts that they wouldn't normally be allowed to if they wanted to publish, and frees them to tell the stories they want to tell. You can do things in fanfiction that would be difficult or impossible to do in fiction intended for commercial publication, such as experiments with form and subject matter that don't fit with prevailing tastes. This freedom is especially felt in representations of romantic and sexual relationships—and this is a major reason, I think, why women, queer folk, and young people have found fanfic so appealing, because these are all groups whose sexual expressions have been heavily policed. It's a way of asserting rights of interpretation over texts that may be patriarchal, heteronormative, and/or contain only adult-approved representations of children and teenagers.⁶⁷

65. See, e.g., WRITERS GUILD OF AMERICA, WEST & WRITERS GUILD OF AMERICA, EAST, “ARE YOU SELLING TO ME?": STEALTH ADVERTISING IN THE ENTERTAINMENT INDUSTRY 4-6 (Nov. 14, 2005), available at http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf (offering numerous examples of content distortion in response to product placement mandates).

66. Cf. Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 797-803 (2004) (arguing that copyright-supported industries engage in inefficient winner-take-all fights for attention and focus on works that can most easily be sold to the largest audiences, even within niche markets).

67. Gender and Fan Studies (Round Five, Part One): Geoffrey Long and Catherine Tosenberger, July 1, 2007, http://www.convergenceculture.org/weblog/2007/07/gender_and_fan_studies_round_f.php; see also Catherine Tosenberger, *Potterotics: Harry Potter Fanfiction on the Internet* 34-35 (unpublished dissertation, University of Florida 2007) (“[F]andom is a space where freedom to read and write whatever one wants are felt in a much more concrete way than in more ‘official’ spaces. . . . Fanfiction is, in many ways, given life by what other spaces don't allow.”); Liz Gannes, *NTV Predictions: Online Video Stars*, Dec. 30, 2007, <http://newteevee.com/2007/12/30/ntv-predictions-online-video-stars/> (“Fans, operating outside of the commercial mainstream, have the freedom to do things which would be prohibited [to] those working at the heart of a media franchise—explore new stories, adopt new aesthetics, offer alternative interpretations of characters, or just be bad in whatever sense of the word you want. And much of the online video content thrives because it is unpublishable in the mainstream but has strong appeal to particular niches and subcultures.”) (quoting Henry Jenkins; alteration in original); Timothy B. Lee, *Ars Book Review: “Here Comes Everybody” by Clay Shirky*, Apr. 3, 2008, <http://arstechnica.com/articles/culture/book-review-2008-04-1.ars/3> (interview with Clay Shirky discussing valuable group productions whose transaction costs mean that they can only take place voluntarily, outside the market and the firm).

This freedom—including freedom to be bad—allows new talents to develop, whether or not they ultimately join the mainstream or continue producing within a noncommercial niche.⁶⁸

By contrast, copyright-incentivized works will seek to appeal to more consumers; even when they target niche markets, they will target *markets* – people who can pay for something specialized.⁶⁹ Not incidentally, people who can pay are less likely to be young, relatively poor, female, or otherwise part of culturally devalued groups, since cultural and economic power are often related.⁷⁰ Copyright’s incentivizing virtues come with costs, and Netanel thus argues that copyright should be limited where it threatens to give certain commercial voices too much control over public discourse.⁷¹ Netanel calls for a system in which copyright, government grants, and private patronage all offer different kinds of support for creativity, establishing a more robust and diverse expressive system than any one type of incentive could do on its own.

To Netanel’s list of different sources of support for creativity, I would add voluntary expression, not directly funded by anyone but the author and, crucially, understood by both author and audience to be distinct from the sphere of market exchange.⁷² Indeed, like fan creators, many non-fan artists support their art with other paid work, becoming their own patrons, and thereby marking a boundary between art and the market.⁷³ For many creators, self-patronage is a sensible way

68. See Gannes, *supra* note 67.

69. See Netanel, *supra* note 64, at 360 (“[A] copyright market dominated by media conglomerates may also exhibit a certain centripetal force. As noted above, given market dictates and institutional risk-averseness, media conglomerates share, at least to some extent, corporate patrons’ proclivities toward prosaic and safe products.”).

70. See Tosenberger, *supra* note 67 (“[I]ssues of gender, race, class, sexuality ... have affected who has ACCESS to that institutional approval Fandom is a space where people who have historically been denied access to institutional narrative creation have said, ‘Well, then, we’ll tell this story OUR WAY.’ The Internet has exacerbated fandom’s anarchic tendencies, and all those old cultural hierarchies -- creator/consumer, male/female, straight/queer, art/crap—are getting shaken up In fandom, you don’t have to be anointed by the Official Culture Industry to be an artist, to share your work and have it be appreciated.”).

71. See *id.* at 333:

[B]ook publishers, film studios, and other media organizations show an inherent bias against minority tastes and in favor of expression that is likely to appeal to large audiences. This is especially the case in those sectors characterized by firm concentration, which, given the unabated growth of multimedia conglomerates in recent years, are now absorbing a greater and greater share of the copyright marketplace.

(internal citation omitted); *id.* at 362:

[E]xpansive copyright owner control over existing expression may exacerbate the problem of market- based hierarchy. Given authors’ needs to draw on the existing images, sounds, and texts that make up our cultural milieu, conglomerate control over existing expression would continue to subvert the democratization of public discourse even in a digital age in which many authors no longer rely on conglomerates to market and distribute new works.

72. See Quiggin & Hunter, *supra* note 54, at 238 (“Just as there is a policy of encouraging, through commercial incentives, the production of socially valuable inventions, such as books, music, ideas, and software, there should be a policy of encouraging the amateur production of socially valuable software, commentary, news, and text.”).

73. See HYDE, *supra* note 45, at 275; see also Bell, *supra* note 51 (“Blockheaded authors do not rely on copyright law to recoup those expenses, however. They instead subsidize the costs of creating

of satisfying a desire to create. No matter how robust copyright rights become, most artists will never be able to make a living selling their works, because audiences won't pay enough.⁷⁴ (In the flattened language of law and economics, creative expression is often a preference, something individuals will do to whatever level they can, rather than a behavior that needs an incentive.)

The classic case of *Bleistein v. Donaldson Lithographing Co.* offers a related perspective on the inability of the market to provide all the creation worth having.⁷⁵ Perhaps ironically, in the course of arguing that works at the core of market production—commercial advertisements—deserved copyright protection, Justice Holmes noted that the most innovative works might often fail to find a market at all: “At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”⁷⁶ As he pointed out, Goya and Manet produced art that took time for audiences to appreciate.⁷⁷ The class of works with no obvious commercial value, works that therefore do not benefit from whatever exclusive economic rights apply to them, can include the next generation's great art. Because copyright's incentives don't provide much, if any, benefit to works that circulate in nonmarket, gift economies—as fanworks generally do—copyright should at least not stand in their way.⁷⁸

and distributing their works, paying for them out-of-pocket and then, typically, freeing them on the world. Blockheaded authors effectively pay to satisfy their own demand for their own works.”)

74. This reality—sad from creators' perspectives, sensible from audiences' perspectives—ties into Benkler's point about the risks of destroying nonmonetary incentives with small monetary incentives. See BENKLER, *supra* note 53, at 95:

Where intrinsic motivation is an important factor because pricing and contracting are difficult to achieve, or because the payment that can be offered is relatively low, the aggregate effect [of monetary rewards] may be negative. ...Negative effects of small payments on participation in work that was otherwise volunteer-based are an example of low payments recruiting relatively few people, but making others shift their efforts elsewhere and thereby reducing, rather than increasing, the total level of volunteering for the job.

75. 188 U.S. 239 (1903).

76. *Id.* at 251.

77. *See id.*

78. As one fan explains:

I think the subversion actually exists in the nexus of product and practice, of fanworks and fan cultures. Fanfic fans ... have a fundamentally different way of valuing fannish things than capitalist culture has of valuing everyday products and practices. . . . In my experience, that's where a lot of the confusion comes from with non-fans—they see all this effort, all the work that goes into fanwork, and they are so immersed in the invisible reality of capitalist thinking, that they honestly can't conceptualise that people might genuinely not give a shit about selling that work for money. They can't understand an economy of giving things away or sharing. They think it has to be lip-service, that there's a secret agenda . . .

. . . This is why I've come around to the idea that valuing something without a monetary price-tag is one of the most subversive everyday acts now possible in capitalist culture.

Posting of cupidssbow to <http://cupidssbow.livejournal.com/266405.html> (Dec. 15, 2007, 22:42:00); cf. Quiggen & Hunter, *supra* note 54, at 252 (“Poorly capitalized creators create amateur content for motives that are generally not commercial. So they have little desire and no incentive to create mass-media content that appeals to a broad audience. This is the source of a great deal of misunderstanding on the part of the mainstream media, which assumes that the numbers of readers or the number of links for a given blog are the only significant metrics of success.”).

In practice, and regardless of whether all creative activity can be reduced to a utility function, people who understand themselves to be participating in a noncommercial activity produce different kinds of works than people who are deliberately participating in market exchanges.⁷⁹ This is not to say that one kind of creativity is superior to another or that the types of works won't overlap.⁸⁰ I am not arguing that "the market" and "the private" are separate spheres that must be kept apart; that would be a particularly odd claim when the noncommercial works I focus on take commercial works as their starting points. Rather, my point is that commercial and noncommercial motivations cannot be flattened into one another, despite their overlap. That which is done for love and that which is done for money coexist, but they are not equivalent, and not just any exchange of one for the other will work.⁸¹ Noncommercial works display systematic differences in subject matter, aesthetics, accessibility, and other creative features. If we value expressive diversity, as copyright doctrine routinely suggests, we should not attempt to assimilate everything into the profit-seeking sphere, even if it were possible to do so.

I have argued that noncommercial production can signal transformative purpose, even if that transformation is not immediately apparent to those outside the target audience.⁸² My argument also has a more specific doctrinal implication for fair use: even if third parties profit from aggregating and disseminating freely offered works, we should still consider such works noncommercial under the first factor of the fair use test.⁸³ Where the social meaning of creativity belongs to the noncommodified sphere, copyright's goals are best served by treating the resulting works as noncommercial. That YouTube is profit-seeking no more renders

79. Participants often perceive the absence of market discipline as creative freedom. *Cf.* BENKLER, *supra* note 53, at 125-26 (explaining that voluntary contributors to sites like Wikipedia and to open-source software projects demand more control over their own experiences than traditional consumers; they prefer customizing their own content rather than receiving it complete from a distant producer).

80. As Benkler explains, market production has systematic, predictable incentives to shape culture in ways that preserve existing corporate values, while nonmarket production has more room for variation. *See id.* at 290-91. On the other hand, the market can be flexible in ways nonmarket production may not be. *See id.* at 291-92.

81. *See generally* VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005) (setting forth ways in which economic exchanges and intimate relations often coincide, but people make careful distinctions between proper and improper forms of mingling to organize their relationships); *cf.* HYDE, *supra* note 45, at 274 (arguing that art can fruitfully be commercialized, but only within limits: "The problem is not 'Can gift and commodity coexist?' but 'To what degree may one draw from the other without destroying it?'").

82. *See* Henry Jenkins, *How to Watch a Fan-Vid*, Sept. 18, 2006, available at http://www.henryjenkins.org/2006/09/how_to_watch_a_fanvid.html (discussing how one fan-made *Star Trek* video was differently from within and without fan communities; commenting that "[m]any of the bloggers who have pointed to [the video] seem to have little or no awareness that there is a much larger tradition of fan-made videos or that the video makers, T. Jonsey and Killa have produced a larger body of work that circulates within the fanvid community. As artists, they are known for their sophisticated techniques and intelligent use of appropriated materials as well as for their diversity of approaches to their subject matter.").

83. *See* Quiggin & Hunter, *supra* note 54, at 247 & n.259 (proposing a noncommercial use exemption to copyright similar to the rule in trademark law).

individual participants' work commercial than the fact that paints and canvas cost money makes every painting commercial.

IV. TRANSFORMATION IN JEOPARDY: THE IMAGINARY ALTERNATIVE OF LICENSING

Another important doctrinal issue of fair use related to commerciality is the problem of circularity. Market harm is a key fair use factor, but the markets to which a copyright owner is entitled may change over time. In particular, a copyright owner may start licensing certain uses, then claim market harm from any unlicensed use.

As noted above, fans have long insisted that a main justification for their activities is that they do not hurt, and often help, copyright owners' financial bottom lines. People who are so invested in a source that they create works based on that source are good customers—they watch the original on TV, buy the DVDs, see the movie, collect the action figures, read the tie-in novels, and otherwise support the authorized versions. The copyright owner's response to the no-economic-harm argument is generally to argue that even if an unauthorized use is not substituting for current sales, the owner could be making *more* money if he had the right to authorize the use. Thus, responding to the idea that noncommercial fanworks are fair use, Julie Hilden suggests blanket licensing as an alternative.⁸⁴ If licenses are available, then arguably a non-paying fanwork is suddenly commercial, in that the fan creator is creating for free something for which she would ordinarily have to pay.⁸⁵

The possibility of blanket licensing does not change the fair use calculus. The previous section explained why assimilation to the market would destroy many of the unique creative energies expressed in fanworks. Even if that were not so, there are other reasons to reject licensing as an alternative to fair use. First, as Julie Cohen has explored, creativity is often spontaneous and unpredictable.⁸⁶ If people have to pay \$100 before writing 500 words about Harry Potter, they will make other plans. This is especially true for younger (and poorer) writers. In any event, it is standard copyright doctrine that the author's willingness to be paid for allowing book reviews, critical commentary, or other transformative works isn't a

84. See Julie Hilden, *The Organization for Transformative Works and Its Bid to Protect Fan Fiction: Are Its Proposed Changes to Copyright Law, Creating Immunity for Suits Against FanFic, a Good Idea?*, FINDLAW, Jan. 21, 2008, <http://writ.corporate.findlaw.com/hilden/20080121.html>.

85. The usual formulation is that the copier is getting for free something for which she would ordinarily have to pay. However, in the case of fanworks, that is a bit inapposite because the fanwork is not available until it is created. The "thing" here is a right, not a copy, and that makes the situation different from standard filesharing examples. Another point of departure from the usual model is that current quasi-blanket licensing schemes for user-generated content do not charge the users. They hope to make money off of advertising. So it is even odder to say that the fan creator is getting something for free for which she would ordinarily pay. She would not pay in either event, though her audience might do so in the form of tolerating advertising if she posts at an "approved" site.

86. Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); see also Madison, *supra* note 22, at 1678-86 (arguing that creativity is an emergent property of systems structured around creative practices, including fair use).

reason to give her a right to payment.⁸⁷ We prevent the concepts of commercial use and the copyright owner's market from becoming completely circular by reference to normative limits on the proper scope of copyright owners' rights.⁸⁸

Second, the blankets always, in practice, have holes. Though licensing optimists promised that fair use would disappear as copyright owners figured out how to license every last use,⁸⁹ existing licensing options for user-generated content routinely retain the option to censor.⁹⁰ Official fan communities want fans to "celebrat[e] the story the way it is,"⁹¹ not to explore ways in which it might be different. But it's that very freedom that makes fanworks so vibrant, innovative, and potentially critical of the originals, whether critical of an existing work's views on race,⁹² sexuality,⁹³ or politics.⁹⁴ An environment in which a blanket may be tugged away at any moment does not encourage creativity.

In fact, fanworks' detractors do not want blanket licensing. For example, after suggesting blanket licensing, Hilden then worries that "many unauthorized follow-up works might simply take characters and the story in a different direction, one that might be antithetical to the original."⁹⁵ (Interestingly, Hilden's nightmare

87. See, e.g., *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 617 (2d Cir. 2006).

88. See Madison, *supra* note 22, at 1672:

[N]oncommercial' use consists of a pattern in which consumption or use of the work is structured on nonmarket grounds, that is, according to the norms and conventions of an 'embedded' rather than price-based economy.... [This standard] has the virtue of depending on evidence other than whether or not the defendants received, or avoided having to spend, cash.") (internal citation omitted).

89. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

90. YouTube's "blanket" music licensing gives the licensor the option to remove any content that it finds objectionable.

91. Amy Harmon, 'Star Wars' Fan Films Come Tumbling Back to Earth, N.Y. TIMES, Apr. 28, 2002, at B28.

92. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). Alice Randall's novel was commercially published, but its racial critiques can also be found in fanworks. See also Sunder & Chander, *supra* note 47; Teland.com, Remember Us, <http://www.teland.com/remember/index2.html> (July 21, 2007) (characters of color archive); Yahtzee, Them Mean Ol', Low-Down, Lando Calrissian Blues, <http://www.thechicagoloop.net/yahtzee/chivalry/chivfic/LCBlues.htm> (in which a number of African-American sidekicks from various television shows meet and commiserate).

93. The popular subgenre of slash regularly recodes characters who are presumed heterosexual in canon as bisexual or homosexual.

94. The politics of *Star Wars*, for example, are arguably quite antidemocratic. See David Brin, "Star Wars" despots vs. "Star Trek" populists, SALON, Jun. 15, 1999, http://www.salon.com/ent/movies/feature/1999/06/15/brin_main/index.html. Fictional responses, on the model of the popular *Star Wars* fan film *Troops* (offering a C*O*P*S-style take on the life of a stormtrooper), can be much more effective than critical essays. As Cory Doctorow says,

One of the nice things about writing fiction that has some didactic elements, or that has a mission and is intended to educate as well as entertain, is that it's very hard to rebut a short story. If you write an essay, someone can come along and write another essay that says your essay is rubbish. The number of people who can write a short story to rebut your short story is much smaller.

Henry Jenkins, Confessions of an Aca-Fan: Cory Doctorow as Exemplar, http://www.henryjenkins.org/2006/09/cory_doctorow_as_exemplar.html (Sept. 15, 2006).

95. Hilden, *supra* note 84. See also Justin Hughes, "Recoding" Intellectual Property and

scenario, in which a fan-altered Harry Potter renounces magic and rejects J.K. Rowling's ideals, was already written years ago.⁹⁶) Reworkings that attack the original are, however, quite clearly protected by fair use *because* they operate as a critique of the original.⁹⁷

Under this reserved power to suppress, the very works likely to be disallowed by a "blanket" license are those that have the best fair use cases. But because the blankets are tuggable, there is no certainty for any fan creator, and authorized spaces are no substitute for more freewheeling noncommercial spaces. As a result, the potential for quasi-blanket licensing should not be accepted as a reason that fanworks harm a legitimate market.

CONCLUSION

Copyright theory speaks of incentives, but less often investigates what incentives other than money could spur creation. Especially in an age of cheap digital copying and distribution, it is vital to take many sources of creativity into account.⁹⁸ This paper has focused on one: the love, or sometimes love/hate, that encourages people to share their own transformative works.

Peter Jaszi has opined that fair use is like a muscle: it has to be used, or it will waste away. But if fair use is part of the user's body (of work?), it's more than just something to be subjected to an exercise regime. As parts of creative practice, fair uses carry with them theories, whether articulated or not, about why appropriation, remixing, and reuse are legitimate. Fanworks and other types of "user-generated content" will never be backed by the kind of political power that commercial copyright industries can bring to bear. But that makes judicial consideration of their claims to transformative fair use even more important.

Overlooked Audience Interests, 77 TEX. L. REV. 923, 927-28, 952-63 (1999) (arguing in favor of the stability of cultural icons to benefit audiences); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 487-88 (2003) (expressing similar concerns for dilution and exhaustion of characters).

96. See Bill Keller, *Harry Potter and the Search for a King*, <http://www.liveprayer.com/potter.cfm> (last visited May 2, 2008).

97. One point to take from this is that the nightmare scenario hasn't hurt J.K. Rowling even though that website has been up for several years. The fact that Hilden doesn't know that we're already in the nightmare world suggests something about how scary we ought to find it.

98. See Cohen, *supra* note 86 (criticizing most copyright theories' inattention to how creativity actually works).