NORM ENTREPRENEURS, FAN FICTION & REMIX CREATIVITY

STEVEN HETCHER

INTRODUCTION

This article explores an important new source of creativity—so-called user-generated content (UGC). In particular, discussion will focus on two particularly promising but also problematic types of UGC—fan fiction and remix culture. UGC is beginning to attract serious attention by entrepreneurs who are coming forward with business models that seek to monetize this content, which is created by amateurs largely for non-commercial motives. The basic attraction in such business models is obvious. In the entertainment world, it is often said that content is king. But content, at any rate, content that people are willing to pay to consume, can be very expensive to produce. Mainstream Hollywood movies create.[[1]](#footnote-2) Mainstream music and books cost less to create but the ratio of unprofitable to profitable projects is skewed toward the unprofitable regularly cost $100 million dollars to ones such that a book publisher or record label must invest in many unprofitable ones in order to have a few successes that will hopefully out weight the losing projects.[[2]](#footnote-3) Major television series such as *Lost* are expensive to produce.[[3]](#footnote-4) From this vantage point, UGC is like manna from heaven to the entrepreneur. Instead of dropping from the skies, UGC is typically simply uploaded by amateur creators who typically seek no remuneration or cut of the profits. Framed in this manner, UGC is an entrepreneur’s dream come true. As if often the case in business, however, something that sounds too good to be true usually is, and the same may be true with the prospects for monetizing UGC. At any rate many issues are raised as to the long-run viability of business models that rely on UGC.

There are a number of forms of what can be called UGC: Wiki entries, open-source software, photographs on sites like Flickr are just some examples. In other instances, UGC is part of some larger business model—as in the situation in which bookseller Amazon offers functionality such that users can comment on books. Here the UGC—book reviews--augments a business model that does not fundamentally rely on the UGC. Another type of UGC is the content found on sites like Facebook. Here the model is somewhat different in that the type of content created has a subjective value to a significant extent instead of an objective value in the way that a mainstream film does in as much as it is intended to appeal to millions of consumers. While some people do spend time randomly consuming Facebook profiles of people who are strangers or well-known persons, much consumption is of content of people one personally knows.[[4]](#footnote-5) People have circles of friends and overlapping sets of friends. In this sense the content is of subjective value—it is of value to the particular subjects who post and share with one another. Notice how this is different from what might be labeled Long Tail niches of content.[[5]](#footnote-6) In the sort of niche consumption groups Chris Anderson theorizes about, the group is not determined by social relationships but by particular aesthetic tastes. For example, I am less likely to find Werner Herzog fanatics among my social circle as compared to some group of people I have never met but who have online access, whereas the main set of potential consumers of content created, for example, during a fraternity party or a class reunion, are those who attended the events, and to a lesser extent, their overlapping circles of friends and family.

While the amount of UGC being created has exploded, yet the ability of entrepreneurs to monetize this content has been fairly limited so far. YouTube and MySpace have been economically successful in the sense that the entrepreneurs who created them were made rich when the companies were acquired. But neither of these companies has since generated much revenue for its acquirer.[[6]](#footnote-7) And while Facebook early on was characterized as a potential gold mine, thus far no large revenue stream has panned out. On two occasions well covered in the press when Facebook sought to alter its business model in a way that would create greater potential to generate revenue through the greater use of so-called behavioral marketing, each time it has been harshly rebuffed in the media and by well-coordinated privacy groups.[[7]](#footnote-8) Thus, it has now become a serious issue as to whether the much anticipated efforts to take the great leap forward in behavioral marketing will be held in check by the sort of serious privacy concerns that have to this point significantly hampered the efforts of Facebook.

Another potential concern is that users may not be content to continue creating content as the enterprise they are contributing to becomes a profit-making venture for others.[[8]](#footnote-9) Whether amateurs will continue to contribute appears to depend on the strategic structure of the group activity and the motivations for participation of the various conformers. One would predict that those models that rely on contributors receiving small benefits or creating benefits to others would be most fragile.[[9]](#footnote-10) As Benkler remarks, will users be as likely to contribute to software projects when the beneficiary is Microsoft?[[10]](#footnote-11) On standard economic assumptions, one would expect the most successful projects to be those in which the contributors receive a material benefit. This is why it is important to distinguish between actual benefits that users might receive from the sort of circular benefits that are sometimes postulated by those who employ an economic approach.[[11]](#footnote-12)

With the above brief survey of some of the types of UGC that may arise in mind, in the next Part I will focus on a type of UGC that is both highly significant in terms of the potential to promote creativity but which may also create a particularly difficult problem for entrepreneurs seeking to monetize such content. This type of UGC is fan fiction and remix. This type of content is often highly creative. It is not merely creative content in the technical sense that it is copyright protected due to the low threshold for copyright protection, whereby for example the photos on Facebook of each person who takes a quick amateur shot of the Statue of Liberty are copyrightable, or a blog posting is copyrightable, even though it says nothing of any particular interest. Similarly, fan fiction will often have as little relative value as a blog posting by an amateur with no particular expertise. Other fan fiction and remix are highly valuable, however, as indicated by the fact that this sort of UGC serves as a draw to popular sites like YouTube.[[12]](#footnote-13) People consume user-generated videos in large numbers. The more popular ones are viewed many times by people who then often forward them to others such that these videos spread virally.[[13]](#footnote-14) This can be self reinforcing in that videos on YouTube that receive more viewings rise in the rankings and thus receive yet more viewings.[[14]](#footnote-15) Another indication that this content has real creative value is that it is increasingly the case that the next generation of new media creators are getting their start by creating fan fiction and remix.[[15]](#footnote-16) Thus, fan fiction and remix will often be more significant from a creative point of view than the other types of UGC mentioned above.

Fan fiction and remix also present what may be the most significant difficulty for entrepreneurs, however. Unlike blog postings or content posted to sites like Facebook, fan fiction and remix almost by definition raise the issue of copyright infringement. The reason is that most fan fiction and remix are created by in part drawing on pre-existing, copyrighted commercial works without authorization. Thus, entrepreneurs who wish to develop business models that somehow draw on fan fiction are thrown into the thorny thicket that is copyright law. For the entrepreneur, then, involvement with fan fiction and remix may be a high beta strategy—potentially highly rewarding but also potentially legally risky. Thus, it may be no surprise that it would take a Google or a NewsCorp to dive in feet first. These are companies that need significant growth if they are to maintain their high P/E ratios on Wall Street. And they also have the deep pockets and wherewithal to rebuff well-armed adversaries such as Viacom, itself a media behemoth.[[16]](#footnote-17) The next Part will look at fan fiction and remix in greater detail. Subsequent discussion will examine the role that entrepreneurs may play in further developing this important new source of creativity.

I. THE EMERGENCE OF FAN FICTION AND REMIX

Fan fiction and remix culture have been, and are, continuing to explode both in terms of social relevance and sheer quantity of new works produced and available.[[17]](#footnote-18) Fan fiction is simply that: fiction created by fans, typically of popular commercial works, such as the *Harry Potter* book and film series. [[18]](#footnote-19) As technologies have advanced, fan fiction has morphed into “fanworks” or, alternatively, “fanvids.”[[19]](#footnote-20) A related but more general term is “remix.” Remix culture is culture that is created by taking digital snippets from various sources and combining them to create a new work. 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.[[20]](#footnote-21)

Fan fiction and remix culture have been, and are, continuing to explode both in terms of social relevance and sheer quantity of new works produced and available.[[21]](#footnote-22) 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.”[[22]](#footnote-23) One might nominate *Suntrust* as the first fan fiction case, but Alice Randall is better described as an “anti-fan” of *Gone With the Wind*, and the case turned on a defense of criticism and parody, not on any considerations that turned specifically on the fan-like nature of the work. 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.[[23]](#footnote-24)

A non-digital 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. A term roughly synonymous with “remix” most often used in a musical context is the so-called “mashup,” which “[t]ypically consist[s] of a vocal track from one song digitally superimposed on the instrumental track of another. . . .”[[24]](#footnote-25) Another roughly synonymous term is that of “appropriation art.” The best known contemporary appropriation artist--especially to copyright scholars-—is Jeff Koons.[[25]](#footnote-26)

Remix is legally interesting; infringement is a central issue because much remix contains varying amounts of unauthorized copyright-protected material. However, there is a strong argument that much of this remix is fair use and hence not an infringement but instead legal. Because the trend toward remix is substantially technology driven, it is likely to continue, if not accelerate, unless the law somehow puts the brakes on the process. Both the potential for explosive new growth and the potential for its curtailment make the task of determining how to best regulate these important new sorts of creative works urgent. As the following discussion will indicate, there is a role to be played both by traditional entrepreneurs and by norm entrepreneurs in promoting fan fiction and remix. The remainder of this article will develop such an account.

Below, I will first develop a positive or descriptive account, which will make clear the important role that social norms have played up to this point in the de facto regulation of these sorts of works. I use the term “de facto” as a term of art to refer to regulation by both formal legal means and informal social norms.[[26]](#footnote-27) Understanding this story is as important as it is instructive in terms of demonstrating possible alternatives when it comes to regulation. This account, of course, says nothing about the normative desirability of the current role played by social norms. Especially since social norms have sometimes historically 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 apt in the context of regulation by social norms to ask whether such regulatory means may be better formalized.

In general, one of the important larger lessons of recent norms theory is to serve as a corrective to an earlier optimism about the power of norms to regulate judiciously as a result of their emergence through bottom-up social forces which are accordingly more democratic in light of their emergence through social evolutionary forces that take into account the desires and preferences of everyday members of society.[[27]](#footnote-28) This romantic conception has been replaced by a contemporary one under which social norms are better understood to be potentially subject to their own sorts of distorting influences, such that, like formal law, each social norm must be normatively justified on its own merits rather than in light of its pedigree.[[28]](#footnote-29) Having said this, it is also true that recent norms theory has shown as well that social norms are often the most effective means to regulate. When discussion below turns to policy alternatives, I will not only defend the desirability of the role currently played by norms in regulating fan fiction and remix works, but will argue that norms offer the potential to play an even more valuable and significant role.

This means that there is a larger role for norm entrepreneurs to play. Norm entrepreneurs can serve as important role in encouraging the sorts of creation of fan fiction and remix that would likely be fair uses. As I will argue, norms have an important role to play in combination with the DMCA in affecting the amount of fan fiction and remix works that are likely to be available. The statute works functionally so as to divide the costs of monitoring and removing potentially infringing content between owners and ISPs. I argue that for a complex set of reasons owners of content that is used without authorization in fan fiction and remix works will be less inclined to pursue those uses that are not harmful to their markets or otherwise offensive to the extent that the cost of doing so increases, and that there is room for materially increasing these costs by means of norm entrepreneurship. The reason there is scope for this is that in addition to the help from the structure of the DMCA, norms are also already in place that provide fan fiction and remix and thus norms simply need to be strengthened and promoted more widely so as to have a more comprehensive effect.

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. This may dramatically increase the amount and sources of remix while simultaneously reducing the force that communities have played in the fan fiction world. Thus, one of the important questions we will need to keep in mind is whether on a going-forward basis, norms can continue to play the important role 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) together provide a regulatory environment in which remix can continue to flourish and while allowing owners to protect against those uses that they perceive as especially costly.

# II. Norms Currently Regulating Fan Fiction and Remix Culture

The following discussion will set out three distinct social norms that have played, continue to play, or may increasingly 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.[[29]](#footnote-30) Lawyers sometimes overemphasize 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.[[30]](#footnote-31) Contrary to this top-down causal view, one of the contributions of norms theory to the law has been to help foster a better appreciation that the regulatory structure of society is constructed from the bottom-up as well as top-down.[[31]](#footnote-32) Indeed, these forces interact in ways that causally loop. Not only do norms regulate people’s activities in an informal, non-legal manner, but norms and law influence one another and work in tandem to regulate behavior.[[32]](#footnote-33) In the absence of law, or of effective law, norms will tend to fill in the void.[[33]](#footnote-34) This has been poignantly seen with 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.[[34]](#footnote-35) This defense was no longer colorable after *Napster* and was not raised in *Grokster*.[[35]](#footnote-36) In the early days of file sharing, most people were simply unaware of the legal status of their behavior.[[36]](#footnote-37) The commercial creative-content industry expended significant effort to educate people on the illegality and purported wrongfulness of file sharing, comparing it to theft.[[37]](#footnote-38) Perhaps to the industry’s surprise, their efforts at convincing people that their actions were equivalent to thievery have had a limited effect. Quite clearly, ordinary morality appears not to find the analogy compelling.[[38]](#footnote-39) While the law in a typical file-sharing case is no longer in dispute, the activity continues apace, occurring millions of times a day.[[39]](#footnote-40) The best explanation of this behavior, then, is not the legal status of the activity. The best explanation draws centrally on social norms.[[40]](#footnote-41)

It is against this background that one can best understand the current situation with fan fiction and remix culture. With file sharing, the law was clear. What has stood in the way of bringing about behavior in conformity with the law was, first, that file sharers had to be educated about the law and, second, once they were educated, they were still more shaped in their behavior by norms permitting such behavior than those 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 typical file sharing is not a fair use, typical amateur fan fiction and remix are fair uses, 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 to better 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).[[41]](#footnote-42) The reason for drawing this distinction can now be made clear. Social practices, not 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.[[42]](#footnote-43) The utility payouts to the players are mutually interactive. In other words, the benefit one player receives for conforming will typically depend on choices made by others, and vice versa.[[43]](#footnote-44) In addition, norms, *qua* patterns of social behavior, typically have sanctions attached, and conformity to them is typically prescribed from one person to another, although these characteristics are not essential.[[44]](#footnote-45)

There are three basic types of rational norms: “Prisoner’s Dilemma norms” (“PD norms”), “coordination norms,” and “epistemic norms.”[[45]](#footnote-46) For each of these types of norms, the rationality of one’s conformity is affected by the behavior of others. For example, in a coordination norm, one may be indifferent between two options in the abstract (such as driving 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 due to the interactive nature of the behavior, one receives a “coordination benefit” from doing what others are doing and a “coordination loss” for doing the opposite.[[46]](#footnote-47)

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.[[47]](#footnote-48) What this means in practical terms is that if others are participating in these sites, then the individual has an incentive to do so as well, and in the manner that others are doing so.[[48]](#footnote-49) 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.[[49]](#footnote-50)

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-saving device.[[50]](#footnote-51) The rational actor model assumes that the players in strategic games have enough information about their situations and the strategic structure of the game as well as information about other players so as to know whether they are free riders or are instead cooperators in iterated games. On a more sophisticated model, we must not assume perfect information as a constant of the model, but let it vary instead.[[51]](#footnote-52) We will see that doing so is informative in the context of norms *qua* practices constituted of conforming acts. For example, the assumption of full information tends to be more factually accurate in close-knit communities. In other circumstances, however, assuming full 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 action is a fair use or not, is to conform to norms of 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 on their own 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. For most typical remixers, it is implausible to think that they 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.

With norms with the structure of a PD, rational actors will look to the behavior of others but in the hope of free-riding on this behavior if the opportunity should present itself. In a single-shot game, famously, rational actors will defect.[[52]](#footnote-53) But a social practice, by the continued nature of its participants, implies that it is not a single-shot game. Conformity in the social practice is rational typically because the payoff is higher for conforming than defecting, given the iterative nature of the game.[[53]](#footnote-54) As will be seen below, fan fiction creators are engaged in a PD game with one another when it comes to taking actions to commercialize 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 a dispositive determinant in whether an individual continues to conform to a given social practice. This in turn matters because any policy prescription must take account of the ambit of factors that go into the motivation of individuals to either conform to socially desirable patterns of behavior or be deterred from conforming to undesirable patterns.

## 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 as acceptable by a substantial number of relevant actors, as well as society in general, to the extent such a view may be discerned at all.[[54]](#footnote-55) Indeed, in some quarters, this behavior is strongly encouraged.[[55]](#footnote-56) Needless to say, not all relevant actors accept this norm, but that is true of all norms.[[56]](#footnote-57) What is the evidence of the existence of the norm? First, of course, is widespread behavior of a sort, namely, the millions of works of fan fiction that have been produced and shared in recent years. Importantly, such behavior does not carry social sanctions; to the contrary, there is much social reinforcement of this behavior in these communities.

As previously noted, fan fiction and remix activity are plausibly claimed to provide significant social benefits, and thus, it is not surprising that there is a norm that promotes this activity. Henry Jenkins, an educator himself, for example, emphasizes the educational benefits to young people from participation in these activities and in the communities built around them.[[57]](#footnote-58)

Jenkins notes that users feel as if they have a right to such uses.[[58]](#footnote-59) One fan fiction writer Jenkins interviewed states, "[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."[[59]](#footnote-60) 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 in place that are responsible for the rise in fan fiction.

The above quote and much other commentary by enthusiasts of fan fiction implicitly assumes fanworks involving a substantial portion of creativity on the part of the fan author. It assumes a typical situation where the creator borrowed commercial characters such as Kirk and Spock from *Star Trek* and then created a new fictional work with a plot of her own imagination based on these characters. And indeed, this has been the form of much fan fiction in the past.[[60]](#footnote-61) Under such conditions, it is not hard to understand how these creators would feel some degree of ownership or proprietary interest in the fanwork. Such a feeling would be predicted as matter of social science, to the extent that Lockean property intuitions have been empirically demonstrated.[[61]](#footnote-62) 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 the borrowed work is contained in a particular remix, the greater the sense of ownership and entitlement one would expect on the part of the creator.[[62]](#footnote-63)

Users have also been subject to advertising that famously has encouraged them to rip, mix, and burn.[[63]](#footnote-64) It is reasonable for an average person to think that if a high-profile company like Apple openly encourages a sort of behavior, that it cannot be illegal, or even wrong by dominant social norms. Note that Apple did not encourage users to file share.

Permit me to add a personal anecdote here in support of the norm I am characterizing. As a professor of copyright law at a law school in “Music City,” Nashville, Tennessee, each Fall, I am asked by the Vanderbilt University administration to give a talk to undergraduates about file-sharing. 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 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 in trouble for engaging in it, especially if one is 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 remix works.[[64]](#footnote-65) I would speculate that if I am not asked to comment on these issues, it is because the RIAA and MPAA are not demanding that the university do so. I would suggest that the RIAA and MPAA consider stopping their attempts at moral education of America’s youth with file-sharing. It is hard enough to explain to even 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. If for no better reason, from a pedagogical point of view, it would be futile in this context to attempt to teach the legal details with regard 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 do in a brief span of time.

Another reason the RIAA and MPAA would be unlikely to serve their interests by attempting to educate the masses about remix is that one of the main arguments the industry has used in the past in the context of file sharing is that file-sharers hurt not only faceless corporations, rich rock stars and movie stars, but threaten the livelihoods of all the little people who work in these industries.[[65]](#footnote-66) This cynical claim loses all credibility in the context of fan fiction and remix, however, for, as will be argued below, 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 be more likely to be helped by such activities.[[66]](#footnote-67) If anything, then, the implicit lesson that young people would take away from their 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. This conclusion is natural, given that they are taught about the evils of file-sharing but the same people imparting this message are silent when it comes to remix activity.

What one could meaningfully do, however, is simply provide the bottom-line conclusion that much fan fiction and remix is legal fair use and hence legal, although making complete digital copies of works that one changes very little is unlikely to be embraced by that doctrine.[[67]](#footnote-68) 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.[[68]](#footnote-69) But as I have argued in detail elsewhere, this feature is not true of all norms.[[69]](#footnote-70) 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 the sort of PD structure such that to not conform is to free ride. Instead, others are more or less indifferent as to whether any given individual looks both ways before crossing the street. The norms at issue with much remix creation are similar. It is best seen as a particular instantiation of the more general norm that what is not forbidden is permitted. Thus, because for kids, 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, kids feel free to remix, but that they actually go ahead and do so and are more inclined to do so because others are doing so. This norm has the structure of a coordination norm.[[70]](#footnote-71) 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.”[[71]](#footnote-72)

## B. The Norm Against Commercializing Fan Fiction

Now consider the second norm of importance--the norm against the commercialization of amateur users’ works. As we saw above, fan fiction preceded remix culture historically. Fan fiction from the beginning was circulated among groups and communities.[[72]](#footnote-73) Some commentators have described these communities as “close-knit.”[[73]](#footnote-74) Among the fan fiction community there is a norm against seeking commercial gain.[[74]](#footnote-75) Upon first hearing this, one might at first suppose that fan fiction writers are anti-capitalist, for what else could explain this norm? There is indeed a rational explanation, however. It is that 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.[[75]](#footnote-76) Note that the fact that the community fears this attention does not necessarily mean it is widely believed that using the works is infringement. For even if most such works are not infringements, no one wants to be sued.

Regarding the strategic structure of this behavior, each member is inclined to take an interest in each other’s actions precisely because each person, in fact, speaking in terms of the actual utilities and disutilities, has an interest in each other person’s actions with regard to seeking to commercialize one’s acts of remix. Thus, the norm against commercial use among the fan fiction community has the structure of an iterated Prisoner’s Dilemma. In other words, at least some narrowly self-interested rational actors would defect from cooperation if they could get away with it.[[76]](#footnote-77) Defection in this context means seeking commercial gain from one’s work. As with other Prisoner’s Dilemmas, one does better if others conform to a norm while one does not. In the present context, the benefit the free rider gets from the conformity of others is that this conformity will deflect the unwanted attention of commercial owners. The reason is that owners are less likely to pursue legal actions against the fan fiction community if the community presents no commercial threat. For the conformers to the non-commercial norm, however, the free rider creates costs. The cost is that by seeking commercial gain, the defector makes it more likely that commercial content owners will begin to garner more attention to the fan fiction community, and thus each of the conformers is more likely to draw attention than would otherwise be the case.

Norms theory would predict that the conformers would seek means to bring about conformity by potential free riders. Typically, this occurs through sanctions or by threatening to cut off the free rider from the benefits of iterated play. In the legal scholarship, Robert Ellickson provides the seminal account of the conditions under which groups will be able to solve their collective action problems. [[77]](#footnote-78) Like the groups cited by Ellickson, fan fiction communities are close-knit. This close-knitedness allows for effective sanctioning behavior. Sanctions are the means groups use to incentivize conformity when free riding would otherwise be the first choice.[[78]](#footnote-79) As Ellickson’s model would predict, there is indeed a strong sanctioning regime in place in fan fiction communities.

## C. Competing Norms Among Owners Regarding Toleration of Non-Commercial Use

There is a third norm that pertains to fan fiction that is closely related to the previous one. Under this norm, owners will leave alone remix creators who use their works but who do not seek to commercialize these works. This is not an established norm, but instead a putative one. In actuality, there is an ongoing battle of norms between one that is tolerant of such uses and one that is not.

From the perspective of norms theory, the question of whether there is a norm boils down to the question of whether there is 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 via the fact that the industry has developed standards for user-generated content.[[79]](#footnote-80) While these 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, and not surprisingly, their interests were largely served.[[80]](#footnote-81) 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 as to which type of norm is involved is answered not by the *fact* of conformity but by determining 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 sort of question: would a George Lucas want other owners to be tolerant toward remixers so that he could free ride on the resulting benefits? The answer clearly appears to be no.[[81]](#footnote-82) There appears to be no free-rider benefit that accrues to an owner as a result of other commercial owners not seeking 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 with Warner Brothers in its overly zealous defense of creative properties against amateur fan fiction creators of *Harry Potter*-based works. The studio got terrible PR for targetting *Harry Potter* websites run by children and teens.[[82]](#footnote-83) The fact that many other commercial owners are de facto tolerant of such uses made Warner Brothers stand out as particularly unreasonable. Thus, the putative norm among owners to tolerate non-commercial content has the structure of a coordination norm. Any given owner has reason to do what other owners are doing. The more others are tolerant, 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 non-commercial 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.”[[83]](#footnote-84) Other owners have explicitly stated that some fan works are fair uses. [[84]](#footnote-85) At the other extreme are owners who bring lawsuits and send cease-and-desist letters.[[85]](#footnote-86) Whether the norm of commercial owners’ toleration 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.[[86]](#footnote-87)

In order to better 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 actions against non-commercial remixers. The costs are straightforward: mainly there would be the cost of monitoring the Internet for uses of one’s work and the cost of pursuing legal actions of various sorts.[[87]](#footnote-88) Perhaps the best statement regarding these costs comes in Viacom’s Complaint against YouTube in its lawsuit. Viacom alleges 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.”[[88]](#footnote-89)

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 Viacoms of the world are not clear, as there is arguably no direct threat to their business models from most fan fiction and remix.[[89]](#footnote-90) Indeed, owners sometimes will stand to benefit from enhanced exposure of their works, like the fostering of a more devoted fan base.[[90]](#footnote-91)

One reason commercial owners seek to stop fan uses is to control their characters.[[91]](#footnote-92) 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 toleration they will, other things equal, be more inclined to take broad action against all non-authorized 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 non-commercial norm.[[92]](#footnote-93) 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 fact that owners are often not inclined to pursue non-commercial remix is indicative of the fact that this enforcement behavior is simply not justified in cost/benefit terms. The monitoring and legal costs of stopping the behavior are very real and measurable, while the benefits are amorphous and therefore hard to quantify in dollar terms for purposes of cost/benefit analysis.

# III. Regulatory Options in a World of Shifting Norms

What are we to make of the above discussion of the three norms at play in the de facto regulation of fan fiction and remix culture? Recall that above I stated that I would first set out the positive or descriptive account of the role played by social norms in the regulation of fan fiction and remix culture. As we have seen, this role is pervasive and powerful. The straightforward policy question is whether this role is optimal in terms of promoting the goals of copyright? On first take, one might well conclude that things are working out exceedingly well, judging from the simple fact that fan fiction and remix culture are exploding. And since these new and distinctive types of works themselves are of clear and distinct value in serving core goals of copyright law, by implication the three norms that play a material role in making this possible are of value as well.

Yet all may not be so simple. For 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 blessings and stability of formal law and can easily change. This can be a good or a bad thing depending on whether this flexibility is used in the service of desirable policy goals, on the one hand, or nefarious private interests on the other hand. For example, in an important recent case, the artist formerly and now again known as Prince and his record label, Universal, took legal action to thwart a mother, Stephanie Lenz, who posted a video on YouTube of her toddler dancing around with a Prince song barely audible in the background.[[93]](#footnote-94) This sort of overreaching use of the technicalities of copyright law against ordinary people causes commentators to rightly call for legal reform.[[94]](#footnote-95) The possibility of cases like this raises the question of whether regular people require some stronger sort of protection than the current norms. Because the norms studied in the last Part 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 anti-commercialization 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, non-commercial, creative economy, both Rebecca Tushnet and Lessig talk in detail about the non-commercial motivations that drive the creation of much fanworks and remix.[[95]](#footnote-96) Indeed, this attention is well deserved as this is an important feature of remix. Yet one must also not lose sight of the fact that many amateur creators will seek to commercialize their work if they can. The reason many would want to do so is obvious: most people need to make a living and if they enjoy and are gifted at creating fanworks, it would be natural for many to seek to support themselves in this manner, rather than putting up with a day job in order to sustain their art.

As noted in the discussion of the non-commercial norm, Henry Jenkins provides a good deal of evidence that many creators have mixed motivations.[[96]](#footnote-97) The practical implication of this is that we cannot take the current degree of adherence to the norm of non-commercialization of fanworks as a given, but rather must treat it as a variable that may change as a function of the relative costs and benefits of adhering to the non-commercial norm versus the costs and benefits of seeking to commercialize one’s works.[[97]](#footnote-98)

In a world where the norm of non-commercial use is weakened, one can predict that there will be more commercial use as the costs of doing so go down. The sanctioning regime that creates costs for commercializing begins to lose its ability to drive cooperative behavior through sanctioning, interested play, and reputation effects within communities that are increasingly less close-knit. This is relevant because as old school fan fiction has broadened out to fanworks or media fiction or remix or whatever we choose to call it, the conditions of close-knittedness are slipping away.[[98]](#footnote-99) In turn, the Ellicksonian forces of iteration and overlapping interaction--forces that encourage actors to forgo 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 world dominated by remix, there is likely to be a breakdown of the second norm against non-commercializing fanworks, which may lead more owners of creative content to sue more of the Stephanie Lenzes of the world. As a result, the third norm, which is a battleground between the commercial tolerators and the commercial intolerators, may shift in the direction of less toleration of remix, as the perception grows that there is a greater need to sue people to create the sort of fear and panic among the populous of users that has been the hallmark of the RIAA tactics toward file sharers over the past five years.

The potential for a breakdown of the non-commercial norm and the consequent victory of the non-toleration camp regarding the third norm may be highly significant, as this can be predicted to lead to greater harassment of fair users by commercial owners. This outcome is widely viewed in the copyright policy community as very undesirable. But if norms may not be the optimal regulatory solution in a changing world, what is? There are two obvious candidates. First, formal law-—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 the existing fair use doctrine can play a more effective role in supporting fan fiction and remix than it currently does. With regard to the 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.[[99]](#footnote-100) This would be a huge step as it in effect does away with the derivative works right. But it might also do away with frivolous suits against fair users that have the effect of making the legal right of fair use of no practical value to those who possess it. This potential outcome makes legalization worth considering despite the potentially huge issues it brings with it in terms of taking away an important copyright: the derivative works right.[[100]](#footnote-101) Lessig’s account is sophisticated and worth examining in detail.

One of the conclusions I draw is that Lessig’s argument that remix is criminal fails to adequately acknowledge the important extent to which amateur remix is fair use and hence not criminal. Fair use analysis is crucial to understanding the relationship between user-generated content and entrepreneurship because the policy proposal I propound, namely, that norm entrepreneurs should promote fan fiction and remix practices depends in important part on the normative acceptability of these practices. For example, to the extent that these practices are normatively parallel to file sharing, justifications for using norm entrepreneurship to promote the expansion of these practices will be dubious. As the following fair use analysis will bear out, however, the opposite is the case. Unlike unauthorized use for file-sharing purposes, unauthorized use for fan fiction and remix purposes is often highly creative and even when not necessarily highly creative, nevertheless transformative so as to count as fair use. Such uses, because fair, are hence not illegal and hence justifiable to promote by means of norm entrepreneurship.

# IV. Lessig’s Vision of America: Millions of Kids in Orange Jumpsuits

Lawrence Lessig’s new book, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, is evidently written to some extent for a non-academic audience. Given the subtitle--“Making Art and Commerce Thrive in the Hybrid Economy”--it is reasonable to guess that the intended audience extends beyond academics into the larger business and internet policy crowd. Further evidence of this is found on the back cover of the book’s dust jacket, where the accolades for the book come from non-academics. Two of them note that the book is “surprisingly entertaining,” and two more remark on the book’s polemical nature: “A bright and spark-filled polemic,” and a “provocative and engaging polemic.”[[101]](#footnote-102) It is further noted that Lessig “displays a storyteller’s knack.”[[102]](#footnote-103) One expects to see the book in airport bookstores, which would be a good thing given that it is a recurrent theme among copyright academics that the general public should know more copyright law.[[103]](#footnote-104) Yet, this combination of facts makes the book a challenge--albeit a highly worthwhile one--with regard to serious academic interpretation, as it is both the work of an authority on an important subject and yet it is argued in a narrative, polemical, storytelling, and entertaining style, utilizing textural and rhetorical devices not typically associated with scholarly writing.

Whereas Lessig’s goal is polemical, mine is to provide a more even-handed normative evaluation, even if this means that some polemical goal such as shocking the broad U.S. *intelligencia* into a heightened appreciation of remix is less than optimally served as a result. Neither approach is better, per se. It is best to conceptualize the approaches in terms of a division of labor--rhetoric and polemics have great value in their proper domain.[[104]](#footnote-105) Just as there is value in provoking a response via strong polemical language, there is value in a more neutral approach that ventures into gray areas that shade any complex normative issue. Lessig characterizes himself as a peacemaker in the so-called “copyright wars.”[[105]](#footnote-106) This is a clever bit of rhetoric as who can argue with peace? To his credit, Lessig is more aptly characterized as a warrior in the copyright wars, fighting to make the world safe for free culture. In war, one fights fire with fire. Lessig sees his opponents as the commercial creative content industries. Their goal is profit, not sound public policy. In their pursuit of profit, they are polemical in their characterization of unauthorized users as thieves and criminals.[[106]](#footnote-107) 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 notes, “It’s been a decade since I got myself into the fight against copyright extremism.”[[107]](#footnote-108) Rather than peace, Lessig’s book is a defense of a view that is fairly characterized as extreme in the opposite direction in as much as legalizing remix in effect does away with the derivative works right when amateur works are involved.[[108]](#footnote-109) Given that the field of amateur creative works are experiencing explosive growth, the implication is that under Lessig’s proposed regime, the derivative works right would correlatively experience explosive shrinkage.

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 seek to set out the costs as well as the benefits of the phenomenon under examination--even if from a polemical point of view, 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 that a more subtle policy response than direct legalization of amateur remix begins, then, with an appreciation of the potential for harm that such a solution would engender. Accordingly, the examination of Lessig’s argument below will be undertaken with the eventual goal of evaluating whether the policy proposal he supports would serve or instead undermine the goals of copyright.

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*:

Remixing is criminal.[[109]](#footnote-110)

The rising generation of kids use their computers largely for remixing activities.[[110]](#footnote-111)

*Therefore*, the rising generation of kids are criminals.

*Argument Two*:

The rising generation of kids are criminals.

Making kids criminals is bad for them and for society, as it will lead to disrespect for the law and more criminal activities, and potentially punishment of the sort meted out to file-sharers.[[111]](#footnote-112)

If remixing were legal, our kids would not be criminals and thus would not suffer the harm of being labeled criminals.[[112]](#footnote-113)

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

*Argument Three*:

In addition to turning kids into criminals, laws against remix culture will deter development of institutions of literacy.[[113]](#footnote-114)

Institutions of literacy should not be deterred.[[114]](#footnote-115)

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

*Argument Four*:

Remixes cause no harm.[[115]](#footnote-116)

Creative practices that cause no harm should not be impeded by the law.[[116]](#footnote-117)

Creative practices that create social benefits should be promoted by copyright law.[[117]](#footnote-118)

Remix culture creates social benefits.[[118]](#footnote-119)

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

*Argument Five*:

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.[[119]](#footnote-120)

A non-sensible, unjust, unintended legal result of some other legal goal is unjustified.[[120]](#footnote-121)

*Therefore*, criminalizing remix culture is unjustified.

As the above arguments indicate, the cornerstone premise in Lessig’s overall set of arguments as well as the overall rhetorical posture of the book is that amateur remix cultural activity is, under current law, criminal activity, and that this has harmful consequences both to our nation’s “kids” and society in general.[[121]](#footnote-122) It will be worthwhile picking through Lessig’s premises one at a time. The first premise of Argument One is that “[r]emixing is criminal.”[[122]](#footnote-123) 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.[[123]](#footnote-124) A use that is fair is not an infringement.[[124]](#footnote-125) A use that is not an infringement is *a fortiori* not a criminal infringement.[[125]](#footnote-126) Accordingly, a fundamental premise undergirding Lessig’s argument for the policy proposal that amateur remix be made legal is false.[[126]](#footnote-127) To establish fully 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, on the basis of the following fair use test, I will argue for the opposite conclusion and do so largely on the basis of the results of this fair use test.

# V. The Fair Use of Much Fan Fiction and Remix

Factor One of the fair use test looks to the purpose and character of the use.[[127]](#footnote-128) In short, the key features are that much fan fiction and remix culture are transformative and non-commercial, thus satisfying both sub-factors of Factor One of the fair use test. The variety and creativity of remix culture is truly astounding.[[128]](#footnote-129) Henry Jenkins lists ten different kinds of fan fiction.[[129]](#footnote-130) A common criticism of much such work is that it is of low quality.[[130]](#footnote-131) The issue of the quality of the work is orthogonal to the issue of transformation, however, 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.[[131]](#footnote-132)

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*, can be interpreted as proffering two distinct conceptions of transformativeness--one that looks to whether a new work sufficiently alters the first, and the other as to whether it promotes social welfare.[[132]](#footnote-133) In the case of fan fiction and remix, works will often possess each of these features. Whether a fanwork is sufficiently creative will, of course, turn on the standard 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 for 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.[[133]](#footnote-134) 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 a bare minimum of originality so as to just pass the test for a derivative work would be likely to not count as very transformative in the context of Factor One analysis.[[134]](#footnote-135)

Lessig does not define the term, “remix culture,” in his new book, despite its title. He does, however note that remix works are “transformative.”[[135]](#footnote-136) He also equates remix with literary quotations.[[136]](#footnote-137) There is a tension here as a work would not become transformed simply in virtue of the addition of a quotation from another work.[[137]](#footnote-138) There is ambiguity as well 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.[[138]](#footnote-139) The question is pertinent as there is a movement to develop the concept of transformative use which appears not to limit itself to the legal sense of this word.[[139]](#footnote-140) The definitional expansion of the term “transformative use” beyond its legal origins would be complimentary to Lessig’s larger agenda, which includes by-passing fair use altogether when it comes to the legal treatment of amateur remix.[[140]](#footnote-141)

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 works of remix would pass this test as they both create social welfare and do not create 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 to be a transformative use that is extremely socially valuable.[[141]](#footnote-142)

When one thinks of the welfare created by new works, it is common to think in terms of the welfare that would come through consumption of the works.[[142]](#footnote-143) By this standard, it would appear that a low quality work would have a marginal impact on social welfare. And given that much fan fiction and remix is admitted to be of low quality,[[143]](#footnote-144) the conclusion would seem to be that much fan fiction and remix adds little to social welfare. But the issue is more complicated as the utility impact may pertain not only to fanworks, per se, but to the impact on the people involved. For example, Lessig argues that participating in remix culture promotes personal integrity.[[144]](#footnote-145) Tushnet as well points to the transformation involved as pertaining to the creator and not the work per se, as does Tony Reese.[[145]](#footnote-146) These commentators also point to the social benefit of more diverse creative culture. For Lessig, the argument is that more diversity of remix will better inspire creators.[[146]](#footnote-147) For Tushnet, the fact that fanworks are motivated for non-commercial reasons 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 by monetary rewards.[[147]](#footnote-148)

Note, however, that once one adopts a welfarist approach to evaluating the purpose and character of the use, one must be open to purposes that may be socially deleterious as well. A controversial example would be pornography.[[148]](#footnote-149) 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.[[149]](#footnote-150) These concerns are in accordance with a general view that online pornography is harmful to children.[[150]](#footnote-151)In the rapidly evolving world of digital remixing technology, these authors could expect to see remixed pornographic content drawing from feature-length *Harry Potter* and *Star Wars* films.[[151]](#footnote-152) Thus, while it is fair to conclude that much fan fiction and remix is transformative, both because these works contain new forms of expression, meaning and message and because they are generally productive of social welfare, nevertheless, the logic of a welfarist approach to transformative use forces the conclusion that some works may be transformative, yet arguably productive of disutility.

The second sub-factor of Factor One considers whether the use is commercial on the one hand or non-commercial and perhaps educational on the other hand.[[152]](#footnote-153) As seen earlier in the discussion of the norm against commercial use, writers on fan fiction have frequently heralded the non-commercial nature of fan fiction as one of its core features, and core virtues.[[153]](#footnote-154) The same predominantly non-commercial features pertain to remix culture as well, as least for the present time.[[154]](#footnote-155) As noted, Henry Jenkins has discussed the extent to which creators of remix do indeed sometimes seek commercial gain.[[155]](#footnote-156) Up to this point, however, such efforts have been relatively insignificant for a few reasons: first, due to quality differentials with 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.[[156]](#footnote-157) In addition to being overwhelmingly non-commercial in nature, as noted earlier in the discussion of the first norm, fanworks and remix are plausibly characterized as promoting important educational values.[[157]](#footnote-158)

Because of the dearth of case law involving non-commercial uses, fair use analyses in the cases and commentaries have focused overwhelmingly on the consideration of transformative use. A consequence is that past discussion of putative fair uses of fan fiction and remix has relied too much on comparisons with cases such as *Bridgeport* or the *Rocky* case. In these cases, the use was not found to be fair, but the context was commercial. As a result, these cases fail to provide an apples to apples comparison. 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.[[158]](#footnote-159) 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. As a hypothetical juror, I can say that for me, it would not even be close--there is absolutely no way I would find a child liable for infringement for using a one-second sample of a piece of music in a non-commercial context.[[159]](#footnote-160) Moreover, I would speculate 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 under-appreciated due to a dearth of cases.

Following *Campbell*, courts have noted the inverse relationship between transformative uses and the Factor Four consideration of harm to the market of the unauthorized work--the more transformative, the less likely for there to be market harm because the works are increasingly dissimilar and thus less likely to serve the same market.[[160]](#footnote-161) Note that a parallel case can be made that the more non-commercial a work, 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 sub-factors of Factor One, we see that typical remix is both transformative and non-commercial, and often educational to boot. Given that Factor One is the most important of the four factors, the above Factor One considerations count strongly toward the fair use of works of fan fiction and remix.

With regard to Factor Two, most fan fiction and remix culture draw from unauthorized works that are published, which counts in favor of the putative fair user. Typically, however, these works are creative as opposed to being factual in nature.[[161]](#footnote-162) This counts against fair use.[[162]](#footnote-163) In such instances, when the Factor Two sub-factors point in opposite directions, courts typically find that the factor disfavors fair use.[[163]](#footnote-164) Thus, Factor Two will typically not work in favor of finding fan fiction and remix to be fair uses. Courts, however, have typically characterized Factor Two as the least important of the fair use factors.[[164]](#footnote-165)

With regard to Factor Three, there is no typical case--some fan fiction and remix draws heavily from the underlying works, either quantitatively or qualitatively, or both, while other works draw relatively little from the underlying works and add much that is creative and original. The former category of works will count in favor of the owner while the latter will count in favor of the user, all else being equal. 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.[[165]](#footnote-166) In a well-known case, *Air Pirates*, however, the court found that defendants had taken too much to be justified by the other factors, including the transformative nature of the work, so it cannot be taken for granted that the consideration of transformative use will always trump Factor Three considerations.[[166]](#footnote-167)

Courts and commentators have tended to talk almost exclusively about this tradeoff between Factor One analysis and Factor Three analysis in terms of transformativity of fair use versus the amount and the 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.[[167]](#footnote-168) In the context of amateur remix, the question is a different one because the fact patterns, were they to be litigated, would involve non-commercial uses. In such instances, the Factor One sub-factor of non-commercial use would work together with the transformative element of the use to be set off against the amount and substantiality of the portion used. What this means is that all else being equal, in an amateur remix context, it will require less transformativity than would otherwise be necessary to offset the Factor Three consideration of the amount and substantiality of the portion used, due to the non-commercial nature of the fanwork. In addition, it is reasonable to suppose that the more non-commercial a work, the less likely a court would be to find Factor Three to be a weighty consideration.

There is reason to think 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, people can be predicted to make more full-length copies of unauthorized works as 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 his or 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. But also observe how the opposite is true 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 work, which by hypothesis has commercial value to start with. If one starts with a few characters only 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 possible now 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 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 for example write in an extra character, or take out some foul language, or change some of the words. For example, many older novels and movies use language that by contemporary standards is racist or sexist. Often it is only a few words in a whole book or movie. One can easily imagine fans making such minor changes to complete digital books, then uploading them to video sharing sites that allow for complete copies of large works to be uploaded. The possibilities seem endless. Consider my favorite novelist, Cormac McCarthy. In his Border Trilogy, some of the characters speak in Spanish and the author does not provide translations. Now imagine if someone made a digital copy of the book and changed it only by adding footnotes or parenthetical notes in which the dialog was translated (based on past experience).

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 the amount and substantiality of the portion taken and to market harm. Just as Factor One is tied to Factor Four in that highly transformative works and non-commercial works will tend not to cause market harm, the above discussion highlights the important connection between Factor Three and Factor 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.[[168]](#footnote-169) 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. 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 the market for the original. As the above discussion has indicated, because a significant amount of fan fiction and remixes are transformative and non-commercial, they will not harm the market for the owner’s original work.[[169]](#footnote-170) A more difficult question is whether these works hurt the market for derivative works. Not all possible derivative works markets are protected; rather, only those that are reasonably likely to be exploited by owners are protected.[[170]](#footnote-171) This limitation works in favor of amateur creators, as fanworks and remixes are often idiosyncratic to the particular creator and hence not geared toward a reasonable, commercial market.

There is a second point to note that may as well 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.[[171]](#footnote-172) This characterization will be true for many works built on top of the original works such that the original works, or elements of them, such as key characters, remain recognizable and often continue to remain a large presence in the new work. These sorts of works are plausibly characterized as transforming, recasting, or adapting the original and thus may put the creator in the position of being alleged to be an infringer of the owner’s derivative works right. In other instances, however, it is not apt to characterize the new work as a “derivative” of the original. For example, music mash-ups are an important category of remix. Mash-up artists often use large numbers of unauthorized works in the process of creating their music. For example, the remixer behind GirlTalk uses tens of unauthorized snippets. It cannot plausibly be claimed that the new work is a recasting, adaptation, or transformation of all or one of these works in particular. This feature should work to the benefit of remix when it comes to fair use as fewer of these works can colorably be alleged to violate the derivative works right because fewer of these works are derivative works.

Having considered each of the four factors of the fair use test, the next step is to balance the four factors taken as a whole. We saw that much fan fiction and remix culture will win on 3.5 out of four of the fair use factors, including the two that courts consider most important, the first and fourth factors. Generally speaking, then, fan fiction and remix are fair uses. To be clear, my claim is that these uses are fair presently, and not just in some counterfactual world in which a court actually performs a fair use test. I state this in the Holmesian sense that law is the best prediction of what judges will do. 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 are fair uses, however. 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 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, 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 non-commercial nature of the fanwork). We see then that while there may be a vast number of fair uses, there may be a not insignificant 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 is 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 “[r]emixing is criminal.”[[172]](#footnote-173) 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 of 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.

Lessig does make some remarks about fair use in passing, from which it is clear that he takes a dim view as to the value 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 [Read/Write] use violates copyright law. RW culture is thus presumptively illegal.”[[173]](#footnote-174) 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.”

This argument is a non sequitur. Users are fairly characterized as infringers only when their use, if evaluated by a court, would fail to pass the fair use test. What is true is that 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. However, this 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 involving 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 to provide a better indication of the legal status of various uses.[[174]](#footnote-175) Possible-world semantics allows for the expression of the idea that there is 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 of interest, overbearing commercial owners harass fair users such that for practical reasons 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 effects of previous actions taken by owners against fair users.[[175]](#footnote-176) 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 not 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.

As noted, Lessig claims that remix is “presumptively illegal.”[[176]](#footnote-177) However, the remarks he provides fail to explain what this claim entails. The passive tense of the statement begs the question as to whom is presuming the illegality. If he is referring to those worlds where owners intimidate fair users, it is not the case that there is any 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. In saying this, I do not mean to suggest that this would necessarily preclude them 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.

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 that therefore the party no longer has this 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.,[[177]](#footnote-178) a rare case involving amateur remix. This case gained a good deal of media attention because it was yet another instance in which the commercial copyright industry sued a particularly sympathetic plaintiff for an act that, while technically a colorable instance of infringement, nevertheless appears to the common person to be a foolish abuse of law. The facts of the case, in short, are that an eighteen-month-old child spontaneously began dancing to a Prince song and the mother recorded it on a video and posted it on YouTube.[[178]](#footnote-179) Universal filed a takedown notice pursuant to the DMCA, the mother objected, and the Electric Frontier Foundation took the case pro bono after the situation gained attention.[[179]](#footnote-180) Lessig begins the Introduction to his book with the facts of this case,[[180]](#footnote-181) contrasting it with what he would call a “fair and justified” use of the law, one in which Universal might for example demand the takedown of a “new television series with high-priced ads.”[[181]](#footnote-182) Lessig argues that, in the *Lenz* case, the use of the law is neither fair nor justified because the Prince song on 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 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.[[182]](#footnote-183)

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 clams like this in the pages that follow.”[[183]](#footnote-184) Instead, Lessig goes to the 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?”[[184]](#footnote-185)

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) as the real meaning of the case is precisely the opposite of that which is implied by the manner in which the case is represented by Lessig. Lenz disputed the infringement claim, asserting fair use, and then she sued Universal for submitting a takedown request to YouTube without first making a good faith effort to determine whether the use was fair--and hence authorized under the law.[[185]](#footnote-186) Lenz won the case, 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 their work was used in a remix. In addition, an owner filing a takedown notice must represent that it has a good faith belief that the use is not a fair use.[[186]](#footnote-187) 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 due to 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.[[187]](#footnote-188) 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,[[188]](#footnote-189) 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 legal, however, as creators will still need to engage with 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.[[189]](#footnote-190) An example of such a use would be the movie *Titanic* without the scene of Kate Winslett topless. Were the owner unable to sue for violations of its right to derivative works because amateur remix was legal, the owner would sue under the theory that this 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.[[190]](#footnote-191) Consider a paradigm case in copyright law, Steinberg v. Columbia Pictures Industries, Inc., as an example.[[191]](#footnote-192) In this case, the defendant produced a poster to promote the film *Moscow on the Hudson*, that the court held was an unauthorized use of plaintiff’s well-known *New Yorker* cover.[[192]](#footnote-193) While the poster was clearly a transformative-derivative work, it was also successfully alleged to involve elements of exact copying.[[193]](#footnote-194) Thus, even if Lessig gets his desired statutory change, ordinary users will still need to be able to distinguish remixes that involve making elicit 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.[[194]](#footnote-195) In other words, Lessig must acknowledge that producers of remix culture will not be able to avoid fair use because any putative user has to be in a position 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, “[r]emixing is criminal,”[[195]](#footnote-196) is false. Lessig might retort that the truth of my argument does not gainsay the fact that some kids are criminal by virtue of their activities, namely, those that create remixes that are not fair uses. Accordingly, we can substitute for Premise One of Argument Two the assertion that “some” kids are criminals in light of their remix activities.[[196]](#footnote-197) This would affect the conclusion to Argument Two in that the word “some” would have to be inserted in front of “kids” in the conclusion as well. This would still be an important conclusion if true. It is not true, however, because the second premise to Argument Two is false. The second premise claims that because remix is criminal, this will lead to disrespect for the law and more criminal activity.[[197]](#footnote-198) 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 or not 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, which is that such a rule is so counterintuitive to common sense that one who believed the law generally made sense would be inclined to doubt that the rule could be such.

The fact that such a rule is so equitably counterintuitive that one would not expect it to exist, is a fact that cuts against the grain of Lessig’s larger argument. Consistent with the considerations already touched on above, if people are not told that a certain behavior is criminal, and not charged with it even following civil lawsuits, and if prosecutors responsible for enforcing crimes never take such referrals and prosecute, then the claim that kids are suffering the negative effects of being labeled as criminals cannot be true. Not only are remix kids not labeled as criminals (except by Lessig) but they receive information that would lead them to reasonably conclude the opposite, were they actually to think about the issue. 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 to some extent or another remix from commercial sources. From this fact, it would be natural to conclude, if only implicitly, that such videos are not criminal, as these sites are not on the fringes of mainstream culture—quite the opposite--and yet no one is shutting down YouTube or telling kids 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. [[198]](#footnote-199) 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 kids into greater contact with criminals. Thus, we can conclude that the second premise of Argument Two is false, and so the conclusion is left unsupported.

The fair use of significant amounts of remix works also affects Premise One of Argument Three.[[199]](#footnote-200) 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 a conclusory fashion, apparently from the implicit premises that remix is criminal and that schools, by their nature, do not teach criminal activities.[[200]](#footnote-201)

Lessig’s argument is faulty for both conceptual and empirical reasons. Consider the most compelling conceptual reason first. The skills that one needs to be a criminal remixer are exactly the same as those 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 after all. Obviously, art and design schools would by their nature consider it part of their core mission to teach students the skills they need to qualify for employment. and 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 digitally 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 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.[[201]](#footnote-202) Thus, it should be no surprise that these arguments rather than Lessig’s argument are borne out by the facts on the ground, where remix is widely taught.[[202]](#footnote-203)

Argument Four contains four premises. The only one I contest is the first premise, that “[r]emixes cause no harm.”[[203]](#footnote-204) While Premise One is false, Premise Two appears unproblematic. It is that “[c]reative practices that cause no harm should not be impeded by the law.”[[204]](#footnote-205) This premise is unobjectionable for 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.[[205]](#footnote-206) Nor is Premise Three objectionable. It reads: “[c]reative practices that create social benefits should be promoted by copyright law.”[[206]](#footnote-207) This follows from a basic consequentialist approach, which at its core values welfare-enhancing outcomes. Nor can Premise Four be plausibly denied. It contends that, “Remix culture creates social benefits.”[[207]](#footnote-208) The truth of this claim has been seen in passing throughout the following discussion. Lessig wishes to draw the conclusion that, “Therefore, remix cultural practices should not be impeded but instead supported by legal rules.”

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 in not an unalloyed good such that policy issues never arise or that tradeoffs never need to be made regarding its regulation. As earlier discussion indicated, I as well 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 a fair use, not all is.

The clearest type of harm for which I predict there would be a significant degree of consensus is the harm to the exclusive right of copyright that would be possible in a world in which it would be legal to, for example, 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.”[[208]](#footnote-209)

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 original” 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, but it is a likely scenario if we move to a regime of the sort Lessig proffers in which amateur remix is legal.

Needless to say, it would be open to 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 for engaging in the argument 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, whereas Lessig assumes in Premise One of Argument Four that “[r]emixes cause no harm,” we see that while the issue is complicated and merits a more comprehensive discussion than can be provided here, on first take, it is very plausible that at least some types of significant harms would plausibly 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 better 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 “[t]here 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.” Premise Two is implicit and uncontroversial: “A non-sensible, unjust, unintended legal result of some other legal goal is unjustified;” leading to the conclusion that, “[t]herefore, criminalizing remix culture is unjustified.” 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 that amateur remix works not be 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 in principle punishing innocent people if the utility calculation in favor of doing so is compelling.[[209]](#footnote-210) In the law and economic literature on punishment, it is axiomatic that the level of punishment may vary as a result of such things as the likelihood of detection.[[210]](#footnote-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 end up with sanctions similar to those that the proportionality principle would produce. The greater the crime, by definition, the more net disutility that is created. Other things equal, the greater the crime, the greater the amount of resources that are justified to deter behavior of this sort. 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 non-consequentialist thinking about criminal punishment, must be applied in the present context. The proportionality principle demands that the punishment must be proportional to the crime.[[211]](#footnote-212) In fact, one can colorably argue that not only would a criminal sanction be out of proportion with the nature of the wrong in a typical remix case (assuming such a case is even a wrong at all), but that it would be extraordinarily out of proportion. Perhaps not surprising, then, criminal sanctions are seemingly never applied in cases involving the putatively infringing actions of remixing amateurs.[[212]](#footnote-213) Nevertheless, even the possibility of criminal sanctions in such cases is offensive to the proportionality principle.[[213]](#footnote-214)

The existence of criminal sanctions here is a reflection of the fact that historically copyright infringement and the enforcement of rules against it have arisen in the context of commercial use.[[214]](#footnote-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. [[215]](#footnote-216) In addition, the primary concern of copyright law has historically been piracy of copies, as these present a greater danger of market harm to owners because the exact copies are much more likely to supersede the originals than are works of remix.[[216]](#footnote-217) Thus, it is plausible to argue as a matter of legal history that criminal sanctions were never really intended for amateurs.[[217]](#footnote-218)

The above discussion has examined Lessig’s complex set of arguments all leading to 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, and thus there will be no stigmatizing of a whole generation as criminals. Nor will institutions of learning suffer. Thus, Lessig has not provided 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 talked about 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 referred to by such terms as a “safety value” for copyright law.[[218]](#footnote-219) And while this positive characterization is merited, we must not lose sight of the fact that the fair use test is like one of those visual tests in which one can see a recognizable image both by looking at the black image within the 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 by logic committed 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 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.

# VI. 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 a behavior or activity of a certain sort. This part will highlight and develop an important yet under-appreciated 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 Part 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.[[219]](#footnote-220) As noted earlier, this important concern begins with 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 the fairness and hence legality of these uses. 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.[[220]](#footnote-221) While costs borne by owners of commercial content have generally been downplayed, the fact is that such costs are real and not insignificant. This point is made well by Viacom in its lawsuit against YouTube.[[221]](#footnote-222) The general attitude among commentators is to dismiss the importance of these costs, seemingly for the reason that we should not worry about this problem faced by commercial owners when it pales in comparison to the costs owners unfairly levy on fair users. These costs seem of an ilk with the sorts of costs that are sometimes an embarrassment for the law and economic 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.[[222]](#footnote-223) Similarly, 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 detection of unauthorized uses of owners’ works and elimination of those uses from the public sphere.[[223]](#footnote-224)

Notice the virtuous circle that comes with increased participation by everyday creators. There is a direct relationship between the amount 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 others’ participation, it marginally raises the cost to commercial owners because of the attendant increase in monitoring costs. This gives the norm among users the strategic structure of a “coordination norm,” and in particular, one possessing a “positive coordination effect.”[[224]](#footnote-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 the cases remain de facto free and fair. This is the main explanation for the explosion of unauthorized content available on sites such as YouTube: it is more costly for owners to remove the content and ensure it remains unavailable than it is beneficial.[[225]](#footnote-226)

This impact on the cost-benefit calculus and resulting behavior of commercial owners is facilitated by the structure of the DMCA.[[226]](#footnote-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 they must incur in order to protect their works from unauthorized use,[[227]](#footnote-228) YouTube can plausibly claim that Congress contemplated precisely such an arrangement when it enacted the DMCA.[[228]](#footnote-229)

This regulatory ecosystem depends on the DMCA functioning to protect YouTube from the sort of indirect infringer liability that plagued earlier online creative content intermediaries such as Napster, Aimster, and Grokster.[[229]](#footnote-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 it has over commercial owners’ behavior over time simply by expanding the volume of remix activity.[[230]](#footnote-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 functioning of the DMCA and both the norm of permissible remix and 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 takedown provisions allocate costs creates what is in effect a default that favors the ability to upload and share remix. Remix is favored because unless an owner takes positive steps to seek 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 the use as unfair. For example, as discussed earlier, it is plausible that remix 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 v. Universal* 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.[[231]](#footnote-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 access to works in the shared domain as owners at the margin cease to actively enforce their claimed rights.

# VII. Conclusion

An important and little appreciated fact is that fair use doctrine creates an important 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 fair use doctrine. We saw that the model whereby this is occurring, and 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.[[232]](#footnote-233) This cooperation has allowed for 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 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 non-commercialization 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 Lessig suggests 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 due to 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. Clearly 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 kids are criminals, but as we saw, the kids are alright; they are creating as never before and social norms are an important part of why they are doing so. In addition, we saw that there is the potential for norm entrepreneurs to promote popular participation in fan fiction and remix such that it becomes more expensive to deter such activities, such that they become more prevalent still.

1. Adam Leipzig, *How to Sell a Movie (or Fail) in Four Hours*, NY Times, Nov. 13, 2005 (“A typical studio movie costs nearly $100 million: an average of $63.6 million to make and $34.4 million to market.”) [↑](#footnote-ref-2)
2. *See,* e.g., Arian Cohen, *A Publishing Company*, New York Magazine, Jun. 4, 2007 (““Many books are unprofitable,” says CEO Peter Olson. Fifteen to twenty best sellers at a time and a huge volume of steadily selling older titles support Random House, a unit of German media giant Bertelsmann. Every week, the country’s biggest trade publisher releases 67 new books, but it’s the the 33,000-book backlist (Ian McEwan’s*Atonement,* for example) that supplies 80 percent of its profit. Random House editors pay advances to authors of as much as $10 million (it helps to have the last name “Clinton”), and as little as $7,000. “) [↑](#footnote-ref-3)
3. Tim Ryan, *Lost Opportunity*, Honolulu Star-Bulletin, Jan. 26, 2005(“"Lost," with its ensemble cast, costly sound stage, office and storage space and crew expenses, arguably is the most expensive series on television, costing $2.5 million to $2.8 million an episode, several sources said.”). [↑](#footnote-ref-4)
4. Seb Chan, Time Spent on Facebook, Oct. 10, 2007, <http://www.powerhousemuseum.com/dmsblog/index.php/2007/10/10/time-spent-on-facebook/> (“What is interesting about their brief analysis, especially when combined with other available analysis of Facebook application popularity, is that the predominant behaviour is very unsurprisingly browsing friend profiles - with almost 4 times the amount of time spent and 50% more visitors than using the Group or even Facebook applications.”). [↑](#footnote-ref-5)
5. *See Generally*, CHRIS ANDERSON, THE LONG TAIL. [↑](#footnote-ref-6)
6. Brian Stelter, *YouTube Videos Pull in Real Money*, Dec. 10, 2008, (“The [YouTube] site records 10 times the video views as any other video-sharing Web site in the United States, yet it has proven to be hard for Google to profit from, because a vast majority of the videos are posted by anonymous users who may or may not own the copyrights to the content they upload. While YouTube [has halted](http://www.nytimes.com/2008/08/16/technology/16tube.html) much of the illegal video sharing on the site, it remains wary of placing advertisements against content without explicit permission from the owners. As a result, [only about 3 percent](http://www.nytimes.com/2008/08/16/technology/16tube.html) of the videos on the site are supported by advertising.”); Alexia, Tsotsis, *Stealing MySpace: An Interview With Julia Angwin at SXSW*, L.A. Weekly, Mar. 18, 2009, <http://blogs.laweekly.com/style_council/sxsw/stealing-myspace-julia-angwin/> (author of *Stealing MySpace* remarks: “MySpace is not making that much money. They're profitable but it's thin, and the only reason they make money at all because they have this gigantic Google deal which is going to expire next year. I don't know if they're going to make any money after that.“). [↑](#footnote-ref-7)
7. Brad Stone and Brian Stelter, *Facebook Withdraws Changes in Data Use*, NY Times, Feb. 18, 2009 (“After three days of pressure from angry users and the threat of a formal legal complaint by a coalition of consumer advocacy groups, the company reversed changes to its contract with users that had appeared to give it perpetual ownership of their contributions to the service.”). [↑](#footnote-ref-8)
8. Yochai Benkler, *Coase’s Penguin, or, Linux and* The Nature of the Firm, 112 Yale L.J. 369, 439-44 (2002). Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy 231-48 (2008) [hereinafter Lessig, Remix]. [↑](#footnote-ref-9)
9. See *infra* text surrounding notes \_\_\_\_ [↑](#footnote-ref-10)
10. Yochai Benkler, *Coase’s Penguin, or, Linux and* The Nature of the Firm, 112 Yale L.J. at 440 (2002). [↑](#footnote-ref-11)
11. [cite/quote Hetcher, JETlaw article, 2009 (forthcoming)] [↑](#footnote-ref-12)
12. Bill Carter*, Thanks to YOuTube Fans, ‘Nobody’s Watching’ May Return From the Dead,* NY Times, July 3, 2006 (telling “the story of "viral video," which is what YouTube is all about. People post a snippet of self-made video, and word spreads about how funny, shocking, stupid or embarrassing it is.”). [↑](#footnote-ref-13)
13. *Id.*  [↑](#footnote-ref-14)
14. YouTube, Videos, <http://www.youtube.com/browse?s=mp> (The two main ways to browse videos on YouTube are by “Most Popular” and “Most Viewed.” These videos are therefore more likely to receive additional views and continue to be ranked highly. [↑](#footnote-ref-15)
15. *See infra note 76*, Henry Jenkins, Convergence Culture: Where Old and New Media Collide 188 (2006) [hereinafter Jenkins, Convergence Culture]. [↑](#footnote-ref-16)
16. *See,* First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial at 19, Viacom Int’l Inc. v. YouTube, Inc., No. 1:07-cv-02103 (S.D.N.Y. April 24, 2008). [↑](#footnote-ref-17)
17. *See* Matthew Mirapaul, *Why Just Listen to Pop When You Can Make 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.* [↑](#footnote-ref-18)
18. 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.”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*]. Tushnet’s definition does not mention that the works must be created by fans. Thus, the definition would not disallow the work of anti-fans such as Alice Randall, 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 *The Wind Done Gone* was entitled to the fair use doctrine). [↑](#footnote-ref-19)
19. Media scholar Henry Jenkins refers to “fan videos” in his early discussion of the subject, though the more common term now is the shortened version, “fanvids.” *See* Henry Jenkins, Textual Poachers: Television Fans & Participatory Culture 223-49 (1992) [hereinafter Jenkins, Textual Poachers] (devoting a chapter to “fan music video and the poetics of poaching”). *See generally* Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use,* 25 Cardozo Arts & Ent. L.J. 647, 650 (2007) (discussing the history of fanvids on the internet); *see also* Posting of Henry Jenkins to Confessions of an Aca-Fan, http://www.henryjenkins.org/2006/09/how\_to\_watch\_a\_fanvid.html (Sept. 18, 2006, 00:00 EST). [↑](#footnote-ref-20)
20. *See* Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy 72-74 (2008) (providing example of remix of sound bites of George W. Bush and Tony Blair meant to be highly critical). [↑](#footnote-ref-21)
21. *See* Matthew Mirapaul, *Why Just Listen to Pop When You Can Make 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.* [↑](#footnote-ref-22)
22. 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*]. Tushnet’s definition does not mention that the works must be created by fans. Thus, the definition would not disallow the work of anti-fans such as Alice Randall, 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 *The Wind Done Gone* was entitled to the fair use doctrine). [↑](#footnote-ref-23)
23. *See, e.g.*, Henry Jenkins, Convergence Culture: Where Old and New Media Collide 188 (2006) (“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 makes this claim but prior to *Suntrust*. Tushnet, *Legal Fictions*, *supra* at 664 (“Case law does not address fair use in the context of fan fiction or anything reasonably similar to it.”). [↑](#footnote-ref-24)
24. Pete Rojas, *Bootleg Culture*, Salon, Aug. 1, 2002, available at http://archive.salon.com/tech/feature/2002/08/01/bootlegs/. [↑](#footnote-ref-25)
25. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006) (concluding that Koons’ incorporation of a photograph in a collage painting constituted fair use); *see also* Negativland, *Two Relationships to a Cultural Public Domain*, 66 Law & Contemp. Probs. 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 . . . .”). “Remix” has been defined in the following terms: “a society which allows and encourages derivative works.” Remix Syndicate, http://remixsyndicate.wordpress.com/written/ (last visited Mar. 01, 2009). A related term Lessig has used previously is, “cut and paste” creativity. Lawrence Lessig, Free Culture 105 (2004). [↑](#footnote-ref-26)
26. Steven A. Hetcher, Norms in a Wired World (2004) [hereinafter Hetcher, Norms] (developing a philosophical conception of norms and applying it to tort law) [↑](#footnote-ref-27)
27. *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 then discussing potential problems with this model). [↑](#footnote-ref-28)
28. *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). For a discussion questioning the merits of norms (aka customs) in an intellectual property context, with respect to the manner of their formation, 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-ref-29)
29. 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*, 70 Law & Contemp. Prob. 135, 155-60 (2007) [hereinafter Tushnet, *Payment in Credit*] (discussing the norms around 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). [↑](#footnote-ref-30)
30. *See* Robert Ellickson, Order Without Law: How Neighbors Settle Disputes 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 denies the role of substantive norms in guiding behavior). Other scholars agreed with Professor Ellickson’ proposition that legal theory consistently overemphasizes the role of law. *See* 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.”). [↑](#footnote-ref-31)
31. *See, e.g.*, Ellickson, *supra* note , at 141-42 (discussing the important role played by norms in regulating property entitlements in the Old West in absence of effective legal regime); Hetcher, Norms, *supra* note , at 243 (2004) [hereinafter] (discussing the role of norms in regulating website privacy in early years in the relative absence of formal rules). [↑](#footnote-ref-32)
32. Ellickson, *supra* note , 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-ref-33)
33. 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. [↑](#footnote-ref-34)
34. Chris Woodford, 2 The Internet: A Historical Encyclopedia 33 (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: Unresolved Problems: The Fight Over Napster* (Fox News television broadcast July 21, 2000), transcript available at LEXIS, News Library, transcript # 072103cb.256 (facilitating a debate between John Perry Barlow from the Electronic Frontier Foundation and Howard King, attorney for Metallica in the Napster lawsuit over the potential application of fair use to file sharing). [↑](#footnote-ref-35)
35. *See* MGM 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 copyright 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). [↑](#footnote-ref-36)
36. *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, as was the case in the initial years of Napster, that file sharing is not a priori illegal and that it may be justifiable to engage in file sharing until a court or statute explicitly states otherwise.”). [↑](#footnote-ref-37)
37. *See* Steven A. Hetcher, *The Music Industry’s Failed Attempt to Influence File Sharing Norms*, 7 Vand. J. Ent. & Tech. L. 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.”). [↑](#footnote-ref-38)
38. *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 (Sept. 28, 2000) *available at* http://www.pewinternet.org/pdfs/PIP\_Online\_Music\_Report2.pdf (finding that 78% of music downloaders and 53% of all Internet users do not consider file sharing to be stealing). [↑](#footnote-ref-39)
39. *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); 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). [↑](#footnote-ref-40)
40. *See* Hetcher, *supra* note 17*; See* also Gaia Bernstein, *When New Technologies Are Still New: Windows of Opportunity for Privacy Protection*, 57 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-ref-41)
41. *See* Hetcher, Norms, *supra* note , at 24-36, 306 (critiquing linguistic views of norms and providing an extensive definition). [↑](#footnote-ref-42)
42. *Id.* at Chapter Two, “Rational Norms”. [↑](#footnote-ref-43)
43. *Id.* at 39. [↑](#footnote-ref-44)
44. *Id.* at 28. [↑](#footnote-ref-45)
45. *Id.* at 39. [↑](#footnote-ref-46)
46. *See* Hetcher, Norms, *supra* note , at 46 (providing game theoretic matrices and examples to illustrate the point). [↑](#footnote-ref-47)
47. *See* Steven A. Hetcher, *The Emergence of Website Privacy Norms*, 7 Mich. Telecom. & 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). [↑](#footnote-ref-48)
48. *See* Danah Boyd, *Why Youth (Heart) Social Networking Sites: The Role of Networked Publics in Teenage Social Life*, in MacArthur Foundation Series on Digital Learning--Youth, Identity, and Digital Media Volume (David Buckingham, ed. 2007), *available at* [*http://www.danah.org/papers/WhyYouthHeart.pdf*](http://www.danah.org/papers/WhyYouthHeart.pdf) (noting that teenagers join social networking sites because their friends are on them) [↑](#footnote-ref-49)
49. *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.”). [↑](#footnote-ref-50)
50. *See* Hetcher, Norms, *supra* note , at 28 (noting that the information-cost saving feature of some norms explains why prescriptivity is not always necessary to enforce them) [↑](#footnote-ref-51)
51. *See* *id.* at 191-92 (noting the tendency to converge towards social practices in the absence of full information). [↑](#footnote-ref-52)
52. *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 or not). [↑](#footnote-ref-53)
53. Hetcher, Norms, *supra* note at 298 (“When 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.”). [↑](#footnote-ref-54)
54. *See generally* Edward Lee, *Warming Up to User–Generated Content* 2008 U. Ill. L. Rev. 1459 (2008) (discussing how the public becomes emboldened to violate copyright law based on social norms in Web 2.0); Rebecca Tushnet, *User-Generated Discontent: Transformation In Practice*, 31 Colum. L. Rev. 101 (noting that many people feel that fan fiction does not hurt, and may even help the financial well being of the copyright owner). [↑](#footnote-ref-55)
55. *See* Jenkins, Convergence Culture, *supra* note , at 10, 152 (discussing Lucalsfilm’s offer of free web space to *Star Wars* fans). *See generally* Lee, *supra* note , at 1486-88 (noting the phenomenon of hedging, wherein commercial copyright owners tacitly encourage users to create derivative works which can help market the main product, enforcing the license only when infringement is hurtful). [↑](#footnote-ref-56)
56. Tushnet, *Payment in Credit*, *supra* note , 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.”). [↑](#footnote-ref-57)
57. *See* Jenkins, Convergence Culture, *supra* note , 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 Warner Brothers film studio. The highlight of this sequence of events came when Heather debated a lawyer for Warner Brothers on the *Chris Matthews Show*, a television program devoted to current affairs and political punditry. *Id.* at 187. [↑](#footnote-ref-58)
58. See *id.* at 191 (noting “fans’ own sense of moral ‘ownership’”). [↑](#footnote-ref-59)
59. Tushnet, *Legal Fictions*, *supra* note , at 657 n.25 (quoting from a Jenkins interview). [↑](#footnote-ref-60)
60. Jenkins, Textual Poachers, *supra* note , at 156 (“Fans, as one long-time Trekker explained, ‘treat the program like silly putty,’ stretching its boundaries to incorporate their concerns, remolding its characters to better suit their desires.”). [↑](#footnote-ref-61)
61. *See generally* Nicholas Blomley, *The Borrowed View: Privacy, Propriety, and the Entanglements of Property*, 30 Law & Soc. Inquiry 617 (2005) (interpreting a survey of gardeners in the context of Lockean property principles). [↑](#footnote-ref-62)
62. Conversely, the less creative matter is added, the more the owner of the source work will feel like the victim of theft. [↑](#footnote-ref-63)
63. Apple ran an iTunes advertisement in 2001 containing the slogan, “Rip. Mix. Burn.” The television commercial ended with the words, “It’s your music. Burn it on a Mac.” The company’s press releases encourage users to use the iMac to create custom music CDs. *See* Press Release, Apple, *Apple Unveils New iMacs with CD-RW Drives and iTunes Software: Rip, Mix, Burn Your Own Custom Music CDs*, Press Release, (Feb. 22, 2001)*,* http://www.apple.com/pr/library/2001/feb/22imac.html/. [↑](#footnote-ref-64)
64. The RIAA website, in a section entitled “Piracy: Online and On the Street,” outlines a variety of actions that it considers illegal but does not mention remixes or mashups or any like activity. Recording Industry Association of America, http://www.riaa.com/physicalpiracy.php (last visited Mar. 2, 2009); The MPAA website, in a section entitled “Internet Piracy,” also sets out various actions that constitute piracy but do not discuss remixes or mashups. Motion Picture Association of America, http://www.mpaa.org/piracy\_internet.asp (last visited Mar. 2, 2009). [↑](#footnote-ref-65)
65. Hetcher, *Music Industry*, *supra* note , at 23 (quoting the president of the National Academy of Recording Arts and Sciences as saying that they need to sensitize the public to the fact that “the artists, the studios, the engineers--the entire food chain that’s involved in this--is harmed.”). [↑](#footnote-ref-66)
66. For example, *Star Trek* fan fiction writers in the early 60s and 70s were organized the first *Star Trek* conventions, due to their 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 the 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* Fransesca 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). [↑](#footnote-ref-67)
67. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (describing the appropriate standard) [↑](#footnote-ref-68)
68. *See, e.g.*, Lawrence Lessig, Code Version 2.0 340 (2006) (defining social norms as constraints imposed through “many slight and sometimes forceful sanctions that members of a community impose on each other.”). [↑](#footnote-ref-69)
69. Hetcher, Norms, *supra* note , at 2-3 (describing coordination and epistemic norms). [↑](#footnote-ref-70)
70. Hetcher, Website Privacy Norms, supra note , 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). [↑](#footnote-ref-71)
71. Boyd, *supra* note , at 1. [↑](#footnote-ref-72)
72. *See generally* Jenkins, Textual Poachers, *supra* note , 153-84 (describing fan fiction communities) [↑](#footnote-ref-73)
73. *See* Fiesler, *supra* note , 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 Pods & Blogs, FanLib and Fan Fiction, http://www.bbc.co.uk/blogs/podsandblogs/2007/05/fanlib\_and\_fan\_fiction.shtml (May 23, 2007, 10:08) (“There were many concerns voiced by fanfic writers but a key issue seems to be that a commercial presence in fanfic will draw attention to a space that has operated as a close-knit community"). [↑](#footnote-ref-74)
74. Fiesler, *supra* note , at 749-52. [↑](#footnote-ref-75)
75. *See* *id.*, at 751 (quoting an irate fan as noting the legal “trouble that . . . [could be brought] down on the fanfic ‘industry’” if a writer attempts to profit from her work); Posting of Henry Jenkins to Confessions of an Aca/Fan, http://www.henryjenkins.org/2007/05/transforming\_fan\_culture\_into.html (May 22, 2007 09:27) (describing the uproar in the fan community when a commercial website attempted to profit from fan fiction). [↑](#footnote-ref-76)
76. Jenkins provides a good deal of support for the claim that many amateur creators would like to commercialize their works. He notes that “[h]istorically, fan fiction ha[s] been 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 the various franchises.” Jenkins, Convergence Culture, *supra* note , 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 to use it as a vehicle for getting producers and agents to notice them. *Id.* at 143. And as a specific example described elsewhere, one writer who was in the middle of writing a fan fiction novel attempted to profit from it by asking 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 , at 751. [↑](#footnote-ref-77)
77. Ellickson, *supra* note , at 184-206 (discussing the emergence of cattle-trespass norms in the Old West, contract norms among close-knit Wisconsin business men, and whaling norms which had the effect of reducing the need for litigation). [↑](#footnote-ref-78)
78. *Id.* Note that the norm against commercial use is only adhered to by many in the group for the instrumental reason that they think 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 , at 750. 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. [↑](#footnote-ref-79)
79. *See generally* User Generated Content Principles, http://www.ugcprinciples.com/ (last visited Mar. 02, 2009) (setting forth a list of principles for websites providing user-uploaded audio and video content meant to encourage creativity while thwarting infringement). [↑](#footnote-ref-80)
80. *See* Press Release, Internet and Media Industry Leaders Principles to Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), 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) [↑](#footnote-ref-81)
81. As Jenkins relates, Lucas Arts varied its stance on fanworks, but has over time become more tolerant. Jenkins, Convergence Culture, *supra* note , at 148-59. [↑](#footnote-ref-82)
82. *Id.* at 185-88 (describing how the intense reaction led the senior vice president of Warner Bros. Family Entertainment to admit the legal response was “naïve” and develop a more collaborative policy similar to that of Lucasfilm.) [↑](#footnote-ref-83)
83. Complaint at 3, Warner Bros. Entn’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 07 Civ. 9667) [↑](#footnote-ref-84)
84. 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 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].” Gaiman further stated that his attitude is not “particularly uncommon among authors.” Neil Gaiman’s Journal, http://journal.neilgaiman.com/2004/06/how-to-survive-collaboration.asp (June 3, 2004 21:57). *See also* Malene Arpe, *Television’s Afterlife*, The Toronto Star, May 22, 2004, at J01 (quoting Joss Whedon, creator of Buffy the Vampire Slayer and Firefly as saying, “I love it. 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.”). George Lucas famously gave fan fiction writers permission to publish stories as long as they were non-erotic and not for profit. Jenkins, Convergence Culture, *supra* note , at 150. Even J.K. Rowling has publicly said that fans may write fan fiction, though she has noted that she doesn’t read it and that it makes her somewhat uncomfortable. 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 works . . . .”). [↑](#footnote-ref-85)
85. *See, e.g.*, Jenkins, Convergence Culture, *supra* note , at 151-52 (describing Viacom’s crackdown on fanzines); *id.* at 185-88 (describing Warner’s attempts to shut down *Harry Potter* fansites); Authors/Publishers Who Do Not Allow Fan Fiction, Media Miner, http://www.mediaminer.org/blog/index.php?\archives/23-AuthorsPublishers-Who-Do-Not-Allow-Fan-Fiction.html (last visited Mar. 2, 2009) (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"). [↑](#footnote-ref-86)
86. Lessig downplays the tension between commercial and non-commercial use for purposes of fair use analysis. This may serve his larger strategic purposes of minimizing the importance of any distinction “between text on one hand and film/music images on the other.” Lessig, Remix, *supra* note , at 55. He argues, that however “sensible [the commercial-non commercial] . . . distinction might seem, it is in fact not how the rules are being enforced just now . . . .” Lessig proceeds by citing the example of Disney complaining about kids at a kindergarten painting Mickey on a wall. *Id.* Lessig discusses how jazz musicians tolerated practice of improvising on works of others and argues that remix artists should be able to “commercialize” their “creativity.” *See* *id.* at 105, 255. [↑](#footnote-ref-87)
87. Discussion has tended to focus on remix on the internet 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 it controls. Tim Wu, *Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That’s Destroying Hip-Hop*, Slate, Nov. 16, 2006, available at http://www.slate.com/id/2153961/. [↑](#footnote-ref-88)
88. First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial at 19, Viacom Int’l Inc. v. YouTube, Inc., No. 1:07-cv-02103 (S.D.N.Y. April 24, 2008). *See also* Linda Rosencrance, *Prince Fights YouTube, eBay over Copyrighted Content*, MacWorld, Sept. 19, 2007, *available at* http://www.macworld.com/article/60113/2007/09/princeyoutube.html (quoting Prince’s lawyer, “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.”). [↑](#footnote-ref-89)
89. Of course, this is not to say that Viacom does not allege damages. *See* First Amended Complaint, *supra* note , at 9. (“Additional massive damages to plaintiffs and others have been caused by Google's preservation and backing of YouTube's infringing business model.”). [↑](#footnote-ref-90)
90. *See e.g.*, Coppa, *supra* note , at 45-48 (discussing the early *Star Trek* fan community); Jenkins, Convergence Culture, *supra* note , at 191 (describing fans as “‘inspirational consumers’ whose efforts help generate broader interests in [commercial owners’] . . . properties”); Lessig, Remix, *supra* note , 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.”). [↑](#footnote-ref-91)
91. Some authors, while short of stopping pursuing legal action, have publically 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, 2008, at W2 (describing the constant irritation felt by Annie Proulx, author of the short story *Brokeback Mountain*, from fans who send their derivative manuscripts); Anne Rice, Anne’s Messages to Fans, http://www.annerice.com/ReaderInteraction-MessagesToFans.html (last visited Mar. 2, 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.") [↑](#footnote-ref-92)
92. [↑](#footnote-ref-93)
93. Lenz, in turn, alleged that Universal had taken legal action in bad faith. *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (denying Universal’s motion to dismiss Lenz’s lawsuit). [↑](#footnote-ref-94)
94. *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 for strengthening the copyright misuse doctrine to discourage copyright misrepresentation). [↑](#footnote-ref-95)
95. *See e.g.*, Tushnet, Legal Fictions, *supra* note , 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-ref-96)
96. *See* *supra* note 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 , at 143. [↑](#footnote-ref-97)
97. Note that I am not claiming that all creators of fanworks would necessarily make this calculation. Tushnet and Lessig are right to emphasize the non-commercial 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’ account on this issue is well researched and reasoned; nothing that either Lessig or Tushnet say contradicts it. Neither denies that there either is, or could be under friendlier incentives, a material number of creators who would commercialize if they could. *See also* Hardin, *supra* note , at 183 (“[A]fter trying, at a 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.”). [↑](#footnote-ref-98)
98. Tushnet, *Payment in Credit*, *supra* note , 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.”). [↑](#footnote-ref-99)
99. Lessig, Remix *supra* note , 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.”) [↑](#footnote-ref-100)
100. Note as well that if it were the case that amateur remix were legal, then it would not matter that the second and third norms studied in Part II were breaking down, because even if they did, the amateur creator would be protected by the fact that her creative efforts were legalized. Thus, she would not have to rely on the kindness of strangers as it were, or in other words, the forbearance or toleration on the part of commercial owners. [↑](#footnote-ref-101)
101. The commentators include: Adam Cohen, Stewart Baker, Chris Lehmann, and Jonathan A. Knee. *See* Lessig, Remix *supra* note , dust jacket. [↑](#footnote-ref-102)
102. *Id.* [↑](#footnote-ref-103)
103. *See, e.g.*, Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity 253-54 (2001); *see also*, Posting of Henry Jenkins to Confessions of an Aca-Fan,

     http://henryjenkins.org/2008/02/recut\_reframe\_recycle\_an\_inter.html (Feb. 8, 2008 00:00 EST), (“Copyright is not broken, but knowledge of copyright law is broken.”) [↑](#footnote-ref-104)
104. Judge Posner argues that judicial opinions may be more powerful and serve certain functions better if they are written in a crisp rhetorical style. *See* Richard A. Posner, *Judge’s Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1426-32 (1995) (describing different styles of judicial writing and their virtues). [↑](#footnote-ref-105)
105. Lessig, Remix, *supra* note , at xv-xvi. [↑](#footnote-ref-106)
106. *See* *supra* note 81 and accompanying text. [↑](#footnote-ref-107)
107. Lessig, Remix, *supra* note , at 293. [↑](#footnote-ref-108)
108. *Id.* at xvii (describing Jack Valenti’s rhetoric on behalf of the Motion Picture Association of America) [↑](#footnote-ref-109)
109. Lessig writes, “In 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 to them will seem natural?” Lessig, Remix, *supra* note , at xviii. [↑](#footnote-ref-110)
110. *Id.* at 19 (advocating that we should “reform the rules that render criminal most of what your kids do with their computers”). [↑](#footnote-ref-111)
111. Lessig writes, “I worry about the effect this is having upon our kids. What is this war doing to them? Who 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 horribles and suggests that this is what lies in store for remixers, who follow in the steps, legally speaking, of file-sharers. He asks, “Should we continue the expulsions from universities? The threat of multi million-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. Lessig ominously suggests that once we turn our kids 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. Lessig suggests as well that prosecutors may become involved. [↑](#footnote-ref-112)
112. This premise is implicit. [↑](#footnote-ref-113)
113. Lessig argues, “[T]he 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. [↑](#footnote-ref-114)
114. This premise is implicit. [↑](#footnote-ref-115)
115. With regard to the lawsuit against the music mash-up artist who is Girl Talk and his remark to Lessig in an interview that he could not understand why anyone would want to stop his music, since unlike ”bootlegging,” it was not hurting anyone, Lessig notes, “Why anyone ‘should’ was a question I couldn’t answer.” Lessig, Remix, *supra* note , at 13. Furthermore, Lessig does not discuss any harms that may result from remix. *Silencio non est disputandum*. [↑](#footnote-ref-116)
116. This premise is implicit. It is a particular instantiation of the so-called 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.”). [↑](#footnote-ref-117)
117. This premise is implicit, although it would find much support in copyright case law. *See, e.g.*, Harper & Row Pubs., 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). [↑](#footnote-ref-118)
118. Remix culture is more “democratic.” Lessig, Remix, *supra* note , at 25. Lessig states that so-called Read/Write culture extends itself differently from Read Only 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. “And with the practice of writing [as in, writing on top of another work] comes a certain important integrity.” *Id.* at 92. “[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.” *Id.* at 130. “I mean to romanticize the yeoman creator. In each case, the skeptic could argue that the product is better produced elsewhere . . . . The Long Tail enables a wider range of people to speak. Whatever they say, that’s a very good thing. Speaking teaches the speaker even if it just makes noise.” *Id.* at 132. [↑](#footnote-ref-119)
119. Lessig, Remix, *supra* note , 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. The creators are just one type of collateral damage from this war.”). [↑](#footnote-ref-120)
120. This premise is implicit. [↑](#footnote-ref-121)
121. *See* *The Colbert Report* (Comedy Central television broadcast Jan. 8, 2009) (interviewing Lessig and discussing *Remix*). [↑](#footnote-ref-122)
122. *See* *supra* text accompanying note . [↑](#footnote-ref-123)
123. Commentators have taken a range of views on the fair use of fan fiction, fanworks and remix culture. *See, e.g.*, Jenkins, Convergence Culture, *supra* note , at 188 (quoting Brad Templeton of the Electronic Frontier Foundation as writing, “Almost all ‘fan fiction’ is arguably a copyright violation. If you want to write a story about Jim Kirk and Mr. Spock, you need Paramount’s permission, pure and simple.”); Ranon, *supra* note , at 435 (“Fan fiction qualifies as an unauthorized derivative work, and is therefore illegal.”); Tushnet, *Legal Fictions*, *supra* note , at 651 (“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 , at 445 (“[Y]es, writing fan fiction infringes on copyright protections.”); The Organization for Transformative Works, Frequently Asked Questions, http://transformativeworks.org/faq (last visited Feb. 11, 2009) (answering why the OTW thinks that fanworks are legal: “Copyright is intended to protect the creator's right to profit from her work for a period of time to encourage creative endeavor and the widespread sharing of knowledge. But this does not preclude the right of others to respond to the original work, either with critical commentary, parody, or, we believe, [transformative](http://transformativeworks.org/glossary/13#term441) works.”). [↑](#footnote-ref-124)
124. *See generally* 17 U.S.C. 107 (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”). [↑](#footnote-ref-125)
125. It should also be noted that, although beyond the scope of this article, even if the argument that remix content qualifies for fair use fails, there is a strong argument that such content creators will not be subject to criminal liability under the NET Act. Lessig does reference the NET Act in his book. (“In 1997 and 1998, that strategy was implemented in a series of new laws designed to extend the life of copyrighted work, strengthen the criminal penalties for copyright infringement . . .”) Lessig, Remix, *supra* note , at 39. And his frequent references to the criminalization of a generation imply a belief that these remixers are, or will, violate the NET Act. *See, e.g., id*. at 283-84. However, whereas this statement may be correct with respect to file sharing, it should not apply to remix. First, the act has a threshold requiring a retail value of $1000 before criminal liability attaches. 17 U.S.C. § 506; 18 U.S.C. § 2319. Using the value of the infringing works, remix content would rarely, if ever, attain a value of $1000. *See* U.S. Sentencing Guidelines Manual § 2B5.3 cmts. (A), (B), available at http://www.ussc.gov/2008guid/GL2008.pdf. Second, the statute requires the government to prove that there was willful infringement. 17 U.S.C. § 506. Under the majority view of willfulness that a defendant must intend to infringe a copyright, if a defendant has even an incorrect belief that his actions constituted fair use the conduct would not be willful. Warez Trading and Criminal Copyright Infringement, Eric Goldman 13 (Marquette Univ. Law Sch. Working Paper 2004), available at http://pdf.textfiles.com/academics/warezcriminalcopyright.pdf (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 Content in the “Remix” culture would not be criminal under the NET Act, and in fact, to date the 80 prosecutions under the NET Act have been for acts that involve wholesale copying, not remix content. *See* Intellectual Property Cases, http://www.usdoj.gov/criminal/cybercrime/ipcases.html (last visited Mar. 13, 2009). [↑](#footnote-ref-126)
126. It is ironic that while Lessig expresses much concern about the deleterious effects of labeling kids as criminals, his work may give the false impression to its readers that a significant proportion of typical remix is criminal. [↑](#footnote-ref-127)
127. 17 U.S.C. § 107 (1)(2008). [↑](#footnote-ref-128)
128. Tushnet, *User-Generated Discontent*, *supra* note , at 503 (“[F]anworks have expanded from mostly text-based, with occasional graphic art, to include music and 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-ref-129)
129. His 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 at 162-77. [↑](#footnote-ref-130)
130. *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?”) [↑](#footnote-ref-131)
131. *See* F. Jay Dougherty, *All the World’s Not a Stooge: 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) (discussing how quality judgments have no place in the transformative analysis and 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 parody, ‘will not take the further step of evaluating its quality.’”). [↑](#footnote-ref-132)
132. The Supreme Court in Campbell v. Acuff-Rose Music, Inc. stated,

     The central purpose of this investigation is to see . . . whether the new work merely ‘supersedes 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. at 579. Campbell was found jto be parody. *see also* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (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.”). One might nominate *Suntrust* as the first fan fiction case, but Alice Randall is better described as an “anti-fan” of *Gone With the Wind*, and the case turned on a defense of criticism and parody, not on any considerations that turned specifically on the fan-like nature of the work. 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. *See, e.g.*, Henry Jenkins, Convergence Culture: Where Old and New Media Collide 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 makes this claim but prior to *Suntrust*. Tushnet, *Legal Fictions*, *supra* at 664 (“Case law does not address fair use in the context of fan fiction or anything reasonably similar to it.”). [↑](#footnote-ref-133)
133. Judge Posner in *Gracen* has argued that the standard for derivative works is a higher one. *See* Gracen v. Bradford Exchange, 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.”). [↑](#footnote-ref-134)
134. *See, e.g.*, Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329 (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). [↑](#footnote-ref-135)
135. *Id*. at 255 (“Remix, here means transformative work.”). [↑](#footnote-ref-136)
136. “[A friend of Lessig’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.” *Id.* at 51. Also, “[RW media] remix, or quote, a wide range of “texts” to produce something new.” *Id.* at 69. [↑](#footnote-ref-137)
137. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1112-16 (1990) (discussing the existence of quotation that is not sufficiently transformative to warrant protection of fair use). [↑](#footnote-ref-138)
138. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994) (“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.’”) (citations omitted). [↑](#footnote-ref-139)
139. *See* Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 Colum. J.L. & Arts 497, 501 (2008) [hereinafter Tushnet, *User-Generated Discontent*] (discussing a new nonprofit *Organization for Transformational Works* as a vehicle to study transformative creative practices of various creative communities). [↑](#footnote-ref-140)
140. *See* Lessig, Remix, *supra*, at 254. (“[w]e need to restore a copy-right 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.”). [↑](#footnote-ref-141)
141. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 848-49 (C.D. Cal. 2006) (“It is by now a truism that search engines such as Google Image Search providegreat 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, non-profits, 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.”). [↑](#footnote-ref-142)
142. *See, e.g.*, Derek A. 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.”). [↑](#footnote-ref-143)
143. *See, e.g.*, Anelli, *supra* note , 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 , at 136 (“Most of what the amateurs create is gosh-awful bad . . . .”); Lessig, Remix, *supra* note , 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.”). [↑](#footnote-ref-144)
144. *See* Lessig, Remix, *supra* note , at 92 (“And with a practice of writing [blogs] comes a certain important integrity.”). [↑](#footnote-ref-145)
145. *See* Tushnet, *User-Generated Discontent*, *supra* note , 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 . . . .”); 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.”). 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 in virtue of the fact that because they are transformative, they are less likely to cause harm. Note, however, that if the transformation is subjective to a person and not to the work itself, this connection may not hold. [↑](#footnote-ref-146)
146. Lessig, Remix, *supra* note at 42. [↑](#footnote-ref-147)
147. Tushnet, *User-Generated Discontent*, *supra* note **Error! Bookmark not defined.** at 507 (“[N]oncommercial creative uses, precisely because they are not motivated by copyright’s profit-based incentives, are more likely to contain content that the market would not produce or sustain. . . .”). [↑](#footnote-ref-148)
148. 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 implies that it 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 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, noting that “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., No. C78-679A 1981 U.S. Dist. LEXIS 17722, at \*8 (N.D. Ga. Dec. 24, 1981) (finding a pornographic rendering of characters similar to those owned by Pillsbury to be fair use, though noting that “[t]he 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.”). [↑](#footnote-ref-149)
149. *See* Letter from Theodore Goddard, Attorneys for J.K. Rowling, to unnamed *Harry Potter* adult fan fiction illustrator (Jan. 22, 2003) (on file with the Chilling Effects Clearinghouse) *available at* http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=534 (reprinting a cease-and-desist letter sent to a website dedicated to adult *Harry Potter* fan fiction on behalf of Rowling’s literary agency, expressing concern that children may come across the sexually explicit content); Jenkins, Convergence Culture, *supra* note , at 150 (describing warnings by Lucasfilm to fans in the early 1980’s to not publish erotic *Star Wars* stories). [↑](#footnote-ref-150)
150. SeeRobert A. Gomez, *Protecting Minors From Online Pornography Without Violating the First Amendment: Mandating an Affirmative Choice*, 11 SMU Sci. & Tech. L. Rev. 1, 2 (2007) (“[T]here is general consensus that pornography has a detrimental effect on impressionable youths,” noting the actions 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). [↑](#footnote-ref-151)
151. *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, 408-10 (2005) (describing how digital manipulation can be used to create both fictional lifelike characters and manipulated versions of real people, including the anecdote, “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*, Short Film Magazine, *available at* http://www.shortfilm.de/index.php?id=2989&L=2 (“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 file sharing is what makes it all possible. . . .”);. [↑](#footnote-ref-152)
152. *See* 17 U.S.C. § 107(1) (2006) (“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 education purposes.’”). The definition of fan fiction sometimes includes that it is noncommercial. *See* Fiesler, *supra* note , at 731-32 (“[F]an fiction is understood to be ‘unauthorized’ and ‘not-for-profit.’”); Tushnet, *Legal Fictions*, *supra* note , at 655 (stating part of the definition of fan fiction as “not produced as ‘professional’ writing”);. Tushnet also defines “fanworks” as “noncommercial” for the purposes of protection under the Organization for Transformative Works. Tushnet, *User-Generated Discontent*, *supra* note , at 501. [↑](#footnote-ref-153)
153. *See* Tushnet, *Legal Fictions*, *supra* note , 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-ref-154)
154. *See* Fiesler, *supra* note , at 748 (describing the “thou shalt not profit” rule as a self-enforced constraint on the fan fiction community); Jenkins, Textual Poachers, *supra* note , at 158 (noting that even as fan fiction becomes more prevalent, “fanzines continue to be a mode of amateur, non-profit publication.”) [↑](#footnote-ref-155)
155. For example, the creators of *George Lucas in Love*, the *Star Wars* fan film. Jenkins, Convergence Culture, *supra* note , at 139-43. [↑](#footnote-ref-156)
156. *See* Fiesler, *supra* note , 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). [↑](#footnote-ref-157)
157. *See* s*upra*, text accompanying note 37. [↑](#footnote-ref-158)
158. Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470 (6th Cir. 2007). Lessig notes that it is not sensible that a student can quote from a *New Yorker* article but that one cannot do the equivalent in the remix context. Lessig, Remix, *supra* note , at 54. He gives the example of *Bridgeport* to support his claim that a parallel ability to quote is not available in an audio context.  *Id.* at 104 (discussing Bridgeport Music, Inc. v. Justin Combs Publ’g, 507 F.3d 470 (6th Cir. 2007)). [↑](#footnote-ref-159)
159. Lessig downplays the distinction between commercial and non-commercial 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. . . . 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 , at 55. Lessig compares jazz musicians of old and their tolerated practice of improvising on works of others and asks rhetorically why the same should hold for the contemporary parallel, music mash-ups: “[w]hy 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?” Lessig, Remix, *supra* note , at 105. His response, “The answer is: for no good reason, save inertia and the forces that like the world frozen as it is.” Id. In other words, these remix artists should be able to “commercialize” their “creativity.” Id. “There should be a broad swath of freedom for professionals to remix existing copyright work . . . .” *Id.* at 255. [↑](#footnote-ref-160)
160. *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” (citations omitted). Campbell, 510 U.S. at 591. *See, e.g.,* Davis v. Gap, Inc., 246 F.3d 152, 176 (2d Cir. N.Y. 2001) (“*Campbell* explains that the market effect must be evaluated in light of whether the secondary use is transformative.”); Castle Rock Entertainment v. Carol Publ'g Group, 150 F.3d 132, 145 (2d Cir. N.Y. 1998) (“The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.”). [↑](#footnote-ref-161)
161. *See* Tushnet, *Legal Fictions*, *supra* note , 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. . . .”). [↑](#footnote-ref-162)
162. *See* *id.* (“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.”). [↑](#footnote-ref-163)
163. 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) (discussing interplay between creative/factual inquiry and published/unpublished inquiry, including when the two subfactors point in opposite directions). [↑](#footnote-ref-164)
164. *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-ref-165)
165. *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.”). *See also* *Campbell*, 510 U.S. at 587 (citing Sony, 464 U.S. at449-50, “[R]eproduction of entire work ‘does not have its ordinary effect of militating against a finding of fair use’ as to home videotaping of television programs”). [↑](#footnote-ref-166)
166. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. Cal. 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.”). [↑](#footnote-ref-167)
167. *See, e.g.*, Campbell, 510 U.S. at 570 (discussing the tradeoff in the context of commercial songs); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268 (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 where transformative use was “at least partially commercial in nature.”). [↑](#footnote-ref-168)
168. *Campbell*, 510 U.S. at 587-88 (“[W]hether ‘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.”). [↑](#footnote-ref-169)
169. *Campbell*, 510 U.S. at 591 (citing Sony Corp., 464 U.S. at 451 ) (noting that there is only a presumption of market harm in the case of commercial works, quoting language from *Sony*: “[i]f 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.”). [↑](#footnote-ref-170)
170. *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.”). [↑](#footnote-ref-171)
171. 17 U.S.C. § 101 (2006). [↑](#footnote-ref-172)
172. See supra text accompanying note . [↑](#footnote-ref-173)
173. Lessig, Remix, *supra* note , at 100. [↑](#footnote-ref-174)
174. *See generally* Saul A. Kripke, Naming and Necessity 15-20 (1980) (explaining and defending the use of “possible world” semantics). [↑](#footnote-ref-175)
175. In addition to this deterrence based on actions against other users, simply the uncertainty inherent in the fair use doctrine can be a serious chilling effect for 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. 1493 (2007) (suggesting that because of overdeterrence and uncertainty, fair use should be reformed to recognize certain types of copying as per se fair). [↑](#footnote-ref-176)
176. *See* *supra* text accompanying note [↑](#footnote-ref-177)
177. 572 F. Supp. 2d 1150 (N.D. Cal. 2008). [↑](#footnote-ref-178)
178. *Id.* at 1151-52 [↑](#footnote-ref-179)
179. Id. at 1152-53 [↑](#footnote-ref-180)
180. Lessig, Remix, *supra* note , at 1-5. [↑](#footnote-ref-181)
181. *Id.* at 2. [↑](#footnote-ref-182)
182. *Id.* at 2-3 [↑](#footnote-ref-183)
183. *Id.* at 4. As it turns out, however, in the rest of the book there is no discussion of a case of remix in which Lessig discusses either fair use or allegations of criminal conduct. [↑](#footnote-ref-184)
184. *Id.* at 4-5. Lessig might have charitably noted that Prince is well known for being zealous in protecting against unauthorized uses of his works. *See, e.g.*, David Bauder, *Singer Sues Websites, Claiming Bootlegging*, Chicago Sun-Times, April 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*, The Guardian, Nov. 7, 2007, at 1, *available at* http://www.guardian.co.uk/uk/2007/nov/07/musicnews.topstories3 (discussing his threats to sue his own fans for copyright violations due to images appearing on fansites); 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 of Prince covering one of their songs that Prince had had taken down). [↑](#footnote-ref-185)
185. *Lenz*, 572 F. Supp. 2d at 1153 (“On July 24, 2007, Lenz filed suit against Universal alleging misrepresentation pursuant to 17 U.S.C. § 512(f) and tortuous interference with her contract with YouTube.”). [↑](#footnote-ref-186)
186. *See* *id.* at 1156 (“A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute.”). [↑](#footnote-ref-187)
187. *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)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.01&ifm=NotSet&fn=_top&sv=Split&tc=-1&docname=17USCAS512&ordoc=2016810920&findtype=L&db=1000546&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw) of the DMCA.”). [↑](#footnote-ref-188)
188. Lessig contends that if the law is going to regulate kids, it should do so in a manner that is understandable to them. Lessig, Remix, *supra* *note* 4, at 267. *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/ (last Aug. 10, 2007) (discussing various governmental attempts to explain copyright law to minors and non lawyers). [↑](#footnote-ref-189)
189. *See* Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006) (noting the process by which CleanFlicks deletes “sex, nudity, profanity and gory violence” from movies and redistributes them). [↑](#footnote-ref-190)
190. *See* 17 U.S.C. § 106(1) (2006) (noting that the owner of a copyright has exclusive rights to “reproduce the copyrighted work in copies . . . ”). [↑](#footnote-ref-191)
191. 663 F. Supp. 706 (S.D.N.Y. 1987) [↑](#footnote-ref-192)
192. Id. at 708-09 [↑](#footnote-ref-193)
193. *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”) [↑](#footnote-ref-194)
194. The claim that fair use doctrine is unusually imprecise, while often stated, is nevertheless subject to serious question. *See, e.g.*, Pamela Samuelson, *Unbundling Fair Use* (Fordham Law Review, Forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1323834 (arguing that fair use is actually more coherent and predictable than most commentators have suggested, and that fair use cases typically fall into policy-relevent clusters that make it possible to predict whether a use would be considered fair). [↑](#footnote-ref-195)
195. *See* *supra* text accompanying note . [↑](#footnote-ref-196)
196. *See* discussion of Argument 2, *supra* Part IV. [↑](#footnote-ref-197)
197. *See* *supra* text accompanying note 99. [↑](#footnote-ref-198)
198. Stephen Pudney, *The Road to Ruin? Sequences of Initiation to Drugs and Crime in Britain*, 113 The Econ. J. C182, C183 (noting that one of the causes of the “gateway effect” is social interaction, i.e. meeting people one would not otherwise have met). [↑](#footnote-ref-199)
199. *See* *supra* text accompanying note 102. [↑](#footnote-ref-200)
200. Lessig, Remix, *supra* note , at 108 (“[T]he 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.”). [↑](#footnote-ref-201)
201. *See* 17 U.S.C. § 107 (1) (providing that the purpose and character of [a] 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). [↑](#footnote-ref-202)
202. *See, e.g.,* Berkeley Center for New Media, Mixing and Remixing Information, http://bcnm.berkeley.edu/pages/courses-s09 (last visited Feb. 23, 2009) (“This course focuses on employing XML and web services to reuse or ‘remix’ digital content and services.”); Hyde Park Art Center School and Studio, Youth Courses: Digital Mix Up, http://www.hydeparkart.org/school-studio/youth-courses/digital\_media/digital\_mix\_up/ (last visited Feb. 23, 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.”). [↑](#footnote-ref-203)
203. *See* *supra* text accompanying note . [↑](#footnote-ref-204)
204. *See* *supra* text accompanying note . [↑](#footnote-ref-205)
205. John Stuart Mill, *On Liberty in* On Liberty and Utilitarianism 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.”). [↑](#footnote-ref-206)
206. *See* *supra* text accompanying note . [↑](#footnote-ref-207)
207. *See* *supra* text accompanying note . [↑](#footnote-ref-208)
208. Tushnet, *User-Generated Discontent*, *supra* note at 503. [↑](#footnote-ref-209)
209. *See* Matt Matravers, Justice and Punishment: The Rationale of Coercion 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 . . .”). [↑](#footnote-ref-210)
210. *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). [↑](#footnote-ref-211)
211. *See* Sanford H. Kadish and Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials 278 (7th ed. 2001) (“The requirement that punishment be proportional to the seriousness of the offense has traditionally been a salient principle of punishment.”). [↑](#footnote-ref-212)
212. *See* Ann Bartow, *Arresting Technology: An Essay*, 1 Buff. Intell. Prop. L.J. 95, 96 (2001) (noting a potential reason for “a reluctance to take legal action against individual noncommercial copyright infringers” to be a “cultural unwillingness directly and linearly to equate unauthorized not-for-profit copying with criminal behavior.”). [↑](#footnote-ref-213)
213. In addition, I would propose dispensing with statutory damages for amateur remix. This would have the desired consequence of preventing owners from selectively or randomly wreaking financial havoc on those whose remixing is deemed so odious as to be worth stopping. The question can be raised, however, as to whether real damages will sufficiently deter amateur remix, as real damages are likely to be *de minimus* or small, even for genuinely objectionable remixes. Nevertheless, these remixes would still constitute an infringement and thus an injunctive remedy would remain available. [↑](#footnote-ref-214)
214. *See, e.g.*, Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L.J. 29, 35 (1994) (“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.”). [↑](#footnote-ref-215)
215. 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 discussing possible legislative reasoning). [↑](#footnote-ref-216)
216. *But see* No Electronic Theft Act (NET Act) of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (codified as amended in scattered sections of 17 and 18 U.S.C.) (amending Titles 17 and 18 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). [↑](#footnote-ref-217)
217. For example, the DMCA imposes criminal sanctions only for willful acts of circumvention and infringement, done for a commercial purpose or for financial gain. Professors Pamela Samuelson and Suzanne Scotchmer note that “commercial purpose” or “financial gain” should be interpreted by courts to exclude infringement for personal use. Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575, 1640 n. 309 (2002). [↑](#footnote-ref-218)
218. *See* Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 283 (5th Cir. 1970) (quoting John Schulman as describing the fair use doctrine as a “balance wheel and safety valve for the copyright system . . . ”). [↑](#footnote-ref-219)
219. *See, e.g.*, Negativland, *Two Relationships to a Cultural Public Domain*, 66 Law & Contemp. Probs. 239, 254-55 (2003) (“[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 . . . copyright warnings are unfair because they intimidate consumers into forgoing such legally permitted uses, and because they attempt to withdraw consumers' rights to make such uses, contrary to the Constitution, Congress and public policy.”). [↑](#footnote-ref-220)
220. 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 their power to determine the custom. *See* Rothman, *supra* note . 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. [↑](#footnote-ref-221)
221. *See* Thomas S. Mulligan & Claudia Eller, *Viacom took months to build its case*, L.A. Times, March 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.’”). [↑](#footnote-ref-222)
222. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1197 (1985) (“It 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.”). [↑](#footnote-ref-223)
223. *See* Rothman, *supra* note , at 1922-23 (“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.”). [↑](#footnote-ref-224)
224. *See* Hetcher, Norms, *supra* note , at 46-47. [↑](#footnote-ref-225)
225. *See, e.g.*, Stelter & Stone, *supra* note 20, at A19 (“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.”). [↑](#footnote-ref-226)
226. *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). [↑](#footnote-ref-227)
227. *See, e.g.*, Rosencrance, *supra* note (quoting Prince’s lawyer as complaining about the expense of monitoring for copyright infringement). [↑](#footnote-ref-228)
228. Defendants’ Answer and Demand for Jury Trial at 1, Viacom Int’l, Inc. v. YouTube, Inc., No. 1:07-cv-02103 (S.D.N.Y. Apr. 30, 2007) (“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 copyright holders and the need to protect the internet as an important new form of communication.”). [↑](#footnote-ref-229)
229. David L. McCombs et al. observe that the Viacom v. YouTube 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-ref-230)
230. 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. Mark A. Lemley, *Rationalizing Internet Safe Harbors* (April 10, 2007). Stanford Public Law Working Paper No. 979836, *available at* http://ssrn.com/abstract=979836 (noting the inefficiency of this system, despite its theoretical even-handedness, and that it often rewards overzealous copyright owners). [↑](#footnote-ref-231)
231. The blanket notification used by Universal in *Lenz* would likely be inadequate in a future case now that owners are on notice. *Lenz*, 772 F. Supp. 2d at 1156. The court says that it doubts that on its understanding of the facts that defendants will be shown to have acted in bad faith. 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 findings are in order. In the past, Universal might have colorably 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 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 I propose. It is because much remix is fair use that it would be justified for society to adhere to the permissive remix norm. *See, e.g.*, Steven D. Kim, *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.”); Michael Jude Galvin, *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.”). [↑](#footnote-ref-232)
232. *See* *supra* text accompanying notes and . [↑](#footnote-ref-233)