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CREATIVE READING

JESSICA LITMAN*

Let me begin with something that Jamie Boyle wrote ten years ago in *Intellectual Property Policy Online: A Young Person's Guide*:[1]

> Copyright marks the attempt to achieve for texts and other works a balance in which the assumption of the system is that widespread use is possible without copying. The relative bundles of rights of the user and the owner achieve their balance based on a set of economic and technical assumptions about the meaning of normal use.

For our purposes, I would like to generalize this as something that Boyle might have written if he had not in that particular essay been talking about RAM (random access memory) copies: "*Copyright marks the attempt to achieve for texts and other works a balance in which the assumption of the system is that widespread use is possible without [infringing].*" The copyright model is based on a balance between uses copyright owners are entitled to control and other uses they simply are not entitled to control.

I don't think that any of the policies underlying copyright would be undermined if the uses that Professor Tushnet describes[2] were on the "no copyright owner control" side of that line. Fan creations are usually good for business. Star Trek was just one of a bunch of TV series canceled for poor ratings,[3] until some women got together at science-fiction conventions and started exchanging home-made Star Trek short stories based on the premise that Kirk and Spock were lovers.[4] Fan fiction, fan art, and a generation of people who attended science-fiction conventions to dress up in Klingon costumes[5] gave Star Trek a second life that was far more commercially

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* Professor of Law, University of Michigan. I would like to thank Jon Weinberg, whose insights and suggestions greatly improved this comment.

1. 10 HARV. J. L. & TECH. 47, 56 (1996).

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

3. (Although it seemed to have a perpetual life in syndication to the cheapest TV broadcaster in any given town.)

4. *See* JOANNA RUSS, MAGIC MOMMAS, TREMBLING SISTERS, PURITANS AND PERVERTS 80–99 (1985); Kirk/Spock, Wikipedia, http://en.wikipedia.org/wiki/Kirk/Spock (last visited Sept. 27, 2006).

5. If references to "Kirk," "Spock," and "Klingon" seem like gibberish to you, you can find innumerable books and websites to introduce you to the basics of the Star Trek universe. A Google search for "Kirk Spock Klingon" turns up 248,000 results. I would suggest that you consult SAM RAMER, THE JOY OF TREK (1997), but you would have difficulty getting your hands on a copy. Mr.

successful than the first. Paramount built the remnants of Star Trek into a multimillion-dollar franchise initially on the backs of creative fans.[6] Similarly, fans who continued to try to live in the Star Wars universe for a generation after the *Return of the Jedi* gave George Lucas the audience base he needed to foist on us three Star Wars prequels,[7] Jar Jar Binks,[8] a universe of flimsy plastic toys,[9] and $100 replica light sabers in your choice of Jedi colors.[10] Why not, then, allow fannish creativity to blossom without limit?

I suspect that many people feel uncomfortable with the idea of allowing fan creations to multiply without restraint. If J.K. Rowling wants to say "no sexually explicit Harry Potter fan fiction or fan art,"[11] or George Lucas wants to say "no Star Wars fan fiction or art except when you're signed on to the official Lucasfilm web site,"[12] or Steven Spielberg wants to say, "No E.T. fan fiction, period," we figure they are within their rights, since Harry Potter, Star Wars, and E.T. are, after all, their creations.

But they aren't; not entirely. They also result from the active collaboration of fans. We haven't come up with a good way to think about the interests that fans—and other readers, viewers, listeners and users—have in the contributions they've made to their experiences of copyrighted works, although you do see those interests popping up in the very occasional case.[13] Copyright scholars spill a lot of ink on the public interest, but almost all of us are guilty of having given reader and listener interests short shrift in our work. Certainly, that's something that I'm guilty of. We have focused so hard on the idea that copyright is an incentive for authors and publishers that it is almost as if we thought that we

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Ramer, who authored the book, neglected to get Paramount Pictures' permission. Paramount decided to bite the hands that feed it, and sued Mr. Ramer and his publisher for copyright infringement, persuading the court to enter an injunction prohibiting the manufacture, publication, or sale of the book. *See* Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329, 338 (S.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999).

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

7. STAR WARS EPSIODE I: THE PHANTOM MENACE (1999); STAR WARS EPISODE II: ATTACK OF THE CLONES (2002); STAR WARS EPISODE III: REVENGE OF THE SITH (2005). This is not to mention the multiple television spin-offs and Star Wars video games. *See* Internet Movie DataBase, Search results for "Star Wars," http://www.imdb.com/find?s=all&q=star+wars (last visited Sept. 27, 2006).

8. *See* Star Wars Databank: Binks, Jar Jar, http://www.starwars.com/databank/character/jarjarbinks/index.html (last visited Sept. 27, 2006).

9. *See, e.g.*, Toy Wiz, Star Wars Toys & Action Figures, Light Sabers, Miniatures & More at Toy Wiz!, http://www.toywiz.com/starwarcarga.html (last visited Sept. 27, 2006).

10. *See* Star Wars Force FX Light Sabers, Think Geek, http://www.thinkgeek.com/geektoys/warfare/69de/ (last visited Sept. 27, 2006).

11. *See* Darren Waters, *Rowling Backs Fan Fiction*, BBC News Online (May 27, 2004) http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm (last visited Nov. 18, 2006).

12. *See* Star Wars Welcome: Terms of Use, http://www.starwars.com/welcome/about/copyright.html (last visited Sept. 27, 2006).

13. In *Lotus v. Borland*, 49 F.3d 807, 821 (1st Cir. 1995) (Boudin, J., concurring), *aff'd by an equally divided court*, 516 U.S. 233 (1996), for instance, Judge Boudin was concerned about user-written macros. In *Nintendo of America v. Lewis Galoob Toys*, 780 F. Supp. 1283, 1291–98 (N.D. Cal. 1991), *aff'd*, 964 F.2d 965 (1992), the trial court felt it was important to preserve the consumer's interest in modifying games.

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could achieve the "Progress of Science" just by filling up some stockroom somewhere with lots of works of authorship. Recently, it seems as if many of us have had a similar "aha!" moment and recognized that we have been undervaluing the central place that readers and listeners play in the copyright scheme.[14] After all, in order for the creation and dissemination of works of authorship to promote the progress of anything, people need to read, look at, listen to, watch, and use them. We have not been paying enough attention to the fact that contemporary incentive-based theories of copyright have tended to knock readers and listeners out of the picture frame.

Theorizing copyright primarily in terms of author incentives looks primarily at the law's effects on authors and distributors, and relegates the readers, listeners, and viewers of the world to the ghetto of fair use. I am less optimistic than Professor Tushnet that fair use is capacious enough to be able to do a good job, even for the authors of fan fiction, fan art, and fan video. In its current form, it cannot possibly answer the legitimate claims of readers, listeners, and viewers of other sorts. Fair use is much too busy protecting *The Wind Done Gone*[15] and trying to figure out what to do with Google Book Search[16] to be able to support the copyright interests of millions of everyday readers, listeners, and viewers.

Tushnet reminds us that "[c]ase law is not all that matters,"[17] and urges us to pay more attention to "the choices people make about copyright on a daily basis."[18] She explores media fandom as one example of an information ecology with something to teach us about copyright law's effects on creativity. Tushnet describes fandom as developing a common-property-like regime, in which intellectual property rights are shared among members of fan communities.[19] The common-property regime is implicitly understood to be adverse to the rights of the owners of intellectual property in the original creations that are the subjects of fan creativity. That is, the owners of the copyrights in the original *Star Trek*, *Star Wars*, *Harry Potter*, and *Superman* works are, fans assume, probably *entitled* to control fan works, but they have not for the most part insisted on exercising that control.[20] The common property Tushnet describes thus subsists at the sufferance of major commercial copyright owners, at best

14. *See, e.g.*, Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003).

15. *See, e.g.*, SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

16. *See* McGraw Hill Cos. v. Google, No. 05 CV 8881 (S.D.N.Y. filed Oct. 15, 2005); Authors Guild v. Google, No. 05 CV 8136 (S.D.N.Y. filed Sept. 20, 2005); Jonathan Band, *The Google Print Library Project: A Copyright Analysis*, *available at* http://www.policybandwidth.com/doc/googleprint.pdf.

17. *See* Tushnet, *supra* note 2, at 140.

18. *Id.* at 134.

19. *See id.* at 151–55.

20. *See id.* at 138–39.

occupying the limbo of property potentially subject to adverse possession or prescriptive easement.[21]

Copyright law gives us tools we can use to treat fannish creativity the way we might like to: we could treat fannish creations as implicitly authorized derivative works. The implicit authorization flows from releasing a work in the mass media for which the buzz generated by fannish activity is likely to mean a huge increase in the bottom line, and the terms of the implied license are roughly speaking the terms set by the fannish norms Tushnet lays out in her paper. If J.K. Rowling, George Lucas, and Steven Spielberg want to vary the terms of the implied-in-fact license, they could do so easily, by making public announcements of their variances.

Analyzing fan activity through the lens of implied license solves the prescriptive-easement problem too, since copyright owners' permission defeats any claim to have acquired a right to engage in fannish creativity through prescription. Implied license theories thus allow us to permit fan activity without undermining the core understanding that the copyright owner is entitled to decide whether or not to allow fans to engage in creative embroidery.

Taming fannish creativity by seizing on its contribution to the copyright owners' bottom line, though, is troubling because it treats fan activity as exceptional. Tushnet's essay cautions us to avoid facile generalizations. We should not, she insists, easily assume that the fan community shares the same interests and norms as librarians or documentary filmmakers.[22] Media fandom may be a sui generis ecology. It is difficult to ignore the possibility, though, that fandom, as Tushnet describes it, might be the vanguard of a new and increasingly widespread copyright headache, as individuals combine the raw material of commercial mass-media entertainment with their own creativity and post the result on the web for the enjoyment of millions of their online buddies. The burgeoning popularity of Internet sites like YouTube,[23] the explosion of personal blogs,[24] the expansion of online communities like MySpace.com into film, music, and video,[25] and the increasingly blatant efforts of mainstream media to harness the power of amateur promotion to create buzz for their

21. *Cf.* Gee v. CBS, 471 F. Supp. 600, 657 (E.D. Pa.) (finding that Columbia Records' possession of the recordings of Bessie Smith satisfies the requirements for common-law adverse possession), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

22. *See* Tushnet, *supra* note 2, at 145.

23. YouTube, http://www.youtube.com/ (last visited Feb. 5, 2007). *See* Fred Von Lohmann, *YouTube's Balancing Act: Making Money, Not Enemies*, HOLLYWOOD REPORTER, ESQ., July 10, 2006, http://www.hollywoodreporteresq.com/thresq/spotlight/article_display.jsp?vnu_content_id=1002802746.

24. *See* Felicia R. Lee, *Survey of the Blogosphere Finds 12 Million Voices*, N.Y. TIMES, July 20, 2006, at B3.

25. Myspace, http://www.myspace.com/ (last visited Feb. 5, 2007). One can find on MySpace.com both advertising for mainstream commercial films and music and subscriber-created clips. The concept appears to be that major film studios and record labels have concluded that associating their release with MySpace.com will give it desirable buzz.

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works[26] suggest that the issues posed by media fandom may soon implicate a much larger slice of the Internet. Fandom may be a harbinger of a new explosion of noncommercial, but very public, dissemination of amateur derivative works incorporating the copyrighted expression of others. Potentially, the way we think about fandom will influence the way we treat large numbers of twenty-first century readers, listeners, and viewers.

As a normative matter, I find it an ominous sign that we need to rely on implied license to permit fannish behavior and lots of behavior like it. Relying on implied license to permit fan fiction and fan video reinforces the obvious negative pregnant: if it is not the sort of thing copyright owners have a clear interest in permitting, copyright law should not allow it. Much creative interaction with works of authorship will lack fandom's obvious contribution to the bottom line. A home video posted on YouTube.com is unlikely to substitute for a ticket to *Pirates of the Caribbean: Dead Man's Chest*, but it may so amuse viewers that they decide they do not have the time to watch a 180-minute movie. It is not at all clear, however, that the policies underlying copyright should encourage only copyright-owner-authorized creativity. We cannot make appropriate decisions about whether incursions on copyright-owner control of the ways their works are read, heard, seen, and played ought to be actionable without considering the value of the uses as well as the degree of the invasion.

My argument is that by ignoring the central importance of readers, listeners, viewers, and players in the copyright scheme, we have all but conceded that the essential policy question in determining whether a use of copyrighted material should be lawful is the way the use looks from the viewpoint of the copyright owner. The comfort level supplied by an implied license analysis is emblematic of our failure to pay enough attention to reader interests. We need to take another look at copyright, keeping the significance of readers, listeners, and viewers in mind. When we ignore their role in the copyright scheme, we are left with a copyright law that seems, for good reason, to be out of kilter.

Authors (and author-centric copyright scholars) who pay attention to readers, listeners, and viewers tend to be most comfortable with an image of the reader-listener-viewer as a passive sponge. The author creates, the publisher disseminates, and the reader-listener-viewer forks over appropriate payment and passively soaks it all up. When pressed, we admit that reading is often an activity requiring a fair amount of creativity. (That is one reason we encourage our children to read rather than watch television or play videogames.) Different readers of *Harry Potter and the Sorcerer's Stone*[27] will envision the characters differently. When Warner Brothers turns the book into a major motion picture, viewers will disagree about whether Chris Columbus has captured or butchered

26. *See* Elinor Mills, *Advertisers Look to Grassroots Marketing*, CINET News.com, Apr. 4, 2006, http://news.com.com/2102-1024_3-6057300.html; *see also* Mike Yamanote, *Can "Crowdsourcing" Be Slave Labor*, CINET Media Blog, July 18, 2006, http://news.com.com/2061-10802_3-6095563.html.

27. J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1998).

the book characters.[28] Listening, viewing, and playing can engage the imagination in comparable ways. If copyright is designed to encourage listening, viewing, and playing—and if it is not, it is curious that it confers protection on works designed to be listened to, viewed, or played—we presumably want individuals to bring the same creativity to their listening, viewing, and playing that we assume they bring to their reading.

Our collective failure to pay sufficient attention to the interests of readers, listeners, and viewers is especially damaging to the overall fabric of copyright law, because in the past two decades we have acquiesced in two large, non-statutory expansions of copyright rights at the expense of reader and listener rights. Those expansions, taken together, are a lot more dangerous than the Digital Millennium Copyright Act.[29] First, we have accepted, indeed in some cases promoted, an expansive literal reading of the copyright act under which every use of a copyrighted work is either licensed, subject to a statutory exemption, or infringing.[30] This is another unfortunate product of the impulse to generalize that Tushnet critiques in her paper.[31] Copyright law is increasingly complicated, and the temptation to compress it into something formulaic and easy to communicate is strong. Section 106 means what it says, we tell our students. Any reproduction, creative alteration, or distribution, any performance or display outside of the home, we tell them, is copyright infringement unless it comes within some statutory or judge-made exception. We are even kind of gleeful at the implausible results that follow from the premise. "That's how the statute sets things up," we say, as if our hands were tied.

But this expansive literal meaning is not so well established as the characterization implies. That reading of section 106 is neither one Congress intended for the statute, nor one reflected in a large number of actual court

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28. *Compare* Caitlin Bell, *Wild About Harry; Magic in the Air*, BUFFALO NEWS, Nov. 13, 2001, at N6 ("The movie follows the exact plot of the book, condensed into a thrilling ride through a world no Muggle (non-wizard) has seen. The book came to life in the cast of old and new, handpicked with help from Rowling herself. . . . Dame Maggie Smith as thin-lipped Professor McGonagall; Ian Hart as the trembling Professor Quirrell and Alan Rickman as Professor Snape, are those who Harry Potter readers will think jumped right from Rowling's imagination."), *with* Rory L. Aronsky, *If You Liked Harry Potter Book, Skip the Film*, FORT LAUDERDALE SUN-SENTINEL, Nov. 23, 2001 (Broward Metro Edition) at 102 ("As for the adult actors, here's a short version: Maggie Smith as McGonagall? She completely lacks what Minerva McGonagall stands for. . . . Alan Rickman? Snape has nastiness in the book, but Rickman just presents him as a looming character (the camera looks up at him at times) and speaks his lines like a drone.").

29. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). *See, e.g.*, Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 641 (2004); Electronic Frontier Foundation, *Unintended Consequences: Seven Years Under the DMCA* (Apr. 2006), http://www.eff.org/IP/DMCA/DMCA_unintended_v4.pdf.

30. *See, e.g.*, David L. Hayes, *Application of Copyright Rights to Specific Acts on The Internet*, COMPUTER LAWYER, Aug. 1998, at 1; MARK LEMLEY, *Dealing with Overlapping Copyrights on the Internet*, 22 DAYTON L. REV. 547 (1997); Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 883–84 (1987).

31. *See* Tushnet, supra note 2, at 136.

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decisions. Rather, it is a construct drawn by connecting the dots represented by controversial holdings in some cases,[32] with dots designated by broad (and I would argue ill-considered) language in others.[33] Sometimes, this sort of claim is a rhetorical device to demonstrate the over-breadth of existing copyright rights.[34] Sometimes, it may derive at least in part from what I have characterized elsewhere as "copyright luncheon circle law," legal theories that evolve during meetings of the members of the copyright bar.

Other times, though, those who advance this expansive literal interpretation do so because they believe that the statutory language mandates such a reading. This belief is especially curious because the same folks are usually completely competent to construe a statute sensibly so long as they are talking about some other statute. Section 32 of the Lanham Act, for example, says explicitly that if a trademark registrant has a certificate of incontestability (which is available to any trademark registrant who files the requisite affidavit of continuous use five years following its trademark registration), the registration is "conclusive evidence of . . . the registrant's exclusive right to use the registered mark in commerce."[35] Yet scholars and judges have no difficulty rejecting arguments that that language should be read to give trademark registrants the right to enjoin *all* commercial uses of the word or symbol they have registered as their mark.[36] Giving the copyright statute this expansive reading gives section 106 a scope far broader than the language of the statute requires, or than the drafters of the 1976 Copyright Act and the Congress that enacted it intended.[37] Copyright owners, though, perceiving a need to meet the digital threat with strong legal weaponry, have seized on the expansive literal reading and made it their own. Some courts are enforcing it, and copyright scholars are questioning it only faintly and half-heartedly. We seem to get more of a kick from devising implausible applications of the broad construction than from explaining what is wrong with it.

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32. *See, e.g.*, Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993); Intellectual Reserve v. Utah Lighthouse Ministry, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999); Playboy Enterprises v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

33. *See, e.g.*, Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001) ("[C]opyrights are categorically immune from challenges under the First Amendment."), *aff'd sub. nom.* Eldred v. Ashcroft, 537 U.S. 186 (2003); CleanFlicks v. Soderbergh, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) ("[T]he intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright.").

34. *See, e.g.*, Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 DAYTON L. REV. 587, 605–06 (1997), James Boyle, *Sold Out*, N.Y. TIMES, Mar. 31, 1996, at 15 ; Lemley, *supra* note 30.

35. The Lanham Act, 15 U.S.C. § 1115(b) (2000).

36. *See, e.g.*, K.P. Permanent Makeup v. Lasting Impression, 543 U.S. 111 (2004); Gibson Guitar Corp. v. Paul Reed Smith Guitars, 423 F.3d 539 (6th Cir. 2005).

37. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994). Nor is there something exceptional about copyright laws that indicates they are meant to be read more literally than statutes on other subjects. The 1909 Copyright Act defined copyright-owner exclusive rights with comparable breadth, *compare* 1909 Copyright Act § 1 *with* 17 U.S.C. § 106, but courts easily inferred limitations and exceptions, which later Congresses approved.

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Second, we have failed to prevent the expansion of the individual enumerated copyright rights until they, together, seem to coalesce into a general-use right. This is also an extra-legislative development. Congress has had nothing to do with it; rather, litigants persuaded courts and some commentators that section 106 rights should be broader than previously understood. Copyright owners have convinced courts that reproducing in copies includes looking at, at least in a digital realm,[38] and are currently trying hard to persuade courts that distributing copies to the public includes having a copy that is available for copying.[39] With a huge expansion of that sort, implied license is not going to make much of a dent.

To resist that encroachment, we need something to push back with. We've tried relying on "Too big is bad," and on "Copyright law is all about balance," without much success.[40] Recalling that readers, listeners, and viewers have central importance in the copyright scheme and that we want them to be able to interact with works of authorship as well as to absorb them passively reminds us of why we need to push back and gives us a tool to do so. There may even be some payoff from resistance. Non-statutory expansions are sometimes easier than statutory ones to undo.[41]

Tushnet's fan communities may seem like exceptional readers, listeners, and viewers, with exceptional needs. Although fans in these communities interact with works in exceptionally visible ways, I would argue that the creativity they bring to viewing, listening, and reading is very much like the creativity that other, less visible viewers, listeners, and readers bring to viewing, listening, and reading, and that that creativity is something copyright should encourage. I

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38. *See* Intellectual Reserve v. Utah Lighthouse Ministry, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999).

39. *See, e.g.*, *In re* Napster Copyright Litigation, 377 F. Supp. 2d 796, 802–05 (N.D. Cal. 2005); Plaintiff's Opposition to Defendant's Motion to Dismiss at 15–20, Electra Entm't Group v. Barker, No. 05-CV7430 (KMK) (THK) (Jan. 24, 2006).

40. I was recently reminded of how little impact copyright scholars have had on the world outside of academia. Henry Hotbaczewski, general counsel of Reed Elsevier and a distinguished IP lawyer, gave a lecture last November to the Washington, D.C. chapter of the Copyright Society of the USA. He used his podium to alert fellow members of the copyright bar to a new and troubling threat to copyright that he had first discovered only months earlier: Unaccountably, suddenly, and improperly, a large number of copyright law professors had taken the position that copyright protection should be weakened, and had even filed amicus briefs to that effect. *See* Henry Horbaczewski, *Copyright Under Siege: Some Thoughts of a Publisher's Counsel: The Sixth Annual Christopher A. Meyer Memorial Lecture*, 53 J. COPYR. SOC'Y 387, 393 (2006). Obviously, Mr. Horbaczewski and his audience have not been reading our stuff.

41. *See, e.g.*, Dastar v. Twentieth Century Fox Film, 540 U.S. 806 (2003) (rejecting cases reading section 43(a) of the Lanham Act to include an attribution right); Feist Publ'ns v. Rural Telephone Co., 506 U.S. 984 (1992) (rejecting cases giving copyright protection to facts). *See generally* Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"?*, 23 CARDOZO ARTS & ENT. L. REV. 379 (2005) (criticizing *DaStar*); Jane C. Ginsburg, *No Sweat? Copyright and Other Protection for Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338 (1992) (criticizing *Feist*). *See also* Moseley v. V Secret Catalog, 537 U.S. 418 (2003) (rejecting judicial expansion of trademark dilution to include likelihood of dilution); Walmart v. Samara, 529 U.S. 205 (2000) (rejecting trade-dress protection for inherently distinctive product designs).

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would even claim, properly understood, that much of that creativity is something copyright already does encourage.[42]

To reach this understanding we need to remember that copyright was never intended to be a general-use right. Rather, Congress designed statutory copyright as a collection of enumerated, individually bounded, exclusive rights. Supporters of cultural environmentalism need to defend the borders of the territory that is not within those boundaries. We need to do this by developing much more robust language, theories, and stories about the rights of readers, listeners, and viewers. We need to gather a more compelling collection of justifications for the borders between controlled and uncontrolled uses of copyrighted works.

Copyright scholars have acquired the habit of thinking that copyright owners need tools to limit user activities to prevent those users from undermining the copyright owners' exploitation of their works.[43] Scholars should also be careful to recognize that copyright owner control must be cabined so that it does not unduly threaten reader, listener, and viewer enjoyment of those works.[44] I don't claim that devising appropriate limits will be straightforward. In a world in which technology enables consumers to engage in creative, massively shared interaction with and on works of authorship, figuring out how and where copyright law should locate the line between infringing exploitation and non-infringing enjoyment will be a major challenge. But in making the determination, we need to focus on the historic liberties of readers, listeners, and viewers as well as on the rights of authors and publishers. Both the Progress of Science and the integrity of copyright law are likely to be furthered by encouraging readers, listeners, and viewers to experience works with imagination and creativity.

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42. *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. (forthcoming 2007) (manuscript on file with author).

43. *See, e.g.*, Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYR. SOC'Y. 113 (2003).

44. *See, e.g.*, Julie Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998).

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