

2010

Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere

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Recommended Citation

Jacqueline D. Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 *Maryland Law Review* 1 (2010).

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MARYLAND LAW REVIEW

VOLUME 70

2010

NUMBER 1

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Articles

COPYRIGHT'S *TWILIGHT ZONE*¹: DIGITAL COPYRIGHT LESSONS FROM THE VAMPIRE BLOGOSPHERE

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I. INTRODUCTION

*"I did not want my readers to experience *Midnight Sun* before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author As the author of the *Twilight Saga*, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public[] Unfortunately, with the Internet, it is easy for people to obtain and share items that do not legally belong to them. . . . This has been a very upsetting experience for me, but I hope it will at least leave my fans with a*

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1. *The Twilight Zone* Series (CBS television broadcast 1959–1964).

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*better understanding of copyright and the importance of artistic control.*²

In this online posting, Stephenie Meyer, the author of the popular *Twilight* series, describes her reactions to the leak of a draft manuscript of her work, *Midnight Sun*, and its dissemination over the Internet.³ During production on the film adaptation of the book, *Twilight*, Meyer was working on a new project, *Midnight Sun*, which retold the original story from a different perspective.⁴ While *Twilight* is narrated by the series' heroine, Bella Swan, *Midnight Sun* retells the story from the perspective of her vampire love interest, Edward Cullen.⁵ Meyer had released drafts of *Midnight Sun* to some individuals involved in the production of the *Twilight* movie.⁶ The manuscript was then leaked and appeared on the Internet.⁷ Meyer subsequently posted her own "official" version of the *Midnight Sun* manuscript on her website, urging her fans not to read any versions of the unauthorized, uncompleted text but encouraging them to read her version if they felt so compelled.⁸

New Web 2.0 participatory technologies, such as blogs and online social networks ("OSNs"), enable consumers to more readily interact with digital works online.⁹ These technologies enable original creators of works, such as Meyer, to communicate with their fans about their works.¹⁰ Meyer actively maintains digital contact with her fans

2. Stephenie Meyer, *Midnight Sun: Edward's Version of Twilight*, OFFICIAL WEBSITE OF STEPHENIE MEYER (Aug. 28, 2008), <http://www.stepheniemeyer.com/midnightsun.html>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* (explaining that "I have a good idea how the leak happened" as it "was given to trusted individuals for a good purpose").

7. *Id.*

8. *Id.* ("I'd rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes. But how do I comment on this violation without driving more people to look for the illegal posting?").

9. See DAVID KESMODEL, *THE DOMAIN GAME: HOW PEOPLE GET RICH FROM INTERNET DOMAIN NAMES* 126 (2008) ("Web 2.0 was a buzz word used to describe a new wave of Web businesses that leveraged social networking, user-generated content, and other forms of collaboration and information-sharing on the Internet."); JANET LOWE, *GOOGLE SPEAKS: SECRETS OF THE WORLD'S GREATEST BILLIONAIRE ENTREPRENEURS, SERGEY BRIN AND LARRY PAGE* 294 (2009) (defining Web 2.0 as "[a] term used to describe an evolving generation of a participatory Web" and "the proliferation of interconnectivity and social interaction on the World Wide Web"); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460 ("From blogs to wikis to podcasting to 'mashup' videos and social networking sites like Facebook and MySpace, the web 2.0 culture encourages users to engage, create, and share content online.").

10. KESMODEL, *supra* note 9, at 126 (explaining that Web 2.0 allows for collaboration and information-sharing).

on her official website, updating them on her work¹¹ and cross-linking to their blogs.¹² She routinely comments on how she would like her work to be experienced.¹³ She has requested that her readers avoid unauthorized versions of *Midnight Sun*.¹⁴ She has asked fans not to post “spoilers” about forthcoming works.¹⁵ And she wants certain materials removed from fan websites at particular times to avoid interference with the release of new movies and books.¹⁶ Meyer’s relationship with her fans illustrates how Web 2.0 technologies enable today’s authors and artists to actively engage in discourse with their fans¹⁷ and allow fans to respond through text, mashup videos,¹⁸ and fan fiction.¹⁹

These forums advantageously contain rich anecdotal data from a variety of perspectives for legislators and policymakers focused on copyright law about emerging social norms and expectations. Traditionally, commercial publishers, producers, and distributors took center stage in debates about appropriate legal protections for copyrighted works.²⁰ Today, other perspectives are also available, includ-

11. See Seth, Comment by Seth, OFFICIAL WEBSITE OF STEPHENIE MEYER (Aug. 2, 2010), <http://www.stepheniemeyer.com/index.html> (“The paperback version of *Breaking Dawn* will be released in a few hours and is currently available for pre-order.”).

12. Stephenie Meyer, *Twilight Series Fansites*, OFFICIAL WEBSITE OF STEPHENIE MEYER, http://www.stepheniemeyer.com/ts_fansites.html (last visited Sept. 9, 2010).

13. See, e.g., *Twilight Playlist*, OFFICIAL WEBSITE OF STEPHENIE MEYER, http://www.stepheniemeyer.com/twilight_playlist.html (last visited Sept. 9, 2010) (suggesting a list of music for her fans to listen to that Meyer “hear[s] in [her] head while reading [*Twilight*]”).

14. Meyer, *supra* note 2.

15. See, e.g., Stephenie Meyer, *Breaking Dawn*, OFFICIAL WEBSITE OF STEPHENIE MEYER (July 7, 2008), <http://www.stepheniemeyer.com/breakingdawn.html> (requesting that her fans refrain from posting or “spread[ing] . . . around” any *Breaking Dawn* spoilers on the Internet because the book is “meant to be experienced in a certain way,” which an online spoiler may ruin).

16. *Id.* (noting that many fansites will be removing message boards as a favor to Meyer to reduce the possibility that a spoiler will ruin a fan’s reading experience).

17. Cf. *supra* note 9 and accompanying text.

18. Lee, *supra* note 9, at 1509 (defining mashups as “works that incorporate . . . portions of copyrighted material from elsewhere into their works”).

19. Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 598 n.6 (2007) (defining fan fiction as “fiction about characters or settings written by fans of the original work, rather than the original creators” (internal quotation marks omitted)); Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 387–99 (2009) (discussing the interaction of fan fiction, which “includes all derivative fiction and related works created by fans, whether authorized or unauthorized by the author of or current right-holder in the original work,” with copyright law).

20. See, e.g., *Summit Entm’t v. Beckett Media*, No. 09-8161, 2010 WL 147958 (C.D. Cal. Jan. 12, 2010) (considering a request for an injunction by a movie studio claiming copyright and trademark infringement where an unauthorized *Twilight* fan magazine used photos, promotional materials, and trademarks from the film).

ing the views of original artists and their fans.²¹ In addition, the new forums blur the line between consumers and creators.²² Consumers have increasingly become creators.²³ The ability of consumers, themselves, to create and to communicate with original authors profoundly alters the matrix of norms and expectations surrounding uses of copyrighted works online.²⁴ While previous online intellectual property battles focused on preventing digital copyright piracy in the face of early digital technologies, Web 2.0 issues are more nuanced and complex.²⁵ Today's consumer-creators have a very different set of interests in copyrighted works because of the ease in making derivative works and engaging in digital commentary and parody.²⁶

21. See, e.g., Meyer, *supra* note 12 (providing a forum for the author to communicate with fans and links to fans' websites).

22. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 564 (2000) (explaining that the Internet allows consumers to "play the roles of producer and consumer"); see also LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 107 (2008) (explaining that "[t]he single most important effect of the 'digital revolution' is the democratization of writing").

23. See LESSIG, *supra* note 22, at 28–31, 106–08 (noting the capacity that remix technologies give the new generation of children in terms of the potential to remix text, images, film, and music); JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 131–32 (2008) ("[Y]oung people are not passive consumers of media . . . but rather active participants in the making of meaning in their culture. Their art form of the remix, where digital files are combined to create a new video or audio file, is already having an effect on cultural understanding around the world."); Chander & Sunder, *supra* note 19, at 600 ("The increasing power and affordability of digital tools may make it possible to go beyond rewriting stories in words, to permit video and audio creations, often through mash-ups of existing copyrighted material."); Margaret Ann Wilkinson & Natasha Gerolami, *The Author as Agent of Information Policy: The Relationship Between Economic and Moral Rights in Copyright*, 26 GOV'T INFO. Q. 321, 331 (2009) ("As information technology continues to re-shape the future, the distributed, digital environment (where every author is also potentially a publisher and every user is possibly also either an author or a publisher, or both) is challenging the oldest copyright controls, the economic rights." (footnote omitted)).

24. For example, numerous *Twilight* fansites use copyrighted materials from Meyer's books and the *Twilight* movies. See, e.g., Forums, TWILIGHT SERIES BOARDS, <http://thetwilightseriesboards.com/forum/> (last visited Sept. 9, 2010) (displaying photographs from the movies and using characters, plot, and other copyrighted or trademarked materials in various online postings). Although this material might ordinarily infringe on Meyer's copyright, she encourages her fans to visit these sites by listing them and linking to them on her homepage. See Meyer, *supra* note 12 (listing fansites on Meyer's official homepage and linking to them).

25. Cf. PALFREY & GASSER, *supra* note 23, at 131–32 (suggesting that (1) "digital natives" break the law "on a regular basis" by illegally downloading music or watching television shows or movies illegally, whereas "their parents and grandparents" had to purchase music from a store, and (2) this shift "has forced us to rethink a system of copyright that is at odds with the dominant social norms of a generation").

26. See Chander & Sunder, *supra* note 19, at 600 (explaining how those expanding on original works can distribute their creations and have interests in their work).

Web 2.0 forums, including OSNs,²⁷ blogs,²⁸ wikis,²⁹ and virtual worlds,³⁰ have supported the development of online communities of consumer-creators that are developing their own norms and expectations relating to the use of creative works online.³¹ Much of their Web 2.0 conduct does not fit neatly within existing intellectual property paradigms. Copyright law, for instance, aims to incentivize artistic innovation by prohibiting free riding on the works of others, usually in the commercial arena.³² Newer online consumer-creator communities, however, generally engage in conduct that is not typically motivated by commercial profit;³³ the rewards of much of this conduct lie instead in communicative and reputational value.³⁴ An argument

27. Examples of OSNs include Facebook and MySpace. FACEBOOK, <http://www.facebook.com/> (last visited Sept. 9, 2010); MYSPACE, <http://www.myspace.com/> (last visited Sept. 9, 2010); see also LOWE, *supra* note 9, at 292 (defining social networking as “[w]ebsites that allow people to share ideas, information, and images and to form networks with friends, family, or other like-minded individuals.”).

28. LOWE, *supra* note 9, at 288 (defining blog as “[s]hort for *Web log*, or a string of journal entries posted on a Web page”); PALFREY & GASSER, *supra* note 23, at 345 (defining blogs as “[o]nline journals written by individuals, ordinarily the unedited voice of a single person,” explaining that “[t]he term derives from ‘web log[.]’” and noting that they “are becoming an increasingly popular source of news” as “[m]ore and more people, young and old, are writing and reading blogs”).

29. LOWE, *supra* note 9, at 294 (defining wikis as “[a] collection of Web pages that enables anyone who accesses them to contribute or modify content, using a simplified computer language”).

30. PALFREY & GASSER, *supra* note 23, at 28–29 (describing the operation of virtual worlds, like Second Life, as online environments where participants can form their own identities and interact pseudonymously).

31. See generally Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1873–91 (2009) (examining positive aspects of allowing social norms to function as a regulator of fan fiction and remix activities online).

32. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 24–25 (4th ed. 2005) (explaining that copyright law “provides the incentive to create information and a shelter to develop and protect it” but is “limited in time and scope by such doctrines as idea/expression, originality, and fair use” and “represents an economic tradeoff between encouraging the optimal creation of works of authorship . . . and providing for their optimal access, use, and distribution”).

33. See Chander & Sunder, *supra* note 19, at 616 & n.114 (suggesting that “amateur fan fiction is typically authored without remuneration in mind,” but noting that commercial success may be an effect (citing John Jurgensen, *Rewriting the Rules of Fiction*, WALL ST. J., Sept. 16, 2006, <http://online.wsj.com/article/SB115836001321164886.html>)).

34. For example, the pseudonymous author Cassandra Clare parlayed her popularity in the fan fiction world into contracting for her own series of popular commercial novels. See Robert Colville, *Boldly Go Where No One Has Gone Before*, TELEGRAPH.CO.UK (Jan. 27, 2007, 12:01 AM), <http://www.telegraph.co.uk/technology/3350729/Boldly-go-where-no-one-has-gone-before.html>. Cassandra Clare is a bestselling young adult author whose career began in fan fiction. *Id.* Before publishing her own works, Clare wrote fan fiction involving *Harry Potter* and was praised for her originality and accused of plagiarism. *Id.*; see also Chander & Sunder, *supra* note 19, at 613–16 (describing important communicative and

could be made that the noncommercial uses of copyrighted works in this context should never conflict with copyright law.³⁵

This Article argues that legislators and policymakers focused on copyright law should take full advantage of the exponentially increasing amount of information available in the blogosphere about emerging norms that govern the use of copyrighted works online. Norms can regulate a certain amount of conduct on their own, but laws should also support these norms where possible and appropriate.³⁶ At the very least, laws should not flout well accepted norms if the norms are not causing harm to one or more copyright stakeholders (no pun intended).

This Article employs four case studies that involve the *Twilight* books and movies to illustrate the types of norms that are emerging in the Web 2.0 copyright context. Part II outlines the challenges Web 2.0 technologies pose to existing copyright paradigms. Part III introduces the four case studies. Part IV extrapolates lessons from the case studies that might guide future developments in Web 2.0 copyright law and policy. Part V sets out some conclusions about the future of copyright law in the digital age.

II. COPYRIGHT AND WEB 2.0 FORUMS

Because of their interactive and largely noncommercial nature, Web 2.0 technologies raise new challenges for the current legal system, particularly intellectual property law.³⁷ These laws have tended to focus on the protection of economic rights,³⁸ but Web 2.0 partici-

cultural contributions of fan fiction to existing literature and suggesting that amateur fan fiction is not done for remuneratory purposes).

35. See *infra* Part III.C.2 for a discussion of the impact of commercial motivations on the fair use analysis. In other contexts, it has been noted that copyright holders do not object to noncommercial uses being made of copyrighted works by fans. See, e.g., Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 680–81 (2006) (suggesting that “[j]ambands may surrender a great deal of control over their intellectual property to their fans” but “do not allow their commercial releases to be copied” or “allow people to make any commercial gain off their live recordings,” and noting that “some bands insist that fans stop trading all recordings of a show if it is included in a commercially released live album” or “require soundboard recordings to be withdrawn if a show is released commercially”).

36. See generally Hetcher, *supra* note 31, at 1934 (concluding that the “fair use doctrine creates an opening for norms to play a substantial regulatory role in copyright law”).

37. Chander & Sunder, *supra* note 19, at 616 (exploring the commercial motives behind amateur fan fiction in the context of parody).

38. LEAFFER, *supra* note 32, at 22 (“[T]he author is given, through the limited monopoly of copyright law, a private property right over his creation, the worth of which will ultimately be determined by the market. The underlying policy of this constitutional provision is to promote the public welfare through private market incentives.”).

pants are not typically motivated by financial reward.³⁹ Fans share information about copyrighted works online, often posting short movie clips or video mashups on blogs and other online forums.⁴⁰ Their behaviors and motivations differ greatly from the copyright “pirates” who are targeted by existing digital copyright laws.⁴¹

The domestic nature of copyright law, even as augmented by international agreements,⁴² creates practical enforcement limitations. For one, the wide geographical dispersal of online fans makes it difficult to identify alleged online infringers.⁴³ Even where the alleged infringer can be identified, it may be difficult for a copyright holder and the court to assert personal jurisdiction over her.⁴⁴ But even if jurisdiction can be established, bad publicity might haunt copyright owners and licensees for bringing actions against their customers.⁴⁵

The geographically dispersed nature of much online conduct has prompted many commentators to suggest the need for multi-modal approaches to regulating online conduct, particularly in the intellectual property context.⁴⁶ In the early days of the Internet, Professor Lawrence Lessig famously promoted system architecture, or software

39. See also discussion *infra* Part III.C.2.

40. See *supra* note 24.

41. Cf. Hetcher, *supra* note 31, at 1892–93 (noting that although some remix artists do not seek to commercialize their work, if they can, they will “to make a living”).

42. See, e.g., World Intellectual Property Organization Copyright Treaty, *adopted on* Dec. 20, 1996, 112 Stat. 2860, 2186 U.N.T.S. 152; World Intellectual Property Organization Performances and Phonograms Treaty, *adopted on* Dec. 20, 1996, 112 Stat. 2860, 36 I.L.M. 76; Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 102 Stat. 2853, 1161 U.N.T.S. 3.

43. See, e.g., *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 246 (D.D.C. 2003) (considering whether copyright holders can seek identities of alleged digital copyright infringers from Internet service providers).

44. See generally Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1404 (2001) (concluding that the current legal thinking on Internet jurisdiction tends toward a “targeting-based analysis” that requires a determination regarding “whether the party knowingly targeted the particular jurisdiction and could reasonably foresee being haled into court there”).

45. On occasion, copyright holders take legal action directly against their customers. See, e.g., *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (establishing the procedural history of the case, namely that a copyright holder brought an action against an individual file sharer for copyright infringement).

46. See generally LAWRENCE LESSIG, *CODE: VERSION 2.0*, at 5 (2006) (“In real space, we recognize how laws regulate—through constitutions, statutes, and other legal codes. In cyberspace we must understand how a different ‘code’ regulates—how the software and hardware (i.e., the ‘code’ of cyberspace) that make cyberspace what it is also regulate cyberspace as it is.”).

code, as a key regulator of online conduct.⁴⁷ He also identified other important regulatory modalities, including market forces and social norms.⁴⁸ Others have suggested other modes of regulation, including public education and the use of nonprofit institutions to develop effective regulation of online behavior.⁴⁹

Because this Article focuses on online communities organized around particular artistic works, the two key modes of regulation considered here are legal rules and social norms. Social norms are an extremely important form of regulation within cohesive communities.⁵⁰ Norms can be more powerful regulators than laws because, as opposed to sanctions for infringing laws, sanctions for infringing norms can be more immediate and more consistently enforced.⁵¹

As noted before, modern Web 2.0 technologies enable identification of norms and expectations from the perspectives of authors, creators, consumers, producers, and distributors. Looking at a broader matrix of perspectives will allow regulators to enact and enforce laws that better meet the needs of the larger community instead of focusing on one or two interest groups with the greatest lobbying power. It is particularly important that future regulators consider the perspectives of copyright audiences in the Web 2.0 context precisely because of the blurred line between producers and consumers.⁵² Yesterday's

47. See generally *id.* at 5–6 (explaining how code regulates cyberspace and noting that “[w]e can build, or architect, or code cyberspace to protect values that we believe are fundamental” or “build, or architect, or code cyberspace to allow those values to disappear”).

48. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

49. See, e.g., Jacqueline D. Lipton, “We, the Paparazzi”: *Developing a Privacy Paradigm for Digital Video*, 95 IOWA L. REV. 919, 952 (2010).

50. See Lessig, *supra* note 48, at 513 (“In a small and closely knit community, norms might be the optimal mode of regulation; as that community becomes less closely knit, law or the market might become second-best substitutes.”). Although one may argue that a group of online fans for a particular work is not the type of “cohesive community” usually associated with norm development, in other copyright contexts, cohesive communities have developed that are comprised of geographically dispersed fans of particular works. Professor Mark Schultz has demonstrated this phenomenon with respect to jamband fans. See generally Schultz, *supra* note 35, at 677–80 (exploring how a “fluid” and “large community” has developed “around [the] sharing of concert recordings and the bands who allow it” through file sharing, email lists, and message boards).

51. See Lessig, *supra* note 48, at 507 (“Norms are enforced (if at all) by a community, not by a government.”). The problem with norms in the online context, particularly with respect to Web 2.0 forums, may be that many norms are in their infancy because of the novelty of the technologies and of the communities developing around them. As the communities develop, norms may be more easily identifiable, more entrenched, and more consistently enforced. Cf. *id.* at 508 (“Norms regulate behavior in cyberspace as well: talk about democratic politics in the alt.knitting newsgroup, and you open yourself up to ‘flaming’ (an angry, text-based response).”).

52. See *supra* note 22.

passive audiences are today's downstream producers.⁵³ This renewed consideration of consumer-creators' views of appropriate and inappropriate uses of prior works will help to shape a regulatory matrix that protects both original producers and downstream producers of derivative works.⁵⁴

Regulators must also remember that laws have an *expressive* function as well as an enforcement role.⁵⁵ Where possible, what the law expresses should conform—in some measure—to society's expectations about permissible and impermissible uses of copyrighted works. Perfect alignment between each stakeholder's views about copyrighted works is impossible, but regulators must give some thought to the balance between competing interests in these works. One-sided laws run the risk of being honored more in the breach than in the

53. Cf. LESSIG, *supra* note 22, at 106–08 (suggesting that children are encouraged to criticize and build upon their culture).

54. Currently, the exclusive right of making derivative works remains with the copyright holder. See 17 U.S.C. §§ 101, 103(b), 106(2) (2006) (setting forth the definition of derivative work as “a work based upon one or more preexisting works,” limiting the scope of copyright protection for such works “to the material contributed by the author of such work,” and reserving all rights associated with derivative works for the copyright owner). As two scholars have suggested:

United States law permits the copyright owner to claim not only his or her own stories, but also the characters in those stories. It grants the exclusive right to make derivative works to the copyright holder. The unauthorized author of a derivative work such as fan fiction cannot claim a copyright in that work. This places the fan fiction writer at the mercy of the copyright owner, unless the fan fiction constitutes fair use. Thus, a fan fiction writer can pen stories employing copyrighted characters only if: (1) the copyright owner explicitly permits such fan fiction, (2) the copyright owner chooses not to pursue legal action against the fan fiction writer, or (3) the fan fiction constitutes fair use of the copyrighted work.

Chander & Sunder, *supra* note 19, at 612 (footnotes omitted).

55. Professor Neil Netanel writes:

[L]aw often serves an expressive or symbolic function above and beyond regulating or providing incentives for conduct. Antidiscrimination law, for example, may have symbolic importance beyond whatever discriminatory conduct it actually proscribes. In enacting and applying such law, Congress and the courts effectively express our society's official condemnation of discrimination based on race and various other classifications. Similarly, the law might forbid certain market transactions, such as selling body parts or children for adoption, not merely to avoid harmful consequences that might ensue but to make a statement about human dignity. Laws that protect endangered species, forbid hate speech, and require recycling also have important symbolic dimensions over and above their regulation of conduct per se. Such laws give vent to and help crystallize collective understandings and norms. In turn, by giving legal imprimatur to certain values, they shape future perceptions and choices.

NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 104–05 (2008) (footnote omitted); see also Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009) (discussing the law's powers beyond coercion, including its expressive ability to clarify, legitimize, and shape socially acceptable behavior).

observance.⁵⁶ Copyright law has proved particularly problematic in this context because of its emphasis on the protection of economic rights (often to the detriment of other interests like free speech)⁵⁷ and sometimes to the detriment of the author's own rights in a work she has created.⁵⁸

III. COPYRIGHTING *TWILIGHT*: FOUR CASE STUDIES IN WEB 2.0 NORMS

A. *Why Twilight?*

The *Twilight* books and movies present some excellent case studies for examining the interaction between Web 2.0 norms and copyright laws. The popularity of the books and movies has led to a significant amount of online activity.⁵⁹ The *Twilight* story appeals to a variety of individuals,⁶⁰ including the younger, very tech-savvy “digital natives”⁶¹ and older “digital immigrants.”⁶² Stephenie Meyer's active participation in the blogosphere, maintaining a blog where she updates her readers on developments with her work and links to fan

56. See LESSIG, *supra* note 22, at 44 (“Ridiculous, in turn, makes many of us willing to break the rules that restrict access. Even the good become pirates in a world where the rules seem absurd.”).

57. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 675, 714–15 (2000) (exploring the delicate balance between copyrights and First Amendment guarantees).

58. For instance, where the author has assigned a copyright to a third party and later objects to the way in which the copyright holder chooses to exploit the work. This has arisen in relation to the colorization of films originally made in black and white in which the copyright owner who seeks to colorize the films is not the original author. See LEAFFER, *supra* note 32, at 376 n.423 (discussing the colorization debate between copyright owners, authors, and others and the “moral right for visual artists”).

59. Stephenie Meyer, for instance, officially recognizes a number of fan-maintained websites. Meyer, *supra* note 12.

60. A fruitful avenue for future research may include a study of the impact of social norms among varying groups in the online context. Cf. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 921–22 (2005) (exploring the impact of private information dissemination on OSNs on varying societal and cultural groups). For instance, while gender differences may not matter for the purposes of an early attempt at identifying interactions between Web 2.0 norms and copyright laws, it is possible that a work that appeals more directly to men could raise a different series of norms.

61. PALFREY & GASSER, *supra* note 23, at 346 (defining a “digital native” as one “born into the digital age (after 1980) who has access to networked digital technologies and strong computer skills and knowledge” and who “share[s] a common global culture that is defined not strictly by age but by certain attributes and experiences related to how they interact with information technologies, information itself, one another, and other people and institutions”).

62. *Id.* (defining a “digital immigrant” as “[a] person who has adopted the Internet and related technologies, but who was born prior to the advent of the digital age”).

websites, encourages the online dialogue.⁶³ She invites fans to participate in new releases of the *Twilight* films;⁶⁴ she cites reader comments on her blog;⁶⁵ she shares outtakes from early draft novels with her fans.⁶⁶ She has also been actively involved in the development of the film adaptations of her novels (even taking a small cameo role in the first *Twilight* film).⁶⁷ She is not the only copyright-creator to communicate online with fans and commercial adaptors of her work,⁶⁸ but the immense popularity of her work and the scope and scale of her online communications generates a useful set of anecdotal data about emerging Web 2.0 copyright norms.

The *Twilight* story has also generated a large volume of online fan commentary. Moving beyond just the *Twilight* books, fans have become obsessed with the actors and directors and have created many unauthorized fan websites devoted to lead actors Kristen Stewart,⁶⁹ Robert Pattinson,⁷⁰ and Taylor Lautner.⁷¹ Both the books and movies have also spawned a significant volume of online fan fiction, allowing fans to retell the stories from different characters' perspectives or to write stories in their own voices.⁷²

63. See Seth, *supra* note 11.

64. Stephenie Meyer, Comment to Readers on May 17, 2010, OFFICIAL WEBSITE OF STEPHENIE MEYER, <http://www.stepheniemeyer.com/index.html> (inviting members of fansites to meet with her to celebrate the preview of the third film, *Eclipse*).

65. See *Reviews for Twilight*, OFFICIAL WEBSITE OF STEPHENIE MEYER, http://www.stepheniemeyer.com/twilight_reviews.html (last visited Sept. 10, 2010) (posting fan reviews on *Twilight* from Amazon.com and teen readers).

66. *Outtakes*, OFFICIAL WEBSITE OF STEPHENIE MEYER, http://www.stepheniemeyer.com/twilight_outtakes.html (last visited Sept. 10, 2010) (posting portions of rough drafts not included in the final drafts).

67. *Full Cast and Crew for Twilight*, IMDB, <http://www.imdb.com/title/tt1099212/fullcredits#cast> (last visited Sept. 10, 2010) (portraying an uncredited diner customer).

68. For example, Cassandra Clare, author of the popular *Mortal Instruments* trilogy, maintains a website to answer questions from fans and discuss possible movie adaptations of her work. Cassandra Clare, CASSANDRA CLARE, <http://cassandraclare.com/cms/home> (last visited Sept. 10, 2010). Other writers in similar genres who maintain their own websites are Anne Rice, CHARLAINE HARRIS, DIANA ROWLAND, and Kresley Cole. See Anne Rice, ANNERICE.COM, <http://www.annerice.com> (last visited Sept. 10, 2010); Charlaïne Harris, CHARLAINE HARRIS, <http://www.charlaineharris.com> (last visited Sept. 10, 2010); Diana Rowland, DIANA ROWLAND, <http://dianarowland.com> (last visited Sept. 10, 2010); Kresley Cole, KRESLEY COLE, <http://kresleycole.com> (last visited Sept. 10, 2010).

69. See, e.g., KRISTEN STEWART, <http://www.kristenstewart.com> (last visited Sept. 10, 2010).

70. See, e.g., ROBSSESSED: ADDICTED AND DEVOTED TO ROBERT PATTINSON, <http://www.robsessedpattinson.com> (last visited Sept. 10, 2010).

71. See, e.g., TAYLOR LAUTNER ONLINE, <http://taylorlautner.org> (last visited Sept. 10, 2010).

72. See, e.g., Posting of Fan Fiction on *Twilight Stories*, FANFICTION.NET, <http://www.fanfiction.net/book/Twilight> (last visited Sept. 10, 2010) (giving *Twilight* fans a forum to create fan fiction); see also Chander & Sunder, *supra* note 19, 598–600 (expanding on the

The parallel of the release of the *Twilight* books and their subsequent expansion to the big screen with the dominance of the Internet, makes the *Twilight* franchise a very timely example of attitudes toward copyrighted works online and a rich platform for this discussion. The books were published between 2005 and 2008.⁷³ The first movie was released in November of 2008,⁷⁴ the second in November of 2009,⁷⁵ and the third in June of 2010.⁷⁶ Thus, the information about emerging online uses of copyrighted material is very current and can be derived from current fan websites,⁷⁷ Stephenie Meyer's official website,⁷⁸ and websites administered by the movie production company, Summit Entertainment.⁷⁹

The following case studies present a variety of digital copyright issues. The first relates to the leaking of Stephenie Meyer's *Midnight Sun* manuscript.⁸⁰ The second examines the phenomenon of fan mashup videos⁸¹ posted on popular web hosting services, such as YouTube, and often reproduced on fan blogs.⁸² The third examines an incident in an Illinois movie theater in which some *Twilight* fans hosted a birthday party that included a screening of *New Moon*, the second *Twilight* film.⁸³ After the birthday girl's sister video recorded the party and captured a few minutes of the film,⁸⁴ she was detained for two days with the possibility of facing a larger jail term for her actions.⁸⁵ The final case study is an interesting example of turnabout in digital copyright law.⁸⁶ While many copyright disputes involve commercial copyright holders (often music and movie producers) taking action against smaller players (including fans) for unauthorized uses of protected works, this study involves fans taking action against a

topic of fan fiction generally, claiming that “[f]an fiction spans all genres of popular culture, from anime to literature”).

73. STEPHENIE MEYER, *BREAKING DAWN* (2008); STEPHENIE MEYER, *ECLIPSE* (2007); STEPHENIE MEYER, *NEW MOON* (2006); STEPHENIE MEYER, *TWILIGHT* (2005).

74. *TWILIGHT* (Summit Entertainment 2008).

75. *NEW MOON* (Summit Entertainment 2009).

76. *THE TWILIGHT SAGA: ECLIPSE* (Summit Entertainment 2010).

77. See, e.g., Meyer, *supra* note 12 (posting links to fan sites).

78. See, e.g., Seth, *supra* note 11 (posting updates regarding *Twilight*).

79. See, e.g., Summit Entm't, LLC, *TWILIGHT SAGA*, <http://www.eclipsethemovie.com/worldoftwilight/#/Home/HTBL/HBR> (last visited Sept. 10, 2010).

80. See *infra* Part III.B.

81. Lee, *supra* note 9, at 1509 (defining mashups as “works that incorporate . . . portions of copyrighted material from elsewhere into their works”).

82. See *infra* Part III.C.

83. See *infra* Part III.D.

84. See *infra* notes 264–65 and accompanying text.

85. See *infra* notes 266–68 and accompanying text.

86. See *infra* Part III.E.

commercial movie producer.⁸⁷ The complainants were fans who manage a website devoted to one of the leading *Twilight* actors, Robert Pattinson.⁸⁸ The administrators of the *robsessedpattinson.com* blog were irritated when a commercial DVD production company copied information from their blog to promote a commercially released DVD documentary on Pattinson's life and career.⁸⁹ The complaints—framed in terms of plagiarism rather than copyright infringement⁹⁰—while successful (the DVD makers removed the offending material from their website), highlight the level of awareness and effectiveness of copyright law in Web 2.0 communities.⁹¹

B. Case Study One: *Midnight Sun*

Midnight Sun was Stephenie Meyer's attempt to retell the story of her first *Twilight* novel from an alternate character's point of view.⁹² While *Twilight* recounts the tale from Bella Swan's viewpoint, *Midnight Sun* was intended to tell the story from the perspective of her vampire love interest, Edward Cullen.⁹³ While editing some of her later books, Meyer became interested in exploring how Edward reacted to first meeting Bella⁹⁴: While "Bella only kn[ew] that an incredibly gorgeous boy [wa]s looking at her funny," "Edward [wa]s suffering through one of the most momentous days of his very long life!"⁹⁵

After Meyer released confidential *Midnight Sun* drafts to actors and others involved in the production of the first *Twilight* film to assist with character and plot development, various unauthorized drafts of the manuscript appeared online.⁹⁶ Meyer was extremely upset, but—despite knowing who leaked the manuscript—she posted a draft of

87. See Gozde, *Thank You*, *ROBSSESSED: ADDICTED TO ROBERT PATTINSON* (Oct. 8, 2009, 7:44 PM), <http://www.robsessedpattinson.com/2009/10/thank-you.html> (posting about the "site being a victim of plagiarism [sic]").

88. *Id.*

89. *Id.*

90. *Id.* ("Plagiarism is an awful crime and we should always stick together to fight it").

91. See *infra* Part III.E.

92. See *supra* notes 2–8 and accompanying text. In fact, Stephenie Meyer conducted a similar exercise in 2010 when she rewrote portions of the third book, *Eclipse*, from the viewpoint of Bree Tanner, a newly turned vampire. STEPHENIE MEYER, *THE SHORT SECOND LIFE OF BREE TANNER: AN ECLIPSE NOVELLA* (2010); see also *infra* text accompanying notes 141–45.

93. Meyer, *supra* note 2.

94. *Id.* (explaining that Edward is dealing with "the shock and frustration of not being able to hear Bella's thoughts," "the wild, monstrous reaction to her scent," and "the incredible expenditure of self-control that it takes to *not* kill her").

95. *Id.*

96. See *id.* (explaining that the draft was "virally distributed without [her] knowledge or permission").

the manuscript on her website instead of taking legal action or naming who might have been involved.⁹⁷ She explained in an accompanying note that she would prefer if her fans did not read the uncompleted manuscript, but would prefer if they read her version instead of an illegally posted version.⁹⁸ She also stated that she felt unable to complete *Midnight Sun* because the illegal leaking had effectively derailed her artistic process.⁹⁹

While she noted that the Internet distribution was “illegal[]” in terms of infringing her copyright, Meyer also emphasized the intentions of those who leaked the manuscript.¹⁰⁰ Meyer’s emphasis on *intent* is intriguing because copyright law involves strict liability.¹⁰¹ Thus, intent is not an element of a direct infringement action.¹⁰² Presently, intention is only relevant to certain forms of secondary liability, notably contributory liability for copyright infringement.¹⁰³ Meyer’s thoughts, however, suggest that Congress should consider revisiting the role of intent in digital copyright law.

Also illuminating was Meyer’s decision to publish her own version of the incomplete *Midnight Sun* draft on her website.¹⁰⁴ She explained:

97. *Id.*

98. *Id.*

99. *Id.* (“So where does this leave *Midnight Sun*? My first feeling was that there was no way to continue. Writing isn’t like math; in math, two plus two always equals four no matter what your mood is like. With writing, the way you feel changes everything. If I tried to write *Midnight Sun* now, in my current frame of mind, James would probably win and all the Cullens would die, which wouldn’t dovetail too well with the original story. In any case, I feel too sad about what has happened to continue working on *Midnight Sun*, and so it is on hold indefinitely.”).

100. *Id.*

101. 4 MELVILLE B. & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-4 to -5 (Matthew Bender rev. ed. 2010) [hereinafter NIMMER ON COPYRIGHT] (footnotes omitted) (“Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant.”).

102. LEAFFER, *supra* note 32, at 522 (“In general, infringement with innocent intent is *not* a defense to a finding of liability. Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.”).

103. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (A party “who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer ” (footnote omitted)). “Thus, if there is knowledge that the work in question constitutes an infringement, then one who causes another to infringe will himself be liable as an infringer” 3 NIMMER ON COPYRIGHT, *supra* note 101, § 12.04[A][3][a], at 12-85 (citing *Celestial Arts, Inc. v. Neyler Color-Lith Co.*, 339 F. Supp. 1018 (E.D. Wis. 1971); *Vic Alexander & Assocs. v. Cheyenne Neon Sign Co.*, 417 P.2d 921 (Wyo. 1966)).

104. *See Meyer, supra* note 2 (providing a link to a “partial draft” of *Midnight Sun*).

I'd rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes. But how do I comment on this violation without driving more people to look for the illegal posting? It has taken me a while to decide how and if I could respond. But to end the confusion, I've decided to make the draft available here This way, my readers don't have to feel they have to make a sacrifice to stay honest.¹⁰⁵

These comments highlight Meyer's feelings about copyright and authorial integrity. She uses words that relate to her fans' *intentions* with respect to her copyrights.¹⁰⁶ She speaks about the "violation" of her rights and her fear about driving her fans to look for illegal postings.¹⁰⁷ Posting the draft herself is a solution that she feels will allow her readers to enjoy her work while "stay[ing] honest."¹⁰⁸ In many ways, the current copyright system leaves Meyer in an extremely difficult position: the more she talks about her rights under the system, the more she alerts people to the availability of the illegally distributed work.¹⁰⁹ Thus, her rights do not seemingly help her in the Web 2.0 context unless she is willing to personally bargain with, or take legal action against, every website posting illegal copies. Even if she has the time, the wherewithal, and the desire to do so, more websites are likely to spring up every day, and many will be outside the jurisdictional reach of domestic copyright laws.¹¹⁰

Alternatively, Meyer could attempt to pursue action against search engines for secondary liability for copyright infringement.¹¹¹ This is, however, a costly and time-consuming process, and the law is

105. *Id.*

106. *Id.* (describing fans who "obtain and share items that do not legally belong to them" as "dishonest").

107. *Id.*

108. *Id.*

109. *See id.* (questioning how to best "comment on this [copyright] violation without driving more people to look for" the illegally distributed manuscript).

110. *Cf.* Joel C. Boehm, Note, *Copyright Reform for the Digital Era: Protecting the Future of Recorded Music Through Compulsory Licensing and Proper Judicial Analysis*, 10 TEX. REV. ENT. & SPORTS L. 169, 180 (2009) (noting the "problem of jurisdiction over international persons and property operating on the internet"). *See generally* Lawrence A. Waks et al., *Online Copyright Infringement: Minimizing Exposure to Individuals and Small Businesses That Operate on the Internet*, 45 ADVOC. (TEX.) 40, 44 (2008) ("The issue of *where* the adjudication of a copyright infringement suit will take place is always a concern when dealing with a website because personal jurisdiction in the context of online activities is generally determined by the level of interactivity and the commercial nature of the exchange of information that occurs on the website" (internal quotation marks omitted)).

111. Jonathan Band, *Google and Fair Use*, 3 J. BUS. & TECH. L. 1, 3 (2008) (noting that "by virtue of linking to infringing material," search engines may be held secondarily liable for copyright infringement). *But cf. id.* at 3-4 (noting that because the most recent generation

unsettled about the secondary liability of search engines for copyright infringement.¹¹² In the case of an unpublished work, like *Midnight Sun*, there is no commercial publisher or distributor with deep pockets to shoulder the burden of bringing legal actions against unauthorized online distributors of the work. Instead, online copies of clips from the *Twilight* films are occasionally found on services like YouTube but are quickly removed when legal departments at the “deep-pocketed” movie studios claim copyright protection.¹¹³

Meyer’s comments also demonstrate her feelings toward her fans. She understands their interest in her work and their desire to hear the *Twilight* story from Edward Cullen’s viewpoint.¹¹⁴ She wants her fans to enjoy her work and to “stay honest” in the process,¹¹⁵ but she would prefer to maintain control over when and how her fans experience her unpublished work.¹¹⁶ She hopes her fans will respect her wishes and not read anything before she shares it, but she recognizes her fans’ strong feelings about her work and acknowledges her indebtedness to them.¹¹⁷ Thus, she attempts to compromise by catering to her fans’ desires without impinging too greatly on her artistic integrity.¹¹⁸ Copyright law does not really help her achieve any of this. Instead,

of search engines “copy . . . actual webpages into their search indices,” often without the website operators’ permission, they may be *directly* liable for the copyright infringement).

112. See 3 NIMMER ON COPYRIGHT, *supra* note 101, § 12.04[A][3][a], at 12-86.2 to -86.10 (highlighting current inconsistencies in imposing secondary liability for copyright infringement on Internet intermediaries, such as Internet search engines and online payments systems, in the Ninth Circuit, which “has spoken to the issue of contributory copyright infringement far more often and more recently than any other tribunal” (citing *Perfect 10 v. Visa Int’l Serv. Ass’n*, 494 F.3d 788 (9th Cir.); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir.), *overruled by* 508 F.3d 1146 (9th Cir. 2007)).

113. See Jacqueline Lipton, *How to Make a Twilight Fan Remix Film Without Getting Sued*, THR, Esq. (June 15, 2010, 8:51 AM), <http://thresq.hollywoodreporter.com/2010/06/how-to-make-a-twilight-fan-film-without-getting-sued.html> (noting that YouTube and other similar websites “will generally comply with” a notice from the copyright holder requesting removal of “any infringing material” “because compliance will protect them from subsequent infringement liability”).

114. See Meyer, *supra* note 2 (“I hope this fragment gives you further insight into Edward’s head and adds a new dimension to the Twilight story. That’s what inspired me to write it in the first place.”).

115. *Id.*

116. See *id.* (“I’d rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes.”).

117. See *id.* (“I do want to take a moment and thank the wonderful fans who have been so supportive of me over the past three years. . . . I only hope this note will stop all the confusion and online speculation so that the Twilight universe can once again become the happy escape it used to be.”).

118. See *id.* (“It has taken me a while to decide how and if I could respond. But to end the confusion, I’ve decided to make the draft available [online].”).

she must set out her preferred terms of access and use for the work and hope that her fans respect them.¹¹⁹

Her description of this wrong indicates more about her feelings regarding authorial autonomy and integrity than her desire to exploit economic rights in her developing work. Her words imply a mismatch between the objectives of copyright law and her own personal interests in her work. She blogs:

I did not want my readers to experience *Midnight Sun* before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author, not to mention me as a human being. As the author of the Twilight Saga, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public; this is the same for musicians and filmmakers. Just because someone buys a book or movie or song, or gets a download off the Internet, doesn't mean that they own the right to reproduce and distribute it. Unfortunately, with the Internet, it is easy for people to obtain and share items that do not legally belong to them. No matter how this is done, it is still dishonest. This has been a very upsetting experience for me, but I hope it will at least leave my fans with a better understanding of copyright and the importance of artistic control.¹²⁰

Her comments are framed in terms of copyright law, but the overriding concern seems to be over issues foreign to modern copyright law: the integrity of the authorial process and the honesty or dishonesty of copyright audiences.¹²¹ Meyer's description of the unauthorized dissemination of *Midnight Sun* as a violation of her rights as an author and her rights as a human being¹²² are phrased in terms of personal rights to the integrity of her work and of autonomy in controlling her literary creation, not in terms of the right to control the economic benefits derived from her work.¹²³ Further, her concern with her fans' dishonesty is linked not to their intrusions on her economic

119. Cf. *id.* (explaining that she chose to make the *Midnight Sun* manuscript available on her personal website because *Twilight* fans would otherwise be driven to look for the original, illegal posting).

120. *Id.*

121. See LEAFFER, *supra* note 32, at 24 (“[C]opyright law provides the incentive to create information and a shelter to develop and protect it.”).

122. Meyer, *supra* note 2.

123. See *id.* (referring only to the “very upsetting” nature of the experience and “the importance of artistic control” and not mentioning the economic benefits associated with the successful *Twilight* series).

property rights but is instead linked to their intrusions on her personal autonomy.

The *Midnight Sun* case study suggests that copyright law fails to address the needs of the creators of artistic works, as distinct from the needs of the more commercially oriented producers and distributors of these works. Legal action against direct and secondary copyright infringers would be time-consuming, cost ineffective, and distracting for the unpublished author.¹²⁴ Moreover, it would not effectively protect the interests with which the author is most directly concerned: those related to her own integrity as an artist and those related to her fans' integrity as consumers of her work.¹²⁵ Furthermore, copyright law is doing nothing here to incentivize innovation.

Perhaps copyright law could have prevented Meyer's suspension of the *Midnight Sun* project¹²⁶ if Meyer had instead used the appropriate legal channels. In other words, if Meyer had brought legal actions against or sent cease and desist letters to a few key websites that had posted *Midnight Sun* illegally, she could have sent an effective message against copyright piracy, obtained injunctions, and perhaps gained pecuniary damages.¹²⁷ As a result, some individuals might have been deterred from illegally posting the material, and others might have removed the manuscript from their websites.¹²⁸ Thus, one could argue that copyright law would have effectively protected Meyer's rights in this scenario if she had availed herself of its provisions. The practical limitations, however, are the time, cost, and jurisdictional difficulties associated with bringing actions against often anonymous,¹²⁹

124. See Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111, 156 (2005) (noting that the "existing copyright framework generally requires time-consuming and cost-ineffective litigation" against direct infringers who are, in some cases, "difficult to locate").

125. See generally Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 481 (2009) (arguing that the current copyright system "protects the interests of economic investors in the production of creative works more than the interests of the author and the public").

126. Meyer, *supra* note 2.

127. See generally Michael Seringhaus, *E-Book Transactions: Amazon "Kindles" the Copy Ownership Debate*, 12 YALE J.L. & TECH. 147, 160 (2009) ("A copyright owner can seek damages for, or an injunction against, unauthorized reproduction, public display, performance, or preparation of derivative works via an infringement action.").

128. Cf. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1351 (2004) (predicting that legal action by the government against select online copyright infringers would have a "substantial deterrent effect on many [other] illegal users").

129. *But cf. id.* at 1432 (noting that "what often passes for anonymity on the Internet today will not" enable "uploaders to avoid prosecution" because copyright holders may "compel the [Internet service provider] to disclose the identity of the 'anonymous' poster").

globally dispersed, and impecunious defendants in online forums.¹³⁰ Copyright revisions, therefore, should be aimed at procedural difficulties with enforcing copyrights rather than at the substantive provisions of the law itself.

Nevertheless, Meyer's focus on authorial integrity, as well as on the intentions of her fans, indicates that there may be something more going on. Important values may be playing out in the Web 2.0 creator-consumer culture that copyright law is currently missing. Legislators and policymakers should think about whether the United States should adopt something akin to a broader moral rights law that better protects authors' personal rights in their works, as distinct from their copyrights. Moral rights protect various aspects of an author's work, including the author's right to be identified with the work (called "attribution rights")¹³¹ and the author's right to have some say in the way in which the work is presented to the public (called "integrity rights").¹³² Moral rights are more popular in European countries than in the Anglo-American copyright tradition¹³³ and are often opposed because authors who retain such rights can impede downstream copyright holders' and licensees' abilities to commercially exploit the relevant works.¹³⁴ However, moral rights could beneficially complement current copyright law.

Of course, it must be conceded that in the *Midnight Sun* case study, moral rights may not have practically helped Meyer. Like copyright law, moral rights litigation suffers from practical limitations of

130. *Id.* at 1350 (noting that it is not "cost-effective for copyright owners to sue individual infringers, because there are tens of millions of them, because lawsuits are expensive, and because many infringers would only be liable for (or able to pay) minimal damages"). For a thorough discussion of the uncertainty related to Internet jurisdiction, see Geist, *supra* note 44, at 1353–80.

131. 3 NIMMER ON COPYRIGHT, *supra* note 101, § 8D.03, at 8D-31 ("The first major moral right concerns attribution. Conceptually, it falls into two poles—requiring use of the author's name, and forbidding that usage.").

132. Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298 (2003) ("Integrity rights enable the artist to prohibit alterations to his work by subsequent owners of the physical objects to the extent that such alterations are injurious to his honor or reputation—such instances of manipulation of his artistic vision are as offensive as direct assaults to his person."); *see also* Part IV.B.

133. *See* LEAFFER, *supra* note 32, at 376 nn.421–22 (describing France's "famous moral rights law" and noting that while "moral rights have found their greatest strength in Western European countries," thirty-five non-European countries also recognize moral rights).

134. *Cf. id.* at 387 (noting that moral rights may also interfere with contract rights over copyrighted works in lucrative markets such as the motion picture, publishing, and broadcast industries); Ong, *supra* note 132, at 304 ("The restrictions placed on the owner's ability to make alterations to the work of art may have an adverse effect on the value of that work as a private asset.").

time, cost, and personal jurisdiction.¹³⁵ Arguably, then, even if an author wants a specific right to the integrity of her creation, copyright law basically gives her all that she requires in practical terms.¹³⁶ Emerging social norms about respecting an author's expressed preference regarding online uses of her work may become a more important protector against violations of authorial integrity than any form of legal regulation.¹³⁷ Optimally, legislators would create laws that reinforce acceptable norms about permissible online uses of copyrighted works.¹³⁸ This way, norms could regulate on their own while the law's expressive and enforcement functions would help fill in the gaps and bolster the effectiveness of norm regulation.¹³⁹

In the Web 2.0 context, authors and their fans have increased opportunities to engage in discussions about developing norms, which assist in norm recognition and enforcement. In the wake of the *Midnight Sun* debacle, for example, Stephenie Meyer was more careful—and more articulate on her website—about keeping her second attempt at additional character development under wraps until it was published.¹⁴⁰ In 2009, Meyer wrote a *Twilight* novella about Bree Tanner, a secondary character in the third *Twilight* book, *Eclipse*.¹⁴¹ She

135. See *supra* note 130 (discussing the practical limitations of copyright law).

136. See Ong, *supra* note 132, at 309 (“Scholars and practitioners have long debated whether the role of integrity rights can be fulfilled by pre-existing principles of . . . copyright law.”). But see *id.* at 310 (concluding that copyright law “cannot provide [a] perfect theoretical equivalent[] to the sort of protection offered by” the integrity right).

137. See Casey Fiesler, 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, 734, 762 (2008) (arguing that copyright law “should use the existing social norms associated with fan fiction as a framework for dealing with derivative works” in other Internet forums and noting that the norms within the online fan community “derive from the fans’ respect for the copyright holder”).

138. Cf. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1360 (2003) (“The central task, then, is to reverse Internet anarchy through a combination of education, technology and law, shaping each in concert with the others so that the copyright balance can be restored and ownership respected, while maintaining the important role of the public domain, fair use, and reverse engineering.”).

139. See *supra* note 55 (noting that the law’s “expressive” function, in addition to its enforcement function, plays an important role in shaping society’s conduct).

140. See Carolyn Kellogg, *Vampire Book to Aid Red Cross*, L.A. TIMES, Apr. 4, 2010, at 2 (commenting that Meyer “closely guarded” the existence of a manuscript for a novella that complements the *Twilight* series).

141. Bree Tanner is “a newborn vampire introduced in the ‘Twilight’ volume ‘Eclipse.’” Quick Takes, *Meyer Scores a Bestseller Again*, L.A. TIMES, June 29, 2010, at 3; see also Jennifer DeCamp, *The “Twilight” Zone: Love it or Hate It, Join in on “Eclipse” Premiere*, FT. WAYNE J. GAZETTE, June 29, 2010, at 8D (noting that Meyer “started working on Bree’s story while she was editing ‘Eclipse’ and was imagining what life might be like for a newborn vampire”).

released early copies of the manuscript to those involved in the production of the film adaptation of the *Eclipse* book, including the actress who played Bree Tanner.¹⁴² Meyer otherwise guarded the manuscript carefully prior to its commercial publication.¹⁴³ She reinforced the “confidentiality prior to publication” norm on her website by posting a photograph of actress Jodelle Ferland (who plays Bree in the *Eclipse* film) next to a bucket containing the ashes of her burned copy of the manuscript when filming was completed.¹⁴⁴ This posting reinforced Meyer’s strong feelings about maintaining control over the time and manner in which her fans experience her work (a message she had previously delivered during the *Midnight Sun* situation).¹⁴⁵

C. Case Study Two: Mashup Videos

1. The Remix Culture

While the *Midnight Sun* case study focuses largely on the author’s views about her rights in her creative works, the second case study focuses on the consumer-creators’ views. With *Twilight*, as with many other popular works,¹⁴⁶ Web 2.0 participants utilize various aspects of copyrighted works and remix them for their own expressive purposes.¹⁴⁷ These remixes may take the form of parody or criticism, but they very often are simple expressions of ways in which fans relate to the works. Fans may want to experiment with attaching particular mu-

142. Stephenie Meyer, *The Short Second Life of Bree Tanner: An Eclipse Novella*, OFFICIAL WEBSITE OF STEPHENIE MEYER (Mar. 30, 2010), <http://www.stepheniemeyer.com/breetanner.html> (noting that copies were provided to screenwriter Melissa Rosenberg, director David Slade, and three actors).

143. See Carol Memmott, *Meyer Grants Twilight Saga’s Bree Tanner a “Second Life,”* USA TODAY (Apr. 2, 2010, 1:35 PM), http://www.usatoday.com/life/books/news/2010-03-30-breetanner30_ST_N.htm (“In the novella, Meyer says, Bree has been a vampire for about three months. No other details [about the novella] are being released.”).

144. See Meyer, *supra* note 142 (“*Keeping it confidential: Here is Jodelle next to the bucket of waterlogged ashes that were once the pages of her copy of the Bree manuscript.*”).

145. See *supra* notes 116–17 and accompanying text.

146. Chander & Sunder, *supra* note 19, at 598 (“Fan fiction spans all genres of popular culture, from anime to literature.”).

147. See Lee, *supra* note 9, at 1461 (“Informal copyright practices have developed, most notably, for [user-generated content]. Whether in blogs, fan fiction, videos, music, or other mashups, many users freely use the copyrighted works of others without prior permission and even beyond our conventional understandings of fair use.”); see also Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 552-53 (“Google and its popular subsidiary, YouTube, have . . . been sued for copyright infringement because users sometimes upload copies of other peoples’ copyrighted works, including television programs and remixes of motion pictures to YouTube, which then makes them available to millions of other users.”).

sical tracks to images from movies.¹⁴⁸ They may prefer to mix movie images with their own artwork.¹⁴⁹ They may want to experiment with combining aspects of different movies or television shows to create something new.¹⁵⁰

The legal literature largely covers the extent to which these kinds of remixes constitute copyright infringement and, if so, what kinds of defenses may be available to the remixers in certain contexts;¹⁵¹ the fair use and implied license defenses from copyright law take on particular significance in the remix context.¹⁵² This second case study accentuates the gap between what the law actually says about infringement and fair use and what remixers think it says—or should say. Remixers often attach labels to their work, stating that the work does not infringe copyright, that the work is a fair use of the copyrighted material,¹⁵³ or that no copyright infringement was intended.¹⁵⁴ These assertions, however, do not make sense under American copyright law. Because of the vague,¹⁵⁵ equitable rule of reason approach to fair use in American law,¹⁵⁶ a determination of fair use cannot definitively

148. See, e.g., lyssabbyx3, *Love Story Apology—Edward and Bella—Twilight*, YOUTUBE (June 28, 2009), <http://www.youtube.com/watch?v=9Wj7Nmox0T4> (attaching images of Edward Cullen and Bella Swan from the *Twilight* films to a remix of Taylor Swift's song *Love Story* and One Republic's song *Apologize*).

149. Cf., e.g., crischoch, *Bella & Edward—Bleeding Love—Twilight*, YOUTUBE (June 2, 2008), http://www.youtube.com/watch?v=66LEINID_Sw (combining various fan art images with scenes from the *Twilight* “teaser trailer” and the “exclusive MTV scene”).

150. See, e.g., rebelliouspixels, *Buffy vs. Edward: Twilight Remixed [original version]*, YOUTUBE (June 19, 2009), <http://www.youtube.com/watch?v=RZwM3GvaTRM> (containing a mashup of scenes from *Buffy the Vampire Slayer* and *Twilight*, showing a “re-imagined narrative” in which “Edward Cullen . . . meets Buffy the Vampire Slayer”).

151. See, e.g., Hetcher, *supra* note 31, at 1872 (noting that although copyright infringement is “a central issue because much remix contains varying amounts of unauthorized copyright-protected material,” a “strong argument” exists “that much of this remix is fair use and hence legal”); Lee, *supra* note 9, at 1462 (arguing that “‘remix’ practice[] is [not] explained well by the conventional understanding of copyright [law]”).

152. See, e.g., Lee, *supra* note 9, at 1532 (noting that the implied license defense may be applicable to cases in which authors have “publicly supported the use of their characters in fan fiction” or other works).

153. See, e.g., rebelliouspixels, *supra* note 150 (“This transformative remix work constitutes a fair-use of any copyrighted material as provided for in section 107 of the US copyright law.”).

154. See, e.g., lyssabbyx3, *supra* note 148 (“THIS VIDEO IS PURELY FAN-MADE. I OWN NOTHING, NO COPYRIGHT INFRINGEMENT INTENDED. EVERYTHING BELONGS TO THEIR RIGHTFUL OWNERS.”).

155. See Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 401 (2009) (“Fair use law, then, exists at one extreme as a body of vague statutory language and at the other extreme as a collection of narrow, fact-specific, judicial decisions.”).

156. See LEAFFER, *supra* note 32, at 469 (“Although codified in the 1976 [Copyright] Act, the doctrine of fair use has retained its nature as an equitable rule of reason to be applied

be made until a case is litigated. No one can affirmatively state *ex ante* that their use of a given work is a fair use.¹⁵⁷

These consumer-creator statements might evidence an *intent* not to infringe or an assumption that their creation is a fair use. The mere assumption or assertion, however, does not automatically make the work a fair use. Likewise, stated intentions not to infringe a copyright are irrelevant to a determination of copyright infringement.¹⁵⁸ Consumer-creators who state that they did not intend to infringe a copyright and make no particular assertion about fair use are perhaps more realistic because they are saying nothing about whether their use does, *in fact*, infringe a copyright. But in the end, the statement is not particularly meaningful as a matter of copyright law because intention is irrelevant to a claim of direct infringement.¹⁵⁹

Remixers might honestly think that their intentions are relevant to a copyright claim. They might additionally think (equally erroneous in many cases) that a remix constitutes a fair use under copyright law. They may suspect that they are infringing a copyright but believe that stating their intentions not to do so might temper the response of copyright holders; that is, hoping that a copyright holder who discovers that a remixer lacked the intent to infringe might send a cease and desist letter rather than file a lawsuit.

Public education may be the solution to the consumer-creators' erroneous notions about what fair use is and how copyright liability works.¹⁶⁰ That begs the question, however, whether copyright law

where a finding of infringement would either be unfair or undermine the progress of science and the useful arts." (internal quotation marks omitted)).

157. As stated by one scholar:

Given the lack of clear rules for fair use and misappropriation, knowledge of copyright law is often no better than ignorance of copyright law. Even though I am an expert of copyright law, my prediction of what is a fair use probably is no better than the person on the street—or it could be even worse, given that a jury will not typically be comprised of copyright experts and judges often are not well versed in copyright law.

Lee, *supra* note 9, at 1468. *But see* Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2541–43 (2009) (arguing that “fair use law is both more coherent and more predictable than many commentators have perceived”).

158. Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 *RUTGERS L. REV.* 351, 356 (2002) (noting that “American courts . . . have consistently held that intent to infringe is irrelevant in determining liability for copyright infringement”).

159. LEAFFER, *supra* note 32, at 522 (“In general, infringement with innocent intent is *not* a defense to a finding of liability. Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.”).

160. Garon, *supra* note 138, at 1340–41 (arguing that public education is necessary to “reconcile[]” “the Internet culture of shared information and the copyright culture of authorial and artistic integrity”).

should ever regulate fans' remixes, particularly remixes that are non-commercial in nature and likely do not interfere with the copyright holder's protected economic rights. These remixes might, in fact, *enhance* the value of copyrighted works by increasing online discourse and general interest in the works.¹⁶¹ The remixes and the associated online discourse keep the copyrighted works in the public eye and in the public mind, perhaps making it more likely that people will view a film, rent or stream a video for a second time, or purchase an associated product like a soundtrack or wall calendar.¹⁶²

Some copyright holders have already capitalized on opportunities for fans to utilize their works online subject to certain conditions of use. For example, George Lucas's company, Lucasfilm, has allowed fan mashups and fan fiction relating to the *Star Wars* franchise—and has even provided unique content to fans creating such works—as long as his company takes ownership of the resulting works.¹⁶³ This may suit some fans who only intend to use the works for expressive purposes and have no commercial motivations. When he produced *Dr. Horrible's Sing-Along Blog*,¹⁶⁴ Joss Whedon actively encouraged fans to film their own videos related to the storyline¹⁶⁵ and incorporated a selection of those videos on the DVD release of the short movie.¹⁶⁶

161. See Hetcher, *supra* note 31, at 1890 (“Indeed, [copyright] owners will sometimes stand to benefit from [the] enhanced exposure of their works [generated by remixing], for example, through the fostering of a more devoted fan base.”).

162. See, e.g., Lipton, *supra* note 113 (“[*Twilight*] remixes create more buzz for the movies, which ultimately benefits the producers. Summit [Entertainment, the studio that produced the *Twilight* films,] tolerates a lot of online fan activity—including fan-made trailers for forthcoming films and even copying and posting extras from DVD releases.”).

163. HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 156–57 (2006) (“In 2000, Lucasfilm offered *Star Wars* fans free Web space (www.starwars.com) and unique content for their sites, but only under the condition that whatever they created would become the studio's intellectual property.”).

164. *Dr. Horrible's Sing-Along Blog* (Timescience Bloodclub 2008); see *Dr. Horrible's Sing-Along Blog: Editorial Reviews*, AMAZON.COM, http://www.amazon.com/Horribles-Sing-Along-Blog-Patrick-Harris/dp/B001M5UDGS/ref=sr_1_1?ie=UTF8&s=dvd&qid=1265043525&sr=8-1 (last visited Sept. 11, 2010) (describing *Dr. Horrible's Sing-Along Blog* as “a 42-minute musical romp” “[c]onceived as an ‘online miniseries event’ during the 2008 writers’ strike” that follows Dr. Horrible as he “video-blogs about his twin goals to join the Evil League of Evil and to woo the fair Penny” who “he met at the local laundromat”).

165. See Liz Shannon Miller, *Dr. Horrible DVD: Yes, It's Worth Your Money*, NEWTEEVEE (Dec. 10, 2008, 7:44 AM), <http://newteevee.com/2008/12/10/dr-horrible-dvd-yes-its-worth-your-money/> (noting that numerous “fan-created applications to [join] the Evil League of Evil” were submitted, “represent[ing] an international, creative, and surprisingly talented community who were encouraged every step of the way to . . . participate in the show's success” (internal quotation marks omitted)).

166. See *Dr. Horrible's Sing-Along Blog: Editorial Reviews*, *supra* note 164 (noting that the DVD includes “10 videos (a half-hour total) [that] were recorded by fans who want to join the Evil League of Evil”). A number of fan videos are also available at WONDERFLONIUM,

2. *Remixing and Fair Use*

Regardless of what fans say they want, the law has its own limitations with respect to video mashups and fan fiction. In today's cut and paste culture,¹⁶⁷ a *prima facie* case of copyright infringement is relatively easy to establish in cases where clips of music, video, or text have been taken directly from an original source and inserted into a new consumer creation.¹⁶⁸ Copying does not get much more direct than this. Applicable defenses, however, are seemingly not such an easy question. Judicial application of the defenses to the mashup video context is unlikely to result in many clear cut answers.

The fair use defense, as currently set out in Section 107 of the Copyright Act, provides in relevant part:

[T]he fair use of a copyrighted work . . . 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.¹⁶⁹

This defense is not intended to create a clear rule that delineates when a particular use of a copyrighted work will be excused from liability. Rather, it is intended to operate as an equitable rule of reason—in the same way that the defense operated at common law prior to its 1976 codification.¹⁷⁰ Courts thus apply the various elements of

<http://www.wonderflonium.com/> (last visited Sept. 11, 2010), which is described as “a place where fan videos related to the Dr. Horrible sensation will be collected for your viewing pleasure.”

167. See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 245–46 (1996), for more on the “cut and paste” culture.

168. Cf. Kevin C. Hormann, Comment, *The Death of the DMCA?: How Viacom v. YouTube May Define the Future of Digital Content*, 46 HOUS. L. REV. 1345, 1355 (2009) (noting that “direct infringement is usually easy to spot; for example, if a user uploaded an unaltered clip of a copyrighted TV show [to YouTube], it would” violate copyright law).

169. 17 U.S.C. § 107 (2006).

170. 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05, at 13-155 to -156 (noting that the Copyright Act of 1976 was the first “statutory recognition of [the] judge-made rule of reason” and was not “intended to restate the present . . . judicial doctrine of fair use” (internal

the defense with flexibility and discretion.¹⁷¹ Application of some elements of the defense to the fan video mashup context would likely be relatively easy, but application of others is more difficult. For instance, it might be hard for a fan to argue that a mashup was created for several of the purposes listed in the first paragraph of the defense: news reporting, teaching, scholarship, or research.¹⁷²

It is possible that some mashups might count as criticism or comment. Some video mashups, for example, might include critiques of the works on which they are based.¹⁷³ Or a moviegoer's homemade online video review of a new movie, including clips from the movie itself,¹⁷⁴ may be a kind of mashup regarded as a criticism or comment under the fair use defense.

In addition, a mashup that provides a particular artistic take on the work on which it is based may be regarded as commenting on that work. One might compile a montage of female vampires from the *Twilight* movies attacking other vampires, mix it with clips of Buffy, from *Buffy the Vampire Slayer* also attacking vampires, and add accompanying music like "Sisters Are Doing It for Themselves."¹⁷⁵ Such a montage might be regarded as a feminist comment, a critique of the source material, or as a general commentary on feminism or "girl power"—not as a specific comment on the underlying works sampled in the mashup.

Assuming that a particular mashup falls within either the comment or criticism area (or that a court finds the mashup to be otherwise generally within the scope of a potential fair use defense), the court must then apply the four factor fair use test in Section 107.¹⁷⁶ With respect to the first factor—the "purpose and character of the

quotation marks omitted)). The "scope and limits of fair use" should be determined, therefore, by "reference . . . to pre- as well as post-1978 cases." *Id.*

171. Joseph J. Raffetto, *Defining Fair Use in the Digital Era*, 15 U. BALT. INTELL. PROP. L.J. 77, 80–81 (2006).

172. 17 U.S.C. § 107. Of course, these are not exclusive fair use categories. Other uses may be considered fair uses outside this list. See Raffetto, *supra* note 171, at 81 (noting that "the enumerated fair use factors" are "a non-exclusive list, granting courts the discretion to consider other factors that might have a bearing upon the determination").

173. See, e.g., ErickWithNoK, *Twilight—Movie Review*, YOUTUBE (Nov. 21, 2008), http://www.youtube.com/watch?v=JkOUW_nvCb4 (providing a review and critique of the *Twilight* movie).

174. See, e.g., CDTheBookMan, *Movie Review: Twilight*, YOUTUBE (Nov. 20, 2009), <http://www.youtube.com/watch?v=AaGuYS6VGs0> (mixing clips from the *Twilight* film with a review of the movie).

175. ARETHA FRANKLIN & EURYTHMICS, *Sisters Are Doin' It for Themselves, on WHO'S ZOOMIN' WHO?* (RCA Records 1985) and *BE YOURSELF TONIGHT* (RCA Records 1985).

176. See 17 U.S.C. § 107.

use”¹⁷⁷—mashup videos shared over online services such as YouTube and Facebook are generally not disseminated for commercial purposes.¹⁷⁸ The first factor, however, has been judicially characterized as referring to the transformative use of a protected work.¹⁷⁹ This judicial gloss on the statutory language developed based on the underlying policy determination that copyright law should encourage innovation and enhance the store of information and ideas within society.¹⁸⁰ Some judges have opined that purely consumptive uses of copyrighted works should be given less deference under the fair use defense than uses that transform the work in some way¹⁸¹ because transformative activities contribute to artistic innovation in a way that purely consumptive activities do not.¹⁸²

If transformative use is an important aspect of the first factor, then a court should scrutinize each mashup video on a case-by-case

177. *Id.*

178. *Cf.* Michael Allyn Pote, Comment, *Mashed-Up In Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 678 (2010) (noting that “merely posting a mashup for download on a Web site,” such as YouTube, “may favor a finding of fair use”). *But cf. id.* (“[T]he lines between nonprofit and commercial use seem to blur to some extent regarding mashups.”).

179. *See* 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05[A][1][b], at 13-162 to -173 (discussing the manner in which courts have applied the “transformative” and “productive” use terminology to the first fair use factor). Under the “productive use” doctrine, “‘mere reproduction of a work in order to use it for its intrinsic purpose’ . . . may not be considered fair use.” *Id.* at 13-163 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 970 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984)). Based on concerns that “the word ‘productive’ risks ‘the misconception that it encompass[es] any copying for a socially useful purpose,’” some judges “prefer[] the term ‘transformative use.’” *Id.* at 13-163 n.67 (quoting *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 11 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)). The Supreme Court currently adheres to the transformative use “formulation.” *Id.*

180. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (characterizing the first fair use factor inquiry as asking “whether and to what extent the new work is ‘transformative,’” and noting that because “the goal of copyright . . . is generally furthered by the creation of transformative works,” “the more transformative [a] new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use” (citation omitted)).

181. *See, e.g., Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting) (describing purely “consumptive uses” of a copyrighted work as not being the kinds of uses the fair use doctrine protects; in particular, describing “[t]ime shifting” of a television program by videotaping it to watch it later as a “consumptive use” with no productive or transformative aspects to the use).

182. *Cf.* 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05[A][1][b], at 13-167 (noting that “the inquiry [has been framed] as . . . whether ‘the secondary use adds value to the original—if copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.’” (alterations in original) (quoting *Castle Rock Entm't v. Carol Publ'g Group, Inc.* 150 F.3d 132, 142 (2d Cir. 1998))).

basis to ascertain the extent to which the particular mashup is transformative of the original work. A video remix that aggregates elements from different copyrighted works to create a new work with a new message may be highly transformative. Rap music, for instance, routinely aggregates snippets of earlier compositions to make something new.¹⁸³ These kinds of transformative remixes have been common throughout the history of music¹⁸⁴ and are becoming more common in other fields online.¹⁸⁵

Mashup maps present one recent transformative online trend. Various services combine Google Maps¹⁸⁶ with other information, such as property listings or locations of crimes.¹⁸⁷ Many of these uses may technically infringe copyrights held by Google, but norms have developed under which Google welcomes, rather than attacks, these uses.¹⁸⁸ Google obtains more good publicity and potentially more advertising revenue by allowing these kinds of uses.¹⁸⁹ Google allows other entities to freely embed their maps in Google online applications, which is likewise a good source of advertising.¹⁹⁰

183. *Campbell*, 510 U.S. at 572, 581–84 (holding that the commercial nature of a rap music parody of Roy Orbison's *Pretty Woman* did not preclude a finding of fair use because the rap song was sufficiently transformative of the original work).

184. See, e.g., Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 301–10 (2006) (discussing the musicological history of borrowing from previous works, particularly that of George Gershwin).

185. See, e.g., Samuelson, *supra* note 157, at 2554–55 (describing a fan mashup video, entitled "Brokeback to the Future," which "uses music from the movie 'Brokeback Mountain' and clips from [the] 'Back to the Future' movies to suggest that the two male lead characters are in love," as a transformative use that "recontextualize[s] parts of [two] existing works, thereby shedding new light on and contributing new insights about the original[s]").

186. *Maps*, GOOGLE MAPS, <http://maps.google.com/> (last visited Sept. 11, 2010).

187. JEFF JARVIS, *WHAT WOULD GOOGLE DO?* 33–34 (2009) (describing innovative mashup uses of Google Maps, including mashing Chicago crime data with Google Maps to "enabl[e] residents to see every crime, by type, in any neighborhood"); Lisa Veasman, Note, "Piggy Backing" on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups, 30 HASTINGS COMM. & ENT. L.J. 311, 317 (2008) (noting that "a programmer constructed the mashup HousingMaps," which "allows Internet users to search for available housing by viewing available housing listings and a map of those listings' locations side-by-side," "from the Google Maps API and from 'screenscraping' craigslist.org's housing listings" (citing *Data Scraping: Screen scraping*, WIKIPEDIA, http://en.wikipedia.org/wiki/Screenscraping#Screen_scraping (last visited Sept. 11, 2010); HOUSINGMAPS, <http://www.housingmaps.com/> (last visited Sept. 11, 2010)).

188. Presumably, Google also licenses at least some of this to online remixers as well.

189. Cf. Veasman, *supra* note 187, at 331 (noting that "if the infringing material has any 'draw' at all, it draws customers and users to the . . . original website," which is "a financial benefit" for that website).

190. *Id.* at 316 (noting that Google currently licenses out maps for others to use on their websites).

An online video mashup review of a movie, book, or television show that incorporates clips from the copyrighted work may similarly be considered a transformative use and constitute a criticism or comment under Section 107's preamble to the fair use factors.¹⁹¹ While many mashups are not used for nonprofit educational purposes as contemplated in fair use factor one,¹⁹² they likely will nevertheless satisfy the transformative use requirements often considered by courts when applying the first fair use factor.¹⁹³ The first fair use factor in fan mashup cases will therefore cut in favor of the defendant consumer-creator.¹⁹⁴

The second fair use factor—the nature of the copyrighted work¹⁹⁵—will generally cut in favor of the copyright holder in cases involving mashups of popular movies and other artistic works¹⁹⁶ because the second factor contemplates that the more creative a work, the more protection it should be afforded.¹⁹⁷ The most common subjects of fan mashups are movies, television shows, and music

191. 17 U.S.C. § 107 (2006) (stating that “the fair use . . . for purposes such as criticism, [or] comment . . . is not an infringement of copyright”); see *supra* note 179 (describing transformative use under the first fair use factor).

192. 17 U.S.C. § 107 (explaining that one of the factors to be considered in the fair use determination is “whether such use is of a commercial nature or is for nonprofit educational purposes”).

193. See Samuelson, *supra* note 157, at 2591 (“Transformative uses [of a work] include such things as remixing a song, making a mashup of clips from movies, or writing fan fiction about one’s favorite characters.”).

194. There may naturally be cases in which a mashup is used for a commercial purpose, which may change the analysis of the first fair use factor. The above discussion has assumed that most fan video mashups are available on noncommercial, publicly available video sharing websites such as YouTube. Where such remixes are made available on commercial websites—that is, websites that charge fees for access or that subsidize their activities with online advertising—the result may well be different. See Pote, *supra* note 178, at 678 (noting that while posting an audio “mashup for download on a Web site may favor a finding of fair use,” because the mashup is noncommercial, “playing [audio] mashups as part of a show at a club where the mashup remixer is paid to perform may favor a finding against fair use”). Thus, even though most applications of the first fair use factor to video mashups will cut in favor of the consumer-creator, not all will.

195. 17 U.S.C. § 107.

196. Cf. Pote, *supra* note at 178, at 678-79 (concluding that “[b]ecause audio mashups contain samples of sound recordings that are creative works,” and “[c]reative works are considered ‘closer to the core of intended copyright protection,’” the second fair use factor cuts against a finding of fair use in cases involving mashups) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994))).

197. 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05 [A][2][a], at 13-186 (“Under [the second fair use] factor, the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff’s work, the broader should be the scope of the fair use defense.”). As Nimmer suggests: “‘This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.’” *Id.* (quoting *Campbell*, 510 U.S. at 586).

videos¹⁹⁸—the typical creative works that lie at the heart of copyright protection as contemplated by the second fair use factor.¹⁹⁹ They may be contrasted with newspapers, nonfiction works, computer software, and databases, which are less central to copyright’s predominant aim of promoting artistic innovation.²⁰⁰

The third fair use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole²⁰¹—may cut either way depending on the specific mashup video in question.²⁰² The amount and substantiality criterion may be applied quantitatively or qualitatively.²⁰³ The fact that a consumer-creator only made a four minute remix will not help her if she took something qualitatively substantial from the original work.²⁰⁴ If a remixer uses, for instance, a key scene from a movie or an entire song, this may constitute a substantial taking under the third fair use factor.

The application of the fourth fair use factor—the effect of the use upon the potential market for or value of the copyrighted work²⁰⁵—may cut in favor of consumer-creators. Remixes are unlikely to negatively impact the copyright holder’s current or future mar-

198. See, e.g., Lee, *supra* note 9, at 1529 (“Another popular form of user-generated video is the movie trailer mashup, which involves taking snippets of a movie and transforming them into a very short movie trailer, often in humorous ways unintended by the author of the movie.”); *id.* at 1534 (discussing copyright issues arising out of a “user-generated mashup” of the television program *Grey’s Anatomy*); Andrew S. Long, Comment, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 321 (2007) (describing the *Boulevard of Broken Songs* mashup video, created from “various video and audio elements from Green Day’s *Boulevard of Broken Dreams*, Oasis’s *Today*, Travis’s *Writing to Reach You*, and Eminem’s *Sing for the Moment*”).

199. See 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05 [A][2][a], at 13-186.1 (“If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted.” (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981), *rev’d on other grounds*, 464 U.S. 417 (1984))).

200. See *id.* (noting that “there is a ‘greater license’ [under the fair use doctrine] to use portions of” works made by “‘diligence’ . . . such as a catalog, index or other compilation” than works made by “‘originality or inventiveness” (quoting *N.Y. Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977))).

201. 17 U.S.C. § 107 (2006).

202. Pote, *supra* note 178, at 680 (“[T]he determination of the amount and substantiality of the portions used depends greatly on the specific mashup and the specific samples used in that mashup.”).

203. 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05[A][3], at 13-193 to -194; Pote, *supra* note 178, at 679.

204. See Pote, *supra* note 178, at 680 (noting that “the likelihood of a finding of fair use is much greater” if the “samples [used in the mashup] are short and do not take [from] the ‘heart’ of the original works”).

205. 17 U.S.C. § 107.

kets,²⁰⁶ they may instead create positive market effects.²⁰⁷ Further, mashup videos probably do not serve as a “market substitute” for the original movies or other media.²⁰⁸ Thus, it is unlikely that consumer-creators will negatively impact a copyright holder’s market by substituting their products for those of the copyright holder. One might argue that the existence of free online movie mashups positively impacts the copyright holder’s market because they generate more interest in the original work.²⁰⁹

Copyright holders might argue that some mashups negatively affect their markets. For example, a particularly scathing video mashup review of a movie may deter people from viewing the movie in theaters or from renting, streaming, or buying the DVD. Generally, however, the fourth fair use factor is not aimed at this kind of effect on the market; the fair use defense is supposed to be copyright law’s attempt to balance free speech against proprietary copyrights.²¹⁰ Thus, one would hope that a video mashup movie review would be treated like a review in a newspaper or in any other news media²¹¹ that is typically excused as a fair use to the extent that it copies material directly from the work being reviewed.²¹²

Ultimately, factors one and four in most video mashup cases are likely to cut in favor of the consumer-creator²¹³ while factor two will generally cut in favor of the copyright holder.²¹⁴ The third factor will

206. See Pote, *supra* note 178, at 681 (“Generally, for . . . mashups, fans of the original work will not purchase the mashup instead of the original work because the mashup likely appeals to a different audience altogether.”).

207. Hetcher, *supra* note 31, at 1883 & n.59 (noting that fan-originated remixes generally will not cause any economic harm to a copyright holder but may bring benefits and using Star Trek example to explain this phenomenon).

208. Long, *supra* note 198, at 370 (“[M]ashups will seldom serve as a market substitute for the original product.”).

209. See JENKINS, *supra* note 163, at 200 (commenting that fans are viewed by many studios as “‘inspirational consumers’ whose efforts help generate broader interests in their properties”).

210. See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (noting that the fair use defense allows for broad scholarship, comment, and parody, which safeguards First Amendment rights).

211. See generally Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 365 (2008) (“[A] journalist who quotes portions of a book or movie in writing a review for her newspaper is held to have a fair use defense against copyright infringement.”).

212. *Id.* See generally Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1150-51 (2010) (“[F]air use favors the use of a copyrighted work for purposes of comment or criticism, as in a book review or parody, even if the use puts the work in a negative light.”).

213. See *supra* text accompanying notes 192–94, 205–12.

214. See *supra* text accompanying notes 195–200.

depend on the context of a given case.²¹⁵ Using a simple mathematical formula, most fair use cases would weigh in favor of the consumer-creators: two factors will generally fall in their favor;²¹⁶ one will fall against them;²¹⁷ and one will vary from case to case.²¹⁸ Practically, however, the defense is not applied in this formulaic way. A court may give particular weight to, say, factor two if the court is particularly interested in preserving incentives to innovate in areas that go to the heart of copyright protection.²¹⁹

In summary, the fair use defense may prove problematic for remixers.²²⁰ The fact that video mashups creators assert fair use and state that their work is not an infringement does not automatically make it so. However, it is a time-consuming and costly proposition for copyright holders to bring or to threaten judicial proceedings against remixers.²²¹ Moreover, the potential financial externalities of these activities might encourage copyright holders to allow a certain amount of online remixing.²²² The examples of *Star Wars*,²²³ *Doctor Horrible's Sing-Along Blog*,²²⁴ and Google Maps²²⁵ mashups suggest that copyright holders can work with online remixers without destroying the economic viability of their copyrights. Legislators and policymakers should consider these thoughts when making decisions about the contours of digital copyright law. A copyright law that more readily accommodates creative downstream uses of copyrights with greater certainty of application than the current fair use doctrine would be a welcome addition for many digital copyright users.

3. *Remix Liability and Internet Intermediaries*

Copyright holders who object to remixing and do not want to bring actions against individual remixers may, of course, decide to take action against services that host mashup videos, such as YouTube. Depending on the way the web service is set up, there will be questions

215. See *supra* text accompanying notes 201–04.

216. That is, factor one (purpose and character of the use) and factor four (effect of the use on the market).

217. Namely, factor two (nature of the copyrighted work).

218. That is, factor three (amount and substantiality of the portion taken).

219. See Raffetto *supra* note 171 (noting that courts applying the fair use defense have a significant amount of discretion and flexibility).

220. See generally Lee, *supra* note 9, at 1509–10 (explaining why the issue of copyright infringement in remixing cases is far from “simplistic”).

221. See *supra* note 130.

222. See *supra* note 207.

223. See *supra* text accompanying note 163.

224. See *supra* text accompanying notes 164–66.

225. See *supra* text accompanying notes 186–90.

as to whether these services might be direct infringers or could only be secondarily liable for the direct infringements of others. For example, a search engine only linking to content on other websites and not reproducing the content itself would probably only be exposed to secondary liability claims.²²⁶ Current precedents on secondary liability are not terribly clear²²⁷ and rely on the establishment of primary liability elsewhere.²²⁸ Thus, to succeed in a claim for contributory or vicarious liability against a search engine, a copyright holder would need to convince a court that the remixers whose work is indexed by Google are infringing copyrights in the first place.

Direct infringement might be easier to establish in the case of video hosting services like YouTube and Facebook. These services *do* host content posted by their users on their own servers.²²⁹ Their terms of service generally attempt to contract out of copyright liability by extracting warranties from users that nothing will be posted in breach of copyright.²³⁰ Remixers who assert fair use might feel that they have satisfied these terms; one reason many remixers put “no copyright infringement” notices on their work may be to convince themselves and the online service providers that they are not in breach of the web host’s terms of use.

Most online services that host others’ content are quick to respond to takedown notices received from copyright holders and will leave it to the poster of the allegedly infringing content to subsequently establish fair use.²³¹ The Copyright Act has been amended in

226. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–62 (9th Cir. 2007) (finding that Google is not directly liable for infringing copyrights where it does not itself hold or reproduce copies of the protected images).

227. See *supra* note 112.

228. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005) (stating that secondary liability through the inducement theory cannot be established unless primary liability was otherwise established).

229. See Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 *JURIMETRICS* 375, 382 (2009) (noting that YouTube and Facebook, in addition to other online services, such as MySpace, “host ‘user-created content’”).

230. As YouTube’s Terms of Service state:

You shall be solely responsible for your own Content and the consequences of submitting and publishing your Content on the Service. You affirm, represent, and warrant that you own or have the necessary licenses, rights, consents, and permissions to publish Content you submit; and you license to YouTube all patent, trademark, trade secret, copyright or other proprietary rights in and to such Content for publication on the Service pursuant to these Terms of Service.

Terms of Service, Cl. 6.B., YouTube (June 9, 2010), <http://www.youtube.com/t/terms>.

231. See, e.g., *Copyright Claim Disputes: Filing a Counter-Notification*, YouTube (July 15, 2010), <http://www.google.com/support/youtube/bin/answer.py?answer=59826&query=counter&topic=&type=> (“When we receive a notification of alleged copyright infringe-

the digital age to create a safe harbor for Internet intermediaries that respond quickly to such notices.²³² The law leans toward the protection of copyright holders and gives a significant amount of power to copyright owners to decide the fate of mashups that involve their work. Even where there is some question as to whether a given mashup is a fair use, the ability of the web hosting service to avail itself of the safe harbor on receipt of a takedown notice will likely encourage the web host to err on the side of caution and remove the posting; thus, web services like YouTube might remove much material that is not infringing copyright.²³³ It may be difficult (and a high cost burden) for the initial poster to establish fair use in the absence of litigation determining that the use is, indeed, excusable under Section 107.

The current online availability of mashups might suggest that many copyright holders are not too worried about the legal consequences of their remixing. This apparent lack of concern may also reflect copyright holders' hesitancy to aggravate their fan bases or their appreciation of added interest in their works.²³⁴ Therefore, the availability of remixes online heavily depends on the attitudes of copyright holders, which may vary greatly. Universal Music Group, the owner of some of the singer Prince's copyrights, is very quick to assert copyright ownership with respect to mashup videos posted online,²³⁵ but the owners of copyrights in the *Twilight* franchise do not seem so concerned (at least judging by the number of *Twilight* related mashups currently available on YouTube).²³⁶

This divergent approach may be an inevitable result: if we assume that copyright holders should have the right to decide how their work is used online, then it is unproblematic that some copyright holders allow remixing while others do not. However, if we assume that the majority of remixing does not, in fact, infringe copyright—or at least

ment, we remove the posting that is the subject of the notification. If we remove one of your videos, we email you, and place a note in your account”).

232. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2879–86 (1998) (codified as amended in scattered sections of 17 U.S.C.).

233. Cf. LESSIG, *supra* note 22, at 2 (“Companies like YouTube are deluged with demands to remove material from their systems. . . . Copyright law gives [copyright holders] . . . power by giving [them] a quick and inexpensive way to get the YouTubes of the world to help it protect its rights.”).

234. See *supra* note 207.

235. See, e.g., LESSIG, *supra* note 22, at 1–5 (describing the aggressive stance taken by Universal Music Group on unauthorized use of snippets of Prince's *Let's Go Crazy* in a YouTube video).

236. See *supra* note 162.

may be excused in many cases under the fair use defense²³⁷—there is a potential problem. Copyright holders are then arguably taking too much control by effectively dictating how web hosting services like YouTube handle mashup videos. Driven to avoid copyright liability, YouTube, Facebook, MySpace, and other OSNs will respond to takedown notices received from copyright holders to the detriment of fans engaging in non-infringing remixing activities.²³⁸

There may be a number of solutions to this potential problem. Free market advocates would likely favor a solution that allows the market to sort itself out without regulatory intervention. Commentators are increasingly arguing that smart businesses in the Web 2.0 age will open up to online interactions with their consumer bases, allowing consumers to participate in online business activities.²³⁹ For those who prefer regulatory solutions, it may be worth revisiting the application of certain aspects of the Copyright Act to the mashup video context. The two most salient provisions of the Act implicated in this context are the fair use defense and the safe harbor provisions for online service providers.²⁴⁰ It is unclear whether—and to what extent—particular mashup videos qualify as fair uses of copyright material.²⁴¹ If a clearer answer to the fair use question is provided, web hosts will have greater guidance as to whether a copyright holder's takedown notice relating to a video mashup is reasonable.²⁴²

As noted above, the biggest disadvantage for consumer-creators asserting a fair use defense in their mashup videos is that a determination of fair use cannot be made until the issue is litigated. The ability

237. See *supra* text accompanying notes 213–18.

238. See *supra* text accompanying notes 231–33.

239. JARVIS, *supra* note 187, at 98 (“Collaboration with customers is the highest and most rewarding form of interactivity, for that is when the public tells you what they want in a product before you’ve made it. If you’re lucky, they’ll take ownership in the product you create together.”). While much of this literature has discussed businesses that focus more on traditional goods and services, there is no reason why the same reasoning could not be applied to the arts and entertainment businesses. See generally DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 1–2 (2006) (exploring how “[s]mart companies,” like MySpace, InnoCentive, flickr, Second Life, YouTube, the Human Genome Project, and “mature firms,” like Boeing, BMW, and Procter & Gamble, “are encouraging, rather than fighting, the heaving growth of massive online communities”).

240. 17 U.S.C. §§ 107, 512 (2006).

241. See *supra* note 219.

242. *But cf.* Jerome Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyright Works*, 22 BERKELEY TECH. L.J. 981, 993–94 (2007) (“[Internet service providers] and copyright owners have generally adapted to conducting businesses within the framework of the notice and takedown regime of the [Digital Millennium Copyright Act] safe harbors.”).

of a remixer—and her web hosting service provider—to have a better *ex ante* idea of fair use would be very helpful in practice.²⁴³ A remixer’s mere assertion of a fair use defense is not enough. Third party guidelines would be very useful here. Commentators have helpfully suggested approaches to copyright law that take an *ex ante* approach to fair use.²⁴⁴ Alternatively, the issuance of guidelines by the Copyright Office or some other expert agency on fair use in the mashup context would be very useful.²⁴⁵ Remixers could then say more than “no copyright infringement intended”²⁴⁶ and could, in fact, assert a fair use defense and reference an authoritative (or at least persuasive) guideline to support their claim.

4. *Remixing and Licensing*

Outside of the fair use defense, some remixers might try to refute claims of copyright infringement by relying on an express or implied license from the copyright holder to use the work. While most video mashups that include copyrighted material tend to either say “no copyright infringement intended” or assert fair use,²⁴⁷ few refer explicitly to a license. This may be so because an implied license defense would be difficult to sustain in cases where a consumer-creator has taken material from a work that includes clear copyright notices, such as a movie or DVD that begins with a copyright notice and a description of penalties for copyright infringement.²⁴⁸ But, in cases where material that is remixed is taken from other sources—like pro-

243. Cf. Ashley M. Pavel, Note, *Reforming the Reproduction Right: The Case for Personal Use Copies*, 24 BERKELEY TECH. L.J. 1615, 1617 (2009) (“[J]udicial application of the fair use factors to personal use technologies is difficult for innovators and users to predict *ex ante*.”).

244. See, e.g., Jerome Reichman et al., *supra* note 242, at 1032–39 (arguing that a “reverse notice and takedown regime would provide a needed balance in the U.S. anti-circumvention rules”).

245. See, e.g., AM. UNIV. CTR. FOR SOC. MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (2010), available at <http://www.centerforsocialmedia.org/fair-use/best-practices/online-video> (“This document is a code of best practices that helps creators, online providers, copyright holders, and others interested in the making of online video interpret the copyright doctrine of fair use.”); Lipton, *supra* note 124, at 149–55 (suggesting that a “stand-alone [administrative agency] or a department established under the auspices of the Copyright Office” could be used to “enable more people to have access to an inexpensive and effective determination of their rights in relation to a particular copyrighted work”).

246. See *supra* notes 153–54 and accompanying text.

247. See *supra* notes 153–54 and accompanying text.

248. Cf. Jerry S. Birenz, *Caching World Wide Web Sites*, 16 COMM. LAW. 13, 15 (1998) (noting that “[a clear] copyright notice and warning [on a website] . . . may be sufficient to protect against an implied authorization argument” by the infringer).

motional websites for movies that incorporate publicity stills—an implied license argument may be available.²⁴⁹

In *Summit Entertainment, LLC v. Beckett Media, LLC*,²⁵⁰ Summit, the movie studio that holds the copyright in the *Twilight* movies,²⁵¹ sued Beckett Media for copyright infringement based on its “reproduc[tion] without authorization [of] numerous images from the [*Twilight*] films, as well as trademarks and promotional images associated with the films” in “two successive issues of a fan magazine (the ‘*Twilight Fanzines*’).”²⁵² Beckett Media was ultimately unsuccessful in its assertion of an implied license defense against Summit.²⁵³ The defendant’s lack of success in this case, however, was attributable to the fact that it exceeded the scope of the license with respect to the images used.²⁵⁴ The defendant had displayed altered versions of the images with the knowledge that the movie studio’s publicity website clearly stated that users of the stills “will not edit, alter or modify any of the Content without Summit’s prior written approval.”²⁵⁵ The defendant fan magazine had also used photographs that were not available on Summit’s publicity website.²⁵⁶

From this, remixers might learn where to find content that they are allowed to use. Movie studios and other copyright holders should also think more about which content—and how much content—they openly license to fans.²⁵⁷ Copyright holders may not want their audiences to sample indiscriminately from their complete works, but they may decide to make more material available for public use than cur-

249. Cf. Steven Hetcher, *The Half-Fairness of Google’s Plan to Make the World’s Collection of Books Searchable*, 13 MICH. TELECOMM. & TECH. L. REV. 1, 67 (2006) (suggesting that “there is indeed a good argument for an implied license [for website usage] given that websites [unlike books] are open to the public”).

250. No. CV 09-8161, 2010 WL 147958 (C.D. Cal. Jan. 12, 2010).

251. See *infra* note 274.

252. *Summit*, 2010 WL 147958, at *1.

253. *Id.* at *2–3. The court held that Beckett Media had not carried its burden of establishing the existence of a license “since, most notably, [Beckett Media] ma[de] no effort to account for its allegedly infringing photographs that were not even available on [Summit’s] publicity website.” *Id.* at *2. The court also found it “likely” that Summit would overcome any license defense “by establishing that [Beckett Media] impermissibly copied [Summit’s] images beyond the scope of any license [Beckett Media] may have had to use those images.” *Id.* at *3.

254. *Id.* See generally *S.O.S., Inc., v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (“A licensee infringes the owner’s copyright if its use exceeds the scope of its license.” (citing *Gilliam v. Am. Broadcasting Cos.*, 538 F.2d 14, 20 (2d Cir. 1976))).

255. *Summit*, 2010 WL 147958, at *3 (internal quotation marks omitted).

256. *Id.* at *1.

257. Cf. Chander & Sunder, *supra* note 19, at 621–23 (noting difficulties in obtaining licenses for “critical reviews or lampoons” from copyright holders for fan fiction, specifically).

rently is the case.²⁵⁸ For example, clips from movie trailers might be made available for public use.²⁵⁹ Many *Twilight* mashup videos do, in fact, sample from copyrighted movie trailers.²⁶⁰ A number of mashups are actually attempts at fan made trailers.²⁶¹ Their home-made trailers may be useful for studios for marketing purposes because they show copyright holders what fans *think* the trailer should emphasize.

In the future, some copyright holders might create fan competitions to develop movie trailers by releasing video footage and music tracks from the forthcoming film. Movie studios could potentially save money on marketing by turning to their willing fan bases (that would not demand compensation) in this way.²⁶² A law clarifying that such uses are permissible non-infringing uses of copyright works under the rubric of fair use, of licensing, or of some other guise could better support such activities more clearly than current law.²⁶³

D. Case Study Three: New Moon Video Clip and the Criminal Aspects of Copyright Law

In November 2009, twenty-two-year-old Samantha Tumpach was arrested in a Chicago movie theater for incidentally videotaping three minutes of footage from the newly released film, *The Twilight Saga: New Moon*.²⁶⁴ She recorded snippets of the movie while filming her sister's birthday party, which included a trip to see the movie.²⁶⁵ In

258. *Cf. id.* at 621 (“If there is a market for a work, then the copyright owner should seek to maximize his or her profit by exploiting it—even if it means tolerating criticism.”).

259. *But cf. Lipton, supra* note 113 (noting that Meyer and Summit Entertainment “may object to certain fan remixes, particularly those that use extended clips or are misleading in some way”).

260. *See generally id.* (detailing how “Twi-hards” are “borrowing copyrighted material from the ‘Twilight’ movies and mixing it up themselves”).

261. *Id.* (“While some Twi-hards make it clear that their videos are not official trailers, others are less transparent.”).

262. *Cf. id.* (“‘Twilight’ remixes create more buzz for the movies, which ultimately benefits the producers.”).

263. *See supra* notes 243–46 and accompanying text. Another possibility would be a statutorily implied compulsory license. *See, e.g., Chander & Sunder, supra* note 19, at 621–22 (noting that “rather than calling for fair use for criticism [of a copyright owner’s original work], any reluctance to license criticism should simply imply a compulsory license, requiring a royalty payment in lieu of a royalty-free use.”).

264. Shanne Schwarze, “*New Moon*” *Taping May Put Woman in Prison*, CNNENTERTAINMENT (Dec. 4, 2009, 6:28 PM), <http://www.cnn.com/2009/SHOWBIZ/Movies/12/04/new.moon.arrest/>; *see* Amanda Bell, *Charges Against Accused “The Twilight Saga: New Moon” “Pirate” Dropped*, EXAMINER.COM (Dec. 11, 2009, 4:36 PM), <http://www.examiner.com/twilight-in-national/charges-against-accused-the-twilight-saga-new-moon-pirate-dropped> (same).

265. Schwarze, *supra* note 264.

compliance with the anti-piracy guidelines issued to movie theaters by the Motion Picture Association of America ("MPAA"), theater management notified the on-site police officer.²⁶⁶ Tumpach was then detained and spent two days in jail before she was released and the charges against her were dropped.²⁶⁷ Prior to her release, she potentially faced a three year jail term and was "'traumatized'" by the incident.²⁶⁸

The director of *New Moon*, Chris Weitz, questioned whether the arrest was justified,²⁶⁹ but there was little he could do about it. He did not hold a copyright in the film. Expressing his views, he opined: "There is, needless to say, a difference between trying to protect the copyright of a film and making an unfair example of someone who clearly seems not to have any intentions toward video piracy."²⁷⁰ The criminal law of copyright, bolstered by the zero tolerance policy adopted by the MPAA,²⁷¹ however, left little room for discretion in enforcement. Even if Tumpach intended to engage in video piracy, the three minute video was not of sufficient length or quality to do so, and the audio track was obscured by her talking throughout the film.²⁷²

The actual copyright holder, Summit Entertainment,²⁷³ was in a difficult position. Summit Entertainment is a new movie studio that has only recently ventured into the business of making and marketing

266. *Muvico's Official Response to the Rosemont Theater Piracy Incident*, EARTHTIMES (Dec. 12, 2009), <http://www.earthtimes.org/articles/press/muvicos-official-response-to-the-rosemont-theater-piracy-incident,1087028.html#>.

267. Bell, *supra* note 264.

268. *Id.* (internal quotation marks omitted).

269. Amanda Bell, "New Moon" Director Chris Weitz Defends Perp in Piracy Case, Should She Really Receive Jail Time?, EXAMINER.COM (Dec. 9, 2009, 4:32 AM), <http://www.examiner.com/twilight-in-national/new-moon-director-chris-weitz-defends-perp-piracy-case-should-she-really-receive-jail-time>.

270. *Id.* (internal quotation marks omitted).

271. MOTION PICTURE ASS'N, BEST PRACTICES TO PREVENT FILM THEFT 3 (July 2010), http://www.fightfilmtheft.org/pdfs/BP_US_English.pdf ("The MPAA recommends that theaters adopt a Zero Tolerance policy that prohibits the video or audio recording of any portion of a movie and that prohibits the taking of still photographs.")

272. See Seth Abramovitz, *Swashvideoring New Moon She-Pirate Could Face Plank*, MOVIE LINE (Dec. 3, 2009, 3:00 PM), <http://www.movieline.com/2009/12/swashvideoring-new-moon-she-pirate-face-plank.php> (explaining that Tumpach was "talking throughout the taped footage in question"); Bell, *supra* note 269 (explaining that the movie was three minutes and that Tumpach was talking the whole time).

273. *Public Catalog: New Moon*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&ti=1,1&SAB1=Summit%20Entertainment&BOOL1=all%20of%20these&FLD1=Name%3A%20Claimant%20%20%28KCLN%29%20%28KCLN%29&GRP1=AND%20with%20next%20set&SAB2=New%20Moon&BOOL2=as%20a%20phrase&FLD2=Keyword%20Anywhere%20%28GKEY%29%20%28GKEY%29&CNT=25&PID=O-BaOO786KC7A1R2DyzXfdUPXm-O&SEQ=20100819195056&SID=3> (last visited Sept. 14, 2010).

its own films.²⁷⁴ The studio owes much of its recent success to its *Twilight* fans²⁷⁵ (suggesting that it may not want to see them jailed on charges of criminal copyright infringement), but Summit has to take a stand against digital copyright piracy (or risks its own commercial future).²⁷⁶ Summit's official statement walked this fine line:

In regards to the situation with Samantha Tumpach, we applaud Muvico [the movie theater] for upholding the zero tolerance policy on piracy The pirating of films is a very serious issue and we all need to remain vigilant to protect the art of film and the myriad of businesses that the film industry supports. We believe that the attention that this incident has drawn, has served as a reminder to us all that any form of film piracy, or perceived piracy, will be treated with the utmost seriousness. Summit is pleased that all charges against Ms. Tumpach have been dropped and appreciate the efforts of the police and the prosecutors in this outcome.²⁷⁷

Summit was “pleased” that the charges were dropped but made no apologies for the initial arrest or for failing to take public action to set the matter straight.²⁷⁸ In fact, Summit reserved its praise for the actions of the police and prosecutors.²⁷⁹ Summit apparently took a “hands off” approach, leaving resolution to the criminal justice system.

While Tumpach's video was never intended to be publicly distributed, the story surrounding her arrest and release were very quickly disseminated over the blogosphere.²⁸⁰ Web 2.0 technologies that enable the public to comment on these situations might concern copyright holders, particularly those who want to maintain good customer

274. See *Company Info About Summit Entertainment*, SUMMIT ENT. (2010), <http://www.summit-ent.com/> (noting that the “new studio was established in April 2007”).

275. See Kimberly Sherman, Postings Related to Summit, EXAMINER.COM, <http://www.examiner.com/summit-entertainment-in-national/kimberly-sherman> (last visited Sept. 14, 2010) (“Due in large part to the overwhelming success of the *Twilight* Saga, Summit Entertainment has emerged as a prominent leader in the independent film world.”).

276. Cf. Lipton, *supra* note 113 (explaining that allowing “video remixes,” but “draw[ing] the line at [allowing fans to] post[] large chunks of the actual movies online,” “may be an appropriate line to draw—allowing most fan activity but aggressively preventing direct copying of the movies”).

277. Bell, *supra* note 264.

278. See *id.* (noting that, in its official statement, Summit “appreciate[d]” the efforts of police and prosecutors and “applaud[ed]” Muvico for its actions).

279. *Id.*

280. See, e.g., Patrick Corcoran, *Charges Dismissed in Twilight Recording Case: Muvico and Summit Release Statements*, REEL BLOG: NAT'L ASS'N THEATER OWNERS (Dec. 11, 2009), <http://www.natoonline.org/blog/tag/samantha-tumpach>; see also *supra* note 264 (noting online stories about Tumpach's experience).

relationships. Presumably, Tumpach's arrest will not prevent *Twihards* (die-hard *Twilight* fans)²⁸¹ from watching *Twilight* films and purchasing the DVDs and soundtracks. But, some may now think twice about viewing other Summit films.

Summit executives may have engaged in a cost-benefit analysis, realizing that they probably would not lose much, if any, of their audience by supporting the zero tolerance policy.²⁸² It was more important to support the MPAA's stance against copyright piracy than to protect one fan who recorded in a movie theater despite posted warning signs.²⁸³ If one believes that theater patrons are clearly notified that recording movies is an offense and will be prosecuted, this might be the right outcome. But, perhaps a reasonable theater patron could interpret those warnings as prohibiting recording entire films, as opposed to random (and commercially unusable) snippets. Similar interpretative uncertainties arise here as with interpretation of the fair use defense in the video mashup context.²⁸⁴ Just as there is no clear *ex ante* guidance as to whether a particular mashup will be a fair use or not, there is arguably also no clear guidance as to when a recording in a movie theater is sufficiently *de minimis* not to attract criminal copyright liability.²⁸⁵

Perhaps copyright distributors and movie theaters should be required to make their warnings against recording in theaters more pronounced.²⁸⁶ Alternatively, police could be given more discretion about when to detain a person for recording snippets (but this would also require clearer or, at least, different guidelines than currently exist). Perhaps in cases like the Tumpach scenario, police could be given the clear discretion, supported by a MPAA statement, to confis-

281. One of the definitions provided by Urban Dictionary for "Twihard" is "a[] serious/obsessive reader of the *Twilight Saga* by Stephenie Meyer." *Twihard*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=Twihard> (last visited Sept. 14, 2010).

282. See *supra* text accompanying note 277.

283. See Bell, *supra* note 264 ("In a continuing effort to educate its guests about the illegality of film piracy, Muvico prominently places a number of posters and signs within its theaters alerting moviegoers of its 'zero-tolerance' policy with respect to the camcording of films in its auditoriums.").

284. See *supra* Part III.C.2.

285. Cf. Lipton, *supra* note 113 ("Congress and the courts might do well to take a look at what's actually going on in the blogosphere in terms of the balances currently being struck between copyright holders and fans. Such a survey might help to formulate clearer copyright rules for today's digital culture.").

286. Cf. MOTION PICTURE ASS'N OF AM. et al., MPAA, NATO, CMPDA & MPTAC LAUNCH FIGHTFILMTHEFT.ORG TO FIGHT ILLEGAL CAMCORDING IN THEATERS (March 13, 2006), http://www.wired.com/images_blogs/threatlevel/2010/07/moviereward.pdf (noting that among the current camcorder piracy measures are "[w]arning signs" about "prohibiting camcording"); see also *supra* note 283.

cate the physical recording—or perhaps even the recording device—but to excuse the individual who made the recording.

E. Case Study Four: Robsessedpattinson.com Bloggers Versus Robsessed DVD Producers

The consumer reviews section on Amazon.com for a documentary entitled *Robsessed*, about actor Robert Pattinson who plays Edward Cullen in *Twilight*, contains some revealing data.²⁸⁷ Amazon's consumer reviews incorporate feedback from customers about products and services available on Amazon.²⁸⁸ Amazon encourages customers to rate their past purchases from one to five—one being the lowest and five being the highest recommendation for a product.²⁸⁹ A summary of customer rankings is presented in a bar graph on Amazon's webpage for the item, accompanied by a series of full text customer reviews.²⁹⁰ Each product's bar graph generally conforms to one of two basic configurations: Customers either agree on the ranking (resulting in a ranking that clusters around one or two consecutive numbers), or the rankings form a curve (representing a small number of responses from people who like the product the least, a majority of responses clumped in the middle, and a small number of high rankings from people who love the product).

A popular product may receive rankings purely in the four to five range while the rankings for an unpopular product may clump around the one to two range. Products with split consumer support have a wider smattering of rankings—between one and five—but with a majority of the rankings in the middle. For example, the customer rankings for Dan Brown's most recent novel, *The Lost Symbol*, were spread relatively evenly.²⁹¹ As of January 21, 2010, *The Lost Symbol* received 430 five-star rankings, 313 four-star rankings, 427 three-star rankings, 498 two-star rankings, and 482 one-star rankings.²⁹² Amazon's customer rankings for the boxed set of *Twilight* books, in contrast, were clustered around five, reflecting the popularity of the

287. *Customer Reviews: Robsessed*, AMAZON.COM, <http://www.amazon.com/Robsessed-Robert-Pattinson/product-reviews/B002OKK2B6> (last visited Sept. 14, 2010).

288. *See, e.g., id.* (including a "most helpful favorable review" and "most helpful critical review").

289. *See, e.g., id.*

290. *Id.*

291. *See Customer Reviews: The Lost Symbol*, AMAZON.COM, http://www.amazon.com/Lost-Symbol-Dan-Brown/dp/0385504225/ref=sr_1_1?ie=UTF8&cs=books&qid=1264118731&sr=1-1 (last visited Jan. 21, 2010) (showing the evenly spread Amazon customer rankings for *The Lost Symbol*) (graph on file with the Maryland Law Review).

292. *Id.*

series.²⁹³ The boxed set received 1,757 five-star rankings, 129 four-star rankings, 39 three-star rankings, 17 two-star rankings, and 69 one-star rankings.²⁹⁴

These examples demonstrate how customer reviews tend to either spread or cluster. Interestingly enough, the reviews for the *Rob-sessed* DVD did not follow either pattern.²⁹⁵ The reviews comprised a large group of fives, nothing in the middle, and then a large group of ones.²⁹⁶ The first few customer comments below the customer review graph indicate why the graph looks like this.²⁹⁷ The reviews suggest that the distributor of the DVD, Revolver Entertainment,²⁹⁸ copied material from others, including fan sites, without permission or attribution.²⁹⁹ Quite possibly, the people who ranked the video highly knew nothing of the allegations (or did not care about them) while those who did know about Revolver's activities were extremely upset and ranked the product accordingly.

Revolver apparently copied material from an unauthorized Robert Pattinson fansite, *robsessedpattinson.com*.³⁰⁰ The bloggers were upset when Revolver stole material without authorization to advertise the DVD on its own website and gave no attribution to the bloggers.³⁰¹ The bloggers sent a cease and desist notice to Revolver.³⁰² Revolver

293. See *Customer Reviews: The Twilight Saga Collection*, AMAZON.COM, http://www.amazon.com/Twilight-Saga-Collection-Stephenie-Meyer/dp/0316031844/ref=sr_1_1?ie=UTF8&cs=books&qid=1264119088&sr=1-1 (last visited Jan. 21, 2010) (showing that the customer ratings for the *Twilight* boxed set were mostly around five stars, indicating the series' popularity with consumers) (graph on file with the Maryland Law Review).

294. *Id.*

295. See *Customer Reviews: Robsessed*, *supra* note 287 (showing the unusual spread of customer rankings for the *Robsessed* DVD with most consumers rating the DVD either five stars or one star but very few rating the DVD in the middle).

296. *Id.*

297. BroLo, Review of *Robsessed: Stolen Material and Rip-off*, AMAZON.COM (Oct. 8, 2009), http://www.amazon.com/Robsessed-Robert-Pattinson/product-reviews/B002OKK2B6/ref=dp_top_cm_cr_acr_txt?ie=UTF8&showViewpoints=1 ("Do not support a company that blantly [sic] steals work from fan sites: WORD FOR WORD. No permission granted, just stole blog posts and pictures to promote their video."); DeadBunnyDip "Bunny in a Blender," Review of *Robsessed: Nothing You Haven't Already Seen. Why Spend \$18 When You Get Rob Info Online for FREE?*, AMAZON.COM (Oct. 9, 2009), http://www.amazon.com/Robsessed-Robert-Pattinson/product-reviews/B002OKK2B6/ref=dp_top_cm_cr_acr_txt?ie=UTF8&showViewpoints=1 ("Several reviews have stated that this DVD has NO personal interviews with the subject, and has mostly second/third-hand information.").

298. ROBSESSED (Revolver Entertainment 2009).

299. See *Customer Reviews: Robsessed*, *supra* note 287.

300. See Gozde, *supra* note 87 (noting that the site was "a victim of plaigirism [sic]").

301. *Id.* ("[Revolver Entertainment] claim[s] it's an 'all access DVD.' I wonder who/what else they 'accessed' without permission.").

302. *Id.*

later removed the offending material from its website without expressly acknowledging that it had received the letter.³⁰³

This episode is illuminating on a number of fronts. For one, it belies the norm: A small group of bloggers brought a complaint against a commercial production company where, more typically, copyright actions involve a commercial enterprise proceeding against individuals.³⁰⁴ This example illustrates that when Web 2.0 technologies empower consumers to become creators, those consumer-creators will seek to protect their own creations just as surely as commercial producers of valuable copyrighted works.

Moreover, unlike deep pocketed commercial copyright holders with their own teams of legal advisors, the bloggers had to proceed with their own legal understandings. Their initial description of the incident did not mention copyright infringement at all, despite the fact that copyright infringement was at issue.³⁰⁵ The bloggers instead described Revolver's conduct in terms of plagiarism.³⁰⁶ This, of course, is an accurate description of Revolver's conduct, but generally not a claim that gives rise to a legal remedy.³⁰⁷ Further, the bloggers describe plagiarism as a *crime*, which, at least in legal terms, it is not.³⁰⁸

The bloggers desired to protect their idol, Robert Pattinson, from unauthorized commercial exploitation, noting that: "Our stand on the DVD is still the same. It's unauthorized, Robert Pattinson is not getting a dime from it and [Revolver] managed to anger us, the fan base by stealing."³⁰⁹ The bloggers drew a distinction between their own activities and those of the makers of the unauthorized DVD: They saw nothing wrong with their own online activities, nonprofit public

303. *See id.* ("The Robsessed-DVD website has now taken down our content We never heard back from Revolver Entertainment but we assume they got our cease and desist.")

304. *See, e.g.,* *BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005) (affirming judgment for copyright owners against an individual downloader because "downloading full copies of copyrighted material without compensation to authors cannot be deemed 'fair use'").

305. *See supra* note 90 ("Plagiarism is an awful crime and we should always stick together to fight it.")

306. *See* Gozde, *supra* note 87.

307. 3 NIMMER ON COPYRIGHT, *supra* note 101, § 8D.03[A][2][c], at 8D-42 (noting that while plagiarism is an ethical wrong, it "is not in fact a legal doctrine" (quoting *Kindergartners Count, Inc. v. DeMoulin*, 249 F. Supp. 2d 1233, 1251 (D. Kan. 2003))).

308. Gozde, *supra* note 87; *see also* Jacqui Lipton, *More on Digital Copyright Norms . . . and Twilight*, MADISONIAN.NET (Dec. 11, 2009), <http://madisonian.net/2009/12/11/more-on-digital-copyright-norms-and-twilight> (explaining "that the actual legal complaint is about copyright infringement," not plagiarism).

309. *See* Gozde, *supra* note 87.

discourse about Pattinson including text, photos, and videos, but they eschewed unauthorized *commercial* exploitation.³¹⁰

The parallels and divergences between the bloggers' conceptions of their legal rights and actual law capture the extent to which current online social norms (mis)align with intellectual property law. These norms may therefore teach us something about potential future directions for the law based on the norms, or vice versa. Perhaps the misunderstanding in the bloggers' complaints regarding the differences between plagiarism and copyright does not matter in practice. From the complaining party's viewpoint, whether a letter of complaint is framed in either way may be irrelevant if it results in the desired action.³¹¹ In this instance, Revolver removed the offending material from its website, presumably in response to the cease and desist notice.³¹² But, a lawyer may ponder whether the public should be better educated about copyright law, particularly now that members of the public are increasingly becoming creators in Web 2.0 forums.³¹³

One particular statement on the *robsessedpattinson.com* blog is a good example of where public education could be helpful: "Plagiarism is an awful crime and we should always stick together to fight it."³¹⁴ While plagiarism is obviously dishonest, it is not a crime.³¹⁵ There is also little guidance as to how we can "stick together"³¹⁶ to fight it. If the law was easier to understand and if consumer-creators had a better sense of where they might obtain legal assistance, the copyright system might create fairer results. Blogs themselves could be rich sources of such public education if people with relevant information blogged more about these issues.

I, for example, have posted on an intellectual property law blog about the *Robessed* scenario.³¹⁷ A blogger from the *robsessedpatti-*

310. *See id.* (venting about what had happened with Revolver Entertainment and then resolving to "go back to our Robert Pattinson coverage :)").

311. *See* Lipton, *supra* note 308 (noting that the fan club could have sued Revolver Entertainment for trademark infringement if they actually had "[a trademark] in the 'Robessed' name," which would have been more fruitful financially, but explaining that the fan club wanted "to retain credit for their own work").

312. *See* Gozde, *supra* note 87; *see also* Lipton, *supra* note 308 ("The bloggers apparently sent a cease and desist notice to Revolver and the offending material was later removed from Revolver's [sic] blog.").

313. *Cf.* Pavel, *supra* note 243, at 1640 & n.159 (addressing public education about copyright infringement and noting that "[e]ducation is one of the main strategies that the content industries use to combat widespread digital piracy by the public at large").

314. Gozde, *supra* note 87.

315. *See supra* note 307.

316. Gozde, *supra* note 87.

317. *See* Lipton, *supra* note 308.

son.com fansite saw the entry and entered into an online discussion about her legal rights.³¹⁸ In this way, Web 2.0 technologies can enable norms and laws to interact.³¹⁹ If lawyers and nonlawyers blog together about legal issues, nonlawyers obtain a better understanding of their legal rights, and lawyers learn more about emerging online norms.³²⁰ Of course none of this goes directly to the official legislators and policymakers—Congress and the Judiciary—unless they are also trolling the blogosphere for information, or are encouraging their aides and judicial clerks to do so.³²¹ Regardless, lawmakers should pay more attention to the blogosphere to better understand the complex interplay of interests in copyrights online with a view to better reflecting those interests in digital copyright law.

Interestingly, it seems like the robsessedpattinson.com bloggers did not realize that they might have a common law trademark corresponding with their domain name that Revolver may have infringed or diluted.³²² If the bloggers had wanted to bring a trademark action against Revolver, they may have succeeded in obtaining an injunction against distribution of the DVD³²³ (but they instead seemed happy

318. See Gozde, Response to *More on Digital Copyright Norms . . . and Twilight*, MADISONIAN.NET (Dec. 12, 2009, 10:54 AM), <http://madisonian.net/2009/12/11/more-on-digital-copyright-norms-and-twilight/> (commenting that Revolver Entertainment “w[as] taking our blog posts and posting them on their site like they wrote it” and asking whether it was “[p]laigirism [sic]” or “copyright infringement”).

319. Cf. Lipton, *supra* note 308 (“So to me this is another interesting example of where the realities of [intellectual property] law don’t necessarily meet the social norms in the entertainment area.”).

320. Naturally, lawyers engaging in this kind of conduct need to be careful that their discussions do not amount to offering legal advice in states in which they are not licensed to practice. For a more thorough discussion on the “ethical gray areas” posed by legal blogs and potential sanctions that attorneys may face for unauthorized practice by holding themselves out as lawyers and dispensing legal advice, see Adrienne E. Carter, Note, *Blogger Beware: Ethical Considerations for Legal Blogs*, RICH. J.L. & TECH., Nov. 2007, at 8–16.

321. Cf. Lipton, *supra* note 113 (“Congress and the courts might do well to take a look at what’s actually going on in the blogosphere in terms of the balances currently being struck between copyright holders and fans.”).

322. See *Tober v. APROV.com*, No. 1:07cv1252, 2008 WL 4364221, at *2 (E.D. Va. Sept. 23, 2008) (“The use of a mark in a domain name and on a website may be sufficient to create common law trademark rights.”); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 956–57 (C.D. Cal. 1997) (“Like trade names, domain names can function as trademarks, and therefore can be used to infringe trademark rights.”); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:17.50, at 7-29 (4th ed. 2010) (“A domain name can become a trademark if it is used as a trademark” (internal quotation marks omitted)). *But see Lockheed Martin Corp.*, 985 F. Supp. at 956 (“When a domain name is used only to indicate an address on the Internet, the domain name is not functioning as a trademark.”); MCCARTHY, *supra*, at 7-30 (explaining that “probably only a small percentage [of domain names] also play the role of a trademark or service mark”).

323. See, e.g., *Burger King Corp. v. Mason*, 710 F.2d 1480, 1491–93 (11th Cir. 1983) (noting that an injunction is a remedy to a trademark infringement claim).

with simply having their own text removed from Revolver's website).³²⁴ But, that may be because they did not realize the full extent of their legal rights.³²⁵

324. See Gozde, *supra* note 87 ("We'd like to thank all our readers, our fellow bloggers, website owners . . . , [and] our friends for their support.").

325. Of course, a trademark action may be difficult to maintain in the case of an unregistered mark where the mark has not been associated with a commercial product or service. See 15 U.S.C. § 1125(a)(1) (2006) (providing a cause of action for infringement of an unregistered mark where the mark has been "use[d] in commerce"). Thus, if blogs are seen as predominantly noncommercial speech forums, it might be difficult to establish an unregistered mark in a relevant domain name. See, e.g., James Grimmelman, *The Internet is a Semicommons*, 78 *FORDHAM L. REV.* 2799, 2814 (2010) ("The blogosphere, built on an ethos of sharing one's own thoughts and linking to others', is numerically dominated by noncommercial blogs written for personal reasons . . ."). But see Anthony Ciolli, *Are Blogs Commercial Speech?*, 58 *S.C. L. REV.* 725, 729 (2007) ("Whether a blog falls into the commercial speech category may depend on various characteristics of the blog, such as whether it cross-promotes another business."). However, one might take the view that the bloggers are providing an information service to fans of Robert Pattinson. Cf. *id.* (explaining that a blog could fall into the "commercial speech category" if it "cross-promotes another business," such as blogs maintained by practicing attorneys). There is some authority in the trademark law context—mainly in the case of Internet domain name disputes—that anything that happens on the Internet can be described as sufficiently "in commerce" for the purposes of trademark infringement and dilution. *Planned Parenthood Fed'n of Am. v. Bucci*, No. 97 Civ. 0629, 1997 WL 133313, at *3–7 (S.D.N.Y. Mar. 24, 1997) (noting that (1) "defendant's [cybersquatting] actions affect plaintiff's ability to offer plaintiff's services . . . offered in forty-eight states and over the Internet" and "place defendant within the reach of the Lanham Act," and (2) "Internet users constitute a national, even international, audience, who must use interstate telephone lines to access defendant's web site on the Internet," which meet the "in commerce" requirement). Admittedly, these judicial comments are largely aimed at determining whether a *defendant's* activities are sufficiently in commerce for trademark purposes, rather than whether the *plaintiff's* use of a mark is operating as a commercial source identifier. *Id.* at *1, *3–4 (noting that plaintiff "has moved to preliminarily enjoin" the defendant from using the domain name and focusing on defendant's actions). Nevertheless, the notion that anything happening on the Internet is automatically in commerce might have broader application. For instance, if *robsessedpattinson.com* operates as a trademark, it is possible that the use of a substantially similar phrase, *Robessed*, as the title for a commercial DVD, comprises trademark infringement or dilution by blurring. A trademark infringement action might be successful in these circumstances because it is hinged on the defendant confusing consumers as to the source or origin of a particular product or service. See 15 U.S.C. § 1125(a)(1)(A). As the *Robessed* movie title bears a striking similarity to the *robsessedpattinson.com* domain name and the DVD is aimed at a very similar market to the fan website (fans of Robert Pattinson), Revolver Entertainment might well be liable for trademark infringement. Consumer confusion is not a necessary element of a trademark dilution action. *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 812 (7th Cir. 2002) ("Dilution differs from trademark infringement; it does not require a showing of consumer confusion as to source."). Thus, if the bloggers had a trademark in their domain name, they would not need to establish confusion to mount a dilution action, although they would have to assert that their trademark was sufficiently "famous" as required by the dilution statute. See 15 U.S.C. § 1125(c)(1) (providing that "the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use . . . that is likely to cause dilution"); *id.* § 1125(c)(2)(A) (defining "famous" and providing factors for

IV. COPYRIGHT LESSONS FROM THE VAMPIRE BLOGOSPHERE

Some general trends relating to copyright law and policy in the Web 2.0 context can be extrapolated from this eclectic mix of case studies. The studies nicely illustrate some of the emerging interactions between online norms, copyright laws, and to some extent market forces³²⁶ and shed light on the attitudes of those who are often underrepresented in intellectual property policy debates—individual authors and their consumer-creator fan bases. At least three significant points can be drawn from the case studies that would be useful areas for future debate and development in copyright law and policy: (1) the relevance of *intention* to Web 2.0 copyright law and enforcement policies;³²⁷ (2) the varying perspectives on copyright protections of different stakeholders including original authors and their fans;³²⁸ and (3) the problematic application of the fair use doctrine within the Web 2.0 remix culture.³²⁹

A. *The Role of Intention in Copyright Infringement*

The first three case studies are good illustrations of the significance of intention within the Web 2.0 copyright context.³³⁰ In each case, an apparent mismatch emerges between how potential copyright infringers think the law works—or should work—and how the law actually works. In the first case study, Stephenie Meyer emphasized the intentions of those to whom she had released her draft *Midnight Sun* manuscript.³³¹ The fans creating mashup videos in the second case study and the young woman taking the video in the movie theater in the third case study also felt that their intentions not to infringe copy-

“determining whether a mark possesses the requisite degree of recognition”); *id.* § 1125(c)(2)(B) (defining “‘dilution by blurring’”).

326. See generally, e.g., *supra* text accompanying notes 266, 271, 282–83 (discussing the MPAA’s zero tolerance policy on digital copyright piracy, an example of a market force in this context).

327. See *infra* Part IV.A.

328. See *infra* Part IV.B.

329. See *infra* Part IV.C.

330. One could equally say that these case studies demonstrate a mismatch between the expectations of authors and users of copyrighted works. If the focus is on developing norms, then author-user communities need the time and opportunity to create clearer community rules about appropriate uses of protected works. This has occurred over time in other contexts. See, e.g., Schultz, *supra* note 35, at 680–84 (noting the emergence of norms between jambands and their fans about appropriate uses of otherwise protected works); see also *supra* note 50.

331. See *supra* text accompanying notes 100–06.

right should count for something.³³² The strict liability basis of copyright law, however, does not take intention into account.³³³

We might draw two distinct conclusions about the relevance of intention in the copyright law context. First, copyright infringers are simply ignorant of copyright law and need to be better educated to understand that copyright infringement involves strict liability.³³⁴ Second, current copyright law and policy is fundamentally wrong, and the law is not sufficiently tailored to the realities of consumer uses of works involving modern digital technologies.³³⁵ While strict liability may have made sense when technology was less sophisticated, it now arguably causes harm to society's ability to express itself using these new, more interactive technologies. Thus, copyright law might be working counter to its underlying aims of encouraging innovation and artistic expression.³³⁶

There is some merit to the first conclusion—that copyright policy works just fine and consumer-creators need to be better educated. The law has developed to protect copyright holders against unauthorized uses of their works for good reason.³³⁷ Then, consumer-creators need to be aware not only that copyright infringement involves strict liability, but they also need to be better educated on how to mount effective defenses to infringement claims. And there is the rub: The most obvious defense for copyright infringement in the consumer-creator context is fair use.³³⁸ But, the contours of the defense are too vague for consumers to know with any degree of certainty whether their activities—mashup videos, private recordings, or fan fiction—comprise fair use in any given case.³³⁹ Additionally, there is little ex ante guidance as to whether a particular use will be regarded as a fair use.³⁴⁰ Potential infringers would thus need to be prepared to defend against a copyright infringement action to establish their defense. A

332. See *supra* text accompanying notes 158–60, 272.

333. See *supra* note 101.

334. See generally, e.g., *supra* notes 160, 313 and accompanying text.

335. See Lipton, *supra* note 308 (explaining that the Robsessed case study “is another interesting example of where the realities of [intellectual property] law don’t necessarily meet the social norms in the entertainment area”).

336. See LEAFFER, *supra* note 32, at 24–25 (“[C]opyright law represents an economic tradeoff between encouraging the optimal creation of works of authorship through monopoly incentives, and providing for their optimal access, use, and distribution through limiting doctrines.”).

337. See *id.* (explaining that “copyright law provides the incentive to create information and a shelter to develop and protect it”).

338. See generally *supra* text accompanying notes 169–70.

339. See *supra* notes 155–57 and accompanying text.

340. See *supra* note 157.

consumer-creator will thus always be on the defensive. An individual can take no affirmative action to establish a fair use; a mere assertion on a YouTube video that the video is a fair use or that no copyright infringement was intended will not be determinative.³⁴¹

Another wrinkle to relying on the first conclusion—that copyright policy is fine as is—is that when criminal cases are considered alongside civil actions, the law becomes even more confusing. It is currently unclear whether intent is an aspect of criminal copyright law: According to Nimmer, American courts have generally required the prosecution to establish proof of intent or willfulness on the part of the alleged infringer in a criminal copyright case.³⁴² But, it is unclear whether this means intent to *copy* or intent to *infringe*.³⁴³ When applied to a situation like the third case study—involving potential criminal action for incidental videotaping of a snippet of a film—it is not clear how an intent inquiry might play out. Tumpach, the potential criminal defendant, probably did not intend to *infringe* copyright law (particularly if intent is interpreted as purposely pointing a video camera in the general direction of a movie screen and pressing the record button), but she may have intended to *copy* snippets of the movie.³⁴⁴

Intention is perhaps more relevant in the criminal context (clearly downplayed or overlooked by the police in the Tumpach situation) as the defendant must act with a motive for commercial profit.³⁴⁵ In this respect, the Tumpach case study evidences the need for better education of those enforcing criminal copyright law rather than better education of copyright consumers. If a motive of commercial profit is a requirement of a criminal copyright prosecution, then Tumpach should not have been detained, given that three minutes of film footage with her own voice obscuring the audio track could never be the basis of a commercially profitable enterprise.³⁴⁶

341. See *supra* notes 153–57 and accompanying text.

342. See 4 NIMMER ON COPYRIGHT, *supra* note 101, § 15.01[A][2], at 15-4 to -6 (noting that criminal infringement requires commercial advantage and willfulness, which has meant “intent to copy, not to infringe” or a “voluntary, intentional violation of a known legal duty” (quoting *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991))).

343. *Id.* (“Some courts have suggested that ‘willful’ for these purposes may mean only an intent to copy, not to infringe.”).

344. See *supra* text accompanying note 270.

345. See 4 NIMMER ON COPYRIGHT, *supra* note 101, § 15.01[A][2], at 15-5 (“It is not necessary that the accused actually realize such a commercial advantage or private financial gain, so long as the infringing activity is geared towards that goal.”).

346. See Abramovitz, *supra* note 272 (explaining that Tumpach never meant to “intentionally record or sell the movie, and had merely been shooting footage from her sister’s 29th birthday party,” proven by the fact that she was “talking throughout the taped footage

In sum, strict liability in copyright law potentially generates a large amount of uncertainty: It forces consumers to rely on the fair use defense with all of its inherent uncertainties of application.³⁴⁷ And it also leaves those enforcing copyrights in the criminal sphere struggling with the extent to which criminal liability should differ from civil liability in terms of intent, if at all. If intent were to become an aspect of civil copyright law, then some of these problems might be alleviated and the realities of Web 2.0 society—as evidenced by online discussions, including comments by original authors and their fans—might better be realized.

This does not advocate that a true copyright infringement should be excused when someone posts a “no intent to infringe” notice.³⁴⁸ Maybe intent could capture some of the more salient aspects of copyright infringement *ex ante*—especially the question of whether the potential infringer had a commercial profit motive that might compete with the copyright holder’s commercial exploitation of the work. Considering this issue in the context of the initial infringement question might be a better approach than relegating the commercial competition point to the fair use defense.³⁴⁹ In the latter context, the intent question might get lost in the balancing of the other fair use factors, as well as forcing the consumer-creator to perpetually be on the defensive with no *ex ante* opportunity to raise a claim that her activities are not infringing.

Allowing the intent factor to stand on its own in the initial infringement inquiry might better focus market participants, and ultimately courts, on the realities of Web 2.0 interactions. In other words, it may be better to bring copyright law more in line with existing aims and expectations of copyright stakeholders than to educate those parties about laws and policies that are out of touch with the realities of modern online interactions.

in question”); Bell, *supra* note 269 (explaining that the movie was three minutes and that she was talking the whole time).

347. See *supra* notes 155–57 and accompanying text.

348. See, e.g., 1ExtremeEnigma1, *Hollywood Undead – No.5 (W / Lyrics)*, YOUTUBE, <http://www.youtube.com/watch?v=fW8I5O-WUU> (last visited Sept. 14, 2010) (“Hollywood Undead, please just listen for one second. It is not my intent to infringe your rights to this song, you own it, not me.”).

349. That is, in the context of the fourth statutory fair use factor: “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4) (2006).

B. *What Creators Want: Autonomy Versus Profit*

The first and fourth case studies illustrate what we might learn from the blogosphere about the desires and motivations of authors with respect to their own original creations—as distinct from the needs of their commercial producers and distributors. Unlike the focus of traditional copyright discourse on commercially motivated producers and distributors, the individual authors in these two case studies were more concerned with interests traditionally associated with moral rights.³⁵⁰ In neither case were the authors openly concerned about the impact of the wrongdoer's conduct on their own ability to commercially profit from their work. Rather, in the first case study, Meyer was concerned about her ability to control the form in which readers ultimately experienced her work.³⁵¹ The bloggers from the fourth case study were concerned that their work was taken without their consent or any attribution;³⁵² they might have consented if they had been asked or if their work had been attributed to them.

Even though Meyer expressed herself on her blog as being concerned about copyright infringement, her key complaint seemed to relate to what a European lawyer might describe as a moral right—notably the right of integrity³⁵³ to control the form in which a work is exposed to the public.³⁵⁴ In jurisdictions with moral rights law, the right of integrity subsists in the author independently of copyright.³⁵⁵ The copyright may be assigned to another person, but the right of integrity remains in the hands of the author and is sometimes exercised in tension with the rights of the copyright holder.³⁵⁶ Thus, for example, a copyright holder may want to display a work of art in a particular way, say, by printing copies on a tee shirt. While copyright ownership may allow this, an author could object to the use under the right of integrity. The United States has enacted only very limited

350. See *supra* notes 131–37, 324 and accompanying text.

351. See *supra* text accompanying notes 104–08, 114–18.

352. See *supra* Gozde, note 318; see also *supra* text accompanying notes 309–10.

353. Meyer, *supra* note 2 (noting that “[a]s the author of the Twilight Saga, [she] controls the copyright and it is up to [her as] the owner of the copyright to decide when the books should be made public”). See generally Ong, *supra* note 132.

354. See Ong, *supra* note 132, at 298 (“Moral rights confer on the artist a set of entitlements that relate to how his works are treated, presented, displayed, and otherwise utilized after he has relinquished title over the physical objects in which those works are embodied.” (footnote omitted)).

355. See Eric M. Brooks, Comment, “Tilted” Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CAL. L. REV. 1431, 1434–35 (1989) (commenting that moral rights, such as the right of integrity, are separate from copyright law and explaining the French law approach).

356. Ong, *supra* note 132, at 305.

moral rights legislation, particularly under the Visual Artists Rights Act.³⁵⁷ These rights do not extend to authors such as Meyer.³⁵⁸

The United States has argued that copyright law, augmented by trademark and unfair competition law, does much of the work that moral rights law does in other jurisdictions.³⁵⁹ Alongside exercising some control through copyright law—where the author holds a copyright in a work she has created—the author may also be a trademark holder with respect to her work because her name is a source indicator for the work.³⁶⁰ Thus, if someone else makes a use of the work in commerce in a misleading, deceptive, or confusing way or, perhaps more to the point, in a way that dilutes the author's name as a mark, that person could be subject to trademark liability.³⁶¹ So, for instance, an author might argue that the presentation by someone else of her work—particularly in a form in which she would not have released the work—dilutes her name as a mark in the commercial book market.

On her website, Meyer does not assert trademark interests in this way but speaks only of copyright infringement.³⁶² There are likely a variety of reasons for this.³⁶³ For one, Meyer did not want to bring an action against those who released her draft manuscript for *Midnight Sun* over the Internet.³⁶⁴ Thus, it does not matter what right she might have asserted because she did not intend to bring an action. As an expressive matter, copyright law probably makes more sense in this

357. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601–610, 104 Stat. 5089, 5128–33 (codified as amended in scattered sections of 17 U.S.C.); 3 NIMMER ON COPYRIGHT, *supra* note 101, § 8D.06, at 8D-68 (noting that Congress adopted federal legislation “implementing moral rights in a limited sphere, *viz.* in the realm of certain visual arts,” but beyond that arena, “embrace[d] general moral rights” (footnote omitted)).

358. See 3 NIMMER ON COPYRIGHT, *supra* note 101, 8D.06[A][1], at 8D-69 (noting that “[t]he Visual Artists Rights Act of 1990 begins by defining a new category: ‘work of visual art,’” which includes “a ‘painting, drawing, print, or sculpture’” and “[a]ny such item that exists solely in a unique original” (footnotes omitted) (quoting 17 U.S.C. § 101 (2006))).

359. See DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY 254 (2006) (noting that “[f]or the most part, the U.S. has resisted any formal recognition of moral rights for authors” and “has taken the position that other federal and state laws outside of copyright approximate the moral rights of integrity and attribution required by the Berne Convention”).

360. See, e.g., Clinton v. Dinoia, National Arbitration Forum No. FA0502000414641, 2005 WL 853535 (Mar. 18, 2005) (Atkinson, Arb.) (holding that Hillary Clinton held an unregistered trademark right in her personal name based on the “use and exposure of the mark in the marketplace and through use of the mark in connection with [her] political activities, including a successful Senate campaign”).

361. See generally 15 U.S.C. § 1125(a), (c) (2006).

362. See Meyer, *supra* note 2 (noting that she “control[s] the copyright”).

363. See, e.g., Lipton, *supra* note 113 (opining that “‘Twilight’ remixes create more buzz for the movies, which ultimately benefits the producers”).

364. See *supra* notes 96–99 and accompanying text.

context than trademark law.³⁶⁵ Copyright law aims to protect authors' rights while trademark law seeks to prevent unfair practices in commercial markets.³⁶⁶ As a corollary, for an author to bring a successful trademark infringement or dilution action, the defendant must have used the author's mark "in commerce."³⁶⁷ It is not clear that anonymous online bloggers have acted in commerce as required by trademark law by posting a draft online. While some courts have taken the view that anything posted online could be in commerce for trademark purposes,³⁶⁸ other courts have not accepted this view.³⁶⁹

While Meyer might not have sought to enforce a moral rights claim judicially, a moral rights claim may better have expressed her concerns about the unauthorized dissemination of her draft manuscript in violation of her authorial integrity than the available copyright and trademark laws. In this sense, a law more in line with an author's expectations of her artistic rights might bolster the development of appropriate online norms.

Although a detailed consideration of moral rights law in the American context is beyond the scope of this Article, it is worth noting that commentators have examined the possibility of reinvigorating the moral rights debate in countries such as the United States and Canada.³⁷⁰ Some of these commentators have noted that moral rights

365. See *supra* note 55.

366. Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 447 (2008) (noting that copyright laws grant authors certain rights, while "[t]rademark laws prevent others from putting into commercial channels goods or services that are . . . identical to or confusingly similar to those sponsored by the rights holders").

367. 15 U.S.C. § 1125(a)(1), (c)(1) (2006); see Alicia Gamez, *WhenU.com, Inc. & Google Inc.: Parsing Trademark's Use Requirement*, 21 BERKELEY TECH L.J. 403, 404 (2006) (explaining that trademark protection was enacted under Congress's Commerce Clause power and noting that "Section 1127 [of the United States Code] defines the terms 'trademark' and 'use in commerce' (quoting 15 U.S.C. § 1127)); see also *supra* note 325.

368. See *Planned Parenthood Fed'n of Am. v. Bucci*, No. 97 Civ. 0629, 1997 WL 133313, at *3 (S.D.N.Y. March 24, 1997) (stating that defendant's use of plaintiff's mark was in commerce under the "sweeping reach" of the Lanham Act because defendant's actions interfered with plaintiff's ability to offer services "in forty-eight states and over the Internet" and Internet users "must use interstate telephone lines to access defendant's web site" (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 283 (1952))).

369. See *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 679–80 (9th Cir. 2005) (finding that "[t]he Lanham Act, expressly enacted to be applied in commercial contexts, does not prohibit all unauthorized uses of a trademark"); *Utah Lighthouse Ministry v. Discovery Computing, Inc.*, 506 F. Supp. 2d 889, 897 (D. Utah 2007) (noting that "[r]elatively few courts have adopted [the] view" "that 'the national, and even international, nature of the Internet itself makes defendants' use of plaintiffs' trademark as a domain name a "use in commerce" for purposes of the Lanham Act.'" (quoting *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176, 186 (W.D.N.Y. 2000))).

370. See generally, e.g., ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 147–65 (2010); NETANEL, *supra* note 55, at

law “preserv[es] the [important] relationship between [the] author and the text.”³⁷¹ Moral rights also support the use of authorial identity as a proxy for quality judgments about a work.³⁷² In this vein, Professor Neil Netanel has suggested that “those who disseminate a creative appropriation should be required to label it as an unlicensed modification of the original work.”³⁷³ Professor Roberta Rosenthal Kwall has similarly suggested that those who modify a work against the wishes of the author should “be required to provide a disclaimer adequate to inform the public of the author’s objection to the modification or contextual usage.”³⁷⁴ Commentators have further suggested that it serves the overall public interest for jurisdictions to adopt some level of moral rights protections because consumers of works themselves have interests in preserving the integrity of the original work.³⁷⁵

The *Midnight Sun* and *robssessedpattinson.com* case studies also raise issues about the role of individual authors in the Web 2.0 copyright matrix, particularly now that consumer-creators, like fan bloggers, are beginning to assert legal rights in their work. For one thing, more must be done to educate consumer-creators on their rights in relation to works they create online.³⁷⁶ Perhaps mechanisms should also be developed to ease access to enforcement of those

215–17 (arguing for a modified moral rights law for the United States); Wilkinson & Gerolami, *supra* note 23, at 326–27 (examining the development of moral rights additions to Canadian law, noting, in particular, that “[t]he [current] terminology and arrangement” is “somewhat confusing” and arguing that “inherent reasons [exist] why moral rights protection should be increasingly embraced by nations in the emerging information age”).

371. Wilkinson & Gerolami, *supra* note 23, at 321–22 (noting that “the economic rights in copyright” and “moral rights” “function in complimentary, though distinct, manners” as there is an “expanding role moral rights can play in the new information environment [that] has largely gone unrecognized and has not been clearly articulated”).

372. *See id.* at 325 (“[E]conomic rights cannot, in and of themselves, function to support either use of the author’s identity as a mechanism for quality judgments about the work or reliance upon the author to control the integrity of the work as initially conceived. Those who seek indications of the authority for information presented in a work must look elsewhere.”); *see also id.* at 327–28 (noting that “[m]oral rights provisions, according to [one] theory, assume a bond between the author and the work,” that “to preserve integrity for the author, one must preserve the integrity of the work or use the work as the author intended,” and that “[m]oral rights affect the information seeker’s ability to judge the quality of the available information sources and to thus *select* from amongst competing sources”).

373. NETANEL, *supra* note 55, at 215.

374. KWALL, *supra* note 370, at 151.

375. *See* Wilkinson & Gerolami, *supra* note 23, at 327–30 (opining that “inherent reasons [exist] why moral rights protection should be increasingly embraced by nations in the emerging information age,” specifically the United States and Canada, and that “users [are] interested in preserving the integrity of the work” (citing Justin Hughes, “*Recoding*” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999))).

376. *See, e.g., supra* note 313.

rights. For example, if the cease and desist notice had not worked for the bloggers, they may not have been able to afford the costs of litigation against Revolver, rendering knowledge of their legal rights useless.³⁷⁷

These case studies further demonstrate that copyrights are often only a proxy for what many authors really want in terms of control of their literary and artistic works. Despite the “neglect” of many economically developed countries for moral rights, it might be worth reconsidering that position in the Web 2.0 context.³⁷⁸ Because Web 2.0 technologies allow more to be done with the works of others without their authorization,³⁷⁹ rights to attribution and integrity arguably take on greater significance.³⁸⁰ The creation of more authorship rights causes remixers to run into trouble against the rights of attribution and integrity. Attribution may not practically be too problematic if a good faith remixer acknowledges her sources publicly, but integrity could present a quandary if an original artist objects to the content of the remix. Thus, even if a remixer obtains copyright permission or successfully asserts a fair use defense, she could still face difficulties if the author independently asserts an action based on the moral right of integrity. Some authors have argued that if moral rights law is to be adopted in the United States, the focus should be on the right of attribution rather than on the right of integrity.³⁸¹ Professor Netanel has pointed out that statistically American authors seem to be more inter-

377. Cf. Brent C. Johnson, Note, *The Making Available Argument: Is Actual Distribution Required to Find Infringement Upon the Copyright Holder's Distribution Right?*, 85 N.D. L. REV. 371, 375–77 (2009) (explaining how “individuals who can ill-afford the costs of litigation” are forced to settle or represent themselves in lawsuits brought by the Recording Industry Association of America, “a large, wealthy, corporate entity” alleging “that users infringed on sound recording copyrights”).

378. See Wilkinson & Gerolami, *supra* note 23, at 329–30 (claiming that there is an international trend toward “neglect[ing]” moral rights, explaining that “[e]ven in countries where moral rights provisions exist, such as Canada, moral rights may have suffered erosion,” and suggesting that the United States “continues to resist the introduction of moral rights into its copyright legislation”); cf. sources cited *supra* note 370 (citing examples of commentators arguing for increased moral rights in North American jurisdictions).

379. See generally Johnson, *supra* note 377, at 371 (stating that technologies like “computers, electronic networks, and the Internet” “raise difficult and controversial issues concerning intellectual property,” like copyright infringement).

380. See Wilkinson & Gerolami, *supra* note 23, at 329 (arguing that the increase in “revolutionary technology” should correlate with an increase in the role of moral rights).

381. See, e.g., KWALL, *supra* note 370, at 151 (suggesting that there should be a “broadly defined right of attribution” and a “narrowly tailored right of integrity”).

ested in attribution than integrity³⁸² and that a right of attribution would be relatively easy to enforce in the digital realm.³⁸³

The emergence of Web 2.0 technologies is a reason to revisit the moral rights question in the United States and requires balancing the moral rights of authors against the moral rights of others participating in the Web 2.0 culture.³⁸⁴ This balance may not be easy to strike in practice. The costs of adopting moral rights may ultimately outweigh the benefits in terms of facilitating creativity online.³⁸⁵ Alternatively, if a “watered down” version of moral rights is adopted, perhaps it should focus on the right of attribution rather than the right of integrity.³⁸⁶ However, the moral rights debate has not yet played out in the Web 2.0 context in the United States.³⁸⁷ Even if moral rights are ultimately rejected or watered down in this context, having the discussion may lead to a greater awareness of how copyright law might apply in Web 2.0 forums to protect the rights of individual authors without unnecessarily impinging on commercially neutral remixing activities.

C. *Fair Use in the Blogosphere*

The second case study involving fan remixes—and to some extent, the fourth focusing on the Robert Pattison fan blog—raise questions about whether the fair use defense to copyright infringement is

382. NETANEL, *supra* note 55, at 217 (“Creative Commons has estimated that, as of February 2005, authors chose licenses requiring attribution some 94 percent of the time and, in contrast, chose licenses prohibiting the making of a derivative work less than one-third of the time.”); *see also* ASS’N OF INDEP. VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE 4–6 (2005) (emphasizing the importance of authorship attribution in documentary fair use best practices guidelines); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, LAW & CONTEMP. PROBS., Spring 2007, at 135, 153–57 (examining how authorship attribution is an important norm among fan fiction communities).

383. *See* NETANEL, *supra* note 55, at 216 (“Digital technology may well ease the burden of compliance [with an attribution requirement]. In fact, it might entail nothing more than leaving intact the copyright management information that is digitally embedded in the underlying work when portions of that work are incorporated in the creative appropriation.”).

384. *See generally* Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 80 (1996) (arguing that “society needs the ‘parent’ and the ‘child’: the first artist and the parodist” and that the “goal should be to balance their economic and personal interests”).

385. *See generally id.* at 122 (acknowledging that giving moral rights to authors impedes on the parodist’s ability to create).

386. *See, e.g., supra* note 381.

387. *See, e.g.,* Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (forthcoming 2011) (suggesting the need to revisit the question of a moral rights agenda in the United States in light of the emergence of Web 2.0 technologies).

working—or can work—effectively in the Web 2.0 context. Aspects of the fair use defense that have always existed come into sharp relief in the Web 2.0 context because of the sheer number of downstream consumer-creators online³⁸⁸ that make derivative works.³⁸⁹ The equitable rule of reason approach to American fair use³⁹⁰ differs from most other countries that have established more clearly delineated rules for fair dealing.³⁹¹ The American approach has both advantages and disadvantages. The advantages inhere in its flexibility of application to new situations.³⁹² The disadvantages include its inherently uncertain application and unclear determination of a particular issue absent litigation³⁹³ (there is no *ex ante* guidance as to whether a particular use of a copyrighted work will be a fair use or not).³⁹⁴

This can be particularly challenging in the Web 2.0 context because of the sheer number of online participants who might assert fair use, the geographical mix of regions in which those people might reside, and the variety of activities engaged in by the remix culture.³⁹⁵ Previously, most fan uses of copyrighted works involved copying for purely consumptive personal use.³⁹⁶ Today, consumers become creators as a result of the cheap and easy accessibility of recording and

388. See Mary W.S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1077 (2009) (“Digital tools are increasingly ubiquitous in our information-driven society, allowing just about anyone with a computer to reuse, recreate, and otherwise change all manner of literary and artistic works . . .”).

389. 17 U.S.C. § 101 (2006) (defining “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted” and further including “[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship”).

390. See *supra* notes 170–71 and accompanying text.

391. See, e.g., Copyright, Designs and Patents Act, 1988, c.3, §§ 28–44 (U.K.) (outlining, for instance, general provisions, along with specific provisions for education and libraries and archives).

392. See FRED VON LOHMANN, ELEC. FRONTIER FOUND., FAIR USE AND DIGITAL RIGHTS MANAGEMENT: PRELIMINARY THOUGHTS ON THE (IRRECONCILABLE?) TENSION BETWEEN THEM 5–6 (2002) (noting the flexibility of the fair use doctrine in adapting to new technologies).

393. See Elkin-Koren, *supra* note 167, at 283 (“The scheme of providing a broad right to control derivative use, subject to fair use exception, puts users at a disadvantage. Under fair use, users’ rights are less stable. Rights would depend on judicial determination.”).

394. See Pavel, *supra* note 243, at 1617 (“[J]udicial application of the fair use factors to personal use technologies is difficult for innovators and users to predict *ex ante*.”).

395. See *supra* note 110 (noting the jurisdictional reach problems in copyright cases); *supra* note 388 (emphasizing the amount of consumer-creators and their activities).

396. Cf. Elkin-Koren, *supra* note 167, at 243–47 (explaining that digital technology “transforms readers from relatively passive receivers of a message, into potential participants” and “empower[s] individuals to take an active role when experiencing works of others”).

remixing technologies.³⁹⁷ Thus, consumer-creators' relationships to copyrighted works tend to be more interactive, and the resulting creations tend to be more transformative.³⁹⁸ In the past, American courts have stressed the need for a transformative use of a copyrighted work under the first fair use factor.³⁹⁹

While fans' creations appear to be more transformative and more voluminous than ever and are disseminated instantaneously across national boundaries,⁴⁰⁰ the vagueness of the American fair use defense becomes infinitely more problematic. Particularly troublesome is the inability to know in advance whether a copyright holder will object to a given remix or whether a viable fair use defense is available. Ultimately, it might only take one or two copyright holders threatening litigation to chill a large amount of online creation by fans.

There are a number of possible approaches to this difficulty. Legislators and policymakers should think about amending Section 107, or at least providing guidelines to clarify its scope with respect to typical Web 2.0 remixing activities. Specifically, guidance about the application of the fair use defense to typical *noncommercial* remixing activities would be useful. It may be that many noncommercial activities would, in fact, be found to be fair uses if the cases were ever litigated because of the significance that courts tend to attach in applying the fair use defense to the first and fourth factors.⁴⁰¹ The first and fourth fair use factors tend to go to the heart of most copyright holders' complaints because copyrights have become predominantly economic rights in modern markets and most complaints by commercial copyright holders are aimed at protecting their profits.⁴⁰²

If most noncommercial remixes and blog posts are likely to fall under the rubric of fair use, it may be a good idea for Congress or the

397. *Cf. id.* at 241–45 (noting that the “manipulation of digitized works is relatively easy and inexpensive” and that “interactive systems such as Hypertext empowers readers with creative powers and expands the number of people who may participate in the creation process”).

398. *See id.* (“Interactivity allows a convergence of the message with the adjustments made by the receiver/user. Thus, the ability to change the original message is empowering for individuals.”).

399. See 4 NIMMER ON COPYRIGHT, *supra* note 101, § 13.05[A][1][b], at 13-162 to -172.1 for a very thorough discussion of American case law on the issue; *see also supra* note 179.

400. *See generally* Wong, *supra* note 388, at 1077 (expanding on the numerous ways Web 2.0 technologies have “allow[ed] anyone with an Internet connection to disseminate the resulting content, which itself can engender further creation, use, and manipulation”).

401. *See supra* Part III.C.2.

402. *Cf. Wilkinson & Gerolami, supra* note 23, at 330 (“The lack of enthusiasm which the United States has shown for the moral rights regime may be partially explained by the emphasis that the United States places upon the commercial exploitation of information.”).

Copyright Office to adopt a clear guideline to this effect. Rather than waiting for a judicial determination, Web 2.0 participants would have clearer *ex ante* guidance as to the scope of legitimate activities involving copyrighted works.⁴⁰³

V. CONCLUSION

This Article has utilized a series of case studies revolving around the *Twilight* franchise to illustrate some of the challenges inherent in applying intellectual property law to Web 2.0 forums.⁴⁰⁴ The *Twilight* books and movies have no special significance with respect to intellectual property, but the combination of their global popularity and the open relationship between Meyer and her fans creates a useful backdrop for discussions of Web 2.0 intellectual property issues that is helpful in illuminating the copyright law twilight zone.

While no one stakeholder's views should necessarily outweigh the views of others in debates about online intellectual property protection, the discourse thus far has focused largely on the economic needs of commercial producers and distributors of copyrighted works. Web 2.0 technologies not only raise challenges to the existing balance of interests but also create a forum to extract information about the interests of previously sidelined groups. The case studies illustrate ways in which this anecdotal data can be used to identify directions for future debates about digital copyright policy. The case studies highlight issues such as the difficulties of identifying the role of intention within civil and criminal copyright law and of ascertaining the boundaries of the fair use defense online. They present useful, detailed information about the rights that individual authors want to assert with respect to their works—as distinct from rights that commercial producers and distributors seek to enforce. They further exemplify how Web 2.0 technologies facilitate interactions between the different stakeholder groups with respect to online copyrights.

This Article has attempted to make some progress toward resolving challenges currently facing copyright policy in the age of Web 2.0 technologies. Importantly, it has suggested that information gleaned from online forums might create a useful starting point for debates

403. Some commentators have suggested other avenues to create *ex ante* guidance about the scope of fair use rights in general that could be usefully applied in the Web 2.0 context. See generally Lipton, *supra* note 124, at 145–46 (suggesting “the development of an administrative agency to hear complaints brought directly by those seeking to make legitimate use of a copyrighted work”); Reichman et al., *supra* note 242, at 985–96 (suggesting a “reverse notice and takedown” procedure).

404. See *supra* Part III.B–E.

about the future direction of copyright law. The blogosphere is a salient, and often overlooked, source of information about balancing competing interests in copyrighted works. Legislators and policymakers might use this information to great advantage at very little cost when further updating copyright law and policy. This knowledge might be useful in renewed debates about whether the development of a moral rights regime is now necessary in the United States. It may also be instrumental if Congress revisits challenges about the role of intent in copyright law. Important questions for future debate include whether copyright infringement should no longer attract strict liability and whether the vague and flexible fair use test might be replaced with a simple doctrine that focuses more clearly on an alleged infringer's unjust commercial profit. The issues addressed in this Article may also be useful for the development, recognition, and enforcement of norms in the blogosphere relating to fans' uses of creative works.