

VISIONS AND REVISIONS: FANVIDS AND FAIR USE

SARAH TROMBLEY*

I. INTRODUCTION.....	647
II. FANVIDS AND FAIR USE	650
A. <i>Background</i>	650
B. <i>Fanvids and Copyright</i>	655
1. Lay Understandings of Copyright and Justice	655
2. The Fair Use Analysis	659
a. Video	661
b. Audio	672
C. <i>Fair Use, Market Failure, and the First Amendment</i>	676
III. CONCLUSION.....	684

I. INTRODUCTION

In early October 2006, Google agreed to purchase a website known as YouTube for a staggering \$1.65 billion in stock, evoking comparisons to the headiest days of the dot-com boom of the late 1990s.¹ Less than six months later, the giant media conglomerate Viacom sued Google and YouTube for copyright infringement, seeking more than \$1 billion in damages.² Google's purchase and the ensuing lawsuit have made it clear that user-created content of the kind that YouTube offers is now startlingly big business and raises serious questions about the future of U.S. copyright law. YouTube allows anyone to upload video clips and to share them

* Associate at Cravath, Swaine & Moore; A.B., Yale University, A.M., Harvard University, J.D., New York University School of Law. The author would like to thank Diane Zimmerman and Niva Elkin-Koren, in whose copyright law seminar at the New York University School of Law the first version of this paper was presented, and Rebecca Tushnet, for providing comments on a draft of this paper. ©2007 Sarah Trombley.

¹ Andrew Ross Sorkin, *Dot-Com Boom Echoed in Deal to Buy YouTube*, N.Y. TIMES, Oct. 10, 2006, at A1.

² Jeremy W. Peters, *Viacom Sues Google Over YouTube Video Clips*, N.Y. TIMES ON THE WEB, Mar. 14, 2007, <http://www.nytimes.com/2007/03/14/business/14viacom.web.html?ex=1188273600&en=99c91c9dab7c5ab0&ei=5070>.

with the world for free.³ As a result, it has experienced a rapid rise to notoriety in the past two years, particularly among the young. In July 2006 alone, more than 30 million people streamed video from the site.⁴ YouTube is full of clips made by individual users of their favorite moments from professional TV shows, as well as home footage of squabbling pets, the antics of babies, and musicians yelling at audience members whose cell phones go off mid-show. The clips that perhaps brought YouTube the most mainstream attention before it was purchased by Google were the series it hosted of *Brokeback Mountain*-style parody trailers for other movies, with titles like “Brokeback to the Future” and “The Empire Breaks Back.”⁵ Although some content providers have fought to keep their copyrighted material off the site,⁶ others have chosen to embrace the audience-building possibilities YouTube offers: CBS, Universal Music, Sony BMG, and Warner Music Group, as well as smaller providers like the NBA and the BBC, all struck deals to place content on the site and, remarkably, in some cases to allow individual users to incorporate the providers’ content into their own clips. The providers then are said to share advertising revenues generated by the individual pages containing those clips.⁷ As the *New York Times* recently noted, “Studios have done an about face and now regularly court technology ventures such as YouTube.”⁸

Such corporate alliances with YouTube demonstrate a striking willingness on the part of some major content providers to embrace a participatory model of media consumption in which individuals take professional content and reuse and remake it in

³ YouTube also plans to offer other content and has struck a deal to provide older U.S. television programs. Reuters, *YouTube to Offer Old U.S. TV Programs*, Feb. 12, 2007.

⁴ comScore Network, MySpace Leads in Number of U.S. Video Streams Viewed Online, Capturing Twenty Percent Market Share, www.comscore.com/press/release.asp?id=1015 (last updated Oct. 10, 2006).

⁵ Virginia Heffernan, *Brokeback Spoofs: Tough Guys Unmasked*, N.Y. TIMES, Mar. 2, 2006, at E1.

⁶ For instance, content providers continue to seek “digital fingerprinting” technology, which would automate identification of their content in order to make takedown of allegedly infringing content and the claiming of revenue for copyrighted content—easier. See Brad Stone & Miguel Heft, *New Weapon in Web War Over Piracy*, N.Y. TIMES, Feb. 19, 2007, at C1.

⁷ See Associated Press, *YouTube Strikes Content Deals*, USATODAY.COM, Oct. 9, 2006, http://www.usatoday.com/tech/news/2006-10-09-youtube-deals_x.htm; Miguel Heft, *Google Courts Small YouTube Deals, and Very Soon, a Larger One*, N.Y. TIMES, Mar. 2, 2007, at C1; Joshua Chaffin & Kevin Allison, *Warner Opens Video Library to YouTube*, FT.COM, Sept. 18, 2006; Reuters, *YouTube to Offer Old U.S. TV Programs*, Feb. 12, 2007. YouTube also plans to share revenues with individual uploaders who “own the full copyright of the videos they are uploading.” *YouTube Contributors to Receive Share of Ad Money*, ABC NEWS ONLINE, Jan. 28, 2007, <http://www.abc.net.au/news/newsitems/200701/s1834898.htm> (last visited Aug. 26, 2007).

⁸ Gary Gentile, *Hollywood Courts Tech It Once Opposed*, MSNBC, Jan. 10, 2007, <http://www.msnbc.msn.com/id/16566392/>.

their own art—for example, using a Warner-owned song in the soundtrack to a short film produced by a user, which is then released to the world via YouTube. Although this kind of creativity may have only recently come into the public eye, it has actually existed underground for decades in the form of “fanvids,” many of which may, in fact, now be found on YouTube. A fanvid takes footage from a popular television show or film and reworks it into a music video that comments on or critiques the original source. The creators of fanvids have thus adopted techniques similar to those used by appropriation artists, like Jeff Koons and his sculptures incorporating the Odie character from the comic strip *Garfield*, which appropriated a cultural icon to critique modern aesthetics.⁹ Although some of these videos are amateurish (in the sense of lacking technical and artistic merit), many others display remarkable technical prowess and aesthetic sophistication.¹⁰ They thereby marry popular-culture interests with the techniques of high art. Fanvids also provide individuals with a means of self-expression and a chance to form communities with their fellow artists.

The YouTube deal has been shadowed by persistent concerns about possible legal liabilities Google may face from aggrieved content providers who do not find the YouTube model as appealing as companies like Warner Music Group do and may sue for copyright infringement. Google has already reportedly set aside \$200 million to cover YouTube’s potential liabilities.¹¹ With the commencement of the Viacom lawsuit, these concerns have now dramatically materialized. Even the companies that have made deals with YouTube have reportedly demanded inclusion of provisions that would allow them to pursue takedown of user-submitted work they find inappropriate or offensive. The creators

⁹ The opinion in *United Feature Syndicate v. Koons*, 817 F. Supp. 370, 379 (S.D.N.Y. 1993), contemptuously dismissed the idea that “being part of an artistic tradition” could have a bearing on whether the sculpture’s copying was infringement. 817 F. Supp. 370, 379 (S.D.N.Y. 1993). Whether that was a wise approach to this kind of analysis is a question that underlies this paper; one need not find aesthetic merit in any given piece of appropriation art in order to recognize that much of Western cultural history is built on creators’ reimagining of their predecessors’ characters, plots, and visual art. A recent Second Circuit case, *Blanch v. Koons*, showed considerably more sympathy for the aims and methods of appropriation art. 467 F.3d 244 (2d Cir. 2006).

¹⁰ A work in a very similar vein, a satirical version of *Harry Potter and the Sorcerer’s Stone* with a new soundtrack dubbed in, was so well-received that it had actually secured screenings at Boston’s well-known art theater, the Coolidge Corner—until Warner Brothers stepped in to object. Jeff Johnson, *Stop, Wizard!* N.Y. TIMES, Mar. 20, 2005, at B5. Of course, from the point of view of copyright law, a work’s cultural prestige or artistic skill is essentially irrelevant to its value. Courts have long declined to consider such matters in determining whether a work should receive protection. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

¹¹ See Laura M. Holson, *Hollywood Asks YouTube: Friend or Foe?*, N.Y. TIMES, Jan. 15, 2007, at C1.

of fanvids find themselves similarly vulnerable, especially as their work often adopts interpretations of the underlying content that are controversial or contrary to the professed intentions of the underlying content's creators and providers. In a striking example of the tensions surrounding this artform, one company first commissioned a fanvidder to make fanvids for the official DVD release of its show, then promptly sent her a cease-and-desist letter, demanding that she take down the site where she hosted her other fanvids.¹² Fanvids have found a home on the Internet, but can they find a place in the United States copyright regime?

This paper first discusses the history of fanvids and the way their creation and distribution have been transformed by the advent of the Internet. It examines the ways in which their creation and distribution online may be said to violate various rights in the copyright bundle, for both the video and the audio tracks. The paper then discusses whether fanvid creators might be able to assert a defense of fair use against any claims of infringement. It also considers whether, under the analysis suggested by law, economics, and the First Amendment, this sort of copying *should* be treated as fair use. Ultimately, this paper concludes that, although fanvids would not qualify as fair use under the current law, they ought to—and that this contradiction illustrates some of the inequities and irrationalities of the present copyright regime. Insofar as other forms of user-generated video share salient characteristics with fanvids, this argument may also extend to YouTube content in general.

II. FANVIDS AND FAIR USE

A. *Background*

The fan-made music video, or “fanvid,” is the result of the recutting of footage from a television or film source to a new soundtrack, thus producing a sequence resembling a movie trailer (although normally omitting dialogue or voice-over narration) or the “musical montage,” which often ends episodes of television dramas.¹³ Fanvids are, however, usually more rapidly-cut than

¹² From personal correspondence with the fanvidder, K. K also stated, “However, this [matter] was resolved after I pointed out that my site only supports their show and helps sell more DVD sets. Fans also wrote on my behalf, so they allowed me to leave it up, as is, with all videos and images.”

¹³ See Kevin Williamson, *The Usual Suspects*, <http://www.calgarysun.com/cgi-bin/publish.cgi?p=123817&x=articles&s=showbiz> (last visited September 17, 2007).

trailers or montages, rarely using more than a few seconds of video at a time from any given point in the source. In their editing, therefore, they tend to emulate the frantic pace of ordinary music videos, but with a much stronger narrative or thematic throughlines, seeking to convey a point or tell a story. The audio track is usually a pop song, although some fanvids use other types of music. The fanvid may also rework the audio track, sometimes substantially. Fanvids are usually, though not exclusively, based on “genre” media: television shows and films that deal with espionage, mystery, fantasy, romance, or science fiction. Normally, they have not been authorized by the holders of the copyright to the original material; rather, individuals with an interest in the original source create them on their own.¹⁴

In general, fanvids seek to comment on or critique the original source material in some fashion. Fanvids have many different—and often overlapping—specific purposes, which they pursue with varying, but often quite high, degrees of technical and aesthetic sophistication.¹⁵ Many highlight and advance an argument about an element of the original source material, such as the development of a particular character.¹⁶ For example, a fanvid for *La Femme Nikita*, a television show about a ruthless but glamorous antiterrorist organization, might cut together sequences depicting the heroine’s progressive dehumanization as she struggles to survive undercover and set the sequences to a club anthem of urban anomie to suggest an affinity between alienated teenagers and the shell-shocked secret agent. Another fanvid might analyze a popular couple on a particular show, offering an interpretation of the strengths and weaknesses of their relationship through the conjunction of well-chosen images and lyrics. Others gently parody the source by, for example, choosing a song which contrasts humorously with the tone or style of the material (setting a series of shots of the provincial young Clark Kent stumbling through his awkward small-town adolescence on

¹⁴ Due to the legal issues discussed here, this paper will not provide direct links to fanvids or fanvidding sites. In addition, many of the descriptions of fanvids are composites.

¹⁵ Some ambitious amateur filmmakers have actually released “fan films,” unauthorized sequels to existing movies, such as the *Star Wars* films. The most recent crop is notable for the “high production values” that consumer-level technology now makes possible. See Benny Evangelista, *Lights, Sabers, Action! ‘Star Wars’ Fan Films Out of This World Thanks to Cheaper, Powerful Technology*, S.F. CHRON, May 9, 2005, at E1; Danny Hakim, *Star Trek Fans, Deprived of a Show, Recreate the Franchise on Digital Video*, N.Y. TIMES ON THE WEB, June 18, 2006, <http://www.nytimes.com/2006/06/18/arts/television/18trek.html?ex=1308283200&en=29b75c960d6d099d&ei=5088>. However, because these films do not generally involve literal copying of the source, the copyright law concerns involved are somewhat different from those addressed in this paper.

¹⁶ For more examples, see HENRY JENKINS, TEXTUAL POACHERS 223-49 (1992).

the show *Smallville* to a song about an urban hipster). Yet other fanvids retell the story in a way that is calculated to impress new viewers and inspire them to seek out the original source: by stringing together particularly appealing or sexy images of the show's leads. These are humorously referred to as "recruiter" or "pimping" fanvids.

Other types of fanvids take a more explicitly critical approach to their sources. "Vidding is a resistant act—No, I will show you what *I* see."¹⁷ Some present an analysis of the underlying source that runs counter to the explicitly-professed aims of the creators. For instance, the Sci-Fi Channel show *Stargate: Atlantis* provides an almost exclusively celebratory view of a fictional U.S. Air Force expedition to another galaxy, but fanvids critiquing this show point out the imperialistic and militaristic aspects of the mission, such as its lapses into torture and summary execution of prisoners, its crude interventions into local politics, and its usurping of valuable resources for its own use—all actions that are barely questioned within the show itself. Another fanvid might challenge a show's generally positive presentation of an affair between two characters by setting images of the couple to an embittered song of abusive love. The popular subgenre of "slash" fanvids explores the possibility of reading relationships between presumptively (by mainstream standards) heterosexual characters as queer, usually by choosing scenes in which the characters react to each other intensely and a song which expresses the fanvidder's view of what such a relationship might be like. Some "constructed reality" fanvids rewrite the fictional universe of the underlying source completely. For example, after *Smallville's* producers mused publicly about the possibility of introducing a young Bruce Wayne into their show about the teenage Clark Kent,¹⁸ a fanvid did just that, cutting footage of Christian Bale, who was soon to play Wayne in *Batman Begins*, into a *Smallville* video to tell the story of a meeting between Wayne and *Smallville's* version of Lex Luthor. There are also fanvids that engage in even broader cultural commentary: for example, by presenting images of three recent female action heroines struggling to overcome their oppressive environments, accompanied by lyrics lamenting the inescapable burdens of power.

Fanvids are thus a form of cultural appropriation by

¹⁷ par_avion, *Panel Notes from VVC 2007 Town Hall on Vidding and Visibility*, <http://community.livejournal.com/vividcon/119137.html#cutid1> (last visited Sept. 19, 2007).

¹⁸ See Neal Bailey, *Interview with "Smallville" Executive Producer Alfred Gough*, SUPERMAN HOMEPAGE, <http://www.supermanhomepage.com/tv/tv.php?topic=interviews/al-gough3> (last visited Aug. 26, 2007).

individual artists who transform the works of others to fit their own ends.¹⁹ They are, perhaps, best seen as an example of what Lawrence Lessig has called “remix culture,” the creative use of disparate pieces of sound, video, and text to produce new art in a manner that, he argues, is analogous to the use of public-domain information to create new written works of fiction and non-fiction.²⁰ This populist form of art most frequently arises in the particular cultural milieu of the fandom that develops around genre media. By using popular-culture sources as raw materials to rework and critique those same sources, fanvids are essentially the visual equivalent of fan-fiction—unofficial stories using the characters and settings of those sources.²¹ Indeed, many individuals create both. However, as will be discussed *infra*, fanvids have been more radically affected by the coming of the digital environment and raise more complex issues of copyright than fan-fiction.

The production of fanvids has, in fact, changed dramatically over the past decade with the digital video-editing software and hardware that has become accessible to consumers.²² In the earliest years of the fanvid, creating a piece required laborious hours of dubbing tapes of the underlying source (in the case of television shows, the tapes of the underlying source were often homemade also) from one VCR to another. The underlying source quality was generally mediocre at best, and there were few opportunities to edit beyond the insertion of simple cuts.²³ Similarly, the music was usually taken from an analog source and then incorporated onto analog tape. The modern fanvidder, in contrast, can make fanvids using techniques that were until only recently reserved for Hollywood. She generally uses high-quality

¹⁹ See John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103 (1988). Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 275 (1997), argues that artists should be allowed to copy freely for this purpose, a privilege that “would protect an artist only if the art posed no competitive threat to the copied work.” However, Schaumann would restrict this privilege to “fine art,” as defined under the Visual Artists Rights Act of 1990. *Id.* Such reservation of the critique of allegedly banal popular culture to “fine” artists alone, rather than to all who experience the barrage of modern media, would not protect the fanvid creators from legal liability.

²⁰ Richard Koman, *Remixing Culture: An Interview with Lawrence Lessig*, POLICY DEVCENTER, Feb. 24, 2005, <http://www.oreillynet.com/pub/a/policy/2005/02/24/lessig.html>.

²¹ For an insightful description and defense of fan-fiction as fair use, see Rebecca Tushnet, *Legal Fictions*, 17 LOY. L.A. ENT. L.J. 651 (1997); see also Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?* 9 B.U. J. SCI. & TECH. L. 433 (2003); *Frequently Asked Questions (and Answers) About Fan-Fiction*, CHILLING EFFECTS, <http://www.chillingeffects.org/fanfic/faq.cgi> (last visited Aug. 26, 2007). See generally JENKINS, *supra* note 16.

²² See Jan Ozer, *For the Serious Hobbyist*, PC MAG., Jan. 18, 2005; Anton Linecker, *New Formats Make Mac HD Editing a Reality*, MACWORLD, Dec. 1, 2004, at 18.

²³ See JENKINS, *supra* note 16, at 244.

digital source, either ripped from commercial DVDs or downloaded from the Internet using BitTorrent or other peer-to-peer software, and then edits it on an ordinary personal computer with powerful video-editing software, like Adobe Premiere or Apple's Final Cut Pro. Software packages like these offer the ability to alter virtually every aspect of the source, including speed, color, and transparency; provide complex transitions between clips; and allow the application of sophisticated visual effects.²⁴ Today, the source of the audio is virtually always digital and is incorporated into the final work using the same video-editing software, often after being substantially edited itself in a complex audio-editing suite. The resulting fanvid can be indistinguishable from the work of a professional.

The digital environment has also transformed the distribution of fanvids. In the analog era, fanvidders were forced to produce copies of their tapes one at a time, a slow and tedious process that required the use of two VCRs. Informal "tape trees" often sprang up to ease the difficulties of distribution, and some fanvidders were able to advertise their tapes in fannish publications such as 'zines. For many others, however, the only opportunity to see a particular fanvid was at a fannish gathering, an invitation to which required the would-be viewer to have the necessary social connections.²⁵ In the present day, fanvidders can distribute their fanvids via the web to any interested viewer. This is still not an entirely simple process, as the files' large sizes demand a high-speed connection for downloading. Importantly, those hosting such files on their own ISPs are often in danger of exceeding their periodic bandwidth allowances (though YouTube solves this problem by streaming fanvids at a relatively lower audiovisual quality).²⁶ Still, it is unquestionably easier for fanvidders to reach much larger and more diverse audiences today than it was ten years ago.

Finally, the digital environment has made it far easier for fanvidders to build communities; many fanvidders now use mailing lists or blogging sites, like LiveJournal, to discuss fanvidding techniques, develop community norms, and promote

²⁴ Lorne Manly & John Markoff, *Steal This Show*, N.Y. TIMES, Jan. 30, 2005, at B1, discusses the current availability of many television shows for downloading. For a description of the capabilities of current consumer video-editing software, see, e.g., the feature list for the high-end (but not out of reach for the dedicated fanvidder) Final Cut Pro <http://www.apple.com/finalcutstudio/finalcutpro/specs.html> (last visited Sept. 16, 2007).

²⁵ See JENKINS, *supra* note 16, at 247.

²⁶ This also means that older fanvids are in danger of being lost altogether, as fans lose interest in the labor-intensive techniques required to preserve and distribute them to newcomers.

their fanvids. With the technology in easy reach and online resources to consult, it is simpler for fanvidders to develop skills on their own, rather than by becoming apprentices to an experienced fanvidder, and they then have broader social networks to release their works to. Many fanvidders solicit feedback on their works, touching off public discussions of aesthetic standards and trends in the artform. Although most fanvids are still usually the work of a single creator, the use of instant-messaging software makes it possible for fanvidders to collaborate inexpensively across continents. The organization and registration for a well-known, multi-day fannish gathering devoted entirely to the appreciation of fanvids takes place almost exclusively online. Virtually every aspect of fanvid creation and distribution, then, has become easier and more accessible to the average user over the space of just the past few years.

B. *Fanvids and Copyright*

1. Lay Understandings of Copyright and Justice

Fanvid creators have exploited recent technological developments to transform virtually every aspect of fanvidding. However, the ease of creation and distribution brought by the digital environment has in turn dramatically increased fanvidders' exposure to potential legal liability. "Are we Time Magazine's 'Person of the Year' or are we criminals?" was a question raised at a recent gathering of vidders.²⁷ Clearly, it is easier for intellectual property owners to track down fanvidders engaging in public, or even password-limited, distribution of their works via websites than to identify and determine the source of privately-circulated videotapes, some even lacking credits identifying the creator. Furthermore, the simple increase in audience size due to increased ease of distribution likely might intensify the concern with which copyright holders view fanvids. Finally, fanvidders and fanvid-watchers (some of whom are lawyers) often have at least some degree of awareness of the recent strengthening of the U.S. copyright regime and of the greater efforts to police intellectual property rights by its owners.²⁸

²⁷ par_avion, *Panel Notes from VVC 2007 Town Hall on Vidding and Visibility*, <http://community.livejournal.com/vividcon/119137.html#cutid1> (last visited Sept. 19, 2007).

²⁸ See, e.g., the discussion of the *Bridgeport Music* case on a LiveJournal community for legal issues involving fandom. Posting of Heidi8 (*Ugh*) to http://www.livejournal.com/community/fandom_lawyers/9168.html (Sept. 30, 2004, 12:39 EST).

To date, there are relatively few known instances of copyright holders threatening or pursuing legal action against fanvidders. Copyright holders seem to be aware of the potential for backlash if the public perceives them as targeting enthusiastic fans who only wish to support the show through their Internet activities; even Warner Brothers backed down from its demands that a fifteen-year-old girl take down her *Harry Potter* website following substantial negative publicity.²⁹ Fanvidders, however, lack the innocent appeal of a teenager running a fan-site. Copyright holders may perceive fanvidders as not merely infringing upon their potential markets, but also, especially in the cases of fanvids that adopt more critical views of the underlying source material, as hijacking control over the meaning and connotations of the original work. Companies might not want their properties parodied, fearing that this might diminish demand; those that have marketed their properties (such as the *Harry Potter* books) predominantly to children might not be enthusiastic about their use in non-family friendly works such as slash fanvids. Yet, thus far, fanvidders have largely escaped enforcement activity.

Fanvidders' strategies for avoiding potential legal repercussions differ. Some idealistic fanvidders profess indifference to legal action; as one fanvidder analogized, "If breathing was banned, I would still do it."³⁰ Others take relatively severe steps to control distribution of their fanvids by, for example, only making them available on password-protected websites. Such restrictions seem to arise out of a, perhaps naïve, belief on fanvidders' part that copyright holders are not aware of their activities.³¹ Many, however, appear to have faith that action will not be taken against them, at least not without sufficient warning to allow them to cease distribution of their work and avoid actual legal penalties. In this sense, contemporary notice-and-takedown procedures may actually accord well with a lay sense of fairness.

Whether or not individual fanvidders agree that their works violate copyright laws, many of them seem to assume that, whatever the technicalities, fanvids *should not* be seen as infringing. Fanvidders' awareness of copyright laws vary. Some choose to

²⁹ See *Harry Fansite Triumphs*, PRESS (N.Z.), Mar. 22, 2001, at 16. For a contrasting view, see Michael Carlinsky et al., *Panel II: Public Appropriation of Private Rights: Pursuing Internet Copyright Violators*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893, 897-8 (2004).

³⁰ Posting of Permetaform (*On Vidding and It's [sic] Legalities*), to LiveJournal, <http://www.livejournal.com/~permetaform/257733.html> (Mar. 6, 2005, 12:02 EST).

³¹ One fanvidder notes, "you must email me a permission statement in order to get the password to view the vids. I do this to prevent having my work distributed to TPTB (it's happened) . . ." Laura Shapiro's Profile on LiveJournal, <http://laurashapiro.livejournal.com/profile> (last visited Aug. 26, 2007).

essentially ignore them.³² There are probably not at the present any fanvidders who produce works or help to organize the fanvid creative infrastructure *primarily* as a critique of or protest against established intellectual property laws, but there are certainly fanvidders for whom this kind of subversion is part of the appeal of pursuing this art form. Thus, it would be inaccurate to describe fanvidders as constituting a conscious movement against the current regime. However, a number of them do share the belief that their work ought to be legal. In her article, Tushnet identified such a belief as one that is common among authors of fan-fiction, reflecting a lay sense of the equities underpinning copyright rather than technical knowledge of the law.³³

The fanvidders' contention that their work should be legal is based on two major premises. The first is that because the creation of fanvids does not harm the commercial interests of copyright owners, those owners should not be able to prohibit the use of their underlying materials. Fanvidders see themselves not as competing with copyright holders, but rather as using their source material in a noncommercial manner, one that does not damage the markets for the original source.³⁴ Second, fanvidders believe that by promoting awareness of the source, indirectly through most types of fanvids and directly through "recruiter" fanvids, they are providing free advertising for the underlying. Fanvidders are conscious of network effects, understanding that the more people who are interested in the underlying shows or films, the larger the audience for their own works. In an environment where the only recompense for the investment of dozens or hundreds of hours of work is fame amongst one's peers, fanvidders have a substantial incentive to try to grow their peer group. Fanvidders, therefore, bring recruiter fanvids to

³² The LiveJournal community, *fandom_lawyers*, provides a page that lists resources for creators concerned about legal issues, including links to legal bibliographies and *chillingeffects.org*. Community Info page on LiveJournal, http://www.livejournal.com/userinfo.bml?user=fandom_lawyers (last visited Aug. 26, 2007). It is not really possible to determine whether the level of awareness of copyright issues among fanvidders has changed over the years, although it does not seem unreasonable to infer that the emergence of online access to legal resources has made it easier for the curious to acquire information on copyright law issues.

³³ Tushnet, *supra* note 21, at 657, summarizes this point of view. The commonality of viewpoints is unsurprising, given that many individuals produce both fan-fiction and fanvids. Jessica Litman, *Innovation and the Information Environment: Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 23-24, 38-39 (1996), discusses in a broader context the implications of consumers' failure to grasp or buy into stronger intellectual property protections.

³⁴ Jessica Elliott, *Copyright Fair Use and Private Ordering: Are Copyright Holders and the Copyright Law Fanatical for Fansites?*, 11 DEPAUL-LCA J. ART & ENT. L. 329, 333 (2001), discusses the efforts that conscientious creators of fan-sites take to avoid confusion with officially-authorized sites.

conventions specifically to encourage people to watch the underlying media source. More indirectly, individuals who enjoy a particular television show or film who can then spend hours watching and discussing fanvids based on it may be more likely to become invested in it, to continue watching it, and to purchase related merchandise. Fanvidders also believe that they are promoting the musicians whose music they use in their fanvids' audio tracks. One fanvid-watcher wrote, "There are many musicians I wouldn't have ever heard of . . . if it weren't for fanvids on the net, so [a cease-and-desist order received by a fanvid archive website is] really a loss, as far as I'm concerned."³⁵

Fanvidders' belief that they are promoting the underlying source is not as naive as some might instinctively think. As mentioned above, many content providers have begun to take a more tolerant approach towards consumer-created works in general as such works have dramatically increased in numbers and exposure. Speaking of unofficial fan-sites in general, Marvel Studios head Avi Arad confessed, "I used to hate the Internet I thought it was just a place where people stole our products. But I see how influential these fans can be when they build a consensus I now consider them filmmaking partners."³⁶ CBS has recently, and remarkably, embraced this same concept, promising to allow fans to post clips of shows and even "mashups," or simple fanvids, on the Internet. "If somebody spends the time to take 20 clips from 'CSI Miami,' I think that's wonderful That only makes him more involved with my show and want to come to CBS on Monday night and watch my show. And we're going to get paid for the clips this guy takes off our air as well. It's win, win."³⁷

A number of Japanese companies have benefited substantially from building markets in the United States for their animation and comic books by turning a blind eye to fan-fiction, fanvids, and even, most notably, unlicensed translations and dubbings, or "fansubbings," of their underlying sources. One would expect that with such rampant infringement occurring, Anime and Manga

³⁵ Posting of Cofax7 (*Monday Update - Television, Writing, All That Yotz*) to LiveJournal, <http://www.livejournal.com/users/cofax/185742.html> (Feb.28, 2005, 15:40 EST).

³⁶ Scott Bowles, *Fans Have the Muscle to Shape the Movie*, USATODAY.COM, June 20, 2003, http://www.usatoday.com/life/movies/2003-06-19-movies-cover_x.htm.

³⁷ Gary Gentile, *CBS to Allow Snippets of Shows on the Web*, INT'L BUS. TIMES, Jan. 9, 2007, <http://www.ibtimes.com/articles/20070109/gadget-show-cbs.htm>. It is important to note that CBS has not explained how this will be implemented in practice. CBS says it will work with Slingbox, whose products store and transfer digital cable. It is far from clear whether CBS could successfully pass on charges for individual clips to the customer, as Leslie Moonves' quote above implies, or that customers who decline to use the technology would be willing to pay higher fees to cover the cost of licensing to all users.

sales would be suffering or non-existent. Yet Anime and Manga seem to have grown with surprising success over the past few years, despite massive amounts of fansubbing. But perhaps “despite” is the wrong word. Maybe the recent surge of this once unknown form of entertainment has very much to do with the fansub activities increasing the fan base and thus establishing a market. If this is the case, then can the infringing fan and the licensed (or actual) owner work together?³⁸

As mentioned above, at least one company has chosen to incorporate fanvids into its official DVD release of a show. Another actually *hosts* dozens of fanvids on its official website, presumably as a means of increasing viewer investment in the show.³⁹ In this context, it is also important to remember that fan creators of all kinds are usually careful to disclaim their ownership of the underlying property, thus considerably diminishing the risk that an ill-advised fanvidder use of the material will be seen as “official,” thereby harming the reputation of the underlying property in question.⁴⁰

In short, the fanvidders’ sincere argument that their works do not qualify as infringement because, at worst, they are doing their sources no harm and, at best, they are actually performing a valuable service for copyright owners for free, has surprising traction. Scholars have agreed: “It makes little sense to attack one’s most devoted fans . . . if there is no need to do so when fan fiction is not damaging the copyright holder financially, and if failure to act is of no consequence legally.”⁴¹

2. The Fair Use Analysis

The production and distribution of a fanvid involves multiple *potential* violations of copyright, for both audio and video sources, throughout the process. Even if the fanvidder has paid for a licensed DVD of the video source, her “ripping” of the material into a format suitable for use in a video-editing software package is probably a violation of the anti-circumvention provisions of the

³⁸ Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMPLE UNIV. ENVTL. L. & TECH. J. 131, 149 (2003) (footnote omitted).

³⁹ BravoTV.com: Project Runway: Video Mash-Ups, http://www.bravotv.com/Project_Runway/mashups/index.php (last visited Aug. 25, 2007).

⁴⁰ See Tushnet, *supra* note 21, at 678-80.

⁴¹ Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1580-81.

Digital Millennium Copyright Act.⁴² If she downloads the video source from a peer-to-peer network, she potentially infringes the right of reproduction, as she copies the material to the hard drive. Similarly, she may have purchased a copy of a CD carrying the audio track, in which case she may be infringing by ripping it to her hard drive or by downloading the track.⁴³

Even if she has paid for a digital version of the song through Apple's iTunes Music Store, it is not clear whether she thereby gains a license to make a derivative work from it.⁴⁴ In creating the fanvid by composing literally-copied pieces of audio and video, she infringes the right of reproduction and probably the right to prepare a derivative work. By hosting the fanvid on a website for distribution, she infringes the right of reproduction, the right of distribution, and the right of public performance (the audio source) and/or display (the video source). In short, without the fair use defense, the average fanvid is a veritable smorgasbord of potential copyright infringement.⁴⁵

The Copyright Act of 1976 governs current fair-use analysis, codifying the originally judge-made exception to copyright protection. It provides that:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

⁴² 17 U.S.C. § 1201(a)(1)(A) (2006) declares that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.” Ripping a work to a hard drive usually removes, at the very least, any regional encoding that controls which countries the DVD may be played in. It can be argued that ripping therefore constitutes circumvention, although certain recent cases do throw this into doubt. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004); *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1198-9 (Fed. Cir. 2004); R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003). The DMCA is not subject to fair use exceptions. If ripping does qualify as circumvention, this suggests that fanvidders and others may have a perverse incentive to download their video source from peer-to-peer networks instead of purchasing licensed DVDs to rip from (thereby, of course, providing revenues to the copyright owner).

⁴³ See *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 517 (9th Cir. 1993).

⁴⁴ Apple's Terms of Service currently authorize “personal, noncommercial use” and limited copying, but are silent on the issue of derivative use. A later provision notes: “Any burning (if applicable) or exporting capabilities are solely an accommodation to you and shall not constitute a grant or waiver (or other limitation or implication) of any rights of the copyright owners in any audio or video content, sound recording, underlying musical composition, or artwork embodied in any Product.” APPLE INC., ITUNES STORE: TERMS OF SERVICE § 9 b (iv), (May 30, 2007), available at <http://www.apple.com/legal/itunes/us/service.html>.

⁴⁵ A fanvid might potentially use public-domain video or (more likely) audio sources, but this is not the common practice.

- (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.⁴⁶

Fair use is a vital part of the bargain that the United States copyright regime strikes with the creators of copyrighted works to provide them with compensation in return for their contribution to the culture. It makes it possible for society to benefit from copyrighted works not merely by consumption, but also by letting others use them without a license as sources and building blocks for further new works.⁴⁷ The determination of whether copying qualifies as fair use must be made on a case-by-case basis and requires a fact-intensive inquiry to balance the interests involved in each instance.⁴⁸ However, as fanvids as a genre do share many aesthetic and technical characteristics, it is worth identifying likely common points of concern in such inquiries. The question, then, is whether the production of fanvids should be regarded as in accord with the policy goals of § 107, or as simply the theft of intellectual property. As the analyses of the use of the audio and video sources for fanvids differ considerably, this paper will consider the applicability of a fair use defense for each separately.⁴⁹

a. Video

The first factor in a fair use defense is the “purpose and character of the use.” The commerciality of the use weighs significantly in the resolution of this factor, although less so the more transformative the use.⁵⁰ Fanvidders generally do not sell their fanvids, as they would regard it as taking an unearned profit from someone else’s work.⁵¹ Although it is sometimes possible to

⁴⁶ 17 U.S.C. § 107 (1992).

⁴⁷ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

⁴⁸ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984).

⁴⁹ It is important to remember that the availability of such a defense is not a panacea. Under most circumstances, fanvidders will be in no practical position to mount any kind of defense; even if they are aware of their rights, they will usually lack the resources to pit themselves against a large media corporation attempting to enforce against them. Due to the case-by-case approach of current law, it is also impossible for fanvidders to know with any degree of certainty before actual litigation is concluded whether they are infringing or not. Fear of rightsholder retaliation may not effectively deter the creation of fanvids, but it certainly chills their widespread distribution.

⁵⁰ See *Campbell*, 510 U.S. at 581.

⁵¹ Some examples of fanvidders discussing the ethics of fanvid sale include: “As long as we don’t use these videos commercially or ask to be paid for our work, we’re all right.” *_happyme_*, “Video Plagiarism [sic] Q&A,” *at*

purchase collections of fanvids on VHS or DVD, social norms permit charging only enough to cover the actual medium used, not even the labor of mastering the compilation.⁵² A number of fanvids are probably hosted on sites which automatically include advertising on users' or individual download pages, such as Yousendit.com, but individual creators or fanvid archivists do not, as a rule, sell advertising on the sites from which downloads are available. YouTube itself, however, does include advertising on every page carrying a video clip, but none of these revenues currently go to the creators of clips.⁵³ This indicates that the making and distribution of fanvids, as they are usually practiced by the creators, are noncommercial.

It is true that the Ninth Circuit, in finding commercial use in the *Napster* case, asserted that “[d]irect economic benefit is not required to demonstrate a commercial use Commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.”⁵⁴ In that sense, at least the distribution of fanvids, if not their creation, might qualify as a commercial use. However, this is an excessively broad formulation of commerciality. Given that the vast majority of fair uses—even nonprofit, educational ones—will entail the use of copyrighted works that *could have been* paid for, applying such an expansive definition would make virtually any use that involved more than

<http://www.livejournal.com/community/clamshellers/1374.html> (last visited Aug. 25, 2007); “Remember that all t.v. shows are the property of their production companies and financial backers, and you can’t sell the clips, etc.” *Finn’s Fanvid FAQ*, at <http://home.comcast.net/~ryukyu4/fanvid.html> (last visited Aug. 25, 2007); “As of today, I’ve made over 300 song videos...I have never made money off the videos, and the only way I will let them be copied is if the copying is done for cost, and not for profit.” *Television and Video*, at <http://www.iment.com/maida/tv/> (last visited Aug. 25, 2007). See also HENRY JENKINS, *TEXTUAL POACHERS* 247, Routledge, New York (1992). Clearly, in a decentralized subculture which lacks any sort of enforcement mechanisms beyond informal social pressure which seeks to avoid the attention of copyright holders, it would not be possible to actually prevent fanvidders from selling their works if they could find an audience ignorant of or indifferent to community norms. In such cases, the commerciality of the use would naturally weigh significantly against a finding of fair use. See also Tushnet, *supra* note 21, at 664 (discussing similar attitudes among fan-fiction writers).

⁵² This still may be considered to add modest weight to the argument that fanvids are a commercial use.

⁵³ See YouTube Fact Sheet, http://www.youtube.com/t/fact_sheet (last visited Aug. 25, 2007). In fact, under the recent deals with content providers discussed *supra*, YouTube will probably pay some of its advertising revenues to the original rightsholders (although the mechanism for identifying them is not made clear).

⁵⁴ *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001). However, *Napster* involved “wholesale reproduction and distribution of copyrighted works,” unaltered. Fanvidders do not redistribute their source material. *Id.* at 1013. See also *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006) (analyzing case law and observing that “untransformed duplication” of the original is more likely to make commerciality unfavorable to the fair use analysis).

one copy “commercial” and thus render the inquiry into the first fair use factor essentially nugatory. It is not even clear that the use of VCRs for the time-shifting of programs whose non-commerciality was so vital to the finding of a substantial noninfringing use in the seminal *Sony* case would continue to qualify as noncommercial under this standard.⁵⁵ Indeed, in that case, the Court specifically rejected the similar argument that “consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the homemade tape because the consumer will not buy tapes separately sold by the copyright holder.”⁵⁶ A narrower understanding of the definition of commerciality offered by the Supreme Court in *Harper & Row*, “[W]hether the user stands to profit from exploitation of the copyrighted material without paying the customary price,” one that focuses on the actual realization of *profit*, whether direct or indirect, is more appropriate here.⁵⁷

Even if the use of video in fanvids was found to be commercial, that would by no means end the inquiry, as the Supreme Court recognized in *Campbell*, among other cases.⁵⁸ The degree to which the use is *transformative* is vital:

The central purpose of this investigation is to see . . . whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” . . . [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. . . the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁵⁹

The court in this instance was specifically considering whether a commercial parody should be potentially regarded as fair use (as opposed to condemned out of hand for its combination of commerciality and substantial copying), but the underlying standard it articulated should be applicable to a broader range of works. However, as commentators have noted, it is difficult both to draw a bright line that separates parody from other genres of communication, such as pure political protest, and to make principled distinctions between the use of copyrighted

⁵⁵ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442, 450 (1984).

⁵⁶ *Id.* at 450.

⁵⁷ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

⁵⁸ *See Campbell v. Acuff-Rose Music*, 510 U.S. 569, 584-85 (1994).

⁵⁹ *Id.* at 579 (citations omitted).

works in parody and in satire.⁶⁰ If transformative use truly furthers the goals of the copyright regime by enriching our culture, then it also makes little policy sense to protect only one subgenre of such use.⁶¹

This broader view has been endorsed by at least one appellate court in *SunTrust Bank v. Houghton Mifflin, Co.*, which interpreted *Campbell* to mean that “we [should] treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.”⁶² As will be seen, this suggests that the use of video in fanvids should be protected. The *SunTrust Bank* decision has been criticized as “expand[ing] parody beyond all recognition,” legitimizing any and all derivative uses.⁶³ Without addressing the difficult question of whether the present scope of derivative rights is in fact optimal, one can still note that a simple finding of parody is not, in itself, dispositive for fair use. What the liberal parody inquiry in a decision like *SunTrust Bank* seeks to do is to screen out purely piratical exploitations of copyrighted material while still protecting the contribution of independent value to our culture through the use of such material as the basis for further creative works. In other words, it looks to whether the artist had “a genuine creative rationale for borrowing [her source].”⁶⁴ It is easier to identify the independent value in “classic” or “non-creative” fair uses, such as scholarly quotation or summaries for review purposes, which further different goals than and do not have the superficial appearance of competing with the original work. However, as discussed above, creative transformative use is also in accord with the policy aims of copyright. Thus, such an inquiry is needed.

In addition, there is one respect in which parody is distinctive

⁶⁰ “We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.” *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006); Tushnet, *supra* note 21, at 668 (discussing the ways in which parody and political protest can shade into each other); Michael A. Einhorn, *Miss Scarlett’s License Done Gone!: Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L. J. 589, 602-4 (arguing that the case for protecting satire as transformative fair use is actually stronger than for parody).

⁶¹ Some commentators have argued that this approach lacks clarity and in fact undermines the goals of the copyright regime by overemphasizing the production of new works at the expense of their ongoing availability. See Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 712-3 (1995); Diane Leenheer Zimmerman, *The More Things Change, The Less They Seem “Transformed”*: Some Reflections on Fair Use, 46 J. COPYRIGHT SOC. 251 (1998).

⁶² 268 F.3d 1257, 1269 (11th Cir. 2001). The work in question incorporated plots, characters, and settings from the original to a substantial degree, but this did not prevent a finding of fair use.

⁶³ Schuyler Moore, *What’s So Funny About Parody?* 11 UCLA ENT. L. REV. 21, 22 (2004).

⁶⁴ *Blanch*, 467 F.3d at 255.

from many other derivative uses. As noted in *Campbell*, a parody generally *must* be able to conjure up the work parodied if it is to have any artistic effectiveness.⁶⁵ In other words, the art form depends on copying—often quite close, even literal, copying—in order to achieve its aesthetic aims. If the novel in *SunTrust Bank* had not been able to deliberately evoke *Gone with the Wind* through copying, much of its meaning would have been lost; it was criticizing not merely the story contained in the book, but also the status of the book itself and, of course, the movie as cultural icons.⁶⁶ Therefore, granting greater license to copy to a parody does not throw open the barn doors to every potential unauthorized derivative use.

The degree to which fanvids are overtly transformative may vary. Some fanvids are quite clearly parodies, using an ironic contrast between particular visual images from the source and the tone of the music to poke fun at the original. Many more are not, and so require a more careful analysis. A fanvid which merely recapitulates the plot of a work or the development of a relationship between previously-existing characters is perhaps the least transformative use. A fanvid which engages in a broader meta-analysis—say, one commenting on the ways in which even in the utopian futures of science fiction television women are still oppressed, by setting telling clips from several of such shows to lyrics like “they say that the next big thing is here/that the revolution’s near/but to me it seems quite clear/it’s all just a little bit of history repeating”—is probably the most transformative.⁶⁷ However, even the most faithful fanvid involves some commentary on and reworking of the original video, through the use of non-literal imagery and of the synchronized lyrics of the audio to present the author’s distinctive view of the plot or relationship. Most fanvids will involve considerably more. A “constructed reality” fanvid will place the characters in a different environment or introduce them to characters not in the original source, producing a substantially different story.

Perhaps more interestingly, a slash fanvid usually argues that a character who appears to be either single or involved in a heterosexual relationship in the source is actually attracted to a character of the same sex. The view put forth in such a fanvid may require a radical reappraisal of characters’ motives, the plot, and authorial intent. The slash fanvid also demonstrates the ways in

⁶⁵ *Campbell*, 510 U.S. at 580-1.

⁶⁶ *SunTrust Bank*, 268 F.3d at 1270.

⁶⁷ The Propellerheads, History Repeating, <http://www.songsofshirleybassey.co.uk/song/sng97001.html> (last visited Aug. 25, 2007).

which such transformative use edges towards political commentary that may deserve protection under the First Amendment. Although it may not be accurate to claim that *Uncle Tom's Cabin* actually caused the Civil War, American fiction has a long tradition of political engagement. An artwork that asserts that, for example, the most passionate and true romance of Superman—champion of “truth, justice, and the American way” and symbol of American power and morality—was his long-time nemesis Lex Luthor is potentially quite a pointed critique of homophobia in American politics and culture.⁶⁸ In short, virtually all fanvids involve the creation of a distinct work that comments on or transforms the original source video, or uses it as raw material for independent cultural critique. Thus, they should be recognized as transformative use.

Insofar as the copying required by parody is acceptable because it is essential to the art form itself, as discussed *supra*, the same argument applies to fanvids. The fanvid as an art form relies on the creative use of clips of video sources in order to evoke, critique, and transform those sources. Ultimately, the fanvid is a form of animated collage, and it is difficult to imagine how one might go about achieving the same effect without the use of actual clips. The exact copying involved is not gratuitous, but vital to the fanvid's socially valuable goal of artistic expression. The same reasoning which helped find fair use for 2 Live Crew's lifting of the “Pretty Woman” bass riff in *Campbell* should thus apply in this instance as well.

The second factor that courts consider in determining fair use is the nature of the copyrighted work. This turns on whether a work is primarily fact or fictional. The general presumption is that predominantly factual works are subject to less copyright protection because underlying facts are not copyrightable; only the arrangement of the facts and the specific expression of them may be.⁶⁹ Although it is not inconceivable that fanvids might draw upon documentaries or news reports, the vast majority of them do copy fictional works. (There is also some indication that unpublished works enjoy more protection than published works, but this consideration is not relevant here.⁷⁰) This factor, therefore, tilts against a finding of fair use for the video in fanvids. However, this factor rarely weighs heaviest in making this

⁶⁸ The reinterpretation of a major character in *Gone With the Wind* as homosexual in a copying work has been deemed a particularly obvious manifestation of parodic intent. *SunTrust Bank*, 268 F.3d at 1271. The author is grateful to Rebecca Tushnet for first raising this point.

⁶⁹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348-9 (1991).

⁷⁰ See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987).

determination; as the Supreme Court noted in *Campbell*, when the allegedly infringing work openly copies from publicly-known works in order to make its point, the second factor is of little use in “separating the fair use sheep from the infringing goats.”⁷¹

The third factor of the fair-use analysis is the amount and substantiality of the portion used in relation to the work as a whole. This calls for a separate analysis of the quantitative and qualitative significance of the copying. Fanvids generally do not copy a substantial portion of the work as a whole. First, fanvidders rarely take clips that last more than a few seconds from any given portion of the material. Current aesthetic norms dictate a five-second upper limit in order to avoid a static effect in the fanvid. Second, although the sources themselves vary in length, most fanvids are only two to five minutes long. In contrast, a movie used as source may be an hour and a half to three hours long, and a television series that has reached the one hundred episode milestone for easy syndication involves nearly eighty hours of footage without commercials.⁷² Therefore, fanvids typically use only a minuscule amount of the entire copyrighted work, and even that amount is taken from widely scattered points in it. This argues in favor of fair use.

However, the Supreme Court indicated in *Harper & Row* that the sheer amount of copied material must be considered in conjunction with the extent to which the copied material is the heart or most important part of the protected work. In that case, the infringer copied only approximately three hundred words of a several-thousand-word article, but the Court found that the copying was not fair use because the infringer took “among the most powerful passages” which “qualitatively embodied Ford’s distinctive expression.”⁷³ This principle is somewhat limited by the Court’s later finding in *Campbell* that inasmuch as parody must be able to conjure up the work parodied, even copying of particularly distinctive or characteristic elements may be protected. “Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart.”⁷⁴ The question, then, is whether fanvids take the heart of copyrighted works to a degree not necessitated by their artistic purposes. The answer is, generally speaking, no.

First, the impact of any copying will be blunted both by the

⁷¹ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 586 (1994).

⁷² Anne Becker and Allison Romano, *Fear Factor Soars on FX; Its reality is that there is life after network run*, BROADCASTING & CABLE, Sept. 13, 2004, at 2.

⁷³ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565 (1985).

⁷⁴ *Campbell*, 510 U.S. at 588.

rapid-fire cutting techniques which ensure that no particular image remains on the screen for very long and by the removal of the original dialogue and music, which are often very important to the aesthetic effect of the original shot. In addition, it has become increasingly common for fanvidders to use their video-editing software or standalone software packages like After Effects or Flash to apply various types of special effects to their clips, sometimes radically transforming their appearance. Finally, the fanvidder tends to strip away the clip's original artistic context in favor of her own carefully chosen sequence of images. All these changes mean that a particular moment in a television show or movie, carefully built up to by the rest of the work, skillfully orchestrated with words and music, is reduced to a quick flash of imagery in a fanvid; if it *was* the heart, it is relatively unlikely to function as such in the form in which the fanvidder uses it and in the different context the fanvidder has created for it. This is in contrast to the situation in *Harper & Row*, where the infringer deliberately selected and published some of the most notable passages of Ford's memoirs *as* the most notable passages, relying on their impact in the original to bolster sales.

Second, although fanvidders do sometimes choose to copy imagery that is particularly pivotal or key because it is such, they are just as likely to use imagery from much less important moments from the original source in the building of their own stories. Again, even if they do copy key imagery, this may be necessary in order to conjure up the work in question, as in *Campbell*. Although some number of fanvids may fail this test, then, the majority of them will not.

The fourth and most hotly disputed element in a fair use analysis is the effect of the use on the market for the copyrighted work, that is, the degree to which the copying work can substitute in the market for the original and therefore may deprive the copyright holder of some of the economic benefit he might rightfully expect to realize from his copyright. Some, indeed, have argued that this element is, in practice if not in doctrine, essentially dispositive: "if market substitution is found, then the fair use defense will fail."⁷⁵ This element is supposed to reflect only actual substitution, not other means by which the work in question might diminish the market for the copyrighted work, such as criticism or parody that negatively influences potential purchasers.⁷⁶ For works like fanvids, the analysis must actually

⁷⁵ Michael G. Anderson et al., *Market Substitution and Copyrights: Predicting Fair Use Case Law*, 10 U. MIAMI ENT. & SPORTS L. REV. 33, 34 (1993).

⁷⁶ *New Era Publ'ns Int'l, ApS v. Carol Publ'g Group*, 904 F.2d 152, 160 (2d Cir. 1990)

address *two* potential markets: the market for the video source itself and the market for derivative works, of which the fanvid might be considered to be a variety. Although fanvids do not fit precisely into any of the categories suggested in the Copyright Act, it is fair to argue that they qualify as a form “in which a work may be recast, transformed, or adapted,” and therefore the possibility of their displacing licensed derivative works must be considered.⁷⁷

Can fanvids effectively substitute in the market for the sources from which they are drawn? It is difficult to see how. Fanvids generally present only a small portion of the original video, substantially reworked and stripped of the original music and dialogue. Although a viewer might enjoy and gain new insight from a three-minute fanvid that presented the rise of the character Aragorn from lonely wanderer in the wilderness to king of a mighty realm as a triumph more bittersweet than unalloyed, it would hardly be the same experience as watching the more than nine hours of movie, covering many more characters and plots and themes, which make up Peter Jackson’s *Lord of the Rings* trilogy. Furthermore, fanvids are generally quite small—often no more than 640 x 480 pixels—and of lower quality than an actual film would be, meaning that they are not desirable as a replacement for a source even viewed on an ordinary television. The benefits the viewer takes from fanvid and original source are simply too distinct for one to substitute for the other.

Indeed, far from substituting for the original, fanvids often demand that the original be consumed *as well* in order to be understood, just as most of the impact of *Rosencrantz and Guildenstern Are Dead* would be lost if the reader were unfamiliar with *Hamlet*.⁷⁸ Unlike fan fiction, which sometimes takes the form of standalone stories which can be followed, if not always easily, even if one is not particularly familiar with the source, fanvids (except for the recruiter variety) usually rely on the viewer’s ability to recognize, quickly and without additional cues, characters and scenes from the source and deduce the fanvidder’s interpretive choices from their juxtaposition. It is a common lament amongst fanvidders that it is difficult to achieve any sophisticated appreciation of fanvids that draw on source which the viewer is not

(discouraging purchase of religious works through critical biography of author not the type of harm covered by this element); *Campbell*, 510 U.S. at 591-92 (suppression of demand for song through parody also not relevant).

⁷⁷ 17 U.S.C. § 101 (2004).

⁷⁸ For an argument that the language of § 107 requires that market-substitution analysis explicitly take into account potential *benefits* from the distribution of the copying work as well as harms, see Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 688-89 (2004).

familiar with, no matter how technically skilled the fanvidder may be.⁷⁹ This is not merely wishful thinking on the part of fanvidders. YouTube's recent licensing deals, discussed *supra*, show quite clearly that some content providers have already come to understand that fanvids may help build their revenue rather than compete with their offerings. Fanvidders create the fanvids (and help build the fan networks which consume them) for free, but YouTube and the content providers involved will be able to divide the resulting advertising revenues. The content provider then also gets to enjoy the broader benefits of visibility and apparent buzz for his source. Fanvids are thus effectively free promotion of the original source at the street or word-of-mouth level, the kind which corporations routinely try to force into existence with "street teams" and viral marketing. Finally, as fanvids are distributed free, they do not actually require financial resources which might otherwise go to the source, though there may be some concern about the saturation of intellectual desire for it.⁸⁰ Therefore, fanvids will usually serve as a *complement to*, rather than a *replacement for*, their sources.

The problem of whether fanvids substitute for potential *derivative* works is slightly more complex, as the case law on the subject is more confused. There is considerable dispute over how the possible derivative markets for any given work should be defined; in theory, a copyright holder *might* choose to create or license its source for the creation of *any* kind of transformative derivative use, in which case the finding of market harm in such instances would be nearly inescapable. The Second Circuit's rule most effectively captures genuinely likely harm: "Only an impact on potential licensing revenues for *traditional, reasonable, or likely to be developed markets* should be legally cognizable when evaluating a secondary use's 'effect upon the potential market for or value of the copyrighted work.'" However, this standard has proved somewhat difficult to apply in practice.⁸¹ In any case, it is

⁷⁹ See, e.g., Lucy Cereta, VividCon Report Part the Second: Vids, <http://www.livejournal.com/users/cereta/98646.html> (last visited Aug. 25, 2007); HENRY JENKINS, TEXTUAL POACHERS 238 (1992).

⁸⁰ William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 486 (2003) (arguing that consumers may become confused or bored if they are overexposed to a particular symbol, thus producing an "overgrazing" problem). This argument is difficult to reconcile with the marketing behavior of copyright-holding corporations, whose advertising campaigns and development of subsidiary markets are rarely characterized by restraint. See Benjamin A. Goldberger, *How the "Summer of the Spinoff" Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301 (2003).

⁸¹ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (finding no fair use in photocopying individual articles from scholarly journals because, even though the articles were not sold singly, a clearinghouse to purchase bulk photocopy rights existed) (emphasis added); *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366,

particularly important to employ a sensibly-limited definition of potential derivative markets with regard to uses for which the copyright holder is motivated *not* to license the work—as the Supreme Court has noted, “there is no protectible derivative market for criticism” because it is unlikely that copyright holders will seek to diminish the value of their properties by subjecting them to critique.⁸² Even in a case in which the copyright owner had already licensed derivative works in the same medium as the copying work, it cannot be presumed that a parody will displace those derivative works.⁸³

The fair-use analysis, then, must consider whether fanvids represent a work for which copyright owners have a traditional, reasonable, or likely to be developed market. At this point, there are no known instances in which copyright owners have produced and sold their own fanvids.⁸⁴ Nor do they seem likely to. The current audience for fanvids is impossible to estimate; while it certainly has grown over the past decade (and, in the last two years, it may be fair to say explosively so), the investment required to create or read vids will surely continue to prove a limiting factor. The potential market of individuals who would actually *pay* for the privilege of viewing corporate-produced fanvids is doubtless even smaller. The production of a sophisticated fanvid is usually time-consuming, requiring from a few to over a hundred hours of work, meaning that it is less likely that a copyright owner could recover costs of production, especially if it had to pay another content provider for use of the audio track.

In addition, insofar as fanvids critique originals, or rework them in ways which the copyright owner might not find appealing, they fall squarely into that category of derivative work for which the copyright owner will never seek to develop a market, as it is perceived to diminish the value of the original. The agreements, for instance, that YouTube has reached with major content providers reportedly allow them to demand the takedown of works

1377 (2d Cir. 1993) (finding no market harm when “the defendant’s work filled a market niche that the plaintiff simply had no interest in occupying”). *But see* Castle Rock Entertainment v. Carol Publ. Group, 955 F. Supp. 260, 271-72 (S.D.N.Y. 1997), which recited the *AGU* standard but ultimately found market harm based on its judgment that the derivative market in question “*should* properly be left to plaintiffs” and concluding, contra *Twin Peaks Prods.*, that a production of a derivative work in a market that the copyright owner has chosen not to enter actually works market harm on the owner (emphasis added).

⁸² Campbell v. Acuff-Rose Music, 510 U.S. 569, 592 (1994).

⁸³ See SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1274-76 (11th Cir. 2001). *But see* Ty, Inc. v. Publ’ns Int’l, 292 F.3d 512, 518 (7th Cir. 2002) (holding that a burlesque, as distinct from a parody, may be “just a humorous substitute for the original and so [cut] into the demand for it”).

⁸⁴ Trailers for films generally serve a different purpose; furthermore, as advertising, they are commonly given away for free.

incorporating their content for any reason at all.⁸⁵ Thus, content providers are clearly attempting to preserve an ability to prevent uses they find unsuitable; they are not prepared to grant blanket licenses for even noncommercial use and thus are quite unlikely to license these kinds of uses commercially. Therefore, it would require an excessively generous application of the standard to reach the conclusion that fanvids displace a genuine derivative market which copyright holders can reasonably expect to exploit. However, given the rapidity of current cultural and technological change, it is possible that this question may need to be revisited at a later date.

This consideration of the four fair-use factors demonstrates that the use of *video* in fanvids should be regarded as likely to achieve the standard for fair use. First, the use is both largely noncommercial and transformative, which tilts in the fanvidder's favor. Second, the copied material is generally fictional, which tilts in favor of the copyright owner; however, this factor has relatively limited weight, particularly when considering transformative uses. Third, fanvids generally use only a small portion of their sources and by no means necessarily the heart of them. Finally, fanvids do not substitute in the market either for the original or for derivative works as the market currently stands, and many fanvids are of a type which the copyright holder might refuse to license anyway. Thus, the use of video in this particular art form will very often be defensible under current copyright law.

b. Audio

The fair-use analysis for the *audio* used in fanvids, however, is not nearly as hopeful. An analysis of the four factors indicates that under most circumstances, the use of audio will be infringing. (This analysis concentrates on the use of an underlying musical composition as soundtrack; although fanvids occasionally incorporate dialogue or sound effects from the original video source, this happens too rarely to merit separate consideration.) This means that, under current doctrine, the fair-use claim for fanvids as a whole will probably fail.

As discussed above, the first factor considers the nature and purpose of the use, particularly focusing on its commerciality and transformativeness. For the reasons given in the discussion of video, the use of audio in fanvids is noncommercial; fanvidders are no more attempting to realize a profit from the audio track in a fanvid than from the video. However, the use of audio is

⁸⁵ See *supra* note 3.

considerably less transformative. Although it is now a common practice to edit the audio track of a fanvid—generally, in order to reduce the length of the fanvid or eliminate lyrics deemed not germane to the fanvidder’s artistic intent, but sometimes even to rearrange verses or musical sequences to better meet the fanvidder’s needs—it is still sometimes simply incorporated whole.⁸⁶ Furthermore, fanvidders generally focus on using the audio to reflect on or rework the meaning of the video, rather than vice versa. By associating particular images with particular lyrics, a fanvidder *is* advancing an interpretation of a song. There are a number of popular songs which have been incorporated into fanvids for many different shows or films, with the resulting fanvids—and, inevitably, the understanding of the songs the viewer takes away from them—differing wildly in tone and meaning. A song that seems celebratory when played against one set of images might read as far more bittersweet in a different visual context. In the starkest case, some fanvidders have used the same song to interpret the same video, yet ended up with significantly different readings of both the underlying video and audio. (For example, one vid might use a sentimental love song with utter sincerity to express enthusiasm for a particular couple’s romance, while another might deploy it with the fiercest cynicism to condemn them.) A viewer’s understanding of or associations with a song can be changed by watching a fanvid, just as they can be by watching its professional music video, a television show or movie that incorporates it skillfully into the soundtrack.⁸⁷ Thus, a fanvid *can* be said, to some degree, to be adding “new expression, meaning, or message” to its chosen audio track.⁸⁸ Yet, with respect to the audio, it is less obvious that an important artistic purpose of the fanvidder is to “comment upon or criticize a prior work by appropriating elements of the original.” Interpreting the audio may simply too often be a merely incidental result of the fanvidder’s desire to interpret the video.

One might well argue that using a copyrighted work to comment on *another* work is still transformative, in that it puts the

⁸⁶ See Chapter 4: Editing Your Audio, <http://www.animemusicvideos.org/guides/avtech/audio4.html> (last visited Aug. 25, 2007).

⁸⁷ For instance, few viewers of the film *Reservoir Dogs* are likely to ever think of *Stuck in the Middle With You*, a cheerful pop song the director played over a graphic torture scene, in quite the same way again.

⁸⁸ *Campbell*, 510 U.S. at 579. See also *Abilene Music, Inc. v. Sony Music Entertainment*, 320 F. Supp. 2d 84, 90 (S.D.N.Y. 2003) (finding fair use where a rap song incorporated a few lines of a pop standard and “its rendition of [the song] just before the beginning of the rap is easily understood as commenting on the innocence reflected in the lyrics of the original, in order to drive home its own message more effectively”).

original to a new purpose, unconceived-of by the creator. This argument makes sense in terms of policy. It is counterintuitive that an artist who uses two different sources to produce a new work of art should be deemed to be making a transformative use of only one. However, the rationale of *Campbell* does not quite support this argument; the Court noted that if the copying work “has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses . . . to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish).”⁸⁹ A fanvidder could argue that the use of a recognizable composition allows for better and more effective criticism of the video and is not simply a labor-saving device, and there is some strength to this point when the song is particularly well-known, so that it carries additional cultural resonance. The use of, say, “All Along The Watchtower” in a vid evokes an era and a whole complex of cultural meanings that goes far beyond the surface meaning of the lyrics or music. However, there is also considerable merit to the retort that a fanvidder *might* compose whatever music or lyrics she likes to convey her point or mood, without borrowing wholesale from another.

The second factor, the nature and character of the work copied, also weighs against fanvidders’ use of audio. Music and lyrics, although not explicitly fictional, seem to qualify as the sort of work which lies closer to the core of copyright protection than primarily factual works do; the *Campbell* decision analyzes the bass riff and lyrics of Orbison’s original work as such.⁹⁰ Again, this element is often not that heavily weighted, but it does tip against fair use.

The third factor is the amount and nature of the work copied. As mentioned *supra*, a fanvid normally takes a very large portion, if not the whole, of an audio track. In this sense, it is different from the fair use in *Campbell*, where the defendant borrowed the bass riff, but surrounded it with its own instrumentation and replaced the vocals entirely. The audio track is usually simply incorporated wholesale, or nearly so, into the fanvid. With such extensive copying, one can expect that normally the heart or climax of the song in question will also be copied. Of course, a parody might take even the heart of the original work and still be fair use. It can be argued that the fanvid borrows no more of the audio source than it must to exist—the art form depends on the ability to synchronize video to some sound

⁸⁹ *Campbell*, 510 U.S. at 580.

⁹⁰ *Campbell*, 510 U.S. at 520.

recording—but if the use is not transformative, i.e., if the copying work borrows more than it needs to in order to comment on or criticize the copied work, this argument will fail. Therefore, this factor still weighs against a finding of fair use.

Finally, the fourth factor is the degree to which the copying work may substitute in the market for the original.⁹¹ This is a somewhat closer question than the determination of the other factors, which is particularly important given the relative weight often accorded this factor. Insofar as a fanvid exactly copies an entire section of an audio source, the copyright holder might contend that it is a perfect substitute. However, functionally, it may well not be.

First, more and more fanvids *do* edit the audio track, trimming out portions and even shifting around blocks of sound; few listeners will find a copy of a song missing the second verse or the instrumental bridge to be a desirable substitute for the original. Second, fanvids are generally much, much larger than MP3s are, often by an order of magnitude or more, and the differences in size will only increase as fanvidders increasingly produce higher-resolution (and therefore larger) fanvids, while the size of MP3s remains static. The programs which play them also tend to use considerably more RAM than an ordinary MP3-playing program. Therefore, even fanvids that incorporate exact and complete copies of audio tracks would make unwieldy substitutes for the audio tracks themselves. Finally, fanvids lack portability. They are not playable on MP3 players; they cannot be burned to audio CDs. They can be ripped to more expensive video playback devices such as Apple's video iPods, but to play vids on iPods is a radically inefficient use of the battery life.⁹² It simply does not seem to be a common practice for someone who simply wants to hear a particular song to go to the trouble of launching a video-player on her computer to load a particular fanvid. However, it remains *possible*, if considerably less convenient, as long as the fanvid does incorporate all or virtually all of a discrete portion of the audio source. Hence, courts are still somewhat likely to find that fanvids can serve as effective substitutes for their

⁹¹ The analysis for derivative works of the audio source is similar to that of the video source *supra*. To the degree that content providers do market derivative works, they tend to produce a single music video, which has a completely different aesthetic purpose than a fanvid does. A consumer is unlikely to be diverted from the purchase of a music video that will allow him to contemplate anonymous blondes writhing to his favorite metal tune by the opportunity to download a fanvid using the same song to illustrate the true and pure love of two lead characters on *Friday Night Lights*.

⁹² On the most recent video iPod, video playback uses the battery at roughly three times the rate of audio playback. iPod, <http://www.apple.com/ipod/ipod.html> (last visited Aug. 25, 2007).

audio source and therefore inflict market harm.

Overall, then, the factors tip toward a finding of no fair use of the audio source in a fanvid. The first, second, and third factors resolve fairly clearly in favor of the copyright holders. The judgment on the fourth factor is not as obvious, but ultimately is likely to be in favor of the copyright holder for the majority of fanvids. This would appear to indicate that the ability of the fanvidder to successfully assert a fair use defense with respect to the video source is irrelevant, except in determining which plaintiffs can actually assert their rights against her; she only needs to be found to infringe on one copyrighted work to be effectively shut down. The next section, therefore, will consider whether this outcome is actually the desirable one.

C. *Fair Use, Market Failure, and the First Amendment*

The major economic justification of the U.S. copyright regime is that it provides suitable economic motives for individuals to create copyrightable works.⁹³ Without copyright, the creators of such works would face a classic public goods problem. The consumption of a copyrighted work is usually nonrivalrous—i.e., it can be consumed by all without being exhausted—and, without property rights, it is difficult to exclude individuals from the enjoyment of the work.⁹⁴ It is simply far more expensive, in most

⁹³ The naïveté of the assumption that economic incentive drives all creation has hopefully been illustrated by this paper. The creators of fanvids not only forgo any potential profits they might receive from their creations, but often *lose* money on them instead, and face the risk of legal penalties. Nonetheless, the economic model of production will capture the motives of large corporate copyright holders in particular much of the time and cannot simply be discarded. It has been argued that the economic model is particularly appropriate in dealing with mass market or popular culture media properties, as the creators of these items are less likely to be motivated by concerns for subjective self-fulfillment. Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569, 596-7 (2000). This argument fails to recognize that individuals outside the artistic elite may engage with the “humble” productions of popular culture to produce works of art for their own satisfaction (and thus will be equally insulated from traditional market forces). For these individuals, strengthening of copyright means the suppression of self-expression—and the failure to produce works that may actually be of considerable interest and value.

⁹⁴ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1610-11 (1982). *But see* Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975 (2002) (arguing that a perceived market failure does not adequately explain decisions like *Sony* and *Campbell* and asserting that there is a strong public interest in accessing and copying works that better grounds findings of fair use); Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works*, 77 S. CAL. L. REV. 903, 911 (2004) (also rejecting market failure as the appropriate basis for fair use and arguing that instead “[s]ound analysis sets aside the presumption in favor of owner control when there is reason to believe that the copyright owner’s profit incentive is misaligned with the social interest in social welfare maximization.”). Presumably this shift away from reliance on market failure is due to a fear that technology will soon allow the imposition of microlicenses where previously transaction costs made this impossible, thereby justifying further limitations on fair use. This eventuality still seems distant for this particular case, and it seems likely that

instances, to *create* the original copyrighted work than to *copy* it. This potential problem has only grown larger in recent years, as digital technology has moved to drastically reduce the costs that once attended copying. It once took months for a monk to copy a scroll; now an individual can cut-and-paste, or save a copy of, a document containing the same information in less than a second.⁹⁵ Thus, without some form of property right, individuals who made the initial investment required to produce the work might find themselves unable to recover their costs, as individuals copied their works freely. Creators would thus under-produce their works relative to the actual potential consumer demand or fail to create at all. Hence, by granting control over the right to reproduce and related works, the U.S. copyright regime preserves their economic incentives to create.

One of the underlying assumptions of this regime is that, under most circumstances, granting property rights to the copyright holder will result in the most efficient allocation of resources. Bargaining in a perfect market, it is believed, will provide for the transfer of those property rights to the entities which can exploit them for the most economic value; an individual author, with limited mechanisms for distributing and publicizing his new novel, will transfer his rights for some form of payment to a large media corporation, which can bring all its machinery to bear and thus not only realize a much larger profit than the author might have, but more effectively bring the novel to those who might value it enough to pay for it, but who might never even hear of it without the media corporation's promotional efforts. This may accurately describe many copyright-related transactions; however, there are circumstances in which the market breaks down and fails to facilitate efficient transfers of property rights.⁹⁶ In those scenarios, commentators such as Wendy Gordon have argued, allowing the use of copyrighted materials under the rubric of fair use may be appropriate.⁹⁷

The would-be fanvidder confronts a market failure with respect to both her audio and her video source. Fanvidders are

one might justify treating fanvids as fair use under these alternate rationales as well.

⁹⁵ Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1137-40 (2001) (summarizes the transformation with respect to consumer response to popular media properties).

⁹⁶ Gordon, *supra* note 94, at 1607-09. The validity of this theory, which was originally developed to describe the market for rivalrous goods, also seems more limited in the generally nonrivalrous intellectual property context.

⁹⁷ *Id.* at 1601. See also Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785 (2004), for a discussion of other ways in which the copyright regime may actually discourage creation of new works.

not generally wild-eyed Internet pirates or free-riders; most of them have a keen respect for the creators of their sources and the capacity to understand the costs involved in their production. Although some, no doubt, would choose not to create if they were forced to pay a licensing fee for the video and audio sources, and some would probably continue to use their sources unlicensed, others would probably be willing to pay a reasonable fee. Given the minimal effect of such uses on the market interests of the copyright holder, in a perfect market, copyright holders would be able to charge such a fee proportionate to the value the fanvidder places on it. Both parties would thereby avoid most disputes over infringement. However, it is not presently possible for a fanvidder to negotiate such a license.⁹⁸

There are multiple reasons for this failure to negotiate. The fanvidder is a single, usually economically and legally unsophisticated, bargainer. Given the lack of notice required by the current Copyright Act, she may not be able to identify easily the copyright holder(s) in her audio or video source, if they even still exist. The license required would need to be precisely tailored to her particular individual use, which might even change as the project progressed. This type of transaction in the corporate world is complex enough that it is generally conducted by lawyers. Therefore, transaction costs are likely to make the acquisition of a license infeasible from her point of view. Also, the fanvidder has highly imperfect information as to the market value of her source, thus making it possible for the copyright holder to demand fees in excess of the actual market value of her limited use. The copyright holder, on the other hand, will generally be more sophisticated but must also bear its share of transaction costs in multiple individualized negotiations with single users, which will quickly overwhelm any profit likely to be realized from an appropriately-set fee. If it should set fees that far exceed its actual costs, it is unlikely to achieve fanvidder buy-in to the licensing system. Given the broad range of rights implicated in Internet transmission and the state of uncertainty regarding the actual owners of the rights in many musical compositions in particular, copyright holders may not even find themselves positioned to assert that they can license all the rights which would be required. Thus, the fanvidder may be faced with the situation known as “the tragedy of the anti-commons,” where rights are so widely dispersed that the costs of uniting them for a particular purpose defeat what

⁹⁸ So far, the market appears to agree with this assessment. Note that the major licensing deals discussed *supra* have all been with large-scale *distributors*, not individual *creators*.

would otherwise be an efficient use.⁹⁹

Further, copyright holders may be reluctant to negotiate with individual fanvidders for non-economic reasons. As discussed, it is true that some copyright holders *have* recognized the value of permitting consumers to produce such works in order to build and maintain audiences. Many large media corporations, however, do find it easiest to deal with the model of the individual as passive consumer of their works, at her most energetic simply choosing between the various choices proffered by the market. Unsurprisingly, this is the view which most clearly supports the strongest intellectual property entitlements, as it downplays considerations of the potential ongoing productive use and reuse of cultural building blocks in favor of ensuring that large corporations continue to enjoy incentives to produce them in the first place.¹⁰⁰ Individuals who wish a more active and creative engagement with media properties—or, more simply, fans—are still often “seen as eccentric at best, delusional at worst.”¹⁰¹ Corporations may be reluctant to entangle themselves and their properties with such individuals; indeed, it may be more comfortable for them to turn a blind eye to fannish activities so as to avoid the specter of appearing to endorse individuals who they do not effectively control.

Furthermore, copyright holders may fear that their products’ carefully-crafted image may be tarnished or diluted by works which veer off in different artistic directions. Such beliefs are dependent on the assumption that audiences will be unable or unwilling to differentiate between their authorized productions and the unofficial offerings of private creators. For example, a corporation which has invested massive resources in positioning a particular character as the hero of an ongoing action-film franchise may be reluctant to see that character re-envisioned in ways that diverge from or even undermine its marketing campaign. From that point of view, there *is* such a thing as bad publicity—the publicity that is “off message.” Finally, insofar as fanvidders seek to use their sources to engage in more ambitious political or cultural critiques or to rework the sources in ways considered undesirable (such as reinterpretations of same-sex

⁹⁹ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003). Note that a willingness to license to a distributor such as YouTube does not solve the problem, as it locks the fan into a particular channel of distribution and leaves her unable to negotiate over terms or to prevent takedown at the rightsholder’s whim.

¹⁰⁰ See Joseph P. Liu, *Copyright’s Theory of the Consumer*, 44 B.C. L. REV. 397, 402-04 (2003).

¹⁰¹ Tushnet, *supra* note 21, at 655.

relationships as romantic), copyright holders may simply be unwilling to license the materials altogether, even if the transfer might be economically efficient.

This description of the fanvidder's situation vis-a-vis the copyright holder corresponds closely to the conditions Gordon identified as likely to represent market failure, particularly her discussion of transaction costs and noncommercial use.¹⁰² Of course, a finding of market failure alone is not sufficient to justify a claim of fair use. She suggested that two other conditions must be fulfilled: the transfer of the use to the defendant must be socially desirable (or, as she phrases it elsewhere, the injury to the plaintiff should be outweighed by the benefit to the plaintiff or society), and the plaintiff must not experience substantial harm from the type of use contemplated.¹⁰³ The cost to the copyright holder from use of its property in a fanvid, which should also be considered in conjunction with the potential *gains* to the rights-holder of publicity and community-building for its property, is minimal.¹⁰⁴ This must be balanced against the socially desirable purpose of producing transformative works, which benefits the individual by promoting expression and society by promoting the continued production of new works of art which are available to all. It appears, then, that the second condition is met by the fanvidder.

The third condition is meant to take into account the likely result if many such uses, not simply the individual one under consideration, are made, to ensure that a finding of fair use would not substantially undermine the plaintiff's incentive to create. Copyright holders currently *are* largely content not to contest these uses of video and audio, and, as has been discussed, some have recently sought ways to permit them to go forward. They do not represent a market for licensing fees on which the copyright holders now rely to make their profits. Nor do they effectively replace copyright holders' goods in any widespread way (as discussed *supra*, the audio track of a vid comes somewhat closer to doing so than the video does, but still, at best, in a limited and uncommon manner). It is doubtful, therefore, that fanvids are doing them substantial injury now. Thus, it is reasonable to conclude that under a market-failure theory, fanvids should usually be found to be a fair use, even though the current analysis mandated by the case law tends to produce a different result, at

¹⁰² Gordon, *supra* note 94, at 1629, 1631.

¹⁰³ *Id.* at 1614.

¹⁰⁴ Consider that several major music publishers are already willing to sell limited reproduction rights in individual tracks of music via iTunes for only 99 cents.

least for their audio tracks.¹⁰⁵

Finally, if this kind of use *should* be deemed infringing, that would implicate the increasingly urgent concern of the potential encroachment of copyright upon important First Amendment values.¹⁰⁶ Although many commentators have begun to address this issue, courts have so far been reluctant to recognize any such conflict.¹⁰⁷ As the Supreme Court noted in this context in *Eldred v. Ashcroft*, “The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” The Court claimed that the limitations built into the copyright regime, such as fair use, were generally sufficient to protect First Amendment rights. However, it also explicitly rejected the idea that copyright laws could be “immune” from First Amendment challenges.¹⁰⁸ Therefore, it is appropriate to continue to ask whether there are circumstances in which copyright legitimately conflicts with core First Amendment values.

Fanvids, like fan-fiction, parody, and similar transformative uses, illustrate neatly the problem with the dichotomy between one’s own speech and others’ speech that *Eldred* established. In many cases, in order to be able to speak effectively, one needs to be able to appropriate and transform the work of others.¹⁰⁹ In the United States, more and more powerful, widely-recognized symbols and icons have become *private* property even as corporations invest billions of dollars in ensuring that they saturate public discourse. We are in danger of creating an

¹⁰⁵ Elliott, *supra* note 34 at 356-58, suggests that a compulsory licensing scheme might be suitable for fansites. However, this would not meet the need for individualized licenses for audio and video which the fanvidder would require. It also seems unlikely that copyright holders and/or the government are likely to be willing to invest in the development of the infrastructure required to administer such a scheme.

¹⁰⁶ See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777 (2000) (arguing that the Founders intended the First Amendment to prevent the recurrence of licensing and censorship but did not see copyright as contradictory to this aim because they did not anticipate the way that private enforcement of copyright could produce similar results).

¹⁰⁷ Notably, in *SunTrust Bank*, the Eleventh Circuit initially overturned the injunction which the district court had issued against the publication of the novel in question as “an unlawful prior restraint in violation of the First Amendment,” *SunTrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001), *substituted opinion at* 268 F.3d 1257 (11th Cir. 2001). However, the court in its final opinion essentially accepted that copyright and the First Amendment are not in tension. See *Suntrust*, 268 F.3d at 1263.

¹⁰⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); see also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (“In view of the First Amendment protections already embodied in the Copyright Act . . . we see no warrant for expanding the doctrine of fair use . . .”)

¹⁰⁹ For a broader discussion of this issue, see Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

impoverished “look, but don’t touch” world, one in which the very public whose enthusiastic response to certain symbols and icons gives them their resonance cannot use those symbols and icons themselves to communicate—a sad inversion of the copyright regime’s original goal of enriching the stock of American culture. The creators of the U.S. intellectual property regime did not fully anticipate the astonishing rise to dominance of visual media in our culture. It is difficult to appropriate or transform visual media without literal copying; to write an essay or even a short story about Charles Foster Kane simply has different effects and meanings than the copying and transforming of Orson Welles’ classic imagery would. In other words, to draw effectively on the rich visual imagery that is part of Western culture, one generally needs to copy it, at least closely enough to conjure up the original—and draw the attention of copyright enforcers.

In the past, technological barriers excluded individuals from full participation in the creation of their own culture. Now, even as modern technology puts the capacity to enter into media discourse on its own terms into the hands of average consumers, copyright threatens to shut them out. This paper has discussed in some detail the ways that major content providers have sought to tap the power of YouTube and thus made some accommodation for the fanvidder. But carefully-regimented use on corporate sufferance is a far cry from the creative freedom to interweave cultural riches into one’s own work that the U.S. copyright regime is supposed to promote, especially when the artist may choose to create work that may not quite be to the taste of the conservative legal departments at giant multimedia corporations. A license is no substitute for the right of fair use. Google may be able to withstand a lawsuit by a major media conglomerate—the ordinary citizen cannot.

It may seem to some that works like fanvids, and even their underlying source material, are far too culturally humble and crude to merit much consideration. One might even ask if meaningful cultural values really are implicated by the inability of an ordinary person to make a fanvid that defends Darth Vader or deconstructs the motives of Buffy the Vampire Slayer. However, one generation’s cultural detritus is often the next’s treasure.¹¹⁰

¹¹⁰ For example, “[C]omic books have moved from the disreputable, juvenile margins of pop culture to...upper-middlebrow literature, too, as young middle-aged novelists like Michael Chabon and Jonathan Lethem have found in the realm of boyhood fandom a rich store of ready-made myths, mysteries and moods.” A. O. Scott, *Revenge of the Nerds*, N.Y. TIMES, May 8, 2005, at 2A1. One hardly need recount the artistic apotheosis in the last two decades of the rock-n-roll musicians patronized by the Baby Boomers and dismissed by their parents as “noise, not music.”

The judgment of history has often favored artists who were neglected in their own day. The fanvid as a genre has achieved a level of technical competence and artistic vision which might surprise those who reflexively scorn “genre” art or user-generated content. Furthermore, the very fact that works like fanvids provide a means for otherwise marginalized—or at least unremarkable—individuals to engage critically with a culture which is otherwise rapidly passing under the dominion of massive multinational corporations, makes them particularly significant. In a cultural milieu of homogenous “product” constructed according to formula by faceless development teams, fanvids and similar noncommercial productions allow even those who lack economic clout to express their cultural, political, and social views and communicate them to others. Fanvids’ subject matter might not always be elevated, but the average person in the United States probably spends more time watching television dramas than the news; fanvids and their ilk, then, deal with material that is familiar and accessible to a broad range of people to make their points. Surely, the question of their continued existence *does* touch on vital and ongoing concerns about the viability of citizen participation in democracy. It would be a serious mistake to overlook the value of these works based on their—or their creators’—relative lack of cultural prestige.

Too aggressive an enforcement of copyright, therefore, may strike at the crucial policy aims underlying our First Amendment guarantees, those of promoting political discourse among an informed citizenry, the search for truth in all fields of human knowledge, and the development of the self through free expression. It may be that fanvids in themselves do not frequently engage in the kind of overtly political or religious speech that represents the most obvious case for First Amendment protection. Even as a form of self-expression, they may appear relatively trivial and dispensable. But for many people, fanvids are the closest they are likely ever to come to entering into Western civilization’s millennia-old debate over the arts, philosophy, and the ideas they present. Fanvids, and the myriad other forms of remix culture flourishing in the digital environment, *are* their artwork, and when courts and legislatures seek to strike the balance between protection of property rights and freedom of expression, the value of that contribution should be taken into account.

III. CONCLUSION

Fanvids provide an excellent microcosm of the kind of copyright issues that postmodern art is likely to encounter in the digital environment. These issues are bound to be litigated again and again as the artistic promise of the Internet age—the easy accessibility of prior speech in forms that even the average individual can manipulate and then distribute cheaply to all who are interested—collides with its peril—the attempts by large corporate copyright holders to lock down these uses, even when their analog equivalents might have been overlooked, for fear that they will siphon away their profits. As courts and legislatures seek to balance competing interests, it is important for them to remember that the copyright regime exists, above all, for the benefit of the public through the production of useful works; laws that discourage this production deserve careful scrutiny.

Fanvids, or at least their use of their audio sources, may fail the four-factor fair-use analysis as it currently stands. However, under a market-failure theory, fanvidders *should* be allowed to assert that defense, even for their audio tracks. This outcome accords well with a lay sense of justice: a person who copies for personal use, without any intention of profiting from it, especially a person who has actually paid for the copied work, is not harming the copyright holder and should be left alone. It is also consistent with the basic goals of the U.S. copyright regime, as it promotes the creation of new works without seriously undermining the incentive of other creators to produce. Finally, it serves the purposes of the First Amendment as well, by encouraging self-expression and in some cases political or social critique. Therefore, a court would be well-advised to find fair use in such cases, which it could do most easily by recognizing that the rationale which excuses copying even in commercial parody should extend to all noncommercial transformative use and by resolving the contested market-substitution factor for the audio track of a fanvid in favor of the fanvidder.

It is, however, improbable that a case involving fanvids will ever make its way to an appellate court. This is not simply because, so far, relatively few copyright holders have attempted enforcement action. Rather, it is because no individual user is likely to be able to muster the kinds of resources required to resist a large corporation's attempt to enforce its copyright through the courts, whether its claim be legitimate or not. This art, then, exists on the sufferance of multinational media conglomerates. That in itself raises disturbing questions about the future of artistic

2007]

FANVIDS AND FAIR USE

685

freedom, most especially for the individual consumer and creator, in the age of digital copyright.