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Internet Expression in the 21<sup>st</sup> Century: Where Technology and Law Collide**\*843 CRAFTING COPYRIGHT LAW TO ENCOURAGE AND PROTECT USER-GENERATED CONTENT IN THE INTERNET SOCIAL NETWORKING CONTEXT**

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Online social networking sites like Facebook [FN1] and YouTube [FN2] are popular and continue to grow both in the numbers of people and organizations involved and in the services and functions available. The social networking technologies, combined with the affordability and ease of use of hardware and software to manipulate digitized works, create new challenges to copyright law. [FN3] Works are more easily copied and distributed, and derivative works of all types (audio-visual, audio, graphic, etc.) and quality are easier to make than ever before. Online social networks, through their support of users' ability to generate and share works, \*844 serve the constitutional copyright purpose of advancing culture and society or, in the words of the Constitution, these sites “promote the Progress of Science and useful Arts.” [FN4] Indeed, online social networking is perhaps the most vibrant location of the creation and dissemination of information today.

For the most part, forbearance by copyright holders from enforcing rights at present seems to accommodate most social networking uses, [FN5] and a robust application of the fair use doctrine could support that practice in law. [FN6] Were the forbearance to stop, [FN7] however, or were fair use not applied robustly in support of users and cultural and social developments in cyberspace, [FN8] the explosion of creative expression could be capped and the dynamic development of online society dampened. Indeed, cases such as *Lenz v. Universal Music Corp.*, [FN9] where the court established that fair use must be considered before a Digital Millennium Copyright Act (DMCA) [FN10] takedown notice may be sent pursuant to 17 U.S.C. § 512, [FN11] illustrate how copyright holders can chill even the most \*845 innocent of postings to YouTube. [FN12] The number of such improper notices given without being contested is unknown. At times, for some copyright holders, the attitude seems to be best expressed by the seagulls in Disney's film, *Finding Nemo*, [FN13] where a cacophony of “mine, mine, mine” explodes as they relentlessly chase after Nemo's father to get the last possible morsel of food. [FN14] Both the *Lenz* case and the Recording Industry Association of America (RIAA) suits [FN15] seem to exemplify this attitude, as does the current drive to make Internet service providers (ISPs) the gatekeepers for copyrighted content online. [FN16]

**\*846** A properly tailored copyright law for online social networks could ensure the advancement of the constitutional purpose of copyrights through user-generated works including advancement by the creation and sharing of derivative works. [FN17] The building of community and the development of culture and society through such creation and sharing are exactly the sorts of things contemplated in the constitutional directive. [FN18]

**\*847** In the online social networking context, the constitutional purpose of the Copyright Clause [FN19] will best be served by establishing relatively clear guidelines through legislation and court decisions that protect the ability of users and creators of works, including derivative works, to utilize the full capabilities of social networking technologies and the technologies that help **\*848** make networks so vibrant-without having to depend upon the mercurial forbearance of copyright holders.

In this essay, I propose some possible contours for such a system. This is not new ground in some ways insofar as Larry Lessig in *Remix* [FN20] (and other works), along with others, notably William Patry [FN21] and Jessica Litman, [FN22] have explored aspects of the topic and I draw heavily upon their ideas. [FN23]

The copyright law in the online social networking context should explicitly authorize the sorts of interactions generally done by online social network participants now. Codifying current practice would cause little if any negative impact to the creation of and commercial exploitation of copyrighted works for those wanting to do so. To the extent there would be any negative impact, it would be insubstantial, and financial incentives attendant to the copyright monopoly for the creation of new works would still be more than sufficient-music, literature, and movies would still be created and commercially exploited. The purpose of the Copyright Act [FN24] is not to protect business models that become outmoded; it is to protect the societal interest in the creation and distribution of works. [FN25]

I propose revising the Copyright Act and interpreting it along the following lines:

1. Noncommercial social network users should be allowed to lawfully post links to and post portions of copyrighted works without permission.

**\*849** 2. A broad right to create and disseminate derivative works online for noncommercial purposes should be provided.

3. A right to create derivative works for commercial purposes should be given where even substantial portions of the original work are used, provided that

(a) the new work is original; [FN26]

(b) the new work is (i) transformative or (ii) constitutes parody, satire, or commentary; and

(c) the new work does not directly compete with the source work.

The third part of the proposal essentially seeks a rethinking of the scope of the right to control the creation and distribution of derivative works in a number of situations involving digital forms of works. [FN27]

This proposal comports with the actual usage and expectations of the people. [FN28] Just as importantly, it advances the constitutional \*850 purpose of copyright law to promote the creation and dissemination of information for the progress [FN29] of culture and, as a \*851 colleague and I have argued elsewhere, social justice. [FN30] Social justice is a protean concept. Social justice encompasses at the very least inclusion of everyone in the benefits of society, culture, economic opportunity, and technological possibilities. People should be able to share fully the bounty that has been created and is being created. Sharing in the bounty includes being able to use what *is* to create what is *to be*; everyone should be able to use the past works to create new works. And indeed that is how works have always been created. [FN31] We should not be making criminals of many people in order to maintain old business models by not recognizing appropriate use being made of prior works. [FN32]

Applying social justice concepts to copyright does not eviscerate the rights of copyright holders in copyrighted works, but it does require proper limitations on the scope of rights attached to such works. [FN33] If someone has lawfully acquired a copy of a work, the degree of freedom to use that work to create new works should be much broader than it is today in many instances, particularly in the digital realm. [FN34] I can read a book, show a movie, or perform a song without infringing. I can use the ideas and create my own work without infringing. But if I make and distribute a derivative work of sample a single sound for a sound recording (both ubiquitous practices online), I infringe. This limits my participation in the use and creation of works and culture and society and limits my ability to exploit commercially and to enter into the information world as a provider in ways that are unnecessary, counterproductive, unwise, and not in line with tenets of social justice. [FN35]

\*852 Implementation of this proposal would remove uncertainty caused by the specter of lawsuits by copyright holders [FN36] and the move to make ISPs and host sites liable for user-generated content that may infringe under current law. [FN37] It would reduce the abuses under the DMCA, such as the takedown notice issued for the home video of a baby bopping to a Prince tune. [FN38] As an example of a work that would be protected under this proposal, the AV work of *Stairway to Gilligan's Island*, which put the lyrics from the *Gilligan's Island* theme song to Led Zeppelin's live, AV recording of *Stairway to Heaven*, [FN39] would easily pass the transformation and originality tests. [FN40]

This approach fits well within the commercial rights regime underlying the United States system. [FN41] Under the United States system of copyright, the act of creation and the moral power connected to 'mineness' are not the proper focus or function of protecting certain rights in certain types of works against certain uses without permission. [FN42] Instead, under the United States system, \*853 it is the benefit to society that matters. [FN43] This proposal rebalances the scope of the enforceable right and the public purpose of granting that right. Most rights under copyright would not be significantly affected, and even the right to control derivative works, the right most directly impacted, would remain robust in most respects.

Creation and dissemination of works are the purpose of copyright. But copyright should be granted only to the extent necessary to incentivize those activities. [FN44] The problems are where to draw the lines and on what basis. In literature, theater, and film, how much should copyright protect characters? Plot? Imagined worlds? Fact-like things within those

worlds? Or in music, should copyright protect music keys? Chord progressions? Rhythms? Melodies? Lyrics? Or for sound recordings, how much should copyright protect the actual sounds on the recording? Or for visual works, how much should copyright protect images? Sequences of images? Parts of images? Or for utilitarian works like software, should it ever extend beyond the literal? If so, to what? And why? From a policy perspective, one should protect works and parts of works only to the extent necessary to provide an incentive for their creation.

One of the ways copyright law has addressed the proper limits of the rights granted by copyright is the idea/expression dichotomy. [FN45] Original expression is protected; ideas are not. [FN46] The problem is to distinguish between the two. For some works, it is appropriate to protect against more than literal copying, or else, in the words of Judge Learned Hand in *Nichols v. Universal Pictures Corp.*:

a plagiarist would escape by immaterial variations. That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, \*854 as was recently well said by a distinguished judge, the decisions cannot help much in a new case. [FN47]

Judge Hand then articulated the nontest, which has come to be known as the abstractions test:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can. [FN48]

Judge Hand is correct: no formula of words can mechanically determine the proper boundary between unprotected ideas and putatively protected expression.

Certain other standard copyright limits are related to or arise out of the idea/expression dichotomy. For example, the doctrine of merger states that when there is only one way (or a very limited number of ways) to express an idea, the expression merges with the idea and is unprotected. [FN49] In literature or poetry or historical writing, and indeed in writings of all kinds, there would rarely be just one way to explain or express or capture an idea or emotion or sensation. And in music there are endless ways to create endless numbers of melodies and to work them into songs and longer works.

Similarly, copyright does not extend to the building blocks of either writings or music. [FN50] The assemblage may be protected as original, but at some point one is confronted with a merged unit: a word or short phrase is merged with the idea, a sound is merged \*855 with a note or a chord, a rhythm is merged with the expression of it. No permission is required to use another's idea or chord or rhythm.

My proposal expands the allowable use of raw materials first made by others without first

obtaining their permission in the social networking world for user-generated content, particularly for those works without a commercial motive or substantial commercial impact. Part III of the proposal also builds on the idea/expression dichotomy and related doctrines of the unprotectability of building blocks and standard devices (scenes a faire, blues progression, etc.), but in a more limited fashion due to the commercial aspect.

All works use the material of others as raw material for the new works, some very directly and explicitly: *The Wizard of Oz* gets reimagined as *Wicked* [FN51] and *Gone with the Wind* is recast as *The Wind Done Gone*. [FN52] Other works draw upon more varied or remotely connected sources. The forbidden marriage plot was not new when Shakespeare wrote *Romeo and Juliet*, nor was it original when, centuries later, Judge Learned Hand wrote about the copyright dispute involving two works, each of which revolved around a child of a Catholic family marrying a child of a Jewish family. [FN53] *Avatar* [FN54] is a story well told, but it is an old story or, at most, an amalgam of bits of other old stories. [FN55]

**\*856** For many user-generated works, including, for example, fan fiction, problematic issues arise from the copyright holder's right to control the making and exploitation of derivative works. [FN56] Every work is, in a nonlegalistic sense of the word, derived from some other work or works. Composer Igor Stravinsky famously said, "A good composer does not imitate, he steals." [FN57] T.S. Eliot said the same about poets: "Immature poets imitate; mature artists steal." [FN58] Indeed, as Mr. Justice Hugh Laddie wrote:

The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress. [FN59]

The problem is not whether works are derived from others. They are. They all are. The problem is not whether people will copy or create new works based on the ideas and the expression of others; they do and will continue to do so. The question is what works or sorts of derivative works (in the vernacular sense of 'derivative') should be allowed without permission and which ones need permission. The idea/expression dichotomy concept helps us think about this problem but resolves little. The idea of protecting only some but not all derivative works is not very helpful; the problem is how does one distinguish among them? Deciding where to draw the line between derivative works that infringe and those that do not is not easy. The line can and should be drawn better and more clearly than at present, where user-creators need to rely upon the vagaries of fair use or the abstractions of the idea/expression dichotomy concept. A better, brighter line should be developed to **\*857** support the creation and dissemination of user-generated content online.

Some of the aspects of the derivative works right are not problematic or controversial today and should continue to exist in strong forms. Examples include the right to translate the work into another language [FN60] or the right to transfer a work from one medium to another, such as making a movie from a comic book series. [FN61] Similarly, the right to market commercial spinoffs, such as action figures, is not a matter of much controversy. However, if the protection for a derivative work were pushed just a step or two further than it exists today, the right to control derivative works could swallow the idea/expression dichotomy concept.

For example, the granddaddy of superhero comics, Superman, could truthfully claim that all subsequent superhero comics were ‘derived’ from it. But we should not stop the creation of Captain America, Batman, Spiderman, Green Lantern, the Fantastic Four, and so on [FN62] just because they owe so much to Superman. That seems like an easy line to draw: you cannot tie up a whole genre, even if you created it. Neither Tolkien and Frodo Baggins [FN63] nor Rowling and Harry Potter [FN64] can stop others from creating worlds where magic is real.

The proper limits of the derivative work right should be determined by the purpose of copyright and the need to grant such a right to incentivize the creation of works. Where a derivative \*858 work made by another neither competes with nor otherwise reduces the ability to exploit the underlying work, the right should not stop the creation and distribution of the derivative work.

Fan fiction distributed online uses worlds created by others, and generally the fan fiction authors use characters that were created and placed in those worlds by the original authors as well. There are hundreds of stories, some full-book length (or longer), set in the *Harry Potter* universe using the *Harry Potter* characters. [FN65] Some are faithful to the Rowling creation; others feel free to change the rules, the magic, the characters and, of course, the plot. Some plots are just new additions or back stories or other adventures. Some stay closer to the *Harry Potter* canon, but rework things they dislike.

Authors should be admitted into Middle Earth or Harry Potter's world, and while there, they should be able to use the same geography and magic powers and limits of those worlds without a visa. Worlds, even original ones, should not be protected by copyright any more than the detective genre should be tied up by the first detective story. Fans should be able to tell more about life among the hobbits or write a story about other students at Hogwarts without first getting permission from the creators of those worlds.

While the use of the original author's characters and plotlines by those writing fan fiction is somewhat more problematic than merely using the fictional world as a setting, both the plotlines and leading characters should be open to use by authors writing noncommercial fan fiction for online distribution. Retelling *The Lord of the Rings* from Sauron's perspective with Sauron winning should be permitted, even with Gandalf, Frodo, and Gollum all playing major roles. Fan fiction reworking the storyline of *Harry Potter* such that Harry and Hermione end up together [FN66] or Dumbledore does not die, should similarly be permitted.

\*859 There is no commercially justifiable reason to stop the publication of these noncommercial works. And yet, under current law, this huge outpouring of creative works would be stopped if Rowling chose to do so because they are all derivative works under sections 101, [FN67] 103, and 106 of the Copyright Act. [FN68]

If a work is to be commercially exploited, then a greater degree of originality should be required, and the work should be more transformed than being merely parroted with a twist. Characters should still be available for use since they are integral parts of the worlds. Tracking the same plotline would be more problematic in the commercial setting unless the sort of transformative commentary of *The Wind Done Gone* variety exists. Of greater importance

than either originality or transformativeness should be the degree to which the new work competes with or reduces the market for the underlying work. Even strongly derivative works that follow the original plot and use well-developed, defining characters may not, in fact, compete with the original work and may not, in fact, undermine the value or market for the original work and may not appropriate a legitimate market opportunity away from the original work's copyright holder. The financial incentive to create should be protected, but not more than is necessary for the incentive to exist.

**\*860** Tom Stoppard's *Rosencrantz & Guildenstern Are Dead* takes bit characters from *Hamlet* and tells their story. [FN69] One should not need to wait for copyright to expire to make such leaps, even commercially. If Tolkien himself had not done so, others should be allowed to write the story of Tom Bombadil, even for commercial gain.

Thus hugely popular works in well-developed and popular worlds would be more open to exploitation by others than less familiar or less popular works; the negative impact on the *Harry Potter* series from anything done by fans will be negligible. The impact of similar fan fiction on less well-known works may be greater and so should be examined a little more closely; some care should be taken to protect against co-opting a sequel for commercial gain, particularly of a work by a new artist. This sort of sliding scale undermines the clarity of the line I am seeking to draw, but it is appropriate for commercial works. Creation and distribution of noncommercial derivative works would still be broadly protected.

J.K. Rowling's *Harry Potter* series has generated a huge industry in commercial derivative works, including films, ornaments, toys, and more. It has also generated a huge Internet presence of unauthorized websites with noncommercial fan fiction commentaries. J.K. Rowling has not tried to stop this online explosion. Nor has she tried to block the ongoing creation and online publishing of *The Harry Potter Lexicon*, a *Harry Potter* online cyclopedia. [FN70] Indeed, evidence was admitted in court that she herself used it when writing the later books in the series: ““This is such a great site that I have been known to sneak into an internet cafe while out writing and check a fact rather than go into a bookshop and buy a copy of *Harry Potter* (which is embarrassing). A website for the dangerously obsessive; my natural home.”” [FN71] But when Steve Vander Ark, the author of *The \*861 Lexicon*, decided to publish a hardcopy version, Rowling sued and stopped him. [FN72] Ultimately, protected by the doctrine of fair use, a shorter version of *The Lexicon* that used less material directly from the books (for example, fewer descriptive paragraphs were taken verbatim or in slightly modified form) was published. [FN73]

The online version of *The Lexicon* and all of the fan fiction are derivative works under current law and thus could be barred by Rowling and the other copyright holders. Thus their existence is contingent upon the forbearance of the copyright holders. It should not be. These works should be encouraged. Neither Rowling nor Warner Bros, need broader rights to incentivize their creative *Harry Potter* books and movies, respectively. Nor do they need to stop fans from doing what they are doing online to make money through other avenues. [FN74]

Under current law, no one has been able to publish an account of Holden Caulfield as an adult because J.D. Salinger would not authorize it and copyright law gave him control not

only over the story, *The Catcher in the Rye*, [FN75] but also over Holden's name and character, including his later imagined but never developed or published life. [FN76] This may have made some copyright sense while \*862 Salinger was alive, had he indicated any interest in writing such a sequel himself. But he did not. [FN77] But, have no fear, in 2046 someone will be able to tell us (or, more accurately, tell those alive then, almost a century after the Holden Caulfield character stepped out of Salinger's pen), [FN78] because 2046 is when the copyright term of ninety-five years expires. [FN79] The year 2046 is, at least, three decades earlier than 2080, which is what life plus seventy years would yield. [FN80]

The current expansive application of the derivative works right does not comport with the constitutional aim of copyright. Indeed, it undermines it. Stoppard can tell us about *Shakespeare in Love*, [FN81] and Amy Heckerling can rework Jane Austen's classic, *Emma*, into *Clueless* [FN82] because enough time has expired. Endless stories of Huck Finn have been created since he is no longer in copyright, and the same is true of *Sherlock Holmes* (including a recent movie named *Sherlock Holmes*, which bears almost no relationship to Sir Arthur Conan Doyle's creation other than names and a vaguely late nineteenth century Londonesque setting). [FN83] But 'new' works, that is, almost any popular works copyrighted in 1923 or later, are still overly protected by the derivative works right against creative, transformative exploration by others.

\*863 Copyright should not extend to preventing online user-generated content like fan fiction from being created and disseminated. Using the idea/expression dichotomy, scenes a faire, merger, and related ideas coupled with reducing protection for characters themselves and universes created by authors would provide space for these sorts of works, especially those works that use these elements and not the plots as their starting point.

People have been doing these sorts of things, retelling and reshaping stories, for as long as stories have been told. And people have most likely been writing altered versions of stories and writing letters telling others what they liked or disliked and would have changed. Today, with the Internet, the unparalleled ability to find people with similar interests and the unparalleled ability to share one's efforts with millions of others at functionally no cost (that is, no marginal cost above access to the Internet in general), we now have innumerable published fan fiction online: retelling of the same story, side stories, extensions in time or space, retelling-as-commentary, satirical versions, parodic versions, and more. These works should be given very, very broad latitude all the way to the use of characters and plot, provided the work (1) is indeed original, that is, not a copy or near-copy in the sense of minor word changes or mere condensing a la *Readers' Digest Condensed Books*; (2) is transformative, i.e., there is something new, something changed, something that adds something that was not there before; and (3) is not being commercially exploited in a way that competes directly with the original work. Thus publishing the fan fiction for profit in hardcopy, or even in electronic form for pay, would be outside the scope of this broadest right of users to create user-generated content. [FN84]

The same rule, with some variations needed due to inherent differences in the works, would apply to AV works, graphic works, and audio works, at least with respect to the non-commercial development and distribution of them.



\*864 In 2003, the Moldovan music group, O-Zone, released a song called *Dragostea Din Tei*. [FN85] In the song were the lyrics “nu ma, nu ma.” [FN86] This song was happened upon online by Gary Brolsma who, in December 2004 using just a webcam, created a video of himself lipsyncing to the song and breaking into a dance. [FN87] Brolsma posted his video online where it spread virally around the world, spawning parodies and inspiring others to do the same thing with other music. [FN88] This phenomena is now called *Numa Numa*, after the original video. [FN89] The Internet knows no borders ... nor, apparently, does *Numa Numa*.

Under standard United States copyright analysis, Brolsma violated the copyright in the musical composition by not paying royalties or obtaining permission for performing the work; in the sound recording itself; by performing the sound recording; and in the right to authorize derivative works by making a new work (his own video of him mouthing the words and dancing) using the original, underlying work. A community was founded around this work and it, in turn, inspired other works. [FN90] Allowing this sort of thing results in more works, more creativity, more people involved, and more community-building. In short, it results in what copyright is supposed to encourage, but what copyright law, if too strictly enforced in favor of copyright holders, would in fact curtail.

Other phenomena, like flash mobs singing opera [FN91] or dancing to Rodgers and Hammerstein's *Do-Re-Mi* from *The Sound of Music*, [FN92] have copyright implications. For example, whoever owns \*865 the copyright in the sound recording used for the opera singers would have rights affected by the public performance of it. While the opera composition itself is in the public domain, *Do-Re-Mi* is not. Nor has the copyright in the Julie Andrews' recording of it, at least in the film version, expired. [FN93] Even if the dance itself is not a derivative work, permission is required to use the music in the performance. [FN94] Permission would also be required to incorporate the sound recording or soundtrack from the movie in the AV work of the live performance. Modification of the original composition and performance using hip-hop DJ techniques would also require permission under ordinary derivative works doctrine. And, of course, the posting of the resulting video online may involve the reproduction, distribution, transmission, and public performance rights.

Flash mob events like these should be permitted to happen and should be allowed to be shared with others without the transactions costs and consequent likely inability to get permission for all of the copyright aspects involved. Neither they nor the community-building civic sharing of them should be stopped by a ‘mine-mine-mine’ seagull form of copyright protection and enforcement.

If the user/creator distributes the work commercially, arguably a somewhat higher standard or somewhat more limited use could be applied without unduly limiting this flourishing, strange new world. Even so, for genuinely original and transformative work that does not directly compete with the original work, even commercial uses should generally be allowed.

The meaning of ‘commercial’ in this setting can be problematic. If the flash mob is an advertisement for an opera school or opera company, arguably that is a commercial use and should be treated differently than the more impulsive and innocent and decidedly noncommercially motivated *Numa Numa*. Or, if advertising is sold on the site where the video is shown

and the \*866 video copyright holder benefits (as opposed to YouTube or some other host), that is in some sense a commercial use. But mere commercial use that does not compete directly with the underlying work should not bar the creation and sharing of user-generated content online. This sort of use is still a positive, social, and cultural development, and copyright law ought not stop it.

An interesting example of many aspects of online work going from free to commercially exploited is the story of the song *Crank That*. [FN95] *Soulja Boy* (as the song, as well as the artist who wrote and recorded it, came to be known) was first distributed online for free. [FN96] *Soulja Boy* issued a video showing friends and himself dancing to the song. [FN97] In *Numa Numa* fashion, the song and dance caught on like crazy with many other people submitting videos of themselves doing the dance to the song. [FN98] Ultimately, *Soulja Boy* was signed by a record label that issued the song commercially with a video that essentially tells the history of the development of the hit through a collage of clips from online-homage to the grassroots route of its discovery. [FN99] Ironically, given its roots, the record label has since required that the soundtrack of the Cebu, Philippines, prisoners dancing to *Soulja Boy* be deleted, so the \*867 video now uses a classical recording (with a notice of why it is doing so) in its place. [FN100]

MC Hammer's song, *Can't Touch This*, is essentially Hammer's lyrics over Rick James' earlier, lesser hit *Super Freak*. [FN101] This is sampling to the max-not just using the underlying composition performed by a sound-alike group, but using the actual sound recording. And not taking just a few bars or sounds, but using or sampling essentially the whole melody and arrangement. In this instance, Hammer (properly) credited James as a coauthor. [FN102]

But most sampling takes much smaller snippets of sound from other recordings and uses them as raw material to create new works. In general, sampling has not undermined the selling of old works; it has created new works using materials created by others. Furthermore, and further undermining the incentive theory against sampling, it is typically not the musicians who created the sounds who are benefiting from copyright in the sound recording, it is someone else-whoever holds the copyright, for example, a music company or the composer or the band leader. Clyde Stubblefield's creation of a funk beat for James Brown's band in the song *Funky Drummer* is probably the most sampled recording ever. [FN103] Stubblefield created the sound. [FN104] He first laid down the rhythm, \*868 then the bass and guitar came in, then James Brown sang over it. [FN105] Stubblefield has not seen any royalties-ever. [FN106] But the copyright holders of the composition and the recording have. [FN107]

This sort of commercial sampling of small parts of sounds created by others should be allowed explicitly without users incurring the transaction's costs of licensing. While the commercial use should be allowed-considering sounds themselves to be building blocks, like words or notes, which do not receive copyright protection-I am more concerned about the user-generated content distributed online through social networks for free without commercial gain as the motivating factor. These sorts of mash-ups are ubiquitous. Such collages almost certainly neither harm the underlying work commercially (and probably have the opposite effect) nor compete with it. Nor do they undermine the ability of the authors of the underlying work to create derivative works of their own. And these mash-ups certainly do not constitute a

disincentive to create the underlying works in the first place.

The use of *Gilligan's Island* clips and lyrics online in a variety of YouTube videos [FN108] has not hurt the show; it has probably extended its life. The stupidity of Comedy Central trying to stop people from using clips from *The Colbert Report*, when that show itself relies so extensively on clips from other shows, exemplifies the Disney seagull mentality of 'mine' trumping even rational economic thought. [FN109] Comedy Central rather quickly backed off its short-sighted assertion.

All of the sorts of user-generated content I have described should be permitted by clear rules demarcating what is permitted and what is not. The lack of clear rules can chill ongoing development of new works. Short of a reinterpretation of \*869 derivative works or an amendment to the statute, legal protection will depend on the doctrine of fair use. The equitable, judicially created, legislatively recognized doctrine of fair use should be applied so as to support the current, vibrant online world of creation and sharing of user-generated content.

Under the fair use doctrine, certain uses of copyrighted works are allowed without the copyright holder's permission. [FN110] Appropriate application of the fair use doctrine can help balance the incentive of granting a copyright with meeting the important social purposes of copyright law. [FN111]

In developing the doctrine of fair use:

the courts recognized an inherent public privilege to make "fair use" of copyrighted works, and thus to intrude upon a copyright owner's exclusive exploitive rights for the purpose of educational and literary discourse and comment .... [FN112]

... It enables the copyright law to account for certain situations, among others, in which a specific unauthorized use of copyrighted material will have little to no impact upon the author's overall incentive/compensation interests, and the social utilities to be achieved in permitting the use warrants a limited intrusion upon the copyright holder's exclusive rights. [FN113]

\*870 In explaining the justification for the fair use doctrine, Goldstein writes:

The social judgment in these cases is that, even if transaction costs do not systematically disable negotiated licenses, these users are not only so important but also so characteristically underfunded that they deserve a free ride or, at least, should be required to compensate the copyright owner with no more than a reasonable fee. These social judgments presuppose that the copyright owner will be able to earn returns in other markets that are sufficient to provide it with the incentives it needs to produce copyrighted works in the desired quantity and of the desired quality. [FN114]

The problem with relying on fair use in the context of user-generated content in the online social network environment stems from the after-the-fact determination of fair use, the uncertain application of it to many particular situations, [FN115] plus the costs of defense if sued even where the defense would be upheld. An explicit, relatively bright-line rule would remove much uncertainty associated with reliance on fair use and concomitantly reduce transaction costs associated with a permission-based system, thus leading to the creation and dissemina-

tion of more works. I do not propose a blanket permission to use large parts of a work to compete with the copyright holder. [FN116] My proposal is much more limited but still covers most social networking usages. There \*871 would, of course, be gray areas still, but a sharper line (or set of lines) can be drawn that more clearly distinguish between which uses are prohibited and which are permitted without significantly disrupting the incentive function of copyright.

My proposal furthers social justice and the constitutional purpose in a number of ways without harming the incentive-based aspect of copyright. The broader, clearer uses that would be permitted by law without users needing to seek one or more copyright holders' express permission for each use will not remove incentives to create and disseminate works. Just the opposite will happen and is happening. The explosion of user-generated content on the web is quite dramatic evidence of the efficacy of this sort of regime.

User-generated content on social networking sites and online generally could be protected against claims of infringement through three main avenues. First is the current forbearance regime where the assumption is that permission is required but that the copyright holders of the underlying works from which the fan fiction or mash-ups are derived simply choose to allow the works to be made and distributed online. As demonstrated above, this is problematic in several ways, including the uncertainty over any particular work's copyright holder allowing such works to be made and the chilling effect of such lack of or change of forbearance.

The second means would be through statutory interpretation by the courts. As the Court made parodic use of a prior work protected by fair use in the *Oh, Pretty Woman* case, [FN117] so the courts could carve out an exception from liability for infringement by declaring that noncompeting, noncommercial, user-generated content distributed online is per se fair use. In addition, the courts could work with the concepts of derivative works, scenes a faire, building blocks, idea/expression, and the scope of copyrightability of aspects of works (such as general plotlines and characters) to support the flowering of works online. Unfortunately, that approach would take many cases and many years and would undoubtedly involve variable rules in the various circuits. This approach is not optimal, and is itself far from certain to create clear \*872 rules that balance the interests well. Nonetheless, in the absence of legislation, courts should interpret the law to encourage, not discourage, what is being done right now-and the interpretive tools and plasticity of the law and language exist to do so.

The third approach would be legislative. Unfortunately, money speaks the loudest in Congress, and the moneyed interests have been pushing not for more freedom for users in copyright, not for more user protection and more limited rights of the copyright holders, but rather for longer terms for copyright holders, stronger rights, and stronger enforcement mechanisms. And they have been successful, always at the expense of the users or creators of derivative works. The abomination of *Bridgeport Music, Inc. v. Dimension Films* [FN118] has not been overturned by Congress or the Supreme Court of the United States, and so, at least in the Sixth Circuit, even de minimis sampling is illegal which, given the presence of music and the Internet in every circuit, effectively determines the law for the country.

Congress can and should step up to support the vibrant online world of creative works

along the lines I propose in this article, just as it has done in the past when confronted with overreaching by copyright holders or strong societal interests in limiting certain copyright abuses in settings such as libraries; educational uses; certain types of works where compulsory licenses are mandated; scenarios requiring pressing needs like archiving and backup copies; or situations requiring implementation of commonsense limits, like for photographing architectural works from public locations.

Copyright is supposed to encourage the creation and dissemination of new works for the benefit of society. The user-generated content disseminated freely online exemplifies that purpose being met in dramatic fashion. Copyright law should be interpreted and, where necessary, revised to comport with what is being done. It should not be used as a brake to keep ineffective business models in business.

[FNa1]. Professor of Law, Howard University School of Law, and Associate Director, Institute of Intellectual Property and Social Justice (IIPSJ). This essay was prepared for the *Widener Law Journal* symposium on internet expression, *Internet Expression in the 21st Century: Where Technology and Law Collide*. Pub. Relations, Harrisburg Campus Examines the Internet and the Law, WIDENER L., Mar. 2, 2010, <http://law.widener.edu/NewsandEvents/Articles/2010/hb030210hbinternetsymp.aspx>. To illustrate through doing, I have relied heavily on Internet resources, particularly YouTube videos, for this article. Since one cannot (yet) embed audio/visual (AV) works in a law review article, citations that allow readers to find the resources online must suffice. For some of the works used as examples herein, I am indebted to my son, Eric Von Hagen-Jamar, who is much more familiar with the online universe than I am. Finally, I am indebted to my colleague at Howard and IIPSJ, Professor Lateef Mtima, whose thoughts and works have inspired and shaped this essay in ways that cannot be traced.

[FN1]. Welcome to Facebook, <http://www.facebook.com> (last visited May 14, 2010).

[FN2]. YouTube -- Broadcast Yourself, <http://www.youtube.com> (last visited May 14, 2010).

[FN3]. Alina Ng discusses the idea that perhaps in response to Web 2.0, copyright law should dramatically shift from protection based on economic interests of authors to protecting rights of attribution for the creator and producer of a work. Alina Ng, *When Users are Authors: Authorship in the Age of Digital Media*, 12 VAND. J. ENT. & TECH. L. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1545005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1545005).

[FN4]. U.S. CONST. art. I, § 8, cl. 8.

[FN5]. See Edward Lee, *Developing Copyright Practices for User-Generated Content*, J. INTERNET L., July 2009, at 6, 12.

[FN6]. See *infra* text accompanying notes 104-10. Compare [Warner Bros. Entm't Inc. v. RDR Books](#), 575 F. Supp. 2d 513, 553-54 (S.D.N.Y. 2008) (holding that the publication of *The Lexicon* was not fair use because too much was taken from J.K. Rowling's works), with [Bridge-](#)

port Music, Inc. v. Dimension Films, 410 F.3d 792, 795-96, 800-05 (6th Cir. 2005) (holding that fair use may be used as a defense against a claim of infringement for a two-second sampling of a sound recording that was modified in pitch and then looped). For an online version of *The Lexicon*, see The Harry Potter Lexicon, <http://www.hp-lexicon.org/index-2.html> (last visited May 14, 2010).

[FN7]. See, e.g., *Capitol Records Inc. v. Thomas-Rasset*, No. 06-1497 (MJD/RLE), 2010 WL 291763, at \*1-2 (D. Minn. Jan. 22, 2010) (detailing facts of a studio copyright holder's action against an individual for personal use of twenty-four songs from a peer-to-peer music system).

[FN8]. Cf. *Bridgeport Music, Inc.*, 410 F.3d at 805 (allowing fair use as an affirmative defense).

[FN9]. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), cert. denied, 2008 WL 4790669 (N.D. Cal. Oct. 28, 2008).

[FN10]. 17 U.S.C. §§ 101-1332 (2006).

[FN11]. *Id.* § 512.

[FN12]. *Lenz*, 572 F. Supp. 2d at 1152-56 (discussing 17 U.S.C. § 512). “*Let's Go Crazy*” #1 is a home video of toddler bopping to a barely audible, twenty-second portion of a recording of Prince's *Let's Go Crazy*. “LET'S GO CRAZY” #1 (YouTube), <http://www.youtube.com/watch?v=N1KfJHFWlhQ> (last visited May 14, 2010) [hereinafter LET'S GO CRAZY].

[FN13]. FINDING NEMO (Walt Disney Pictures 2003).

[FN14]. *Id.*; see also FINDING NEMO -- MINE (YouTube), <http://www.youtube.com/watch?v=H4BNbHBcnDI&feature=related> (last visited May 14, 2010); FINDING NEMO -- SEAGULL SCENE HQ CLIP (YouTube), [http://www.youtube.com/watch?v=1AdSn\\_YE0VQ&feature=related](http://www.youtube.com/watch?v=1AdSn_YE0VQ&feature=related) (last visited May 14, 2010).

[FN15]. E.g., *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 219 (D. Mass. 2009) (copyright action for a college student's download of thirty songs), *mandamus granted*, 564 F.3d 1 (1st Cir. 2009), cert. denied, 130 S. Ct. 126 (2009).

[FN16]. See ANTI-COUNTERFEITING TRADE AGREEMENT: PUBLIC PREDECISIONAL/DELIBERATIVE DRAFT (Apr. 2010), available at [http://www.ustr.gov/webfm\\_send/1883](http://www.ustr.gov/webfm_send/1883) [hereinafter ACTA DRAFT]; OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE ANTI-COUNTERFEITING TRADE AGREEMENT - SUMMARY OF KEY ELEMENTS UNDER DISCUSSION 4, [http://www.ustr.gov/sites/default/files/uploads/factsheets/2009/asset\\_upload\\_file917\\_15546.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2009/asset_upload_file917_15546.pdf) (last visited May 14, 2010) [hereinafter ACTA KEY ELEMENTS]; see also Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. (forthcoming 2010), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1579782](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1579782). The Anti-Counterfeiting Trade Agreement (ACTA) is in the process of being negotiated, and one of the proposals being seri-

ously considered would make ISPs liable for infringing users unless the ISP cut off the user's access. ACTA DRAFT, *supra*; ACTA KEY ELEMENTS, *supra*; Yu, *supra*. An official version of the current ACTA text being negotiated was finally released under pressure from numerous consumer and public interest advocates, ultimately backed by the European Parliament in a 633-13 vote. Declan McCullagh, *ACTA Treaty Aims to Deputize ISPs on Copyrights*, CNET NEWS, Apr. 21, 2010, [http://news.cnet.com/8301-13578\\_3-20003005-38.html](http://news.cnet.com/8301-13578_3-20003005-38.html); *see also* ACTA DRAFT, *supra*; ACTA KEY ELEMENTS, *supra*. For links to related resources, see Electronic Frontier Foundation, Anti-Counterfeiting Trade Agreement, <http://www.eff.org/issues/acta> (last visited May 14, 2010) [hereinafter Electronic Frontier]; Office of the United States Trade Representative, Anti-Counterfeiting Trade Agreement (ACTA), <http://www.ustr.gov/acta> (last visited May 14, 2010); Program on Information Justice and Intellectual Property, American University Washington College of Law, IP Enforcement Research Database, <http://sites.google.com/site/iipenforcement/> (last visited May 14, 2010) [hereinafter IP Database].

[FN17]. *See generally* CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006) (discussing the importance of collective knowledge and the result of such aggregate information, particularly in the form of Internet sources).

[FN18]. The problems that arise through the social networking sites' user agreements, with respect to ownership of and rights in works posted by users of social networking sites, are significant but are beyond the scope of this essay. The MySpace license dispute illustrates some of the concerns:

Until June 2006, there was a concern amongst musicians, artists, and bands on MySpace such as songwriter Billy Bragg owing to the fine print within the user agreement that read, "You hereby grant to MySpace.com a non-exclusive, fully paid and royalty-free, worldwide license (with the right to sublicense through unlimited levels of sublicensees) to use, copy, modify, adapt, translate, publicly perform, publicly display, store, reproduce, transmit, and distribute such Content on and through the Services." The fine print brought particular concern as the agreement was being made with Murdoch's News Corporation. Billy Bragg brought the issue to the attention of the media during the first week of June 2006. Jeff Berman, a MySpace spokesman swiftly responded by saying, "Because the legalese has caused some confusion, we are at work revising it to make it very clear that MySpace is not seeking a license to do anything with an artist's work other than allow it to be shared in the manner the artist intends."

By June 27, 2006, MySpace had amended the user agreement with, "MySpace does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, or any other materials (collectively, 'Content') that you post to the MySpace Services. After posting your Content to the MySpace Services, you continue to retain all ownership rights in such Content, and you continue to have the right to use your Content in any way you choose."

Wikipedia, MySpace, <http://en.wikipedia.org/wiki/MySpace> (last visited May 14, 2010) (citation omitted). For the current terms of agreement, see MySpace, Terms & Conditions (June 25, 2009) <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

See generally Posting of Sandywithay to Squidoo, <http://www.squidoo.com/WhyReadTheTermsOfAgreement> (last visited May 14, 2010) (informing Internet users about the importance of reading a network's terms of agreement). Facebook's user agreement currently provides:

## 2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos (“IP content”), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (“IP License”). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).

3. When you add an application and use Platform, your content and information is shared with the application. We require applications to respect your privacy settings, but your agreement with that application will control how the application can use the content and information you share. (To learn more about Platform, read our About Platform page.)

4. When you publish content or information using the “everyone” setting, it means that everyone, including people off of Facebook, will have access to that information and we may not have control over what they do with it.

5. We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

Facebook, Statement of Rights and Responsibilities, <http://www.facebook.com/terms.php?ref=pf> (last visited May 14, 2010).

[FN19]. U.S. CONST. art. I, § 8, cl. 8.

[FN20]. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

[FN21]. WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009).

[FN22]. JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

[FN23]. See SUNSTEIN, *supra* note 17; Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009) (discussing the conflicting interests between copyright law and the advancement of creativity and expression on the Internet).

[FN24]. 17 U.S.C. §§ 101-1332 (2006).



[FN25]. See PATRY, *supra* note 21, at 36-41.

[FN26]. The level of originality would be higher than the minimal standard set in *Feist Publications, Inc. v. Rural Telephone Service Co.* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1], at 1-111 (2009)) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”). But it would not be so high that the right becomes meaningless.

[FN27]. Although in this essay I focus primarily on user-generated content primarily made for and distributed through social networking sites, many of the same considerations apply in other areas such as sampling sounds, the creation and distribution of fan fiction, and the creation and distribution of various AV works, even if distributed outside of social networks proper. Some of the data for my argument, especially sound sampling, come from outside the online social networking context.

[FN28]. See News Release, Library of Congress, Michael Wesch to Discuss “The Anthropology of YouTube” at Library of Congress on June 23 (May 22, 2008), <http://www.loc.gov/today/pr/2008/08-104.html>; see also AN ANTHROPOLOGICAL INTRODUCTION TO YOUTUBE (YouTube June 23, 2008), [http://www.youtube.com/watch?v=TPAO-IZ4\\_hU](http://www.youtube.com/watch?v=TPAO-IZ4_hU); NUMA NUMA (YouTube Aug. 14, 2006), <http://www.youtube.com/watch?v=60og9gwKhlo> [hereinafter NUMA NUMA]; NUMA NUMA, DRAGOSTEA DIN TEL - SOUTH PARK (YouTube Apr. 3, 2008), <http://www.youtube.com/watch?v=9-MZEe-jvzY&feature=related>; SOULJA BOY TELL'EM - CRANK THAT (YouTube 2007), <http://www.youtube.com/watch?v=8UFIYGkROII> [hereinafter CRANK THAT]; see also COPYRIGHT CRIMINALS (PBS 2009). For more information on the film, see Independent Lens, Copyright Criminals, <http://www.pbs.org/independentlens/copyright-criminals/> (last visited May 14, 2010).

[FN29]. The aim of the copyright law is progress for the people, for cultural advancement; granting a copyright for a limited time is merely the means to that end. As the Supreme Court stated in *Feist Publications*, “The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” *Feist Publ'ns*, 499 U.S. at 349 (quoting U.S. CONST. art. I, § 8, cl. 8) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); accord *Eldred v. Ashcroft*, 537 U.S. 186, 227 n.4 (2003) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); *Twentieth Century Music Corp.*, 422 U.S. at 156 (quoting *Fox Film Corp.*, 286 U.S. at 127); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (quoting U.S. CONST. art. I, § 8, cl. 8). The Court continued, in *Feist Publications*: “To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist Publ'ns*, 499 U.S. at 349-50 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57 (1985)); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (“We have often recognized the monopoly privileges that Congress has authorized ... are limited in nature and must ultimately serve the public good.”); *Sony Corp.*, 464 U.S. at 431-32 (quoting *Twentieth Century*

*Music Corp.*, 422 U.S. at 156) (stating the purpose of copyright is to promote wide dissemination of information, literature, music, and other arts); L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* (Craig Joyce ed., 2009), *reprinted in* 46 HOUS. L. REV. 215 (2009) (discussing the foundations, purpose, and functions of copyright). *See generally* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006) (discussing recent developments in constitutional law regarding copyrights); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001) (discussing U.S. CONST. art. I, § 8, cl. 8) (interpreting the meaning of "progress" in Article I, Section 8, Clause 8 of the United States Constitution).

[FN30]. *See generally* Mtima, *supra* note 23; Lateef Mtima & Steven D. Jamar, *The Copyright Social Justice Promise of Digitizing Textual Information*, 55 N.Y.L. SCH. L. REV. (forthcoming 2010).

[FN31]. *See, e.g.*, PATRY, *supra* note 21, at 71-75; *see also* LESSIG, *supra* note 20.

[FN32]. *See* PATRY, *supra* note 21, at 26-36; *see also* COPYRIGHT CRIMINALS, *supra* note 28.

[FN33]. *See* Mtima, *supra* note 23.

[FN34]. *See id.*

[FN35]. *Id.*

[FN36]. The RIAA suits are examples. *E.g.*, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795-97 (6th Cir. 2005).

[FN37]. ACTA KEY ELEMENTS, *supra* note 16, at 4; *see also* Electronic Frontier, *supra* note 16; IP Database, *supra* note 16.

[FN38]. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-53 (N.D. Cal. 2008), *cert. denied*, 2008 WL 4790669 (N.D. Cal. Oct. 28, 2008); LET'S GO CRAZY, *supra* note 12.

[FN39]. The original has been forced off the Internet, but many versions have followed. *See, e.g.*, GILLIGANS ISLAND - STAIRWAY TO HEAVEN (YouTube May 2, 2007), <http://www.youtube.com/watch?v=xG21TB-UVvs>; STAIRWAY TO GILLIGAN'S ISLAND (YouTube Mar. 25, 2006), <http://www.youtube.com/watch?v=KTCYLbFxTpl> 9; THE CAST-AWAY SONG - LED ZEPPELIN MEETS GILLIGAN (YouTube May 2, 2007), <http://www.youtube.com/watch?v=k8Iy5BCGxLc&NR=1>. Indeed there is a whole host of *Gilligan's Island* YouTube bits now. *E.g.*, SHE'S NOT THERE (YouTube July 1, 2006), <http://www.youtube.com/watch?v=kR3rXf3cx6w&feature=related>.

[FN40]. Such a rule should extend beyond social networking to sampling more generally and thus overturn *Bridgeport Music, Inc. v. Dimension Films* and restore the doctrine that de minimis appropriation is legal, thereby generally allowing sampling of audio recordings as raw

material from which to make new music. *See generally* COPYRIGHT CRIMINALS, *supra* note 28 (examining the issue of music sampling and the debates that surround it).

[FN41]. *See* PATRY, *supra* note 21, at 69-96.

[FN42]. *See id.* ch. 6, at 109-32.

[FN43]. *See* PATRY, *supra* note 21, ch. 6, at 109-32.

[FN44]. *See id.* at 63-64.

[FN45]. *See* Baker v. Selden, 101 U.S. 99, 101-07 (1879); *see also* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

[FN46]. 17 U.S.C. § 102 (2006).

[FN47]. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

[FN48]. *Id.* (internal citations omitted).

[FN49]. *See, e.g., Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967).

[FN50]. *See* 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.14.2.2(d), at 1:52 (3d ed. Supp. 2009).

[FN51]. *Wicked: A New Musical*, <http://www.wickedthemusical.com/#> (last visited May 14, 2010).

[FN52]. ALICE RANDALL, *THE WIND DONE GONE* (2001).

[FN53]. *Nichols*, 45 F.2d at 120-21.

[FN54]. *AVATAR* (Twentieth Century Fox et al. 2009).

[FN55]. Hero myths are as old as storytelling. *See generally* JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (3d ed. 2008) (1949) (discussing and comparing the heroes of mythology and religions across the world and throughout history). One of the better illustrations of the derivative nature of *Avatar* is a marked up “script” of Disney's *Pocahontas*. *See* Posting of Chris to WTFOODGE.COM, <http://wtfoodge.com/avatar-pocahontas/> (Jan. 4, 2010, 22:55 EST). Others have likened it to *FernGully* (gaia tree, bulldozer), *Star Wars* (revolutionaries against imperial power), *Born on the Fourth of July* (wounded warrior finds redemption), *Dances with Wolves* (invader saves natives), and *The Matrix* (a linked-in avatar functioning in another world). *See, e.g.,* Posting of Daniel Carlson to Mania.com, [http://www.mania.com/five-movies-avatar-ripped-off\\_article\\_117340.html](http://www.mania.com/five-movies-avatar-ripped-off_article_117340.html) (Aug. 31, 2009). More could be added easily enough. *See id.*

[FN56]. *See* 17 U.S.C. §§ 103, 106(2) (2006); *see also* Pickett v. Prince, 207 F.3d 402, 405-06 (7th Cir. 2000) (citing, in relevant part, 17 U.S.C. § 106(2)).

[FN57]. PATRY, *supra* note 21, at 73.

[FN58]. *Id.*

[FN59]. *Id.* (quoting Hugh Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated*, 18 EUR. INTELL. PROP. REV. 253, 259 (1996)).

[FN60]. For an excellent, sophisticated discussion of translation across languages and cultures, see generally DOUGLAS R. HOFSTADTER, *LE TON BEAU DE MAROT: IN PRAISE OF THE MUSIC OF LANGUAGE* (1997).

[FN61]. For example, the film *Iron Man* is based on the Marvel Comic of the same name. IRON MAN (Paramount Pictures et al. 2008); *see also* Marvel Universe, Iron Man, [http://marvel.com/universe/Iron\\_Man\\_\(Tony\\_Stark\)](http://marvel.com/universe/Iron_Man_(Tony_Stark)) (last visited May 14, 2010).

[FN62]. For lists of various comic book characters, which may all have similar roots as Superman, see Marvel Universe, Character Bios, <http://marvel.com/universe/Category:People> (last visited May 14, 2010); DC Universe, Heroes and Villains, [http://www.dccomics.com/dcu/heroes\\_and\\_villains/](http://www.dccomics.com/dcu/heroes_and_villains/) (last visited May 14, 2010).

[FN63]. *E.g.*, J.R.R. TOLKIEN, *THE LORD OF THE RINGS* (Harper Collins Publishers 1994) (1954).

[FN64]. *E.g.*, J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* (1997).

[FN65]. *See, e.g.*, Harry Potter Fan Fiction, <http://www.harrypotterfanfiction.com/> (last visited May 14, 2010).

[FN66]. *See, e.g.*, CHEM PROF, *NOTEBOOKS AND LETTERS* (2007), [http://www.fanfiction.net/s/3867175/1/Notebooks\\_and\\_Letters](http://www.fanfiction.net/s/3867175/1/Notebooks_and_Letters). The premise is that Harry and company had licensed their story to J.K. Rowling, who strayed from the true events in books five, six, and seven, particularly with respect to the romantic involvement of Harry and Hermione. *See id.* “Chem Prof” includes the following disclaimer at the start of this story: “The Harry Potter universe and all the characters in it belong to J. K. Rowling. I get nothing out of this except enjoyment.” *Id.*

[FN67]. Under [section 101](#), a derivative work is defined as follows:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101 (2006).

[FN68]. *See id.* §§ 101, 103(a), 106(2); *see also* *Pickett v. Prince*, 207 F.3d 402, 405-08 (7th Cir. 2000) (discussing 17 U.S.C. §§ 103(a), 106(2)); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-92 (2d Cir. 1976).

[FN69]. See generally TOM STOPPARD, ROSENCRANTZ & GILDENSTERN ARE DEAD (1967).

[FN70]. The Harry Potter Lexicon, *supra* note 6.

[FN71]. Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 521 (S.D.N.Y. 2008) (quoting J.K. Rowling Official Site, [http://www.jkrowling.com/textonly/en/fansite\\_view.cfm?id=14](http://www.jkrowling.com/textonly/en/fansite_view.cfm?id=14) (last visited May 14, 2010)).

[FN72]. Warner Bros. Entm't Inc., 575 F. Supp. 2d at 517-33 (detailing the facts of the dispute).

[FN73]. STEVE VANDER ARK ET AL., THE LEXICON: AN UNAUTHORIZED GUIDE TO HARRY POTTER FICTION AND RELATED MATERIALS (2009). This decision is a bit hard to square with the *Seinfeld* case, *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, in which the court treated facts trivia from the show as protectable expression rather than as unprotectable. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 135 (2d Cir. 1998). The attributes of a fictional world are not only fact-like, but are, indeed from the outside, facts and thus arguably should not get copyright protection.

[FN74]. It is important to note that there are ways to make money online through advertising or, as is exemplified by Vander Ark himself, to establish a presence online through high-quality, free offerings and then to exploit that through advertising online or publishing a hard-copy or both. See Tim Wu, *Fan Feud*, NEW YORKER, May 12, 2008, at 42, available at [http://www.newyorker.com/talk/2008/05/12/080512ta\\_talk\\_wu?printable=true](http://www.newyorker.com/talk/2008/05/12/080512ta_talk_wu?printable=true).

[FN75]. J.D. SALINGER, THE CATCHER IN THE RYE (1951).

[FN76]. *Salinger v. Colting*, 641 F. Supp. 2d 250, 254-69 (S.D.N.Y. 2009) (granting a preliminary injunction); see also Sewell Chan, *Judge Rules for J.D. Salinger in 'Catcher' Copyright Suit*, N.Y. TIMES, July 2, 2009, at A.17, available at <http://www.nytimes.com/2009/07/02/books/02salinger.html>.

[FN77]. Chan, *supra* note 76, at A.17.

[FN78]. J.D. SALINGER, THE CATCHER IN THE RYE (1951).

[FN79]. Compare *id.*, with 17 U.S.C. §§ 301-305 (2006) (duration of copyrights). See also Laurie Richter, *Reproductive Freedom: Striking a Fair Balance Between Copyright and Other Intellectual Property Protections in Cartoon Characters*, 21 ST. THOMAS L. REV. 441, 456-64 & n.75 (2009) (discussing the history of copyrights and copyright duration).

[FN80]. Compare Charles McGrath, *J.D. Salinger, Author Who Fled Fame, Dies at 91*, N.Y. TIMES, Jan. 29, 2010, at A.1, available at <http://www.nytimes.com/2010/01/29/books/29salinger.html> (explaining that Salinger died in 2010), with 17 U.S.C. §§ 301-305 (duration of copyrights).

[FN81]. Mel Gussow, *Tom Stoppard in Love, with Shakespeare*, N.Y. TIMES, Jan. 12, 1999,

at E.1, available at <http://www.nytimes.com/1999/01/12/movies/critic-s-notebook-tom-stoppard-in-love-with-shakespeare.html>; SHAKESPEARE IN LOVE (Universal Pictures et al. 1998).

[FN82]. Janet Maslin, *Film Review; A Teenager Who's Clear on Her Priorities*, N.Y. TIMES, July 19, 1995, at C.9, available at <http://movies.nytimes.com/movie/review?res=990CE7D6163AF93AA25754C0A963958260>; CLUELESS (Paramount Pictures 1995).

[FN83]. See SHERLOCK HOLMES (Warner Bros. Pictures et al. 2009).

[FN84]. As I have already noted, it too would be protected under my proposal, but the degree of originality and transformativeness required would be higher. See *supra* notes 69-80 and accompanying text.

[FN85]. O-ZONE, *Dragostea Din Tei*, on DISCO-ZONE (Ultra Records, Inc. 2004); see also Douglas Wolk, *The Syncher, Not the Song: The Irresistible Rise of the Numa Numa Dance*, BELIEVER, June/July 2006, available at [http://www.believermag.com/issues/200606/?read=article\\_wolk](http://www.believermag.com/issues/200606/?read=article_wolk).

[FN86]. Wolk, *supra* note 85.

[FN87]. *Id.*

[FN88]. *Id.*; NUMA NUMA, *supra* note 28.

[FN89]. Wolk, *supra* note 85; NUMA NUMA, *supra* note 28.

[FN90]. Joseph Diaz, *The Kid Who Rocked the World from His New Jersey Bedroom*, ABCNEWS, Aug. 24, 2007, <http://abcnews.go.com/print?id=3515665>.

[FN91]. OPERA EN EL MERCADO (YouTube Nov. 13, 2009), <http://www.youtube.com/watch?v=Ds8ryWd5aFw>.

[FN92]. CENTRAAL STATION ANTWERPEN GAAT UIT ZIJN DAK! (YouTube Mar. 23, 2009), [http://www.youtube.com/watch?v=0UE3CNu\\_rtY](http://www.youtube.com/watch?v=0UE3CNu_rtY).

[FN93]. RICHARD RODGERS & OSCAR HAMMERSTEIN II, THE SOUND OF MUSIC (1959); THE SOUND OF MUSIC (Twentieth Century Fox Film Corporation et al. 1965).

[FN94]. I am using United States law throughout. Since these videos have been distributed in the United States through the Internet, they could be violating United States law even if not violating the law where they were made.

[FN95]. SOULJA BOY, *Crank That (Soulja Boy)*, on SOULJA BOY TELL 'EM (ColliPark Music/Interscope Records 2007); Soulja Boy Tell 'Em News, *Teen Rapper Soulja Boy Building Hip-Hop Empire*, REUTERS, Dec. 13, 2008, <http://new.music.yahoo.com/soulja-boy-tell-em/news/teen-rapper-soulja-boy-building-hip-hop-empi>

re-61922280.

[FN96]. *See id.*

[FN97]. *See id.*; *see also* CRANK THAT, *supra* note 28 (commercial version).

[FN98]. *See* Soulja Boy Tell 'Em News, *supra* note 95; *see, e.g.*, PHILIPPINES BEST DANCE CREW - A DAY WITH THE CPDRC DANCING PRISONERS (YouTube Apr. 23, 2009), [http://www.youtube.com/watch?v=Fxm\\_6ytTsDk](http://www.youtube.com/watch?v=Fxm_6ytTsDk) [hereinafter PHILIPPINES BEST DANCE CREW] (explanation with prisoner version); PRISON INMATES DANCE TO SOULJA BOY AND MC HAMMER (YouTube Apr. 21, 2008), <http://www.youtube.com/watch?v=eblCaSPIFR4&feature=related>.

[FN99]. *See* CRANK THAT, *supra* note 28; Soulja Boy Tell 'Em News, *supra* note 95. For a taste of the implications regarding the culture of YouTube, *see* AN ANTHROPOLOGICAL INTRODUCTION TO YOUTUBE, *supra* note 28 (discussing *Numa Numa* and other adaptations that have become part of YouTube culture); News Release, Library of Congress, *supra* note 28; NUMA NUMA, *supra* note 28; NUMA NUMA, DRAGOSTEA DIN TEI - SOUTH PARK, *supra* note 28.

[FN100]. SOULJA BOY (YouTube Feb. 24, 2008), <http://www.youtube.com/watch?v=yYp2Aloz-uE&feature=related> (Philippines prison dancers with sound dubbed over); *see also* PHILIPPINES BEST DANCE CREW, *supra* note 98 (explanation with prisoner version); PRISON INMATES DANCE TO SOULJA BOY AND MC HAMMER, *supra* note 98.

[FN101]. Associated Press, *Funk Star Rick James Dies at Age 56*, MSNBC.COM, Aug. 6, 2004, <http://www.msnbc.msn.com/id/5625044/>. *Super Freak* had a third act as the song the beauty contestant danced to on the bad advice of her grandfather, played by Alan Arkin, in the movie *Little Miss Sunshine*. LITTLE MISS SUNSHINE (Fox Searchlight Pictures et al. 2006); *Synopsis for Little Miss Sunshine*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0449059/synopsis> (last visited May 14, 2010).

[FN102]. *See* Associated Press, *supra* note 101.

[FN103]. *See* Ethan Hein's Blog: The Natural History of the Funky Drummer Break, <http://www.ethanhein.com/wp/2009/the-natural-history-of-the-funky-drummer-break> (May 25, 2009, 11:34 EST) [hereinafter Ethan Hein's Blog].

[FN104]. *Id.*

[FN105]. Ethan Hein's Blog, *supra* 103.

[FN106]. *Id.*

[FN107]. *Id.*; *see also* COPYRIGHT CRIMINALS, *supra* note 28.

[FN108]. YouTube, Gilligan's Island Theme Song, [http://www.youtube.com/results?search\\_query=gilligan%27s+island+theme+song&search\\_](http://www.youtube.com/results?search_query=gilligan%27s+island+theme+song&search_)

type=&aq=l&oq=gilligan%27s+ (last visited May 14, 2010) (showing a list of search results for “Gilligan's Island Theme Song”).

[FN109]. See The Marquee Blog, <http://marquee.blogs.cnn.com/2010/03/03/comedy-central-pulls-daily-show-colbert-report-from-hulu/?ir ef=allsearch> (Mar. 3, 2010, 15:49 EST).

[FN110]. 17 U.S.C. § 107 (2006); see also Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 149, 167 (1999) (discussing fair use).

[FN111]. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

[FN112]. Mtima & Jamar, *supra* note 30 (citing WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 19-63 (2d ed. 1995) (discussing cases developing fair use in the United States)).

[FN113]. *Id.*; see *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901); see, e.g., 2 PAUL GOLDSTEIN, *COPYRIGHT* § 10.2.1, at 10:19 to:22 (2d ed. Supp. 2005) (discussing the scope of fair use); 4 NIMMER & NIMMER, *supra* note 26, § 13.05[A][1], at 13-160 to -185 (discussing fair use); Appel, *supra* note 110, at 174-75 (discussing the tension between copyright and public access to works); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49, 56-57 (1993) (discussing fair use and the purpose of copyright); see also Leval, *supra* note 111, at 1105 (citations omitted) (“Not long after the creation of the copyright [law] by the Statute of Anne of 1709, courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as ‘fair abridgment,’ later ‘fair use,’ would not infringe the author’s rights.”).

[FN114]. 2 GOLDSTEIN, *supra* note 113, § 7.0.2, at 7:7; see also *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-27 (9th Cir. 1992); *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 387 F. Supp. 2d 521, 535-37 (M.D.N.C. 2005); Leval, *supra* note 111, at 1105; Samuelson, *supra* note 113, at 51.

[FN115]. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (holding that reproduction of course packs assembled from portions of copyrighted works was not fair use); *New Era Publ'ns Int'l, ApS v. Carol Publ'g Group*, 904 F.2d 152 (2d Cir. 1990) (holding that publication of a critique of Scientology, including reproduction of substantial portions of L. Ron Hubbard's (Scientology's creator) writings, was not fair use).

[FN116]. MC Hammer's use of *Super Freak* would not qualify, for example.

[FN117]. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

[FN118]. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

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