

CULTURE OF THE FUTURE: ADAPTING COPYRIGHT LAW TO ACCOMMODATE FAN-MADE DERIVATIVE WORKS IN THE TWENTY-FIRST CENTURY*

ABSTRACT

Fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture, and in fact represent the rebirth of popular folk culture in America after a century of being submerged beneath commercial mass-media cultural products. The Internet has enabled what scholar Lawrence Lessig calls a “read/write”¹ culture where ordinary Internet users are empowered to become active creators of culture rather than mere passive consumers. Yet, if this exciting trend is to continue, the copyright laws of the twentieth century must adapt to accommodate the possibilities of the twenty-first.

This Note describes the importance of amateur, fan-made derivative works in the new folk culture of the twenty-first century and demonstrates how this culture is under attack by the creators of the popular works to which it pays tribute. It describes how overreaching copyright claims by media companies cast a considerable chilling effect on vibrant new art forms such as fan fiction, fan-made videos, and virtual worlds. Finally, this Note argues that the Copyright Act² must be amended to (1) explicitly clarify that non-commercial, transformative works are fair use, (2) ban the use of the Digital Millennium Copyright Act (“DMCA”)³ takedown process and automated copyright filters to block this type of content, and (3) provide real penalties to deter copyright owners from abusing copyright law to suppress legitimate, follow-on creativity.

INTRODUCTION

You must imagine, at the eventual heart of things to come, linked or integrated systems or networks of computers capable of storing faithful simulacra of the entire treasure of the accumulated knowledge and artistic production of past ages, and of taking into the store new

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¹ LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 28 n.* (2008) (“The analogy is to the permissions that might attach to a particular file on a computer. If the user has ‘RW’ permissions, then he is allowed to both read the file and make changes to it. If he has ‘Read/Only’ permissions, he is allowed only to read the file.”).

² 17 U.S.C. §§ 102–1332 (2006).

³ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2006)).

intelligence of all sorts as produced. The systems will have a prodigious capacity for manipulating the store in useful ways, for selecting portions of it upon call and transmitting them to any distance . . . Lasers, microwave channels, satellites . . . and, no doubt, many devices now unnamable, will operate as ganglions to extend the reach of the systems to the ultimate users as well as to provide a copious array of additional services.⁴

These words, originally written by Judge Benjamin Kaplan in 1967, were some of the most prescient predictions of the present-day Internet, made almost thirty years before it became a reality. Today, the global computer network that Kaplan called his “own bedtime story or pipedream”⁵ has not only become real, but over a period of a mere fifteen years has become integrated at the very heart of modern American society.⁶ The Internet is now a crucial part of business, commerce, government, art, science, literature, and personal interaction—such that it is hard to imagine how we ever lived without it only twenty years ago. Nevertheless, there is one final barrier that is preventing the Internet from achieving its true potential to revolutionize our culture.

Copyright law, which once served to promote new forms of cultural production, has now become a hindrance to them, as the law has failed to adapt⁷ to a new culture built on precisely what copyright forbids—the easy and unlimited copying of information. The new breed of amateur creators born of this culture does not need copyright to “incentivize” their production of creative works. They do it for the pure joy of creating something that will be seen and appreciated by potentially millions of people around the globe.

Nowhere is this truer than in the world of fan-made, “follow-on” creativity—creative works based on popular cultural phenomena like books, movies, and television shows.⁸ Despite the tremendous new forms

⁴ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 119 (photo. reprint 2008) (1967).

⁵ *Id.*

⁶ Steve Almsy, *The Internet transforms modern life*, CNN (Oct. 10, 2005), http://articles.cnn.com/2005-06-23/tech/evolution.main_1_netscape-browser-world-wide-web?_s=PM:TECH.

⁷ See LESSIG, *supra* note 1, at 253.

⁸ I use the term “fan-made media” to encompass a wide variety of amateur derivative works, which are “based on an identifiable segment of popular culture, such as a television show, and [are] not produced as ‘professional’ writing.” Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997) (defining “fan fiction”). While my definition encompasses Tushnet’s definition of “fan fiction,” it is considerably broader as it includes fan-made works in numerous media forms, not just written text. Neither is it limited to works of fiction, but also includes “remixes” of popular works such as mashups and parodies, as well as interactive adaptations of popular culture such as virtual worlds.

of creativity the Internet has enabled, the copyright laws of the pre-Internet age are threatening to stifle that creativity, as large corporate copyright holders are increasingly insensitive to the desires of fans to interact with popular culture by basing their own creations upon it.⁹ As a result, the current reality of online practice is vastly out of step with the law, and sooner or later the law must adapt to changing cultural norms.

This Note argues that current copyright laws are ill-suited to deal with the challenges of amateur, follow-on creativity based on popular copyrighted works, which is likely to become an increasingly important part of American culture in the twenty-first century. It will argue instead for the creation of new laws specifically designed to deal with this form of cultural creation, which must, at a minimum, involve strong protections for amateur creativity and penalties for major media companies that fail to respect it.

I. THE GOALS OF COPYRIGHT AND THE ROLE OF FAN-MADE WORKS IN TWENTY-FIRST CENTURY FOLK CULTURE

The Copyright Clause of the U.S. Constitution declares that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁰ Taken together, the protections authorized by this clause of the Constitution are intended to promote the “progress” of literature, art, and science in our society.¹¹ In other words, the purpose of copyright is to promote the growth of culture.¹² Every proposed system of copyright protection must keep this goal in mind and should be evaluated based on whether the system in question promotes or hinders cultural development.

We live in a time of great cultural change, brought about by the advent of revolutionary new technologies that are transforming our society at a faster rate than ever before. One of the most important cultural developments that has resulted from these new technologies is the emergence of a participatory culture of “user-generated media”¹³ on

⁹ See *id.* at 653.

¹⁰ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

¹¹ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”).

¹² See LESSIG, *supra* note 1, at xvi.

¹³ HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 334 (2006) (defining user-generated content as “[a]n industry term used to refer to content submitted by consumers, often in a context where the company asserts ownership over and makes a profit upon content freely contributed by its ‘community.’”).

the Internet.¹⁴ This trend is at last reversing one of the most pernicious consequences of twentieth-century media technologies—the suppression of amateur “folk” culture in favor of mass-market, corporate culture.¹⁵

During the nineteenth century, popular culture was much more participatory and democratic in the sense that nearly everyone could be involved in cultural production.¹⁶ With the advent of twentieth-century, mass-media technologies, however, this tradition of amateur culture began to change. Cultural production came to be dominated by a series of large media conglomerates that churned out cultural works through an industrialized process not unlike the manufacturing of cars or furniture.¹⁷ Only corporations could secure the tools and resources necessary to produce cultural works, which were simply too expensive for ordinary people to afford.¹⁸ Culture shifted from a bottom-up tradition of amateur folk culture to a top-down, professionalized system with a strict dichotomy between cultural “producers” and “consumers.”¹⁹

Composer John Philip Sousa anticipated this change when observing the cultural impact of the first phonographs, fearing that they would turn Americans into mere passive consumers of culture, undermining the people’s direct connection and involvement with music.²⁰ As Sousa stated, “[T]he tide of amateurism cannot but recede, until there will be left only the mechanical device and the professional executant.”²¹ Unfortunately, Sousa’s prediction largely came true, and popular folk culture was rapidly displaced by commercial mass media.²² While amateur folk culture still existed, it was largely driven underground and lost nearly all prominence in American life, relegated to small circles of family and friends.²³

Just as changes in the technology of cultural production and distribution in the early twentieth century almost erased amateur

¹⁴ See, e.g., *id.* at 167–68 (describing Raph Koster’s work for LucasArts on engaging the fan community in the design and creation of the Star Wars universe for his online game).

¹⁵ *Id.* at 139–40 (arguing that mass media displaced American folk culture during the twentieth century but that folk culture has pushed back in the twenty-first).

¹⁶ *Id.* at 139 (noting that in the 1800s, “[c]ultural production occurred mostly on the grassroots level” and that even emerging forms of commercialized entertainment “competed with thriving local traditions of barn dances, church sings, quilting bees, and campfire stories.”).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ *Id.* at 139–40.

²⁰ LESSIG, *supra* note 1, at 25.

²¹ *Id.* at 26 (alteration in original) (quoting John Philip Sousa, *The Menace of Mechanical Music*, 8 APPLETON’S MAG., July–Dec. 1906, at 278, 281).

²² See JENKINS, *supra* note 13, at 139.

²³ *Id.* at 139–40.

culture, however, technological changes at the beginning of the twenty-first century have reversed that trend. Over the last twenty years, the advent of personal computers and the Internet has brought about a revival of amateur grassroots creativity by once again giving ordinary people access to the tools of cultural production.²⁴ In what Jenkins calls, “the public reemergence of grassroots creativity,”²⁵ ordinary Internet users can now easily share a wide variety of amateur content with the public at large through “user-generated media” hubs like YouTube and Flickr, blogging services, and social networking sites like Facebook—greatly contributing to public discourse and dialogue.²⁶

With the sudden explosion in user-generated amateur content, a clash between the new folk culture and the traditional mass media was inevitable. That clash came when amateur culture began to appropriate elements of mass culture and incorporate them into its own works.²⁷ According to Jenkins,

[I]t should be no surprise that much of what the public creates models itself after, exists in dialogue with, reacts to or against, and/or otherwise repurposes materials drawn from commercial culture. . . . Having buried the old folk culture, this commercial culture becomes the common culture. . . . [T]he modern mass media builds upon borrowings from folk culture; the new convergence culture will be built on borrowings from various media conglomerates.²⁸

Nowhere is this conflict more apparent than in the case of “fan-made” media. The Internet has spurred the growth of thousands of fan-based websites and online communities where ardent fans create and share a wide variety of creative works based on popular media, ranging from “fan fiction” in the form of short stories or whole novels, to fan-made films, music videos, and even fan-made virtual worlds and video games.²⁹ Under current copyright law, all of these forms of creativity are considered “derivative works” of the originals upon which they are based; thus, they are all potentially copyright infringing.³⁰

As a result, the entire world of fan-made art exists under a constant cloud of legal ambiguity. Although fan-made works rarely cause any

²⁴ *Id.* at 140.

²⁵ *Id.*

²⁶ Michael S. Sawyer, *Filters, Fair Use, & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J., 363, 363–64 (2009).

²⁷ See JENKINS, *supra* note 13, at 141.

²⁸ *Id.*

²⁹ See *id.* at 16.

³⁰ This Note assumes *arguendo* that fictional characters and settings are copyrightable and that, absent fair use, fan works that incorporate these elements or remix copyrighted video and music satisfy a *prima facie* case for infringement. See Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 660 (2007).

harm to the market for the original works they are based on,³¹ fans frequently find their works threatened by copyright holders and the automated tools they employ in attempting to thwart copyright infringement, which in turn are backed by ambiguous, one-sided copyright laws that inevitably favor large media corporations over private individuals who are not legally trained.³²

Numerous articles have been written about whether fan-made creations constitute “fair use” under current copyright law, and that attempt to predict how a hypothetical court would rule on the issue.³³ Yet all of this is nothing more than an academic exercise, because no case regarding non-commercial, fan-made media has ever gone to trial, and it is likely that none ever will because, when faced with the overwhelming legal and financial might of modern media empires, individual fan-work creators will inevitably yield.³⁴ It is a battle they simply cannot win, at least not on their own. Whether fan-made creations are actually legal, copyright law exerts a considerable chilling effect on this valuable new form of cultural creation that must be alleviated if this vibrant new form of cultural expression is to thrive.

II. THE PROBLEM: COPYRIGHT IS STIFLING FOLLOW-ON CREATIVITY BASED ON POPULAR CULTURAL WORKS

A. *The Motivation: Consumer Creativity Disrupts the Commercial Mass-Media’s Business Model of Top-down, Centralized Control*

While the early mass-media culture was able to freely borrow from the pre-existing folk culture without resistance, attempts by the new folk culture to borrow from the mass-media culture have resulted in significant conflict because it is contrary to current copyright regimes and such borrowing is highly disruptive to the traditional business models of modern media empires.³⁵ Those empires are based on top-down control enabled by copyright rather than bottom-up creativity.³⁶ As copyright scholar William Patry states, “Copyright owners’ extreme reaction to the Internet is based on the role of the Internet in breaking the vertical monopolization business model long favored by the copyright

³¹ Fan-made works are highly unlikely to ever substitute for official works by the original creator; nor do they cause harm to any potential derivative market, as no major media company has shown any interest in licensing for non-commercial amateur use. See Tushnet, *supra* note 8, at 672.

³² See *id.* at 653.

³³ See, e.g., Trombley, *supra* note 30, at 659–60; Tushnet, *supra* note 8, at 664.

³⁴ JENKINS, *supra* note 13, at 142.

³⁵ See WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 5 (2009).

³⁶ *Id.* at 5–6.

industries.”³⁷ Patry continues, “[T]he copyright industries view the entirety of copyright as unidirectional: the public is a passive participant, whose role is simply to pay copyright owners, or to stop using copyrighted works.”³⁸ In contrast, the amateur culture of the Internet is based on collaboration and is designed to empower people at the periphery (those formerly called “consumers”) to become creators themselves, harnessing their creativity to drive innovation and cultural production and rendering vertical monopolization of culture impossible.³⁹

This then is the source of the conflict between the two cultures, as they follow completely opposite philosophies. While amateur fan culture has always existed, the Internet makes it available to a mass audience for the first time.⁴⁰ This allows it both to directly compete with the commercial culture for people’s time spent on entertainment and to influence how people think about mass-media properties. It is therefore not surprising that the traditional mass-media companies would seek to suppress such amateur culture to prevent it from competing with their own products, while simultaneously seeking to control it and to harness it to promote their products and using copyright as their means of control.⁴¹

Thus far, the media industry’s response to fan-made media has been largely confused and inconsistent, as media companies struggle to come to terms with the realities of online fandom.⁴² According to Jenkins, mass-media producers have followed a fundamentally conflicted approach to the world of fan culture—simultaneously recognizing the benefits of having a devoted and engaged fan base who will spread the word about their favorite franchises, yet terrified at the prospect of losing control of their media properties and ending up facing wholesale piracy of their works as the recording industry did with Napster.⁴³

Jenkins describes two basic camps that have emerged among media producers—the prohibitionists and the collaborators.⁴⁴ The prohibitionists view any type of fan creativity built on corporate media properties as dangerous and seek to suppress it at all costs, while collaborators seek to work with active fan communities and harness their enthusiasm to promote their products.⁴⁵ As a result, some media companies have simply tried to suppress all types of fan creativity, while

³⁷ *Id.* at 5.

³⁸ *Id.* at 8.

³⁹ *Id.* at 7.

⁴⁰ JENKINS, *supra* note 13, at 135–36.

⁴¹ *See* PATRY, *supra* note 35, at 10–11.

⁴² JENKINS, *supra* note 13, at 142.

⁴³ *Id.* at 138.

⁴⁴ *Id.*

⁴⁵ *Id.*

others have sought to encourage a limited degree of fan interaction with their properties by keeping it on a short leash and cracking down hard if fan culture veers in undesirable directions.⁴⁶

The consequence of these varying approaches from the fans' perspective has been the creation of a murky gray zone where fans may engage in creativity based on some media properties but not on others and where any fan creator is potentially vulnerable to seemingly arbitrary intervention by copyright holders that can wipe out everything the fan has created.⁴⁷ This creates an environment of incredible uncertainty, which is exacerbated by the overwhelming disparity in power between copyright owners and fan creators, who are for the most part wholly ignorant of the limited rights they have under copyright law.⁴⁸

B. The Means: The DMCA Takedown Process and the Dominant Positions of Large Media Companies Allow Easy Censoring of Online Expression with No Accountability or Penalties for Abuse

At the heart of the problem is the notice-and-takedown process established by the DMCA.⁴⁹ Under the DMCA, in order to qualify for immunity from secondary liability under the "safe harbor" provision of the act, online service providers that host user-generated content must "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity" upon notification by a copyright holder that certain content is alleged to be infringing.⁵⁰ The uploader of the allegedly infringing content may then respond with a counter-notification asserting that the content is not infringing, and after counter-notification, the hosting site may restore access to the material "not less than 10, nor more than 14, business days following receipt of the counter notice," unless the hosting site receives notice that the copyright owner has filed a lawsuit seeking an injunction against the alleged infringer.⁵¹

⁴⁶ See *id.* at 156–59 (discussing Lucasfilm's varying approaches to fan-made media based on the *Star Wars* franchise and its recent attempts to establish its own tightly-controlled online fan communities, by only allowing limited degrees of fan creativity subject to its own rules and conditions).

⁴⁷ See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008) (describing the situation where a woman created a video of her young children dancing in their home to a song by the artist, Prince, and YouTube's subsequent removal of the video).

⁴⁸ JENKINS, *supra* note 13, at 172–73.

⁴⁹ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2006)).

⁵⁰ 17 U.S.C. § 512(c)(1)(C) (2006).

⁵¹ *Id.* § 512(g)(2)(C).

Functionally, the DMCA takedown process operates as an automatically granted temporary restraining order (“TRO”) or preliminary injunction against alleged infringers, which is carried out not by courts, but by private webhosting services.⁵² Even though the takedown process has the same effect as a TRO in that web content is disabled pending further action, it has none of the safeguards of judicially granted injunctions, which require courts to consider “(1) the likelihood that plaintiff will prevail on the merits at final hearing; (2) the extent to which plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.”⁵³ Under the DMCA, the content is simply taken down immediately upon the mere allegation of infringement with no objective evaluation and no required showing of “irreparable harm.”⁵⁴ Service providers are then required to keep it offline for a minimum of ten business days (two to three weeks) before it can be restored.⁵⁵

The potential for abuse of such a system is enormous. According to Wendy Seltzer of the Berkman Center for Internet & Society at Harvard Law School, “If this takedown procedure took place through the courts, it would trigger First Amendment scrutiny as a prior restraint—silencing speech before an adjudication of unlawfulness. But because DMCA takedowns are privately administered through service providers, they have not received such constitutional scrutiny despite their high risk of error.”⁵⁶ Private administration therefore allows the government to accomplish indirectly what it could not accomplish directly in placing a prior restraint on all online speech alleged to infringe copyrights. This raises significant concerns for free speech on the Internet, and baseless DMCA notices have even begun to be used to censor campaign commercials by major political candidates on YouTube with potentially disastrous consequences.⁵⁷

⁵² See, e.g., Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 175–76 (2010).

⁵³ *Pappan Enters. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 803 (3d Cir. 1998) (citing *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992) and *Opticians Ass'n v. Indep. Opticians*, 920 F.2d 187, 191–92 (3d Cir. 1990)).

⁵⁴ Seltzer, *supra* note 52, at 173.

⁵⁵ 17 U.S.C. § 512(g)(2)(C).

⁵⁶ Seltzer, *supra* note 52, at 176.

⁵⁷ See CTR. FOR DEMOCRACY & TECH., CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH 4–9 (Sept. 2010), available at http://www.cdt.org/files/pdfs/copyright_takedowns.pdf (describing the use of baseless DMCA notices by television networks to take down campaign commercials from YouTube by both major candidates in the 2008 presidential election).

While fan-made speech based on popular fiction may not be as critical to society as political speech by candidates during elections, it is even more vulnerable to baseless takedowns.⁵⁸ Unlike political campaigns, legally unsophisticated fans do not have access to legions of experienced attorneys and are often wholly unaware of the principles of fair use or their ability to file a counter-notice and get their content restored. Thus, when a fan-made video is taken down from YouTube, in the vast majority of cases, the uploader will simply accede to the takedown rather than attempt to fight it and risk potentially devastating liability in a copyright lawsuit.⁵⁹

This is even more likely given that, in such situations, copyright owners tend to misrepresent the true nature of copyright protection and “assert much broader control than they could legally defend.”⁶⁰ As Jenkins observes, in a copyright dispute between a major media company and an ordinary fan creator, “[S]omeone who stands to lose their home or their kid’s college funds by going head-to-head with studio attorneys is apt to fold.”⁶¹ It is with little wonder that Jenkins further notes, “After three decades of such disputes, there is still no case law that would help determine to what degree fan fiction is protected under fair-use law.”⁶² Additionally, even though Section 512(f) of the DMCA allows an alleged infringer to collect damages for misrepresentation by a copyright holder that the material was infringing,⁶³ the naturally disadvantageous position of ordinary Internet users versus large media companies makes it highly unlikely that this provision could ever be effectively used to punish or deter abuse of the takedown process.⁶⁴ To date, only one case has ever been brought by a YouTube user under Section 512(f).⁶⁵

Besides formal DMCA notices, corporate copyright holders have another tool at their disposal for blocking online videos that incorporate their content in the form of automated content filters. Sites like YouTube have begun to implement these filters in an attempt to appease copyright holders who regard searching out infringing content and sending takedown notices for every item as too great a burden.⁶⁶ Since

⁵⁸ Seltzer, *supra* note 52, at 174–75.

⁵⁹ JENKINS, *supra* note 13, at 142.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 17 U.S.C. § 512(f) (2006).

⁶⁴ *See infra* Part III.C.

⁶⁵ *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1153 (N.D. Cal. 2008).

⁶⁶ *See* Fred von Lohmann, *YouTube’s January Fair Use Massacre*, ELECTRONIC FRONTIER FOUND. (Feb. 3, 2009), <https://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre>.

2007, YouTube has implemented its “Content ID” system that scans every video that is uploaded to the site against digital fingerprints of copyrighted files provided by copyright holders.⁶⁷ If a video matches the fingerprint, the system automatically applies a policy set by the copyright holder to either “block, track or monetize their content.”⁶⁸

If a video is blocked by the Content ID system, users have the option to dispute the match on the basis that the video is (1) misidentified, (2) fair use, or (3) authorized by the copyright owner.⁶⁹ While a video is usually immediately restored after a dispute is filed, this triggers review by the copyright holder who may then elect to send a formal DMCA notice and have the video taken down that way, and it also counts as one of three “strikes” against the YouTube user’s account that will terminate the account.⁷⁰

Though it is meant to be an easier system than the DMCA takedown process for both copyright owners and YouTube users both to block content and get it restored, the Content ID system provides yet another obstacle for creators of fan-made media and is another tool that large media companies use to indiscriminately block videos that use even the slightest amount of copyrighted content and may very well be fair use.⁷¹ As copyright owners increasingly resort to automated tools such as YouTube’s Content ID system or their own systems that send automated DMCA notices, more and more legitimate content is being caught in the takedown net, making these methods for detecting and blocking potentially infringing content a danger to all forms of online speech.⁷² As shown below, it is a danger that threatens fan-made media to a disproportionate extent.

⁶⁷ See *id.*; David King, *Latest content ID Tool for YouTube*, THE OFFICIAL GOOGLE BLOG (Oct. 15, 2007, 2:01 PM), <http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html>.

⁶⁸ *What is YouTube’s Content ID Tool?*, YOUTUBE, <http://www.google.com/support/youtube/bin/answer.py?hl=en&topic=13656&ctx=sibling&answer=83766> (last visited Nov. 27, 2011).

⁶⁹ *Learn More About the Dispute Process*, YOUTUBE (on file with author) (non-publicly available page generated for videos that are blocked by the Content ID system).

⁷⁰ Nate Anderson, *What Fair Use? Three strikes and you’re out . . . of YouTube*, ARS TECHNICA (Jan. 15, 2009), <http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars>.

⁷¹ See von Lohmann, *supra* note 66.

⁷² See Anderson, *supra* note 70.

C. The Consequences: Three Types of Fan-Made Works Being Stifled by Copyright Laws

While fan-made derivative works, such as fan-fiction stories, amateur films, and fan art, have existed for decades,⁷³ the Internet has made them much more common, more visible, and more sophisticated than ever before.⁷⁴ In providing a distribution network for fan-made works, the Internet has given potential fan creators a ready-made audience of other fans not only in their immediate geographical areas but also across the world. As a result, many more fans are motivated to create these works, with technology providing both the means of distribution and the tools for creation.

The history of fan-made works on the Internet is one of a steady progression in both technological and artistic sophistication, beginning with written fan fiction and evolving to include fan-made films and videos, music, graphical art, and more recently videogames and virtual worlds.⁷⁵ Amateur creators can now do the same things with an average computer that could previously only be done with thousands of dollars in professional equipment, resulting in a proliferation of fan-made works in media spaces that were formerly the exclusive domain of corporations.⁷⁶ As fan-made works become more sophisticated, media companies feel threatened by them, inevitably bringing the media companies into conflict with even their most ardent fans.⁷⁷ This Section traces the progress of fan-made media in three areas over the last decade and shows how every new advance in fan-made media has resulted in conflicts with copyright owners that threatened fan expression.

1. Written Fan Fiction

The first type of fan-made media to become common on the Internet was written fan fiction, which became prevalent when previously existing fan clubs and fan-fiction magazines and newsletters moved

⁷³ Tushnet, *supra* note 8, at 655 (tracing the advent of organized written fan fiction to 1967, when fan fiction magazines based on *Star Trek* first emerged).

⁷⁴ See JENKINS, *supra* note 13, at 140 (describing the role of the Web in facilitating and fostering the amateur creative revolution).

⁷⁵ See generally *id.* at 140–41 (discussing grassroots creativity and its expansion from print to more technological mediums).

⁷⁶ Chris Suellentrop, *To Boldly Go Where No Fan Has Gone Before*, WIRED, Dec. 2005, at 249, 250, available at http://www.wired.com/wired/archive/13.12/startrek_pr.html.

⁷⁷ See, e.g., *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010); *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

online.⁷⁸ Specialized sites arose that were devoted to hosting archives of fan fiction from numerous separate fandoms. One of the earliest general-purpose, fan-fiction sites was *FanFiction.net*, which was established in 1998 and is currently the largest online repository of fan-fiction in existence by far.⁷⁹ As of January 2011, the site had approximately 3 million registered users⁸⁰ and hosted over 3.7 million fan fiction stories based on a wide variety of books, movies, TV shows, videogames, and Japanese anime cartoons.⁸¹ *FanFiction.net* has struggled with copyright issues since its founding, and as a result, over 20,000 user accounts have been deleted for infringement and other violations of the site's terms of service since 1998 (about 1 out of every 100 users).⁸²

The reactions of authors to fan fiction vary greatly. Some, like J.K. Rowling and Stephanie Meyer, welcome fan fiction; while others, like Ursula Le Guin and George R.R. Martin, see it as a violation, an unholy hijacking of their work, and a kidnapping of their literary "children."⁸³ In order to avoid copyright and trademark lawsuits, *FanFiction.net* respects the wishes of twelve authors who have requested to have stories based on their works banned from the site. It currently forbids users from uploading fan fiction based on the works of Anne Rice, Archie Comics, J.R. Ward, and others.⁸⁴

Most copyright clashes over fan fiction, however, come not from authors but from publishers and movie studios. One of the most significant copyright clashes between fan-fiction authors and their favorite franchise's corporate overlords was the incident known as the

⁷⁸ SHEENAGH PUGH, *THE DEMOCRATIC GENRE* 118–19 (2005) (discussing how fans posted fan fiction on the Internet even before the advent of email or web sites); see JENKINS, *supra* note 13, at 140.

⁷⁹ Maryanne Murray Buechner, *Families: Learning Corner: Pop Fiction*, TIME (Mar. 4, 2002), <http://www.time.com/time/magazine/article/0,9171,1001950,00.html>; Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1560 (2005).

⁸⁰ *Fan Fiction Demographics in 2010: Age, Sex, Country*, FAN FICTION STAT.—FFN RES. BLOG (Mar. 18, 2011), <http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html>.

⁸¹ *FanFiction.Net Fandoms: Story and Traffic Statistics*, FAN FICTION STAT.—FFN RES. BLOG (Jan. 11, 2011), <http://ffnresearch.blogspot.com/2011/01/fanfictionnet-fandoms-story-and-traffic.html>.

⁸² *FanFiction.Net Member Statistics*, FAN FICTION STAT.—FFN RES. BLOG (July 18, 2010), <http://ffnresearch.blogspot.com/2010/07/fanfictionnet-users.html>; *Erased Accounts*, FAN FICTION STAT.—FFN RES. BLOG (Oct. 1, 2010), http://ffnresearch.blogspot.com/2010-10_01_archive.html.

⁸³ Lev Grossman, *The Boy Who Lived Forever*, TIME, July 18, 2011, at 45, 46, 50.

⁸⁴ *FanFiction.Net Content Guidelines*, FANFICTION.NET (Nov. 20, 2008), <http://www.fanfiction.net/guidelines/>.

“Potter War” of the early 2000s.⁸⁵ The *Harry Potter* series first became popular at the same time the Internet was emerging as a significant social force (the first *Potter* book was released in 1997⁸⁶) and quickly developed the largest online fan community of any other fictional franchise.⁸⁷ Currently, *Harry Potter* fan fiction by far outnumbers all other fandoms on *FanFiction.net* with over 400,000 stories ranging from short stories of a few paragraphs to full-length spinoff novels.⁸⁸ In the wake of *Harry Potter*’s rapid growth in popularity, numerous other specialized fan websites emerged, including those devoted to fan fiction and general news and discussion of the series.⁸⁹

One of the larger *Harry Potter* fan sites at the time was *The Daily Prophet*, which was based on the fictional newspaper of J.K. Rowling’s magical world and ran news articles written by school kids from around the world pretending to be students at Hogwarts.⁹⁰ The site was run by Heather Lawver, a teenage homeschool student from Virginia,⁹¹ and had a staff of 102 children from a variety of countries.⁹² Fan sites like Lawver’s went relatively unnoticed until Warner Bros. bought the film rights to the *Harry Potter* series in 2001.⁹³ The studio immediately embarked on a campaign to protect its newly acquired intellectual property by sending numerous cease-and-desist letters to *Harry Potter* fan sites and attempting to seize their domain names as trademark infringing.⁹⁴ While *The Daily Prophet* itself never received a cease-and-desist letter, Heather made it her cause to defend other fan sites that had been threatened by Warner Bros., particularly a site run by fifteen-year-old Claire Field of Britain who received a cease-and-desist letter from Warner Bros. in December 2000.⁹⁵

In early 2001, Heather launched an initiative through her site called *Defense Against the Dark Arts* and formed an alliance with

⁸⁵ *PotterWar: A Decade Later*, THE HEATHER SHOW (Feb. 22, 2011, 10:25 PM), http://www.heathershow.com/old/20110222/potterwar_a_decade_later/.

⁸⁶ J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE*, at iv (1997).

⁸⁷ See Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 392–93 (2009); *FanFiction.Net Fandoms: Story and Traffic Statistics*, *supra* note 81 (stating that Harry Potter is the largest fandom on *FanFiction.Net*).

⁸⁸ *Books—Harry Potter Stories*, FANFICTION.NET, http://www.fanfiction.net/book/Harry_Potter/ (last visited Nov. 27, 2011).

⁸⁹ *The Harry Potter Economy*, ECONOMIST, Dec. 19, 2009, at 121, 123.

⁹⁰ JENKINS, *supra* note 13, at 178–79.

⁹¹ *All About Me*, THE HEATHER SHOW, <http://www.heathershow.com/about/> (last visited Nov. 27, 2011).

⁹² JENKINS, *supra* note 13, at 178.

⁹³ *Id.* at 194–95.

⁹⁴ *See id.*

⁹⁵ *Id.* at 195.

Alastair Alexander of the British website, *PotterWar.org.uk*.⁹⁶ Together, Heather and Alistair led an international movement protesting Warner's actions against *Harry Potter* fan sites.⁹⁷ They quickly wrote a petition with over 1,500 signatures, and Heather appeared on MSNBC's *Hardball with Chris Matthews* to debate a Warner Bros. spokesperson.⁹⁸ By June 2001, it was all over.⁹⁹ Warner Bros. backed down and withdrew their claims against Claire Field's and most other *Harry Potter* fan sites with the exception of one (a site that had already transferred its domain to Warner Bros.).¹⁰⁰

Both *Defense Against the Dark Arts* and *PotterWar* declared victory, proclaiming that they had successfully exposed Warner's campaign to seize fan sites' domains as "the PR disaster that it is."¹⁰¹ As Warner Bros. Senior Vice President Diane Nelson told author Henry Jenkins, "We didn't know what we had on our hands early on in dealing with *Harry Potter*. We did what we would normally do in the protection of our intellectual property. As soon as we realized we were causing consternation to children or their parents, we stopped it."¹⁰² Subsequently, Warner Bros. has restricted its actions against derivative works based on the *Harry Potter* series to commercial works, such as the famous *Harry Potter Lexicon*, which Warner Bros. allowed to remain available for free on the Internet, but sued to prevent it from being published commercially.¹⁰³

The Potter War incident was the first of many similar incidents involving fan-made works,¹⁰⁴ and it illustrates the most common reaction of corporate copyright holders to fan-made works. When they first learn of these works, copyright holders fail to understand their importance to fans, have a knee-jerk reaction, and attempt to suppress them. Only after a painful conflict with their fans are copyright holders forced to grudgingly tolerate them or risk enduring their wrath. Most copyright

⁹⁶ *PotterWar: A Decade Later*, *supra* note 85.

⁹⁷ *Id.*

⁹⁸ JENKINS, *supra* note 13, at 195–96.

⁹⁹ Simone Murray, 'Celebrating the Story the Way It Is': *Cultural Studies, Corporate Media and the Contested Utility of Fandom*, *CONTINUUM: J. OF MEDIA & CULTURAL STUD.*, Mar. 2004, at 7, 17.

¹⁰⁰ *Claiming Victory*, DEFENSE AGAINST THE DARK ARTS (June 13, 2001) (on file with author).

¹⁰¹ *It's over*, POTTERWAR.ORG.UK (June 11, 2001), <http://web.archive.org/web/20030611102815/http://www.potterwar.org.uk/> (accessed using WAYBACK MACHINE INTERNET ARCHIVE); *see also* Murray, *supra* note 99.

¹⁰² JENKINS, *supra* note 13, at 196.

¹⁰³ *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 522, 524, 554 (S.D.N.Y. 2008) (enjoining publication and awarding statutory damages).

¹⁰⁴ *See, e.g.,* Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010); Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

holders come to reluctantly turn a blind eye to fan fiction, although some, such as the twelve authors whose works are banned from *FanFiction.Net*, never accept them.¹⁰⁵ Thus, even when fan fiction is tolerated, it is allowed only at the sufferance of copyright holders who retain the ability to have it shut down at any time.¹⁰⁶

2. Fan-Made Video

The next innovation in fan-made media came in the mid-2000s, when pervasive broadband Internet and the availability of inexpensive video editing software for the first time enabled the widespread sharing of digital video online. During this time, it became increasingly common for fans to make their own amateur “fan films,” which are based on popular media, and distribute them on the Internet.¹⁰⁷ These films are the video equivalent of fan fiction and are typically either new fictional stories based on popular franchises like *Star Wars* or parodies of them.¹⁰⁸ These films range from short films under ten minutes to feature length productions.¹⁰⁹ Some can be highly sophisticated, employing a wide range of special effects and computer generated graphics almost on par with professional films.¹¹⁰

Another common type of fan-made video that became popular during this time was the practice of “vidding.”¹¹¹ Rather than making their own original fan films, “vidders” remix existing video from movies,

¹⁰⁵ See generally *FanFiction.Net Content Guidelines*, *supra* note 84.

¹⁰⁶ See, e.g., Clive Young, *Max Payne Fan Film Shot Down By Fox*, FAN CINEMA TODAY (May 8, 2008), <http://fancinematoday.com/2008/05/08/max-payne-fan-film-shot-down-by-fox/>; Clive Young, *MGM Kills Historic James Bond Fan Film*, FAN CINEMA TODAY (June 5, 2008), <http://fancinematoday.com/2008/06/05/mgm-kills-historic-james-bond-fan-film/>.

¹⁰⁷ See Suellentrop, *supra* note 76, at 520.

¹⁰⁸ WILL BROOKER, USING THE FORCE: CREATIVITY, COMMUNITY AND *STAR WARS* FANS 173–74 (2002).

¹⁰⁹ See, e.g., *Batman: Dead End*, THEFORCE.NET, http://download.theforce.net/theater/batman-deadend/Batman_Dead_end.mov (last visited Nov. 27, 2011) (showing a seven minute Batman fanvid); *Star Trek: Phase II*, DIGITAL NEW AGE ENT., <http://www.digitalnewage.com/dnapartners/stp2/default.asp?epi=IHW> (last visited Nov. 27, 2011) (showing a fifty minute Star Trek fanvid).

¹¹⁰ For examples of two feature-length *Star Wars* fan films that employ highly sophisticated special effects, see *Star Wars: Revelations*, PANIC STRUCK PRODUCTIONS, http://panicstruckpro.com/revelations/revelations_movie.html (last visited Nov. 27, 2011); *Latest News*, REIGNOFTHEFALLEN.COM, <http://www.reignofthefallen.com/> (last visited Nov. 27, 2011).

¹¹¹ Logan Hill, *The Vidder*, N.Y. MAG. (Nov. 12, 2007), <http://nymag.com/movies/features/videos/40622/index1.html> (“Vids are fan-made music videos. We create them using scenes taken from our favorite TV shows and movies, pairing them with a particular piece of music and imposing our own video-editing choices and style. The motivation for a lot of us is to convey something deeply felt about the show.” (quoting Luminosity, a popular “vidder”).

TV shows, or videogames, and use that footage to create their own works. The most common type of vidding is the “songvid,” in which fan editors combine short video clips from different sources with popular songs to create original music videos.¹¹² These videos are designed so that the video clips illustrate the song, and the song reflects upon the video footage to emphasize different aspects of the story or the characters or, in some cases, to create entirely new storylines.¹¹³ While there are songvids based on any number of media franchises, by far the most popular subset of these videos are those based on Japanese anime cartoons and video games, which are called Anime Music Videos (“A.M.V.s”).¹¹⁴

There are many highly developed fan communities dedicated to producing A.M.V.s,¹¹⁵ and most anime conventions around the world include A.M.V. contests.¹¹⁶ The largest online community devoted to A.M.V.s is *AnimeMusicVideos.org*, which currently has over 850,000 registered members and hosts a registry of more than 146,000 A.M.V.s, of which over 100,000 are available for download through the site.¹¹⁷ Once the most popular site for hosting A.M.V.s, *AnimeMusicVideos.org* has since been surpassed by YouTube, on which a search for “anime music video” currently brings up over 420,000 results.¹¹⁸ Like fan films, fan-made music videos have experienced a steady growth in sophistication and now frequently use high definition footage and employ a wide range of advanced digital effects for an overall quality that in some cases surpasses professionally produced music videos.¹¹⁹

Original fan films have largely been tolerated by copyright holders as long as they are not sold for profit, and copyright holders have in some cases even attempted to promote their creation by hosting “official”

¹¹² See JENKINS, *supra* note 13, at 159–60.

¹¹³ See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 145 (2007).

¹¹⁴ See, e.g., DarkLordofDebate, *Final Fantasy 7: Heroes*, YOUTUBE (June 25, 2009), <http://www.youtube.com/watch?v=Kma6yeHY9Sc> (showing one of my own A.M.V.s using footage from the *Final Fantasy* videogame series).

¹¹⁵ See, e.g., ANIMEMUSICVIDEOS.ORG, <http://www.animemusicvideos.org> (last visited Nov. 27, 2011); EVAGEEKS.ORG, <http://evageeks.org> (last visited Nov. 27, 2011); TRINUT: THE TRIGUN ONLINE FAN COMMUNITY, <http://trinut.clicdev.com> (last visited Nov. 27, 2011).

¹¹⁶ See, e.g., *AMV Contest Calendar*, ANIMEMUSICVIDEOS.ORG, <http://www.anime-musicvideos.org/help/calendar> (last visited Nov. 27, 2011).

¹¹⁷ *Members Main Page—Global Statistics*, ANIMEMUSICVIDEOS.ORG, http://www.animemusicvideos.org/members/members_main.php (requires user account to view) (last visited Jul. 7, 2011).

¹¹⁸ *Search results for anime music video*, YOUTUBE, http://www.youtube.com/results?search_query=anime+music+video&aq=f (last visited Nov. 27, 2011) (showing search results for “anime music video”).

¹¹⁹ See, e.g., MJMusicVideoRemake, *Michael Jackson—Thriller Music Video Remake*, YOUTUBE (Feb. 14, 2010), <http://www.youtube.com/watch?v=9AkgOICCdPM>.

fan film sites and video contests.¹²⁰ Likewise, the owners of the rights to the video sources of A.M.V.s and other songvids have mostly turned a blind eye to them, recognizing that A.M.V.s provide valuable promotion for the anime on which they are based.¹²¹ Legally, A.M.V.s are most likely fair use at least with respect to the video portion, though the audio portion remains problematic and is the most likely aspect to be challenged.¹²²

A.M.V. creators are highly conscious of the fact that their hobby exists only at the sufferance of anime companies and music labels, and the aura of illegality hangs over their work.¹²³ Even though it hosts thousands of A.M.V.s using a wide variety of copyrighted music, *AnimeMusicVideos.org* has only run into copyright problems once. It received a cease-and-desist letter in November 2005 from Windup Records demanding that the site remove all videos using songs by Evanescence, Creed, and Seether from its archive.¹²⁴ Even though the site complied and has since not received any similar demands, many members of the site believe it is only a matter of time before the site gets shut down for copyright infringement.¹²⁵

While *AnimeMusicVideos.org* has not been threatened recently, the battle has merely shifted to YouTube where A.M.V. editors frequently find their videos targeted by DMCA takedown notices and blocked by YouTube's automated Content ID system, both by music labels and

¹²⁰ See JENKINS, *supra* note 13, at 153–59, 163–64 (discussing Lucasfilm's efforts to accommodate and encourage *Star Wars* fan films, albeit with certain limitations and restrictions, which some fans still find odious).

¹²¹ See B. Dong & S. Pocock, *Chicks on Anime: Copyright Enforcement*, ANIME NEWS NETWORK (May 5, 2009), <http://www.animenewsnetwork.com/chicks-on-anime/2009-05-05> (featuring an interview with Evan Flournoy, copyright specialist with the anime production company Funimation).

¹²² See Trombley, *supra* note 30, at 672, 676 (concluding that because they are non-commercial and only use short, highly edited video clips, the video tracks of songvids are most likely fair use; while because they use complete, unedited songs, the audio tracks are most likely not fair use).

¹²³ See, e.g., Gotegenks, *What if AMVs were made legal?*, ANIMEMUSICVIDEOS.ORG (May 16, 2010, 10:30 PM), <http://www.animemusicvideos.org/forum/viewtopic.php?f=2&t=100023> (showing a forum discussion among A.M.V. editors about the possibility of legalizing A.M.V.s, where most editors simply assume A.M.V.s are copyright infringing).

¹²⁴ Phade, *Evanescence, Seether and Creed videos no longer available*, ANIMEMUSICVIDEOS.ORG (Nov. 15, 2005, 10:27 PM), <http://www.animemusicvideos.org/forum/viewtopic.php?f=14&t=60255&p=781148> (showing a forum post by the site's administrator).

¹²⁵ See Kazeatoo, *Wind-up Records? Copyright Infringement?* [sic], ANIMEMUSICVIDEOS.ORG (Oct. 30, 2009, 8:49 AM), <http://www.animemusicvideos.org/forum/viewtopic.php?f=2&t=97075> (discussing whether AnimeMusicVideos.org will survive being taken down for copyright infringement).

increasingly by anime companies as well.¹²⁶ Most A.M.V. creators lack a sophisticated knowledge of copyright law and remain ignorant of options for disputing copyright notices and having their videos restored as fair use (a status that is at best legally questionable¹²⁷).¹²⁸ YouTube's automated Content ID system poses the greatest threat to these videos, since it is incapable of distinguishing when a video might be fair use.¹²⁹ Thousands of A.M.V.s and other songvids were likely among those blocked in December 2008 after a breakdown in licensing negotiations between YouTube and Warner Music Group caused YouTube to block all videos using Warner's music, which ensnared countless videos that were likely fair use.¹³⁰ Fan-made videos of all types remain subject to arbitrary takedowns and blocking on YouTube, casting a considerable chilling effect on this potent new art form.

3. Fan-Made Videogames and Virtual Worlds

Just as fan-made media expanded to include video after the development of tools for the easy creation and sharing of digital video, it is now expanding again to include virtual reality. As more fans are growing up versed in the art of computer-generated graphics and three-dimensional design, the more they branch out and begin creating interactive virtual realities based on their favorite fandoms. The two most common ways of doing this are through game "modding" (modifying existing videogames with new levels, environments, and characters)¹³¹ and the creation of themed role-playing environments within virtual worlds such as *Second Life*.¹³²

¹²⁶ See AceD, *Owned by YouTube*, ANIMEMUSICVIDEOS.ORG (Apr. 5, 2010, 3:35 PM), <http://www.animemusicvideos.org/forum/viewtopic.php?f=2&t=99291&hilit=Owned+By+Youtube> (discussing experiences of A.M.V. editors with takedowns on YouTube); Patrick McKay, *Square Enix Abuses YouTube DMCA Takedown Process*, THE PRELATOR (Oct. 7, 2009), <http://prelator.wordpress.com/2009/10/07/square-enix-abuses-youtube-dmca-takedown-process/> (describing my own experience with one of my A.M.V.s being targeted by a DMCA takedown notice—most likely automatically generated—on YouTube).

¹²⁷ See Trombley, *supra* note 30, at 659–60.

¹²⁸ See *What If AMVs Were Made Legal?*, *supra* note 123.

¹²⁹ See *infra* note 166 and accompanying text.

¹³⁰ See von Lohmann, *supra* note 66.

¹³¹ A good example of this practice is *Battlestar Galactica—Edge of Apocalypse*, a non-commercial total conversion mod for the videogame *Freelancer* (a space combat simulator game) that allows users to engage in simulated space battles with a wide variety of ships from the re-imagined *Battlestar Galactica* TV series. *Battlestar Galactica—Edge of Apocalypse*, FREELANCER, <http://www.bsg-galactica.com/> (last visited Nov. 27, 2011).

¹³² *Second Life* is a massive-online-multiplayer game in which users navigate a virtual world by means of animated "avatars," using a free software client. The content and environment of the virtual world—including terrain, buildings, vehicles, etc.—are almost entirely created by users, who can rent virtual land and buy and sell virtual goods in a fully integrated virtual economy using a virtual currency that is exchangeable for real-

Since the virtual environments within *Second Life* are entirely created by users,¹³³ it is not surprising that many of these environments (called “sims”¹³⁴) are based on works of popular culture, especially science fiction and fantasy. There is a quite extensive *Star Wars* role-playing community in *Second Life*, which contains a number of sims containing detailed recreations of *Star Wars* settings like Tatooine and Coruscant.¹³⁵ There are also virtual stores that sell *Star Wars* themed items like Jedi costumes, lightsabers for the user’s avatar, and even fully flyable spaceships ranging from X-Wing fighters to the Millennium Falcon that have highly detailed interiors and exteriors.¹³⁶ There are role-play sims based on *Battlestar Galactica*,¹³⁷ complete with virtual recreations of battlestars (the titular capital starships of the series), and there are many others based on *Star Trek*, *Stargate*, and, of course, *Harry Potter* (the latter including full recreations of Hogwarts and the neighboring town of Hogsmeade).¹³⁸ In each of these sims, it is common for users to take on the personas of characters from their respective source franchises (typically of their own creation), and users will act out their own stories within these virtual worlds, often in the context of a meta-narrative established by the sim’s creators.¹³⁹ Virtual worlds therefore take fan-made media one step further and go beyond fan fiction and even fan-made video to literally bring the worlds of literature to life in an interactive and organic fashion.

Fans in *Second Life* have also faced challenges with copyright, though not as often as one might think given the fact that some of these virtual worlds take on a limited commercial character with the selling of virtual goods based on those in the source franchise (though rarely for actual profit¹⁴⁰). While most copyright holders have seemed to tolerate

world currency. See Yuval Karniel & Stephen Bates, *Copyright in Second Life*, 20 ALB. L.J. SCI. & TECH. 433, 435–36 (2010).

¹³³ *Id.* at 436.

¹³⁴ BRIAN A. WHITE, *SECOND LIFE: A GUIDE TO YOUR VIRTUAL WORLD 6* (2008).

¹³⁵ *World Map*, SECOND LIFE, <http://maps.secondlife.com/> (last visited Oct. 13, 2011) (access requires membership account; search “World Map” for “Tatooine” or “Coruscant”).

¹³⁶ *Marketplace*, SECOND LIFE, <https://marketplace.secondlife.com/> (last visited Nov. 27, 2011) (search for *Star Wars* related items, such as “Jedi Costumes,” “Lightsabers,” “X-Wing Fighters,” or “Millenium Falcon”).

¹³⁷ *World Map*, *supra* note 135 (access requires membership account; search “World Map” for “Caprica City,” “Battlestar Phoenix”).

¹³⁸ *Id.* (access requires membership account; search “World Map” for “United Federation Starfleet,” “Olympus Project,” “Astria Porta,” and “Hogsmeade”).

¹³⁹ REBECCA TAPLEY, *DESIGNING YOUR SECOND LIFE* 117, 121 (2008).

¹⁴⁰ See Wagner James Au, *Enforcers of Dune: Frank Herbert Estate Targets Dune Roleplayers In Second Life*, NEW WORLD NOTES (Apr. 9, 2009), <http://nwn.blogs.com/nwn/2009/04/enforcers-of-dune.html> (discussing how the *Dune*-based sim in question charged rental fees but never made a profit and in fact was run at a loss).

these unauthorized virtual role-playing communities, some have not.¹⁴¹ In April, 2009, a *Second Life* role-play sim based on Frank Herbert's *Dune* novels and their corresponding movies received a DMCA takedown notice from Trident Media Group, the literary agency that maintains Herbert's estate.¹⁴² Linden Lab (the company that runs *Second Life*) ordered the sim's administrators to remove all *Dune*-themed items and names from the sim within two days or Linden would remove them itself.¹⁴³ They complied and were forced to convert the sim into a "generic sci-fi desert planet with spice mining."¹⁴⁴ In a statement on the incident, Linden Lab said the company is "impressed by the creativity of role-playing games in Second Life and believe[s] that they're an important part of the inworld social experience," but when faced with complaints by copyright holders, they "pass these concerns along."¹⁴⁵

Fan-made videogames have likewise been subject to copyright actions, such as when videogame company Square Enix shut down a non-commercial, fan-made sequel to the game *Chrono Trigger*, which had been five years in development and was almost complete.¹⁴⁶ Likewise, an upcoming online, fan-made alternate reality game (ARG) made in anticipation of the film adaptation of *The Hunger Games* was forced to be taken down by the movie studio, Lionsgate Films.¹⁴⁷ On the other hand, a fan-made update to *Duke Nukem 3D* managed to secure an official license to distribute the game non-commercially, allowing production to continue.¹⁴⁸

While copyright problems with fan-made videogames and virtual worlds may be relatively rare, that may only be because these things themselves are rare. It is likely that media companies will take greater

¹⁴¹ BENJAMIN TYSON DURANSKE, VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS 147–48 (2008).

¹⁴² Wagner James Au, *supra* note 140.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Earnest Cavalli, *Square Enix Kills Near Complete Chrono Trigger Fan Project*, WIRED (May 11, 2009, 4:16 PM), <http://www.wired.com/gamelifelife/2009/05/square-enix-kills-near-complete-chrono-trigger-fan-project/>.

¹⁴⁷ Dan Koelsch, *Fan-Made "Hunger Games" ARG Launches*, MOVIEVIRAL.COM (June 14, 2011), <http://www.movieviral.com/2011/06/14/fan-made-hunger-games-arg-launches/>. After unsuccessfully attempting to make further contact with Lionsgate, the game-makers subsequently decided to re-launch their game, called "Panem October," under a different domain name with better disclaimers clarifying its unofficial, fan-made status. Michael Lee, *Panem October Aftermath: Rowan The Gamemaster Speaks Out About Lionsgate Issue*, MOVIEVIRAL.COM (Sept. 22, 2011), <http://www.movieviral.com/2011/09/22/panem-october-aftermath-rowan-the-gamemaster-speaks-out-about-lionsgate-issue/>.

¹⁴⁸ Ben Kuchera, *Fan-made Duke 3D Unreal Engine 3 update is now officially licensed*, ARS TECHNICA (Oct. 17, 2010, 4:00 PM), <http://arstechnica.com/gaming/news/2010/10/fan-made-duke-3d-update-is-now-official-blessed-by-creators.ars>.

notice of these things in the future, especially as fan-made virtual worlds and games become more sophisticated and could be regarded by companies as competing with their own offerings (though it is unlikely they actually would since fan-made games would likely never offer the same experience as official products¹⁴⁹). Thus, while the creators of fan-made virtual worlds have not yet faced significant challenges with copyright, it still has the potential to stifle this burgeoning form of creativity, which stands as the next frontier for fan-made derivative works.

Like Kaplan, we must consider the future of these technologies and how copyright law will need to adapt them. How will copyright law deal with the development of the first truly immersive virtual realities, which instead of being accessed with the clunky interfaces and poor graphics of current virtual worlds, like *Second Life*, are experienced via a direct neural link with a computer and allow users to experience virtual worlds as if they were actually real? Given that fans already create virtual worlds based on popular culture, how would copyright law react to fans literally bringing literature to life in this fashion? Would it be encouraged or repressed? Science fiction, long famous for anticipating the social challenges of future technologies, has already begun to deal with such questions. The television show *Caprica*, which aired in 2010, portrayed precisely this type of fully immersive, user-created virtual world, showing how disruptive it could be both to society and copyright law.¹⁵⁰ When reality begins to imitate fiction, as fiction itself takes on [virtual] reality, the law will need to have an answer.

Because the primary purpose of copyright is to promote cultural growth, we must begin to anticipate such technologies now and begin to craft a legal framework capable of dealing with the ways in which people are likely to use them, while preserving the maximum potential for the new forms of cultural creativity they will enable.

¹⁴⁹ Cf. McKinley Noble, *13 Fantastic Fan-Made Game Remakes and Demakes*, GAMEPRO (Dec. 2, 2009, 15:45 PM), <http://www.gamepro.com/article/features/213136/13-fantastic-fan-made-game-remakes-demakes/> (“When fans take video games into their own hands, the results are often unpredictable. Artwork, music, and other types of tributes can range from the gut-wrenchingly awful to the eternally awesome, but only the best projects are worth waiting for. That’s why fan-made video game remakes can be one of those things that’s worth some patience.”).

¹⁵⁰ A fully immersive virtual reality called “V-World” is a central element of *Caprica*’s premise. The show frequently deals with the societal consequences of this technology, such as addiction and moral decline, and even alludes to copyright difficulties in the form of “hacked sites” created by users without the permission of the corporation that owns the technology. *Caprica: Pilot* (SyFy television broadcast Jan. 22, 2010); *Caprica: There Is Another Sky* (SyFy television broadcast Feb. 26, 2010).

III. THE SOLUTION: PROVIDE EXPLICIT STATUTORY PROTECTIONS FOR NON-COMMERCIAL, TRANSFORMATIVE WORKS AND REAL PENALTIES FOR ABUSE OF THE DMCA TAKEDOWN PROCESS

From the above analysis, it is clear the current system of fair use and the procedures of the DMCA takedown process do not provide adequate protection for fan-made derivative works. As Henry Jenkins says,

Current copyright law simply doesn't have a category for dealing with amateur creative expression. Where there has been a 'public interest' factored into the legal definition of fair use[,] . . . it has been advanced in terms of legitimated classes of users and not a generalized public right to cultural participation. Our current notion of fair use is an artifact of an era when few people had access to the marketplace of ideas, and those who did fell into certain professional classes. It surely demands close reconsideration as we develop technologies that broaden who may produce and circulate cultural materials.¹⁵¹

Because of the legal uncertainty surrounding fan-made works and because large corporate copyright owners hold such a dominant position over ordinary fans and Internet users, there is currently no effective check on rights-holders to prevent them from abusing the discretion that the law gives them and stifling this important form of cultural participation. Accordingly, the law must change to provide specific protections for fan-made media and similar non-commercial derivative works, while also providing real penalties for abuse of copyright power. The following section suggests a number of proposed reforms to accomplish these goals.

A. Add Non-commercial, Transformative Works to the Preamble of Section 107 as an Example of Fair Use

While most scholarly literature on the subject agrees that fan-made works should be considered fair use,¹⁵² the absence of any caselaw involving fan works and the vagueness of current fair use law imposes a high degree of legal uncertainty upon them.¹⁵³ For the reasons mentioned above, there is little chance of the issue receiving judicial clarification in the near future since few fans have the resources to bring a case involving non-commercial fan works to trial.¹⁵⁴ In the absence of such judicial guidance, Congress should, at minimum, act to clarify that such uses are indeed fair use. The simplest way to provide this clarification would be to add "*non-commercial, transformative use*" to the

¹⁵¹ JENKINS, *supra* note 13, at 198.

¹⁵² See Stendell, *supra* note 79, at 1578 (discussing different proposals for protecting fan fiction as fair use).

¹⁵³ Tushnet, *supra* note 8, at 664.

¹⁵⁴ See *supra* Parts II.A.–B.

preamble of Section 107 of the Copyright Act, which lists examples of works Congress intends to be considered fair use.¹⁵⁵ If amending the preamble alone proves insufficient to protect non-commercial transformative works, Congress may also wish to amend the Copyright Act to provide a rebuttable presumption that such works are fair use, absent demonstrable harm to a presently existing market.

Both the terms “non-commercial” and “transformative” are already well-defined in copyright law. “Non-commercial” refers to uses where the user does not “stand[] to profit from exploitation of the copyrighted material without paying the customary price.”¹⁵⁶ “Transformative” refers to use that does not “merely supersede” the original but “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁵⁷ These definitions would likely be adequate to cover most types of fan-made derivative works, with the possible exceptions of the actual sale of virtual goods in *Second Life* based on copyrighted properties and the use of full songs in songvids, which may require statutory exceptions. Creating a presumption of fair use as mentioned above with definitions crafted to include them would likely be sufficient. Alternatively, Congress could provide for these uses by establishing an easily accessible compulsory licensing system, which amateur creators could use to purchase licenses for a nominal fee.

Since the preamble is only illustrative and in no way alters the courts’ discretion when applying the four fair use factors,¹⁵⁸ amending the preamble would be a perfect way to clarify the legal status of fan-made works without effecting a substantive change in the law. The advocacy group, Public Knowledge, recently recommended a similar approach to resolve several other ambiguities in fair use law, calling for Congress to amend the preamble of Section 107 to include “incidental uses, non-consumptive uses, and personal, non-commercial uses.”¹⁵⁹

According to Public Knowledge, amending the preamble is a “limited change,” and “[n]othing would prevent courts from continuing to apply fair use to new situations, as they have done since the ‘76 Act took effect.”¹⁶⁰ Furthermore, “including a modernized list of explicitly favored uses adds clarity for courts and diminishes uncertainty for copyright

¹⁵⁵ 17 U.S.C. § 107 (2006) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching[,] . . . scholarship, or research, is not an infringement of copyright.”).

¹⁵⁶ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

¹⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁵⁸ *Id.* at 581.

¹⁵⁹ JENNIFER M. URBAN, PUBLIC KNOWLEDGE, UPDATING FAIR USE FOR INNOVATORS AND CREATORS IN THE DIGITAL AGE: TWO TARGETED REFORMS 10 (2010), available at <http://www.publicknowledge.org/pdf/fair-use-report-02132010.pdf>.

¹⁶⁰ *Id.* at 11.

holders and follow-on users,” by providing guidance for parties in all jurisdictions.¹⁶¹ Clear guidance from Congress that non-commercial transformative use is a favored fair use could be especially helpful for amateur creators in deciding whether they have grounds to dispute takedown notices on sites such as YouTube and for rights-holders in deciding how to respond to counter-notices. Amending the preamble of Section 107 to include non-commercial transformative use is a crucial but easy first step to provide guidance to courts, rights-holders, and amateur creators regarding the legal status of such works.

B. Make the DMCA Takedown Process Unavailable for Non-commercial Transformative Works and Ban the Use of Automated Filters to Block User Generated Content

As noted above, the DMCA takedown process and automated copyright filters employed by user-generated content sites like YouTube currently pose the greatest threat to fan-made derivative works online. If these works are to have any meaningful protection as fair use, they must not be subject to what amounts to arbitrary prior restraints.¹⁶² These arbitrary restraints place the burden on the fan-creators to justify their uses of copyrighted works, despite the fact that such creators usually lack sufficient knowledge of copyright principles and procedures to do so.

It is therefore crucial that Congress enact legislation specifying that the DMCA takedown process may not be used against non-commercial, transformative works. If a copyright owner is determined to have a non-commercial derivative work taken down, they should be required to either contact the creator directly or sue for an injunction, in which case, they would be required to justify suppressing that creative expression before a court.¹⁶³ This would in no way impair copyright holders’ ability to use the DMCA takedown process for blatantly infringing direct copies of their work; it would only deprive them of the ability to suppress legitimate creative expression without judicial oversight.¹⁶⁴

¹⁶¹ *Id.*

¹⁶² Seltzer, *supra* note 52, at 173, 175–76.

¹⁶³ *Id.* at 229–30.

¹⁶⁴ To mitigate any danger of plagiarism of the author’s work without giving due credit or danger of confusion between fan-made and official works and to make this proposal more palatable for copyright holders, Congress may wish to consider granting original creators a right of attribution in cases of non-commercial derivative works. The special protections described above could only extend to works that credit the original author and disclaim any official affiliation with the original. Although currently of no legal effect, this is already common practice among many creators of fan-made media, and would likely be seen by the fan community as a reasonable requirement. *See* Tushnet, *supra* note 113, at 154–55 (describing practices regarding attribution and disclaimers by fan-fiction authors).

Secondly, Congress must also ban the use of automated content filters to automatically block user-generated content on copyright grounds without human intervention. At least one court has held the following:

[I]n order for a copyright owner to proceed under the DMCA with ‘a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,’ the owner *must evaluate whether the material makes fair use of the copyright*.¹⁶⁵

No matter how useful automated tools may be to identify potentially infringing works, computers are simply incapable of making the requisite legal judgment that a specific work is not fair use, and therefore, cannot satisfy this requirement.¹⁶⁶ Thus, it is likely that copyright owners who use automated systems to send actual DMCA notices without human intervention are already in violation of the statute. It should not matter whether copyright owners are using the formal DMCA process or an informal system of copyright enforcement established by private websites like YouTube; the principle remains the same.

Copyright holders should remain free to use automated systems to *identify* potentially infringing content, but the actual *judgment* that a work is infringing must be made by a human. Accordingly, Congress should explicitly ban actually *blocking access* to online works on copyright grounds by means of private automated systems of copyright enforcement outside the DMCA process without the accountability that process provides. If a copyright owner wishes to have content taken down from a site like YouTube, the law should require individual evaluation of each specific work by a human being trained in the principles of fair use, and a formal DMCA takedown notice should be issued. YouTube could still provide automated tools to *detect* potential copyright infringement and even “monetize” it by showing ads alongside videos and giving copyright owners a portion of the proceeds, but *blocking* that content would require specific notice from the copyright holder. While this may place additional burdens on copyright holders, it is only just that, when copyright owners wish to block online expression

¹⁶⁵ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (emphasis added).

¹⁶⁶ See Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 REGENT U. L. REV. 83, 87 (2011) (While it is true that computer software can now assist lawyers in managing documents, producing deposition summaries, and streamlining other data reviewing tasks, these are not the equivalent of legal analysis For the foreseeable future, it will still take a trained lawyer to identify legal issues, analyze relevant legal authorities, and predict or advocate a certain outcome . . .”).

by accusing users of violating the law, that accusation must be made by a human being rather than a computer.

C. Provide Real Penalties for Abuse of the DMCA Takedown Process Such as Fines and Statutory Damages

Finally, if fan-made derivative works are to enjoy any real protection under the law, including protection from abusive takedown notices and automated filtering, the law must provide real penalties for abuse of the powers the DMCA gives copyright holders to have infringing works removed from the Internet. The current ability of accused infringers to sue copyright holders for misrepresentation of infringement under DMCA Section 512(f)¹⁶⁷ is inadequate to actually prevent abuse by copyright holders for two reasons: (1) the burden of proof is too high;¹⁶⁸ and (2) the damages are inadequate in cases where the material was non-commercial;¹⁶⁹ such that, as a practical matter, ordinary Internet users are unlikely to be able to sue over wrongful takedowns.

First, in *Rossi v. Motion Picture Association of America*, the Ninth Circuit held that the misrepresentation clause of the DMCA imposes a “subjective good faith” standard and only applies to “knowing misrepresentation,” which requires “a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”¹⁷⁰ This burden of proof is simply too high for cases involving non-commercial transformative works since all a copyright holder must show to avoid liability for misrepresentation is that they honestly believed the material was not fair use. Since major copyright holders are in general reluctant to acknowledge that the concept of fair use even exists, it is difficult to imagine a situation in which a copyright holder would *not* believe a use was not fair use. As the court observed in *Lenz v. Universal Music Corp.*, “there are likely to be few [cases] in which a copyright owner’s determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation.”¹⁷¹

At minimum, the burden of proof for misrepresentation must be lowered in order to allow such claims to have any chance of succeeding. Public Knowledge suggests a standard of “recklessness,” which “should encourage copyright owners to either review notices generated by automated technologies or to design company protocols to reasonably to

¹⁶⁷ 17 U.S.C. § 512(f) (2006).

¹⁶⁸ DENA CHEN ET AL., PUBLIC KNOWLEDGE, UPDATING 17 U.S.C. § 512’S NOTICE AND TAKEDOWN PROCEDURE FOR INNOVATORS, CREATORS, AND CONSUMERS 9 (2011), available at <http://www.publicknowledge.org/files/docs/cranoticketakedown.pdf>.

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Rossi v. Motion Picture Ass’n*, 391 F.3d 1000, 1005 (9th Cir. 2004).

¹⁷¹ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008).

protect [sic] against erroneous or deficient infringement claims.”¹⁷² At the same time, this standard would be high enough to avoid ensnaring legitimate claims.¹⁷³

Second, even if amateur creators could meet the standard of proof for a misrepresentation claim under Section 512(f), because non-commercial works are by definition not for profit, they could rarely ever prove actual damages that resulted from a false claim of infringement.¹⁷⁴ Statutory damages and attorney’s fees are not available.¹⁷⁵ Thus, they could rarely hope for more than nominal damages. Without the possibility of significant damages and absent *pro bono* representation, ordinary fans and Internet users lack the resources necessary to bring a successful lawsuit under Section 512(f). Thus, it is unlikely to serve as an effective deterrent against abuse. It is vital that Congress establish a more effective mechanism for penalizing copyright holders who abuse the takedown process and fail to consider fair use for non-commercial, transformative works (or as proposed above, who use the DMCA process against such works at all).¹⁷⁶

One possibility is to make statutory damages available for misrepresentation¹⁷⁷ since they are for copyright infringement itself; but this still requires Internet users to take the formidable step of hiring a lawyer and filing a lawsuit—something few people are likely to do. While statutory damages should still be available to plaintiffs with the resources to file a lawsuit, they would not offer any real benefit to non-commercial, amateur creators.

A more feasible solution would be to give the Copyright Office the authority to fine copyright owners upon receiving complaints of abuse of the takedown system, similar to the Federal Trade Commission (“FTC”)’s complaint process under Section 45 of the FTC Act.¹⁷⁸ User-generated

¹⁷² CHEN ET AL., *supra* note 168, at 12.

¹⁷³ *Id.*

¹⁷⁴ *Cf. Lenz v. Universal Music Corp.*, No. C 07-3783 JF, slip op. at 10–16 (N.D. Cal. Feb. 25, 2010) (Order Granting Partial Summary Judgment) (stating that alleged infringers may recover actual damages resulting from the improper takedown, even if nominal, including the cost of filing a counter-notice).

¹⁷⁵ *See id.* (alleged infringers may not recover costs and fees incurred by filing suit).

¹⁷⁶ While Section 512(f) also applies to false counter-notices by alleged infringers, the current system is sufficient for dealing with misrepresentations on that end, as copyright owners still have the option to sue for infringement even if the alleged infringer sends a counter-notice, in addition to actual damages suffered from the misrepresentation.

¹⁷⁷ CHEN ET AL. *supra* note 168, at 13–14 (arguing for the creation of statutory damages for misrepresentation under Section 512(f)).

¹⁷⁸ *See* 15 U.S.C. § 45(b) (2006) (explaining the process by which the Commission requires a person, partnership, or corporation to cease and desist from violating the law so charged in a complaint); 15 U.S.C. § 45(l) (granting the Commission authority to fine a person, partnership, or corporation who violates an order).

content creators who receive illegitimate takedown notices could file a complaint through a web form on the Copyright Office's website. After a brief factual investigation to determine whether the takedown notice was misrepresentative, based on an objective ("recklessness") standard rather than the current subjective ("good faith") standard, the Copyright Office could levy the appropriate fines.¹⁷⁹ These fines should be substantial enough to provide true deterrence against abuse, yet not so high as to deter copyright owners from enforcing their intellectual property rights online altogether. For routine abusers, forfeiture of copyrights might also be in order. Under such a system, the burden on legally unsophisticated Internet users would be minimal, and it would be far more likely to serve as an effective deterrent against copyright abuse than the current statute,¹⁸⁰ which will never be more than a hypothetical deterrent.

CONCLUSION

As described above, fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture and may in fact represent the rebirth of popular folk culture in America after a century of being submerged beneath commercial mass-media cultural products. The Internet has enabled what scholar Lawrence Lessig calls a "read/write culture"¹⁸¹ where ordinary Internet users are empowered to become active creators of culture rather than mere passive consumers. Yet, if this exciting trend is to continue, the copyright laws of the twentieth century must adapt to accommodate the possibilities of the twenty-first. This Note demonstrates how amateur fan-made culture is under attack by the creators of the popular works it pays tribute to and how overreaching copyright claims by media companies cast a considerable chilling effect on vibrant new art forms such as fan fiction, fan-made videos, and virtual worlds. In order for these practices to thrive unmolested by the ghosts of the past, the law must change in anticipation of the future. Accordingly, the Copyright Act must be amended to (1) explicitly clarify that non-commercial, transformative works are fair use, (2) ban the use of the DMCA takedown process and automated copyright filters to block this type of content, and (3) provide real penalties to deter copyright owners from abusing copyright law to suppress legitimate follow-on creativity.

While copyright holders will no doubt object that these reforms deprive them of necessary control over their copyrighted works and may

¹⁷⁹ Alternatively, the FTC could administer this process, if Congress deems it better equipped to act directly on consumer complaints.

¹⁸⁰ See 17 U.S.C. § 512(f) (2006).

¹⁸¹ LESSIG, *supra* note 1, at 28.

result in their works being tarnished by association with offensive fan works, we must remember that the purpose of copyright is neither to allow maximum control over copyrighted content, nor to protect “brands” from negative associations, but to promote the growth of culture. Even if some amateur uses of culture may be objectionable, the overall cultural benefit gained by allowing such uses far outweighs the slight detriment of negative associations in fan-made works, which most people are perfectly capable of distinguishing from officially sanctioned works.

At the heart of copyright is a balance between the rights of creators to benefit from their works and the right of society to benefit from increased cultural production. When the former becomes detrimental to the latter, the time has come to rebalance the equation. If the new twenty-first century folk culture is to survive into the future, and if Kaplan’s dream of global networks with unlimited potential for cultural production is to be fully realized, then Congress and the courts must act to protect the rights of amateur creators before it is too late.

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