

# COPYRIGHTS RETOLD: HOW INTERPRETIVE RIGHTS FOSTER CREATIVITY AND JUSTIFY FAN-BASED ACTIVITIES

*Nathaniel T. Noda\**

*Fan subculture, in all its varied forms, brings with it distinctive examples of what may be dubbed “fan-based activities,” a class of derivative works that confounds traditional copyright analysis. While ostensibly infringement, these activities expand the public’s stores of knowledge and enhance the copyright holder’s economic and creative interests. Drawing on the distinctive characteristics of those activities, this article advances an interpretive rights framework as a means for copyright law to better account for the unique attributes of “fan-based” works. Through the development of concepts like interpretive rights, creative teleology, and canonicity, and by applying those concepts to real-world examples of fan-based activities, this article seeks to fill in a crucial gap in traditional conceptions of copyright. With this framework, copyright law can account for and uphold fan-based uses that fulfill the dual purposes of copyright by furthering the interests of copyright holders and the public alike.*

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\* Research & Scholarship Fellow, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai‘i at Mānoa. J.D., *cum laude*, William S. Richardson School of Law; B.A., *summa cum laude*, Santa Clara University. This article was awarded First Prize at the local level of the 2009 ASCAP Nathan Burkan Memorial Competition. The author thanks Prof. Danielle M. Conway for her mentorship, guidance, and encouragement; Prof. Jill J. Ramsfield for her insightful comments and advice; and Ellen D. Bernstein and the members of the *Seton Hall Journal of Sports and Entertainment Law* for their fastidious editing and support.

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## INTRODUCTION

Twice a year, over 130 corporations, 35,000 amateur artists, and 500,000 attendees converge on a man-made island in Tokyo Bay for a three-day convention<sup>1</sup> centering on the sale of unauthorized derivative works, called “doujinshi.”<sup>2</sup>

1. See COMIC MARKET PREPARATIONS COMMITTEE, WHAT IS THE COMIC MARKET?, Feb. 2008, at 4, *available at* <http://www.comiket.co.jp/info-a/WhatIsEng080225.pdf>.

2. Doujinshi (sometimes written as dōjinshi) are fan-made comics, commonly deriving characters and milieus from manga, anime, or video game sources, which are sold by doujinshi artists for profit, usually without the copyright holder’s authorization. See, e.g., Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155, 156 (2002) (describing “dojinshi” as “Japanese manga written by authors using the well-known characters of another, more famous, author”).

Every week, thousands<sup>3</sup> of groups comprised of translators, encoders, typesetters, and webmasters across the internet collaborate in the unauthorized production and distribution of translated anime episodes, called “fansubs.”<sup>4</sup> These groups often release their fansubs only days after the episodes’ initial airing on Japanese television. Both doujinshi and fansubs represent pervasive forms of potential copyright infringement on a scale gargantuan enough to have made Melville Nimmer<sup>5</sup> blench. Nevertheless, both doujinshi artists and fansub groups have conducted their respective activities for the better part of three decades,<sup>6</sup> mostly with the tacit acquiescence<sup>7</sup> of – and, in the case of the doujinshi markets, in complicity<sup>8</sup> with – the anime and manga industries.

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3. See AniDB.net Group List, <http://anidb.net/perl-bin/animedb.pl?show=group>list.

4. Fansubs have a direct analogue in the form of “scanlations,” which are manga pages reproduced in digital image form with their original Japanese dialogue replaced with translated text. For the purposes of this article, “fansubs” will encompass both fansubs and scanlations.

5. Melville B. Nimmer (1923-1985), the author of *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property*, was a preeminent authority on U.S. copyright law, who, among his many accomplishments, “pioneered several then-novel concepts that continue today to enrich the well-being (and coffers) of Hollywood’s creative talent.” 1 DAVID NIMMER, NIMMER ON COPYRIGHT, IN MEMORIAM (1986).

6. See Mehra, *supra* note 2, at 164-178 (describing the emergence of the doujinshi markets and their coexistence with the anime and manga industries); see Sean Leonard, Article, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 196-225 (2005) (summarizing the history of fansub groups in the United States).

7. See *id.* at 217 (suggesting that the efforts of fansub groups and anime clubs in the 1980s and 1990s directly contributed to the present success of U.S. anime and manga licensees by cultivating the nascent fan base into the blossoming otaku subculture that serves as the primary market for U.S.-licensed anime and manga). For the Japanese licensor, fansubs provide a free means of increasing exposure to U.S. fans and distributors alike, with only the remote possibility that fansubs themselves might scare away potential distributors. See Animesuki.com, License Database, <http://www.animesuki.com/licensed.php> (cataloging hundreds of formerly fansubbed anime series that have subsequently been licensed by U.S. distributors, as well as a “rumors” section indicating series that may soon be licensed) (last visited Nov. 15, 2009).

8. See, e.g., COMIC MARKET PREPARATIONS COMMITTEE, COMIC MARKET 73 CATALOG 1169-81 (2007) [hereinafter COMIC MARKET 73 CATALOG] (listing hundreds of commercial vendors with participating booths in the Winter 2007 convention) (on file with author); but see Mehra, *supra* note 5, at 180 n.136 (describing the “Pokemon doujinshi” case, a singular instance in which Nintendo sued a woman who created and sold an adult-oriented doujinshi utilizing characters from its Pokemon franchise) (citing

In a previous article,<sup>9</sup> I demonstrated that a class of fan-based activities<sup>10</sup> can be derived from the examples provided by doujinshi and fansubs, and that the definitive characteristics of this class indicate that its activities should fall within the penumbra of fair use. In this article, I will go beyond the fair use doctrine and examine the relationships between authors, the fan-authors responsible for fan-based activities, and the public at large, and how those relationships should reshape our conceptions of copyright. Ultimately, this article will propose a conceptual framework that furthers the dual constitutional goals of copyright by expressly granting to the general public certain “interpretive” rights while preserving both the integrity of the original author’s creative vision and his or her incentives for creation. This interpretive rights framework augments the public’s stores of knowledge – the primary goal of copyright<sup>11</sup> – while preserving and even

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Pikachu doujinshi na henshin dame [Alteration of Pikachu in Doujinshi a Violation], ASAHI SHIMBUN, Jan. 14 1999, at 37)).

9. Nathaniel T. Noda, Article, *When Holding On Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities*, 5 U. DENVER SPORTS & ENT. L.J. 64 (2008), available at <http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/05/Fall2008SELJPublication.Revised2.pdf>. An earlier form of the discussion of fan-based activities *infra* Parts II.A and II.B originally appeared as a part of this article.

10. The term “fan-based activities” is mostly synonymous with the terms “user-generated content,” “user-contributed content,” or similar terminology, which have been discussed in other law review articles. See, e.g., John Baldrica, Note, *Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects*, 8 MINN. J.L. SCI. & TECH. 681 (2007); Casey Feisler, Note, *Everything I Need To Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 748 (2008); Jocelyn Kempema, Note, *Imitation is the Sincerest Form of . . . Infringement?: Guitar Tabs, Fair Use, and the Internet*, 49 WM. AND MARY L. REV. 2265 (2008). Fan-based activities may be a preferable nomenclature, however, as it emphasizes the often communal nature of those activities, and the effects shared values and norms can exert on fan behavior. See Transforming Fan Culture into User-Generated Content: The Case of FanLib, [http://www.henryjenkins.org/2007/05/transforming\\_fan\\_culture\\_into.html](http://www.henryjenkins.org/2007/05/transforming_fan_culture_into.html) (May 22, 2007, 09:27 EST) (“The industry tends to see these users in isolation -- as individuals who want to express themselves, rather than as part of pre-existing communities with their own traditions of participatory culture.”).

11. See U.S. CONST. art. I, § 8, cl. 8 (declaring the “promot[ion of] the Progress of Science” to be the purpose of “securing for limited times to Authors . . . the exclusive Right to their respective Writings”). “Science” as used in this clause refers to “scienter,” or knowledge. See also MELVILLE B. NIMMER & DAVID NIMMER, 1-1 NIMMER ON COPYRIGHT § 1.03 (2009) (“The primary purpose of copyright is not to reward the

enhancing the limited monopolistic incentives reserved by copyright to the original author.

Previously, I construed fan-based activities as a narrow class derived from original works that have garnered popularity sufficient to constitute a fandom. However, in actuality this class may apply to any original narrative work,<sup>12</sup> insofar as any such work has the capacity to garner a fandom, which then may give rise to fan-based activities. In this way, the re-conceptualization of copyright proposed by this article may have far-reaching implications for virtually any creative work. The interpretive rights framework introduced in this article allows copyright law to keep pace with changing times and practices by recognizing that an author implicitly cedes certain interpretative rights to the general public when he or she introduces a work into the stream of public discourse. These interpretive rights, which manifest in recognized fair uses like review and parody, as well as fan-based activities, may also serve to illustrate why fan-based activities should be allowed to thrive alongside the works of the original authors.

Part II highlights the distinctive characteristics of fan behavior that result in works like doujinshi and fansubs, uses those characteristics to delineate the class of fan-based activities, and considers the questions those activities raise for traditional conceptions of copyright. Part III offers a possible answer in the form of a conceptual framework that allocates certain rights of interpretation to the public while preserving the incentives of the copyright holder. Part IV demonstrates how the proposed re-conceptualization furthers copyright's constitutional imperatives, and explores the metes and bounds of the framework through a series of contextual examples.

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author, but is rather to 'secure the general benefits derived by the public from the labors of authors.'") (citations omitted).

12. To the extent that activities exhibiting fan-based characteristics may arise around non-narrative creative works, such as paintings and sculptures, the considerations explored in this article may apply to those works as well. While this area of inquiry is worthy of further exploration, it is beyond the scope of the present article.

# I. THE CHARACTERISTICS OF – AND QUESTIONS RAISED BY – FAN-BASED ACTIVITIES

In Japan, doujinshi borrowing copyrighted elements<sup>13</sup> from anime, manga, and a host of other media are created and sold by amateur artists at conventions supported and attended by industry members.<sup>14</sup> So long as the releases do not compete with domestic versions of the anime or manga titles in question, anime and manga companies and their licensees have largely turned a blind eye to the internet activities of thousands of fansub groups.<sup>15</sup> At least one U.S. licensee has followed the example of fansub groups and has made subtitled anime episodes available as freestreaming content on its website.<sup>16</sup> The persistence of doujinshi, fansubs, and similar fan-based activities is best explained by looking to the fans themselves.

## A. Four Principles of Fan Behavior

First, fans are predisposed to refrain from activities that erode the copyright holder's economic or creative interests. A fan relies too much on the copyright holder's output to endanger it by engaging in competitive or predatory practices that could push the author's works off the air or out of print. Current anime and recent manga and video game releases

13. Although governed by Japanese as opposed to U.S. law, the Japanese Copyright Act affords its copyright holders rights that are virtually identical to its U.S. counterpart. See Japanese Copyright Act (CHOSAKUKEN), art. 21-28, available at [http://www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html) (attributing the rights of reproduction, performance, presentation, public transmission, recitation, exhibition, distribution, transfer of ownership, lending, translation, adaptation, and exploitation of a derivative work to the holder of a Japanese copyright).

14. See, e.g., COMIC MARKET 73 CATALOG, *supra* note 8, at 1169-80 (listing more than 100 commercial vendors' booths participating in the event) (on file with author). The catalog itself is replete with sponsoring advertisements for anime, manga, and video games.

15. See Animesuki.com, Groups, <http://www.animesuki.com/group.php> (last visited Nov. 15, 2009) (listing hundreds of active fansub groups).

16. See, e.g., *Funimation to Offer 2009 Fullmetal Alchemist on April 9 (Update 3)*, ANIME NEWS NETWORK, Apr. 3, 2009, <http://www.animenewsnetwork.com/news/2009-04-03/funimation-to-stream-2009-fullmetal-alchemist-on-april-9> (describing FUNimation's plans to offer the second *Fullmetal Alchemist* anime adaptation on its own website) [hereinafter ANIME NEWS NETWORK]; FUNimation Videos, <http://www4.funimation.com/video/> (last visited Nov. 15, 2009) (offering *Fullmetal Alchemist*, *School Rumble 2*, and other licensed titles as free streaming content) [hereinafter FUNimation Videos].

often serve as the basis for the majority of new doujinshi releases.<sup>17</sup> Likewise, fansub groups could hardly continue their operations without a constant stream of new anime episodes from Japanese airwaves. In this way, if the author's work sinks, the fans go down with the ship.

Second, fans proselytize others to share in their affections. This tendency is readily corroborated by the history of U.S. fansubs,<sup>18</sup> and holds true across the spectrum of fan-based activities. Conventions are held, websites managed, and newsletters distributed not only to maintain lines of interaction between fans, but also to expand exposure to and interest in the underlying work. Numerous fans of professional football paint or garb themselves in the colors and emblems of their championed team, just as many trekkers and other science fiction fans attend conventions clothed in the uniforms and attire of their favorite characters. They do so in part to identify with members of their fandom, but also to draw the attention of others – some of whom might, having been initiated into the fandom, join their ranks. Perhaps in part because fans' self-interest is so closely aligned with the interests of the author and the success of his or her work, proselytizing activities serve to bolster simultaneously the popularity of the underlying work and, by extension, the fans' own sense of identity and self-esteem.

Third, the fans' preoccupation with the delineation between canon (that which is considered "official," or to have actually happened within a fictional universe) and non-canon (that which is not) prevents their activities from eroding the copyright holder's incentives. The issue of "canonicity" often arises in situations where a fictional universe expands to the point where the narrative contained within one medium contradicts the narrative contained within another. An example would be an event in a manga that develops differently in an anime adaptation, or not at all.<sup>19</sup> Fan

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17. See, e.g., COMIC MARKET 73 CATALOG, *supra* note 8, at 75-411 (containing a majority of doujinshi circle listings that advertise works based on recently released manga, video games, or currently airing anime series).

18. See Leonard, *supra* note 6, at 213-14 (asserting that "fans built fervor for anime by constructing an open proselytization commons, whose chief aim was to spread anime as far and wide as possible").

19. An example of this situation arose between the original manga version and anime adaptation of *Rurouni Kenshin*, where the events of volumes nineteen through twenty-eight of the manga were replaced by another story arc in the anime. Another

preoccupation with canonicity occurs most prominently in the United States among fans of major science fiction franchises like *Star Trek* and *Star Wars*, whose fans have created entire databases to distinguish canon from non-canon.<sup>20</sup> The importance fans ascribe to canonicity preserves the author's artistic and economic integrity, drawing a firm line between the original work, canon derivatives, and the subsequent derivative works crafted by fans. In the fans' eyes – and, accordingly, in the marketplace – the official will always trump the unofficial.

Fourth, because fans thrive not only on the object of their affections, but also through the community that grows from their mutually shared interests, they tend to engage in activities that reinforce those communities. In this way, there are noteworthy parallels between contemporary fan culture and traditional folk culture:

Fan culture, like traditional folk culture, constructs a group identity, articulates the community's ideals, and defines its relationship to the outside world. Fan culture, like traditional folk culture, is transmitted informally and does not define a sharp boundary between artists and audiences. Fan culture, like folk culture, exists independently of formal social, cultural, and political institutions; its own institutions are extralegal and informal with participation voluntary and spontaneous. Fan texts, like may folk texts, often do not achieve a standard version but exist only in process, always open to revision and re-appropriation.<sup>21</sup>

Fan communities often adopt their own extralegal codes of conduct, enforcing them informally through peer pressure or ostracism from the community. By doing so, the community functions to a certain extent as internal regulatory force, discouraging aberrant activities that erode the original

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example is the movie adaptation of the comic book *Watchmen*, which, while generally faithful to the original work, replaced the climactic giant squid alien attack with a nuclear holocaust. See Zack Snyder Confirms Non-Squid Ending in Watchmen Movie, COMICBOOKMOVIE.COM, Nov. 10, 2008, <http://www.comicbookmovie.com/watchmen/news/?a=5186>.

20. See, e.g., Memory Alpha, <http://memory-alpha.org> (last visited Nov. 16, 2009) (containing a fan-maintained, Wikipedia-like database of Star Trek information, wherein most articles distinguish between canonical and non-canonical accounts); Firefly Wiki, <http://fireflywiki.org> (last visited Nov. 16, 2009) (containing a similar database for the TV series *Firefly*).

21. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 656 (1997) (quoting HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 272-73 (1992)).



author's incentives and threaten the existence of the community while encouraging involvement in activities that benefit both the fans and the works they adore.

### *B. Defining Fan-Based Activities*

The four preceding fan characteristics establish criteria for delineating a class of fan-based activities. An activity is fan-based if it is (1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the author's economic and creative interests. First, because the fan's interests are largely entwined with those of the original author, fan-based activities are never undertaken to exploit the fruits of the original author's labor. Instead, they serve to proselytize others to the underlying work or strengthen the interconnections between constituent fans and the fan community at large. Second, the symbiotic relationship between the fan community and the success of the underlying work means that fan-based activities will augment, rather than subtract from, the author's aggregate economic and creative incentives.

### *C. The Enigma Posed – and Opportunities Raised – By Fan-Based Activities*

The characteristics of fan-based activities demonstrate that certain forms of infringing works and behavior actually serve to further the dual constitutional goals of copyright: to augment the public's stores of knowledge, and to incentivize further advances by furnishing authors with limited-time monopolies over their works.<sup>22</sup> This appears counterintuitive to the conception of copyright as something that holders should defend with near-jealous vigor. It suggests that there are nuances to the creative process that the contemporary formulation of copyright fails to appreciate. If copyright law remains unchanged, and the phenomena of fan-based activities remains unexplored, many copyright holders may be instinctively driven to enforce their copyrights in situations that not only hinder the growth of public knowledge and

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22. See U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science . . . by securing for limited times to Authors . . . the exclusive Right to their respective Writings.").

discourse but also impair the copyright holders' own economic and creative well-being. In this way, a framework that explains why fan appropriation of copyrighted works is not only a fair use under Section 107 of the Copyright Act<sup>23</sup> but quintessentially fair to both the copyright holder and the public at large can help copyright holders better determine when it is in their interest to enforce their copyright, and when it is in everyone's interest simply to let potential infringement go. An examination of the relationship between authors and their audiences reveals the elements of an interpretive rights framework that may do just that.

## II. INTERPRETIVE RIGHTS, CREATIVE TELEOLOGY, AND THE IMPORTANCE OF CANONICITY: A PROPOSED FRAMEWORK

### *A. Interpretive Rights: Sowing the Seeds of Derivation*

It is no major departure from ordinary conceptions of copyright to argue that an author's placement of his or her creative work in the stream of public consciousness – through publication, transmission, or similar action – implicitly cedes certain rights of interpretation to the public at large. These interpretive rights are distinct from copyright; they may be conceptualized as a kind of implied license between author and audience, granting the members of that audience the ability to appropriate certain copyrighted aspects of a creative work and use them in subsequent works that interpret the underlying creative work.

The most obvious of these interpretive rights is the right to

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23. Section 107 indicates that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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; (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.

17 U.S.C. § 107 (2009).

review.<sup>24</sup> One need only read one of the reviews in *Publishers Weekly*<sup>25</sup> or on Roger Ebert's website<sup>26</sup> to realize that the entire entertainment review industry is driven by the creation, distribution, and sale of unlicensed derivative works – namely, the reviews themselves. Every review of a creative work is *ipso facto* derived from that work; no critic can review a novel, short story, television episode, motion picture, or any other creative composition without invoking some element of the underlying work. Granted, use for the purpose of criticism or comment is expressly enumerated as fair under Section 107,<sup>27</sup> but citing the inclusion of those purposes in the Copyright Act begs the question: why should the unauthorized use of copyrighted elements for criticism or commentary be allowed?

The answer reveals itself when one considers what would happen if the law required critics to obtain a license from copyright holders before reviewing their respective works. Such a requirement would empower copyright holders to selectively license only the most favorable reviews, thereby stifling open discourse and tainting the objectivity of any review so licensed. The perception in the public's mind that a licensed review, by virtue of its licensed status, is predisposed to be skewed in favor of the underlying work implicitly negates the proselytizing effect of a favorable review. The process of licensing reviews then becomes an exercise in futility, ending somewhere between industry-wide acquiescence to unauthorized reviews and the quashing of all industry-related critical discourse. The former is preferable, as the potential benefits of unbiased reviews largely outweigh the potential detriments for the industry at large: unbiased reviews bolster the success of worthy creative works by distinguishing them from their mediocre or subpar counterparts, which arguably would be poorly received with or without unflattering reviews. The Copyright Act recognizes this, and accordingly legitimizes unauthorized

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24. For the purposes of this article, "comment," also explicitly enumerated as a fair use under Section 107, is subsumed into the term "review."

25. Publishers Weekly, <http://www.publishersweekly.com> (click on the "See All Reviews" button under the "Reviews" tab) (last visited Nov. 16, 2009).

26. Rogerebert.com, <http://rogerebert.suntimes.com> (last visited Nov. 16, 2009).

27. See H.R. REP. NO. 94-1476, at 65, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (noting that the examples enumerated in Section 107 "give some idea of the sort of activities the courts might regard as fair use under the circumstances").

reviews through the fair use doctrine.<sup>28</sup>

Section 107 points to another implicit right of interpretation: the right to parody.<sup>29</sup> Parody usually entails greater appropriation of the underlying work than a review does: “When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its satire recognizable.”<sup>30</sup> Nevertheless, it also brings to bear a larger infusion of originality on the part of the parodist than a review demands of the reviewer.<sup>31</sup> The only danger lies in the possibility, however remote, that the demand for a parody could supplant demand for the parodied work.<sup>32</sup> Courts accordingly balance a parody’s effect on the market for the parodied work against its social and artistic value to the public: the more likely supplantation becomes, the more crucial a role the parody’s transformative and critical value plays in the judicial determination of fair use.<sup>33</sup>

Consistent with the rights to review and parody, the placement of a creative work in the stream of public consciousness can be viewed as ceding yet another right of interpretation to the public at large: the right to create fan-based works. These works, like the fan-based activities that give rise to them, are a subset of derivative works that (1) complement, rather than compete with, the underlying work, and (2) enhance the original author’s aggregate economic and creative interests. Fan-based works are unique among the works that result from interpretive rights in that they are inextricably dependent on the underlying creative work as well as the fan discourse surrounding it; this dual dependency makes them objects of inherently intermingled authorship.

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28. See 17 U.S.C. § 107 (2009).

29. See H.R. REP. NO. 94-1476, at 65, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (listing parody as one example of “the sort of activities the courts might regard as fair use under the circumstances”).

30. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994).

31. See *id.* at 579 (noting that “parody has an obvious claim to transformative value. . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one”).

32. A hypothetical example of this supplantation involving Ronald D. Moore’s reimagined *Battlestar Galactica* television series is discussed *infra*, Part IV.E.

33. See *id.* n.14 (“If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives . . . it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the original.”).

This renders the fan-author unable to claim copyright over a fan-based work insofar as the work is neither sufficiently original nor the direct product of his or her own authorship. The fan-based work is so profoundly dependent on copyrighted elements from the underlying work, and so inextricably bound up with other fan-based discourse, that it falls outside the realm of copyrightable subject matter.<sup>34</sup> As such, anyone – whether a member of the public, a fellow fan, or the original author him or herself – can appropriate any portion of a fan-based work for use in another.<sup>35</sup>

Like other works of authorship, fan-based works contribute to the public's store of knowledge. Their effect on the original author's economic and creative interests, however, is not quite so clear. While they appear to function as complementary goods to the original works they are based on, insofar as they proselytize others to the underlying work rather than supplant demand for it, fan-based works nevertheless encroach upon the copyright holder's exclusive right to create derivative works<sup>36</sup> at least as much as parodies do. This conflict is even more salient in situations where a fan-based work potentially preempts the original author from creating his or her own derivative work. Those situations, if left unchecked, would not only stifle the original author's output of derivative works, but also discourage the author from producing new, original works<sup>37</sup> because of the potential for other fan-based works to usurp the author's right to create subsequent works derived from the original.

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34. See 17 U.S.C. § 103(b) (2009) (noting that “[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work”).

35. The work appropriating elements from a fan-based work may itself be copyrightable, as in the case of such a work created by the original author, or itself a fan-based work, in turn uncopyrightable in of itself and capable of subsequent appropriation by other works.

36. See 17 U.S.C. § 106(2) (2009).

37. See, e.g., Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 388 (2005) (warning that an abolition of the derivative right “would force authors to hurry creation of adaptations of their own works,” and that, while “[u]nauthorized adaptations . . . might provide some value to consumers, . . . these works might simply reflect shifts in resources from production of more original copyrighted works, as well as from other markets”); but see, e.g., Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1216 (1997) (noting that, “[g]iven the importance of appropriation in various fields of art and other expressive activities, current copyright law seems, at least, counter-intuitive,” and suggesting that the derivative right be redefined).

Fortunately, the very nature of fan-based activities, particularly the shared interests of the fans and the original author and the fans' own preoccupation with canonicity, keep them and the works they produce from harming the original author's interests. The concept of creative teleology<sup>38</sup> helps to illustrate the relationship between fan-based works and derivative works of the original author.

### *B. Creative Teleology: Toward the Best of All Fictional Worlds*

Creative teleology is best described in relation to serial-length creative works like television and multiple-novel series. It is the direction that an author wishes an original creative work and its derivatives to take collectively, his or her selected chain of events that lead to a particular end. Consider, for example, J.K. Rowling's *Harry Potter* series; from the first book to the last, Rowling reveals her vision for the series as a whole, taking Harry from orphan to hero as he saves the wizarding world from its greatest foe. Arguably, the story that made it to print is a fair representation of the story that Rowling intended to tell, and in that way, those seven books fulfill her creative teleology for the series.

Rowling's creative teleology is far, however, from the only one possible. One reader of the *Harry Potter* series may share in that teleology – that is, agree that it represents the best possible direction for the series as a whole. Another may disagree with the way that Rowling developed her plot, believing instead that an alternate chain of events would have been a better path for the storyline. Yet still another might adore Rowling's treatment of Harry and his friends in every aspect but one: on page 759 of *Harry Potter and the Deathly Hallows*, the story ends.<sup>39</sup>

The way fans feel when their personal creative teleologies diverge from the original author's is not hard to imagine. Almost everyone has encountered a novel that left too many loose ends, a television series that jumped the shark,<sup>40</sup> a

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38. Teleology (from the Greek *telos*, meaning end or purpose) is the philosophical study of design and purpose. This article introduces the concept of "creative teleology" to denote a given individual's authorial take on a particular creative work – in essence, the way that individual believes that work should develop and, ultimately, end.

39. See J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* 759 (Arthur A. Levine Books 2007).

40. The expression "jumping the shark" is "a colloquialism used by TV critics and

movie adaptation that represented the original about as faithfully as a reflection in a funhouse mirror. At least some of us have paused between paragraphs, during a commercial break, or while shuffling across the aisle and thought, “I could’ve done better.” A few go on to do just that: some successful authors cite reading and recognizing bad fiction as an important part of their growth as a writer.<sup>41</sup>

In the same fashion, fans who think they can improve upon the original author’s creative teleology express their dissatisfaction through a variety of outlets. Some fume privately and do their best to put their dissatisfaction behind them; others go online and lambast the original author’s artistic vision on forums shared by their peers. A few might put pen to paper and attempt to bring their version of the story – their creative teleology – to life.<sup>42</sup> Those who simply want the story to continue beyond the point that the original author laid down his or her pen may do the same, composing entirely new storylines with the familiar characters and trappings of their favorite series. In our own individual ways, we each have a personal take on – and stake in – a creative work, a private creative teleology that reflects where we feel the story should go, and how it ought to end. To a certain extent, an author’s success or failure in crafting an original creative work depends on whether that work manages to fulfill our deepest and most heartfelt expectations for the story in a way that is both surprising and largely inevitable. When an author falls shy of fulfilling this implicit promise to his or her audience – or, on occasion, if he or she is too

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fans to denote the point in a television program’s history where the plot spins off into absurd story lines or unlikely characterizations.” *Jumping the shark* - Wikipedia, the free encyclopedia, [http://en.wikipedia.org/wiki/Jumping\\_the\\_shark](http://en.wikipedia.org/wiki/Jumping_the_shark) (last visited Nov. 16, 2009). It “refers to the climactic scene in ‘Hollywood,’ a three-part episode opening the fifth season of the American TV series *Happy Days* in September 1977. In this story, the series’ central characters visit Los Angeles, where Fonzie (Henry Winkler), wearing swim trunks and his trademark leather jacket, jumps over a confined shark on water skis, answering a challenge to demonstrate his bravery.” *Id.* Jon Hein describes it as “[a] defining moment when you know that your favorite television program has reached its peak.” *Id.* (citing *Jump The Shark...what is this all about?*, <http://web.archive.org/web/20000817233601/www.jumptheshark.com/about.htm>).

41. See, e.g., STEPHEN KING, *ON WRITING: A MEMOIR OF THE CRAFT* 140 (Pocket Books 2002) (describing reading terrible fiction as “the literary equivalent of a smallpox vaccination”).

42. See, e.g., Fanfiction.net, <http://www.fanfiction.net> (hosting millions of fan-created fiction set in and appropriating various commercial milieus and characters).

successful in doing so – a few members of that audience may be driven to bring their own creative teleologies to bear.

So what happens when fans do just that, and share the fruits of their labors with other fans, or perhaps even the public at large: does their encroachment on the original author's exclusive right to produce derivative works disserve copyright's dual constitutional imperatives? What if the fans seek to profit from their fan-based works – must their gain always be at the original author's expense? Should that author then be entitled to sue those fans and claim the profit as his or her own?

The traditional authorial response to these questions is a fevered "Yes!"<sup>43</sup> Especially when fans attempt to turn a profit, many authors are conditioned to see fan-based works as an affront to their creative and economic interests.<sup>44</sup> However, these authors overlook two important factors: first, the very nature of fan-based activities and their resultant works insulate the original author from economic or creative harm, and second, any success enjoyed by the fan-based work inevitably proselytizes others to the underlying work. In addition, when one recognizes the insulating role canonicity plays in distinguishing the original author's creative teleology from the creative teleologies of the fans and public at large, the answer to these questions, whether posed to the author, the fans, or the public, becomes a stalwart "No."

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43. See, e.g., Nick Taylor, *The Prospects for Copyright in a Bookless World*, 30 COLUM. J.L. & ARTS 185, 185-86 (2007) (predicting "that copyright – already under both de facto and practical attack by a broad and loose coalition of internet users, misinformed technophiles, content snatchers – excuse me, I meant to say thieves – and Stanford law professors – will continue to suffer the slings and arrows of people for whom ease of assembly is a more important concept than paying authors and other artists for their work," and further vilifying those people as both "mean-spirited" and "misinformed"). But see, e.g., Free Culture, <http://free-culture.cc/index.html> (last visited Nov. 15, 2009) (offering resources on Lawrence Lessig's book, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY, which is available both as a traditional book in retail stores and as free, downloadable content under a Creative Commons Attribution-Noncommercial License).

44. See, e.g., Taylor, *supra* note 43.



*C. Canonicity: The Authorial Mandate of Heaven*<sup>45</sup>

Canonicity sets the original author's creative teleology apart from all other creative teleologies. It is an implicit stamp of legitimacy that gives the original author's work primacy over every fan-based work that comes after it. If fiction were nonfiction, canonicity would liken an original author's work to an autobiography: no matter what feats of flowery prose or astute scholarship subsequent biographers achieve, the demand for their works can never directly supplant demand for the original author's work. The popularity of subsequent biographies, however, may rekindle interest in the subject of those biographies. Inevitably, this interest will in turn increase the demand for the original author's work. After all, what satiates an inquisitive mind more than the subject's life story told first-hand, in his or her own words?<sup>46</sup>

The fundamental role that canonicity plays in setting an original author's work apart from the derivative works of fan-authors and others can be seen in the way that fans carefully distinguish between canon and non-canon.<sup>47</sup> In this way, canonicity instills the original author's creative output with economic and creative superiority over any derivative, fan-based work. The original author's works enjoy economic superiority in that, if forced to choose between the author's works and near-identical fan-based works,<sup>48</sup> the fans themselves will always opt for the works of the original

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45. The Chinese philosophical concept of the Mandate of Heaven encompasses the notion that heaven bestows its blessing upon the rule of a just ruler, and, in turn, revokes it from the rule of a despotic one. A comparison of canonicity with the Mandate of Heaven is particularly apt if one analogizes the Mandate's blessing of heaven with canonicity's blessings of the fans and the public at large. Just as it is possible for heaven to revoke the Mandate from a sorely incapable ruler, it is possible for the fans and public at large to revoke their blessings from an equally incapable original author. For a fuller discussion of the repercussions of such a revocation, see *infra* Part IV.F. A useful comparison can also be drawn between the "stamp of canonicity" and the goodwill associated with a famous mark.

46. See, e.g., NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (Macdonald Purnell 1995); ANTHONY SAMPSON, *MANDELA: THE AUTHORIZED BIOGRAPHY* (HarperCollins 1999) (an authorized – and, in that respect, canonical – biography written after *LONG WALK TO FREEDOM* that provides details on events in Mandela's life that the autobiography does not).

47. See *supra* note 20.

48. Note that this is a contrived choice, as the author's work and fan-based works, being complementary, do not compete for the same market.

author. The author's works enjoy creative superiority in that the original author is, in fact, the originator of the work's copyrighted elements – principal characters, distinctive aspects of the milieu, etc. Thus, the author is presumptively the greatest authority on those elements and the story they comprise. So long as they exhibit definitively fan-based characteristics – namely, a complementary relationship with, and a proselytizing effect on the market for, the underlying work – fan-based works are incapable of injuring the original author's economic or creative interests. Moreover, the stamp of canonicity assures the primacy of the original author's works over those of fan-authors, providing an additional layer of protection for the interests of the original author.

#### *D. Summarizing the Interpretive Rights Framework*

When an author places his or her original creative work in the stream of public consciousness, he or she implicitly cedes to the public certain rights of interpretation, notable among them the rights to review, parody, and create fan-based works. The interpretive right to create fan-based works reflects the notion that the original author's creative teleology is not the only one possible, and this empowers the public – in the form of fan-authors – to explore their own creative teleologies for the underlying work, and to share the resultant fan-based works with others. The works of fan-authors further both of copyright's constitutional imperatives, by expanding the breadth of works in the stores of public knowledge and, by virtue of the principles of canonicity, preserving – and even at times enhancing – the original author's economic and creative interests.

### III. TRIAL BY FANDOM: INTERPRETIVE RIGHTS IN THE REAL WORLD

Perhaps the best way to test the accuracy and explicative value of the interpretive rights framework may be to bring it to bear on a series of contexts that tease out the murkiest aspects of the interactions between copyright and fan-based activities. Interestingly, and as a testament to the timeliness of an inquiry into the nature of fan-based activities, all but the last of the following contexts are pulled entirely from real-world situations. The richness and breadth of these examples

speak both to the pervasiveness of fan-based activities in our increasingly globalized and borderless world, and to the urgent need to reexamine issues relating to these emergent practices, lest copyright law fall so far behind the times as to betray its fundamental constitutional mandates.

*A. When Fans (and Actors) Want an Encore: Star Trek: Phase II and Of Gods and Men*

The dawn of the twenty-first century was a dark time for the fans of *Star Trek*. *Enterprise*, the latest installment of the franchise, suffered a long-term decline in ratings that culminated in its eventual fourth-season cancellation on February 2, 2005, making it the first *Star Trek* series since the original to be cancelled rather than concluded by its producers. The final episode, aired on May 13, 2005, marked more than the end of the series: it heralded the end of an eighteen-year-long run of continuous *Star Trek* television programming.

However, even as *Enterprise* languished in its death throes, a group of fans looked back longingly at *Star Trek*'s origins. Forming a production company called Retro Film Studios,<sup>49</sup> they sought to continue the original series where it had left off nearly forty years before, with a new cast of fan-actors assuming the principle roles of the starship *Enterprise*'s crew.<sup>50</sup> Their goal: "to produce a full year's worth (22 or more) web episodes per year maintaining Gene Roddenberry's philosophy and vision for the original 1960's television show. . . . We feel that Star Trek is a great vehicle for exploring the human condition."<sup>51</sup> As of early 2009, *Star Trek: Phase II* (formerly *Star Trek: New Voyages*) has filmed five episodes and one vignette, releasing them as web-episodes freely downloadable from their website.<sup>52</sup> Nominated for a Hugo Award in 2008,<sup>53</sup> the series is notable for its strong

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49. See *Retro Films Studios [us]*, INTERNET MOVIE DATABASE, <http://www.imdb.com/company/co0188531/>.

50. See *Star Trek: Phase II Home Page*, *Star Trek: Phase II Cast / Crew*, [http://www.startreknewvoyages.com/cast\\_crew.html](http://www.startreknewvoyages.com/cast_crew.html) (last visited Nov. 16, 2009).

51. *Star Trek: Phase II Home Page*, *Star Trek: Phase II FAQ*, <http://www.startreknewvoyages.com/faq.html> (last visited Nov. 15, 2009).

52. *Star Trek: Phase II Home Page*, *Star Trek: Phase II Downloads*, <http://www.startreknewvoyages.com/downloads.html> (last visited Nov. 16, 2009).

53. The Hugo Awards: 2008 Hugo Award Results Announced,

production values and recurring ability to bring veteran *Star Trek* actors back to reprise their roles.<sup>54</sup> Following the success of *Star Trek: Phase II*, a group of *Star Trek* actors and alumni produced a three-part mini-series entitled *Star Trek: Of Gods and Men*, intended by its producers as a fortieth anniversary gift from *Star Trek* actors to their fans.<sup>55</sup>

In the four-year dry spell of *Star Trek* productions between the 2005 cancellation of *Enterprise* and the 2009 release of J.J. Abrams' *Star Trek* motion picture, these fan-based productions helped keep the flame of *Star Trek* fandom alive, much as syndication and fan conventions sustained interest in *Star Trek* throughout the decade separating the cancellation of the original series and the release of *Star Trek: The Motion Picture*.<sup>56</sup> Perhaps in deference to the same fan fervor that convinced NASA to name its first space shuttle "*Enterprise*,"<sup>57</sup> *Star Trek* franchise owner CBS has done all but endorse these not-for-profit fan-based endeavors, even posting several articles publicizing these unauthorized productions on the official *Star Trek* website.<sup>58</sup>

The success of fan-based productions like *Phase II* and *Of Gods and Men* demonstrate fans' pervasive desire to explore their own creative teleologies as fan-authors, and to share the resultant fan-based works with others. It also, in keeping with the entire saga of the *Star Trek* franchise, underscores the positive effect that fan-based activities can exert on the interests of the original author or copyright holder, effectively breathing new life into a creative work that could have died

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<http://www.thehugoawards.org/2008/08/2008-hugo-award-results-announced/> (last visited Nov. 16, 2009).

54. Examples include original series actors George Takei (Hikaru Sulu), Walter Koenig (Pavel Chekov), and Grace Lee Whitney (Janice Rand), as well as *The Next Generation*'s Denise Crosby (playing Dr. Jenna Yar, a progenitor of her *The Next Generation* character Tasha Yar) and Majel Roddenberry (computer voice). See *Star Trek: Phase II Home Page*, *Star Trek: Phase II Cast / Crew*, [http://www.startreknewvoyages.com/cast\\_crew.html](http://www.startreknewvoyages.com/cast_crew.html) (last visited Nov. 15, 2009). Notably, Eugene Roddenberry, Jr., the son of series creator Gene Roddenberry, serves as a consulting producer for the series. *Id.*

55. *Star Trek: Of Gods and Men* – Wikipedia, the free encyclopedia, [http://en.wikipedia.org/wiki/Star\\_Trek:\\_Of\\_Gods\\_and\\_Men](http://en.wikipedia.org/wiki/Star_Trek:_Of_Gods_and_Men) (last visited Mar. 24, 2009).

56. See Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation,"* 24 U. TOL. L. REV. 43, 43 (1992).

57. *Id.* at 44.

58. See, e.g., *Let There Be Lights: "Of Gods and Men" Shoots*, STARTREK.COM, July 12, 2006, <http://www.startrek.com/startrek/view/news/article/19255.html>.

only three years into its original five-year voyage.

Whether the proselytizing effect of these fan-based activities would be augmented if CBS were to allow the fans to profit from the resultant works – thereby increasing the incentives for fans to engage in proselytization, as well as their ability to garner the funding necessary to finance these ambitious undertakings – may not be empirically demonstrable. However, the defining characteristics of fan-based activities, coupled with the primacy afforded to the original author or copyright holder via the stamp of canonicity, strongly suggest that allowing fans to profit from their fan-based works would benefit CBS, just as it would the fans and public at large. Ultimately, the notion of allowing fans to profit from their fan-based works requires a delicate but firm differentiation between profit and proselytization on the one hand, and profiteering and exploitation on the other.

### *B. Crossing the Fan-Based Line: The Harry Potter Lexicon*

The conflict between J.K. Rowling and the author of an unauthorized Harry Potter reference book provides a test case for this distinction. Steven Vander Ark's web site, The Harry Potter Lexicon,<sup>59</sup> is premised upon the best of fan-based intentions: "to organize and discuss the complicated and very elaborate world of Harry Potter."<sup>60</sup> Hailed as "a great site" and "my natural home" by J.K. Rowling herself,<sup>61</sup> the Lexicon in its free, web-based format is a paradigmatic example of a fan-based work, designed both as a resource for the Harry Potter fan community and a potential gateway for new readers to find their way to – and through – Rowling's fictional world.

However, when Vander Ark and publisher RDR Books proceeded to publish the Lexicon in book form at \$24.95 a

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59. The Harry Potter Lexicon, <http://www.hp-lexicon.org/index-2.html> (last visited Nov. 16, 2009).

60. Associated Press, *J.K. Rowling testifies: Fan's book is 'wholesale theft,'* Apr. 15, 2008, available at <http://today.msnbc.msn.com/id/24122901/> [hereinafter AP Rowling] (quoting publisher RDR Books' attorney, Anthony Falzone).

61. J.K.Rowling.com, The Harry Potter Lexicon, [http://www.jkrowling.com/textonly/en/fansite\\_view.cfm?id=14](http://www.jkrowling.com/textonly/en/fansite_view.cfm?id=14) ("This is such a great site that I have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter (which is embarrassing). A website for the dangerously obsessive; my natural home.").

copy, Rowling sued to enjoin its publication,<sup>62</sup> expressing her displeasure upon learning that “Vander Ark had warned others not to copy portions of his Web site[,]”<sup>63</sup> and criticizing the book by noting that “[i]t provided no analysis and virtually no commentary. It takes far too much and it offers precious little in return.”<sup>64</sup> Rowling ultimately prevailed in the lawsuit, and Vander Ark and RDR eventually published a new version of the book, entitled *The Lexicon: An Unauthorized Guide to Harry Potter Fiction*,<sup>65</sup> revised to include “a lot more critical commentary” and with plot spoilers removed, to comply with the court’s instructions.<sup>66</sup> Neil Blair, a lawyer for Rowling’s agent, expressed “delight[] that this matter is finally and favorably resolved and that J.K. Rowling’s rights – and indeed the rights of all authors of creative works – have been protected.”<sup>67</sup>

The interpretive rights framework offers even deeper insight into the legal drama between Rowling and Vander Ark than traditional conceptions of copyright. Under traditional analysis, Rowling appears to have tolerated the infringement constituted by Vander Ark’s website in the hope of encouraging fan activity and discourse. She then chose to enforce her copyright against his work when he overtly attempted wholesale appropriation of elements and quoted language from her original works, incorporating them into a work for which he claimed authorship, and which he intended to publish and sell as his own copyrighted work. Under the traditional doctrine of fair use, because the Lexicon’s use of Rowling’s works was not consistently transformative, and because it took more from those works than was reasonably necessary to create an A-to-Z reference guide, the court determined that Vander Ark “should not be permitted to ‘plunder’ the original works of authors . . . ‘without paying the

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

63. AP *Rowling*, *supra* note 60.

64. *Id.* (quoting J.K. Rowling).

65. RDR Books Online Bookstore, *The Lexicon: An Unauthorized Guide to Harry Potter Fiction* (R), [http://store.rdrbooks.com/index.php?main\\_page=product\\_info&cPath=7&products\\_id=67](http://store.rdrbooks.com/index.php?main_page=product_info&cPath=7&products_id=67) (last visited Nov. 15, 2009).

66. Associated Press, *Revised Potter encyclopedia to be released*, Dec. 5, 2008, available at <http://today.msnbc.msn.com/id/28070572/>.

67. *Id.* (quoting Neil Blair).

customary price.”<sup>68</sup> After the court’s ruling, Vander Ark revised the Lexicon to address the court’s concerns – in particular, reducing direct quotes to Rowling’s works, eliminating plot spoilers, and increasing the proportion of original commentary and analysis – thereby bringing his work into stricter compliance with fair use standards, to the satisfaction of both sides of the dispute.

This analysis of the events transpiring between Rowling and Vander Ark leaves a key question unanswered: why did Rowling tolerate Vander Ark’s infringement in its website form, but not in print? A cynical onlooker might surmise that she had pecuniary interests in mind; however, the fact that Rowling sought – and eventually granted – only injunctive relief and the minimal damages prescribed by statute, coupled with her agent’s subsequent expression of pleasure at the publication of the revised Lexicon, indicates that monetary gain was not the primary goal of the litigation. Another question arises with regard to the line that should be drawn between the original Lexicon – which fell outside the scope of fair use – and the revised Lexicon, – which, by virtue of Judge Patterson’s analysis<sup>69</sup> and Rowling’s tacit acceptance of its publication, appears to constitute fair use.

The interpretive rights framework clarifies the questions plaguing the view offered by traditional conceptions of copyright. Rowling did not sue Vander Ark for his work in website form because, as a freely accessible web resource, it represented the very epitome of a fan-based work – that is, a work that complements and proselytizes others to the work on which it is based. Under the interpretive rights perspective, Rowling implicitly granted the public the interpretive right to create fan-based works with the publication of the *Harry Potter* series, and the Lexicon in website form, as a fan-based work, merely represented the exercise of this implicit right. However, the moment that Vander Ark sought to prevent others from copying his fan-based work, his actions encroached on the exclusive rights reserved to Rowling as the original author of the underlying works, and he thereby exceeded the scope of the interpretive right ceded to him by

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68. *Warner Bros.*, 575 F. Supp. 2d at 551 (quoting *Harper & Row, Publishers, Inc. v. Nat’l Entm’t*, 471 U.S. 539, 562 (1985)).

69. *See id.* at 539-51 (analyzing Vander Ark’s *Lexicon* under section 107’s four-factor test for fair use).

the publication of Rowling's books. In doing so, Vander Ark's conduct ceased to constitute a fan-based activity, and the Lexicon, in turn, no longer qualified as a legitimate manifestation of his interpretive right to create fan-based works. Rowling was then justified in enforcing her copyright against Vander Ark's infringing conduct. When Vander Ark revised the Lexicon by excising direct quotes to, and spoilers from, Rowling's works, and incorporating original and substantial commentaries not found in the website version, he transformed his work into the product of a different interpretive right: the right to review. This interpretive right, unlike the right to create fan-based works, granted Vander Ark the ability to create a largely original work of authorship – in essence, a copyrightable work – that borrowed a “fair” portion of material from Rowling's books. Thus, the dispute between Rowling and Vander Ark can be described as reflecting the Lexicon's metamorphosis from fan-based work to infringing work, and then, post-lawsuit, from an infringing work to an original work borrowing a “fair” portion of material – per Section 107 of the Copyright Act – from another original work.

*C. Story Bursting Forth, Full-Grown and Armed, From Music's Forehead: There she is!!*

In 2004, a flash animation titled *There she is!!*,<sup>70</sup> created by the Korean animator group SamBakZa, garnered unexpected popularity when SamBakZa member Amalloc posted it to the Newgrounds website, exposing it to Western audiences. Notable for its fluid animation, *There she is!!* attracted tremendous positive feedback, including fan art, which motivated SamBakZa to produce four more animations in the series.<sup>71</sup> The first animation won several first-place awards at the 2004 Anima Mundi festival in Brazil.<sup>72</sup> Even more notable for the purposes of the interpretive rights framework is that each installment of the *There she is!!* series

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70. See SamBakZa's Flash, Newgrounds, <http://sambakza.newgrounds.com/flash/> (last visited Nov. 15, 2009) (listing all of SamBakZa's flash animations available on the Newgrounds website).

71. *There she is!!* – Wikipedia, the free encyclopedia, [http://en.wikipedia.org/wiki/There\\_she\\_is!!](http://en.wikipedia.org/wiki/There_she_is!!) (last visited Mar. 24, 2009).

72. *Id.*



is choreographed to a different Korean pop (“K-Pop”) song; the first animation is set, predictably enough, to a song titled “There she is!!” by the K-Pop group Witches.<sup>73</sup>

With each K-Pop song providing a soundtrack integral to the action and events in each flash animation, *There she is!!* represents a unique instance of a fan-based work derived from music. The dramatic effectiveness of each animation depends heavily on the melodies and – for those who can comprehend them – the lyrics of the appropriated songs, which are incorporated into a work that extrapolates a specific and cumulative storyline from the images and emotions suggested by those melodies and lyrics. Although SamBakZa’s animations are original, they appropriate the underlying songs wholesale, but do so in a way that is distinctively fan-based by promoting those songs, often overtly, in the form of an “Easter egg” link to a musician’s website,<sup>74</sup> or in advertising posters for the song and performer integrated into the animation itself,<sup>75</sup> to audiences and markets that otherwise would have no exposure to them.<sup>76</sup> At present, SamBakZa’s *There she is!!* animations occupy a kind of copyright limbo; while popular and highly regarded in their own right, concerns over copyright have stymied requests for versions of the animations for viewing on iPods,<sup>77</sup> as well as requests for merchandising.<sup>78</sup>

If U.S. copyright alone controlled, and the *There she is!!* animations were recognized as fan-based works – as they likely would be under the interpretive rights framework – SamBakZa would have the latitude to accommodate requests for iPod video versions and merchandizing, and would even be able to freely profit from its animations without fear of lawsuits on the part of the songs’ copyright holders. SamBakZa’s profit from such merchandising would in no way impede interest in the original artists’ songs. Instead, the

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73. *Id.*

74. *Id.* (describing a link to the artist T.A.COPY’s website embedded in a black poster).

75. See *There she is!!* step 2, <http://www.newgrounds.com/portal/view/224148> (last visited Nov. 15, 2009) (displaying ads for the background song, “Happy birthday to me” by Bulldog Mansion, in the subway scene).

76. See *supra* note 71 (linking to two online stores selling the Witches’ CD album, which includes “There she is!!” as a track).

77. *Id.*

78. See *supra* note 72.

already sizable proselytizing effect that the songs have enjoyed would be further augmented by the increased visibility of the *There she is!!* series: the availability of t-shirts, DVDs, and other merchandising would increase awareness of the flash animations, which in turn would increase awareness of the underlying songs.

Interestingly, in situations resembling that of the *There she is!!* series, where the underlying creative work is so far removed that the fan-based work is virtually its own original work – albeit one that borrows substantially from the underlying work – the fan-based work itself can enjoy a sort of second-level canonicity that gives it primacy over any other fan-based works that appropriate its elements. Insofar as SamBakZa is the creator of those original elements, independent of any element borrowed from or contributed by the underlying songs, it would enjoy a similar stamp of canonicity, affording it an economic and creative advantage over subsequent, *There she is!!*-derived, fan-based works.

*D. Software Mascot Plus Original Character Plus Music Video Equals Franchise: Black Rock Shooter*

Miku Hatsune, the principle mascot of Yamaha Corporation's Vocaloid2 singing synthesizer computer application, has garnered a fan following large enough to give even the most popular J-Idols pause. Starring in countless doujinshi, two manga volumes, and spawning several anime figurines, a forthcoming Playstation Portable video game, and her own music album, *Re:package* – which sold over 20,000 copies in its first week, and broke into the Oricon charts (the Japanese equivalent of the Billboard Hot 100) at fifth place<sup>79</sup> – Miku Hatsune is arguably one of the most popular and prolific two-dimensional celebrities at work today. In a stroke of commercial genius, her singing voice – the core of her bestselling album – is that of the original Vocaloid2 synthesizer application itself.<sup>80</sup>

Although ostensibly an “original character” created by the artist huke, “Black Rock Shooter” bears a striking resemblance to Miku Hatsune, from her knee-length pigtailed

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79. See Vocaloid – Wikipedia, the free encyclopedia, <http://en.wikipedia.org/wiki/Vocaloid> (last visited Apr. 10, 2009).

80. See *id.*

to her alabaster complexion and lithe build. Whether truly an original character or a darker, warped version of her commercial lookalike,<sup>81</sup> Black Rock Shooter began her life as a single illustration on her creator's website.<sup>82</sup> A fan named ryo composed a song for her, using – predictably – the same Vocaloid2 software that gave Miku Hatsune her voice, and collaborated with huke to create a promotional video that was then posted to Nico Nico Douga, the Japanese analogue to YouTube.<sup>83</sup> The resulting torrent of internet frenzy and fandom has propelled Black Rock Shooter and her creator huke into a bone fide franchise, with an official figurine,<sup>84</sup> several t-shirt and stationary designs,<sup>85</sup> and even an upcoming anime series.<sup>86</sup>

The ambiguity of Black Rock Shooter's status as an "original character" or a Miku Hatsune derivative is a prime example of fan-based activities at work. The character as rendered in the original illustration, though bearing similarities to Miku Hatsune, diverges enough in artistic style and design to substantiate huke's assertion that Black Rock Shooter is an original character. However, sufficient similarity exists between Miku Hatsune and Black Rock Shooter to influence subsequent fan-based illustrations – works drawing heavily from both characters – which rendered Black Rock Shooter in an increasingly Miku Hatsune-like light.<sup>87</sup> The fan-based promotional video deepened this fan association between the two characters by utilizing a fan-

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81. See Black Rock Shooter Figure – A Dark Hatsune Miku, <http://www.sankakucomplex.com/2009/03/05/black-rock-shooter-figure-a-dark-hatsune-miku/> (last visited Nov. 15, 2009).

82. HWB, <http://huke.blog.shinobi.jp/>.

83. See Hatsune Miku ga originaru wo utatte kureta yo "BLACK ROCK SHOOTER" [Presenting Miku Hatsune singing an original song, "Black Rock Shooter"], <http://www.nicovideo.jp/watch/sm3645817> (requires a Nico Nico Douga user account to access the video).

84. See *id.*

85. See HobbyLink Japan, <http://www.hlj.com/> (search for "Black Rock Shooter" under Quick Search for listings of related apparel and "fun goods").

86. *Black Rock Shooter Anime with Yutaka Yamamoto Confirmed for Spring (Updated)*, ANIME NEWS NETWORK, Aug. 22, 2009, <http://www.animenewsnetwork.com/news/2009-08-22/hatsune-miku-anime-with-yutaka-yamamoto-confirmed-for-spring>.

87. See, e.g., Gelbooru.com, <http://gelbooru.com/index.php?page=post&s=view&id=590964> (featuring a work of fan art tagged both as an image of "black rock shooter" and "hatsune miku," and containing colors and design elements from both).

authored soundtrack created with the Vocaloid2 software – and, in that way, “sung” by Miku Hatsune.<sup>88</sup> In this instance, interaction between fan-based works strengthened the connection between these two characters and their respective fan bases, evincing the sort of cross-proselytizing effect that fan-based works can exert on the markets for two related – but distinct – original works of authorship.

*E. So Say We All: A Fan-Based Battlestar Galactica and the Revocation of Canonicity*

The last interpretive rights example moves from what has occurred to what might have: suppose Ronald D. Moore’s critically acclaimed *Battlestar Galactica*<sup>89</sup> remake was instead an unauthorized, fan-based work under the interpretive rights framework. Let us assume that, after watching the original series, Moore and his creative staff decided to explore their own creative teleology for the series, succeeded in assembling the same cast, writers, and production crew, and even negotiated the same four-season run on the Sci-Fi Channel. Under the interpretive rights framework, the re-imagined series would have the characteristics of a fan-based work, as its impressive success and popularity would ultimately proselytize others to the original 1978 series.

Or would it? Outside of an insular core of original *Battlestar Galactica* fans, many fans of the re-imagined series are apt to remember the original with more of a shudder than a smile.<sup>90</sup> In many ways, Moore’s *Battlestar Galactica* has proven more successful than its predecessor, both

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88. See Hatsune Miku ga originaru wo utatte kureta yo “BLACK ROCK SHOOTER” [Presenting Miku Hatsune singing an original song, “Black Rock Shooter”], <http://www.nicovideo.jp/watch/sm3645817> (requires a Nico Nico Douga user account to access the video).

89. Based on a short-lived 1978 sci-fi television series of the same name. Declining ratings and cost overruns led to the cancellation of the original *Battlestar Galactica* by ABC. Battlestar Galactica (TOS) – Battlestar Wiki, [http://en.battlestarwiki.org/wiki/Battlestar\\_Galactica\\_%28TOS%29](http://en.battlestarwiki.org/wiki/Battlestar_Galactica_%28TOS%29) (last visited Nov. 16, 2009).

90. See, e.g., *Geeking out to ‘Galactica,’* NEWSWEEK, Oct. 4, 2006, <http://www.newsweek.com/id/57643> (describing the original series as an “unfortunate[] . . . predecessor, a 1978 ‘Star Wars’ clone that presented humanity fleeing through space, pursued by robots with the same blinking red LEDs that was later adopted by the talking car in ‘Knight Rider’”).

commercially and critically.<sup>91</sup> Could a fan-based *Battlestar Galactica* completely eclipse the original and, if it did, what would it mean for the original series' stamp of canonicity?

If it possessed the same high production values – impeccable writing, sweeping musical scores, inspired direction, evocative acting, etc. – as the re-imagined *Battlestar Galactica*, it would be entirely possible for a fan-based work to outshine the work on which it was based. Nevertheless, the success of such a fan-based work would not negatively impact the economic or creative interests of the original creator. Those who would have liked the original series absent the re-imagined version would still like it, for the very same reasons; the mere fact that a fan-based work is equally or more attractive than the original does not intrinsically diminish the merit of the original work. Also, while most of those who disliked the original *Battlestar Galactica* will continue to dislike it in largely the same ways after seeing Moore's version, a few may be convinced to give the original series another viewing and – perhaps due to its positive association with the re-imagined series – may end up enjoying it. The difference between the bright campiness of the original series and the raw grit of the re-imagined version, however, means that those receptive to the proselytizing effect of Moore's *Battlestar Galactica* may be less inclined to appreciate the original series on which it was based. Nevertheless, a few of those *Battlestar Galactica* proselytes may come to appreciate – and thereby increase the demand for – the original *Battlestar Galactica*. Meanwhile, the fans who initially supported the original series may appreciate the re-imagined version, or see it as an affront to the sanctity of the series' true version; either way, their interest in the original series is undisturbed by the success of the re-imagined series.

Interestingly, under the interpretive rights framework,

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91. E.g., compare Mary McNamara, 'Battlestar' crew confronts a terrible reality, Los Angeles Times, Jan. 16, 2009, available at <http://articles.latimes.com/2009/jan/16/entertainment/et-battlestar-galactica16> (citing the remade *Battlestar*'s "ability to anchor fantasy with vivid and recognizable human psychology" as "what lifts all great works out of the confines of genre") with Travis Mackenzie Hoover, *Battlestar Galactica* - Widescreen DVD, <http://filmfreakcentral.net/dvdreviews/battlestargalactica.htm> (last visited Nov. 16, 2009) (noting that the original series's "leaden and convoluted plot" and "general artistic lethargy results in a limp and bloodless film drained of vitality").

*Battlestar Galactica*'s original creator – or the successor to his copyright – could appropriate wholesale elements from Moore's hypothetical fan-based remake, and then proceed to produce an "official" *Battlestar Galactica* remake, one that represents the original creator's creative teleology in response to Moore's interpretation. By intermingling the original aspects of his creative teleology with integral elements from the original *Battlestar Galactica*, as one would under the interpretive rights framework, Ronald Moore would have relinquished any claim of copyright he otherwise would have possessed over his original contributions. By irretrievably combining those contributions with elements appropriated from the original series, he would have created a fan-based work that could be freely reinterpreted and, in turn, appropriated by the public, fellow fans, or even Glen A. Larson, the creator of the original *Battlestar Galactica* himself. Insofar as his fan-based work represents his own creative teleology for *Battlestar Galactica*, and so long as his work promotes rather than competes with the original series, Moore would even be entitled to profit from his fan-based remake. In turn, fan-based works inspired both by the original *Battlestar Galactica* and Moore's fan-based version would be equally entitled to profit. If one of these fan-based works – whether Moore's, or some subsequent rendition – happened to resemble a derivative work contemplated, but not yet produced, by the original creator, that fan-based work would in no way preclude the creator from producing that derivative work. Moreover, the fan-based work would not impede the demand or market for a derivative work created by Larson because, as long as Larson's work possesses the stamp of canonicity, no fan-based work would be able to compete with it, or exclude Larson from creating subsequent derivatives.

But what if Larson's supposed derivative work is so unequivocally bad that it makes the public lose faith in his creative teleology? Or, what if Moore's work is so vastly superior to Larson's attempt that the public at large begins to regard Moore as a better authority on *Battlestar Galactica* than Larson himself? However improbable, the possibility remains that an original author could produce a derivative work so inferior – or a fan-author could produce a fan-based

work so superior – as to induce public opinion to remove the stamp of canonicity from the original author’s derivative.<sup>92</sup> At that point, canonicity would no longer protect the primacy of Larson’s subsequent works. In effect, it seems that by doing so well, or by Larson doing so poorly, Moore could effectively steal the incentives that copyright reserves for Larson, as *Battlestar Galactica*’s original creator.

Fortunately, the definitive characteristics of fan-based activities prevent this from occurring. Even without the stamp of canonicity, the complementary nature of fan-based works keeps them from directly competing with the works of the original author. An original author’s poorly executed derivative work will likely prove to be a commercial and creative failure, with or without the presence of superior fan-based works. In addition, the mere presence of superior fan-based works does not stop the faithful few, unfazed by the quality of the work, who remain invested in the original author’s creative teleology from enjoying his derivative works. The market demand for the original author’s admittedly substandard derivative works is unchanged, whether it sits on store shelves beside a vastly superior fan-based work or not: it is the quality of the original author’s derivative work itself that determines its successfulness. Ultimately, the only injury that an original author can suffer at the hand of a highly successful fan-based work has nothing to do with copyright, and everything to do with ego.

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92. The movie *HIGHLANDER 2: THE QUICKENING* is an example of an official derivative work so poorly realized that most fans have dismissed its canonicity. *HIGHLANDER 2* departed so dramatically from the original film in back story, congruity, and aesthetic quality that it has almost universally panned by critics and fans alike. See RottenTomatoes.com, *Highlander 2: The Quickening*, [http://www.rottentomatoes.com/m/highlander\\_2\\_the\\_quickening/](http://www.rottentomatoes.com/m/highlander_2_the_quickening/) (last visited Nov. 15, 2009) (listing zero-percent positive reviews and an overall “rotten” rating). Perhaps Roger Ebert, who gave the movie one-half stars out of four, put it best: “*Highlander 2: The Quickening* is the most hilariously incomprehensible movie I’ve seen in many a long day – a movie almost awesome in its badness. Wherever science fiction fans gather, in decades and generations to come, this film will be remembered in hushed tones as one of the immortal low points of the genre.” RogerEbert.com, *Highlander 2: The Quickening*, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19911101/REVIEWS/111010305/1023> (last visited Nov. 15, 2009).

## CONCLUSION

As the preceding contextual examples have shown, the proposed interpretive rights framework serves to fill gaps in traditional conceptions of copyright where fan-based activities and resultant works are involved. The notion that authors cede to the public an implicit right of interpretation upon placing their work in the stream of public consciousness explains both existing fair uses like review and parody, but also demonstrates the fairness of fan-based activities. The concept of creative teleology illustrates the potential advancements that fan-based works can contribute to the stores of public knowledge. Finally, the stamp of canonicity, coupled with the intrinsically complementary nature of fan-based works themselves, preserves the original author's economic and creative interests.

Taking cues from the proselytizing and complementary characteristics of fan-based activities like doujinshi and fansubs, the world has begun to recognize the potential boon that fan-based activities provide to copyright holders and the public alike. Grassroots anime conventions, hybridized descendents of the Japanese doujinshi markets and U.S. comic book conventions like Comic-Con,<sup>93</sup> serve as gathering points for the sale and distribution of both authorized derivatives and unauthorized fan-based works, and garner active participation and support from members of the Japanese and U.S. anime industries.<sup>94</sup> Meanwhile, perhaps in recognition of the proselytizing power of online fansubs, U.S. anime distributors like FUNimation have begun to make subtitled versions of their licensed anime titles available online as free streaming content, only days after their initial airing on Japanese television.<sup>95</sup> Fan groups and commercial

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93. San Diego Comic-Con International, first held in 1970, is "the country's leading comics and popular arts convention." Comic-Con 2010: What's New, <http://www.comic-con.org/cc> (last visited Nov. 16, 2009).

94. See, e.g., GAMERS EVOLUTION EXPO, L.L.C., KAWAII-KON: HAWAII'S PREMIER CONVENTION & CONFERENCE, Apr. 10-12, 2009 (containing diagrams of separate rooms for commercial vendors and amateur artists to set up booths and sell their respective authorized and unauthorized goods; listing guests from the Japanese and U.S. anime industries) (on file with author).

95. See, e.g., ANIME NEWS NETWORK, *supra* note 14 (describing FUNimation's plans to offer the second *Fullmetal Alchemist* anime adaptation on its own website); FUNimation Videos, *supra* note 14 (offering *Fullmetal Alchemist*, *School Rumble 2*, and other licensed titles as free streaming content).



industries alike are increasingly doing what copyright law thus far has not: accounting for and harnessing the complementary and proselytizing power of fan-based activities, for the mutual benefit of all.

The interpretive rights framework provides a way for copyright law to keep pace with changing times and practices by recognizing the original author's implicit cession of interpretative rights and delineating the position of fan-based activities alongside other forms of interpretation like review and parody. The concept of creative teleology reveals the fundamental and dynamic expansion of knowledge that fan-based activities can facilitate by allowing the public to express their individual artistic visions for established narrative works, while the implicit stamp of canonicity buttresses the intrinsically complementary and proselytizing characteristics of fan-based activities, further insulating the original author from creative or economic harm. Ultimately, the interpretive rights framework demonstrates how fan-based works both increase the public's stores of knowledge and preserve and augment the original author's incentives, and, accordingly, illustrates why the law should allow them to thrive alongside the works of the original authors.