
ARTICLE

USING SOCIAL NORMS TO REGULATE FAN
FICTION AND REMIX CULTURE

STEVEN A. HETCHER[†]

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INTRODUCTION

Fan fiction and remix culture have been and are continuing to explode both in terms of social relevance and sheer quantity of new

[†] Professor of Law, Vanderbilt University Law School (Yale Law School, J.D.; University of Chicago, M.A.; University of Illinois at Chicago, Ph.D.). I would like to gratefully acknowledge the research and administrative assistance of Casey Fiesler, Pam Holland, and Nicole Lytle, as well as the staff of the *University of Pennsylvania Law Review*. I would also like to thank the Symposium participants for their many helpful comments.

works produced and available.¹ Fan fiction is simply that: fiction created by fans, typically of popular commercial works, such as the *Harry Potter* book and film series. Rebecca Tushnet's path-setting article defines fan fiction as follows: "'Fan Fiction,' broadly speaking, is 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."²

Suntrust Bank v. Houghton Mifflin Co. could be called the first fan-fiction case, but Alice Randall, the author of the parody at issue in *Suntrust*, is better described as an antifan of *Gone with the Wind*.³ The case turned on a defense of criticism and parody, not specifically on the fanlike nature of the work.⁴ However, if Randall's book counts as fan fiction, then it is not the case that there is no settled fan-fiction case law, a claim that sometimes has been made.⁵

As technology has advanced, fan fiction has evolved into "fan-works" or, alternatively, "fanvids."⁶ A related but more general term is

¹ See Matthew Mirapaul, *Why Just Listen to Pop When You Can Mix Your Own?*, N.Y. TIMES, Aug. 20, 2001, at E2 ("In postmodern culture, in which existing elements are routinely cut, pasted and blended into new works, computers are providing handy tools for these transformations, and the Internet is supplying an eager audience for the results."). Like amateur musicians who produce derivative musical works, amateur authors maintain hundreds of literary "fan fiction" websites publishing stories about popular characters from television shows like *Star Trek* and *The West Wing*. *Id.*

² Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997) [hereinafter Tushnet, *Legal Fictions*].

³ Tushnet's definition does not mention that the works must be created by fans. Thus, the definition would not exclude the work of antifans such as Alice Randall. Randall is the author of *The Wind Done Gone*, a brilliantly scathing critique of the racism embedded in *Gone with the Wind*. See generally *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (holding that Randall was entitled to a fair use defense for *The Wind Done Gone* and lifting the injunction issued against its publication); ALICE RANDALL, *THE WIND DONE GONE* (2001).

⁴ See *Suntrust*, 268 F.3d at 1267-76 (analyzing Randall's fair use defense in terms of parody).

⁵ See, e.g., HENRY JENKINS, CONVERGENCE CULTURE 188 (2006) [hereinafter JENKINS, CONVERGENCE CULTURE] ("After several decades of aggressive studio attention, there is literally no case law concerning fan fiction."); Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 441 (2003) ("[N]ot a single fan fiction case has appeared on a court docket, although this distinct absence of litigation may not continue indefinitely."). Tushnet herself made this claim prior to the decision in *Suntrust*. See Tushnet, *Legal Fictions*, *supra* note 2, at 664 ("Case law does not address fair use in the context of fan fiction or anything reasonably similar to it.").

⁶ Media scholar Henry Jenkins refers to "fan videos" in his early discussion of the subject, though the shortened version, "fanvids," is more common now. See HENRY JENKINS, TEXTUAL POACHERS ch. 7 (1992) [hereinafter JENKINS, TEXTUAL POACHERS]

“remix.” The term “remix” avoids the suggestion that the new works are produced by fans of the underlying works. Lawrence Lessig gives examples of remix works that are highly critical of the works drawn upon in the remix.⁷ Lessig does not define the term “remix” in his new book, despite its title. He does, however, note that remix works are “transformative.”⁸ He also equates remix with literary quotation.⁹ There is a tension here, however, as a work is not necessarily transformed simply by adding a quotation from another work.¹⁰ Additionally, there is ambiguity because Lessig is not explicit as to whether he intends to use the term “transformative” in its legal sense, namely, in reference to factor one of the fair use test.¹¹ The question is pertinent as there is a movement to develop the concept of transformative use that appears not to limit itself to the legal sense of this word.¹² The

(devoting a chapter to “Fan Music Video and the Poetics of Poaching”); see also Posting of Henry Jenkins to Confessions of an Aca-Fan, How To Watch a Fan-Vid, http://www.henryjenkins.org/2006/09/how_to_watch_a_fanvid.html (Sept. 18, 2006) (examining fan videos posted online, including *Star Trek* videos set to Nine Inch Nails music). See generally Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 650-55 (2007) (discussing the history of fanvids on the Internet).

⁷ See LAWRENCE LESSIG, REMIX 72-74 (2008) [hereinafter LESSIG, REMIX] (providing an example of remixed sound bites from George W. Bush and Tony Blair meant to be highly critical).

⁸ *Id.* at 255.

⁹ See *id.* at 51 (“Ben’s [Lessig’s friend’s] writing had a certain style. . . . Were it digital, we’d call it remix. . . . [H]e built the argument by clipping quotes from the authors he was discussing.”); see also *id.* at 69 (“[Read/Write media] remix, or quote, a wide range of ‘texts’ to produce something new.”).

¹⁰ See Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1112-16 (1990) (discussing the existence of literary quotation insufficiently transformative to warrant fair use protection).

¹¹ Factor one of the fair use test is helpfully described in *Campbell v. Acuff-Rose Music, Inc.*:

The first factor in a fair use enquiry is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. . . . The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”

510 U.S. 569, 578-79 (1994) (alteration in original) (citations omitted) (internal quotation marks omitted).

¹² See Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 501 (2008) [hereinafter Tushnet, *User-Generated Discontent*]

definitional expansion of the term “transformative use” beyond its legal origins would complement Lessig’s larger agenda, which includes bypassing fair use altogether when it comes to the legal treatment of amateur remix.¹³

Broadly, then, remix works are created by taking digital snippets from various sources and combining them to create a new work.¹⁴ A nondigital precursor in the visual arts, collage, traces back to the beginning of modern art with the works of Braque and Picasso in the early years of the Twentieth Century.¹⁵ A term roughly synonymous with remix frequently used in a musical context is “mashup,” which “[t]ypically consist[s] of a vocal track from one song digitally superimposed on the instrumental track of another.”¹⁶ Another roughly synonymous term is “appropriation art.” The best-known contemporary appropriation artist—especially to copyright scholars—is Jeff Koons.¹⁷

Remix is legally interesting. Infringement is a central issue because much remix contains varying amounts of unauthorized copyright-protected material. There is a strong argument, however, that much of this remix is fair use and hence legal. Because the trend toward remix is substantially technology driven, it is likely to continue, if not to accelerate, unless the law somehow puts the brakes on the process. Both the potential for explosive new growth and the poten-

(discussing a new nonprofit Organization for Transformative Works as a vehicle to study the transformative creative practices of various creative communities).

¹³ See LESSIG, REMIX, *supra* note 7, at 254 (“[W]e need to restore a copyright law that leaves ‘amateur creativity’ free from regulation.”); see also Christina Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 451 (2006) (“The best way to protect this useful, transformative category of creative works is through a categorical fair use exception for Internet fan fiction.”).

¹⁴ The term “remix culture” has been used to mean “a society which allows and encourages derivative works.” Remix Syndicate, Written, <http://remixsyndicate.wordpress.com/written> (last visited Apr. 15, 2009). A related term Lessig has used previously is “cut and paste” creativity. LAWRENCE LESSIG, FREE CULTURE 105 (2004).

¹⁵ Tate Collection, Glossary: Collage, <http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=70> (last visited Apr. 15, 2009); Diane Waldman, Guggenheim Collection—Concept—Collage, http://www.guggenheimcollection.org/site/concept_Collage.html (last visited Apr. 15, 2009); cf. Negativland, *Two Relationships to a Cultural Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 239, 255-56 (2003) (“Copyright law, as presently interpreted and enforced with regard to collage, is being used by cultural property owners as anti-art law . . .”).

¹⁶ Pete Rojas, *Bootleg Culture*, SALON, Aug. 1, 2002, <http://archive.salon.com/tech/feature/2002/08/01/bootlegs>.

¹⁷ See, e.g., *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (concluding that Koons’s incorporation of a photograph into a collage painting constituted fair use).

tial for its curtailment make the task of determining how best to regulate these important new kinds of creative works urgent. The remainder of this Article will develop such an account.

Below, I will first develop a positive account, which will make clear the important role that social norms have played in the de facto regulation of fan-fiction and remix works up to this point. I use the term “de facto” as a term of art to embrace regulation both by formal legal means and by informal social norms.¹⁸ Understanding this story is as important as it is instructive in terms of demonstrating possible alternatives to regulation. This account, of course, says nothing about the normative desirability of the current role played by social norms. Since social norms have sometimes served as regulators in the absence or ineffectiveness of formal law, only to be replaced at some later time by more formal forms of regulation, it is especially pertinent to ask whether such informal regulatory means may be better formalized.

In general, recent norms theory serves to correct earlier optimism about the power of norms to regulate judiciously as a result of their emergence from bottom-up social forces that democratically take into account the desires and preferences of everyday members of society.¹⁹ This romantic conception has been replaced by a contemporary one under which social norms are better understood as potentially subject to their own distorting influences. Therefore, like formal law, each social norm must be normatively justified on its own merits instead of its pedigree.²⁰ This said, it is also true that recent norms theory has shown that social norms are often the most effective means of regulation. When the discussion below turns to policy alternatives, I will not only defend the desirability of the role currently played by norms in

¹⁸ See generally STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* (2004) [hereinafter HETCHER, *NORMS*] (developing a philosophical conception of norms and applying it to tort law).

¹⁹ See, e.g., Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 ALA. L. REV. 1, 9-15 (2005) (describing the evolutionary model of norms with an emphasis on the work of Ellickson and Axelrod and discussing potential problems with this model).

²⁰ See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (discussing the false assumption that a group of people with a common interest will act to further that interest). Jennifer Rothman has published an intriguing discussion questioning the merits of norms (also known as customs) in an intellectual property context. See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1972 (2007) (“While some scholars have suggested preferring IP users to owners, I see no reason to favor one-sided customs regardless of which side is preferred. Practices developed solely by users are likely to be just as bad at balancing IP rights as those developed solely by owners.” (footnote omitted)).

regulating fan-fiction and remix works but will also argue that norms offer the potential to play an even more valuable and significant role.

It will be helpful to begin by looking in greater detail at the main social norms that play a regulatory role. To a certain extent, the norms discussed in the next Part emerged under a somewhat different set of conditions than exist today or are likely to exist in the future, as technological advances make it easier for fanworks and remix to draw much more comprehensively from underlying sources. These advances may dramatically increase the amount and source variety of remix while simultaneously reducing the role that communities have played in the fan-fiction world. Thus, one of the important questions that we will need to keep in mind is whether norms can continue to play the important role that they have played in past regulation of fan fiction. Once we see how the relevant norms function, we will be in a better position to appreciate how norms working with the fair use doctrine and the Digital Millennium Copyright Act (DMCA)²¹ together provide a regulatory environment in which remix can continue to flourish, while allowing owners to protect against those uses that they perceive as especially costly.

I. THREE NORMS THAT REGULATE FAN FICTION AND REMIX CULTURE

The following discussion sets out three distinct social norms that play a substantial role in the overall regulation of fan fiction and remix culture. The first two of these are well established. The third is battling with its antithesis for dominance.²² Lawyers sometimes over-emphasize the role of law in the overall regulation of society; it is as if law makes rules from on high and people below are pulled by strings, like puppets buffeted about by the incentives created by law.²³ Con-

²¹ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

²² These are not the only norms at work. For example, one important norm in the fan-fiction community requires fans to give attribution to their sources. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, LAW & CONTEMP. PROBS., Spring 2007, at 135, 155-60 [hereinafter Tushnet, *Payment in Credit*] (discussing the norms surrounding credit and attribution in fan fiction); see also Casey Fiesler, Note, *Everything I Need To Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 752 (2008) (noting two situations in fandom where attribution is considered important).

²³ See ROBERT C. ELLICKSON, ORDER WITHOUT LAW 137-42 (1991) (criticizing the traditional Hobbesian framework of legal centralism adopted by contemporary law and economics scholars, which regards the state as the sole source of social order and de-

trary to this top-down causal view, one of the contributions of norms theory to the law has been to help foster a better appreciation of the fact that the regulatory structure of society is constructed from the bottom up as well.²⁴ Indeed, these forces interact in ways that causally loop. Not only do norms regulate human activities in an informal, nonlegal manner, but norms and law influence one another and work in tandem to regulate behavior.²⁵ In the absence of law, or of effective law, norms will tend to fill in the void.²⁶ This has been poignantly evidenced by the phenomenon of file sharing. Initially, the law was in dispute, with one influential element of the policy community arguing that the activity was fair use.²⁷ This defense was no longer colorable after *Napster* and was not raised in *Grokster*.²⁸ In the early days of file sharing, most people were simply unaware of the legal status of their

nies the role of substantive norms in guiding behavior). Other scholars agree with Professor Ellickson's argument that legal theory consistently overemphasizes the role of law. See, e.g., Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1126 (1997) ("Over a very wide range of human interaction, the content of the relevant legal rules simply does not matter very much. People do not bother to learn the underlying legal rules that affect their actions and rely instead on norms and customs to govern their behavior.").

²⁴ See, e.g., ELLICKSON, *supra* note 23, at 141-42 (discussing the important role played by norms in regulating property entitlements in the Old West in the absence of an effective legal regime); HETCHER, NORMS, *supra* note 18, at 243 (discussing the role of norms in the early regulation of website privacy given the relative absence of formal rules).

²⁵ See ELLICKSON, *supra* note 23, at 132 ("When courts look to business custom to flesh out incomplete express contracts, the state is enforcing norms created by social forces. A person who has 'internalized' a social norm is by definition committed to self-enforcement of a rule of the informal-control system." (footnote omitted)).

²⁶ As the title of Ellickson's book suggests, the absence of law does not lead to disorder but to an order established by suitable social norms. *Id.* at 4-6.

²⁷ See, e.g., CHRIS WOODFORD, 2 THE INTERNET: A HISTORICAL ENCYCLOPEDIA 33 (Hilary W. Poole ed., 2005) ("[A]dvocacy groups such as EFF and Public Knowledge counter [the arguments of copyright owners] that consumers are seeing their rights systematically eroded by new copyright laws, antipiracy technologies that seek to prevent what many people see as fair use, and deliberately intimidating legal actions by such organizations as the RIAA and the MPAA."); see also *The O'Reilly Factor* (Fox News television broadcast July 21, 2000) (transcript available at LexisNexis, News Library, Transcript No. 072103cb.256) (facilitating a debate between John Perry Barlow of the Electronic Frontier Foundation and Howard King, the attorney for Metallica in the Napster lawsuit, over the potential application of fair use to file sharing).

²⁸ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005) (holding that one who distributes a device with the object of promoting its use for copyright infringement becomes liable for the infringements of its users); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (noting that injunctive relief is appropriate in cases involving piracy but not when the alleged infringer has a potential fair use defense).

behavior.²⁹ The commercial creative-content industry expended significant effort to educate people on the illegality and purported wrongfulness of file sharing, comparing it to theft.³⁰ Perhaps to the industry's surprise, its efforts at convincing people that their actions were equivalent to thievery have had a limited effect. Ordinary morality appears not to find the analogy compelling.³¹ While the law in a typical file-sharing case is no longer in dispute, the activity continues apace, occurring millions of times per day.³² The best explanation of this behavior, then, is not the legal status of the activity; rather it draws centrally on social norms.³³

It is against this background that one can best understand the current situation with fan fiction and remix culture. With file sharing,

²⁹ See Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1142 (2005) ("Many users of file-sharing networks were unaware of copyright issues until the first wave of litigation."). File sharing has enough in common with sharing CDs among friends—and is different enough from selling pirated CDs—that users of file-sharing technology might believe that file sharing is not a priori illegal and that it may be justifiable until a court or statute explicitly states otherwise. This was the case in the initial years of Napster.

³⁰ See Steven A. Hetcher, *The Music Industry's Failed Attempt To Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 11 (2004) [hereinafter Hetcher, *Music Industry*] ("[Groups such as the RIAA, MPAA, and AAP] have sought to teach consumers that file sharing is not permissible behavior but is instead tantamount to stealing and therefore morally wrong in the same way that stealing is morally wrong."); see also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264-65 (2002) (describing the "copyright optimists," who regard file sharing as "nothing more than theft").

³¹ See, e.g., AMANDA LENHART & SUSANNAH FOX, THE PEW INTERNET & AMERICAN LIFE PROJECT, DOWNLOADING FREE MUSIC: INTERNET MUSIC LOVERS DON'T THINK IT'S STEALING 5-6 (2000), available at http://www.pewinternet.org/~media/Files/Reports/2000/PIP_Online_Music_Report2.pdf (finding that seventy-eight percent of music downloaders and fifty-three percent of all Internet users do not consider file sharing stealing).

³² See, e.g., Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 7 (2006) ("At the high end, there are claims that up to 60 million Americans have used peer-to-peer networks, that perhaps as many as 5 billion music files are downloaded by Americans in a typical month . . . and that perhaps 60 percent or more of all Internet bandwidth is taken up by file sharing . . ." (citation omitted) (footnotes omitted)); Brian Stelter & Brad Stone, *Digital Pirates Winning Battle with Major Hollywood Studios*, N.Y. TIMES, Feb. 5, 2009, at A1 (noting that over seven million copies of the recent Batman film were illegally downloaded from file-sharing sites).

³³ See Hetcher, *Music Industry*, *supra* note 27; see also Gaia Bernstein, *When New Technologies Are Still New: Windows of Opportunity for Privacy Protection*, 51 VILL. L. REV. 921, 944 (2006) ("Dominant social norms do not conceive of file sharing as immoral conduct and it appears that copyright violations are not embedded with social stigma. Hence, peer-to-peer file sharing remains an extensive practice despite legal action." (footnote omitted)).

the law was clear. What stood in the way of bringing about behavior in conformity with the law were (1) that file sharers had to be educated about the law and (2) that once file sharers were educated, they remained shaped more by norms permitting such behavior than by norms proffered by the music industry proscribing it. With fan fiction and remix, the law is more uncertain and nuanced. Of most dramatic significance is the fact that while file sharing typically is not fair use, typical amateur fan fiction and remix are, or so I will argue.

Remix culture is a more recent phenomenon than fan fiction. Thus, it is not surprising that norms with regard to fan fiction are better formed. Informal social norms have long played an important role in the fan-fiction community. Before looking at these norms in particular, it is first worth offering an aside to consider the core structures that norms may take in order better to comprehend their creation and maintenance conditions.

Norms are best viewed not as linguistic entities but rather as social practices of a certain sort (albeit ones that typically have linguistic entities attached).³⁴ The reason for drawing this distinction can now be made clear. Social practices, unlike linguistic entities, are rationally governed in the sense that they are maintained as social practices because actors conform to them for rational reasons. It is important to see that it is the behavior that matters in the end because that is what produces utility or disutility, and it is the behavior, or rather the collection of conforming behaviors, that has strategic structures.³⁵ The utility payouts to the players are mutually interactive. In other words, the benefit that one player receives for conforming will typically depend on choices made by others and vice versa.³⁶ In addition, norms qua patterns of social behavior typically have sanctions attached, and conformity to them is typically proscribed by one person to another, although these characteristics are not essential.³⁷

There are three basic types of rational norms: prisoner's dilemma (PD) norms, coordination norms, and epistemic norms.³⁸ For each of these types of norms, the rationality of one's conformity is affected by the behavior of others. For example, under a coordination norm, one may be indifferent between two options in the abstract (such as driv-

³⁴ See HETCHER, NORMS, *supra* note 18, at 24-36, 306 (critiquing linguistic views of norms and providing an extensive definition).

³⁵ *Id.* ch. 2.

³⁶ *Id.* at 39.

³⁷ *Id.* at 28.

³⁸ *Id.* at 39.

ing on the left as opposed to the right side of the road), but when one becomes aware of what others are doing, one's preference becomes to conform, because one receives a "coordination benefit" from doing what others are doing and a "coordination loss" from doing the opposite.³⁹

For example, a tremendous new source of creative content is being produced by people who post their creative efforts to social-networking sites such as MySpace. The production of this content is plausibly modeled as being governed by norms that have the structure of a coordination norm.⁴⁰ What this means in practical terms is that if others are participating in social networking, then the individual has an incentive to do so as well, in the same manner as others.⁴¹ As a result, external forms of motivation may not be necessary to incentivize the continued production of this type of creative work once the norm is set in motion. If true, this would surely be of interest to copyright law, which has as its essential goal the incentivization of creative works.⁴²

With epistemic norms, the fact that others are conforming to some normatively governed pattern of behavior is evidence of the rationality of one's conformity. Here, conformity is an information-cost-saving device.⁴³ The rational-actor model assumes that the players in strategic games have enough information about their situations, the strategic structure of the game, and the other players to know whether they are free riders or instead cooperators in iterated games. On a more sophisticated model, however, we must not assume perfect in-

³⁹ See *id.* at 46-47, 46 figs.2.5 & 2.6 (providing game-theoretic matrices and examples to illustrate coordination benefits and losses).

⁴⁰ See Steven A. Hetcher, *The Emergence of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97, 122-26 (2001) [hereinafter Hetcher, *Website Privacy Norms*] (discussing the coordination norms that discourage websites from adopting stringent user-data-collection and privacy policies).

⁴¹ See Danah Boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in YOUTH, IDENTITY, AND DIGITAL MEDIA 119, 126 (David Buckingham ed., 2008), available at <http://www.danah.org/papers/WhyYouthHeart.pdf> (noting that teenagers join social-networking sites in part due to peer pressure).

⁴² See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."), superseded by statute, Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2541 (codified as amended at 17 U.S.C.).

⁴³ See HETCHER, NORMS, *supra* note 18, at 28 (noting that the information-cost-saving feature of some norms explains why prescriptivity is not always necessary to enforce them).

formation as a constant.⁴⁴ We will see that relaxing the assumption of perfect information is informative in the context of norms qua practices constituted of conforming acts. For example, this assumption tends to be more factually accurate in close-knit communities. In other circumstances, however, assuming perfect information is simply unrealistic. Depending on the circumstances, a more realistic approach to determining one's best course of action, such as whether some particular creative work is a fair use, is to conform to the behavior of others.

Elsewhere, I discuss hybrid norms that are constituted of different sorts of motivation to conform. In the context of the norm whereby ordinary users by the millions think it is socially acceptable to remix, it is plausible that some conform in order to receive the coordination benefits of doing what others are doing, while others conform in order to save on the information costs of determining if conformity is rationally justified. Indeed, given the set of circumstances ordinary users are exposed to, it is completely sensible that they should implicitly conclude that a wide range of remix activity is socially acceptable and indeed of positive social value. It is implausible to argue that typical remixers know the law. For them, the existence of increasingly pervasive remix practices has important epistemic value, both in terms of indicating the practice's legality as well as its potential as a source of coordination benefits.

Under PD norms, rational actors will also look to the behavior of others, but in the hope of free riding on this behavior should the opportunity present itself. In a single-shot game, rational actors will defect.⁴⁵ But a social practice, due to the continuing nature of its participants, implies that it is not a single-shot game. Conformity to the social practice is rational because the payoff is typically higher for conformity than for defection, given the iterative nature of the game.⁴⁶ As

⁴⁴ See *id.* at 191-92 (noting the tendency of behavior to converge towards social practices in the absence of perfect information).

⁴⁵ See Steven Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J.L. & TECH. 149, 199 n.179 (2001) (noting that the cooperation of players in David Axelrod's computer-tournament experiment depended on whether the game was repeated).

⁴⁶ I have written elsewhere that [w]hen there is an opportunity for the parties to interact over time in a repeat game situation, however, then it may be rational for each party to adopt a cooperative strategy in which each defers the immediate gain from defection in order to attempt to realize the long-term gain that may result from cooperation. HETCHER, NORMS, *supra* note 18, at 298.

will be seen below, fan-fiction creators are engaged in a PD game with one another when it comes to commercializing their works.

As the preceding discussion indicates, being clear on the strategic structure of norms matters because it is this structure that will often be dispositive in determining whether an individual continues to conform to a given social practice. This in turn matters because any policy prescription must take account of the variety of factors that affect individuals' motivation either to conform to socially desirable patterns of behavior or to be deterred from conforming to undesirable patterns. This Part will discuss three kinds of social norms that directly impact creators of fan-fiction and remix works: (1) the norm of socially acceptable and somewhat-encouraged amateur remix, (2) the norm against commercializing fan fiction, and (3) competing norms among owners regarding tolerance of noncommercial use.

A. *The Norm of Socially Acceptable and Somewhat-Encouraged Amateur Remix*

Consider the rational structure of norms in the context of the sorts of social practices that give rise to this Article: the normatively governed practices whereby, every day, large numbers of people use commercial copyright-protected works as elements in works of fan fiction or remix that they create. When this is done by amateurs in non-commercial contexts, this social practice is deemed acceptable by a substantial number of relevant actors, as well as by society in general, to the extent that such a view may be discerned at all.⁴⁷ Indeed, in some quarters, this behavior is strongly encouraged.⁴⁸ Not all relevant actors accept this norm, but that is true of all norms.⁴⁹ What is the

⁴⁷ See generally Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1463-64 (discussing how the public becomes emboldened to violate copyright law based on social norms in Web 2.0); Tushnet, *User-Generated Discontent*, *supra* note 12, at 506-14 (noting that many people feel that fan fiction does not hurt, and may even help, the financial well-being of the copyright owner).

⁴⁸ See JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 152 (discussing Lucasfilm's offer of free web space to *Star Wars* fans). See generally Lee, *supra* note 47, at 1486-88 (noting the phenomenon of hedging, whereby commercial copyright owners tacitly encourage users to create derivative works that can help market the main product, enforcing the license only when the infringement is harmful).

⁴⁹ See Tushnet, *Payment in Credit*, *supra* note 22, at 141 ("[F]an fiction has attracted more attention from 'free culture' advocates who are concerned about copyright owners' attempts to channel and control popular culture. Some copyright owners have also taken an aggressive stance against fan creativity, sending cease-and-desist letters threatening lawsuits to fan websites.").

evidence of the existence of the norm? First, of course, is widespread behavior of a given sort, namely, the millions of works of fan fiction that have been produced and shared in recent years. Importantly, such behavior does not court social sanction; to the contrary, there is a great deal of social reinforcement of remixing in creative communities.

As previously noted, fan-fiction and remix activity can plausibly be claimed to provide significant social benefits. Thus, it is unsurprising that there is a norm that promotes this activity. For example, Henry Jenkins, an educator himself, emphasizes the educational benefits to young people from participation in these activities and in the communities built around them.⁵⁰

Jenkins notes that creators of fan fiction and remix feel as if they have a right to such uses.⁵¹ One fan-fiction writer whom Jenkins interviewed states that “[t]he text already belongs to us; we are not taking anything other than our own fantasies, so therefore we are not stealing anything at all.”⁵² This quote highlights a stark difference between fan fiction and file sharing. With fan fiction, there is an addition to the sum total of creative output, which is not the case with file sharing. Thus, unless the dynamic processes that are producing fan fiction disincentivize the creation of the original works, we cannot help but embrace the set of regulatory forces that are responsible for the rise of fan fiction.

The quote above and other commentary by fan-fiction enthusiasts implicitly assume that fanworks involve a substantial amount of creativity on the part of the fan author. They assume a typical situation in which the creator borrows commercial characters such as Kirk and Spock from *Star Trek* and then creates a new fictional work, with a plot of her own concoction, based on these characters. Indeed, this is the

⁵⁰ See JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 177-85 (describing fan-fiction communities as distributed-knowledge “affinity spaces,” proposing that the practice promotes literacy, and discussing fanwork in the context of educational scaffolding and apprenticeship). Jenkins discusses in detail the story of Heather, a brave and enterprising teenager who ran her own *Harry Potter* website and organized similar sites worldwide in a protest against their ill treatment by the Warner Brothers film studio. *Id.* ch. 5. The highlight of this sequence of events came when Heather debated a lawyer for Warner Brothers on *Hardball with Chris Matthews*, a television program devoted to current affairs and political punditry. *Id.* at 187.

⁵¹ See *id.* at 191 (noting “the fans’ own sense of moral ‘ownership’” over copyright-protected source material).

⁵² Interview by Taylor Harrison with Henry Jenkins, in Tucson, Ariz. (Apr. 24, 1994), in ENTERPRISE ZONES app. A at 267 (Taylor Harrison et al. eds., 1996) (internal quotation marks omitted).

form that much fan fiction has taken in the past.⁵³ Under such conditions, it is not hard to understand why these creators would feel some degree of ownership or proprietary interest in the fanwork. Such a feeling would be predicted as a matter of social science, to the extent that Lockean property intuitions have been empirically demonstrated.⁵⁴ Under this assumption, more fine-grained predictions become possible and plausible. For example, one would predict that the greater the proportion of new work in relation to borrowed work contained in a particular remix, the greater the sense of ownership and entitlement one would expect on the part of the creator.⁵⁵

Users have also been subject to advertising that famously has encouraged them to rip, mix, and burn.⁵⁶ It is reasonable for an average person to think that if a high-profile company like Apple openly encourages certain behavior, it cannot be illegal or even wrong under dominant social norms. Note, however, that Apple did not encourage users to share files.

Permit me to add a personal anecdote here in support of the norm I am characterizing. As a professor of copyright law in “Music City”—Nashville, Tennessee—I am asked by the Vanderbilt University administration to give a talk to undergraduates about file sharing every fall. Each year I give the talk along with two persons from the administration whose job, in part, is to curtail student file sharing when notified by the Recording Industry Association of America (RIAA) of such activities on campus. My task is a simple one: to impart the message that file sharing is illegal and that one can get into trouble for engaging in it. This is especially true at Vanderbilt, which is one of the schools allegedly targeted by the music industry. I am never asked to comment on the legal status of making fan-fiction or

⁵³ See JENKINS, TEXTUAL POACHERS, *supra* note 6, at 156 (“Fans, as one longtime Trekker explained, ‘treat the program like silly putty,’ stretching its boundaries to incorporate their concerns, remolding its characters to better suit their desires.”).

⁵⁴ See generally Nicholas Blomley, *The Borrowed View: Privacy, Propriety, and the Entanglements of Property*, 30 LAW & SOC. INQUIRY 617 (2005) (arguing that Lockean property rights can value autonomy as well as social duty).

⁵⁵ Conversely, the less creative matter added, the more the owner of the source work will feel like a victim of theft.

⁵⁶ Apple ran an iTunes advertisement in 2001 containing the slogan, “Rip. Mix. Burn.” Press Release, Apple, Apple Unveils New iMacs with CD-RW Drives and iTunes Software: Rip, Mix, Burn Your Own Custom Music CDs (Feb. 22, 2001), *available at* <http://www.apple.com/pr/library/2001/feb/22imac.html>. The television commercial ended with the words, “It’s your music. Burn it on a Mac.” *Id.* The company’s press releases encouraged users to create custom music CDs with their iMacs. See, e.g., *id.*

remix works.⁵⁷ I would speculate that I am not asked to comment on these issues because the RIAA and Motion Picture Association of America (MPAA) are not demanding that the university address them. I would suggest that the RIAA and MPAA consider ending their attempts at moral education of America's youth regarding file sharing. It is hard enough to explain even to very smart college students how it can be illegal to make copies of CDs one owns when one can legally make copies of TV shows with a DVR. From a pedagogical point of view, it would be futile to attempt to teach the legal rules applicable to fan fiction and remix. The core of any such account would necessarily involve teaching fair use doctrine, a task that is simply impossible to accomplish in a brief span of time.

Another reason that the RIAA and MPAA would be unlikely to further their interests by attempting to educate the masses about remix is that one of the main arguments the industry has used to discourage this practice in the past is that it not only hurts faceless corporations, rich rock stars, and movie stars, but also threatens the livelihoods of all the people who work in these industries.⁵⁸ This cynical claim loses all credibility in the context of fan fiction and remix, however, because it is implausible in most instances to argue that anyone is harmed. Indeed, it would be more intuitive for typical remixers to see how commercial owners would likely benefit from such activities.⁵⁹ If anything, then, the implicit lesson that young people would

⁵⁷ The RIAA website, in a section entitled "Piracy: Online and on the Street," outlines a variety of actions that it considers illegal, but it does not mention remixes, mashups, or any similar activity. Recording Indus. Ass'n of Am., Piracy: Online and on the Street, <http://www.riaa.com/physicalpiracy.php> (last visited Apr. 15, 2009). The MPAA website, in a section entitled "Internet Piracy," also sets out various actions that constitute piracy but does not discuss remixes or mashups. Motion Picture Ass'n of Am., Internet Piracy, http://www.mpaa.org/piracy_internet.asp (last visited Apr. 15, 2009).

⁵⁸ See Lou Carlozo, *Web Music Still a Free-for-All, Users Vow*, CHI. TRIB., Jan. 4, 2001, § 3, at 1 ("[T]he artists, the studios, the engineers—the entire food chain that's involved in this—is harmed. And we've got to sensitize people to that fact." (internal quotation marks omitted)).

⁵⁹ For example, *Star Trek* fan-fiction writers in the early 1960s and 1970s organized the first *Star Trek* conventions after feeling unwelcome at World-Con and other science-fiction conventions. These same fans were responsible for the letter-writing campaign that saved the show from cancellation after its second season. The continuation of the franchise since then, spawning three spin-off series and ten films, has obviously made a great deal of money for Paramount. See generally Francesca Coppa, *A Brief History of Media Fandom*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 41, 45-48 (Karen Hellekson & Kristina Busse eds., 2006) (describing the history of *Star Trek* fandom).

take away from forced education on the evils of file sharing is that remix is not a parallel sort of evil or, for that matter, an evil at all.

What could meaningfully be done, however, is simply to provide the bottom-line conclusion that much fan fiction and remix is fair use, and hence legal, while complete digital copies of works that remain largely unchanged are unlikely to be embraced by that doctrine.⁶⁰ I think it would be reasonably intuitive to students that the latter sort of uses would be closer to plain-vanilla exact copies—and hence morally equivalent to file sharing—than they are to remix works.

Scholars often write as if all norms are structured such that they are rules that members enforce against one another.⁶¹ But as I have argued in detail elsewhere, this feature is not true of all norms.⁶² To take a prosaic example, it is a norm that parents teach their children to look both ways before crossing the street. This norm does not have a PD structure such that not to conform is to free ride. Instead, others are indifferent as to whether any given individual looks both ways before crossing the street. The norms at issue with much remix creation are similar. They are best seen as a particular instantiation of the more general norm that what is not forbidden is permitted. Thus, because there is no norm prohibiting remix, the situation falls back onto the norm of permissibility. From a policy perspective, it matters not just that, as a formal matter, children feel free to remix but also that they are more inclined to do so because others are as well. This norm has the structure of a coordination norm.⁶³ One is more inclined to conform in light of the conformity of others. As eighteen-year-old Skyler says, “If you’re not on MySpace, you don’t exist.”⁶⁴

B. *The Norm Against Commercializing Fan Fiction*

Now consider the second important social norm—the norm against the commercialization of amateur users’ works. As we saw

⁶⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that “transformative” works are embraced by the fair use doctrine).

⁶¹ See, e.g., LAWRENCE LESSIG, *CODE: VERSION 2.0* app. at 340 (2006) (defining social norms as “many slight and sometimes forceful sanctions that members of a community impose on each other”).

⁶² See HETCHER, *NORMS*, *supra* note 18, at 2-3 (arguing that coordination and epistemic norms are not sanction driven).

⁶³ See Hetcher, *Website Privacy Norms*, *supra* note 40, at 122-23 (defining a coordination norm as a practice in which each user who conforms receives a “coordination benefit” derived from the conformity of others).

⁶⁴ Boyd, *supra* note 41, at 119.

above, fan fiction preceded remix culture historically. Fan fiction was circulated among groups and communities from the beginning.⁶⁵ Some commentators have described these communities as “close-knit.”⁶⁶ Within the fan-fiction community, there is a norm against seeking commercial gain.⁶⁷ Initially, one might suppose that fan-fiction writers are anticapitalist. There is indeed a rational explanation, however. There is a fear in this tightly knit community that by seeking to commercialize their work, authors will draw unwelcome attention to the entire community.⁶⁸ Note that the community’s fear of attention does not necessarily mean that it is widely believed that the use made of copyrighted works is infringement. Even if most such works are not infringements, no one wants to be sued.

The community’s interests give rise to a pattern of strategic behavior. Members are inclined to take an interest in each other’s actions precisely because each person, in terms of the actual utilities and disutilities, has an interest in any step that other members take to commercialize their acts of remix. Thus, the norm against commercial use in the fan-fiction community has the structure of an iterated PD. In other words, at least some narrowly self-interested rational actors would defect from cooperation if they could get away with it.⁶⁹ Defec-

⁶⁵ See generally JENKINS, *TEXTUAL POACHERS*, *supra* note 6, ch. 5 (describing fan-fiction communities).

⁶⁶ See Fiesler, *supra* note 22, at 746 (“Fandoms are extremely close-knit communities, and members protect themselves by operating under a specific set of self-regulating guidelines—their own social norms.”); see also Posting of Chris Vallance to BBC—Radio Five Live—Pods & Blogs, FanLib and Fan Fiction, http://www.bbc.co.uk/blogs/podsandblogs/2007/05/fanlib_and_fan_fiction.shtml (May 23, 2007) (“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 . . .”).

⁶⁷ See Fiesler, *supra* note 22, at 749-52 (describing the fan-fiction community’s techniques for self-policing this norm).

⁶⁸ See *id.* at 751 (discussing a quote from an irate fan calling attention to the legal “trouble [that could be brought] down on the fanfic ‘industry’” if a writer attempts to profit from her work (quoting Posting of Yuuo to The Pitfalls of Fanfiction, This Has Probably Been Ranted About Before . . ., <http://community.livejournal.com/fanficrants/3349486.html> (Sept. 24, 2006))); Posting of Henry Jenkins to Confessions of an Aca-Fan, Transforming Fan Culture into User-Generated Content: The Case of FanLib, http://www.henryjenkins.org/2007/05/transforming_fan_culture_into.html (May 22, 2007) (describing the uproar in the fan-fiction community when a commercial website attempted to profit from fan fiction).

⁶⁹ Jenkins provides a good deal of support for the claim that many amateur creators would like to commercialize their works. He notes that, “Historically, fan fiction ha[s] proven to be a point of entry into commercial publication for at least some amateurs, who were able to sell their novels to the professional book series centering on

tion in this context means seeking commercial gain from one's work. As with other PDs, one does better if others conform to a norm while one does not. In the present context, the benefit that the free rider gets from the conformity of others is deflection of the unwanted attention of commercial owners. Owners are less likely to pursue legal action against the fan-fiction community if the community presents no commercial threat. For those who conform to the noncommercial norm, however, the free rider creates costs. By seeking commercial gain, the defector makes it more likely that commercial content owners will begin to pay more attention to the fan-fiction community. Each of the conformers is therefore more likely to draw attention than would otherwise be the case.

Norms theory would predict that conformers will seek means to force potential free riders to conform. Typically, this occurs through sanctions or by threatening to cut the free rider off from the benefits of iterated play. In the legal literature, Robert Ellickson provides the seminal account of the conditions under which groups will be able to solve their collective action problems.⁷⁰ Like the groups cited by Ellickson, fan-fiction communities are close knit. This characteristic allows for effective sanctioning behavior. Sanctions are the means that groups use to incentivize conformity when free-riding would otherwise be an individual member's first choice.⁷¹ As Ellickson's model would

the various franchises." JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 152. He also notes that young digital filmmakers sometimes use fan films as a "calling card" to break into the industry. *Id.* at 154. For example, the creators of the *Star Wars* fan film *George Lucas in Love* intended it as a vehicle for getting producers and agents to notice them. *Id.* at 143. In another specific example, one writer who was in the middle of writing a fan-fiction novel attempted to profit from it by "ask[ing] her readers to donate money so that she could take time off from work in order to write full-time" and complete the novel. Fiesler, *supra* note 22, at 751.

⁷⁰ See ELLICKSON, *supra* note 23, ch. 11 (discussing the emergence of cattle-trespass norms in the Old West, contract norms among close-knit Wisconsin businessmen, and whaling norms, all of which had the effect of reducing the need for litigation).

⁷¹ See, e.g., *id.* at 188 (describing how cattle ranchers who failed to reimburse a neighbor for part of the construction of a "cost-justified boundary fence" would be subject to the creditor's "measured self-help"). Note that many in the group only adhere to the norm against commercial use for the instrumental reason that they think that they have something to gain by it. Fiesler describes in detail the case of Laura Jareo, who self-published her novel *Another Hope* and listed it on Amazon. She was heavily criticized on fan-fiction blogs such as Fandom Wank. Fiesler, *supra* note 22, at 750-51. Fiesler concludes 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." *Id.* at 757.

predict, there is indeed a strong sanctioning regime in place in fan-fiction communities.

C. *Competing Norms Among Owners Regarding
Tolerance of Noncommercial Use*

There is a third norm pertaining to fan fiction that is closely related to the previous one. Under this norm, owners will not prosecute remix creators who use their works but who do not seek to commercialize them. This is not an established norm but a putative one. In actuality, there is an ongoing battle between this more tolerant norm and one that does not tolerate such uses.

From the perspective of norms theory, the question whether there is a norm boils down to the question whether there are conforming behavior and interactive utilities. There are both empirical and conceptual reasons to think that the behavior of commercial owners has a normative component. The empirical evidence comes from the fact that the industry has developed standards for user-generated content.⁷² While these principles were initially proffered as creating best practices for all relevant parties—commercial owners, fan authors, and viewers—only the owners were at the table when the norms were drafted. Unsurprisingly, their interests were largely served.⁷³ The existence of these practices indicates that the commercial content industry perceives some mutual benefit in developing a uniform set of norms to which each member can attempt to hold the others.

The second reason to think the behavior has a normative component is that it has a strategic structure. The question which type of norm is involved is answered not by the *fact* of conformity but by the *motivation* for conformity. If actors conform only to avoid sanctions and the loss of future interactions in iterated games, but in the absence of these considerations would prefer to free-ride on the benefits created by the conformity of others, then the practice has the structure of a PD norm. We would want to ask, for example, the following

⁷² See generally User Generated Content Principles, <http://www.ugcprinciples.com/> (last visited Apr. 15, 2009) (setting forth a list of principles, for websites providing user-uploaded audio and video content, meant to encourage creativity while thwarting infringement).

⁷³ See Press Release, Internet and Media Industry Leaders Unveil Principles To Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), *available at* http://www.ugcprinciples.com/press_release.html (indicating that the principles were generated solely by commercial owners and focusing on the development of filtering technology and the removal of links to other sites containing infringing content).

sort of question: would George Lucas want other owners to be tolerant toward remixers so that he could free-ride on the resulting benefits? The answer clearly seems to be no.⁷⁴ There seems to be no free-rider benefit that accrues to an owner as a result of other commercial owners declining to seek legal redress against amateur remixers.

In fact, the opposite is the case. If there is a norm of tolerance among owners, then a particular owner who seeks redress is more likely to stand out as intolerant. This is what happened to Warner Brothers in its overly zealous defense of creative properties against amateur *Harry Potter*-based works. The studio was lambasted for targeting *Harry Potter* websites run by children and teens.⁷⁵ The fact that many other commercial owners were de facto tolerant of such uses made Warner Brothers stand out as particularly unreasonable. Thus, the putative norm among owners to tolerate noncommercial content has the structure of a coordination norm. Any given owner has reason to do what other owners are doing. The more tolerant others are, the more it is in a particular commercial owner's interest to be tolerant as well. The utilities are interactive in that when one acts in conformity with others, one receives more utility for doing so than would otherwise be the case.

There are prominent commercial content owners on each side of this battle of norms. During her copyright-infringement lawsuit against the publisher of a *Harry Potter* encyclopedia, J.K. Rowling indicated that she would not oppose online noncommercial uses of her work:

[T]here is a big difference between the innumerable Harry Potter fan sites' latitude to discuss the *Harry Potter* Works in the context of free, ephemeral websites and unilaterally repackaging those sites for sale in an effort to cash in monetarily on Ms. Rowling's creative works in contravention of her . . . rights.⁷⁶

Other owners have explicitly stated that some fanworks are fair uses.⁷⁷ At the other extreme are owners who bring lawsuits and send

⁷⁴ As Jenkins relates, LucasArts has varied its stance on fanworks but has become more tolerant over time. JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 148-59.

⁷⁵ See *id.* at 185-88 (describing how the intense reaction led the senior vice president of Warner Brothers Family Entertainment both to admit that the legal response had been "naïve" and to develop a more collaborative policy similar to Lucasfilm's).

⁷⁶ Complaint at 3, Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 07-9667).

⁷⁷ When asked why he allowed fan fiction of his work, Neil Gaiman replied, "Because fan fiction is fan fiction. I don't believe I'll lose my rights to my characters and

cease-and-desist letters.⁷⁸ Whether the norm of commercial owners' tolerance of amateur remix uses can be effectively established as a social practice of the owner community is an important policy question. To the extent that this norm is instantiated, there will be less harassment of fair users by the owners of commercial works.⁷⁹

In order better to understand what would be involved in establishing and maintaining this norm, it is useful to consider its strategic structure, which turns on the costs and benefits of commercial owners' taking legal action against noncommercial remixers. The costs are straightforward: principally there would be the cost of monitoring the Internet for uses of one's work and the cost of pursuing legal ac-

books if I allow/fail to prevent/turn a blind eye to people writing say Neverwhere fiction, as long as those people aren't, say, trying to sell books with my characters in [them]." Posting of Neil Gaiman's Journal, How To Survive a Collaboration, <http://journal.neilgaiman.com/2004/06/how-to-survive-collaboration.asp> (June 3, 2004). Gaiman further stated that his attitude is not "particularly uncommon among authors." *Id.*; see also Malene Arpe, *Television's Afterlife*, TORONTO STAR, May 22, 2004, at J1 (quoting Joss Whedon, creator of *Buffy the Vampire Slayer* and *Firefly*, as saying, "I absolutely love it. I wish I had grown up in the era of fan fiction That's why I made these shows. I didn't make them so that people would enjoy them and forget them; I made them so they would never be able to shake them." (internal quotation marks omitted)). George Lucas famously gave fan-fiction writers permission to publish stories as long as they were nonerotic and not for profit. JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 150. Even J.K. Rowling has publicly said that fans may write fan fiction, though she has noted that she does not read it and that it makes her somewhat uncomfortable. See MELISSA ANELLI, HARRY, A HISTORY 92-93 (2008) (quoting Rowling as stating, "I felt that we needed to be hands off, accept it as flattering I've never read any fanfiction online. I know about some of it. I just don't want to go there. It is uncomfortable for the writer of the original work" (internal quotation marks omitted)).

⁷⁸ See, e.g., JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 151-52 (describing Viacom's crackdown on "fanzines"); *id.* at 185-88 (describing Warner Brothers' attempts to shut down *Harry Potter* fansites); Posting of Lady MacBeth to MediaMiner, Authors/Publishers Who Do Not Allow Fan Fiction, <http://www.mediaminer.org/blog/index.php?archives/23-AuthorsPublishers-Who-Do-Not-Allow-Fan-Fiction.html> (Oct. 8, 2006) (maintaining a list of "authors or publishers who have made statements on their websites or have filed Cease and Desist notices against fan fiction writers").

⁷⁹ Lessig downplays the tension between commercial and noncommercial use for purposes of fair use analysis. This may serve his larger strategic purpose of minimizing the importance of any distinction "between text on one hand and film/music/images on the other." LESSIG, REMIX, *supra* note 7, at 55. He argues that however "sensible . . . [the commercial/noncommercial] distinction might seem, it is in fact not how the rules are being enforced just now." *Id.* Lessig cites the example of Disney's complaining about children at a kindergarten painting Mickey on a wall, clearly a non-commercial use. *Id.* He also discusses how jazz musicians tolerated the practice of other musicians improvising on their works and argues that remix artists should be able to commercialize their creativity. See *id.* at 103-05, 255.

tion of various sorts.⁸⁰ Perhaps the best statement regarding these costs comes in Viacom's 2008 complaint against YouTube. Viacom alleged that "Defendants continue to infringe Plaintiffs' works and impose on Plaintiffs the substantial costs and burdens of locating and demanding the removal of their copyrighted works from Defendants' website."⁸¹

What are the benefits to commercial owners that would justify their expenditures on enforcement? In the classic online-piracy cases *Napster* and *Grokster*, the benefit was clear: file sharing was perceived to be a huge threat to the core business model of the record labels, which was to sell recorded music. Here, the cost-benefit analysis was straightforward: the costs of enforcement versus the benefits to be gained from stopping or slowing the rate of file sharing. With amateur remix, however, the direct, tangible benefits to the Viacom of the world are not clear, as there is arguably no direct threat to their business models from most fan fiction and remix.⁸² Indeed, owners will sometimes stand to benefit from enhanced exposure of their works, for example, through the fostering of a more devoted fan base.⁸³

⁸⁰ Discussion has tended to focus on Internet remix, but if we take the broader topic to be monitoring for unauthorized uses generally, then, depending on the commercial works at issue, monitoring might take other forms. For example, Bridgeport Music monitors commercially released music in order to seek and destroy unauthorized sampling of works that it controls. Tim Wu, *Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That's Destroying Hip-Hop*, SLATE, Nov. 16, 2006, <http://www.slate.com/id/2153961>.

⁸¹ First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial at 19, *Viacom Int'l Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (No. 07-2103) [hereinafter First Amended Complaint]; see also Linda Rosencrance, *Prince Fights YouTube, eBay over Copyrighted Content*, COMPUTERWORLD, Sept. 19, 2007, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleID=9037578> (quoting Prince's lawyer as saying, "We notify YouTube of infringements and they remove the files, but it goes on ad infinitum at Prince's expense Now the onus is on artists and rights' creators to police YouTube at their expense").

⁸² Of course, this is not to say that Viacom did not allege damages. See First Amended Complaint, *supra* note 81, at 9. ("Additional massive damages to plaintiffs and others have been caused by Google's preservation and backing of YouTube's infringing business model.")

⁸³ See, e.g., JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 191 (describing fans as "inspirational consumers' whose efforts help generate broader interests in [commercial owners'] properties"); LESSIG, REMIX, *supra* note 7, at 259 ("For with the removal of a legal barrier to fan action, more fans will participate in that fan action. And the more who devote their efforts toward Warner creative products, the better it is for Warner."); COPPA, *supra* note 59, at 45-48 (discussing the early *Star Trek* fan community).

One reason that commercial owners seek to stop fan uses is to control their characters.⁸⁴ Another potential reason might be that owners fear that the norm against commercial use will break down and lead to increased commercialization of fanworks and remix. If owners see the norm against commercialization starting to give way to a norm of tolerance, all else equal, they will be more inclined to take broad action against all unauthorized uses. As we saw in the previous discussion of the norm against commercial use maintained in the fan-fiction community, it is precisely this fear that has motivated fan-fiction entrepreneurs to zealously promote the noncommercial norm.⁸⁵ Nevertheless, this would be a more amorphous sort of harm than that suffered by the music industry, which has witnessed CD sales declining year after year since the advent of file sharing.

Thus, I would postulate that the general disinclination of owners to prosecute noncommercial remix is indicative of the fact that enforcement behavior is simply not justified in cost-benefit terms. The monitoring and legal costs of ending remix are real and measurable, while the benefits are amorphous and difficult to quantify.

II. REGULATORY OPTIONS IN A WORLD OF SHIFTING NORMS

Recall that, in the Introduction, I stated that I would first set out the positive account of the regulatory role played by social norms. As we have seen, this role is pervasive and powerful. The normative question next presents itself: is the role for social norms detailed in Part I optimal in terms of promoting the goals of copyright? At first glance, one might well conclude that things are working out exceedingly well, judging from the simple fact that fan fiction and remix culture are exploding. Since these new and distinctive types of works themselves are of clear and distinct value in serving core goals of copyright law,

⁸⁴ Some authors, while stopping short of pursuing legal action, have publicly expressed their distaste for fan fiction, sometimes asking fans to refrain from writing it. See, e.g., Robert J. Hughes, *Return to the Range*, WALL ST. J., Sept. 6–7, 2008, at W2 (describing the constant irritation felt by Annie Proulx, author of the short story *Brokeback Mountain*, from fans who send in derivative manuscripts); Anne Rice, Messages to Anne Rice Fans, <http://www.annerice.com/ReaderInteraction-MessagesToFans.html> (last visited Apr. 15, 2009) (“I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.”).

⁸⁵ See *supra* Section I.A.

the three norms that play a material role in making them possible are valuable by implication as well.

Yet all may not be so simple. While norms are demonstrably powerful regulators both in the present context and in general, they are informal regulators and thus, by definition, do not have the stability of formal law; they can easily change. Flexibility can be a positive or negative attribute depending on whether it is used in the service of desirable policy goals on the one hand or nefarious private interests on the other. For example, in an important recent case, Prince and his record label, Universal, took legal action against a mother, Stephanie Lenz, who had posted a video on YouTube of her toddler dancing with a Prince song barely audible in the background.⁸⁶ This sort of overreaching use of copyright law against ordinary people rightly causes commentators to call for legal reform.⁸⁷ The possibility of cases like *Lenz* raises the question whether regular people require stronger protection than that provided by current norms. Because the norms studied in Part I are not law, there would appear to be nothing to stop these norms from changing should the underlying conditions of their maintenance change. This is more than a mere abstract possibility; consider the fact that the anticommercialization norm discussed above has the strategic structure of an iterated PD. This means that the maintenance of the norm is dependent on the increasingly difficult task of sustaining close-knit communities.

In their efforts to characterize a distinctive noncommercial creative economy, both Tushnet and Lessig talk in detail about the non-commercial motivations that drive the creation of much fan fiction and remix.⁸⁸ Indeed, this attention is well deserved, as noncommercialism is an important feature of remix. Yet one must not lose sight of the fact that many amateur creators will seek to commercialize their

⁸⁶ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008). Lenz, in turn, alleged that Universal had taken legal action in bad faith. *See id.* at 1156-57 (denying Universal's motion to dismiss Lenz's lawsuit).

⁸⁷ *See, e.g.*, Rebecca F. Ganz, Note, *A Portrait of the Artist's Estate as a Copyright Problem*, 41 LOY. L.A. L. REV. 739, 758 (2008) (pointing to the *Lenz* case as an example of copyright misuse and the overly aggressive defense of intellectual property); Tyler McCormick Love, Note, *Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 J. INTELL. PROP. L. 369, 381-82 (2008) (using the *Lenz* case to illustrate the need to strengthen the copyright-misuse doctrine to discourage copyright misrepresentation).

⁸⁸ *See, e.g.*, Tushnet, *Legal Fictions*, *supra* note 2, at 657 ("The ethos of fandom is one of community, of shared journeys to understanding and enjoyment. . . . Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit." (footnote omitted)).

work if they can. The reason is obvious: most people need to make a living. If some people are gifted at creating fanworks, it would be natural for them to seek to support themselves in this manner, rather than with a day job, in order to sustain their art.

As noted in the discussion of the noncommercial norm, Henry Jenkins provides a good deal of evidence that many creators have mixed motivations.⁸⁹ The practical implication of this is that we cannot take the current degree of adherence to the norm of noncommercialization as a given; rather, we must treat it as a variable that may change as a function of the relative costs and benefits of adhering to the noncommercial norm versus the costs and benefits of seeking to commercialize one's works.⁹⁰

In a world where the norm of noncommercial use is weakened, one can predict that there will be more commercial use as the costs of commercial use decrease. The sanctioning regime that creates costs for commercializing begins to lose its ability to drive cooperative behavior through sanctioning, interested-play, and reputational effects within communities that are decreasingly close knit. This is relevant because as old-school fan fiction has broadened to embrace fanworks, media fiction, remix, or whatever we choose to call it, close-knit communities are disappearing.⁹¹ In turn, the Ellicksonian forces of iteration and overlapping interaction—forces that encourage actors to

⁸⁹ See *supra* note 69 and accompanying text. In discussing the different reasons why fan filmmakers have made *Star Wars* movies, Jenkins describes (1) a creator who wanted to “do something that would get the agents and producers to put the tapes into their VCRs instead of throwing them away,” (2) a fourteen-year-old who wanted to have fun with his friends, (3) the members of a wedding party who made a film as a tribute to the bride and groom, (4) students who made films as school projects, and (5) members of *Star Wars* fan clubs who made films as collective projects. JENKINS, *CONVERGENCE CULTURE*, *supra* note 5, at 143 (internal quotation marks omitted).

⁹⁰ Note that I am not claiming that all creators of fanworks would necessarily make this calculation. Tushnet and Lessig are right to emphasize the noncommercial nature of many fan-fiction creations. It is enough for the effect I am hypothesizing that some material number of creators would be so motivated. Jenkins's account on this issue is well researched and reasoned; nothing that either Lessig or Tushnet says contradicts it. Neither denies that there either are or could be under friendlier incentives a material number of creators who would commercialize if they could. See also HARDIN, *supra* note 20, at 183 (“[A]fter trying, at substantial loss, to punish the loner for stubborn defection, the [rest of the group] might all begin to suspect that they would gain more over the long run by tolerating a free rider than by further attempting to get the loner to cooperate.”).

⁹¹ See Tushnet, *Payment in Credit*, *supra* note 22, at 154-55 (“[W]ith the increasing variety and visibility of fan creativity, new fans are not always initiated by more experienced ones. They may not learn the norms of the preexisting community when they start sharing their own stories and art, including norms of explicitly disclaiming ownership.”).

forego short-term gain in favor of long-term cooperation—are diminishing.

Thus, as we move from a world dominated by fan fiction to a more freewheeling society dominated by remix, there is likely to be a breakdown of the second norm against commercializing fanworks. This may lead owners of creative content to sue more of the Stephanie Lenzes of the world. As a result, the third norm may shift in the direction of decreased tolerance of remix as the perception grows that law-suits are needed to create fear and panic among users.

The potential for a breakdown of the noncommercial norm and the consequent victory of the intolerance camp regarding the third norm may be highly significant if it leads to greater harassment of fair users by commercial owners. This outcome is widely viewed in the copyright-policy community as undesirable. But if norms are not the optimal regulatory solution in a changing world, what is? There are two obvious candidates. First, formal law—for example, the Copyright Statute—may be changed in some way to more fully support fan fiction and remix. The second is to seek a means by which existing fair use doctrine can play a more effective role in supporting fan fiction and remix than it currently does. With regard to a change in formal law, the most straightforward solution would be to legalize fan fiction and remix. In his important new book, Lessig argues for the legalization of amateur remix.⁹² This would be an important step, as it effectively does away with the derivative-works right. This change, however, might also do away with frivolous suits against fair users that have the effect of making the legal right of fair use practically worthless to those who possess it. This potential outcome makes legalization worth considering despite the fact that the derivative-works right could be taken away.⁹³ Lessig's account is sophisticated and worth examining in detail. Subsequent discussion will consider the potential for fair use doctrine to play a more constructive role than is presently the case.⁹⁴

⁹² See LESSIG, REMIX, *supra* note 7, at 255 (“There is no good reason for copyright law to regulate this [amateur] creativity. There is plenty of reason—both costs and creative—for it to leave that bit free.”).

⁹³ Note as well that if amateur remix were legal, then it would not matter that the second and third norms studied in Part I were breaking down because, even if they did, the amateur creator would be protected by the fact that her creative efforts were legal. Thus, she would not have to rely on the kindness of strangers or, in other words, forbearance or tolerance on the part of commercial owners.

⁹⁴ See *infra* Part IV.

III. LESSIG'S VISION OF AMERICA: MILLIONS OF KIDS IN ORANGE JUMPSUITS

Lawrence Lessig's new book, *Remix*, is evidently written, to some extent, for a nonacademic audience. Given the subtitle—"Making Art and Commerce Thrive in the Hybrid Economy"—it is reasonable to guess that its intended audience extends beyond academia into the larger business- and Internet-policy crowd. This makes the book a challenge—albeit a highly worthwhile one—with regard to serious academic interpretation, as it is the work of an authority on an important subject, yet it is argued in a narrative, polemical, and entertaining style, utilizing textual and rhetorical devices not typically associated with scholarly writing.

Whereas Lessig's goal is polemical, mine is to provide a more evenhanded normative evaluation, even if this means that a goal such as shocking the legal academy into a heightened appreciation of remix is less than optimally served as a result. Just as there is value in provoking a response through the use of strong polemical language, there is also value in a more neutral approach that ventures into the gray areas that shade any complex normative issue. Lessig characterizes himself as a peacemaker in the so-called "copyright wars."⁹⁵ This is a clever bit of rhetoric: who can argue with peace? To his credit, however, Lessig is more aptly characterized as a warrior in the copyright wars, fighting to make the world safe for free culture.⁹⁶

Lessig sees his opponents as the commercial creative-content industries. Their goal is profit, not sound public policy. In their pursuit of profit, these industries are polemical in their characterization of unauthorized users as thieves and criminals.⁹⁷ It is perhaps the case that this profit-driven characterization is best responded to polemically with an account equally one sided, but in the opposite direction. This is, after all, the model of zealous advocacy that law professors teach to their students. Lessig's book is a defense of a view that is fairly characterized as extreme inasmuch as legalizing remix effectively does away with the derivative-works right when amateur works are involved. Given that the field of amateur creative works is experi-

⁹⁵ LESSIG, REMIX, *supra* note 7, at xv-xvi.

⁹⁶ Lessig notes that "[i]t's been a decade since I got myself into the fight against copyright extremism." *Id.* at 293.

⁹⁷ *See id.* at xvii (describing Jack Valenti's rhetoric on behalf of the Motion Picture Association of America).

encing explosive growth, the derivative-works right would correlatively experience dramatic shrinkage under Lessig's proposed regime.

My approach has a different starting point and a different goal. It is no part of my project to counteract the profit-driven polemics of the commercial content industry. Once one assumes a more neutral posture, it becomes necessary to set out the costs as well as the benefits of the phenomenon under examination—even if this amounts to exposing the tender underbelly of one's position, such that it may be more effectively skewered by those whose goal is not good policy but profit. The starting point for appreciating a more subtle policy response than direct legalization of amateur remix thus begins with an appreciation of the potential for harm that a broader solution would engender. Accordingly, the examination of Lessig's argument below will be undertaken with the objective of evaluating whether the policy proposal that he supports would serve or undermine the goals of copyright law.

As someone trained in analytic philosophy, my natural instinct for taming a text is to seek out the syllogisms. Thus, the following discussion will first seek to set out Lessig's core arguments in syllogistic form. Subsequent discussion will then seek to determine which of the premises is true and, correlatively, which of the conclusions is true. I extract five arguments, which I will first list seriatim in order to better capture the overall flow of Lessig's argument.

Argument One:

- (1) Remixing is criminal.⁹⁸
- (2) The rising generation uses its computers largely for remixing activities.⁹⁹

Therefore, the rising generation is made up of criminals.

Argument Two:

- (1) The rising generation is made up of criminals.

⁹⁸ Lessig writes that

[i]n a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?

Id. at xviii.

⁹⁹ *See id.* at 19 (arguing that we should “reform the rules that render criminal most of what your kids do with their computers”).

- (2) Making children criminals is bad for them and for society, as it will lead to disrespect for the law, more criminal activity, and potentially punishment of the sort meted out to file sharers.¹⁰⁰
- (3) If remixing were legal, our children would not be criminals and thus would not suffer the harm of being labeled criminals.¹⁰¹

Therefore, we should make remixing legal so that our children will no longer be criminals and thus they and society will not suffer the harm of children being criminals.

Argument Three:

- (1) In addition to turning children into criminals, laws against remix culture will deter development of institutions of literacy.¹⁰²
- (2) Institutions of literacy should not be deterred.¹⁰³

Therefore, laws against remix culture should be dispensed with in order to promote institutions of literacy and the social good they create.

Argument Four:

¹⁰⁰ Lessig writes, "I worry about the effect this war is having upon our kids. What is this war doing to them? Whom is it making them? How is it changing how they think about normal, right-thinking behavior? What does it mean to a society when a whole generation is raised as criminals?" *Id.* at xvii. Throughout, Lessig presents a parade of horrors and suggests that this is what lies in store for remixers, who follow in the footsteps, legally speaking, of file sharers. He asks, "Should we continue the expulsions from universities? The threat of multimillion-dollar civil judgments? Should we increase the vigor with which we wage war against these terrorists? Should we sacrifice ten or a hundred to a federal prison (for their actions under current law are felonies), so that others learn to stop what today they do with ever-increasing frequency?" *Id.* at xviii (internal quotation marks omitted). Lessig ominously suggests that once we turn our children into criminals, they will turn on us: "I then want to spotlight the damage we're not thinking enough about—the harm to a generation from rendering criminal what comes naturally to them. What does it do to them? What do they then do to us?" *Id.* at 18.

¹⁰¹ This premise is implicit.

¹⁰² Lessig argues that

the law as it stands now will stanch the development of the institutions of literacy that are required if this literacy is to spread. Schools will shy away, since this remix is presumptively illegal. Businesses will be shy, since rights holders are still eager to use the law to threaten new uses.

Id. at 108.

¹⁰³ This premise is implicit.

- (1) Remixes cause no harm.¹⁰⁴
- (2) Creative practices that cause no harm should not be impeded by the law.¹⁰⁵
- (3) Creative practices that produce social benefits should be promoted by copyright law.¹⁰⁶
- (4) Remix culture creates social benefits.¹⁰⁷

Therefore, remix cultural practices should not be impeded but instead supported by legal rules.

Argument Five:

- (1) There is no sensible reason to criminalize remix culture; rather, it is the unintended collateral damage of the war that has been fought against file sharing.¹⁰⁸

¹⁰⁴ When the mashup artist Girl Talk told Lessig in an interview that he could not understand why anyone should want to censor his music since, unlike “bootlegging,” it was not hurting anyone, Lessig replied, “Why anyone ‘should’ was a question I couldn’t answer.” *Id.* at 13. Furthermore, Lessig does not discuss any harms that may result from remix. *Silencio non est disputandum.*

¹⁰⁵ This premise is implicit. It is a particular instantiation of the Millian harm principle that is an implication of the utilitarianism that in turn undergirds copyright law, at least in its familiar economic form. See, e.g., Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 162 (2001) (“[H]arm forms the core of the degree of moral opprobrium . . . we should attach to punishment.”).

¹⁰⁶ This premise is implicit, although it would find much support in copyright case law. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 n.3 (1985) (“This equitable rule of reason [fair use] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” (citations omitted) (internal quotation marks omitted)).

¹⁰⁷ Remix culture is more democratic. LESSIG, REMIX, *supra* note 7, at 25. Lessig states that Read/Write (RW) culture extends itself differently from Read/Only (RO) culture. *Id.* at 28. He finds that RW culture

touches social life differently. It gives the audience something more. Or better, it asks something more of the audience. It is offered as a draft. It invites a response. In a culture in which it is common, its citizens develop a kind of knowledge that empowers as much as it informs or entertains.

Id. at 85; see also *id.* at 92 (“With a practice of writing comes a certain important integrity.”); *id.* at 130 (“[T]he breadth of this market . . . can’t help but inspire a wider range of creators. For reasons at the core of this book, inspiring more creativity is more important than whether you or I like the creativity we’ve inspired.”). Lessig concludes that “[s]peaking teaches the speaker even if it just makes noise.” *Id.* at 132.

¹⁰⁸ See *id.* at 18 (“Peer-to-peer file sharing is the enemy in the ‘copyright wars.’ . . . The war is not about new forms of creativity, not about artists making new art. . . . But every war has its collateral damage. These creators are just one type of collateral damage from this war.”).

- (2) A nonsensical, unjust, and unintended legal result of some other legal goal is unjustified.¹⁰⁹

Therefore, criminalizing remix culture is unjustified.

As the above arguments indicate, the cornerstone premises in Lessig's overall set of arguments—as well as the overall rhetorical posture of the book—are that amateur-remix-cultural activity is, under current law, criminal activity and that this classification has harmful consequences both to our nation's youth and to society in general.¹¹⁰ It will be beneficial to sort through Lessig's premises one at a time. The first premise of Argument One is that "[r]emixing is criminal."¹¹¹ I will argue that this key premise is false for the simple yet fundamentally important reason that significant amounts and types of fan fiction and remix culture are fair uses.¹¹² A use that is fair is not an infringement.¹¹³ A use that is not an infringement is a fortiori not criminal.¹¹⁴

¹⁰⁹ This premise is implicit.

¹¹⁰ See *The Colbert Report* (Comedy Central television broadcast Jan. 8, 2009) (interview with Lawrence Lessig) (discussing Congress's misplaced priorities in maintaining a criminal prohibition on remixing).

¹¹¹ See *supra* note 98 and accompanying text.

¹¹² Commentators have taken a range of views on the fair use of fan fiction, fan works, and remix culture. See, e.g., Tushnet, *Legal Fictions*, *supra* note 2, at 681 ("Fan fiction may not be copyrightable, but that does not make it an infringing use any more than a book reviewer's inability to copyright the quotes she uses makes her use unfair."); McCardle, *supra* note 5, at 445 ("[Y]es, writing fan fiction infringes on copyright protections."); Ranon, *supra* note 13, at 435 ("Fan fiction qualifies as an unauthorized derivative work, and is therefore illegal." (footnote omitted)); Org. for Transformative Works, *Frequently Asked Questions: Why Does the OTW Believe that Transformative Works Are Legal?*, <http://transformativeworks.org/faq> (select Legal subsection) (last visited Apr. 15, 2009) ("[Copyright] does not preclude the right of others to respond to the original work, either with critical commentary, parody, or, we believe, transformative works."); Brad Templeton, *Ten Big Myths About Copyright Explained*, <http://www.templetons.com/brad/copymyths.html> (last visited Apr. 15, 2009) ("[A]lmost all 'fan fiction' is arguably a copyright violation. If you want to publish a story about Jim Kirk and Mr. Spock, you need Paramount's permission, plain and simple.").

¹¹³ See generally 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

¹¹⁴ It should also be noted that, although beyond the scope of this Article, even if the argument that remix content qualifies as fair use fails, there is a strong argument that creators of such content will not be subject to criminal liability under the No Electronic Theft (NET) Act, which Lessig references in his book. See 17 U.S.C. § 506(a)(1)(A) (2006) (conditioning criminal sanctions for infringement on having "purposes of commercial advantage or private financial gain"); LESSIG, *REMIX*, *supra* note 7, at 39 ("In 1997 and 1998, that strategy was implemented in a series of new laws designed to extend the life of copyrighted work [and] strengthen the criminal penalties for copyright infringement . . ."). Lessig's frequent references to the criminalization of a genera-

Accordingly, a fundamental premise undergirding Lessig's argument for the policy proposal that amateur remix be made legal is false.¹¹⁵ To fully establish that significant forms of remix culture are fair uses would require a lengthy fair use analysis that is not results oriented. A comprehensive test of this sort is beyond the scope of the present Article. Here I will give a streamlined version. Whereas Lessig wants to jettison fair use in favor of full legislation, I will argue for the opposite conclusion on the basis of the results of the following fair use test.

IV. MUCH FAN FICTION AND REMIX ARE FAIR USE

The current fair use test was originally developed by courts but was codified as section 107 of the Copyright Act of 1976. It is a four-factor test that is considered to be equitable in nature and hence fact specific. Factor one of the fair use test looks to the purpose and character of the use.¹¹⁶ In short, the key features are that much fan fiction and remix culture are transformative and noncommercial, thus satisfying both subfactors of factor one of the fair use test. The variety and creativity of remix culture are truly astounding.¹¹⁷ Henry Jenkins lists

tion imply a belief that these remixers do, or will, violate the NET Act. See, e.g., LESSIG, REMIX, *supra* note 7, at 283-84 (arguing that children have been branded "pirates" and comparing them to Soviet black marketeers). However, while this statement may be correct with respect to file sharing, it should not apply to remix. First, the NET Act has a threshold requiring a retail value of \$1000 before criminal liability attaches. 17 U.S.C. § 506; 18 U.S.C. § 2319 (2006). Remix content will rarely, if ever, attain a value of \$1000. See U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 cmts. 2(A)-(B) (2008) (detailing how to calculate retail values). Second, the statute requires the government to prove that there was willful infringement. 17 U.S.C. § 506. Under the majority view of willfulness, which states that a defendant must intend to infringe a copyright, conduct is not willful even if a defendant holds an incorrect belief that his actions constituted fair use. Eric Goldman, *Warez Trading and Criminal Copyright Infringement*, 51 J. COPYRIGHT SOC'Y U.S.A. 395, 404-05 (2004) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.02[B][2] (2002)); see also 17 U.S.C. § 506(a)(2) ("For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement . . ."). Consequently, user-generated remix content would not be criminal under the NET Act. In fact, the eighty prosecutions under the NET Act to date have been for acts that involve wholesale copying, not remix content. See U.S. Dep't of Justice, Intellectual Property Cases, <http://www.usdoj.gov/criminal/cybercrime/ipcases.html> (last visited Apr. 15, 2009) (listing major criminal copyright prosecutions).

¹¹⁵ It is ironic that while Lessig expresses much concern about the deleterious effects of labeling children criminals, his work may give the false impression that a significant proportion of typical remix content is criminal.

¹¹⁶ 17 U.S.C. § 107(1).

¹¹⁷ See Tushnet, *User-Generated Discontent*, *supra* note 12, at 503 ("[F]anworks have expanded from mostly text-based, with occasional graphic art, to include music and

ten different kinds of fan fiction.¹¹⁸ A common criticism of many such works is that they are of low quality.¹¹⁹ The issue of the quality of the work, however, is orthogonal to the issue of transformation, as there can be low-quality transformations as well as high-quality ones. For purposes of factor one of the fair use test, what matters is that the use is transformative, not that it is a high-quality transformation.¹²⁰

While this is a common way to think about the test for transformation, in fact things may be more complicated. The leading case on fair use, *Campbell v. Acuff-Rose Music, Inc.*, can be interpreted as preferring two distinct conceptions of transformativeness—one that looks to whether a new work sufficiently alters the first, and the other to whether it promotes social welfare.¹²¹ In the case of fan fiction and remix, works will often possess each of these features. Whether a fan-

video. These works add new characters, stories, or twists to the existing versions. . . . [F]anworks encourage and sustain a vibrant fan community that helps authorized versions thrive” (footnote omitted)).

¹¹⁸ Jenkins’s ten categories are (1) recontextualization, (2) expanding the series timeline, (3) refocalization, (4) moral realignment, (5) genre shifting, (6) cross overs, (7) character dislocation, (8) personalization, (9) emotional intensification, and (10) eroticization. JENKINS, TEXTUAL POACHERS, *supra* note 6, at 162-77.

¹¹⁹ See, e.g., ANDREW KEEN, THE CULT OF THE AMATEUR 56 (2007) (“Do we really need to wade through the tidal wave of amateurish work of authors who have never been professionally selected for publication?”).

¹²⁰ See F. Jay Dougherty, *All the World’s Not a Stogie: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 73 (2003) (noting that in *Campbell*, which “emphasized transformativeness as a key element of a copyright fair use analysis, Justice Souter cited Justice Holmes’ aesthetic non-discrimination statement with approval, noting that the Court, having found a work to be a parody, ‘will not take the further step of evaluating its quality’” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994))).

¹²¹ The Supreme Court in *Campbell* stated that

[t]he central purpose of this investigation is to see . . . whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (second alteration in original) (citations omitted); see also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (“[A] search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.”).

work is sufficiently creative will, of course, turn on the standard that a work must pass to be a new work. If the test is merely the test for new works as applied in the context of originality, or in the context of the test of derivative works, the test will be easy to pass, although to some extent this will depend on the circuit when it comes to derivative works.¹²² Additionally, in the context of defining a new work for the purposes of the originality or the derivative-works test, the test is binary: either the work is sufficiently original or it is not. The fair use test, however, is not binary. Rather, courts are interested in the degree of transformation: the more transformative the work, the more weight that will be given to the consideration of transformative use vis-à-vis the other factors of the fair use test. A work that possesses barely enough originality to pass the test for a derivative work would not be likely to count as transformative in the context of factor one analysis.¹²³

On the other conception, courts make a sort of welfare calculation to measure transformative use by considering the social value of the use. It appears that many remix works would pass this test as they create social welfare without creating offsetting harms. For example, in the search-engine cases, courts have found the role that the works in question play in the functioning of search engines is a transformative use that is extremely socially valuable.¹²⁴

When one thinks of the welfare created by new works, it is common to think in terms of the welfare that would come through con-

¹²² Judge Posner has argued in *Gracen* that the standard for derivative works is higher. See *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) (“The requirement of originality is significant chiefly in connection with derivative works, where if interpreted too liberally it would paradoxically inhibit rather than promote the creation of such works by giving the first creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.”).

¹²³ See, e.g., *Paramount Pictures Corp. v. Carol Publ’g Group*, 11 F. Supp. 2d 329, 335 (S.D.N.Y. 1998) (holding that a *Star Trek* commentary book contained enough original expression to be considered a derivative work but not enough to be considered transformative for the purposes of the fair use test).

¹²⁴ Google’s image search is a classic example:

It is by now a truism that search engines such as Google Image Search provide great value to the public. Indeed, given the exponentially increasing amounts of data on the web, search engines have become essential sources of vital information for individuals, governments, nonprofits, and businesses who seek to locate information. As such, Google’s use of thumbnails to simplify and expedite access to information is transformative of P10’s use of reduced-size images to entertain.

Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 848-49 (C.D. Cal. 2006), *rev’d on other grounds*, 508 F.3d 1146 (9th Cir. 2007).

sumption of the works.¹²⁵ By this standard, it would appear that a low-quality work would have a marginal impact on social welfare. Given that much fan fiction and remix are admitted to be of low quality,¹²⁶ the conclusion would seem to be that much fan fiction and remix add little to social welfare. But the issue is more complicated, as the utility impact may pertain not only to fanworks per se but also to the impact on the people involved. For example, Lessig argues that participating in remix culture promotes personal integrity.¹²⁷ Tushnet also points to the transformation involved as pertaining to the creator and not to the work per se, as does Tony Reese.¹²⁸ These commentators also point to the social benefit of a more diverse creative culture. Lessig argues that greater diversity of remix content will better inspire creators.¹²⁹ For Tushnet, the fact that fanworks are motivated by non-commercial factors and that creators write for niche audiences means that a broader array of content will emerge than in a context in which creators are motivated solely by monetary rewards.¹³⁰

¹²⁵ See, e.g., Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 355 (2008) (“Reduced consumption of copyrighted works can . . . generate negative externalities . . .”).

¹²⁶ See, e.g., ANELLI, *supra* note 77, at 81 (“I . . . found myself staring in horror at a one-page story that was so full of sentence fragments, grammatical errors, and narrative interruptions that it looked more like a toddler had been at the page with magnetic letters than someone had actually tried to craft prose. It took a half hour before I ran across a piece of fanfiction by an author who respected commas . . .”); JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 136 (“Most of what the amateurs create is gosh-awful bad . . .”); LESSIG, REMIX, *supra* note 7, at 92 (“The vast majority of remix, like the vast majority of home movies, or consumer photographs, or singing in the shower, or blogs, is just crap.”).

¹²⁷ See LESSIG, REMIX, *supra* note 7, at 92 (“And with a practice of writing [blogs] comes a certain important integrity.”).

¹²⁸ See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 494 (2008) (“[A]ppellate courts also clearly do not view the preparation of a derivative work—or any transformation or alteration of a work’s content—as necessary to a finding that a defendant’s use is transformative. Instead, courts focus on whether the purpose of the defendants’ use is transformative.”); Tushnet, *User-Generated Discontent*, *supra* note 12, at 504 (“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 . . .”). Post-*Campbell*, one of the main connections that is made between factor one and factor four is that transformative works are more likely to be fair uses because, since they are transformative, they are less likely to cause harm. Note, however, that if the transformation inquiry is subjective rather than objective, this connection may not hold.

¹²⁹ LESSIG, REMIX, *supra* note 7, at 42.

¹³⁰ See Tushnet, *User-Generated Discontent*, *supra* note 12, at 507 (“[N]oncommercial creative uses, precisely because they are not motivated by copyright’s profit-based in-

Once one adopts a welfarist approach to evaluating the purpose and character of the use, however, one must be open to purposes that may be socially deleterious as well. A controversial example is pornography.¹³¹ Both J.K. Rowling and George Lucas, the owners of the *Harry Potter* characters and the *Star Wars* characters, respectively, have explicitly expressed the view that they are particularly opposed to pornographic uses of their works by fans.¹³² These concerns accord with a general view that online pornography is harmful to children.¹³³ In the rapidly evolving world of digital remixing technology, these au-

centives, are more likely to contain content that the market would not produce or sustain . . .”).

¹³¹ Ann Bartow would likely see this as an instance of “pornification” of a sort that would be deleterious to the interests of women. See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 816 (2008) (“Web 2.0 facilitates the internet-pornification of anyone who finds herself in front of a camera, voluntarily or not . . .”). Tushnet, however, implies that pornography is transformative:

Campbell may be more convincingly read as implying that fan fiction is transformative and thus fair use (and implicitly that fair use protects “new art,” not merely work that courts deem socially beneficial). . . . From alternate universes to poetry to new adventures to erotica, fan fiction contains much that is “otherwise distinctive.”

Tushnet, *Legal Fictions*, *supra* note 2, at 665-66. It is beyond the scope of the current project to decide who has the better argument here. It is enough for present purposes to note that the welfarist interpretation of the transformative use test under *Campbell* commits one to taking questions of this sort seriously. As per the nature of fair use, the value accorded to the pornographic content will be fact specific. Compare *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (finding a pornographic drawing of Disney characters not to be fair use, because the drawings were too similar to the originals, but implying that this was not due to the content because “the essence of this parody did not focus on how the characters looked, but rather parodied their personalities, their wholesomeness and their innocence”), with *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. (BNA) 124, 131 (N.D. Ga. Dec. 24, 1981) (“The character of the unauthorized use is relevant, but, in the court’s judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.”).

¹³² See JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 150 (describing warnings by Lucasfilm to fans in the early 1980s not to publish erotic *Star Wars* stories); E-mail from Theodore Goddard, Attorneys for J.K. Rowling, to unnamed *Harry Potter* fan (Jan. 22, 2003), available at http://www.chillingeffects.org/fanfic/notice.cgi?action=image_337 (reprinting a cease-and-desist letter sent to the owner of a website dedicated to *Harry Potter* fan fiction on behalf of Rowling’s literary agency, which expressed concern that children might come across the sexually explicit content).

¹³³ See Robert A. Gomez, *Protecting Minors from Online Pornography Without Violating the First Amendment: Mandating an Affirmative Choice*, 11 SMU SCI. & TECH. L. REV. 1, 2-3 (2007) (noting the action that Congress has taken to protect minors from accessing pornography online, including the Communications Decency Act, the Child Online Protection Act, and the Children’s Internet Protection Act, and concluding that “there is general consensus that pornography has a detrimental effect on impressionable youths”).

thors could expect to see remixed pornographic content drawing from feature-length *Harry Potter* and *Star Wars* films.¹³⁴ Thus, while it is fair to conclude that much fan fiction and remix are transformative, both because these works contain new forms of expression and because they are generally productive of social welfare, the logic of a welfarist approach to transformative use nevertheless forces the conclusion that some works may be transformative yet arguably productive of disutility.

The second subfactor of factor one considers whether the use is commercial or noncommercial and perhaps educational.¹³⁵ As seen earlier in the discussion of the norm against commercial use, commentators have frequently heralded the noncommercial nature of fan fiction as one of its core virtues.¹³⁶ The same predominantly non-commercial features pertain to remix culture as well, at least for now.¹³⁷ As noted above, Henry Jenkins has discussed the extent to

¹³⁴ See, e.g., Richard Bernstein, Note, *Must the Children Be Sacrificed: The Tension Between Emerging Imaging Technology, Free Speech and Protecting Children*, 31 RUTGERS COMPUTER & TECH. L.J. 406, 410 (2005) (“Celebrities Alyssa Milano and Nancy Kerrigan commenced legal action when their heads were morphed by use of digital imaging manipulation onto pictures of nude women and placed on commercial Internet sites to be gawked at by voyeurs.”); Reinhard W. Wolf, Short Film Remixing on the Internet—Found Footage in the Age of Web 2.0, <http://www.shortfilm.de/index.php?id=2989&L=2> (last visited Apr. 15, 2009) (“What has long been possible in real life . . . is now permeating the world of digital film on the Internet: the appropriation and recycling of existing material in new combinations. . . . The combination of online tools with filesharing is what makes it all possible . . .”).

¹³⁵ See 17 U.S.C. § 107(1) (2006) (explaining that the first factor involves examining “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”). The definition of fan fiction sometimes includes the limitation that it is noncommercial. See Tushnet, *Legal Fictions*, *supra* note 2, at 655 (defining fan fiction in part as “not produced as ‘professional’ writing”); Fiesler, *supra* note 22, at 731-32 (“[F]an fiction is understood to be ‘unauthorized’ and ‘not-for-profit.’”). Tushnet also defines fanworks as noncommercial for the purposes of protection by the Organization for Transformative Works. Tushnet, *User-Generated Discontent*, *supra* note 12, at 501.

¹³⁶ See Tushnet, *Legal Fictions*, *supra* note 2, at 657-58 (“Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit. They believe that their emotional and financial investment in the characters gives them moral rights to create with these characters.” (footnote omitted)).

¹³⁷ See JENKINS, *TEXTUAL POACHERS*, *supra* note 6, at 158 (noting that even as fan fiction becomes more prevalent, “fanzines continue to be a mode of amateur, non-profit publication”); Fiesler, *supra* note 22, at 748 (describing the “thou shalt not profit” rule as a self-enforced constraint on the fan-fiction community).

which creators of remix do indeed sometimes seek commercial gain.¹³⁸ Up to this point, however, such efforts have been relatively insignificant for a few reasons: first, due to quality differentials between fanworks and the commercial works upon which they are built; second, because of the norm against commercializing fanworks discussed above; and third, out of fear that commercial use might occasion unwanted attention from the owners of the underlying works.¹³⁹ In addition to being overwhelmingly noncommercial in nature, as noted earlier in the discussion of the first norm, fanworks and remix are plausibly characterized as promoting important educational values.¹⁴⁰

Because of the dearth of case law involving noncommercial uses, fair use analyses in the cases and commentaries have focused overwhelmingly on the consideration of transformative use. As a consequence, past discussion of putative fair uses of fan fiction and remix has relied too much on analogies to cases such as *Bridgeport Music, Inc. v. Justin Combs Publishing*.¹⁴¹ These cases are inapposite because, although the use at issue in each was not found to be fair, the context was commercial. In *Bridgeport*, for example, a commercially successful musician, P. Diddy, incorporated music samples without authorization (or even attribution) and was found to be an infringer.¹⁴² I would speculate that in a fact pattern similar to *Bridgeport* but involving a one-second sample used by a child performing amateur remix, a court would almost surely find fair use.¹⁴³ Moreover, I am willing to speculate

¹³⁸ For example, the creators of *George Lucas in Love*, the *Star Wars* fan film, were motivated at least in part by potential profit. JENKINS, CONVERGENCE CULTURE, *supra* note 5, at 139-43.

¹³⁹ See Fiesler, *supra* note 22, at 749 (noting that most fan-fiction writers are worried that if anyone begins to profit from the unauthorized works, it will attract the negative attention of copyright owners).

¹⁴⁰ See *supra* text accompanying note 42.

¹⁴¹ 507 F.3d 470 (6th Cir. 2007).

¹⁴² *Id.* at 475. Lessig notes the oddity of the fact that a student can quote Hemingway in an essay, but cannot do the equivalent in the remix context with a film based on Hemingway's text. LESSIG, REMIX, *supra* note 7, at 53-54. He uses *Bridgeport* to support his claim that a parallel ability to quote is not available in an audio context. *Id.* at 104.

¹⁴³ Lessig downplays the distinction between commercial and noncommercial uses:

At this point, some will resist the way I've carved up the choices. They will insist that the distinction is not between text on the one hand and film/music/images on the other. Instead, the distinction is between commercial or public presentations of text/film/music/images on the one hand, and private or noncommercial use of text/film/music/images on the other. . . .

that a court would find such a use to be fair even if the use was marginally transformative. In other words, the consideration of non-commercial use is a potentially powerful fair use factor that has generally gone underappreciated due to a dearth of cases presenting such uses.

Following *Campbell*, courts have noted the inverse relationship between transformative uses and the factor four consideration of harm to the market caused by the unauthorized work—the more transformative a work is, the less likely it is for market harm to ensue because the works are increasingly dissimilar and thus less likely to serve the same market.¹⁴⁴ Note that a parallel case can be made that the less commercial a work is, the less likely it is to hurt the market for the underlying work that it uses without authorization. The lower risk of market harm means the work is more likely to be a fair use.

Combining the two subfactors of factor one, we see that typical remix is both transformative and noncommercial, and often educational to boot. Given that factor one is the most important of the four

Yet however sensible that distinction might seem, it is in fact not how the rules are being enforced just now And in fact, Disney has complained about kids at a kindergarten painting Mickey on a wall. And in a setup by J. D. Lasica, every major studio except one insisted that a father has no right to include a clip of a major film in a home movie—even if that movie is never shown to anyone except the family—without paying thousands of dollars to do so.

LESSIG, REMIX, *supra* note 7, at 55 (footnote omitted). Lessig later analogizes to jazz musicians and their tolerated practice of improvising on works of others and argues that a parallel, modern art form, music mashups, should similarly be tolerated: “Why should it be effectively impossible for an artist from Harlem practicing the form of art of the age to commercialize his creativity because the costs of negotiating and clearing the rights here are so incredibly high?” *Id.* at 105. In other words, remix artists should be able to commercialize their creativity. *Id.*; see also *id.* at 255 (“There should be a broad swath of freedom for professionals to remix existing copyrighted work . . .”).

¹⁴⁴ *Campbell* notes that

when a commercial use amounts to mere duplication of the entirety of an original, it clearly ‘supersede[s] the objects’ of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (alteration in original) (citations omitted); see also, e.g., *On Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001) (“*Campbell* explains that the market effect must be evaluated in light of whether the secondary use is transformative.”); *Castle Rock Entm’t v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (“The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.”).

factors, the above considerations weigh heavily in favor of the characterization of works of fan fiction and remix as fair uses.

Factor two of the fair use test centers on “the nature of the copyrighted work.”¹⁴⁵ With regard to factor two, most fan fiction and remix culture draw from unauthorized works that are published, which favors the putative fair user.¹⁴⁶ Typically, however, these works are creative as opposed to factual in nature.¹⁴⁷ This counts against fair use.¹⁴⁸ In such instances, when the factor two subfactors point in opposite directions, courts typically find that factor two disfavors fair use.¹⁴⁹ Thus, factor two typically will not find fan fiction and remix to be fair uses. Courts, however, have typically characterized factor two as the least important of the fair use factors.¹⁵⁰

Factor three centers on “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁵¹ With regard to factor three, there is no typical case—some fan fiction and remix draw heavily from the underlying works, either quantitatively or

¹⁴⁵ 17 U.S.C. § 107(2) (2006).

¹⁴⁶ See Tushnet, *Legal Fictions*, *supra* note 2, at 677 (“The published/unpublished distinction of the second factor is instructive. The fan community exists in large part because people have been invited to watch television shows free of charge.”); McCardle, *supra* note 5, at 458 (“As a preliminary matter, fan fiction authors should note that while fictional works inherently receive greater protection, fictional works are also usually in wide distribution, thereby bolstering a fair use argument.”).

¹⁴⁷ See Tushnet, *Legal Fictions*, *supra* note 2, at 676-77 (“Under the second fair use factor, fictional sources get more protection than facts. Like parody, though, fan fiction is unlikely to be written about factual narratives . . .”).

¹⁴⁸ See *id.* at 677 (“This factor supports giving less protection to a work that had been broadly distributed, because such works are at the other end of the continuum from closely-held works.”).

¹⁴⁹ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563-65 (1985) (analyzing both the fact-based and unpublished nature of the work and finding the use “difficult to characterize as ‘fair’”); *Blanch v. Koons*, 467 F.3d 244, 256-57 (2d Cir. 2006) (noting that the original work was both published and creative and that therefore the second fair use factor did favor the copyright holder, even if the factor ultimately did not carry much weight in the fair use analysis). For a more detailed analysis, see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 615 n.215 (2008), in which Professor Beebe discusses the interplay between the creative/factual inquiry and the published/unpublished inquiry, including how to proceed when the two subfactors point in opposite directions.

¹⁵⁰ See Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation To Shape Copyright Protection*, 69 LA. L. REV. 1, 31 (2008) (“While the Supreme Court has indicated that all four factors must be considered and no presumptions should be employed, it has become clear in the case law that often the first and fourth factors dominate the analysis, with the third and second factors trailing in significance, in that order.” (footnote omitted)).

¹⁵¹ 17 U.S.C. § 107(3) (2006).

qualitatively (or both), while other works draw relatively little from the underlying works and add much that is creative and original. All else equal, the former category of works will count in favor of the owner while the latter will count in favor of the user. While factor three will count against users in many cases, this factor is not dispositive against fair use. Once again, following *Campbell*, courts and commentators have often noted that when a work is sufficiently transformative, a use may be fair despite the fact that a complete copy of the work is used without permission.¹⁵² In the well-known *Air Pirates* case, however, the court found that defendants had taken too much to be justified by the other factors, including the transformative nature of the work.¹⁵³ It cannot be taken for granted that the consideration of transformative use will *always* trump factor three considerations.

Courts and commentators have tended to talk almost exclusively about the tradeoff between factor one analysis and factor three analysis in terms of the transformativeness of a use versus the amount and substantiality of the portion of the underlying work that is used. Once again, this is a consequence of the fact that this tradeoff has typically arisen in cases involving commercial uses.¹⁵⁴ In the context of amateur remix, the question is different because the fact patterns, were they to be litigated, would involve noncommercial uses. In such instances, the factor one subfactor of noncommercial use together with the transformative element of the use would be set off against the amount and substantiality of the portion used. All else equal, in an amateur-remix context, the noncommercial nature of the fanwork will require less transformation than would otherwise be necessary to offset the factor three consideration of the amount and substantiality of the portion used. In addition, it is reasonable to suppose that the more non-

¹⁵² See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (“[T]he fact that the entire work is reproduced does not [in certain circumstances] have its ordinary effect of militating against a finding of fair use.” (citation omitted)); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (citing *Sony* for the same proposition).

¹⁵³ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978) (“[I]t is our view that defendants took more than is allowed even under the *Berlin* test as applied to both the conceptual and physical aspects of the characters.”).

¹⁵⁴ See, e.g., *Campbell*, 510 U.S. at 586-88 (1994) (discussing the tradeoff in the context of commercial songs); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001) (discussing this tradeoff in the case of commercial novels); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 327 (S.D.N.Y. 2008) (discussing this tradeoff in a context in which the transformative use was “at least partially commercial in nature”).

commercial a work is, the less likely a court would be to treat factor three as a weighty consideration.

There is reason to believe that as we move from a world of fan fiction to a world of remix, factor three will play a more important role in influencing fair use outcomes in a direction unfavorable to fair use. We can reasonably predict that the amount taken will be a function of technology, such that as it becomes less costly to make digital copies of large files such as feature-length films, more people can be predicted to make full-length copies of unauthorized works their starting point. Compare this to fan fiction, in which the creator takes the ideas of the characters and then does all the writing of the new story on her own. The former sorts of uses are more likely to lead to market harm and thus are less likely to be fair uses.

For instance, if one reads a random sampling of the many thousands of fan-fiction works written using *Harry Potter* characters, they are typically of such low quality from a market perspective that they pose absolutely no threat to the market for the original. The opposite is true, however, if one starts from a complete digital copy and removes very little. The resulting work will be more likely to have commercial value because the work remains largely the original, which presumably has commercial value. If one begins with a few characters and adds very little, one is staring at blank pages. But if one takes a complete digital copy and does very little to transform it, one is not looking at a blank page but instead at a work that very closely resembles the original.

Indeed, the parallel to what is now possible with newly released feature films would be for a fan-fiction writer to start with a complete digital copy of the book and begin to winnow it down from there. Thus, instead of taking characters and writing a new story around them, an amateur remixer might instead take the complete book and write in an extra character, take out some foul language, or change some of the words. For example, many older novels and movies use language that is racist or sexist by contemporary standards. Often it is only a few words in a whole book or movie. One can easily imagine fans making minor changes to complete digital books, then uploading them to file-sharing sites. The possibilities seem endless.

Consider my favorite novelist, Cormac McCarthy. In *The Border Trilogy*, some of his characters speak in Spanish and the author does not provide translations.¹⁵⁵ Now imagine if someone made a digital

¹⁵⁵ See generally CORMAC MCCARTHY, *THE BORDER TRILOGY* (1999).

copy of the book and changed it only by adding footnotes or parenthetical notes in which the dialogue were translated.¹⁵⁶

In sum, then, it is likely to be significant to fair use that it is now much easier to make full digital copies because it is much more likely that fanworks and remix will originate from complete copies and get winnowed down from there. As we have seen, this important change is captured by the parts of the fair use test that look to market harm and to the amount and substantiality of the portion taken. Just as factor one is tied to factor four in that highly transformative works and noncommercial works will tend not to cause market harm,¹⁵⁷ the above discussion highlights the important connection between factors three and four. Other things equal, the more that is taken from the original and the more substantial the part taken, the more likely there is to be market harm as a result of market substitution.¹⁵⁸ This effect is much more likely when the creator begins from a full copy of the work as compared to taking a snippet to use as a small part of a larger whole. Thus, better technology is in tension with fair use in this respect.

Factor four considers whether the unauthorized use will harm the market for the original work.¹⁵⁹ Particularly relevant in the context of fan fiction and remix is the fact that courts consider harm to the derivative-works market as well as to the market for the original. As the discussion above indicates, because a significant amount of fan-fiction and remix works are transformative and noncommercial, they will not harm the market for the owner's original work.¹⁶⁰ A more difficult question is whether these works hurt the market for derivative works. Not all possible derivative-works markets are protected; rather, only

¹⁵⁶ *The Border Trilogy* consists of three novels: *The Crossing*, *All the Pretty Horses*, and *Cities of the Plain*.

¹⁵⁷ See *supra* note 143 and accompanying text.

¹⁵⁸ Indeed, the *Campbell* Court stated that

whether “a substantial portion of the infringing work was copied verbatim” from the copyrighted work is a relevant question, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

510 U.S. at 587-88 (citation omitted) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985)).

¹⁵⁹ 17 U.S.C. § 107(4) (2006).

¹⁶⁰ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.”).

those that are reasonably likely to be exploited by owners are protected.¹⁶¹ This limitation favors amateur creators, as fanworks and remixes are often idiosyncratic to the particular creator and hence not geared toward a commercial market.

There is a second point to note that may also work in favor of amateur creators, and perhaps especially creators of remix as compared to traditional fan fiction. Contrary to the implicit suggestion of some commentary, not all fan fiction and remix are likely to count as derivative works. Derivative works are “recast, transformed, or adapted” from the original.¹⁶² This characterization will be true for many works built on top of the original works such that the original works—or elements thereof, such as key characters—remain recognizable, maintaining a substantial presence in the new work. These sorts of works are plausibly characterized as recasting, transforming, or adapting the original and thus may expose the creator to allegations of infringement.

In other instances, however, it is not appropriate to characterize the new work as “derivative” of the original. For example, music mashups are an important category of remix. Mashup artists often use large numbers of unauthorized works in the process of creating their music. For example, the remixer, working under the name Girl Talk, uses dozens of unauthorized snippets.¹⁶³ It cannot plausibly be claimed that the new work is a recasting, adaptation, or transformation of all or even one of these works. This feature should benefit remix when it comes to fair use, as fewer of these works can be considered derivative. Accordingly, they cannot colorably be alleged to violate the derivative-works right.

Having considered each of the four factors in the fair use test, the next step is to balance them. We saw that much fan fiction and remix culture will prevail on 3½ out of 4 of the fair use factors, including the two that courts consider most important, factors one and four. Generally speaking, then, fan fiction and remix are fair uses. To be clear, my claim is that these uses are fair presently—not just in some counterfactual world in which a court performs a fair use test. I state this

¹⁶¹ See *id.* at 592 (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”).

¹⁶² 17 U.S.C. § 101 (2006).

¹⁶³ See Rob Walker, *Mash-Up Model*, N.Y. TIMES MAG., July 20, 2008, at 15 (noting that Girl Talk’s newest collection of songs “is composed almost entirely of more than 200 samples of other artists’ music, ranging from Lil Wayne to Kenny Loggins—none of which [Girl Talk] has obtained permission to use”).

in the Holmesian sense—that law is the best prediction of what judges will do.¹⁶⁴ My claim is that because judges presented with most examples of fan fiction and remix—as they have existed thus far—would find such uses to be fair, these uses are fair now.

Not all fan-fiction and remix works, however, are fair uses. While a lack of harm to the original work may be characteristic of fan fiction and remix currently, two important qualifications remain relevant. First, some amateur remixes may pose significant threats to the market for the original if they use too much of the work in proportion to the amount of transformative change. Second, we cannot rely on static analysis because the sorts of works that we are likely to see in the future will in part be determined by the form of regulation of fan fiction and remix that is adopted. Of particular relevance is the fact that if amateur remix were to be made legal, we could expect to see an increase in the sorts of works that are likely to harm the owner's market for the original (despite the noncommercial nature of the fanwork). We see then that while there may be a vast number of fair uses, there may be a significant number of unfair uses as well. This fact will come into play further along in my overall argument. For present purposes, what matters is the overall finding that much fan fiction and remix constitute fair use.

Recall why we engaged in the preceding fair use analysis in the first place. The fact of large-scale fair use goes directly toward refuting Premise One of Lessig's first argument, namely that remixing is criminal.¹⁶⁵ A use that is fair is not an infringement. A use that is not an infringement is a fortiori not a criminal infringement. Accordingly, Premise One of Argument One, which is the fundamental claim undergirding Lessig's book, is shown to be false.

It is striking how little Lessig says about fair use, although it is perhaps understandable in a work that has a polemical bent. By acknowledging that fair use is a viable possibility for remix works, one begs the question as to which remix works are fair and therefore not criminal. This in turn begs the further question as to whether fair use doctrine may provide adequate protection for amateur remix, thus obviating the need for the dramatic policy proposal Lessig proffers.

¹⁶⁴ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (“[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer . . . by judgment of the court . . .”).

¹⁶⁵ See *supra* note 98 and accompanying text.

Lessig does make some remarks about fair use in passing, from which it is clear that he takes a dim view of fair use as a viable doctrine in the context of remix. Lessig writes, “Once triggered, the law requires either a license or a valid claim of ‘fair use.’ Licenses are scarce; defending a claim of ‘fair use’ is expensive. By default, RW use violates copyright law. RW culture is thus presumptively illegal.”¹⁶⁶ While the logic of this argument is not crystal clear, Lessig’s claim seems to be that because amateurs cannot afford to establish fair use, they are infringers—or rather, presumptive infringers—as their actions are “presumptively illegal.”¹⁶⁷

This argument is a non sequitur. Users are fairly characterized as infringers only when their use, if evaluated by a court, would fail the fair use test. If one is a fair user and is sued, one will, for all practical purposes, be *equivalent* to an infringer in the sense that one will typically not be able to establish one’s fair use status for monetary reasons and thus will lose by default. This, however, does not make one an infringer—or even a presumptive infringer—but rather a fair user who is not in a position, practically speaking, to vindicate one’s legal rights. Needless to say, it is sensible to question the value of such rights or the regulatory regime that fails to give these rights more practical support. But these are different questions from the ones before us regarding whether such uses are fair. We saw above that the vast preponderance of them are.

It is convenient to conceptualize my point in terms of possible-world semantics, as this helps to clarify what it means to talk about fair use in a context in which there is no established case law, so as to provide a better indication of the legal status of various uses.¹⁶⁸ Possible-world semantics allows for a meaningful difference between talking about case results as *precedent* and considering the status of fair use as a matter of *prediction* in a world without precedent. We must distinguish between two different sets of possible worlds. In one set, litigants actually go to court and a fair use determination is produced. Based on the fair use analysis provided in the previous Part, my claim is that, in these worlds, most amateur fan-fiction writers and remixers are found to be fair users. In the second set of possible worlds, overbearing commercial owners harass fair users such that, for practical reasons,

¹⁶⁶ LESSIG, REMIX, *supra* note 7, at 100.

¹⁶⁷ *Id.*

¹⁶⁸ See generally SAUL A. KRIPKE, NAMING AND NECESSITY 15-20 (1980) (explaining and defending the use of possible-world semantics).

they stop their use voluntarily or default in a lawsuit. In such worlds, many potential users would never attempt to undertake fair use in the first place, due to the chilling effect of previous actions taken by owners against fair users.¹⁶⁹ What is most important about this second set of possible worlds is that courts do not produce fair use case law. In these worlds, the uses are never actually held to be unfair, as there is simply no legal determination on the merits. Losing a lawsuit by default does not turn a fair use into an unfair use.

Lessig claims that remix is “presumptively illegal.”¹⁷⁰ However, he fails to explain what this claim entails. The passive tense of the statement begs the question as to who is presuming the illegality. If he is referring to those worlds where owners intimidate fair users, there is no presumption of illegality. While the users themselves would feel that owners have treated them unfairly, this feeling—quite the opposite of a presumption of illegality—is a reflection of the fact that the users will have a belief, implicit or explicit, that their use is fair.

Perhaps more significantly, there is no reason to think that the owners would make such a presumption. If commercial owners have good lawyers, these lawyers should be able to dispassionately predict what a court would be inclined to find with regard to fair use. If I am right that most fan fiction and remix are fair use, then one would expect owners’ lawyers to reach this conclusion as well—at least if they are worth their salt. Of course, this would not necessarily preclude owners from harassing amateur creators, as they might nevertheless conclude that doing so was the best legal or business strategy.

For the sake of comprehensiveness, we should ask whether anyone else in this set of worlds is presuming illegality. The courts surely are not, because given our definition of the set of related possible worlds under consideration, the fair users are practically prevented from seeking to legally vindicate their fair use claims. Consequently, courts are not even made aware of the dispute, and they are certainly not in a position to develop a specific legal opinion regarding fair use—namely, that it is presumptively illegal.

¹⁶⁹ In addition to deterrence based on actions against other users, the uncertainty inherent in the fair use doctrine can have a serious chilling effect on potential fair users, particularly considering the wide array of possible remedies for copyright owners and the lack of a meaningful method for determining which uses fall under the doctrine. See generally Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007) (suggesting that because of overdeterrence and uncertainty, fair use should be reformed to recognize certain types of copying as per se fair).

¹⁷⁰ LESSIG, REMIX, *supra* note 7, at 100; see also *supra* note 166 and accompanying text.

Summing up the preceding discussion, it is simply a mistake to think that because some party is not in a position to vindicate a legal right, the party no longer has that right. So too, if an unauthorized use is fair, it remains so even if the user is not benefited from the right to this use because the party is either intimidated or otherwise practically disabled from exercising the right. Thus, we see that it is incorrect to think that remix is presumptively illegal.

This important legal principle was recently clarified in *Lenz v. Universal Music Corp.*,¹⁷¹ a rare case involving amateur remix. This case gained a great deal of media attention because it was yet another instance in which the commercial copyright industry took legal action against a particularly sympathetic plaintiff for an act that, while technically a colorable instance of infringement, nevertheless appears to the common person to be harmless.¹⁷² The facts of the case, in short, are that an eighteen-month-old child spontaneously began dancing to a Prince song while his mother recorded the performance on video; she later posted the clip to YouTube.¹⁷³ Universal filed a takedown notice pursuant to the DMCA, the mother objected,¹⁷⁴ and the Electronic Frontier Foundation took the case pro bono after the situation gained attention.¹⁷⁵ Lessig begins the introduction to his book with the facts of this case.¹⁷⁶ He contrasts them with what he calls a “fair and justified” use of the law, one in which a media company might, for example, demand the takedown of a “new television series with high-priced ads.”¹⁷⁷ Lessig argues that in the *Lenz* case, the use of the law was neither fair nor justified because the Prince song in Lenz’s video was something completely different:

First, the quality of the recording was terrible. No one would download Lenz’s video to avoid paying Prince for his music. Likewise, neither Prince nor Universal was in the business of selling the right to video-cam your baby dancing to their music. There is no market in licensing music

¹⁷¹ 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

¹⁷² See, e.g., Op-Ed, *Prince and the Toddler; Should Copyright Law Apply to a YouTube Video of a Baby Dancing to ‘Let’s Go Crazy’?*, L.A. TIMES, July 25, 2008, at A20 (“There should be some deterrent against copyright holders attacking fair uses online . . .”); Timothy B. Lee, *Fair Use Gets a Fair Shake: YouTube Tot To Get Day in Court*, ARS TECHNICA, Aug. 21, 2008, <http://arstechnica.com/old/content/2008/08/fair-use-gets-a-fair-shake-youtube-tot-to-get-day-in-court.ars> (praising the *Lenz* decision).

¹⁷³ *Lenz*, 572 F. Supp. 2d at 1151-52.

¹⁷⁴ *Id.* at 1152.

¹⁷⁵ Lee, *supra* note 172.

¹⁷⁶ LESSIG, REMIX, *supra* note 7, at 1-5.

¹⁷⁷ *Id.* at 2.

to amateur video. Thus, there was no plausible way in which Prince or Universal was being harmed by Stephanie Lenz's sharing this video of her kid dancing with her family, friends, and whoever else saw it.¹⁷⁸

Lessig brushes aside discussion of any further details of the case, noting that there will be "plenty of time to consider the particulars of a copyright claim like this in the pages that follow."¹⁷⁹ Instead, Lessig shifts to his larger point:

What is it that allows these lawyers and executives to take a case like this seriously, to believe there's some important social or corporate reason to deploy the federal scheme of regulation called copyright to stop the spread of these images and music? "Let's Go Crazy?" Indeed! What has brought the American legal system to the point that such behavior by a leading corporation is considered anything but "crazy"? Or to put it the other way around, who have we become that such behavior seems sane to anyone?¹⁸⁰

What Lessig does not discuss, however, is that this case is a counterexample to his basic thesis about the criminality of amateur remix. In fact, this dramatic opening to the book is like *Hamlet* without the Prince (no pun intended). The real meaning of the case is precisely the opposite of that which Lessig implies by the manner in which he represents the case. Lenz disputed the infringement claim, asserting fair use, and then sued Universal for submitting a takedown request to YouTube without first making a good-faith effort to determine

¹⁷⁸ *Id.* at 2-3.

¹⁷⁹ *Id.* at 4. As it turns out, however, there is no discussion in the rest of the book of a case of remix in which Lessig discusses either fair use or allegations of criminal conduct.

¹⁸⁰ *Id.* at 4-5. Lessig might charitably have noted that Prince is well known for being zealous in protecting against unauthorized uses of his works. See, e.g., David Bauder, *Singer Sues Web Sites, Claiming Bootlegging*, CHI. SUN-TIMES, Apr. 15, 1999, at 41 (discussing lawsuits filed in 1999 by Prince against several websites and magazines for unauthorized use of his music, photographs, and the symbol designating his name); Owen Gibson, *Purple Pain Prince Threatens To Sue His Fans over Online Images*, GUARDIAN (London), Nov. 7, 2007, at 1, available at <http://www.guardian.co.uk/uk/2007/nov/07/musicnews.topstories3>; Mike Collett-White, *Prince To Sue YouTube, eBay over Music Use*, REUTERS, Sept. 13, 2007, <http://www.reuters.com/article/idUSL1364328420070914> (discussing Prince's intention to "reclaim his art on the Internet" by suing sites like YouTube, eBay, and Pirate Bay); Jake Coyle, *Radiohead to Prince: Unblock 'Creep' Cover Videos*, USA TODAY, May 30, 2008, http://www.usatoday.com/life/music/2008-05-30-prince_N.htm (discussing Radiohead's desire to have YouTube unblock a video, which Prince had gotten removed, of Prince covering one of their songs).

whether the use was fair (and hence authorized under the law).¹⁸¹ Lenz survived Universal's motion to dismiss,¹⁸² establishing an important precedent that has the potential to strongly promote the ability of amateur remixers to show their works. After *Lenz*, it will no longer be enough for the owner of an underlying work to file a takedown demand based simply on the fact that some amount of her work was used in a remix. An owner filing a takedown notice must represent that she has a good-faith belief that the use is not a fair use.¹⁸³ Given the fair use analysis provided above, showing that much remix is fair use, the obvious but important implication is that there will be much remix for which commercial owners of underlying works will not be able to make good-faith representations of infringement. This means, in turn, that there should be a drop in the DMCA takedown notices filed by owners such as Universal, particularly for those cases in which the use is fair and the owner would otherwise have been able to prevail simply because of the asymmetry in power and resources between corporate owners and amateur remixers. After *Lenz*, taking such actions, if not well supported in terms of fair use analysis, may subject an owner to a finding of misrepresentation under the DMCA.¹⁸⁴ The end result is that this case is strongly supportive of the fair use rights of amateur remixers.

Consider one final thought on fair use. Lessig argues that fair use is too complex for ordinary people to apply,¹⁸⁵ the implication being that legislation will provide a bright-line rule now lacking under fair use analysis. This problem is not solved by making amateur remixes

¹⁸¹ See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153 (N.D. Cal. 2008) ("On July 24, 2007, Lenz filed suit against Universal alleging misrepresentation pursuant to 17 U.S.C. § 512(f) and tortious interference with her contract with YouTube.").

¹⁸² *Id.* at 1157.

¹⁸³ See *id.* at 1156 ("A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute.").

¹⁸⁴ See *id.* at 1154-55 ("An allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.").

¹⁸⁵ Lessig contends that if the law is going to regulate children, it should do so in a manner that is understandable to them. See LESSIG, REMIX, *supra* note 7, at 266-67 ("[W]hen copyright law purports to regulate everyone with a computer . . . then there is a special obligation to make sure this regulation is clear."); see also Posting of Tim Armstrong to Info/Law, U.S. Government: Fair Use Is Too Complex To Explain to Kids, <http://blogs.law.harvard.edu/infolaw/2007/08/10/us-government-fair-use-is-too-complex-to-explain-to-kids> (Aug. 10, 2007) (discussing various governmental attempts to explain copyright law to minors and nonlawyers).

legal, however, as creators will still need to engage fair use law to the extent that their use may implicate other copyrights. In other words, Lessig's proposal will not achieve the bright line to which he aspires. To see this, imagine a type of use that is likely to be common if amateur remix is made legal: the CleanFlicks model of digitizing a movie and then deleting violent and sexually explicit scenes.¹⁸⁶ An example of such a use would be the movie *Titanic* without the scene of Kate Winslet topless. Were the owner unable to sue for violations of its right to derivative works because amateur remix were legal, the owner would sue under the theory that the "clean" *Titanic* was an unauthorized copy. The defendant would then proffer a fair use defense, claiming this use as a transformative remix. There is no reason, however, that a transformative work cannot also constitute an infringing "copy" as this term is understood in its technical, legal sense.¹⁸⁷ Consider a paradigm case in copyright law, *Steinberg v. Columbia Pictures Industries, Inc.*¹⁸⁸ In that case, the defendant produced a poster to promote the film *Moscow on the Hudson*, which the court held was an unauthorized use of the plaintiff's well-known *New Yorker* cover.¹⁸⁹ While the poster was clearly a transformative derivative work, it was also successfully alleged to involve elements of exact copying.¹⁹⁰ Thus, even if Lessig gets his desired statutory change, ordinary users will still need to be able to distinguish remixes that involve making illicit copies of the originals from those that do not. The determining factor in this issue will typically involve the fair use test. Thus, fair use doctrine—with all its vagaries—cannot be avoided after all.¹⁹¹ In other

¹⁸⁶ See *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006) (describing the process by which CleanFlicks deletes "sex, nudity, profanity and gory violence" from movies and redistributes them (internal quotation marks omitted)).

¹⁸⁷ See 17 U.S.C. § 106(1) (2006) (granting the owner of a copyright the exclusive right "to reproduce the copyrighted work in copies").

¹⁸⁸ 663 F. Supp. 706 (S.D.N.Y. 1987).

¹⁸⁹ *Id.* at 708-09.

¹⁹⁰ See *id.* at 713-14 (finding copyright infringement even where "not all of the details are identical" because all that is needed is "a substantial similarity that involves only a small portion of each work" (internal quotation marks omitted)).

¹⁹¹ The claim that fair use doctrine is unusually imprecise, while often stated, is nevertheless subject to serious doubt. See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* (forthcoming 2009) (manuscript at 3), available at <http://ssrn.com/abstract=1323834> (arguing that fair use is actually "more coherent and more predictable" than most commentators have suggested and that fair use cases typically fall into "policy-relevant clusters" that make it possible to predict whether a use would be considered fair).

words, Lessig must acknowledge that producers of remix culture will not be able to avoid fair use because any putative user has to determine if making the transformative remix or derivative work also involves the making of a fair use copy with regard to the remix qua copy.

Let us bring the discussion back to Lessig's Argument One. The above discussion demonstrated that Lessig's first premise, that remixing is criminal,¹⁹² is false. Lessig might retort that the truth of my argument does not gainsay the fact that some children—namely, those that create remixes that are not fair uses—are criminals by virtue of their activities. Accordingly, we can substitute for Premise One of Argument Two the assertion that some children are criminals in light of their remix activities.¹⁹³ This would affect the conclusion of Argument Two in that the word "some" would have to be inserted in front of "our children" in the conclusion as well. This would still be an important conclusion if true. It is not true, however, because the second premise of Argument Two is false. The second premise claims that because remix is criminal, making children criminals will lead to disrespect for the law and more criminal activity.¹⁹⁴ This premise implicitly relies on an assumption of perfect information. In fact, the opposite is true. It is not well known that such activities would be criminal. Unless one was specifically knowledgeable regarding intellectual property law, one would not know whether an unauthorized remix, when not a fair use and willful, is criminal. Indeed, this claim is plausible for precisely the sort of reason Lessig would support: such a rule is extremely counterintuitive.

Because such a rule is so equitably counterintuitive that one would not expect it to exist, it cuts against the grain of Lessig's larger argument. Consistently with the considerations already touched on above, if people are not told that a certain behavior is criminal, people are not charged with a crime following civil lawsuits, and prosecutors responsible for enforcing crimes never prosecute, then the claim that children are suffering the negative effects of being labeled criminals cannot be true. Not only are young remix artists not labeled criminals (except by Lessig), but they also receive information that would lead them reasonably to conclude the opposite. Consider the impact of social-networking sites like YouTube or MySpace. When kids go to these sites, they find large numbers of amateur videos, many of which

¹⁹² See *supra* notes 98-99 and accompanying text.

¹⁹³ For a discussion of Argument Two, see *supra* Part III.

¹⁹⁴ See *supra* text accompanying note 100.

remix from commercial sources to some extent. From this fact, it would be natural to conclude, if only implicitly, that such videos are not criminal. These sites are not on the fringes of mainstream culture—quite the opposite—yet no one is shutting down YouTube or telling children not to upload videos to it.

Indeed, as we saw above, there are strong social norms supporting remix. Lessig's second argument implicitly depends on a general social understanding that remix activity is criminal activity and likely to serve as a gateway crime. We have seen, however, that much remix is not criminal in the first place, and to the extent that it is an infringement and thus potentially criminal, this fact is completely unknown to people and thus will not lead to the felonious downstream consequences that Lessig predicts.

Amateur remix and fan fiction do not fit the typical profile of a gateway crime. For example, one common element of a gateway crime is the presence of a social dimension, such that by taking part in the gateway crime, one begins to associate with a new group of people who themselves are already engaged in a wider array of criminal activities.¹⁹⁵ By associating with such a group, one would naturally be exposed to more criminal socialization and opportunities than would otherwise be the case. However, fan fiction and remix do not involve this social dimension. These acts of amateur creation have no tendency to bring children into greater contact with criminals. Thus, we can conclude that the second premise of Argument Two is false; its conclusion is thus left unsupported.

The fair use of significant amounts of remix works also affects Premise One of Argument Three.¹⁹⁶ In this argument, Lessig claims that institutions of literacy will be deterred from teaching the sorts of skills that would promote the flowering of remix culture. He offers almost no direct support for this claim, however. Rather, it is presented in conclusory fashion, apparently from the implicit premises that remix is criminal and that schools, by their nature, do not teach criminal activities.¹⁹⁷

Lessig's argument is faulty for both conceptual and empirical reasons. Consider the most compelling conceptual reason first. The

¹⁹⁵ See Stephen Pudney, *The Road to Ruin? Sequences of Initiation to Drugs and Crime in Britain*, 113 *ECON. J.* C182, C183 (2003) (noting that one of the causes of the "gateway effect" is social interaction—for example, meeting people one would not otherwise have met).

¹⁹⁶ See *supra* note 102 and accompanying text.

¹⁹⁷ See *id.*

skills that one needs to be a criminal remixer are exactly the same as those that one needs to be a professional remixer working at places like Pixar or Disney. One cannot teach students one set of skills without teaching them the other, as there is really only one set. Obviously, art and design schools would by their nature consider it part of their core mission to teach students the skills that they need to qualify for employment. For commercial content companies, the shift to digital is a fait accompli at this point, and it would therefore be highly surprising if students were not learning to create and manipulate digital content. Indeed, without education in digital design, what else would these students be learning? Moreover, because much remix is fair use and thus legal, schools have an additional reason to teach these skills. The icing on the cake is the fact that in educational settings in particular, unauthorized uses are more likely to be fair.¹⁹⁸ Thus, it should be no surprise that these arguments, rather than Lessig's, are borne out by the facts on the ground where remix is widely taught.¹⁹⁹

Argument Four contains four premises. The only one that I contest is the first premise—that remixes cause no harm.²⁰⁰ While Premise One is false, Premise Two appears unproblematic. Premise Two simply states that creative practices that cause no harm should not be impeded by the law.²⁰¹ This premise is unobjectionable to a whole range of normative views that assume that one is free to do as one wishes as long as there is no issue of countervailing harms to others. This is the famous harm principle that is at the core of consequentialist jurisprudence.²⁰² Nor is Premise Three—which states that creative

¹⁹⁸ See 17 U.S.C. § 107(1) (2006) (providing that “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” should be considered among other factors in determining whether a use is fair and therefore not a copyright infringement).

¹⁹⁹ See, e.g., Berkeley Ctr. for New Media, Spring 2009 Recommended Courses: Mixing and Remixing Information, <http://bcnm.berkeley.edu/pages/courses-s09> (last visited Apr. 15, 2009) (“This course focuses on employing XML and web services to reuse or remix digital content and services.” (internal quotation marks omitted)); Hyde Park Art Ctr., Youth Courses: Digital Mix Up, http://www.hydeparkart.org/school-studio/youth-courses/digital_media/digital_mix_up (last visited Apr. 15, 2009) (“Students in this class will be able to dabble in various digital projects including video, digital photo, digitally creating music, creating video montages, slide shows and more.”).

²⁰⁰ See *supra* Part III; see also *supra* note 104 and accompanying text.

²⁰¹ See *supra* Part III; see also *supra* note 105 and accompanying text.

²⁰² See JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND UTILITARIANISM 3, 12 (Bantam Books 1993) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

practices that produce social benefits should be promoted by copyright law²⁰³—objectionable. This follows from a basic consequentialist approach, which, at its core, values welfare-enhancing outcomes. Nor can Premise Four be plausibly denied. Premise Four contends that remix culture creates social benefits.²⁰⁴ The truth of this claim has been seen in passing throughout the discussion. Lessig wishes to draw the conclusion that “[t]herefore, remix cultural practices should not be impeded but instead supported by legal rules.”²⁰⁵

I will briefly discuss one type of harm. The goal here is not to be comprehensive in discussing possible harms. Rather, the goal is to show that amateur remix culture is not an unalloyed good such that policy issues never arise or that tradeoffs never need to be made regarding its regulation. I, too, sing the praises of remix culture (and especially amateur remix culture) in promoting important cultural values associated with copyright generally. Nevertheless, while much remix is fair use, not all remix is.

The clearest type of harm for which I predict that there would be a significant degree of consensus is the harm to the exclusive copyright that would be possible in a world in which it would be legal, for example, to make full-length remixes of newly released feature-length films. In stark contrast to traditional fan fiction, these remixes very plausibly could hurt the market for the originals. Tushnet defines “fanworks” as follows:

[Fanworks] 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.²⁰⁶

Tushnet’s definition is silent as to whether, under a factor three consideration, a fanwork might simply take too much to be a fair use or alternatively might harm the market for the original. I fully agree that *in general* fanworks encourage and sustain a vibrant fan community, but her suggestion that fanworks do not “displac[e] sales of the

²⁰³ See *supra* Part III; see also *supra* note 106 and accompanying text.

²⁰⁴ See *supra* Part III; see also *supra* note 107 and accompanying text.

²⁰⁵ See *supra* p. 130 (italics omitted).

²⁰⁶ Tushnet, *User-Generated Discontent*, *supra* note 12, at 503.

original”²⁰⁷ implies that she believes that fanworks categorically will never harm the market for the original. Below, I will argue that not only is such harm a possibility, it is a likely scenario if we move to a regime of the sort that Lessig proffers.

It would be possible for Lessig to claim that, on balance, the goals of copyright are better promoted in this counterfactual world than in the current world in which such uses would not pass the fair use test. I would respectfully disagree and point to the fact that such uses would not even be close to passing the traditional fair use test, which provides an indication of how Congress would weigh the countervailing social-welfare considerations. The larger point is that, however this argument comes out on the merits, the stage is not even set until we recognize the harm to the exclusive copyright inherent in the policy prescription that works such as movie remixes could be widely shared due to the legalization of amateur remix. Thus, we see that while the issue is complicated and merits a more comprehensive discussion than can be provided here, at first glance, it seems that at least some types of significant harm would occur in a world in which amateur remix is legal. But we also saw that this fact exists alongside the fact that remix is a great boon to social welfare. Thus, the task for future work becomes one of disentangling the harmful from the beneficial effects of remix and promoting or impeding it on this basis.

Moving on to Argument Five, Premise One contends that there is no sensible reason to criminalize remix culture—rather it is the unintended collateral damage of the war that has been fought against file sharing.²⁰⁸ Premise Two is implicit and uncontroversial: a nonsensical, unjust, and unintended legal result of some other legal goal is unjustified, leading to the conclusion that therefore, criminalizing remix culture is unjustified.²⁰⁹ I agree with Premise One; there is indeed no sensible reason to criminalize remix works, at least amateur ones. I would argue that there should be a statutory rule stating that amateur remix works are not subject to criminal sanctions.

Note that on the hegemonic economic account, criminal sanctions cannot be rejected out of hand. For the utilitarian, everything comes down to a weighing of the impact of various policies on social welfare. As has famously been shown in the philosophical literature, the utilitarian cannot even rule out punishing innocent people in

²⁰⁷ *Id.*

²⁰⁸ *See supra* note 109 and accompanying text.

²⁰⁹ *Id.*

principle if the utility calculation in favor of doing so is compelling.²¹⁰ In the law and economics literature on punishment, it is axiomatic that the level of punishment may vary as a result of such things as the likelihood of detection.²¹¹ In other words, factors other than whether the punishment fits the crime may be dispositive in determining the level of punishment. In theory, this could include criminal sanctions for amateur remix.

Nevertheless, there are good utilitarian reasons why a welfare-maximizing criminal-punishment regime is likely to produce sanctions similar to those that the proportionality principle would produce. The more serious the crime, by definition, the more net disutility that is created. Other things equal, the more serious the crime, the greater the amount of resources that are justified to deter such behavior. Thus, setting ancillary causal factors aside, the worse the crime, the stronger the sanction. This is roughly the proportionality principle, if only in effect.

The proportionality principle, central to nonconsequentialist thinking about criminal punishment, must be applied in the present context. The proportionality principle demands that the punishment be proportional to the crime.²¹² In fact, one can colorably argue that not only would a criminal sanction be disproportionate to the nature of the wrong in a typical remix case (assuming such a case is even a wrong at all), it would be extraordinarily disproportionate. Perhaps unsurprisingly, then, criminal sanctions are seemingly never applied in cases involving the putatively infringing actions of remixing amateurs.²¹³ Nevertheless, even the possibility of criminal sanctions in such cases is offensive to the proportionality principle.²¹⁴

²¹⁰ See MATT MATRAVERS, JUSTICE AND PUNISHMENT 15 (2000) (“[I]n certain circumstances utilitarianism would determine that the morally obligatory action would be to frame and punish an innocent person in order to avoid some greater evil . . .”).

²¹¹ See, e.g., Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 599-605 (2006) (arguing that the government should create penalties for tax evasion that vary inversely with changes in the probability of detection).

²¹² See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 278 (7th ed. 2001) (“The requirement that punishment be proportional to the seriousness of the offense has traditionally been a salient principle of punishment.”).

²¹³ See Ann Bartow, *Arresting Technology: An Essay*, 1 BUFF. INTELL. PROP. L.J. 95, 96 (2001) (“[One] explanation for a reluctance to take legal action against individual noncommercial copyright infringers is a cultural unwillingness directly and linearly to equate unauthorized not-for-profit copying with criminal behavior.”).

²¹⁴ In addition, I would propose dispensing with statutory damages for amateur remix. This would have the desired consequence of preventing owners from selec-

The existence of criminal sanctions here is a reflection of the fact that copyright infringement and the enforcement of rules against it historically have arisen in the context of commercial use.²¹⁵ When commercial pirates are the target of criminal sanctions, these sanctions are more sensible, as the harm is potentially much greater from commercial unauthorized use than from amateur uses.²¹⁶ In addition, the primary concern of copyright law has historically been piracy of exact copies. Exact copies present a greater danger of market harm to owners because they are much more likely to supersede the originals than are works of remix.²¹⁷ Thus, it is plausible to argue as a matter of legal history that criminal sanctions were never intended to be imposed upon amateurs.²¹⁸

tively or randomly wreaking financial havoc on those whose remixing is deemed so odious as to be worth stopping. The question remains, however, whether damages will sufficiently deter amateur remix. Damages are likely to be de minimis, even for genuinely objectionable remixes. Nevertheless, these remixes would still constitute infringement; thus, an injunctive remedy would remain available.

²¹⁵ Jessica Litman argues that the public does not believe that the copyright law extends to noncommercial use:

What we know about the general public's impression of the shape of copyright law suggests that the public believes that the copyright statute confers on authors the exclusive right to profit commercially from their copyrighted works, but does not reach private or non-commercial conduct. The law in this country has never been that simple; the copyright statute has never expressly privileged private or non-commercial use. Until recently, however, the public's impression was not a bad approximation of the scope of copyright rights likely, in practice, to be enforced. If copyright owners insisted, as sometimes they did, that copyright gave them broad rights to control their works in any manner and in all forms, the practical costs of enforcing those rights against individual consumers dissuaded them from testing their claims in court.

Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 35 (1994) (footnotes omitted).

²¹⁶ See Diane L. Kilpatrick-Lee, *Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?*, 14 U. BALT. INTELL. PROP. L.J. 87, 91-102 (2005) (describing the history of criminal sanctions in copyright law and noting that criminal infringement originally required a commercial or financial motive).

²¹⁷ *But see* No Electronic Theft Act of 1997, Pub. L. No. 105-147, sec. 2(b), § 506(a), 111 Stat. 2678, 2678 (codified as amended at 17 U.S.C. § 506(a) (2006)) (amending Title 17 of the United States Code to expand the definition of criminal copyright infringement to include *either* infringement "for purposes of commercial advantage or private financial gain, *or* . . . the reproduction or distribution" of copyrighted works, "including by electronic means" (emphasis added)).

²¹⁸ For example, the DMCA imposes criminal sanctions only for willful acts of circumvention and infringement done for a commercial purpose or for financial gain. 17 U.S.C. § 1204 (2006). Professors Pamela Samuelson and Suzanne Scotchmer note that "commercial purpose" or "financial gain" should be interpreted by courts to ex-

The above discussion has examined Lessig's complex set of arguments for the conclusion that amateur remix should be legalized. We saw that the arguments for moving away from the present regulatory regime were unconvincing because amateur remix is not criminal. Nor will institutions of learning suffer. Thus, Lessig has not provided compelling reasons for moving away from the present regime. Lessig's rhetorical strategy is very effective because by arguing for legalization in the negative, as a better option than the present regime simply because it does not suffer from the defects of the present regime, he is able to avoid consideration of whether legalization may yield other problems. As our examination has demonstrated, however, there are problems with legalization. In particular, unfair uses would go unchecked, as we saw in the example of full-length remixes of newly released films.

Unfair uses are not frequently discussed, but they deserve more attention because they constitute the other side of the coin in fair use doctrine. The fair use test is routinely discussed in positive terms; it has been aptly referred to as a "safety valve" for copyright law.²¹⁹ And while this positive characterization is merited, we must not lose sight of the fact that the fair use test is like an optical illusion in which one can see a recognizable image both by looking at the black image within a white background and by looking at the white area as an image within a black background. In fair use, we routinely seek to determine which uses are fair against a background of infringement. But it is useful to keep in mind that once one accepts that copyright protection is valid, and that its justification is to promote creativity, then one is committed by logic to the idea that not all uses are fair and that unfair uses do not promote the goals of copyright. A lesson to be learned is that we must pay attention to the possibility of significant unfair uses of fan fiction and remix culture going forward. The above discussion has demonstrated that there are a number of dynamic forces at play that may affect the sorts of fan fiction and remix that are likely to be produced in the future.

The question naturally arises whether there is a way to have one's cake and eat it, too—to have a regulatory environment that promotes

clude infringement for personal use. Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1640 n.309 (2002).

²¹⁹ See *Tenn. Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 283 (5th Cir. 1970) (describing the fair use doctrine as a "balance wheel and safety valve for the copyright system" (quoting John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968))).

and facilitates remix culture yet does not entirely eliminate the ability of fair use doctrine to promote fair uses and to deter unfair ones. In the next and final Part, I will begin to develop such an account.

V. NORMS AS GENERATORS OF COSTS TO COMMERCIAL OWNERS

As should be apparent from the above discussion, by the term “norm” I do not mean a linguistic entity but rather a social practice whereby people desire to, feel free to, are incentivized to—or, in the case of fan fiction and remix, are often encouraged to—engage in behavior or activity of a certain sort. This Part will highlight and develop an important yet underappreciated function of norms that has had great significance in the context of fan fiction and remix, especially in light of the rejection of Lessig’s statutory solution. Norms, qua practices, are a means of creating costs for potentially litigious corporate owners of creative content. One does not typically think of creating costs as a good thing, but I will demonstrate that it is beneficial in the particular context I describe. The causal route by which the permissive remix norm set out in Section I.A creates costs is that as more people become remixers and implicitly accept the norm that tolerates and promotes amateur remix activity, this will directly affect the outcome of the cost-benefit analysis performed by commercial owners when they are deciding whether and to what extent to pursue a strategy of harassing amateur remixers.

The ability of powerful commercial owners to intimidate fair users has been one of the abiding concerns of contemporary copyright scholarship.²²⁰ As noted earlier, this important concern begins with

²²⁰ See, e.g., Negativland, *supra* note 15, at 254-55 (“[M]usic owners continue to make great efforts to stamp out unauthorized collage in music, even going so far as to intimidate and threaten, via the RIAA, any CD pressing plants that manufacture any sort of unauthorized found-sound music. The RIAA acknowledges the existence and idea of fair use only in its literature’s footnotes, and hopes it doesn’t spread.”); see also Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTELL. PROP. L. 259, 261 (1994) (“Unfortunately, current practice seems to provide few disincentives for the impoverishment of the public domain. Why shouldn’t a publisher claim rights in public domain material? Why not affix threatening language that will intimidate consumers into paying for otherwise fair uses of validly copyrighted material? The cost of affixing a copyright notice or threatening language is very low, and the rewards can be substantial.”); Cory Tadlock, *Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies Are Overreaching Their Copyright Protections*, 7 J. MARSHALL REV. INTELL. PROP. L. 621, 625 (2008) (“[T]he fair use defense has been explicitly incorporated into the copyright law as a non-infringing use . . . [C]opyright warnings are unfair because they intimidate consumers into forgoing such legally permitted

the observation that amateur fair users are not in a position, practically speaking, to defend their fair use rights when legally challenged simply because of the cost of doing so. Thus, their formal legal rights may amount to nothing in practice; fair users are forced to forestall their uses, despite their legality. Through norm entrepreneurship, however, this abiding problem has the potential to be ameliorated to a significant extent, at least in the context of fan fiction and remix culture.

Note that the conclusion that fair use is inadequate in practice implicitly relies on a utility comparison (albeit obliquely, given that it only looks at one side of the equation): the harm to meritorious fair users who are unable to vindicate their legitimate fair use rights. This begs the question as to the costs on the other side. These are the costs to owners of vindicating their legal rights in those cases in which the uses are not fair.²²¹ While costs borne by owners of commercial content have generally been downplayed, the fact is that such costs are real and significant. This point is strongly argued by Viacom in its lawsuit against YouTube.²²² The general attitude among commentators is to dismiss the importance of these costs, because the problem faced by commercial owners pales in comparison to the costs that owners levy on fair users. These costs seem of an ilk with the sorts of costs that are sometimes an embarrassment for the law and economics approach (at least by the lights of non-law and economics scholars). The most famous examples of these costs arise in the writing of Richard Posner, who is candid enough to acknowledge that an implication of his approach is that the utility gains to bad actors must be factored into the social welfare analysis along with the costs to the victims in determining the optimal level of activities such as crime.²²³ Similarly,

uses, and because they attempt to withdraw consumers' rights to make such uses, contrary to the Constitution, Congress and public policy." (footnote omitted)).

²²¹ Rothman makes an important criticism of the role of custom in determining fair use practices. Her argument is that customs will tend to be biased toward commercial owners due to owners' power to determine the custom. See Rothman, *supra* note 20, at 1956. While I agree with this argument as a general matter, I do not think that this is the situation with fan fiction and remix. Rothman does not take proper account of the powerful role being played by the norm of socially acceptable remix activity, which is supported by the DMCA provisions that permit users to create and distribute works in mass numbers.

²²² See Thomas S. Mulligan & Claudia Eller, *Viacom Took Months To Build Its Case*, L.A. TIMES, Mar. 14, 2007, at C1 ("To lay the groundwork, Viacom hired workers and contractors to scour every corner of YouTube's site at a cost General Counsel Michael D. Fricklas put at 'tens of thousands of dollars a month.'").

²²³ Posner argues that

for many commentators, to worry about the costs to rapacious commercial owners has a hollow moral ring to it.

My point is that instead of being dismissive toward such costs, we should focus in on them—with the goal of raising them. Consider, for example, a situation in which the costs of enforcement for some commercial owner were to increase materially due to increased production of remix or fan fiction by everyday people who draw from this owner's works without authorization. The addition of these new works would have the effect of raising the costs of detecting unauthorized uses of owners' works and of eliminating those uses from the public sphere.²²⁴

Notice the virtuous circle that comes with increased participation by everyday creators. There is a direct relationship between the number of people participating and the costs of stopping such participation. The larger the crowd, the easier it is to hide in it to avoid the wrath of commercial owners. This means that the cost to creators decreases as the number of creators increases. While each new person's participation marginally lowers the cost of each other's participation, it marginally raises the cost to commercial owners because of the attendant increase in monitoring costs. This gives the norm among us-

[i]t might seem, therefore, that before we could pronounce such conduct inefficient we would have to compare the offender's utility with the victim's disutility. We could not do this without exceeding the conventional limits of economics, which do not allow interpersonal comparisons of utilities, just as we could not describe a theft as efficient because the impecunious thief would derive greater pleasure from his act than the pain suffered by his wealthy victim.

Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1197 (1985). This passage notes the problem of interpersonal comparison of utilities but, in doing so, implicitly acknowledges that the malefactor's utilities are to be counted.

²²⁴ Rothman makes precisely this point:

Another set of litigation-avoidance practices have recently been generated in the form of statements of 'best practices.' Professors Patricia Aufderheide, Peter Jaszi, Julie Cohen, William Fisher, William McGeveran, and others have recommended the development of 'best practices' to help educate gatekeepers and users of copyrighted works about the fair use doctrine and to define its scope. Although these best practices statements suggest that they present the 'best' possible practices for the use of others' IP, the statements do not purport to set forth the ideal or even a preferable set of rules to govern fair uses. Instead, the statements try to use industry-established guidelines to establish what are 'reasonable' uses of others' IP in the hopes that these industry statements will be adopted by courts when evaluating fair use defenses.

Rothman, *supra* note 20, at 1922-23 (footnote omitted).

ers the strategic structure of a coordination norm—in particular, one possessing a “positive coordination effect.”²²⁵

Thus, to the extent that amateur creators and their academic and public-interest supporters become active norm entrepreneurs, this will have the effect of changing the cost side of the cost-benefit equation for commercial owners contemplating the sorts of actions necessary to defend their claimed legal rights. The important point is that, at the margin, as the cost of enforcement rises, commercial owners will increasingly conclude that it is not in their economic interest to pursue unauthorized users. Thus, for an ever-expanding domain of unauthorized remix works, economic logic will dictate that they remain de facto free and fair. I would contend that this is the main explanation for the explosion of unauthorized content available on sites such as YouTube: it is more costly than beneficial for owners to remove the content and ensure that it remains unavailable.²²⁶

This impact on the cost-benefit calculus and resulting behavior of commercial owners is facilitated by the structure of the DMCA.²²⁷ The notice-and-takedown provisions create a sort of fee-splitting arrangement under which both owners and users are allocated a share of the costs of copyright enforcement. While content owners have complained bitterly about the expense that they must incur in order to protect their works from unauthorized use,²²⁸ YouTube can plausibly claim that Congress contemplated precisely such an arrangement when it enacted the DMCA.²²⁹

²²⁵ See HETCHER, NORMS, *supra* note 18, at 46-47.

²²⁶ It is not difficult to locate copyrighted content:

The files are surprisingly easy to find, partly because of efforts by people like Mohy Mir, the 23-year-old founder of the Toronto based video streaming site SuperNova Tube. The site, run by Mr. Mir and one other employee, allows anyone to post a video clip of any length. As the site has grown more popular, SuperNova Tube has become a repository for copyrighted content.

Stelter & Stone, *supra* note 32, at A19.

²²⁷ See 17 U.S.C. § 512(c)(3), (g)(1) (2006) (specifying detailed notice requirements for content owners attempting to enforce claimed legal rights and eliminating liability in most cases for service providers who remove the infringing content after notification).

²²⁸ See, e.g., Rosencrance, *supra* note 81 (quoting Prince’s lawyer as complaining about the expense of monitoring for copyright infringement).

²²⁹ See Defendants’ Answer and Demand for Jury Trial at 1, *Viacom Int’l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (No. 07-2103) (“Viacom’s complaint in this action challenges the careful balance established by Congress when it enacted the Digital Millennium Copyright Act. The DMCA balances the rights of copy-

This regulatory ecosystem depends on the DMCA's functioning to protect YouTube from the sort of indirect-infringer liability that plagued earlier online-creative-content intermediaries such as Napster, Aimster, and Grokster.²³⁰ YouTube appears well built to withstand just such an attack. If YouTube is protected from liability under the various safe-harbor provisions of the DMCA, such that the notice-and-takedown procedure is the main factor determining whether fan fiction and remix continue to appear on sites such as YouTube, this will create a regulatory framework in which the public can increase the power that it has over commercial owners' behavior over time simply by expanding the volume of remix activity.²³¹ This activity will alter most owners' cost-benefit calculus such that, in most circumstances, owners will conclude that it is not in their interest to pursue legal recourse against the uses.

We see, then, that remix culture receives a great deal of support from the interaction between the DMCA and both the norm of permissible remix as well as its coordination structure. Consequently, remix culture's maintenance becomes self-perpetuating because people prefer to take part in fan fiction and remix and will generate a prodigious outflow of this creative activity. The way the DMCA take-

right holders and the need to protect the internet as an important new form of communication.”).

²³⁰ David L. McCombs and his coauthors observe that the *Viacom* litigation has received special attention in part because of the possibility that it may provide occasion to interpret the DMCA:

Google and YouTube have asserted that they are protected by the DMCA's safe harbor provisions, appearing in 17 U.S.C. § 512. Within § 512, it is the third safe harbor, for “information residing on systems or networks at direction of users” that may apply to YouTube

Additionally, YouTube has been accused of contributory and vicarious infringement, in addition to direct infringement. It has not been established whether the DMCA safe harbor applies to indirect infringement.

In contrast, the Supreme Court opinion in *Grokster* dealt directly with indirect infringement. Although *Grokster* dealt with cases and copyright issues decided well after the passage of the DMCA, it did not address the DMCA or its safe harbors.

David L. McCombs, Phillip B. Philbin & Jacob G. Hodges, *Intellectual Property Law*, 61 SMU L. REV. 907, 936 (2008) (footnote omitted).

²³¹ Currently, the effect of notice-and-takedown procedures has largely been to encourage intermediaries to take down any complained-of material, no matter how frivolous the complaint. See Mark A. Lemley, *Rationalizing Internet Safe Harbors* 18 (Stanford Pub. Law Working Paper Series, Paper No. 979836, 2007), available at <http://ssrn.com/abstract=979836> (noting that this system is inefficient and often rewards overzealous copyright owners, despite its theoretical evenhandedness).

down provisions allocate costs creates what is in effect a default rule that favors the ability to upload and share remix. Remix is favored because, unless an owner takes positive steps to have disputed content removed, the content will remain available on video-sharing sites to be streamed at will.

Yet, because amateur remix is not per se legal, if an owner believes that a use is not fair under current legal standards, the owner can try to stop it. For example, as discussed earlier, it is plausible that remixes of newly released films could partially displace the market for the original. This is the sort of use that one can predict owners will deem worth the cost to attempt to stop. In addition, the role currently played by the DMCA has the potential to expand. This will occur if *Lenz* becomes precedent. In this case, the DMCA supports fair use doctrine by raising the cost to owners challenging users and hence reducing the number of challenges. This has the natural consequence of making the fair use right more potent.²³² Thus, norm entrepreneurship and the fair use doctrine under *Lenz* can work in unison to raise the costs of enforcement for owners, leading to greater

²³² The blanket notification used by Universal in *Lenz* would likely be inadequate in a future case now that owners are on notice. See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008). The court expressed its doubt that, on its understanding of the facts, the defendants would be shown to have acted in bad faith. *Id.* But suppose that Universal were again to submit a long list of user-generated work that in any way used Prince's music. Surely a court might find that Universal had not learned its lesson that more specific evidence of infringement is in order. In the past, Universal might colorably have argued that it had a good-faith belief that all the uses were infringing, based on cases like *Air Pirates* or *Bridgeport*, which have been read to stand for the proposition that no amount of unauthorized use is too small to serve as the basis for a determination of unfair use. But, according to the view that I defended above, this would not be an apt characterization of the current fair use doctrine in amateur-remix cases such as *Lenz*. Note that fair use plays an important role in the normative model that I propose. It is because much remix is fair use that society would be justified in adhering to the permissive-remix norm. See, e.g., Michael Jude Galvin, Note, *A Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in Bridgeport Music v. Dimension Films*, 9 VAND. J. ENT. & TECH. L. 529, 529 (2007) (“[T]he Sixth Circuit issued its final amended opinion in *Bridgeport Music v. Dimension Films*, in which it held that any amount of unauthorized digital sampling from a sound recording is *per se* copyright infringement.”); Steven D. Kim, Casenote, *Taking De Minimis Out of the Mix: The Sixth Circuit Threatens To Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 VILL. SPORTS & ENT. L.J. 103, 130 (2006) (“Alternatively, the *Bridgeport* holding could potentially eliminate any substantial similarity analysis, which would have significant consequences if applied to the actual fair use defense. . . . If the sampling of a sound recording absent a license is *per se* infringing, it eliminates the ‘amount and substantiality’ analysis which would preclude the defense almost entirely, drastically changing the nature of the copyright regime.” (footnote omitted)).

access to works in the shared domain as owners at the margin cease to actively enforce their claimed rights.

CONCLUSION

An important and little-appreciated fact is that fair use doctrine creates an opening for norms to play a substantial regulatory role in copyright law—not in terms of the evolution of its formal doctrine, but rather in determining the concrete forms of behavior that come within the ambit of fair use. In the above discussion, we saw the manner in which fan fiction and remix works, both receiving support from informal social norms, have come to obtain legal protection by means of the fair use doctrine. We saw that the model under which this is occurring, and under which it could occur to a greater degree with proper norm entrepreneurship, is not what one might naturally expect. It is not that there has been a rash of cases finding fan fiction or remix works containing unauthorized content to be fair uses. Rather, due to the manner in which the DMCA allocates costs, much work of this nature will de facto be available because the cost-benefit calculation does not favor owners. It will still matter, however, that much of such work is fair use, particularly after *Lenz*. The better the claim of fair use, the greater the risk that an owner will successfully be sued for misrepresentation, thereby increasing the cost of filing a takedown notice.

We saw that fan fiction as a distinct phenomenon makes sense in light of its history—it developed earlier and under distinctive conditions that are material to how it should be regulated in order to best serve the goals of copyright. In particular, fan fiction has flourished in close-knit communities that foster cooperative behavior.²³³ This cooperation has allowed fan-fiction communities to self-regulate. This outcome is important from a policy perspective, as the better the group is able to act informally to create effective social norms, the less there will be a need for formal solutions.

This is not to say that informal solutions are necessarily better than formal ones—in the abstract, there are good and bad norms and there are good and bad legal rules. However, the particular legal rule proposed by Lessig carries attendant costs that may be avoided if informal social norms can instead solve the problem, because informal

²³³ See *supra* text accompanying notes 65-66.

norms allow for a desirable flexibility that would be precluded by a formal rule change.

The fan-fiction community has been able to solve an iterated collective action problem in order to minimize the commercialization of fan fiction. To the extent that a noncommercialization norm can be maintained for amateur remix, owners of commercial works will be less inclined to seek to stop fan fiction. In turn, there will be less need to stop commercial owners from harassing amateur creators. Specifically, there will be less need to seek to amend copyright law along the lines that Lessig suggests in order to provide for stronger protection against harassment for amateur fair-using creators. In fact, this harassment is already being significantly curbed by means of the informal social norms that stop amateurs from seeking to commercialize their works.

On Lessig's account, we might have expected to find would-be creators of fan fiction and remix deterred from taking part in these activities because of fear of criminal sanctions, cease-and-desist letters, civil suits for infringement, and the like. In fact we find the opposite—an explosion of fan fiction, fanworks, and remix culture. Ordinary people are not being scared away from creating. Clearly, then, there is something bigger going on that must be better understood if we are to develop a policy regime that is capable of comprehensively accounting for this explosion in amateur creativity, despite the dire warnings that its persistence is threatened. This “something bigger” is the role played by social norms. In particular, we saw that three interconnected norms are pivotal to this explosion of amateur creativity. These norms support the freedom to create fan fiction and remixes. The best explanation of the exploding phenomenon of remix culture, then, is not predominantly legal. Rather, the best explanation of what is occurring in this highly significant new area of creative endeavor is largely norms driven. Lessig thinks remixing children are criminals, but, as we saw, the kids are all right; they are creating as never before, and social norms are an important part of why they are doing so.