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Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright

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SHERLOCK HOLMES AND THE CASE OF THE LUCRATIVE FANDOM: RECOGNIZING THE ECONOMIC POWER OF FANWORKS AND REIMAGINING FAIR USE IN COPYRIGHT

Stacey M. Lantagne*

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ABSTRACT

Fan culture, in the form of fan-created works like fanfiction, fanart, and fanvids, is often associated with the Internet. However, fandom has existed for as long as stories have been told. Sir Arthur Conan Doyle's Sherlock Holmes stories inspired a passionate fandom long before the age of the Internet.

Despite their persistence, fanworks have long existed in a gray area of copyright law. Determining if any given fanwork is infringing requires a fair use analysis. Although these analyses pay lip service to a requirement of aesthetic neutrality, they tend to become bogged down by unarticulated artistic judgments that hinge on a court's personal interpretations of the work in question. One outcome of this emphasis on aesthetic value has been a de-emphasis of the market harm factor of fair use, the examination of which has come to be subsumed by courts' aesthetic judgments.

This de-emphasis of the financial aspect of fair use has strong implications for the legality of fanworks. Mainstream culture has historically considered fanworks to have little aesthetic value, which can lead to knee-jerk findings of infringement in aesthetic-based fair use analyses. However, both old, venerable fandoms like Sherlock Holmes and new works funded by Kickstarter demonstrate that fanworks can actually enable further creativity by the copyright-holder and increase the value of the original work rather than detract from it. Shifting the focus of fair use analysis to a market-based approach would prioritize eco-

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conomic returns over courts' artistic opinions. Such a shift would correct the imbalance created by aesthetic value judgments of free works that cause no economic harm and recognize that fanworks often operate as market facilitators, not market rivals.

This Article examines the phenomenon of fandom and its effect on the original works that inspired it through the medium of both old fandoms that pre-date the Internet age and new fandoms that have come of age in a digital world. This Article argues that active fandoms producing a large amount of fanworks tend to aid the goals of copyright. It further posits that fair use analysis of these works should be re-focused on ensuring a meaningful examination of the effect on the market factor that avoids the taint of courts' aesthetic judgments. A renewed appreciation for the effect on the market factor would result in a more accurate application of the fair use doctrine that would acknowledge the role of fanworks and their participatory culture in supporting the economic incentive motivation of copyright.

INTRODUCTION	264
I. SENDING CAPTAIN KIRK TO HOGWARTS AND OTHER FANWORKS	266
A. <i>Sir Arthur Conan Doyle and the Character Who Refused to Die</i>	267
B. <i>Beyond Fifty Shades of Grey</i>	275
C. <i>Veronica Mars and the Movie That Might Never Have Been</i>	278
II. FANDOM AND FAIR USE IN THE U.S. COPYRIGHT SYSTEM...	283
A. <i>Fair Use: The Doctrine</i>	285
B. <i>Fair Use: Stifling Fanworks</i>	288
III. FAIR USE REIMAGINED AND FANWORK VALUE RECOGNIZED	295
A. <i>The Danger of the Reliance on Hidden Aesthetic Judgments</i>	295
B. <i>The "Money-over-Art" Approach</i>	303
C. <i>Catcher in the Rye, Sixty Years Later, and the Solution for Fanworks</i>	311
CONCLUSION	314

INTRODUCTION

There is a sizeable segment of the population that needs no introduction to the word fandom, the name given to passionate devotees of particular fictional works. Fandoms exist for works as diverse as *Twilight* and *Jane Eyre*, *Inception* and *August: Osage County*, *The Big Bang Theory* and *Mad Men*. They exist for old works, such as Sir Arthur Conan Doyle's Sherlock Holmes mysteries and Jane Austen's *Pride and Prejudice*, and they exist for the newest incarnations of those works, such as *Elementary* and *The Lizzie*

Bennet Diaries. At the most basic level, whenever a creative work has attracted a person who loves it, a fandom can be said to exist.

Some fandoms are *very* active. Thriving on the Internet, busy fandoms collect on message boards to discuss, debate, and delight over their work of choice. They flock to websites that offer synopses, criticisms, analyses, and guides. They band together to create their own wikis and encyclopedias. They undertake their own creative endeavors: fanart of their favorite characters in usual or unusual situations; fanvids re-editing footage to highlight themes or tell new stories; and fanfiction splintering off from the original work in some way. The motivation underlying such works may be as varied as commentary, rebuttal, and speculation.

Fanworks, however, did not come into existence with the advent of the Internet. For example, in the late nineteenth century, Sir Arthur Conan Doyle's Sherlock Holmes stories inspired a devoted and active fandom. More recently, websites like Kickstarter have quantified the value of an active fandom, demonstrating that fanworks may foster demand for works by the original copyright holder, thereby generating revenue for the content owner. Far from deterring the creation of sequels, as some content owners have argued,¹ fandom gave content owners an ability to create that would never have existed otherwise. Fandom does not suffocate further creativity by the content owner; it *enables* it.

Most fanworks—if accused of copyright infringement—are analyzed under the fair use doctrine, which has been developed as an important check on the copyright monopoly. Fair use analysis centers on four statutorily defined factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the copyrighted work used, and (4) the effect on the market of the copyrighted work. However, fair use analyses are often bogged down by aesthetic judgments, made by courts, that fail to give sufficient weight to fanworks' positive economic contribution.² This fair use evaluation, grounded in artistic judgment of a creative work, is at odds with the economic incentivizing character of U.S. copyright law and results in stifling participatory cultural dialogue, rather than the "promot[ion] of Progress of Science and useful Arts."³ Copyright law does not envision a war with winners and losers. It is a much more complicated and symbiotic tangle.⁴ Creativity itself is not eas-

1. See, e.g., WRITERS' RIGHTS COALITION, BRIEF TO THE MINISTERS OF INDUSTRY AND HERITAGE REGARDING THE COPYRIGHT MODERNIZATION ACT (BILL C-32) (Nov. 23, 2010), <http://www.playwrightsguild.ca/news/writers-rights-coalition-bill-c-32-brief> ("[Fan-created works,] if widely disseminated on the Internet, could deter a publisher from subsequently publishing an author's own sequel to his or her own novel.").

2. See *infra* Part III.A and accompanying notes.

3. U.S. CONST. art. I, § 8, cl. 8.

4. I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 1-OV Overview (Matthew Bender rev. ed. 2014) ("In a system rooted in equity that strives for justice (if only occasionally), those disparate circumstances cannot help but percolate into the structure

ily made the equivalent of a business decision. Courts should be wary of characterizing copyright litigations as if they involve competitors clashing over the same slice of exhaustible pie, without acknowledging the latent aesthetic judgments lurking beneath the claims.⁵

This Article suggests that the unarticulated thrust of fair use analyses has revolved around courts' personal aesthetic evaluations of the allegedly-infringing work to the detriment of full and honest consideration of the effect of the fourth factor of the fair use analyses: market harm. It proposes that the fair use analysis be refocused to revolve around the market harm factor, with the understanding that freely offered, fan-created works such as fanvids and fanfiction actually *increase* the value of the original work, rather than detract from it. This "money-over-art" approach will correctly protect the financial incentives of creators to create while resisting inappropriately harsh judgment of less traditional forms of art that cause no harm to the marketplace.

In Part I, this Article examines the phenomenon of fandom and its effect on the original works in the context of both a centuries-old fandom like Sherlock Holmes and the more recent fandoms that have taken advantage of Internet technology to become more than they would have been in traditional media. Part I concludes that content creators have much more to gain from an enthusiastic, noisy, and messy fandom than from a disciplined cadre of well-behaved consumers. In Part II, the Article discusses the roots of the fair use defense in U.S. copyright law and analyzes how it has traditionally—and inaccurately—been applied to fanworks. Part III argues that the current application of fair use has impermissibly imported aesthetic judgments into U.S. copyright law and proposes a re-focusing of the analysis on the fourth factor of effect on the market, with the result of valuing money over art. The fair use analysis advanced in Part III will result in a more accurate application of the doctrine and protect the majority of fanworks, which are not intended to be commercialized. Emphasizing the market harm factor will give active fandoms room to breathe in creating fanworks while simultaneously ensuring that content owners retain their economic incentives to continue to create new copyrighted works.

I. SENDING CAPTAIN KIRK TO HOGWARTS AND OTHER FANWORKS

Although fandom is a noisy, enthusiastic, and boisterous world, it has frequently lurked in the shadows, outside the spotlight of the dominant culture. It has recently enjoyed more attention as a result of bestsellers like *Fifty Shades of Grey*, which began as a piece of *Twilight* fanfiction, and other

of decision-making in the copyright area. . . . [T]he enactments of Congress on the subject are too diffuse in time and purpose to fall under any one overarching framework. Copyright serves many masters, and is designed to accommodate a welter of interests.”)

5. See *infra* Part III.A.

works like Rainbow Rowell's highly-acclaimed and best-selling novel *Fangirl*, which explicitly takes place in fanculture. This Part examines the early fandom phenomenon of Sherlock Holmes in Victorian times, discusses the evolution of fandom in the Internet era, and concludes by examining recent examples—such as the successful crowd-funding of the Veronica Mars movie—of how an active fandom can benefit copyright owners.

A. *Sir Arthur Conan Doyle and the Character Who Refused to Die*

Fandom has become linked with the Internet in the public consciousness, but fanworks are as old as creativity itself. Virgil's "Aeneid" was essentially a piece of "Iliad" fan fiction, focusing on a secondary character from that story.⁶ The Bible has inspired an active fandom,⁷ with John Milton's *Paradise Lost* serving as an early example of a Bible fanwork.⁸ Sherlock Holmes, inspired one of the earliest and most enduring fandoms and as such is a useful illustration of the development of fandom through the years. The case of Sherlock Holmes further underscores how an active fandom can add value to original works.

Sir Arthur Conan Doyle was a doctor who started writing stories to pass the time between patients.⁹ His *A Study in Scarlet*, published in 1887, introduced the world to a character called Sherlock Holmes, who was described through the eyes of his faithful companion Dr. Watson.¹⁰ Doyle subsequently featured Holmes in four novels and fifty-six short stories,¹¹ and in the process, without ever intending to, effectively invented modern fandom.

Doyle was very familiar with the encroaching forces of boisterous and enthusiastic admirers. There may have been no Internet in the Victorian age, but that failed to deter Doyle's fans. Holmes and Watson's following was immense and devoted.¹² Doyle quickly began to feel suffocated by the suc-

6. See Lev Grossman, *The Boy Who Lived Forever*, TIME (July 7, 2011), <http://content.time.com/time/arts/article/0,8599,2081784,00.html> ("When Virgil wrote The Aeneid, he didn't invent Aeneas; Aeneas was a minor character in Homer's Odyssey whose unauthorized further adventures Virgil decided to chronicle."); see generally VIRGIL, THE AENEID; HOMER, THE ILIAD.

7. See Grossman, *supra* note 6 ("There's fan fiction based on the Bible.").

8. See JOHN MILTON, *Back Cover* of PARADISE LOST (John A. Himes ed., Dover Publ'ns 2005) (1667).

9. DICK RILEY & PAM McALLISTER, THE BEDSIDE, BATHTUB & ARMCHAIR COMPANION TO SHERLOCK HOLMES 21 (1999).

10. See ARTHUR CONAN DOYLE, A STUDY IN SCARLET (J. P. Piper Books 2013) (1887), available at <http://www.gutenberg.org/files/244/244-h/244-h.htm> (last visited Feb. 21, 2015); RILEY & McALLISTER, *supra* note 9, at 21–22 ("ACD wrote *A Study in Scarlet*, in which he conjured up the pacing detective and soft-hearted scribe, a duo destined for a global audience.").

11. See *Front Cover & Note to the Reader* of ARTHUR CONAN DOYLE, THE COMPLETE SHERLOCK HOLMES (A.C. Doyle Memorial ed. 1960).

12. RILEY & McALLISTER, *supra* note 9, at 23–24 ("Circulation of The Strand reached half a million.").

cess of his own character. The world was in love with him, but Doyle was indifferent. “I am weary of his name,” he wrote to his mother.¹³ Doyle had always intended to write “serious” historical novels, and he felt that the attention he devoted to writing Holmes stories was distracting him.¹⁴ In an 1891 letter to his mother, Doyle outlined his plan: “I think of slaying Holmes . . . and winding him up for good and all. He takes my mind from better things.”¹⁵ Doyle’s mother grasped immediately how much the fandom had appropriated the Holmes character as its own, responding, “[y]ou may do what you deem fit, but the crowds will not take this lightheartedly.”¹⁶

In December 1893, Doyle published “The Final Problem,” whose name seems almost defensive in its assertion of representing the definitive endpoint of Sherlock Holmes. It begins with the same defensive tone, with the firm proclamation that these are “the last words in which I shall ever record the singular gifts by which my friend Mr. Sherlock Holmes was distinguished.”¹⁷ Holmes’s “death” occurs off-page, by the Reichenbach Falls. Although Watson, the usual faithful narrator, is not there to witness the events, he assures the readers that “[a]n examination by experts leaves little doubt that a personal contest between the two men ended, as it could hardly fail to end in such a situation, in their reeling over, locked in each other’s arms. Any attempt at recovering the bodies was absolutely hopeless, and there, deep down in that dreadful cauldron of swirling water and seething foam, will lie for all time the most dangerous criminal and the foremost champion of the law of their generation.”¹⁸ Holmes himself gets his last words in the form of a letter to Watson, in which it is difficult not to imagine Doyle himself speaking through the famous character of which he’d grown so weary: “[M]y career had in any case reached its crisis, and . . . no possible conclusion to it could be more congenial to me than this.”¹⁹

The fandom’s reaction to Holmes’s death was immediate and unequivocal. More than twenty thousand people canceled their subscription to *The Strand*, the magazine that published the Holmes stories.²⁰ Women donned mourning clothes and men walked around wearing black armbands.²¹ And, in the end, they had their way. In 1901, Doyle wrote another Holmes adven-

13. *Id.* at 25.

14. *Id.* at 24.

15. *Id.*

16. Garrison Keillor, *Friday May 22, 2009*, THE WRITER’S ALMANAC (May 22, 2009), <http://writersalmanac.publicradio.org/index/index.php?date=2009/05/22>.

17. DOYLE, *supra* note 11, at 469.

18. *Id.* at 480.

19. *Id.*

20. RILEY & McALLISTER, *supra* note 9, at 25.

21. See Scott Brown, *Scott Brown on Sherlock Holmes, Obsessed Nerds, and Fan Fiction*, WIRED (Apr. 20, 2009), http://www.wired.com/techbiz/people/magazine/17-05/pl_brown; RILEY & McALLISTER, *supra* note 9, at 25.

ture, *The Hound of the Baskervilles*,²² and by 1903 Holmes had been officially resurrected in “The Adventure of the Empty House,” where he reveals to Watson that his death had been faked.²³ Doyle had, in effect, completely lost control of his own creation.²⁴ And, perhaps, wisely so: Doyle disliked his detective and thought him beneath him. However, “[r]eaders, not writers, create icons.”²⁵

Fans of Holmes, therefore, were among the earliest groups of fans to inspire sequels where no sequel would otherwise have occurred. Despite the warning of many content creators that fanworks have the opposite effect, Holmes’s active, busy, productive fandom spurred more creativity from the original content owner, not less. Holmes is, and always has been, one of the world’s most enduring fandoms. Holmes fans began producing fanfiction as early as 1897²⁶ and have never stopped. To many, the stories are called pastiches, and the fandom takes them extremely seriously.²⁷ “There is no Sherlockian worthy of his salt who has not, at least once in his life, taken Dr. Watson’s pen in hand and given himself to the production of a veritable adventure.”²⁸

Filling in the gaps . . . is the favorite task of many who pen pastiches. What was the truth about Holmes’s childhood and early education? What was he really doing while Watson was investigating the mysterious hound of the Baskervilles? What actually happened to Holmes during the Great Hiatus when Watson and the world thought he was dead?²⁹

In 1910, a fan actually sent a piece of fanfiction to Doyle, hoping to collaborate with the author. Doyle recommended the man re-write the story with his own original characters (as so many authors have suggested through the years), but also kindly offered ten pounds for the purchase of the plot idea.³⁰

22. See Richard Cavendish, *Publication of the Hound of the Baskervilles*, HIST. TODAY, March 2002, available at <http://www.historytoday.com/richard-cavendish/publication-hound-baskervilles> (last visited Feb. 21, 2015).

23. See DOYLE, *supra* note 11, at 486–88; RILEY & MCALLISTER, *supra* note 9, at 27 (“In 1903, at the age of forty-four, ACD revived Holmes in ‘The Adventure of the Empty House’”).

24. RILEY & MCALLISTER, *supra* note 9, at 26–27.

25. Julia Carlson Rosenblatt, *Foreword* to WILLIAM S. DORN, *A STUDY GUIDE TO SHERLOCK HOLMES*, at ix (2000).

26. Brown, *supra* note 21.

27. RILEY & MCALLISTER, *supra* note 9, at 145.

28. *Id.* (quoting Edgar W. Smith).

29. *Id.* at 149.

30. Arthur C. Doyle, *Sherlock Holmes: The Published Apocrypha*, at ix (Jack Tracy ed., 1980).

In 1911, when Doyle was still actively publishing Holmes stories, the paper “Studies in the Literature of Sherlock Holmes” first appeared.³¹ The paper was the launching point of what Holmes fans still refer to as the “Great Game:” imagining that Holmes and Watson were real people and that Doyle merely acted as Watson’s literary agent.³² At its heart, this was an invitation to produce fanfiction, resulting in the insertion of Holmes and Watson into any number of historical events in the course of stories.³³ In fact, the playful essay, which compared Doyle’s writings to the Bible, resulted in fans eventually referring to the work as canon, a term that is more generally used today by fandoms everywhere to refer to the originating work.³⁴ By the 1930s, the Baker Street Irregulars had been formed,³⁵ and, in 1941, Rex Stout gave a speech to the society in which he speculated that Watson may have been a woman,³⁶ thus explicitly raising genderswap and the idea of a romantic relationship between Holmes and Watson, two enduring tropes of the fandom.³⁷ Soon afterward, the fandom began creating encyclopedias of their canon, to aid the fan “with the creative urge full upon him.”³⁸ Today, we would call it aiding fancickers.

31. RONALD A. KNOX, *STUDIES IN THE LITERATURE OF SHERLOCK HOLMES* (1911), available at <http://www.diogenes-club.com/studies.htm>.

32. Sean Cole, *Sherlock Holmes Fans Play ‘Great Game’*, NPR (Dec. 1, 2005), <http://www.npr.org/templates/story/story.php?storyId=5035037>; see, e.g., P.J. Campbell, *The Canon and the Apocrypha*, in *SHERLOCK HOLMES: VICTORIAN SLEUTH TO MODERN HERO* 234, 235 (Charles R. Putney et al. eds., 1996); Walter Pond, *A Plea for Respect for the Canon: With Some Observations on The Three Gables*, in *SHERLOCK HOLMES BY GAS-LAMP: HIGHLIGHTS FROM THE FIRST FOUR DECADES OF THE BAKER STREET JOURNAL* 37, 37 (Philip A. Shreffler ed., 1989).

33. Sean Duncan, *A 21st Century Sherlock*, ANTENNA (Aug. 1, 2010), <http://blog.com-marts.wisc.edu/2010/08/01/a-21st-century-sherlock/>.

34. *Sherlock Holmes*, FANLORE, http://fanlore.org/wiki/Sherlock_Holmes (last visited Feb. 21, 2015).

35. *The Baker Street Irregulars: A Bit of Background and History*, BSI ARCHIVAL HISTORY, http://www.bsiarchivalhistory.org/BSI_Archival_History/The_BSI.html (last visited Feb. 21, 2015); see also Robert Keith Leavitt, *The Origin of 221B Worship*, in *SHERLOCK HOLMES BY GAS-LAMP: HIGHLIGHTS FROM THE FIRST FOUR DECADES OF THE BAKER STREET JOURNAL* 355, 362 (Philip A. Shreffler ed., 1989); RILEY & McALLISTER, *supra* note 9, at 91–92.

36. Rex Stout, *Watson Was a Woman*, THE SATURDAY REVIEW OF LITERATURE, Mar. 1941, at 3, 3–4, 16.

37. See, e.g., Violsva, *The Lodger*, ARCHIVE OF OUR OWN, <http://archiveofourown.org/works/706894> (Mar. 13, 2013) (“Nurse Jane Watson returns from Afghanistan with a bad shoulder, no money, and no options except to take in a lodger. A very remarkable lodger . . .”); Flawedamythyst, *A Waking Dream*, ARCHIVE OF OUR OWN <http://archiveofourown.org/works/331211> (Feb. 1, 2012).

38. Edgar W. Smith, *Introduction* to JAY FINELY CHRIST, AN IRREGULAR GUIDE TO SHERLOCK HOLMES OF BAKER STREET (1946); see also ORLANDO PARK, SHERLOCK HOLMES, ESQ. AND JOHN H. WATSON, M.D.: AN ENCYCLOPEDIA OF THEIR AFFAIRS (1962); JACK TRACY, THE ENCYCLOPEDIA SHERLOCKIANA: OR, A UNIVERSAL DICTIONARY OF THE STATE OF KNOWLEDGE OF SHERLOCK HOLMES AND HIS BIOGRAPHER JOHN H. WATSON, M.D. (1977).

Holmesians believed they were the entire epicenter of fandom, the only one that mattered.³⁹ They could little have imagined the Internet, and how it would enable fandom to the point where other characters, like Elizabeth Bennet and Jane Eyre would be the object of substantial numbers of fanworks.⁴⁰ All the same, Holmesians were right, in a way, to believe themselves to be the most important fandom of them all. The other most popular fandoms of the Internet age were born in the twentieth-century, aided by the dissemination of television, movies, and the Internet itself. Alone among them, the Holmes fandom stands out as being one of the oldest, and one which admirably leaped into modernity.⁴¹

Doyle and his estate, at the head of the first modern fandom, illustrated and predicted the frequently uneasy relationship content creators would have with their fans. The estate was successful in suppressing the 1944 publication of Ellery Queen's fanfiction collection "The Misadventures of Sherlock Holmes," but eventually relented to the publication of the *Baker Street Jour-*

39. Edgar W. Smith, *The Writings about the Writings*, in *SHERLOCK HOLMES BY GAS-LAMP: HIGHLIGHTS FROM THE FIRST FOUR DECADES OF THE BAKER STREET JOURNAL* 33, 33–34 (Philip A. Shreffler ed., 1989):

What is it that makes this subject inexhaustible? Why do those who read the magic tales, for all the utter satisfaction their reading gives them, insist on adding something to the lore themselves? Whence comes the irresistible impulse to dig deeper into the meaning of things Sherlockian, and to seek a closer identification or interpretation of the truth? There is nothing like it, to one's knowledge, in all the field of literature. Not Robinson Crusoe, nor Mr. Pickwick, nor yet great Hamlet has been so honored by the imp of the inquisitive. Do Alice and Don Quixote inspire long hours of research to determine the whys and wherefores of some foible they displayed, or do Petti-Sing and Madame Butterfly compel erudite analyses of the crowded box-rooms of their minds? Ivanhoe and Hiawatha, Dr. Jekyll and David Copperfield, Hercules and George Babbitt—who cares if they were married once or twice, or how profound their knowledge of the Solar System may have been? We know just where Achilles had his wound, and we let it go at that; and we know, too, what college Tom Brown attended and what kind of snake it was that Cleopatra took into her bosom. We know so very much of all the figures that move upon the literary scene, and, knowing, cease to care or question.

40. See, e.g., *Pride and Prejudice – All Media Types*, ARCHIVE OF OUR OWN, <http://archiveofourown.org/tags/Pride%20and%20Prejudice%20-%20All%20Media%20Types/works>, (last visited Feb. 22, 2015); *Jane Eyre – All Media Types*, ARCHIVE OF OUR OWN, <http://archiveofourown.org/tags/Jane%20Eyre%20-%20All%20Media%20Types/works>, (last visited Feb. 22, 2015).

41. See also RILEY & McALLISTER, *supra* note 9, at xi ("Not by clapping our hands, but by cherishing the collections of Conan Doyle's stories—checking them out of libraries, buying them at bookstores, joining with other readers in person or on the Internet to study and revel together—we have kept the beloved duo alive and the game afoot."); Morgan L. Davies, *A Brief History of Slash*, THE TOAST (Sept. 19, 2013), <http://the-toast.net/2013/09/19/brief-history-slash/> (referencing "all those crazy Victorian Sherlock Holmes fans" as evidence that fandom is not a new phenomenon).

nal—not strictly fanfiction, but fandom-related nonetheless.⁴² As the fandom rolled on,⁴³ the original works continued to attract fans, two of whom⁴⁴ produced a high-profile fanfic for the BBC called *Sherlock*.

Sherlock is, at heart, a fan work in the well-worn AU trope. An AU fanfiction—short for “alternate universe”—re-imagines the characters from an original work in different circumstances, such as by changing a character’s gender.⁴⁵ *Sherlock* takes Conan Doyle’s well-known characters and translates them from the Victorian world into the twenty-first century.⁴⁶ The idea of placing the characters from the Sherlock Holmes stories in the modern world is by no means a new one among fans,⁴⁷ and there was even a cartoon titled *Sherlock Holmes in the Twenty-Second Century*.⁴⁸ Indeed, two

42. ARTHUR CONAN DOYLE, *SHERLOCK HOLMES: THE PUBLISHED APOCRYPHA*, at ix (Jack Tracy ed., 1980).

43. The copyright status of Sherlock Holmes is incredibly complex. Sherlock Holmes and his well-known sidekick, Dr. Watson, were featured in fifty-six original stories and four original novels authored by Sir Arthur Conan Doyle. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2013) (Posner, J.). All of these fictional works entered the public domain in the United Kingdom (where they were originally published) in 1980, fifty years after the death of their author, under UK copyright law. *Id.* Ten of the last published stories retain copyright protection in the United States. *Id.* The fact that some of the stories are in the public domain while others are not makes fan activities in the Sherlock Holmes realm foggy at best, and, indeed, the Doyle estate has acted to prevent people from using the characters of Sherlock Holmes and Dr. Watson, although others have argued that any copyright in the individual characters has entered the public domain and only the limited original elements of the last ten stories are still protected by copyright. *Id.* The court has agreed with the view Holmes is mostly in the public domain—except for when he is not, of course. *Id.*

44. Vanessa Thorpe, *Sherlock Holmes is Back . . . Sending Texts and Using Nicotine Patches*, *THE OBSERVER* (July 18, 2010), <http://www.guardian.co.uk/tv-and-radio/2010/jul/18/sherlock-holmes-is-back-bbc> (“The idea for Sherlock germinated on the train journeys [Gatiss] and Moffat shared between London and Cardiff, where *Doctor Who* is filmed. ‘It came up that we were both huge Sherlock Holmes fans,’ he explained.”).

45. See, e.g., Someday Sara, *The Seven Princesses*, FANFICTION (Nov. 12, 2001), http://www.fanfiction.net/s/446228/1/The_Seven_Princesses (reimagining Watson as a fourteen-year-old American girl); Moonrose1, *To Watery Depths*, FANFICTION (Dec. 5, 2001), http://www.fanfiction.net/s/460583/1/To_Watery_Depths (also reimagining Watson as a teenage girl). *Fifty Shades of Grey* started out life as another type of AU fanfiction, in which *Twilight*’s teenage protagonists were aged. See Snowqueens Icedragon, *Fanfic Review – Master of the Universe*, MRS OSHIMBO (Sept. 11, 2009), <http://mrs.oshimbo.com/2010/09/master-of-the-universe.html> (last visited Feb. 23, 2015).

46. See, e.g., *BBC to Make a Modern-Day Sherlock Holmes*, *THE TELEGRAPH* (Dec. 19, 2008), <http://www.telegraph.co.uk/culture/tvandradio/3852882/BBC-to-make-a-modern-day-Sherlock-Holmes.html>.

47. See, e.g., Clarrie, *The Puzzling Affair of Baker Street Comprehensive*, FANFICTION (June 16, 2001), http://www.fanfiction.net/s/258228/1/The_puzzling_affair_of_Baker_street_comprehensive (“Basically this is Holmes, Watson, Russell et al [sic] in a modern UK ‘high’ school.”); Weapon of Choice, *The Darker Side of the Soul*, FANFICTION (Mar. 21, 2002), http://www.fanfiction.net/s/645952/1/The_Darker_Side_of_the_Soul (“A modernized version of A Study in Scarlet set in college, with a student who goes by the name of Sherlock.”).

48. See *Sherlock Holmes in the 22nd Century (TV Series 1999–2001)*, IMDB, http://www.imdb.com/title/tt0218791/?ref_=nv_sr_1 (last visited Jan 31, 2015).

years after *Sherlock* arrived on the BBC, *Elementary*, an American TV show, would do a similar re-imagining, adding in a John Watson gender-swap for good measure.⁴⁹

Sherlock and *Elementary* play the game fans have played since Holmes first appeared on the page: what if? What if Holmes and Watson were living in the year 2010? What would change? What would not change? What would they wear? Where would they live? What would they call each other? And what would happen if one of them were a woman?

Sherlock was an immediate hit.⁵⁰ And the BBC, with an active, built-in Internet fandom, set out to take advantage of it, promoting the show in distinctively twenty-first century ways. Marketers erected an online version of “Sherlock’s website” from the show, with an accompanying “Blog of John Watson,” both of which reference and flesh out the events of the show.⁵¹

The *Sherlock* fandom mushroomed into existence. By August 8, 2010, when the season’s first series finished airing on BBC1, fanfiction communities had sprung up in all of the usual places on the Internet. Fanfiction.net already boasted fifty-one works of fanfiction, for a television series that only broadcasted two episodes by that time. In the week after the *Sherlock* finale aired, that number tripled, with over one-hundred new works of *Sherlock* fanfiction posted to fanfiction.net. A LiveJournal community,⁵² *bbcsherlock*,⁵³ measured enough interest to establish a separate community, *thegameison_sh*, with the sole purpose of providing *Sherlock*-based writing challenges. Interest has still not abated: As of March 2015, fanfiction.net had over 52,000 fics in its *Sherlock* section. Archive of Our Own, another fanfiction community on the web, had over 70,000 *Sherlock* fics, which was enough to place it in the top four most popular television fandoms on that website.⁵⁴ Critically, the popularity of *Sherlock*—an AU fanwork produced lavishly, devoured by an audience of millions,⁵⁵ and with AU fanfics of its

49. See *Elementary (TV Series 2012–)*, IMDB, http://www.imdb.com/title/tt2191671/?ref_=fn_al_tt_1 (last visited Jan. 31, 2015).

50. The second episode beat the draw of two major Hollywood stars—Cameron Diaz and Tom Cruise—appearing on the long-running British series *Top Gear*. The third episode finished in the top ten shows of the week again—the only show in the top ten that was not an episode of British soap operas *Coronation Street* or *Eastenders*.

51. THE SCIENCE OF DEDUCTION, <http://www.thescienceofdeduction.co.uk/> (last visited Mar. 6, 2015); THE PERSONAL BLOG OF DR. JOHN H. WATSON, <http://www.johnwatson-blog.co.uk/> (last visited Mar. 6, 2015).

52. LiveJournal is a social media platform that permits people to band together in “community” pages grouped around common interests. See *About LiveJournal*, LIVEJOURNAL, <http://www.livejournal.com/about/> (last visited Apr. 3, 2015).

53. See *A New Fic Writing Challenge Community*, BCSHERLOCK, <http://bbcsherlock.livejournal.com/13610.html> (last visited Apr. 3, 2015).

54. The third most popular television fandom is “Sherlock Holmes & Related Fandoms,” further evidence of the enduring potency of the character.

55. See, e.g., Lisa De Moraes, *UPDATE: Benedict Cumberbatch Sentimental About ‘Sherlock’ But Mum About More Seasons After Season 3 Premiere Scores in Ratings*, DEAD-

own⁵⁶—did not harm the popularity of the original Doyle stories. After the airing of the AU fanfic *Sherlock*, sales of the original Sherlock Holmes stories increased 180 percent.⁵⁷ Nor did it harm *Elementary* or Robert Downey, Jr.’s Sherlock Holmes movies.⁵⁸ And there is no sign that the mania for all things Holmes is slowing down.⁵⁹ Many of the fans of these works are old Sherlock Holmes devotees, but many others are new to Sherlock Holmes, introduced by modern fanworks.⁶⁰

Sherlock was a massive, unqualified hit, popular both critically and in the ratings. But, due to the demands on the time of both actors and writers, its gaps between seasons are lengthy, averaging more than a year.⁶¹ A lot can happen in a year. In a world moving ever faster and viewers with shorter and shorter attention spans, keeping a television audience interested in a show that has been absent from their lives for over a year is a difficult and challenging task.⁶²

LINE (Jan. 20, 2014, 4:24 PM), <http://www.deadline.com/2014/01/tca-sherlock-move-pays-ratings-dividends-to-pbs-4-million-tune-in/>.

56. See, e.g., TheGeekWithNoBrain, *A Half Decent Education*, FANFICTION (Dec. 25, 2011), http://www.fanfiction.net/s/6764145/1/A_Half_Decent_Education (“John is a new student at Yard Academy. He has been given a scholarship at this top school and all he wants is a normal first year. But his new roommate, Sherlock seems to have other ideas . . .”); Orange_crushed, *Harry Watson Investigates*, LIVEJOURNAL (Jan. 24, 2011, 1:10 PM), <http://orange-crushed.livejournal.com/191949.html> (“An AU set in the *Sherlock* universe, featuring Harry Watson, age eleven; with cameos from our favorite boy detectives.”).

57. *Sherlock Stars Downplay Gay Question Again for New Series*, PINKNEWS (Jan. 3, 2012, 4:11 PM), <http://www.pinknews.co.uk/2012/01/03/sherlock-stars-downplay-gay-question-again-for-new-series/>.

58. See, e.g., Sara Bibel, “*Elementary*” Adds 5.28 Million Viewers, Its Largest Live + 7 Day Life Ever, TV BY THE NUMBERS (Feb. 18, 2014), <http://tvbythenumbers.zap2it.com/2014/02/18/elementary-adds-5-28-million-viewers-its-largest-live-7-day-lift-ever/238005/>; *Sherlock Holmes*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=sherlockholmes.htm> (last updated Feb. 13, 2015); *Sherlock Holmes: A Game of Shadows*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=sherlockholmes2.htm> (last updated Feb. 13, 2015).

59. Fraser McAlpine, *Now Even Sir Ian McKellen is Playing Sherlock Holmes!*, ANGLOPHENIA (Sep. 5, 2013), <http://www.bbcamerica.com/anglophenia/2013/09/now-even-sir-ian-mckellen-is-playing-sherlock-holmes/>.

60. See, e.g., Lisa Granshaw, *Meet the Baker Street Babes, the First All-Female Sherlock Holmes Podcast*, THE DAILY DOT (Dec. 4, 2013), <http://www.dailydot.com/fandom/sherlock-holmes-baker-street-babes-fans-podcast/>.

61. See *Sherlock (TV Series 2010–)*, IMDB, http://www.imdb.com/title/tt1475582/?ref_=nv_sr_1 (listing year for each season) (last visited Feb. 2, 2015).

62. See, e.g., Jason Mittell, *When Great Shows Die (and Weak Ones Linger)*, JUST TV, (Nov. 22, 2008), <http://justtv.wordpress.com/2008/11/22/when-great-shows-die-and-weak-ones-linger/> (discussing how “Pushing Daisies” could not recapture its strong ratings after disappearing from television for an extended period of time during the writers’ strike); Josh Clinton, *Dirty Sexy Money: The Complete and Final Second Season – DVD Review*, INSIDE PULSE (Aug. 31, 2009), <http://insidepulse.com/2009/08/31/dirty-sexy-money-the-complete-and-final-second-season-dvd-review/> (discussing how ABC’s choice to delay returning shows for nearly a year cause many of the shows to lose up to half of their previous audience).

Or it would be, without the dedicated fanbase of *Sherlock*, which continues to generate fanfiction at impressively fast rates, despite the wait between seasons. In spite of—or maybe because of—the long wait periods, the fandom keeps clamoring for the next season, not satisfied by the many works out there that purport to continue the story. They want more of the *original*.⁶³ In fact, the most recent season of *Sherlock* was the highest rated yet, both in the United Kingdom and in the United States.⁶⁴

B. *Beyond Fifty Shades of Grey*

Fandom is “the world of enthusiasts for some amusement or some artist.”⁶⁵ While not as new a word as might be believed—the Oxford English Dictionary lists references from as early as 1903—the idea of fandom came to be associated with the show *Star Trek* in the 1960s.⁶⁶ The concept, however, ranges far beyond science-fiction.

An active fandom normally involves a collection of people who passionately love a content creator’s works. These fans may schedule conventions, get-togethers, and meet-ups to discuss this work; they may “cosplay,” or dress as the characters. As technology has evolved, a higher percentage of fans’ interactions with each other take place virtually. They debate on Internet forums; they Tweet at each other and possibly even as the characters.

63. *Sherlock* is far from the only BBC show to benefit greatly from a fervid fandom stepping in to fill in the blanks between airings. *Doctor Who*, the longest-running science-fiction television show of all time, disappeared from television for over a decade. See Nicole Lyn Pesce, ‘*Doctor Who*’ Marking 50 Years with a Global Simulcast, N.Y. DAILY NEWS (Nov. 19, 2013), <http://www.nydailynews.com/entertainment/doctor-marking-50-years-global-simulcast-article-1.1520993>. In the interim, the BBC permitted fandom to run amok, staging conventions, publishing magazines, and even producing their own episodes of Doctor Who. See, e.g., John Plunkett, *Doctor Who’s 50th Anniversary Stirs Up Old Battle*, THE GUARDIAN (Nov. 18, 2013), <http://www.theguardian.com/tv-and-radio/2013/nov/19/doctor-who-50th-anniversary>; Andrew Harrison, *Steven Moffat: “I Was the Original Angry Doctor Who Fan”*, THE GUARDIAN (Nov. 18, 2013), <http://www.theguardian.com/tv-and-radio/2013/nov/18/steven-moffat-doctor-who-interview>. Eventually, one of those fans officially rebooted the show, which benefitted greatly from never having really fallen out of its fans’ consciousness. Matt Goddard, *Happy 50th Birthday Russell T Davies: 50 Reasons Why Whovians Love the Groundbreaking Doctor Who Boss*, MIRROR (Apr. 27, 2013), <http://www.mirror.co.uk/tv/tv-news/russell-davies-50th-birthday-50-1855505>. Fans themselves recognize the “long and storied tradition of fan-made Doctor Who episode guides, poem books, and celebrations.” See Margaret Eby, *Crowdfunded Doctor Who Poetry Book on The Way*, N.Y. DAILY NEWS (Sept. 6, 2013), <http://www.nydailynews.com/blogs/pageviews/crowdfunded-doctor-poetry-book-blog-entry-1.1641007>.

64. See Claire Hodgson, *Sherlock Series 3 Finale Ratings Are a “Phenomenon” Says Steven Moffat*, MIRROR (Jan. 13, 2014), <http://www.mirror.co.uk/tv/tv-news/sherlock-series-3-finale-ratings-3018057>; Michael O’Connell, *TV Ratings: ‘Sherlock’s’ U.S. Audience Grows After Long Break – Still No ‘Downton Abbey’*, THE HOLLYWOOD REPORTER (Jan. 20, 2014), <http://www.hollywoodreporter.com/live-feed/tv-ratings-sherlocks-us-audience-672543>.

65. 5 OXFORD ENGLISH DICTIONARY 717 (2d ed. 1989).

66. See, e.g., Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159, 168 n.51 (2011).

They make gifs—short files, a few seconds in duration, of clips of the original content, sometimes manipulated in some way—of the objects of their affection, allowing minute and endless study of every second of the source material.⁶⁷ They edit together fanvideos of the source material,⁶⁸ sometimes acting as fake “trailers” for the material.⁶⁹ They draw fanart⁷⁰ and write fanfiction spinning off from the original source material.⁷¹ Such creative endeavors on the part of fandom, including fanfiction, fanart, and vidding, can collectively be thought of as fanworks.⁷²

These days, fandom has primarily entered the public consciousness through the medium of fanfiction. Lev Grossman defines fanfiction as “stories and novels that make use of the characters and setting from other people’s professional creative work,” and continues to explain, “[f]an fiction is what literature might look like if it were reinvented from scratch after a nuclear apocalypse by a band of brilliant pop-culture junkies trapped in a sealed bunker.”⁷³ Fanfiction has also, perhaps pejoratively, been described as “a way for fiction fans to tell their own stories of other people’s characters.”⁷⁴

Traditionally, the non-fandom world has thought of fanworks as consisting of poor quality, often x-rated, creations. The perception of fanworks as sexually explicit is not entirely unwarranted. The world’s most famous piece of fanfiction right now is *Fifty Shades of Grey*, which began as a piece of

67. See, e.g., *BBC Sherlock Faithfulness to Conan Doyle’s Canon*, IN ARDUIS FIDELIS (July 23, 2012, 5:04 PM), <http://deductivism.tumblr.com/post/27743474301> (comparing gifs from the BBC’s *Sherlock* with the original text from Arthur Conan Doyle’s *Sherlock Holmes* stories).

68. See, e.g., Ash4897, *Behind Blue Eyes (Supernatural Fanvid)*, YOUTUBE (Jan. 25, 2010), http://www.youtube.com/watch?v=xIfFyyLkc_c (editing together clips from *Supernatural* and setting them to music to form a fanvid character study).

69. See, e.g., VG934, *Doctor Who – The 50th Anniversary BBC One Trailer*, YOUTUBE (Mar. 15, 2013), <http://www.youtube.com/watch?v=G8g5BrLm7uQ> (creating a “trailer” for the upcoming fiftieth anniversary of *Doctor Who*).

70. See, e.g., *Explaining a Case John Missed*, NO LONGER ACTIVE (Dec. 27, 2012), <http://nolongeractiveinchells.tumblr.com/post/38931009484/explaining-a-case-john-missed>.

71. See generally AN ARCHIVE OF OUR OWN, <http://archiveofourown.org/> (last visited Sept. 24, 2013) (“We’re a fan-created, fan-run, non-profit, non-commercial archive for transformative fanworks, like fanfiction, fanart, fan videos, and podfic. . . . All fans and fanworks are welcome!”); FANFICTION, <https://www.fanfiction.net/> (last visited Sept. 24, 2013).

72. See, e.g., *Fanwork*, FANLORE, <http://fanlore.org/wiki/Fanwork> (last visited Apr. 23, 2015). Notably, this definition does not include downloads of exact copies of episodes or movies. Nor do I include in this definition straightforward summaries or reviews or synopses of original content. While such activity exists and is performed by fans, this article focuses on the creative fanworks described *supra* in the text. See, e.g., *Glossary*, ORGANIZATION FOR TRANSFORMATIVE WORKS, <http://transformativeworks.org/glossary/13#letterf> (last visited Oct. 31, 2013) (“Fanwork[:] The creative work done by fans for fannish purposes.”).

73. Grossman, *supra* note 6.

74. *Harry Potter Lives on in the Pages of Fan Fiction*, NPR (July 27, 2011), <http://www.npr.org/2011/07/27/138754009/harry-potter-lives-on-in-the-pages-of-fan-fiction>.

Twilight fanfiction called *Master of the Universe*.⁷⁵ *50 Shades of Grey* has been described as “an erotic bestseller . . . filled with vivid scenes of kinky sex.”⁷⁶

While erotica is a strong component of fanworks, it does not tell the whole story, and, in fact, “gets a disproportionate amount of attention.”⁷⁷ Fanworks run the gamut, just like original content. Many fanworks attempt to give greater detail to the universe created in the original work. For instance, *Wide Sargasso Sea* takes as its central character a secondary character in Bronte’s *Jane Eyre*: Mr. Rochester’s wife. Similarly, *Death Comes to Pemberley* functions as a sequel to Jane Austen’s *Pride and Prejudice*, thereby expanding the universe of that story. Many other fanfictions follow this same trope. In fact, it seems to be particularly popular in *Lord of the Rings* fandom, where many fanfictions focus on characters so minor as to only be mentioned in the books’ appendices.⁷⁸ A work of fanfiction in a slightly different vein, *Pride and Prejudice and Zombies* introduces zombies to the *Pride and Prejudice* universe. Whenever someone other than the content creator tells a story in the content creator’s universe, that work can be understood to be a fanwork.⁷⁹

75. Bryan Alexander, *How Much Sex Will Be in ‘Fifty Shades of Grey’ Movie?*, USA TODAY (Sept. 8, 2013), <http://archive.pnj.com/usatoday/article/2773007>.

76. See, e.g., Eriq Gardner, ‘Fifty Shades’ Porn Parody Countersuit Claims Books Are In Public Domain, THE HOLLYWOOD REPORTER (Mar. 4, 2013), <http://www.hollywoodreporter.com/thr-esq/fifty-shades-porn-parody-countersuit-425897>; Counterclaim Against Fifty Shades Limited & Universal City Studios LLC at ¶ 17, *Fifty Shades Ltd. v. Smash Pictures, Inc.*, No. 12-10111 (C.D. Cal. 2013), 2013 U.S. Dist. Ct. 20193 (alleging that “as much as 89%” of *Fifty Shades of Grey* had originally been published as *Twilight* fanfiction under the title “Masters of the Universe”).

77. *Harry Potter Lives on in the Pages of Fan Fiction*, *supra* note 74; see also *I Think the OTW Just Won All Games of Anti-Fanfic Bingo Forever :D*, DREAMWIDTH (JULY 17, 2012), <http://bookshop.dreamwidth.org/1099785.html> (noting a person who mocked fandom by suggesting the perfect fanwork would be “only 90% gay porn”). In fact, a recent search of the 819,263 rated works on Archive of Our Own, a popular fanfiction archiving site, revealed that only 35.4% of the posted fanfiction had been rated as “Mature” or “Explicit” (as opposed to “General Audiences” and “Teen and Up Audiences”). See ARCHIVE OF OUR OWN, *supra* note 71.

78. See, e.g., Zeesmuse, *LOVE! Rohirrim Style*, ARCHIVE OF OUR OWN (May 28, 2012), <http://archiveofourown.org/works/398238/chapters/655300> (“*In the Appendixes of the Return of the King, Tolkien states that in the last days of the Third Age, Éomer, King of Rohan married Lothíriel, Princess of Dol Amroth. He also states that they had at least one child – a son, who greatly favored his maternal grandfather. He does not give specifics – was it a love match, a political match, an arranged marriage? Eternal romantic that I am, I would prefer. . . LOVE! Rohirrim Style.*” (emphasis in original)); see also Oshun, *The Princess and the Horse Lord*, ARCHIVE OF OUR OWN (Sept. 14, 2014), <http://archiveofourown.org/works/657430/chapters/1198177>; Boz4PM, *Don’t Panic!*, FANFICTION (Mar. 27, 2004), <http://www.fanfiction.net/s/1690622/1/Don-t-Panic>.

79. See Abigail De Kosnik, *Should Fan Fiction Be Free?*, CINEMA J., Summer 2009, at 121 (listing a number of examples of published fanfiction, including “Anita Diamant’s *The Red Tent* (1997), Sena Jeter Naslund’s *Ahab’s Wife* (1999), Linda Berdoll’s *Mr. Darcy Takes a Wife* (1999) and *Darcy and Elizabeth* (2006), Alica Randall’s *The Wind Done Gone* (2001),

C. Veronica Mars and the Movie That Might Never Have Been

The experience of the Sherlock Holmes fandom is not unique by any means. It is borne out by other fandom experiences, like that associated with Star Trek. Starting life as a television show in the 1960s, *Star Trek* became the poster child for fandom, legendary for its fanfiction-filled fanzines.⁸⁰ Although the fandom came into existence before the Internet, much like the Sherlock Holmes fandom, it made the technological leap into the digital world. By mid-2009, there were around nine hundred Star Trek fanfictions on Archive of Our Own.⁸¹ In May 2009, in the shadow of an energetic and enduring fandom, Paramount released the movie *Star Trek*, which enjoyed a bigger opening weekend than any of the previous *Star Trek* movies⁸² and went on to gross more than any of the previous *Star Trek* movies.⁸³ The movie seemed to trigger a renewed avalanche of fanworks, with over 34,000 now posted on Archive of Our Own. Despite this profusion of fan activity, licensed *Star Trek* offerings continue to be profitable,⁸⁴ and official *Star Trek* novels number in the hundreds on Amazon.⁸⁵

As Sherlock Holmes and *Star Trek* prove, fandoms have always had significant buying power, whether recognized by content creators or not.⁸⁶

Isabel Allende's *Zorro* (2004), and Nancy Rawles's *My Jim* (2005)," all of which "achieved critical acclaim and/or commercial success," and all of which "retell well-known stories").

80. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655, 673 (1997).

81. At the time, the archive had only roughly around 86,000 works, which, for comparison's sake, is equivalent to the number of fanworks on the site belonging to just Harry Potter and Sherlock Holmes fandoms at the moment.

82. See Rosario T. Calabria, *Final Numbers In – Star Trek Breaks Franchise & IMAX Records + Outperforming Batman Begins*, TREKMOVIE.COM (May 11, 2009), <http://trekmovie.com/2009/05/11/final-numbers-in-star-trek-breaks-franchise-imax-records-outperforming-batman-begins/>.

83. See *Franchises: Star Trek*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/franchises/chart/?id=startrek.htm> (last visited Feb. 20, 2015).

84. See *Star Trek*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=startrek11.htm> (last visited Feb. 20, 2015). The movie's 2013 sequel, *Star Trek Into Darkness*, actually grossed more worldwide. See *Star Trek Into Darkness*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=startrek12.htm> (last visited Feb. 20, 2015).

85. See Amazon.com: Star Trek – Book Series: 14 Selected: Books, AMAZON, <http://www.amazon.com> (search for "star trek" under the "Books" category; then Refine by Book Series and select "Star Trek," "Star Trek the Next Generation," "Star Trek: Deep Space Nine," "Star Trek: New Frontier," "Star Trek: Starfleet Academy: Voyager," "Star Trek: Starfleet Corps of Engineers," "Star Trek: Strange New Worlds," "Star Trek: The Eugenics Wars," "Star Trek: The Lost Era," "Star Trek: The Next Generation: Stargazer," "Star Trek: Titan," "Star Trek: Typhon Pact," "Star Trek: Vanguard," and "Star Trek: Voyager").

86. See Elizabeth Minkel, *One Fixed Point: "Sherlock," Sherlock Holmes, and the British Imagination*, THE MILLIONS (Jan. 22, 2014), <http://www.themillions.com/2014/01/one-fixed-point-sherlock-sherlock-holmes-and-the-british-imagination.html>; *Best Selling Books of All Time*, GOODREADS, http://www.goodreads.com/list/show/33934.Best_Selling_Books_of_All_Time (last visited Feb. 22, 2015); *Movie Franchises – Box Office History*, THE NUMBERS, <http://www.the-numbers.com/movies/franchises/sort/World> (last visited Feb. 22, 2015).

Fan obsession provokes spending, and monetary impact garners attention. When Sherlock Holmes died, over twenty thousand people canceled their subscription to the *Strand*.⁸⁷ Eventually, Doyle wrote more Sherlock Holmes mysteries, against his will, at least partly because they paid the bills. *Star Trek* fans were willing to pay to get their fanzines made. It is no coincidence that the most well-known fan communities—Harry Potter, *Twilight*, *Star Trek*, *Star Wars*, *Lord of the Rings*—also surround some of the most lucrative books and movies of all time.⁸⁸ The problem for the copyright holders has, until now, been harnessing that power more directly. Editors paid Doyle for his stories, and then saw subscriptions increase because they were popular. Doyle lacked the ability to Tweet to his fans, “I’m going to resurrect Holmes. Would you like to pre-order the story?”

The story behind the *Veronica Mars* movie illustrates how content creators can use Internet technology to directly engage with their fans. *Veronica Mars* was a decidedly smaller creative phenomenon than Sherlock Holmes or *Star Trek*. A critically acclaimed television show, it failed to attract sufficient viewers to make it worthwhile for the CW to renew it past the third season, and it was therefore canceled, presumably consigned to the relics of history.⁸⁹

Veronica Mars may have been off television, but that did not stop its fans. Fanworks kept appearing. Fanvids continued to be uploaded to YouTube⁹⁰ and fanfiction continued to be written.⁹¹ Fans even held conventions.⁹² *Veronica Mars* has been off of television for six years,⁹³ but its fandom kept it alive and current. Rob Thomas, the creator of *Veronica Mars*, saw an opportunity there. Rather than chide the fans for taking his content and spinning it off, he realized that these fans who were keeping it alive might be able to help him keep it alive in official form and to help him profit off of content that traditional media had declared unprofitable.

Thomas had an idea for a *Veronica Mars* movie. His star, Kristen Bell, was interested. All that remained was to get it funded. But would a tradi-

87. See Minkel, *supra* note 86.

88. See *Best Selling Books of All Time*, *supra* note 86; *Movie Franchises – Box Office History*, *supra* note 86.

89. See Emily Yahr, ‘*Veronica Mars*’ Creator Rob Thomas Explains How His Canceled Show Rose from the Ashes For a Groundbreaking Movie, THE WASHINGTON POST (Mar. 13, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/03/13/veronica-mars-creator-rob-thomas-explains-how-his-canceled-show-rose-from-the-ashes-for-a-groundbreaking-movie/>.

90. See, e.g., Madi S., *Veronica Mars FanVid*, YOUTUBE (July 25, 2013), <https://www.youtube.com/watch?v=i-F4511NjiY>.

91. See, e.g., Petpluto, *All of Neptune’s Children Flock Home*, ARCHIVE OF OUR OWN (Apr. 4, 2014), <http://archiveofourown.org/works/974598>.

92. See, e.g., *Breakout Before Midnight*, STARFURY CONVENTION, <http://www.seanharry.com/BBM/> (last visited Feb. 8, 2015).

93. See *Veronica Mars*, IMDB, http://www.imdb.com/title/tt0412253/?ref_=nv_sr_1 (last visited Feb. 8, 2013).

tional production company foot the bill and take the risk? All Thomas had to show for his belief that the movie had an audience was a small CW viewership that had gotten his show canceled fairly quickly, and an active fandom online that was not deemed to be easily transferrable to financial gain. Thomas, who had deliberately left his show without a resolution,⁹⁴ had already pitched his idea to Warner Bros., the owner of *Veronica Mars*, without success: “Warner Bros. wasn’t convinced there was enough interest to warrant a major studio-sized movie about Veronica and the project never got off the ground.”⁹⁵ Kickstarter, however, allowed his fandom to translate to nearly instantaneous financial gain, without any guesswork involved. Thomas could post his film online, ask for donations, and immediately gauge demand. Warner Bros. approved the idea: “Their reaction was, if you can show there’s enough fan interest to warrant a movie, we’re on board.”⁹⁶ Thomas turned to Kickstarter.

Kickstarter was the idea of Perry Chen⁹⁷ and works like this: if you have an idea that you would like funding for, then you post that idea on Kickstarter, along with a target amount of money that you are hoping to raise.⁹⁸ You can offer different incentives to entice people to pledge different levels of financial support. If you do not raise your target, then nothing happens; pledges from backers are not collected unless the target is raised.⁹⁹ If you raise your target, your project gets funded and you give Kickstarter a five percent cut of the money you raised.¹⁰⁰ Kickstarter quickly gained traction,

94. See Jason Cohen, *Reviving an Old Series the New Way: Fan-Financing*, N.Y. TIMES (Apr. 27, 2013), <http://www.nytimes.com/2013/04/28/us/veronica-mars-will-return-thanks-to-fan-financing.html>.

95. Rob Thomas, *The Veronica Mars Movie Project*, KICKSTARTER, <https://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project> (last visited Feb. 1, 2015).

96. *Id.*

97. Katherine Boyle, *Yes, Kickstarter Raises More Money for Artists Than the NEA. Here’s Why That’s Not Really Surprising*, THE WASHINGTON POST (July 7, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/07/yes-kickstarter-raises-more-money-for-artists-than-the-nea-heres-why-thats-not-really-surprising>.

98. See, e.g., Nathan Zimmerman, *Zallus Reflow Oven Controller*, KICKSTARTER, https://www.kickstarter.com/projects/1070729460/zallus-oven-controller?ref=category_featured (last visited Feb. 8, 2015); Travis Cain, *FUN GUS – A Limited Edition Art Toy*, KICKSTARTER, https://www.kickstarter.com/projects/traviscain/fun-gus-a-limited-edition-art-toy?ref=category_featured (last visited Feb. 8, 2015); Gregg Donnelly, *Jack Donnelly- The Great Khaki Comeback*, KICKSTARTER, https://www.kickstarter.com/projects/1784219699/jack-donnelly-the-great-khaki-comeback?ref=category_featured (last visited Feb. 8, 2015).

99. See *Terms of Use*, KICKSTARTER, <https://www.kickstarter.com/terms-of-use> (last visited Oct. 18, 2014).

100. See Titilayo Tinubu, *Fan Finance: Alternatives to Securities Restrictions on Social Media-Based Fundraising*, 30 ENT. & SPORTS L., June 2013, at 4; see also Inge Ejbye Sorensen, *Crowdsourcing and Outsourcing: The Impact of Online Funding and Distribution on the Documentary Film Industry in the UK*, 34 MEDIA, CULTURE & SOC’Y 709, 736 (2012). Kickstarter has recently changed its Terms of Use to clarify what happens if you fail to deliver on your funded project. See Sarah Perez, *Kickstarter Updates Terms Of Use Section Related To Failed Projects*, TECHCRUNCH (Sept. 19, 2014), <http://techcrunch.com/2014/09/19/kickstarter->

and has funded over \$1.3 billion worth of projects¹⁰¹—more than the amount of money available to the National Endowment for the Arts.¹⁰² Musician Amanda Porter was an early adopter of Kickstarter and used it to fund a new album and subsequent tour.¹⁰³ Palmer’s Kickstarter demonstrated early on that it was possible to use your fans in a very immediate way, bypassing entirely the traditional media intermediary—although this then made you beholden to your fans in new and unusual ways.¹⁰⁴ Kickstarter is, at its core, an embodiment of the same participatory culture that drives the creation of fanworks,¹⁰⁵ and, perhaps unsurprisingly, fans were more than willing to embrace it.¹⁰⁶

updates-terms-of-use-section-related-to-failed-projects/. The full impact of Kickstarter on copyright law, relationships with fans, and intellectual property ownership questions, has not been fully examined yet and is beyond the scope of this article. There have been instances of Kickstarter being used by fans to raise money for fanworks, which seems to have been quickly squashed. *See, e.g.,* Joe Mullin, *Where the Wild Lawyers Are: Knocking Sequels Off Kickstarter*, ARS TECHNICA (July 5, 2013), <http://arstechnica.com/tech-policy/2013/07/where-the-wild-lawyers-are-knocking-sequels-off-kickstarter/>. Like much else on the Internet, users’ own mores may develop over time to shape how Kickstarter operates, rather than traditional understandings of law.

101. *See* Stats, KICKSTARTER, <https://www.kickstarter.com/help/stats?ref=footer> (last visited Feb. 1, 2015).

102. Boyle, *supra* note 97.

103. *See* Adi Robertson, *Amanda Palmer Kickstarter Finishes with Record-Breaking \$1 Million*, THE VERGE (June 2, 2012), <http://www.theverge.com/2012/6/2/3059284/amanda-palmer-million-dollar-kickstarter-finishes>.

104. Palmer raised \$1.2 million on Kickstarter but later requested volunteer musicians join her on tour because she couldn’t afford to pay them. *See* Yancey Strickler, *Amanda’s Million*, KICKSTARTER BLOG (June 4, 2012), <https://www.kickstarter.com/blog/amandas-million>; Daniel J. Wakin, *Rockers Playing for Beer: Fair Play?*, ARTS BEAT (Sept. 12, 2012), <http://artsbeat.blogs.nytimes.com/2012/09/12/rockers-playing-for-beer-fair-play/?hp&r=0>.

Outraged fans created an online petition to request that she pay all of the musicians on her tour. *See* *Petitioning Amanda Palmer: Pay ALL the Musicians that Perform On Your Tour*, CHANGE.ORG, <https://www.change.org/p/amanda-palmer-pay-all-the-musicians-that-perform-on-your-tour> (last visited Aug. 29, 2013). The fans had funded the tour, so the fans clearly felt that they deserved some say in how that money on tour was spent. After the “kerfuffle,” Palmer agreed to move money around to make sure that all of the musicians who played with her were paid. *What We’re Doing about the Crowdsourced Musicians. Also: We Charted at Motherfucking #10*, AMANDA PALMER (Sept. 19, 2012), <http://amandapalmer.net/blog/20120919/>.

105. Strickler, *supra* note 104 (“Traditional marketplaces restrict fans to being consumers, but Amanda’s project invited them to participate.”).

106. Kickstarter is not the only website of its kind. At least one other website, Indiegogo, works much the same way and has been utilized the same way by content creators. *How it Works*, INDIEGOGO, <https://www.indiegogo.com/learn-how-to-raise-money-for-a-campaign> (last visited Mar. 6, 2015). Recently, fans of British actor Benedict Cumberbatch—the star, coincidentally, of the BBC’s *Sherlock*—raised three times the target amount requested in twelve hours to fund an independent film. Fraser McAlpine, *Benedict Takes a Beating in ‘Little Favour’ Teaser*, ANGLOPHENIA (Sept. 23, 2013), www.bbcamerica.com/anglophenia/2013/09/benedict-takes-a-beating-in-little-favour-teaser.

The fan interest in funding the *Veronica Mars* movie was overwhelming. Thomas set a goal for the Kickstarter of \$2 million—the highest goal ever set for a Kickstarter—and gave the fans thirty days to meet it.¹⁰⁷ The fans met it in less than twelve hours.¹⁰⁸ The Kickstarter fund grew steadily and news of it spread like wildfire through social media outlets. Fans talked to other fans, who talked to even more fans. Thomas and Bell spurred fans on, sending them steady messages via social media and the Kickstarter page.¹⁰⁹ When all was said and done, the fans raised more than \$5.7 million for the *Veronica Mars* movie, nearly three times the original goal.¹¹⁰

The *Veronica Mars* Kickstarter story is not an isolated incident. Another fandom-reliant work, *The Lizzie Bennet Diaries*, enjoyed similar results. Much like *Sherlock*, *The Lizzie Bennet Diaries* is a modern re-telling of an old and venerable original work: Jane Austen's *Pride and Prejudice*. Although Austen fans have less of a reputation for being fanatical about the author than fans of Sherlock Holmes, they have nevertheless maintained a very respectable level of activity on the Internet, with thousands of stories based on various Austen novels scattered across the Internet.¹¹¹ *The Lizzie Bennet Diaries* is not the first modern re-telling of the classic story—indeed, *Bridget Jones's Diary* was a wildly popular book and movie that accomplished the same thing, albeit more subtly¹¹²—but it had an interesting hook: it was going to exist entirely on the Internet, composed solely of YouTube videos and Twitter accounts.¹¹³ Such things are the vocabulary of modern-day fandom; fans devour them eagerly.¹¹⁴

Despite the unconventional—from the mainstream perspective—distribution model, *The Lizzie Bennet Diaries* was extremely successful. The complete playlist of the one hundred vlogs, comprising roughly seven hours of video, has lodged over four million views.¹¹⁵ In total, the series within its

107. Thomas, *supra* note 95.

108. See Cohen, *supra* note 94.

109. Rob Thomas, *supra* note 95 (“Get your friends to climb aboard, and help us make history! . . . So call your friends. Rally the troops. Lets [sic] break another record.”).

110. *Id.*

111. See *Books: Pride and Prejudice*, FANFICTION, <https://www.fanfiction.net/book/Pride-and-Prejudice/> (last visited Feb. 15, 2015) (indicating more than 3,000 *Pride and Prejudice* fanfictions); see also ARCHIVE OF OUR OWN, *supra* note 71; DERBYSHIRE WRITERS' GUILD, <http://www.dwiggie.com> (last visited Feb. 8, 2015).

112. *Bridget Jones vs Pride and Prejudice*, BBC NEWS (Jan. 28, 2013), <http://www.bbc.com/news/entertainment-arts-21204956>.

113. See *The Lizzie Bennet Diaries*, PEMBERLEY DIGITAL, <http://www.pemberleydigital.com/the-lizzie-bennet-diaries/> (last visited Feb 8, 2015).

114. See *How to be a Fangirl*, WIKIHOW, <http://www.wikihow.com/Be-a-Fangirl> (last visited Oct. 18, 2014).

115. *The Lizzie Bennet Diaries – Entire Playlist*, YOUTUBE, <http://www.youtube.com/playlist?list=PL6690D980D8A65D08> (last visited Oct. 17, 2013).

first year enjoyed 26 million video views.¹¹⁶ This popularity is perhaps not surprising when one considers that all of the content was offered to the consumer entirely for free. *The Lizzie Bennet Diaries* instead made money by capitalizing on the obsessiveness of fans. Having deliberately encouraged a fanbase composed of obsessive Internet dwellers, *The Lizzie Bennet Diaries* then sold them spin-off merchandise.¹¹⁷ Far from complaining about fanvids and fanfiction, *The Lizzie Bennet Diaries* cultivated its creative fans¹¹⁸—and then used Kickstarter to ask them for money. Again, the result was immediate and instantaneous. The creators of *The Lizzie Bennet Diaries* set a goal of \$60,000 to be met in thirty days; the goal was reached in less than six hours.¹¹⁹ The Kickstarter eventually finished with a total of \$462,405, nearly eight times the original goal.¹²⁰

II. FANDOM AND FAIR USE IN THE U.S. COPYRIGHT SYSTEM

While fanworks occupy an important space in the creative culture, their legal status is unsettled. The systemic lack of support in the precedents for fanworks as a form of accepted expression should be of concern: copyright is always a careful balance between the protection of authors' rights and the suppression of the speech of others.¹²¹ Lopsided application of copyright law in favor of copyright holders can have the effect of depriving an entire segment of the population of its methods of engagement with the larger culture. Such a result should be avoided in the absence of an important countervailing interest.

As Sherlock Holmes proves, fandom is by no means a new phenomenon, even if it is now being used in new ways. But fanworks have always maintained an uneasy relationship with the U.S. copyright regime; they have generally been viewed through the lens of fair use, which is the necessary safety valve used to ensure that the balance struck by the copyright system is the proper one.¹²²

116. Pemberley Digital, *The Lizzie Bennet Diaries DVD. . .and More!*, KICKSTARTER, <https://www.kickstarter.com/projects/pemberleydigital/the-lizzie-bennet-diaries-dvdand-more> (last visited Oct. 17, 2013).

117. *Merchandise*, PEMBERLEY DIGITAL, <http://www.pemberleydigital.com/the-lizzie-bennet-diaries/merchandise/> (last visited Mar. 6, 2015).

118. See, e.g., Hahanella, *CASE STUDY: Lizzie Bennet Diaries*, Fun with Transmedia, <http://hahatransmedia.tumblr.com/post/69929724641/case-study-lizzie-bennet-diaries> (“The Tumblr for Lizzie Bennet Diaries reblogs fan art and other tributes, as a showcase of follower devotion”) (last visited Apr. 3, 2015).

119. Hank Green, Update to *The Lizzie Bennet Diaries DVD. . .and More!*, KICKSTARTER (Mar. 22, 2013), <https://www.kickstarter.com/projects/pemberleydigital/the-lizzie-bennet-diaries-dvdand-more/posts/435025>.

120. *Id.*

121. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218–21 (2003).

122. See *id.* at 219–20.

The clause authorizing the protection of copyright in the U.S. Constitution has the explicit purpose of “promot[ing] the Progress of Science and useful Arts.”¹²³ This seems to be an acknowledgment that human civilization has always received some benefit from a participatory, creative culture. However, the monopoly granted to copyright holders to encourage them to create, necessarily places limits on the ability of the rest of the culture to engage with those works. How much of a burden this imposes depends on where one draws the monopoly line. One might allow an author to prevent any reference, however oblique, to that creator’s work. This would be an extreme form of the Lockean “moral rights” view of copyright, in which the individual creator preserves total control over her work, regardless of the societal cost.¹²⁴ However, such a monopoly would be extremely suffocating, working against the progress of knowledge explicitly favored in the Constitution.¹²⁵ Therefore, the United States implements a more utilitarian view of copyright,¹²⁶ finding the purpose of copyright to be “stimulat[ing] artistic

123. U.S. CONST. art. I, § 8, cl. 8. The word “Science” was apparently intended to mean “learning or knowledge.” *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting).

124. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001) (“The natural law copyright, which is not a part of our system, implied an ownership in the work itself . . .”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (“[T]he copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious.”); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 580 (1985) (Brennan, J., dissenting) (“Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author’s control over his or her product.”); Leval, *supra* note 124, at 1128 (noting that reading artistic integrity into U.S. copyright law would be an adoption of the French law of moral rights); Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S. 513, 519 (1999) (“[Thomas] Jefferson emphatically denied that inventors had ‘a natural and exclusive right’ to their inventions.” (quoting DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 78 (1994))). Courts have described U.S. copyright as having three objectives: “the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author.” See *Suntrust Bank*, 268 F.3d at 1261. The position of the author’s rights as last in this list is instructive.

125. See *Suntrust Bank*, 268 F.3d at 1261 (“The Copyright Clause was intended ‘to be the engine of free expression.’” (quoting *Harper*, 471 U.S. at 558)); Leval, *supra* note 124, at 1107 (“The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for intellectual enrichments of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.”); *id.* at 1136 (“The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author’s monopoly. But it depends equally on the recognition that the monopoly must have limits.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (noting that copyright is not “primarily designed to provide a special private benefit”).

126. See, e.g., Leval, *supra* note 124, at 1107–08 (explaining the utilitarian roots of American copyright as contrasted with an “absolute or moral right, inherent in natural law”); *Eldred*, 537 U.S. at 212 n.18 (“[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”); *Harper*, 471 U.S. at 545–46 (“[C]opyright is intended to increase and not to impede the harvest of knowledge. . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their

creativity for the general public good,”¹²⁷ while recognizing that “the public welfare in artistic works will be maximized by the provision of an economic incentive to authors.”¹²⁸

Indeed, to some extent, the terms of the Copyright Clause appear to constitutionally dictate that copyright simultaneously provide a private monopoly and promote public progress. The resolution of this essential tension between private and public goals of copyright is fair use.¹²⁹

A. *Fair Use: The Doctrine*

Fair use is a doctrine “of ancient lineage.”¹³⁰ Courts have explained its endurance thus: “From the infancy of copyright protection, some opportunity for fair use of copyrighted material has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’”¹³¹ Far from an outlier doctrine, fair use goes fundamentally hand-in-hand with the concept of copyright. “Fair use is not a grudgingly tolerated exception to the copyright owner’s rights of private property, but a fundamental policy of the copyright law.”¹³² The Copyright Clause states as its goal the promotion of progress and fair use advances that goal. Indeed, “[t]he ultimate test of fair use . . . is whether the copyright law’s goal of ‘promoting the Progress of Science and useful Arts’ . . . would be better served by allowing the use than by preventing it.”¹³³ Copyright law rewards creativity and incentivizes the effort behind it, while fair use ensures that

labors.”); *Sony*, 464 U.S. at 429 (“[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward”); *Harper*, 471 U.S. at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); Kozinski & Newman, *supra* note 124, at 519 (“The premise behind copyright (and patent law too) is that the best way to promote production of valuable intellectual works is to give authors and inventors the ability to demand and receive compensation for the value they create.”); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1568 (S.D. Cal. 1996) (“[T]he court must give primary consideration to the Framers’ belief that copyright monopolies increase welfare by encouraging creators of new expressive works.”).

127. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

128. Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y U.S. 546, 565 (1998); see also Gregory K. Jung, *Dr. Seuss Enterprises v. Penguin Books*, 13 BERKELEY TECH. L.J. 119, 123 (1998).

129. *Suntrust Bank*, 268 F.3d at 1261 (“[T]he fair use right was codified to maintain the constitutionally mandated balance to ensure that the public has access to knowledge.”); *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 539–40 (S.D.N.Y. 2008) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)).

130. *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

131. *Campbell*, 510 U.S. at 575 (quoting U.S. CONST., art. I, § 8, cl. 8).

132. Leval, *supra* note 124, at 1135; see also *id.* at 1110 (“Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”).

133. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998)(internal citations omitted).

such incentives do not tip the balance away from a participatory culture. “The doctrine recognizes that there are circumstances in which the Copyright Act’s goals of encouraging creative and original work is better served by allowing a use of a copyrighted work than prohibiting its use.”¹³⁴ Put another way: “[f]air use theory is our legal tradition’s way of grappling with the central issue of intellectual property: at what point does protecting it start to defeat the purpose for having it in the first place?”¹³⁵ Indeed, finding the right balance between fair use and promotion of creative works is more important than ever, given the current frozen state of the public domain.¹³⁶

Initially “a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values,”¹³⁷ fair use is now a multi-factor test codified by statute,¹³⁸ in which no one factor is definitive but all must be weighed against each other.¹³⁹ Traditionally, fair use doctrine has focused on the four factors enumerated in the statute: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.”¹⁴⁰ The statute explicitly states that these factors are not exclusive,¹⁴¹ but they tend to dominate fair use analyses.¹⁴²

Fair use is, by design, a fact-intensive inquiry, applied on a case-by-case basis.¹⁴³ This can lead to curious results. Courts looking at very similar fact

134. *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 839 (S.D.N.Y. 1995) (citing *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992); *see also* *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (“The fair use defense ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ ” (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980))).

135. *Kozinski & Newman*, *supra* note 124, at 515.

136. *See Eldred v. Ashcroft*, 537 U.S. 186, 241 (2003) (Stevens, J., dissenting) (“[W]ith the exception of works which required renewal and which were not renewed, no copyrighted work created in the past 80 years has entered the public domain or will do so until 2019.”).

137. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001); *see also Castle Rock*, 150 F.3d at 141 (“Until the 1976 Copyright Act, the doctrine of fair use grew exclusively out of the common law.”).

138. 17 U.S.C. § 107 (2012).

139. *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008).

140. 17 U.S.C. § 107.

141. *Id.*; *see also SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1371 (N.D. Ga. 2001), *rev’d*, 268 F.3d 1257 (11th Cir. 2001); *Castle Rock*, 150 F.3d at 141.

142. *See, e.g., Salinger v. Colting*, 607 F.3d 68, 73 (2d Cir. 2010); *Suntrust Bank*, 268 F.3d at 1259.

143. *Warner Bros.*, 575 F. Supp. 2d at 540 (“The evaluation of these factors is ‘an open-ended and context-sensitive inquiry’ ” (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“[T]he statute, like the doctrine it recognizes, calls for case-by-case analysis”); *Suntrust Bank*, 136 F. Supp. 2d at 1371 (“[T]he court, under 17 U.S.C. § 107, must evaluate the record evidence on a case-by-

patterns have reached divergent opinions, often based on mainly unarticulated justifications.¹⁴⁴ For example, when considering a promotional poster for a documentary film that re-imagined the promotional poster for the film *Men in Black*, the Central District of California found no fair use.¹⁴⁵ On the other hand, when considering a promotional poster for a film that re-imagined a famous cover photograph from *Vanity Fair*, the Southern District of New York found fair use.¹⁴⁶

Commentators have, of course, noticed this. In comparing the different outcomes of the Supreme Court's *Campbell* case—in which fair use was found—and the Ninth Circuit's *Dr. Seuss* case—in which fair use was not found—one commentator provided this comparison between the allegedly infringing works at issue:

In both cases, the new works share a significant main character with the infringing work; the intruder in *Seuss Enterprises* and the “pretty woman” in *Campbell*. In both instances, the copier took highly recognizable material to “conjure up” the target of their parody. The secondary works both commented on society and the naiveté of the original work. . . . Just as the Supreme Court reasonably perceived a parodic character for “Oh Pretty Woman” in *Campbell*, so could the Ninth Circuit have perceived such a character for *The Cat NOT in the Hat!* in *Seuss Enterprises*.¹⁴⁷

Fair use analyses are always going to be difficult to predict because of the fact-intensive nature of their inquiries.¹⁴⁸ However, the divergent outcomes seem to be too easily dismissed as the result of the weighing of many factors. As one federal judge stated, “when you’re applying a multi-factor

case basis.”); *Castle Rock*, 150 F.3d at 141 (“Fair use analysis . . . always calls for case-by-case analysis.” (internal quotations omitted)).

144. See, e.g., Kozinski & Newman, *supra* note 124, at 520 (“The *Dr. Juice* book was enjoined, but only after a bunch of highly indeterminate weighings and balancings; a different district judge or a different court of appeals panel could have easily reached a different conclusion.”); see also David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 281, 287 (2003) (noting that “the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions”).

145. *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 1998).

146. See *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (S.D.N.Y. 1996), *aff’d*, 137 F.3d 109 (2d Cir. 1998).

147. Mary L. Shapiro, Comment, *An Analysis of the Fair Use Defense in Dr. Seuss Enterprises v. Penguin*, 28 GOLDEN GATE U. L. REV. 1, 31–32 (1998). Commentators have noted that the three landmark Supreme Court fair use cases were all “overturned at each level of review, two of them by split opinions at the Supreme Court level,” as evidence of “[t]he malleability of fair use.” 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender rev. ed. 2014).

148. See *Campbell*, 510 U.S. at 577 (“The task is not to be simplified with bright-line rules . . .”).

test in which the factors are not clearly defined or weighted, it's very difficult to *be* clearly wrong. (I'm not saying it can't be done, but it requires real work.)"¹⁴⁹ In reality, most fair use decisions seem to rise and fall on the court's aesthetic preference for the allegedly infringing work. If a judge decides your use has artistic value, then the rest of the test falls into place in your favor.¹⁵⁰ If not, the factors tend to run against you.¹⁵¹ The unspoken emphasis on aesthetic preference has shifted the focus of fair use analyses to the first factor: the purpose and character of the use. A judge's personal, subjective viewpoint on the artistry of a work tips the first factor, and the rest of the factors follow. Multi-factor tests are always inherently subjective in operation, but the focus on the aesthetic approval of a work places the copyright regime closer to artistic censorship than is comfortable.¹⁵²

B. *Fair Use: Stifling Fanworks*

This problem is most clearly evident in the courts' application of fair use to the few existing fanwork cases. There are no true fanwork cases in the traditional, accepted definition of the term, because typical fanworks are not sold for profit.¹⁵³ In fact, many fans see their works as

149. Kozinski & Newman, *supra* note 124, at 514.

150. *See, e.g.,* Salinger v. Colting, 607 F.3d 68, 74 (2d Cir. 2010); Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268–69 (11th Cir. 2001). These cases are discussed in more detail in Parts III.A and III.B.

151. *See, e.g.,* Salinger, 607 F.3d at 74; Blanch, 467 F.3d at 258; Suntrust Bank, 268 F.3d at 1268–69. These cases are discussed in more detail in Parts III.A and III.B.

152. *See, e.g.,* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Pre-summptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 688–91 (1993) (describing the difficulty courts have experienced in determining whether parodies of works are fair use and the possibility of troubling implications for First Amendment values).

153. *See, e.g.,* Grossman, *supra* note 6 (“They don’t do it for money. That’s not what it’s about.”); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 527 (2009) (“With limited exceptions, [fanworks] circulate outside the money economy, shared freely with other fans.”). This freeness might, in fact, be part of what stymies courts, who frequently quote the Boswell quote that “no man but a blockhead ever wrote, except for money.” *See, e.g.,* Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998). Interestingly, some commentators have connected the gift economy of fandom with its female-heavy composition: “[Women in fandom] construct a new, gendered space that relies on the circulation of gifts for its cohesion with no currency and little meaning outside the economy, and that deliberately repudiates a monetary model (because it is gendered male).” Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, CINEMA J., Summer 2009, at 116; *see also* Davies, *supra* note 41 (“In much the same way that, hundreds of years ago, many women wrote extensively but typically only for private circulation amongst friends and acquaintances, fanfiction is part of an informal, communal cultural exchange, functioning not as a capitalistic enterprise but as a kind of gift economy: I’ll write you this story, a fanfic writer might say, e-mailing her friend snippets of prose; you write me something back.”). The monetization of fanworks, including efforts by Amazon to acquire fanfiction and sell it at a profit, is a new and interesting development that fan communities themselves are struggling to reconcile with the traditional roots of fan. *See* Donald Melanson, *Amazon Launches Kindle Worlds Publishing Platform for Fan Fiction, Will Pay Royalties to Writers and Rights Holders*, ENGADGET (May 22, 2013, 9:49 AM), <http://www.engadget.com/>

“gifts.”¹⁵⁴ While this definitely does not exclude them from the specter of litigation being raised through cease and desist letters,¹⁵⁵ the only cases that have advanced to litigation, so far, have involved fanworks intended to be sold. However, this does not mean necessarily, as the courts have assumed, that these cases have advanced to litigation for entirely economic reasons.¹⁵⁶ In fact, as the precedent indicates, the economic impact of the works in question is only perfunctorily examined and held secondary to the court’s aesthetic sensibilities toward the works. Indeed, one might conclude that litigation occurs in cases of attempted monetization because the effort to make a fanwork profitable would involve a level of marketing and publicity that might cause embarrassment, humiliation, and indignation on the part of the copyright-holder, rather than a true economic impact. And fandom seems to recognize that it is not really the lack of monetization of their works that protects them, but their ability to fly under the radar and beneath the copyright-holder’s notice so as not to provoke the copyright-holder’s sense of moral outrage and violation.¹⁵⁷ Monetization of a fanwork raises the profile of the work and attracts too much attention in the copyright regime, making monetization unattractive for creators of fanworks, even though such development may even benefit the copyright holders.

Traditionally, courts have applied fair use very narrowly, largely protecting parodies and very little else in the way of “creative” fair use (as

2013/05/22/amazon-kindle-worlds-fan-fiction/ (“Our book have generated a massive amount of fan fiction, and we see this as an evolution in publishing and a valuable way of broadening our brands and engaging fans . . .”).

154. See .fcoppa, *LOTR and Twilight Fan Fiction Archives Bought – For Profit*, ORG. FOR TRANSFORMATIVE WORKS (July 1, 2011, 5:54 PM), <http://transformativeworks.org/lotr-and-twilight-fan-fiction-archives-bought-profit>; De Kosnik, *supra* note 79, at 121; Henry Jenkins, *Transforming Fan Culture into User-Generated Content: The Case of FanLib, Confessions of an Aca-Fan*, CONFESSIONS OF AN ACA-FAN (May 22, 2007), http://henryjenkins.org/2007/05/transforming_fan_culture_into.html (“[T]hey operate in a gift economy . . .”). There are those who see this very freeness as marginalization of valuable works. See De Kosnik, *supra* note 79, at 118, 120, 123–24 (“[T]he authors of fan fiction, who are predominantly women, have never, as a group, sought payment for their labor.”); see also Davies, *supra* note 41 (“[T]he tendency of young women writers to funnel their efforts into this sphere can be seen as a preemptive act of isolation, of self-protection, of avoidance of the much more brutal world of publishing.”). However, there are others who see it as “refreshing, rendering it a form of pure play and expression rather than work.” *Id.*

155. See, e.g., *Harry Potter in the Restricted Section*, CHILLING EFFECTS, <https://www.chillingeffects.org/notices/1182> (last visited Mar. 5, 2015); Joanne Teng, *Fanworks, Copyright and Moral Rights*, ARTS LAW CENTRE OF AUSTL. (June 30, 2009), <http://www.artslaw.com.au/articles/entry/fanworks-copyright-and-moral-rights/>. For an overview of cease and desist letters, see generally *Cease & Desist*, FANLORE, http://fanlore.org/wiki/Cease_%26_Desist (last modified Jan. 4, 2015).

156. See *infra* Part III.B.

157. See, e.g., Has, *Fanfiction: A Tale of Fandom and Morality*, DEAR AUTHOR (Mar. 16, 2012), <http://dearauthor.com/features/essays/fanfiction-a-tale-of-fandom-and-morality/> (discussing among the commenters the fear that authors will start to pay more attention to fanfic and try to shut it down).

opposed to what would be regarded as news-reporting or educational fair use).¹⁵⁸ This narrowing of fair use—not required by the more expansively worded statute—may result in courts’ dismissing fanworks without the close examination such works deserve. Indeed, with only a superficial understanding of fanworks, it is easy to dismiss them categorically.¹⁵⁹ In fact, fanworks are not merely “free riding on another’s creations,”¹⁶⁰ as some have argued. The inquiry should be more nuanced than that. In a world where courts sometimes dismiss all other fair use factors in the absence of just one, promotion of a creative culture seems doomed to fail.¹⁶¹

Such was the case in *Salinger v. Colting*. J.D. Salinger published a well-known and widely read novel called *The Catcher in the Rye* in 1951.¹⁶² Despite the popularity of the novel, Salinger refused to publish a follow-up to it, or to permit a movie to be made of it, jealously guarding all of his derivative rights.¹⁶³ This did not stop many people from “rewriting” *The Catcher in the Rye*.¹⁶⁴ Fredrik Colting joined this participatory culture¹⁶⁵ and wrote *Sixty Years Later: Coming Through the Rye*. The book’s protagonist, Mr. C, was understood to be *The Catcher in the Rye*’s famous protagonist, Holden Caul-

158. See, e.g., Ochoa, *supra* note 128, at 594–96.

159. *Harry Potter Lives on in the Pages of Fan Fiction*, *supra* note 74 (“Ask the critics and they’ll say it’s just for geeks or people unable to live in the real world.”). Cf. Bookshop, *I think the OTW just won all games of Anti-Fanfic Bingo forever :D*, DREAMWIDTH (July 17, 2012, 11:33 PM), <http://bookshop.dreamwidth.org/1099785.html> (“[C]onversations are happening that gradually move us further along the sociocultural spectrum towards general, widespread acceptance of fan and remix cultures.”).

160. Leval, *supra* note 124, at 1116. See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994); *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1366 (N.D. Ga. 2001) (noting that the plaintiff argued that “the defendant seeks to associate its work with *Gone with the Wind* in order to trade off of its success”).

161. See *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (quoting *Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001)); Leval, *supra* note 124, at 1116 (“Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense.”).

162. *Salinger v. Colting*, 607 F.3d 68, 70 (2d Cir. 2010).

163. *Id.* at 71.

164. *Id.* (“Literary critic Louis Menand has identified *Catcher* ‘rewrites’ as a ‘literary genre all its own.’”) (internal citation omitted).

165. See, e.g., Fandom Scribe, *Ten Years Later*, FANFICTION (Nov. 17, 2013), <https://www.fanfiction.net/s/9854278/1/Ten-Years-Later> (“Brief glimpse into the life of Holden Caulfield ten years after the end of the book.”); Supermahler2012, *Holden, 10 Years After: How Holden Applied Himself And Moved On*, FANFICTION (Mar. 4, 2013), <https://www.fanfiction.net/s/9070866/1/Holden-10-Years-After-How-Holden-Applied-Himself-and-Moved-On> (“This is my close replication of Holden Caulfield’s voice, and my opinion of what happened to him ten years after the events of *Catcher in the Rye*.”). Interestingly, many of the *The Catcher in the Rye* “sequels” that can be found on the Internet appear to be the result of school assignments. See, e.g., WholockPotterjay, *Caught in the Rye*, FANFICTION (Oct. 11, 2013), <https://www.fanfiction.net/s/9755928/1/Caught-in-the-Rye> (“Just an additional chapter to the *Catcher in the Rye*, that I wrote for English class”); Carrohason, *Nothing’s the Same, ARCHIVE OF OUR OWN* (May 23, 2013), <http://archiveofourown.org/works/813910> (“[Written for my high school English class]. Set ten years after the events of *The Catcher in the Rye*.”).

field, sixty years after the events of the first book. *Sixty Years Later* explicitly mimics the structure of *The Catcher in the Rye*, taking Mr. C through several days in New York City strikingly similar to the days he experienced in *The Catcher in the Rye*. Along the way, Mr. C reveals to the reader how he is, and is not, the same sixty years later. The premise of the book includes J.D. Salinger as a character, a technique that is popular in fanfiction.¹⁶⁶ Salinger, “haunted by his creation[,] . . . now wishes to bring him back to life in order to kill him. . . . As the story progresses, Mr. C becomes increasingly self-aware and able to act in ways contrary to the will of Salinger. . . . Salinger finds he is unable to kill Mr. C and instead decides to set him free.”¹⁶⁷

The court found that *Sixty Years Later* did not operate as a parody of *The Catcher in the Rye*: “60 Years’ plain purpose is not to expose Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, but rather to satisfy Holden’s fans’ passion for Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, which *Catcher* has ‘elevated into the realm of protectable creative expression.’”¹⁶⁸ The court also found that *Sixty Years Later*’s inclusion of Salinger as a character, while “novel,”¹⁶⁹ did not qualify as a parody of Salinger.¹⁷⁰ The court was unconvinced that Colting made Salinger a character “in order to criticize his reclusive nature and alleged desire to exercise iron-clad control over his intellectual property”¹⁷¹ The court did acknowledge that the addition of the Salinger character did lend *Sixty Years Later* some transformative purpose that was not parodic in character but found that the effect of it was diminished because the transformation was inconsistent and out of proportion to the amount of *The Catcher in the Rye* that *Sixty Years Later* copied, “both substantively and stylistically.”¹⁷² As a result, the first factor weighed against fair use.

The finding on this first factor inevitably influenced the rest of the court’s analysis.¹⁷³ When the court turned its attention to the final factor of effect on the market, the court acknowledged that *Sixty Years Later* would not likely have an effect on the market for *The Catcher in the Rye* but did find that it “could substantially harm the market for a *Catcher* sequel.”¹⁷⁴

166. See, e.g., Azriona, *Arthur’s Adventure*, ARCHIVE OF OUR OWN (Dec. 31, 2013) <http://archiveofourown.org/works/1111897>.

167. *Salinger*, 607 F.3d at 72.

168. *Salinger v. Colting*, 641 F. Supp. 2d 250, 260 (S.D.N.Y. 2009) (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998)), *vacated*, 607 F.3d 68 (2d Cir. 2010).

169. *Id.* at 261.

170. *Id.*

171. *Id.* (internal quotations omitted).

172. *Id.* at 262–63.

173. *Id.* at 263–68 (finding that the “limited non-parodic transformative content is unlikely to overcome the obvious commercial nature of the work, the likely injury to the potential market for derivative works of *Catcher*, and especially the substantial and pervasive extent to which 60 Years borrows from *Catcher*”).

174. *Id.* at 267–68.

The court found that the fourth factor weighed against fair use, but “only slightly.”¹⁷⁵ In the end, the court was most persuaded by the amount that *Sixty Years Later* took from *The Catcher in the Rye*,¹⁷⁶ essentially an aesthetic judgment about how the work achieved its purpose. The court made an artistic evaluation and then manipulated the fair use analysis to place undue emphasis on the first and third factors to support its artistic evaluation. The fact that there was little evidence about the economic effect of the work—which the court acknowledged—did not affect the court’s analysis as much as its evident general distaste for Colting’s work and its effectiveness.

The same aesthetic values were at work in the cases involving the commercial *Gone with the Wind* fanwork, *The Wind Done Gone*. Scarlett O’Hara, the heroine of Margaret Mitchell’s *Gone with the Wind*, is the privileged daughter of a slave-holding cotton plantation owner in the days just before the U.S. Civil War breaks out. The story charts her life through the Civil War and Reconstruction, setting Scarlett’s personal experiences in the context of various historical events that frequently concern race in the South. The novel is one of the bestselling books in history, second only to the Bible,¹⁷⁷ and its movie version has enjoyed similar popularity.¹⁷⁸

Alice Randall wrote *The Wind Done Gone*, a re-telling of *Gone with the Wind* from the perspective of one of Scarlett’s slaves who is also Scarlett’s illegitimate half-sister.¹⁷⁹ The character does not exist in the original novel, but she interacts with most of the characters from the original novel, and the events of the original novel also take place in *The Wind Done Gone*.¹⁸⁰ This is a common fanfiction trope.¹⁸¹

In analyzing the transformative purpose factor, the lower court found that *The Wind Done Gone* was not sufficiently transformative to merit fair use protection.¹⁸² That conclusion, in the court’s view, then dictated that the book must “serve as a market substitute for a sequel to *Gone with the*

175. *Id.* at 268.

176. *Id.*

177. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

178. *See All Time Box Office Domestic Grosses Adjusted for Ticket Price Inflation*, BOX OFFICE MOJO, <http://boxofficemojo.com/alltime/adjusted.htm> (last visited Feb. 21, 2015) (showing that *Gone with the Wind* is the highest grossing movie of all time, when adjusted for inflation).

179. *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1364, 1376 (N.D. Ga. 2001).

180. *Id.* at 1364, 1375.

181. *See, e.g., Strange_Hearts, Cause and Effect*, ARCHIVE OF OUR OWN (July 20, 2014), <http://archiveofourown.org/works/1013647/chapters/2012692> (inserting a new original character into the events of “Harry Potter and the Order of the Phoenix”); Natasja, *Not What You Expected*, ARCHIVE OF OUR OWN (Dec. 28, 2014), <http://archiveofourown.org/works/1003756> (inserting two new original characters into the events of “The Hobbit”).

182. *Suntrust Bank*, 136 F. Supp. 2d at 1372–78.

Wind.”¹⁸³ The court recognized that there was value in Randall’s purpose of parodying the antebellum South, but held that she could not “cop[y] Ms. Mitchell’s vision, [retell] *Gone with the Wind*’s story, and then provide . . . a second sequel.”¹⁸⁴ The court acknowledged that *The Wind Done Gone* was at least partly transformative in that “the structure and style of the new work differ dramatically from the epic qualities of *Gone with the Wind*,”¹⁸⁵ but that “it [did] so no more than any other sequel to an original work.”¹⁸⁶

As far as the court was concerned, “[Randall’s] use of the copyrighted material merely summarize[d] most of the earlier work without any commentary or fresh ideas that challenge[d] the reader’s understanding of the earlier work. While the new work add[ed] some new creative elements to the original story, those elements only decorate[d] and [did] not develop something new except to form a sequel.”¹⁸⁷ The court found that this use moved *The Wind Done Gone* from the realm of “parody” to the realm of “piracy.”¹⁸⁸

The court expressed concern over what would happen in the future if it were to find *The Wind Done Gone* to be fair use. “If the defendant is permitted to publish *The Wind Done Gone*, an unauthorized derivative work, then anyone could tell the love story of *Gone with the Wind* from another point of view and/or create sequels or prequels populated by Ms. Mitchell’s copyrighted characters without compensation to the Mitchell Trusts.”¹⁸⁹ The court was unswayed by Randall’s argument that *The Wind Done Gone* was a critical work that Mitchell’s heirs would never have licensed to be produced, noting that Mitchell’s heirs had licensed a sequel already and were considering publication of a second sequel whose story could be preempted by Randall’s telling.¹⁹⁰

The disposition of the case on appeal neatly illustrates the danger of allowing aesthetic preferences to dictate copyright decisions. Whereas the district court had found the *Wind Done Gone* lacked “any commentary or fresh ideas that challenge[d] the reader’s understanding of the earlier work,”¹⁹¹ the appellate court found that it was “a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in [*Gone with the Wind*].”¹⁹² Because the court reached such a different value judgment about *The Wind Done Gone*, the rest of its fair use

183. *Id.* at 1375 (“[T]he new work . . . takes fifteen main characters, more fully explains what happens in the previous work, and then tells what happens to them thereafter—a sequel.”).

184. *Id.* at 1376.

185. *Id.* at 1378.

186. *Id.*

187. *Id.* at 1381.

188. *Id.*

189. *Id.* at 1382.

190. *Id.* at 1382–83.

191. *Id.* at 1381.

192. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

analysis fell into a very different line than the district court's. In stark contrast to the district court's ruling, the appellate court found *The Wind Done Gone* to be so transformative that the book's commercial nature was not considered a problem.¹⁹³ The court practically dismissed the second factor as having "little weight in parody cases."¹⁹⁴ Because of this overriding parodic purpose, the court was also much less concerned with the fact that Randall may have taken more of *Gone with the Wind* than was necessary.¹⁹⁵ Finally, the court criticized the district court for its effect on the market analysis, stating that it had been too preoccupied with the value of *Gone with the Wind*'s licensed derivatives to the exclusion of considering seriously whether *The Wind Done Gone* would actually supplant demand for these licensed derivatives.¹⁹⁶ The appellate court found no evidence that *The Wind Done Gone* would displace sales of *Gone with the Wind* or its derivative works and so this factor weighed in favor of fair use.¹⁹⁷

Copyright holders do not always behave like rational actors driven by economics. Creators get emotionally involved in their creations.¹⁹⁸ Sometimes, in fact, creators make the conscious choice *not* to monetize their creations to the extent they could.¹⁹⁹ The motivation behind litigation should not always be assumed to be economic in nature. Such an assumption makes courts hostile to newer, less familiar forms of art, which is exactly what an emphasis on transformative purpose breeds.

These varied conclusions resulting from the focus on fair use's subjective first factor lead to an unpredictability that breeds inefficiency. Indeed, this unpredictability may actually *deter* creation, contrary to the intended effect of copyright law, as creators will be unable to predict whether their creations will be subsequently stifled.²⁰⁰ Moreover, in today's world of expensive litigation, lawyers frown upon unpredictability because they would

193. *Id.* ("TWDG's for-profit status is strongly overshadowed and outweighed in view of its highly transformative use of GWTW's copyrighted elements.")

194. *Id.* at 1271.

195. *Id.* at 1273–74.

196. *Id.* at 1274–75.

197. *Id.* at 1275–76.

198. Grossman, *supra* note 6 ("Other writers consider it a violation of their copyrights, and more, of their emotional claim to their own creations. They feel as if they characters had been kidnapped by strangers."); *Harry Potter Lives on in the Pages of Fan Fiction*, *supra* note 74 ("There's a lot of passion behind that feeling . . ."); Robin Hobb, *The Fan Fiction Rant*, ROBIN HOBB'S HOME, <http://web.archive.org/web/20050630015105/http://www.robinhobb.com/rant.html> (last visited Sept. 10, 2013) ("I am not rational on the topic of fan fiction. . . . [P]eople who know me well also know that this is one topic that can make my eyes spin round like pinwheels and steam come out of my ears."); *Fan Fiction*, THE CITADEL: SO SPAKE MARTIN (May 9, 1999), http://www.westeros.org/Citadel/SSM/Entry/Fan_Fiction.

199. *See* *Salinger v. Colting*, 607 F.3d 68, 71 (2d Cir. 2010).

200. *See* *Shapiro*, *supra* note 147, at 48 ("Where the court's application of fair use is not well understood and predictable, those that invest capital in distributing creative works become extremely wary."); *see also* Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 21–22 (1994).

prefer to give their clients more concrete guidance. It renders precedent unhelpful²⁰¹ while simultaneously strangling the likelihood of developing more predictable precedent by deterring adversaries from actually investing the money in pursuing such unpredictable litigation.²⁰²

III. FAIR USE REIMAGINED AND FANWORK VALUE RECOGNIZED

Fair use developed as a theory to ensure that copyright would fulfill its purpose of promoting a participatory cultural dialogue. In application, however, it has functioned to import aesthetic value judgments into the copyright law, using such preferences to dictate the rest of the fair use analysis. The economic effect—the fourth statutory fair use factor—has been “presumed” to follow, as if the root of the copyright holder’s disapproval of the work must stem from a depletion of copyright’s incentives to create.²⁰³ That assumption is incorrect, however, as the experience of fandoms over the past decades has made clear. The judgment stems from disapproval of a taking that an individual—whether a copyright holder or a judge—feels does not have sufficient justification in value to society. An effect on the market would be tolerated only if the use is considered valuable enough. Reversing this belief would better serve copyright law’s purpose. In the absence of a demonstrated effect on the market, a use should be allowed and the participatory culture given space to breathe.

A. *The Danger of the Reliance on Hidden Aesthetic Judgments*

When courts allow the transformative use factor to dictate their assumptions about the outcome of fair use, they make problematic aesthetic value judgments that serve to shift copyright away from promoting progress and toward a knee-jerk protectiveness of status quo monopoly rights. The cases pay lip service to “the risk of permitting subjective judgments about quality to tilt the scales on which the fair use balance is made,”²⁰⁴ but in reality,

201. The observations of Judge Leval twenty years ago remain pertinent today: “Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.” Leval, *supra* note 124, at 1106–07 (footnotes omitted).

202. William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 453, 488 (“[T]rademark and copyright infringement cases tried in court can involve highly fact-specific and somewhat subjective analysis, and legal defenses are not particularly clear or consistently upheld. Targets, therefore, often acquiesce to enforcement demands because of the legal uncertainty that IP litigation entails.”); *see also* Leval, *supra* note 124, at 1107 (“Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes.”).

203. *See supra* Part II.B.

204. *Twin Peaks Prod., Inc. v. Publ’n Int’l, Ltd.*, 996 F.2d 1366, 1374 (2d. Cir. 1993); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001) (“[C]ourts should not judge the quality of the work or the success of the attempted humor in

subjective judgments must play a role in decisions about whether a use is important enough to be valued and protected as fair.²⁰⁵ By its very nature, fair use analysis forces courts to make decisions about rap songs describing different types of women and their desirability as a companion and about criticisms of selective portrayals of the antebellum South.²⁰⁶ It is hard to see the disagreement between the district court and the appellate court on the transformative purpose of *The Wind Done Gone* as anything other than a disagreement over how much each court liked the work and how successful they personally found it as a vehicle for a critical message.²⁰⁷ In the end, the appellate court had to argue about Randall's "literary goal" in a paragraph that reads more like a book review.²⁰⁸ When the court states, "it is manifest

discerning its parodic character."); *id.* at 1273 ("[L]iterary relevance is a highly subjective analysis ill-suited for judicial inquiry.").

205. See *Suntrust Bank v. Houghton Muffin Co.*, 136 F. Supp. 2d 1357, 1372 (N.D. Ga. 2001) ("The 'transformative use' concept assists the court in assessing 'the value generated by the secondary use and the means by which such value is generated.'" (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1994)); see also Leval, *supra* note 124, at 1113 ("[A] low estimation of the overall merit of the secondary work can lead to a finding for the copyright owner in spite of a well-justified, transformative use of the particular quotation that should justify a favorable finding under the first factor."); Ochoa, *supra* note 128, at 592 (criticizing a Ninth Circuit decision for refusing to allow the possibility that "a work can have many different meanings to different people" and "allow[ing] its own view concerning the artistic merits of the work to color its judgment"); Jung, *supra* note 128, at 130 (noting that a losing defendant's justification for his "parody" was viewed as "unconvincing" but did "not seem any more implausible" than a parodic justification that had been accepted in another case); Shapiro, *supra* note 147, at 38 (noting that "[f]requently, when a parody attacks a time-honored pop icon, or where an attack is sexually explicit, courts have found no fair use" and so "a determination of no fair use is more likely when the parody is offensive and transgresses the accepted norms of taste and decency."); *Salinger v. Random House, Inc.*, 650 F. Supp. 4134, 426 (S.D.N.Y. 1986) (finding fair use where the secondary work was "a serious, well-researched history"). Even the court that originally warned against value judgments found, in the very next section of the opinion, found that it was "more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes." *Twin Peaks*, 996 F.2d at 1375. Presumably, it was the court's judgment deciding whether a work in question had enough of a "public purpose." See *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 11 F. Supp. 2d 329, 334 ("The first [part of a fair use inquiry] is whether the work is primarily commercial in nature or whether [it] aspires to serve broad public purposes." (citing *Twin Peaks*, 996 F.2d at 1366)); *Salinger*, 650 F. Supp. at 425 (noting that the court must "make an appraisal of social usefulness").

206. *Suntrust Bank*, 136 F. Supp. 2d at 1377–78. Even the concurrence in *Campbell v. Acuff-Rose Music, Inc.* disagreed with the majority's finding that the song in question was a parody. See 510 U.S. 569, 599 (1994) (Kennedy, J., concurring); see also Shapiro, *supra* note 147, at 34 (remarking that *Campbell* may have resulted in a finding of fair use because the court did not "venerate[]" the original pop song).

207. Compare *Suntrust Bank*, 136 F. Supp. 2d at 1367 with *Suntrust Bank*, 268 F.3d at 1269.

208. *Suntrust Bank*, 268 F.3d at 1270 ("Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War.").

that *TWDG*'s *raison d'être* is to parody *GWTW*,²⁰⁹ it ignores the fact that, the district court disagreed, so it was not in fact manifest.²¹⁰

The malleability of the transformative use factor contributes to the problem of courts relying on their personal aesthetic judgments. The transformative use factor has developed in such a way as to force works into narrow categories, shoehorning what could be cultural dialogue into preexisting expectations. There is precedent that fair use is meant to capture uses beyond those delineated explicitly in the statute.²¹¹ However, courts have been reluctant to step outside of the narrow delineations, attempting to shoehorn fanworks that may be trying to communicate subtle observations about social structure into a broad umbrella of "parody,"²¹² an exercise that is complicated by the fact that even the Supreme Court case defining parody is "vague."²¹³ This inevitably devalues non-parodic uses. The existing fair use structure forces fans to characterize their works as either one or the other: either sequels to something they loved and thought a lot about and want to engage with, or critical examinations that parody the underlying work.²¹⁴ One should ask whether there is not enough room in a true participatory culture for creative works that are both.

For instance, the court in *Salinger* was disdainful of the transformative purpose of *Sixty Years Later*, noting that the fanwork in question was much

209. *Id.* at 1273.

210. The concurrence agreed with the majority on this point and scolded the district court even more overtly: "Far from amounting to 'unabated piracy,' 136 F. Supp. 2d 1357, 1369 (N.D. Ga. 2001), *The Wind Done Gone* is unequivocally parody [T]he 'purpose and nature' prong of the fair use analysis is not a close call, in my view." *Suntrust Bank*, 268 F.3d at 1277 (Marcus, J., specially concurring).

211. *See Salinger v. Colting*, 641 F. Supp. 2d 250, 256 (S.D.N.Y. 2009) (noting that *Campbell* found parody to be a transformative use, even though not explicitly included in the text of the statute); *Suntrust Bank*, 268 F.3d at 1268 ("the examples of possible fair uses given are illustrative rather than exclusive"); Leval, *supra* note 124, at 1111 (noting that transformative uses are "innumerable"); *Yankee Publ'g Inc. v. News Am. Publ'g Inc.*, 809 F. Supp. 267, 279 (S.D.N.Y. 1992) ("parody is merely an example of the types of expressive content that are favored in fair use analysis").

212. *See, e.g., Salinger*, 641 F. Supp. 2d at 256 (finding that it must analyze the fanwork in question's "parodic elements" to see if they "are transformative in nature"); Ochoa, *supra* note 128, at 594 (noting that the Ninth Circuit behaved—allegedly incorrectly—as if "satire" could never be a permitted fair use); Shapiro, *supra* note 147, at 28 ("[The court's] analysis suggests that a determination of whether the new work was transformative was dependent on whether the new work was a parody [even though] parody is not the only category of work that may be considered transformative . . .").

213. *Suntrust Bank*, 268 F.3d at 1268 ("On the one hand, the Court suggests that the aim of parody is 'comic effect or ridicule,' but it then proceeds to discuss parody more expansively in terms of its 'commentary' on the original." (quoting *Campbell*, 510 U.S. at 580)); *see also* Ochoa, *supra* note 128, at 548–49.

214. *See, e.g., Salinger v. Colting*, 607 F.3d 68, 72 (2d Cir. 2010); *see also Suntrust Bank v. Houghton Muffin Co.*, 136 F. Supp. 2d 1357, 1376 (N.D. Ga. 2001) (suggesting that characterizing the work in question as "a brilliant rejoinder and an inspired act of literary invention" was more accurate than characterizing it as a "provocative literary parody").

too similar to the original: “Colting does not use a change in style to reinforce any parodic or other transformative purpose, but to the contrary, utilizes a very similar style with the effect of emphasizing the similarities between *60 Years* and *Catcher*, rather than casting a new, contrary light upon the latter.”²¹⁵ In fact, it was these extensive similarities that primarily prompted the court to find against fair use.²¹⁶ Colting’s objectives in *Sixty Years Later* may have been to emphasize how little had changed in sixty years, both in Holden Caulfield and in the world at large. As Colting himself argued, he was trying to provoke readers to consider whether they had moved beyond the protagonist they had idolized decades earlier when they were rebellious teenagers themselves or whether they were still the same people.²¹⁷ The court, however, mischaracterized the argument and dismissed it, claiming that the same point could be found in *Catcher* (even though *Catcher* contains no discussion of Holden Caulfield as an old man).²¹⁸ While an argument could be made that the literary point of *Sixty Years Later* was to expose the futility of life in hindsight by emphasizing how little changes in sixty years, the court found that very similarity to be proof that it had little value.²¹⁹ Nor did the lower court even mention the literary experts that characterize *Sixty Years Later* “as a work of meta-commentary that pursues critical reflection on J.D. Salinger and his masterpiece [*Catcher*] just as do the articles that literary scholars conventionally write and publish in scholarly journals, but . . . casts its commentary in an innovative ‘post modern’ form, specifically, that of a novel.”²²⁰ Presumably, the court did not mention these experts because it was unpersuaded by them, perhaps out of a fear that, if *Sixty Years Later* could be viewed in this way, the copyright infringement floodgates would open. It is interesting to compare *Sixty Years Later*, which takes as its main character the main character of *The Catcher in the Rye* and is slapped down because of it, with *The Wind Done Gone*, which invents an entirely new character and survives fair use but may have lost much of its critical power as a result.²²¹ It is unclear that either of these decisions truly

215. *Salinger*, 641 F. Supp. 2d at 267.

216. *Id.* at 268.

217. *Id.* at 258 (“If this is where his rebellious independence leads, is it as attractive as we adoring fans of CR imagined?”) (internal citation omitted).

218. *Id.* at 258–59.

219. *See, e.g., id.* at 267.

220. *Salinger v. Colting*, 607 F.3d 68, 72 (2d Cir. 2010) (internal quotations omitted). Another literary expert provided by Colting called *Sixty Years Later* a “sustained commentary on and critique of *Catcher*, revisiting and analyzing the attitudes and assumptions of the teen-aged Holden Caulfield.” *Id.* (citation omitted).

221. *See* Andra Varin, *Review: ‘The Wind Done Gone’*, ABC NEWS (July 10, 2001), <http://abcnews.go.com/Entertainment/story?id=103760> (“Maybe Randall would have had better success if she had taken an existing character from GWTW and given her dimension — perhaps Prissy, the rolling-eyed, squeaky-voiced slave girl (played by Butterfly McQueen in the movie) who ‘don’t know nothin’ about birthin’ no babies’ — or perhaps Mammy herself.”).

promotes creative progress if critical works are only allowed if they are first stripped of their critical power.

Certainly, not all fair use analyses use the first factor to stifle new art. However, the first factor is frequently used to provide a vehicle for the judge's own personal views regarding art. In fact, some courts have used the factor to mount impassioned defenses of a form of art that they particularly value. The case of *Blanch v. Koons* is an interesting illustration of this phenomenon. The artist Jeff Koons had previously lost several other copyright cases that had been brought against him²²² before Blanch brought this action in the Southern District of New York. In this case, Koons had used Blanch's photograph in a subsequent piece of artwork that he created. Characterizing Koons's art as "'neo-Pop art' or (perhaps unfortunately in a legal context) 'appropriation art,'"²²³ the court praised it as "fodder for his commentary on the social and aesthetic consequences of mass media."²²⁴ Relying on its obvious particular appreciation for this art, the court conducted a strikingly different fair use analysis from Koons's other cases. Since the court saw value in Koons's art, the court readily concluded that it was transformative. "When, as here, the copyrighted work is used as 'raw material,' . . . in the furtherance of distinct creative or communicative objectives, the use is transformative."²²⁵ Koons justified his use of the photograph in question, even though there was some doubt as to whether he could have achieved the same purpose without using the photograph, because the court had "no reason to question his statement that the use of an existing image advanced his artistic purposes."²²⁶ The value judgment reached so far here that the court approved of Koons's massive profit of nearly \$2 million, contending that his economic gain for his art served "the broader public interest."²²⁷ When it came to effect on the market, the court readily dismissed the idea that there was any:

[Blanch] has not published or licensed 'Silk Sandals' subsequent to its appearance in *Allure*, . . . she has never licensed any of her photographs for use in works of graphic or other visual art, . . . Koons's use of her photograph did not cause any harm to her career or upset any plans she had for 'Silk Sandal' or any other photograph, and . . .

222. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (noting that "it is difficult to discern any parody"); *id.* at 312 (stating that there was "simply nothing in the record to support a view that Koons produced [the artwork in question] for anything other than sale as high-priced art").

223. *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

224. *Id.* at 253.

225. *Id.* (internal citations omitted).

226. *Id.* at 255.

227. *Id.* at 254 (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

the value of ‘Silk Sandals’ did not decrease as the result of Koons’s alleged infringement.²²⁸

This discussion contrasts sharply with the court’s discussion in *Salinger*, who had also never licensed his works. There, the court argued that Salinger had a right *not* to license his works.²²⁹ The difference seems to lie in the aesthetic judgment each court made about the secondary work in question.

On some level, perhaps these divergent results are less troubling than they seem. Courts make judgments based on specific factual scenarios all the time. The problem, however, is that aesthetic judgments in copyright cases lead away from the constitutional directive of knowledge promotion and toward a stifling environment where copyright holders’ monopoly rights are given undue power. Allowing aesthetic value judgments to control fair use analysis is especially harmful to creators who exist outside of the mainstream artistic tradition. In the end, a single person—a judge, who is often older, white, and male²³⁰—is in charge of assessing a challenge to the traditional social hierarchy and deciding whether that challenge is “introduc[ing] new ideas and concepts to the public”²³¹ in a way that should be protected by copyright law. It is worth noting that “a determination of no fair use is more likely when the parody . . . transgresses the accepted norms”²³² Therefore, copyright law’s present emphasis on aesthetic values in fair use analysis can be used to discourage challenging social discourse. This is especially troubling for fanworks, many of which focus on transgression of accepted social norms.

Fan creators are a strong example of “outside creators:” creators who are not part of the dominant culture. Their status as outsiders makes it easy for the majority culture to deride their work as meaningless and pointless. For starters, the perceived frivolousness of fanworks should not diminish their legal standing. As one court noted: “A comment is as eligible for fair use protection when it concerns ‘Masterpiece Theater’ and appears in the *New York Review of Books* as when it concerns ‘As the World Turns’ and appears in *Soap Opera Digest*.”²³³

228. *Id.* at 258.

229. *See Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009).

230. *Cf. Tushnet*, *supra* note 153, at 527 (“In much of media fandom, fanworks are mainly produced by women, contributing to their status as outsider art.”); *see De Kosnik*, *supra* note 79, at 118–19; *Jenkins*, *supra* note 154; *Hellekson*, *supra* note 153; *Davies*, *supra* note 41 (“Though there are . . . no statistics to confirm exactly how few men participate in fandom, they are certainly a minority.”).

231. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001).

232. *Shapiro*, *supra* note 147, at 34.

233. *Twin Peaks Prod., Inc. v. Publ’n Int’l, Ltd.*, 996 F.2d 1366, 1374 (2d Cir. 1993). However, this same court later said in the same case, “[w]e have been more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes.” *Id.* at 1375.

Those who have been selected to write authorized sequels of a writer's works²³⁴ acknowledge the artistic and creative demands of writing such fanfiction: "adopting and modernizing familiar characters; respecting the voices of the dead [T]heir books are clearly haunted by the beloved authors who first breathed life into the characters these continuators carefully but creatively resurrect."²³⁵ Fanworks, just like original creative works, are not easy to create; they take just as much time and effort, and yes, talent.²³⁶

Realistically, though, the perceived frivolousness of fanworks by some courts reflects a fundamental misunderstanding of what many fans seek to do in their work. Most fans working on traditional non-monetized fanworks do not see themselves as "copying" the original work but, instead, adding something to that work.²³⁷ This material addition should count for something if the transformative use factor were properly applied and not just as a disguised aesthetic judgment.²³⁸ Authors of these secondary works do not simply want to write about their favorite character, but "want[] to manipulate

234. Emma Mustich, *The Writers Who Keep Popular Authors Alive*, SALON (Aug. 7, 2011), http://www.salon.com/2011/08/07/bringing_back_characters/.

235. *Id.*

236. The better they are, of course, the more likely they are to have been found to have copied too much from the original work and then run afoul of fair use. *Compare* Salinger v. Colting, 641 F. Supp. 2d 250, 264, 266–67 (S.D.N.Y. 2009) (noting concern that the main character of the fan-authored sequel to *The Catcher in the Rye* closely resembled the main character of *The Catcher in the Rye*) with Varin, *supra* note 221 (noting that the characters in the fair-use-permitted *The Wind Done Gone* "bear only the flimsiest of resemblances" to the characters in *Gone with the Wind*).

237. See Aja Romano, *Fannish Inquisitions: Countering Assumptions About Fandom*, MANGA BOOKSHELF (Mar. 21, 2012), <http://mangabookshelf.com/25964/fannish-inquisitions-countering-assumptions-about-fandom-part-1/> ("In general terms, *fanworks are about expansion, not re-creation.*" (emphasis in original)). Even those who vociferously object to fanfiction seem to admit that it transforms the original work. See, e.g., Hobb, *supra* note 198 ("Every fan fiction I've read to date, based on my world or any other writer's world, . . . focus[es] on changing the writer's careful work . . .").

238. See Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513, 540–41 (S.D.N.Y. 2008) ("Most critical to the inquiry under the first fair-use factor is whether and to what extent the new work is transformative. Specifically, the court asks whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." (internal quotations and citations omitted)); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . ."); Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1372 (N.D. Ga. 2001) ("[T]he question for the court is whether such a work adds something new" (internal quotations omitted)); Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349–50 (1991) ("[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work."); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1264, 1264 (11th Cir. 2001) ("A new author may use or discuss the idea, but must do so using her own original expression.").

the characters themselves. “They want[] to break boundaries and push the envelope.”²³⁹ Other fans see their fanworks as valuable “improvisation exercise[s].” “You have known characters. You apply a set of given circumstances to them. Then you wait and see what happens.”²⁴⁰ In fact, many fans see their endeavors as important social work. As one writer put it:

Fanwork is dangerous because it challenges your worldview and makes you think critically about pop culture, literature, art, and the world you live in. . . . Fandom has serious repercussions because it operates outside of traditional modes of access to ideas, and it is predicated entirely on a culture of free exchange and non-monetary systems of value. . . . Fanwork is complex and diverse. It opens minds, educates, and introduces new cultural experiences to the fan participant. It is anything but shallow.²⁴¹

Another writer notes that “[fan fiction is] a reaction to large publishers, a reaction to mass media It’s a reinterpretation from a minority point of view, a female point of view, an LGBTQ point of view, a queer point of view—it’s reinterpreted to represent people who are often not represented in mass media.”²⁴² Defenses like these compel a conclusion that fanworks are not a simplistic category of things that can be dismissed out-of-hand as infringing.²⁴³ Rather, such characterizations of fanworks raise the possibility

239. *Harry Potter Lives on in the Pages of Fan Fiction*, *supra* note 74.

240. Grossman, *supra* note 6.

241. Romano, *supra* note 237. The author notes that “[f]andom constantly critiques privileged narratives, challenges established sociocultural ways of thinking, and expands the parameters of a particular established worldview,” and provides examples of such types of fan activity, including “a fic in which the character of Mary Poppins is reworked as an Indian ayah in order to offer an important critique of British colonialism.” *Id.*; *see also* Michael Geist, *Copyright Fear Mongering Hits a New High: Writers Groups Post Their C-32 Brief*, MICHAEL GEIST (Nov. 15, 2010), <http://www.michaelgeist.ca/2010/11/writers-brief-on-c-32/> (“It is shameful to find writers groups seeking to stop others from writing and engaging in original creativity.”).

242. Adi Robertson, *How Amazon’s Commercial Fan Fiction Misses the Point*, THE VERGE (June 4, 2013); *see also*, Davies, *supra* note 41 (“For queer women in particular, . . . the notion of ‘queering’ mainstream media (and mainstream romance narratives) is a powerful act of subversion.”).

243. Some commentators have argued that requiring fanworks to obtain a “license” to use the original content would “strip” the works of “much of [their] power.” Robertson, *supra* note 242. *See, e.g.*, Templar, Comment to *Conan Doyle Estate: Denying Sherlock Holmes Copyright Gives Him ‘Multiple Personalities’*, THE HOLLYWOOD REPORTER (Sept. 13, 2013, 7:50 PM), <http://www.hollywoodreporter.com/thr-esq/conan-doyle-estate-denying-sherlock-629078> (“I’m sick of hacks trying to co opt someone else’s genius.”); LockHood, Comment to *Conan Doyle Estate: Denying Sherlock Holmes Copyright Gives Him ‘Multiple Personalities’*, THE HOLLYWOOD REPORTER (Sept. 14, 2013, 3:09 AM), <http://www.hollywoodreporter.com/thr-esq/conan-doyle-estate-denying-sherlock-629078> (“Stop leeching and living on better people’s genius.”).

that they “contribute . . . to the enrichment of society,”²⁴⁴ using the original material “in the creation of new information, new aesthetics, new insights and understandings,”²⁴⁵ and should be protected. Hearing people talk about fanworks in this way sounds remarkably like the testimony of artist Jeff Koons in his successful fair use defense case: “By re-contextualizing . . . these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.”²⁴⁶

Aesthetic analysis of a piece of work’s value, whether literary or artistic in nature, is notoriously fickle and open to interpretation, which probably leads courts to be conservative in their approach to the transformative purpose of works that might not slot into the existing accepted categories. The focus on the first factor seems to tip copyright more toward a natural-rights view than the economic view traditionally understood in this country. Fair use was established to promote progress, but dismissal of commentaries that are not valued by the majority population may in fact hinder progress.

B. *The “Money-over-Art” Approach*

Courts have warned against putting too much emphasis on the commercialism of a work for fear that any work that causes economic harm might be automatically found not to be fair use.²⁴⁷ However, it is the opposite problem that has arisen in the fair use context: devaluing the economic effect of a work has led to works with little to no economic effect nonetheless being found not to be fair use.²⁴⁸ Given the historical roots of copyright in this country and the comparatively greater clarity in a market analysis than in an act of literary criticism, the effect on the market should in fact be the leading factor in the fair use analyses of fanworks. Shifting the focus in this way allows the fair use analysis to refocus on the incentivizing purpose of U.S. copyright. Those works that actually harm the copyright-holder’s bottom line should receive the greatest scrutiny. Those that do not should not be

244. Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513, 541 (S.D.N.Y. 2008). Indeed, some commentators have remarked that “[t]he communal creativity of fandom may enrich the souls of young women across the globe—not at all an insignificant achievement” Davies, *supra* note 41.

245. Leval, *supra* note 124, at 1111.

246. Blanch v. Koons, 467 F.3d 244, 247 (2d Cir. 2006).

247. Suntrust Bank v. Houghton Mufflin Co., 136 F. Supp. 2d 1357, 1378–79 (N.D. Ga. 2001) (“If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107.” (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994))); Leval, *supra* note 124, at 1124–25 (“Although the market factor is significant, the Supreme Court has somewhat overstated its importance.”). *But see Suntrust Bank*, 136 F. Supp. 2d at 1381 (“This factor is arguably the most important of the four factors of the fair use doctrine.”).

248. See, e.g., Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 923 F. Supp. 1231, 1248 (N.D. Cal. 1995).

presumed harmful based on an aesthetic judgment about them. This will provide outsider creations like fanworks enough room to breathe, fostering the value of a participatory culture, while still protecting copyright holders' economic incentive.

In the statute, the effect on the market factor is defined as “the effect of the [allegedly fair] use upon the potential market for or value of the copyrighted work.”²⁴⁹ Courts have looked at the market effect of both the original work and also of any possible derivative works, existing or potential.²⁵⁰ In doing so, the courts focus on derivative works “that creators of original works would in general develop or license others to develop,”²⁵¹ as “the licensing of derivatives is an important economic incentive to the creation of originals.”²⁵² The central inquiry is “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original.”²⁵³ The act of “free-riding” on a more famous copyright is not, by itself, enough to indicate an effect on the market, because “capitaliz[ing] on or benefit[ing] from . . . [a book’s] notoriety does not always amount to harmful substitution.”²⁵⁴ The focus should remain on the purpose of copyright to incentivize new works. If creativity is not discouraged, then the secondary use should be permitted.²⁵⁵ Courts should keep in mind that fair use decisions go beyond the copyright holder and the secondary user to impact the public at large. “[A] balance must be struck between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair.”²⁵⁶ After all, “the court should keep in mind the ultimate goal of copyright, which is to encourage the creation of new works.”²⁵⁷

249. 17 U.S.C. § 107(4) (2012).

250. *Warner Bros.*, 575 F. Supp. 2d at 549; *Twin Peaks Prod., Inc. v. Publ’n Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993); *Salinger v. Colting*, 641 F. Supp. 2d 250, 267 (S.D.N.Y. 2009).

251. *Campbell*, 510 U.S. at 592.

252. *Id.* at 593.

253. *Id.* at 590 (internal quotations mark and citation omitted). At other times, though, courts seem persuaded by considerably less than substantial harm to the market. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (“To be sure, the book would not displace the market for the letters. Indeed, we think it likely that most of the potential purchasers of a collection of the letters would not be dissuaded by publication of the biography. Yet some impairment of the market seems likely. . . . For at least some appreciable number of persons, [they will have] the impression that they have read Salinger’s words, perhaps not quoted verbatim, but paraphrased so closely as to diminish interest in purchasing the originals.”).

254. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1280 (11th Cir. 2001) (Marcus, J., specially concurring) (internal quotation marks omitted).

255. Leval, *supra* note 124, at 1125; *see also* Shapiro, *supra* note 147, at 18.

256. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

257. Ochoa, *supra* note 128, at 606.

Courts have tended to presume, based on their aesthetic judgments of the secondary work in question, a *negative* effect on the market. For instance, the court in *Salinger* was concerned that publication of the unauthorized *Catcher in the Rye* sequel could “substantially” harm the market for a future *Catcher in the Rye* sequel that Salinger might publish or authorize to be published.²⁵⁸ The court seemed to believe that a single sequel could so easily saturate the market as to harm it.²⁵⁹ Likewise, the district court in *Suntrust* worried that *The Wind Done Gone* would negatively affect the market for future *Gone with the Wind* sequels.²⁶⁰ The appellate court criticized this conclusion, stating that “some meaningful likelihood of future harm” must be demonstrated.²⁶¹ In fact, the experience of Rob Thomas, creator of *Veronica Mars*, and other creators with strong fandoms illustrate how questionable this implicit presumption of harm is. Far from being harmed by the fan creations, many of these creators might have lost their markets entirely were it not for the steadfast virulence of their fandoms. Widespread occurrence of traditionally non-monetized fanworks, far from harming the market, should actually be considered to have a *positive* effect on the market and should be properly considered as such.²⁶² As the long hiatuses between the television series *Veronica Mars* and its movie, and the individual seasons of *Sherlock*, make clear, an unauthorized sequel or two might actually help maintain interest until an authorized one is placed on the market. Indeed, content creators have begun to realize that their virulent fans can come with paychecks attached. There has long been evidence that fans will buy whatever merchandise you want to sell them, above and beyond the original creative product.²⁶³ *Doctor Who*, normally on the forefront of creator-

258. *Salinger v. Colting*, 607 F.3d 250, 267–68 (2d Cir. 2010).

259. *But see 20 Works in The Catcher in the Rye – J. D. Salinger*, ARCHIVE OF OUR OWN, <http://archiveofourown.org/tags/The%20Catcher%20in%20the%20Rye%20-%20J%20D%20Salinger/works> (last visited Feb. 25, 2014). Other courts have also seemed persuaded by a perceived narrow demand for the market in question. *See also* *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (finding that a single trivia book was “fill[ing] a market niche”). Commentators have argued that “[i]magination is a renewable resource” that permits an endless amount of stories. Tushnet, *supra* note 153, at 529–30. Such thinking should perhaps make courts more skeptical of the idea that markets can be so easily usurped.

260. *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1382–83 (N.D. Ga. 2001). *But see Works Matching ‘Gone with the Wind’*, ARCHIVE OF OUR OWN, [http://archiveofourown.org/works/search?utf8=%E2%9C%93&work_search\[query\]=gone+with+the+wind](http://archiveofourown.org/works/search?utf8=%E2%9C%93&work_search[query]=gone+with+the+wind) (last visited Feb. 25, 2014).

261. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 (11th Cir. 2001) (emphasis in original).

262. De Kosnik, *supra* note 79, at 124 (“Even though fan fiction is exchanged for free, the proliferation of this fiction works as advertising for mass-marketed media products, so media corporations are already making money from fanfic writers’ labor.”); *see also* *Castle Rock*, 150 F.3d at 136.

263. *See, e.g., Check out Chris Hardwick’s Collection of ‘Who’-mobilia*, BBC AMERICA (Sept. 24, 2011), <http://www.bbcamerica.com/anglophenia/2011/09/check-out-chris-hard>

fandom interaction, even sought out “homemade” *Doctor Who* merchandise for an exhibition specifically looking at the “fans’ devotion and relationship to the show.”²⁶⁴ And Hollywood in general has been criticized for a dependence on already-recognizable names,²⁶⁵ which frequently come complete with built-in fandoms to guarantee some measure of success.

Courts have acknowledged that there is often little evidence that there is harm in copyright infringement cases and that this actually leads to the granting of more preliminary injunctions under the assumption that such hard-to-prove harm will also be irreparable.²⁶⁶ However, it is possible that the harm is hard to prove because, on the economic level primarily recognized by U.S. copyright law, the harm is essentially nonexistent. Some courts have recognized the truth of this. For instance, in a case dealing with a trivia book, the Second Circuit acknowledged that “[t]here [was] no evidence that [the trivia book’s] publication diminished [the original work’s] profitability, and in fact [the original work’s] audience grew after [the trivia book] was first published.”²⁶⁷ However, the court nevertheless ruled against fair use, finding that the very fact of the trivia book’s existence harmed the original content owner.²⁶⁸ This appears to ignore the balance that fair use is supposed to strike: “The less adverse impact on the owner, the less public benefit need be shown.”²⁶⁹ A harm should be substantial enough to outweigh the public benefit in encouraging the cultural dialogue.²⁷⁰

There has long been anecdotal discussion that allowing proliferation of active fan communities can bring new people to the original work.²⁷¹ The

wicks-collection-of-who-mobilia; David Hines, *Intellectual Property and Prop Replica Community Norms*, THE CONCRETE TOMB OF HRADZKA (Feb. 13, 2011, 10:51 PM), <http://hradzka.livejournal.com/423422.html> (discussing the world of making, selling, and purchasing of prop replicas and noting that at least one content-creators supports such activity).

264. *Dr Who Fans Asked to Contribute to Major Exhibition*, BBC (July 8, 2013, 9:04 AM), <http://www.bbc.co.uk/news/entertainment-arts-23226255>.

265. Lucas Kavner, *Hollywood’s Remake Factory: Is Nothing Sacred?*, HUFFINGTON POST (Sept. 19, 2011, 9:56 AM), http://www.huffingtonpost.com/2011/09/19/hollywood-remakes_n_969516.html.

266. *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

267. *Castle Rock*, 150 F.3d at 136.

268. *Id.* at 145–46 (noting that, even though there was no evidence of harm and there was no indication that the original content owner would ever wish to exploit the market in question, the book nevertheless harmed the content owner by existing in the market in question in the first place); *see also* *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997) (inferring that market harm was likely and finding that the defendant had produced only “uncontroverted submissions that there was no likely effect on the market for the original” and therefore could not avail itself of the defense).

269. *Rogers v. Koons*, 960 F.2d 301, 3111–12 (2d Cir. 1992); *see also* *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

270. *See, e.g.,* *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986) (citation omitted) (“Freedom of speech requires the preservation of a meaningful public . . . dialogue . . .”).

271. *See, e.g.,* *Castle Rock*, 150 F.3d at 136; Geist, *supra* note 241 (“Fan fiction is . . . widely disseminated and frequently increases the marketability of the original.”); De Kosnik, *supra* note 79, at 122 (“If anything, fan fiction might be regarded as a form of sales promotion

experience of Sir Arthur Conan Doyle himself bears this out. Sherlock Holmes was in possession of a fierce and fervent fandom long before the Internet made fandom easy and accessible to almost every teenager in every bedroom in the Western world. Fandom made the technological leap, embracing the ease and convenience offered by the Internet, with the result that it seems to have absolutely flourished, both in the amount of “free” traditionally understood fanworks that it supports²⁷² and the amount of officially sanctioned fanworks that fans are expected to pay for.²⁷³

In contrast, some once well-known and best-selling artistic creations have sharply decreased in market value as a result of authorial disapproval of fan-related activities. For instance, Marion Zimmer Bradley authored a series of novels known as the Darkover series, and she initially encouraged her readers to develop fanfiction based on her creation.²⁷⁴ Following a disagreement with a fan, the exact parameters of which remain murky,²⁷⁵ Bradley changed her stance and cracked down on Darkover fan activity.²⁷⁶ After the effective death of its fandom, despite the continued publication of novels in the series by Bradley, “Darkover . . . faded from the prominence it enjoyed in genre fiction in the 1970s and 1980s.”²⁷⁷

Perhaps recognizing this potential for backlash, not all content creators fight against the fandom juggernaut. J.K. Rowling and Stephenie Meyer both

for its source texts.”); Mark O’Connell, *Has James Joyce Been Set Free?*, THE NEW YORKER (Jan. 11, 2012), <http://www.newyorker.com/online/blogs/books/2012/01/james-joyce-public-domain.html> (discussing the possible influx of Joycean works once James Joyce’s copyright had expired as being “welcomed” as it “might bring [the work] to a wider readership”); see also Rebecca Mead, *George Eliot’s Ugly Beauty*, THE NEW YORKER (Sept. 19, 2013), <http://www.newyorker.com/online/blogs/books/2013/09/was-george-eliot-ugly.html> (noting that actress Lena Dunham had decided to read George Eliot’s “Middlemarch” after being inspired by another novel that was “inflected” with Eliot). A British study examining infringing behavior focusing on downloaders—who are not necessarily the same as fans engaging in fanworks—seemed to confirm this idea, finding that “the top 20% of infringers on average not only spend more than the remaining 80% of infringers, but also more than consumers who never infringe.” Andy, *‘Worst’ File-Sharing Pirates Spend 300% More on Content than ‘Honest’ Consumers*, TORRENTFREAK (May 10, 2013), <http://torrentfreak.com/0-more-on-content-than-honest-consumers-130510>.

272. Both FANFICTION.NET and AN ARCHIVE OF OUR OWN show thousands of Sherlock Holmes-related fanfiction.

273. See Ray Subers, *End-of-Run Report: Case Closed on ‘Sherlock Holmes’*, BOX OFFICE MOJO (May 5, 2010), <http://www2.boxofficemojo.com/news/?id=2758&p=.htm> (noting that the movie *Sherlock Holmes* set the record for the highest-grossing Christmas Day opening ever and was the tenth highest-grossing movie of the year); Laurie R. King – *Bestsellers*, LOS ANGELES TIMES, <http://projects.latimes.com/bestsellers/authors/laurie-r-king/> (last visited Mar. 29, 2011) (showing Laurie R. King’s latest Sherlock Holmes novel in 20th place on the best-seller list).

274. See AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION 110–12 (2011).

275. See *id.* at 112–14.

276. See *id.*

277. See *id.* at 116.

permit fanfiction based on their creations, and commentators have noted that “fan fiction has acted as a viral marketing agent for their work.”²⁷⁸ *Sherlock*’s co-creators are especially skilled in using the ways of fandom to maintain high interest in their often-absent and sparse content.²⁷⁹ In fact, the virulent passion of the *Sherlock* fandom has become infamous, with actors and showrunners alike being asked about it repeatedly.²⁸⁰ While the questions sometimes seem to be asked in a spirit of mockery toward the fans, those involved in *Sherlock* seem serious about the importance of the fans to the show’s continued existence. Some courts have even suggested that fanworks can drive up demand for the original work,²⁸¹ and there appears to be some acknowledgment by copyright and business attorneys that fanworks can be valuable.²⁸²

Other writers, however, speak out against fanworks loudly and vociferously.²⁸³ In 2010, Canada was discussing a proposed bill that would amend the Canadian copyright laws to deal with modern issues like digital media.²⁸⁴ Canada is not the United States and does not have the U.S. Constitution overshadowing their copyright statutes (although one of the criticisms of the bill was that it was too influenced by U.S. copyright law²⁸⁵). However, the arguments of the content creators with regard to the “fair use” of fan-created works are illustrative. Without a clear declaration that such works are in-

278. Grossman, *supra* note 6.

279. See, e.g., Kirsty McCormack, *Sherlock Series Three Air Date Revealed in the Back of a Hearse in Live London Stunt*, EXPRESS (Nov. 29, 2013, 3:00 PM), <http://www.express.co.uk/news/showbiz/445885/Sherlock-series-three-air-date-revealed-in-the-back-of-a-hearse-in-live-London-stunt>.

280. See, e.g., Angel K, *Martin Freeman Confronted with Slash: “That’s fine”*, THE GEEKIARY (Mar. 8, 2013), <http://thegeekiary.com/martin-freeman-confronted-with-slash-thats-fine/276>.

281. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1281–82 (11th Cir. 2001) (Marcus, J., specially concurring) (“Readers of Randall’s book may want to refresh their recollections of the original. It is not far-fetched to predict that sales of *Gone with the Wind* have grown since *The Wind Done Gone*’s publication.”).

282. See Gallagher, *supra* note 202, at 481 (“In [certain] circumstances, the fan’s use of the copyrighted material was deemed non-threatening and likely to generate good publicity and goodwill towards the copyrighted work and the client.”).

283. Grossman, *supra* note 6 (“Other writers consider it a violation of their copyrights, and more, of their emotional claim to their own creations. They feel as if they characters had been kidnapped by strangers.”); *Harry Potter Lives on in the Pages of Fan Fiction*, *supra* note 74 (“There’s a lot of passion behind that feeling”); Hobb, *supra* note 198 (“I am not rational on the topic of fan fiction. . . . [P]eople who know me well also know that this is one topic that can make my eyes spin round like pinwheels and steam come out of my ears.”); *Fan Fiction*, *supra* note 198.

284. See An Act to Amend the Copyright Act, 2010, H.C. Bill C-32 (Can.), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4580265&File=42>.

285. See, e.g., Mike Masnick, *Canada More or Less Admits its Copyright Reform Plan is Driven by US, Following DMCA Exemption Rulings*, TECHDIRT (July 27, 2010, 6:29 AM), <http://www.techdirt.com/articles/20100726/17374910366.shtml>.

fringing, argued the content creators, “the market for existing works and for sequels, films, games and other derivative works based on those existing works may be destroyed. . . . For example, ‘fan fiction,’ if widely disseminated on the Internet, could deter a publisher from subsequently publishing an author’s own sequel to his or her own novel.”²⁸⁶ Rob Thomas, however, among others, proved this entirely wrong. He turned to his Internet fans to help him create a sequel that otherwise would never have existed.²⁸⁷ In fact, as Thomas and *The Lizzie Bennet Diaries* demonstrated, content creators—even those who are attempting to harness the power of their fandoms—have, if anything, been severely underestimating the positive effect of an active fandom by several magnitudes.²⁸⁸

The characterization of the extent of the harm in a fair use analysis is important to get right because the harm is balanced against the public benefit to be gained from the use: “The less adverse impact on the owner, the less public benefit need be shown.”²⁸⁹ Given the experiences of Rob Thomas, Sir Arthur Conan Doyle, and others who have put their fandoms to the test, perhaps fanworks should not be viewed as harming future markets. One should not forget that the precedents that exist examine this question from the perspective of a monetized fanwork being sold for profit, which most fanworks are not. A traditional fanwork would be even less likely to harm future markets. However, even if some economic harm still exists, it should

286. Geist, *supra* note 241.

287. Indeed, internet comments seem to suggest that many fans have an active understanding that they should reward the original content creators for the pleasure they have brought them. See, e.g., Kimberly Storbeck, Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 23, 2013) (“I had been wondering how it was funded and if there was a way to support it and then this kickstarter [sic] appeared. I’m glad to know the actors, writers and others who worked on the series will get some royalties, they very much deserve it.”); Rohan Currie, Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 23, 2013) (“[Y]ou’ve done something amazing here and I just want to support it in whatever way I can.”); Megan, Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 23, 2013) (“[T]he money [I] gave is nothing compared to the amount of happiness TLBD has given me.”); Jade, Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 23, 2013) (“You created a great product, and we love you for it!”); Nancy F., Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 22, 2013) (“Excited to have a chance to say thanks to all involved in the project by paying them for their work.”); Jen McDonnell, Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 22, 2013) (“Happy to contribute! You’ve been providing one of my favourite sources of entertainment for almost a year now.”).

288. See *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (raising nearly eight times the original goal); Tomasina Wallman, Comment to *The Lizzie Bennet Diaries DVD. . .and More!*, *supra* note 119 (Mar. 22, 2013) (“I think you underestimated the fans by a long shot . . . !”).

289. *Rogers v. Koons*, 960 F.2d 301, 311–12 (2d Cir. 1992); *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

be weighed against the significant public benefit from enhancing the cultural dialogue advanced through fanworks.²⁹⁰

Moreover, courts should be wary of lumping fanworks in with other Internet activities that have been found to be copyright infringing. Fanworks are very different from music downloading—or even torrenting, which is the act by which an entire episode of a television show or an entire movie is offered for free download over the Internet. Fanworks are, by their very definition, *transformative* in some way, whether in a way that has found approval in the dominant culture or not. They do not displace demand in the same way that exact copies of content do.²⁹¹ The problem with fanworks is not that they are not transformative; it is that they are not transformative in a way that has been given aesthetic value. Refocusing the analysis on the effect on the market factor will help eliminate the subjective aestheticism and

290. See, e.g., *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986) (citation omitted) (“Freedom of speech requires the preservation of a meaningful public . . . dialogue.”).

291. However, some content creators have even expressed a lack of concern over downloads of exact copies of their shows, believing that the “buzz” derived from such illegal downloads inspires more legal viewers to tune in. See, e.g., Emma Dibdin, *‘Breaking Bad’ Creator: ‘Streaming Video-on-Demand Saved the Show’*, DIGITAL SPY (Aug. 31, 2013, 4:56 AM), <http://www.digitalspy.com/tv/s166/breaking-bad/interviews/a510120/breaking-bad-creator-streaming-video-on-demand-saved-the-show.html> (“The piracy is certainly a double-edged sword. It does dis-incentivize companies from making their products if they feel they can’t earn an honest living off of them, but on the other hand there was an upside to the piracy, because it got the word out in regards to Breaking Bad . . . [T]here has to be a bit of gratitude on my part for that having happened.”); Brian Anthony Hernandez, *‘Game of Thrones’ Director Says Illegal Downloads Benefit the Show*, MASHABLE (Feb. 27, 2013), <http://www.mashable.com/2013/02/27/game-of-thrones-piracy-director/>; see also Enigmax, *Former Google CIO: LimeWire Pirates Were iTunes’ Best Customers*, TORRENTFREAK (July 26, 2011), <http://www.torrentfreak.com/former-google-cio-limewire-pirates-were-itunes-best-customers-110726/>; Ernesto, *E-book Piracy Can Boost Sales, Publisher Claims*, TORRENTFREAK (June 20, 2011), <http://www.torrentfreak.com/e-book-piracy-can-boost-sales-110620/>; Ernesto, *Game Changing Study Puts Piracy in Perspective*, TORRENTFREAK (Mar. 11, 2011), <http://www.torrentfreak.com/game-changing-study-puts-piracy-in-perspective-110311/>; Ernesto, *Pirates Are The Music Industry’s Most Valuable Customers*, TORRENTFREAK (Jan. 22, 2010), <https://torrentfreak.com/pirates-are-the-music-industrys-most-valuable-customers-100122/>; KANTAR MEDIA, OCI TRACKER BENCHMARK STUDY ‘DEEP DIVE’ ANALYSIS REPORT, available at <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf>; Glyn Moody, *Spanish Judge Gets It: Pirated Copies Not Necessarily Lost Sales, May Boost Purchases Later*, TECHDIRT (Nov. 1, 2011), <http://www.techdirt.com/articles/20111101/04460416581/spanish-judge-gets-it-pirated-copies-not-necessailry-lost-sales-may-boost-purchases-later.shtml>; Christian Peukert et al., *Piracy and Movie Revenues: Evidence from Megaupload: A Tale of the Long Tail?* (Working Paper, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176246; Emil Protalinski, *Researchers Find Megaupload Shutdown Hurt Box Office Revenues, Despite Gains for Blockbusters*, THE NEXT WEB (Nov. 24, 2012, 11:39 PM), <http://www.thenextweb.com/insider/2012/11/24/researchers-find-megaupload-shutdown-had-a-negative-effect-on-box-office-revenues/>. But see David S. Cohen, *MPPA Fires Back at Piracy Study*, VARIETY (Aug. 28, 2013, 11:13 AM), <https://variety.com/2013/digital/news/mpaa-fires-back-at-piracy-study-1200590749/>; Ellen Seidler, *New (Old) Study on Megaupload’s Demise Features Fuzzy Methods and Major Omissions*, VOX INDIE (Sept. 3, 2013), <http://www.voxindie.org/Megaupload-study-ignores-indie-film-reality>.

provide a more level playing field between copyright monopoly and participatory culture.

C. *Catcher in the Rye, Sixty Years Later, and the Solution for Fanworks*

Courts generally appear to believe that copyright holders will only spend money to sue if they are being harmed economically²⁹²—an assumption that hinders the promotion of knowledge that copyright is supposed to protect. The solution to this is to reclaim the effect on the market factor in a very real way. Rather than allowing transformative use aesthetic judgments to dictate a fair use analysis, courts should first consider the effect on the market. Currently, given the judgment of the first factor, the fourth factor seems to begin at a disadvantage. This balance should return to a neutral starting point, with the effect on the market closely examined, rather than brushed over, hand-in-hand with transformative purpose.

Evaluating the economic impact of a work is, of course, a challenge at the preliminary injunction stage, but not more so than many other determinations at the preliminary injunction stage.²⁹³ A preliminary injunction hearing requires a court to assess harm by its very definition—a serious examination of effect on the market should go hand-in-hand with such a determination. Harm should no longer be presumed based on the court's assumptions about the secondary work or its expectations about why copyright holders bring lawsuits. In the past, courts have frequently admitted little to no evidence of harm to the market.²⁹⁴ In the scheme proposed above, that admission should carry more weight than personal preferences about the value of the work or a theoretical musing that possible future harm is lying in wait. Such nebulous considerations cannot be permitted to stifle creation.

In reality, this modest proposal does not require a radical change in the substance of fair use law: the same statutory factors would apply. What it does require is a recalibration of the values being considered in applying the fair use factors. Rather than letting aesthetic sympathy tip the scales, courts should recall the central economic foundation of copyright law and allow the effect on the market factor to weigh most heavily. Take *Salinger v. Colting* as an example.

The court in *Salinger* took its “central purpose” in its fair use inquiry to be the evaluation of *Sixty Years Later* as a transformative work.²⁹⁵ The beginning—and, effectively, the end—point of its analysis was an aesthetic

292. See *supra* Part II.B.

293. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 80–81 (2d Cir. 2010) (urging that courts “be particularly cognizant of the difficulty of predicting the merits of a copyright claim at a preliminary injunction hearing,” which is “compounded significantly when a defendant raises a colorable fair use defense”).

294. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1381–84 (N.D. Ga. 2001).

295. *Salinger v. Colting*, 641 F. Supp. 2d 250, 256 (S.D.N.Y. 2009).

value determination of whether *Sixty Years Later* added anything to *The Catcher in the Rye*.²⁹⁶ The court concluded that the essential difference between *Sixty Years Later* and *The Wind Done Gone*, a fair-use-permissible work, was one of artistic achievement. The *Salinger* court quoted approvingly the appellate court's assessment of *The Wind Done Gone*: "TWGD is not a general commentary upon the Civil War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites of *GWTW*."²⁹⁷ *Sixty Years Later*, on the other hand, "contains no reasonably discernable rejoinder or specific criticism of any character or theme of *Catcher*."²⁹⁸

The irony, of course, is that *Sixty Years Later*'s entire existence was owed to its desire to engage in a dialogue with *The Catcher in the Rye*, whereas *The Wind Done Gone* arguably had as its purpose a much larger commentary about race relations throughout United States history and the lingering romanticization of the Civil War and slavery as an institution. *The Wind Done Gone*'s point is an important and valuable one to society; *Sixty Years Later*'s does not nearly approach this level. It is likely that this knowledge at least influenced the courts' disparate decisions on the two works, and fair use precedent caused the justification to be twisted, making *The Wind Done Gone* the work more tightly tied to its original inspiration.

Nor is this stilted artificiality the only problem with the *Salinger* court's traditional fair use analysis. The focus on whether or not the work is transformative forces the court to take sides in a literary interpretation debate.²⁹⁹ Once the court has determined that the work's transformative purpose is slight, the rest of the factors fall into line. The third factor weighs against the finding of fair use because *Sixty Years Later* took more than was necessary for its allegedly minor transformative purpose.³⁰⁰ Finally, when it turned to effect on the market, the game was over before it even began, because, given its previous analysis, *Sixty Years Later* was clearly a derivative work that should have been licensed. While the court acknowledged that there was "no evidence that *60 Years* will undermine the market for *Catcher* or any authorized sequel"³⁰¹ and that there would still be "significant" interest in *Catcher* and its derivative works,³⁰² the court speculated that *Sixty Years Later* "could"³⁰³ harm the market and that that was enough to weigh the factor in favor of *Salinger*, albeit only slightly.³⁰⁴

296. *Id.*

297. *Id.* at 258 (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268–69 (11th Cir. 2001)).

298. *Salinger*, 641 F. Supp. 2d at 258.

299. *See id.* at 258–60.

300. *Id.* at 263.

301. *Id.*

302. *Id.* at 268.

303. *Id.* at 267–68 (emphasis added).

304. *Id.* at 268.

Allowing the effect on the market to be the factor that leads the rest of the analysis—and acknowledging the general lack of evidence that fanworks harm the original copyright work—requires a much different outcome in the *Salinger* case. If the court were to start with the market harm factor and devote true analysis to it, the fact that there was no evidence that there would be any harm would be of greater and more central importance. The court acknowledges more than once in its analysis not only that there was no evidence of harm but also that the copyright owner would still be able to exploit for profit its own work and authorized derivative works.³⁰⁵ In a world where effect on the market is made the primary factor, it starts to look as though fanworks do not inflict any damage, either financially or to the purposes of the copyright regime.

Once effect on the market—or the demonstrated lack of it—has been determined, the other factors can be evaluated with that as the background, rather than the court's aesthetic judgment about the value of the work dictating the remainder of the factors. It could be that the court would still find that the remaining factors weigh against a finding of fair use. However, it would be an analysis that would truly acknowledge the fact that no market harm has been—or will be—done, which would provide context for the seriousness of the defendant's actions. In evaluating the transformative nature of the work, the court can condemn the work while not allowing that condemnation to influence all of the other factors in the way it currently does, leading to a much more honest reflection of the actual economics of the copyright harm.

Although the argument may be that economic harm is difficult to pinpoint, it is certainly no more difficult to pinpoint than literary judgments about transformative use, and judges are definitely more familiar with analyzing financial predictions and economic data than they are with wading through warring experts' opinions on a work's critical value.³⁰⁶ Moreover, it is hard to say that economic harm would be difficult to evaluate when, so far, it has taken such a back seat to the transformative purpose analysis. In *Salinger*, for instance, the court spent seven pages analyzing the transformative purpose of the work and only two pages analyzing the effect on the market. In order to meet the constitutional copyright mandate, courts must flip that analysis on its head, remember that we have traditionally chosen an incentivizing model of copyright in this country, and retain the focus on that incentivization. If aesthetic judgments are going to be imported into our copyright regime, they should be brought in after a discussion about the pros and cons, rather than snuck in through ostensibly objective fair use analyses.

305. *Id.*

306. *See, e.g., id.* at 258 (“[T]he Court finds such contentions to be post-hoc rationalizations employed through vague generalizations about the alleged naiveté of the original, rather than reasonably perceivable parody.”).

CONCLUSION

Fair use, as it has been applied by courts to fanworks, has drifted away from the purpose of copyright law—the promotion of progress—in favor of using aesthetic judgments to determine whether a work falls under the fair use exception. This drift has centered the debate around the cultural and social value of secondary works, a tricky determination at best. It has likewise obfuscated the “effect on the market” analysis in a way that overprotects copyright and stifles the participatory culture the Copyright Clause envisions.

The continued popularity of Sherlock Holmes, now in its second century, illustrates an essential truth about the relationship between fans and the work they adore: having a vast and passionate fan base creating a number of derivative works does not inevitably hurt the market for the original work in the way that fair use analyses have frequently presumed. The idea that Sherlock Holmes could have been more popular, if only Doyle had been able to stop those pesky fans from writing their own adventures about him, is preposterous. For a little while, Doyle tried to leave the character of Sherlock Holmes entirely to the fans. When he came back, the fans did not turn up their noses in favor of their own creations; they embraced the return of the original.

It is difficult to imagine that Holmes would endure to the extent that he has today were it not for the engine of the fandom continuing to chug along. Even with the vast quantity of fanfiction available for free, Holmes fans support many for-profit derivative works, and there is no sign that such support is slowing down. A robust fandom was part of what made the for-profit derivative works possible. It is doubtful that the same robust fandom could destroy that market. In fact, in the Internet age, the correlation between an active fandom and increased economic incentive for the copyright holder to create is even more evident, as the creators of *Veronica Mars* and the *Lizzie Bennett Diaries* can attest.

Analyzing the case of a J.D. Salinger fanwork, a court praised the idea that “an author’s artistic vision [could] include[] leaving certain portions or aspects of his character’s story to the varied imaginations of his readers, . . . hop[ing] that his readers will engage in discussion and speculation as to what happened subsequently.”³⁰⁷ The court described an active fandom. It is worthwhile to explicitly acknowledge fans’ value and encourage their crea-

307. *Id.* at 268. Interestingly, some authors argue the same thing: “Fan fiction closes up the space that I have engineered into the story, and the reader is told what he must think rather than being allowed to observe the characters and draw his own conclusions.” Hobb, *supra* note 198. Such a view seems to ignore the fact that fan fiction itself is part of the dialogue that the author is hoping to create; that there is a limitless number of fan fiction whose writers are interpreting the space the original writer left open, just as the original writer intended. They simply share their interpretations with others who then consider and comment in an ongoing conversation about the work—presumably just as the original writer wished.

tive activities rather than casting them as the villains in the copyright law production. “[T]o the extent authors and publishers will be encouraged to experiment with new and different forms of storytelling, copyright’s fundamental purpose, ‘[t]o promote the Progress of Science and useful Arts,’ will have been served.”³⁰⁸

308. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1283 (11th Cir. 2001) (Marcus, J., specially concurring) (quoting U.S. CONST. art. I, § 8, cl. 8).

