

# GRAY WORKS: HOW THE FAILURE OF COPYRIGHT LAW TO KEEP PACE WITH TECHNOLOGICAL ADVANCEMENT IN THE DIGITAL AGE HAS CREATED A CLASS OF WORKS WHOSE PROTECTION IS UNCERTAIN . . . AND WHAT CAN BE DONE ABOUT IT

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## I. INTRODUCTION

Technological advancement has created problems for copyright law for decades, if not centuries. From the phonograph to the player piano to the VCR, judges and legislators have struggled to apply and update copyright doctrines to new technologies. Thomas Edison invented the phonograph in 1877,<sup>1</sup> but audio recordings (phonorecords) were not granted copyright protection until 1972.<sup>2</sup> Sony began marketing their Betamax VCR in the United States in 1975,<sup>3</sup> but the legality of the technology and the practice of copying television programs onto video cassette was not resolved until the Supreme Court's 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>4</sup>

Despite the lag time between these technological advances and the law's responses to these advances, the extent of the gaps between technological development and copyright law remained manageable throughout most of United States history. It was not until the digital revolution of the 1990s that the number and extent of these gaps began to multiply.<sup>5</sup> These expanded gaps between common behaviors that appear to infringe copyright and the letter of copyright law stretch defensive doctrines like fair use and implied licensure to the breaking point—well beyond their historical range of elasticity. Where in the past courts and Congress have closed these gaps in a similar fashion to an inch worm, bringing the law up to near-current practices before the next advance moved those practices forward, many practices today appear not to correspond to established principles of copyright law nor its defensive doctrines. The authored works in these gaps of copyright law are subject to uncertain protection under the law and are therefore termed “gray works” in this study. Gray works are simply works of authorship whose creation draws on prior copyrighted works and whose status as infringing or not infringing

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<sup>1</sup> The History of the Edison Cylinder Phonograph, Library of Congress, <http://memory.loc.gov/ammem/edhtml/edcylldr.html> (last visited Feb. 19, 2014).

<sup>2</sup> Pub. L. No. 92-140, 85 Stat. 391.

<sup>3</sup> Eugene Secunda, *VCRs and Viewer Control Over Programming: An Historical Perspective*, in *SOCIAL AND CULTURAL ASPECTS OF VCR USE* 9, 16 (Julia R. Dobrow ed., 1990) (“In November 1975, a little more than a year after Sony and its Japanese rivals terminated negotiations for a unified ½-inch VCR design concept, Sony introduced the Betamax VCR in America.”).

<sup>4</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>5</sup> Mark B. Radefeld, *The Medium is the Message: Copyright Law Confronts the Information Age in New York Times v. Tasini*, 36 AKRON L. REV. 545, 547 (2003) (“Unfortunately the technological revolution has sparked a civil war within copyright law. Congress has periodically, but consistently, modified the copyright laws to respond to the introduction of new technologies affecting copyright. Although Congress passed the Copyright Act of 1976 . . . to cope with emerging computer technology, no one anticipated the explosion of digital technology that has marked the dawning of the Information Age.”).

those original works is uncertain. This is distinct from music or video downloads where the act of downloading may infringe copyright but the underlying music or video file being downloaded does not itself infringe.

Gray works are not new. Any unauthorized derivative work that claims a defense to copyright infringement of fair use may be a gray work if the defense is unclear. That is to say that if the defense to infringement is sufficiently strong, then the work should be classified as non-infringing, and if the defense is sufficiently weak, then it is an infringing work. So why coin a new term to discuss possibly infringing derivative works? Because in the Internet Age there are several new classes of such works that have not generally been discussed together but whose similarities merit comparison and extrapolation.

But why should anyone be concerned with these gray works, save the authors whose copyrights they may or may not infringe? Gray works are troubling on two levels, both of which have Constitutional implications. First, they embody the tension between the First Amendment protection of free expression<sup>6</sup> and the Intellectual Property Clause's protection of authors' property rights in their writings.<sup>7</sup> People communicate through stories and talking about shared experiences. Telling and adapting shared stories is an important form of cultural expression dating back to pre-literate cultures.<sup>8</sup> Modern shared stories can take the form of books, movies, and television programs. Alienating people from these types of communication restricts free speech in a manner that may not be consistent with the First Amendment.

Second, gray works present a question of whether the Intellectual Property Clause's goal of promoting the useful arts is better served by protecting first generation works<sup>9</sup> or by allowing their use in the creation of derivative works.<sup>10</sup> In other words, the existence of gray works may be at odds with the

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<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>8</sup> SIMONA ALIAS, CONVERGING OF TRADITIONS AND USABILITY OF THE SHORT STORY: ORALITY AND FRAME IN THE *CANTERBURY TALES* 31, 31–32 (The Bulletin of the Japanese Association for Studies in the History of the English Language (2009)) (“Storytelling was among primitive and ancient cultures a means to acquire and pass on knowledge and experience, thus enabling the formation of the identity of the people. The knowledge, the view of the world, and the beliefs of a certain culture were thus encoded and transmitted orally through generations, relying on collective memory. This culture used to be transmitted in narrative forms that we would call short stories, and medieval as well as modern short narrations descend precisely from the oral tale characteristic of ancient and primitive cultures.”).

<sup>9</sup> In truth, there is probably no such thing as a “first generation work,” since all works rely to some extent on previous copyrighted works or the public domain for their content. But for purposes of this study, the term will be used to designate the works that gray works borrow from and may or may not infringe.

<sup>10</sup> See discussion *infra* Part III.

Constitution's Intellectual Property Clause in that they are potentially valuable for the promotion of the progress of science and the useful arts. Gray works exist in the shadow of possible copyright infringement claims. Even gray works that do no harm to anyone's economic interests could make their authors liable for huge statutory damages should they ever be litigated. Also, the lack of any ability to monetize gray works interferes with their ability to promote the progress of science and the arts. For example, the author of a fan fiction story whose fair use defense relies on the noncommercial nature of the work is permitted to publish the story on the Internet, but not to get the story published in a magazine where a professional editor may help to improve it.

The confluence of two forces appears to have led to the proliferation of gray works: the end of copyright formalities and the technological revolution that brought about the digital age. Prior to January 1, 1978 when registration became optional under the 1976 Copyright Act, copyright registration was required for a work to receive federal copyright protection.<sup>11</sup> Now, every original work of authorship that is "fixed in any tangible medium of expression" is automatically granted copyright protection.<sup>12</sup> In the history of the Copyright Office, it has registered fewer than 34 million copyrighted works.<sup>13</sup> There are more than 144 billion e-mails sent each day; in short, there are about the same number of new works generated every two seconds as the number of registered copyrights in the nation's history.<sup>14</sup> Even if only four percent of these e-mails has sufficient originality to qualify for copyright protection, there are more new copyrighted works being generated by e-mail every minute than there were copyrighted works registered in the United States prior to January 1, 1978.

This growth of copyrighted works has had the effect of shrinking the public domain. Because most creative efforts build on previous works, this shrinking public domain has forced authors into the dilemma of either limiting the sources on which they build upon or building upon copyrighted works and relying on defenses such as the fair use doctrine to avoid infringement. In cases where their works do not qualify for fair use, they are creating derivative works

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<sup>11</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 145–47 (2010).

<sup>12</sup> 17 U.S.C. § 102(a).

<sup>13</sup> *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, Circular 1a, available at <http://www.copyright.gov/circs/circ1a.html> (last visited May 27, 2014) (the Copyright Office reports having registered "more than 33,654,000 claims to copyright and mask works" since 1870).

<sup>14</sup> Sara Radicati (editor), *Email Market, 2012–2016*, The Radicati Group, Inc. (Oct. 2012) (according to the report's executive summary, "The total worldwide email traffic including both business and consumer emails is estimated to be over 144 billion emails/day at year end 2012 and growing to over 192 billion emails/day by 2016."), available at <http://www.radicati.com/wp/wp-content/uploads/2012/10/Email-Market-2012-2016-Executive-Summary.pdf>.

to which they have limited economic rights.<sup>15</sup> Faced with a proliferation of such derivative works, many copyright holders have opted to tolerate—and in some cases to encourage—such works.<sup>16</sup> From videos with copyrighted music to fan fiction to forwarded e-mails, these “gray works” have become more the rule than the exception. While there are contract-based solutions that clarify authors’ rights to these gray works, in many cases the specter of litigation hangs over such authors and their works. Copyright law should catch up with the collaborative and layered creative process by creating new rules for regulating such works.

Part II of this Article sets forth the scope of the inquiry, defining what is meant by “gray works” and providing some examples. Part III reviews some of the possible solutions to the gray works problem that have been discussed in various contexts. Part IV deconstructs the various possible solutions identified in Part III in hopes of findings some guiding principles that may be helpful in bringing the types of gray works discussed in Part II under a rational and appropriate scheme of copyright protection and constructs a package of proposed reforms from these elements.

## II. “GRAY WORKS” IN THE DIGITAL AGE

Because gray works are writings whose creation may infringe copyright, they exist under the shadow of possible litigation. While gray works have likely existed as long as there has been copyright law, the Internet Age has opened the door to the creation of whole new classes of such works and has greatly facilitated the dissemination of others. This study examines five such types of possible gray works<sup>17</sup> to determine whether they meet the definition: (A) forwarded e-mails, (B) fan fiction, (C) online videos that incorporate copyrighted elements, (D) songs that sample from earlier copyrighted recordings, and (E) user-generated content in online forums, such as blogs, discussion groups, and other online media. The question for each of these classes of works is whether the bulk of works within the class are inherently infringing, non-infringing, or somewhere in between.

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<sup>15</sup> John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1248 (“[T]he broad exclusive right of copyright owners to prepare derivative works has swallowed up the ability of transformative users to escape infringement liability, thereby undermining the key goal of the federal copyright regime.”).

<sup>16</sup> See discussion of acquiescence defense, *infra* Part II.B.3.

<sup>17</sup> These five categories overlap to a considerable extent. For example, as is discussed *infra* in Part II.B, a category of fan fiction known as fan films are also online videos that incorporate copyrighted elements.

Most of these types of potential gray works have been the subject of litigation and scholarship,<sup>18</sup> but one, forwarded e-mails, has rarely been considered in this context.<sup>19</sup> Therefore, this inquiry begins with the question of whether forwarded e-mails are gray works.

A. DOES FORWARDING AN E-MAIL WITHOUT PERMISSION INFRINGE COPYRIGHT?

On their face, e-mails appear to merit the same level of copyright protection as letters, because copyright protection attaches at the time a work is fixed in a tangible medium of expression<sup>20</sup> and electronic communication has been construed to be tangible for purposes of copyright.<sup>21</sup> Copying or distributing a

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<sup>18</sup> See Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159 (2011); Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889, 914–15 (2010); Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261 (2009); Carl Michael Szabo, *Thwack!! Take That, User-Generated Content!: Marvel Enterprises v. NCSOFT*, 62 FED. COMM. L.J. 541, 544.

<sup>19</sup> One scholar who examines this question concludes that forwarded e-mails are not generally protected by the Copyright Act, but they are instead protected by common law copyright. In his article, “A Copyright Conundrum: Protecting Email Privacy,” Professor Ned Snow of the University of Arkansas School of Law argues that forwarding e-mails generally falls into the fair use exception. Ned Snow, *A Copyright Conundrum: Protecting Email Privacy*, 55 U. KAN. L. REV. 501, 540–41 (2007) (“This subpart analyzes the rights relevant to the email context and then discusses whether the fair-use doctrine protects otherwise infringing uses. It concludes that fair use protects a recipient’s use of casual email correspondence.”). However, Professor Snow’s analysis is predicated on the possibility that the common law of copyright survived the passage of the Copyright Act of 1976.

<sup>20</sup> 17 U.S.C. § 102(a) (2006) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); *id.* § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

<sup>21</sup> *Id.* § 108(b)(2) (makes an exception to the author’s exclusive rights of reproduction and distribution allowing libraries to make up to three copies in “digital format,” so long as those copies are not made available to the public. In order for this exception to be meaningful, a “digital copy” must be read as otherwise violating the reproduction right and must therefore be deemed to be “tangible.” The Supreme Court has found digital music files to be tangible for purposes of copyright protection. For example, in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 915 (2005), the Court found the defendant to have secondary liability for copyright infringement for its role in encouraging and profiting from the transfer of digital music files without the permission of the copyright holders of those music files.)

copyrighted work, absent an applicable defense, constitutes infringement.<sup>22</sup> Just as copying and distributing a letter violates the author's copyright in the letter, forwarding an e-mail or copying its contents to a web page would seem to make out a *prima facie* case for copyright infringement. Is there a defense or exception under which e-mail forwarding is not copyright infringement or is the law merely ignored by e-mail authors and forwarders alike?

Part A.1 of this subsection examines under what circumstances e-mails are copyrighted works. Part A.2 explores possible defenses to infringement, including implied licenses and fair use, concluding that neither defense is consistently applicable to e-mail forwarding. Part A.3 discusses whether forwarded e-mails qualify as gray works.

1. *When Are E-mails Copyrighted Works?* In order for an e-mail to be a copyrighted work, it must be an "original work of authorship fixed in any tangible medium of expression."<sup>23</sup> While a one-word e-mail or an e-mail that itself copies a prior work would not itself be "an original work of authorship," the vast majority of e-mails of more than a few words meet the low bar for originality established by the courts.<sup>24</sup> In order to be "fixed in a tangible medium of expression," a work must be perceivable by people either with or without the aid of a machine.<sup>25</sup> Therefore, e-mails are automatically copyrighted when written, so long as they are sufficiently original to meet the low bar described by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Company*.<sup>26</sup>

2. *What Defenses Are There to E-mail Forwarding That Would Otherwise Constitute Infringement?* When determining whether a copyrighted work has been infringed, a number of questions must be asked, including how much of the work was copied or distributed and whether the purpose of the copying or distribution was to comment on it.<sup>27</sup> Certainly, it is a fairly common practice to send a

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<sup>22</sup> *Id.* §§ 106, 501(a).

<sup>23</sup> *Id.* § 102(a).

<sup>24</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.").

<sup>25</sup> *See Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) ("[T]he work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium . . . and it must remain thus embodied for a period of more than transitory duration" (internal quotation marks omitted)). E-mails may be perceived and reproduced with the assistance of a computer and are relatively permanent, satisfying the fixation requirement.

<sup>26</sup> *Feist*, 499 U.S. 340.

<sup>27</sup> See discussion of the fair use standard *infra* Part II.A.2.b.

quotation from an e-mail and to respond to it.<sup>28</sup> Rather than parsing the borderline cases, it is helpful to begin this conversation by examining the most basic example: when an entire original e-mail is forwarded without commentary. In such a case, what are the viable defenses to infringement, if any? Two possibilities merit examination: (a) whether the sender of the e-mail grants an implied license to the recipient to forward it and, if so, what are the terms and limitations of such an implied license and (b) whether the forwarding of the e-mail may constitute fair use.

*a. Does the Author of an Original E-mail Grant an Implied License that Permits the Recipient of that E-mail to Forward it to Others?* An author of a copyrighted work has the exclusive right to copy and to distribute that work, as well as to authorize others to copy or to distribute that work.<sup>29</sup> It can be derived from these rights that unauthorized copying and distribution of copyrighted material constitutes infringement. However, it is possible that copying and distribution may be authorized by an implied license granted by the author.<sup>30</sup> A non-exclusive implied license may be found based on a course of conduct.<sup>31</sup> Courts have found implied licenses where an author had a commercial relationship with the alleged infringer of the copyright in cases where that commercial relationship required the use of the copyrighted work.<sup>32</sup> For example, in *Oddo v. Ries*, the Ninth Circuit found an implied license where an author of a manuscript entered into a partnership to have his manuscript included in a book.<sup>33</sup> The court reasoned that the author had granted an implied license by entering into the partnership.<sup>34</sup> The Ninth Circuit also applied this doctrine to special effects footage that was included in a horror movie, despite a contractual dispute between the special effects producer and the movie executive that

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<sup>28</sup> In fact, most e-mail software automatically copies only the highlighted portion of an e-mail when a user highlights a portion of an incoming e-mail then clicks the reply button.

<sup>29</sup> 17 U.S.C. § 106 (the reproduction and distribution rights are described in parts (1) and (3) of that section respectively).

<sup>30</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 194 (2002) (raising the possibility that e-mail forwarding may be permissible under the implied license doctrine). Note: this reference appears to have been removed from more recent editions of the book.

<sup>31</sup> 3-10 MELVILL NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03 (2012) (“[N]onexclusive licenses may therefore be granted orally, or may even be implied from conduct.”).

<sup>32</sup> See discussion of *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) and *Effects Assocs. v. Cohen, infra*.

<sup>33</sup> *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) (“We conclude that Oddo, by preparing a manuscript based on his preexisting articles as part of his partnership duties, impliedly gave the partnership a license to use the articles insofar as they were incorporated in the manuscript, for without such a license, Oddo’s contribution to the partnership venture would have been of minimal value.”).

<sup>34</sup> *Id.*

resulted in the executive only paying the special effects producer half of the agreed upon price.<sup>35</sup> These precedents appear to rely on the financial relationship between the authors and the alleged infringers and therefore are likely not to apply to noncommercial e-mail correspondence.

Some courts apply a three-pronged test to find an implied license, comprising the following steps: “whether the licensee requested the work, whether the creator made and delivered that work, and whether the creator intended that the licensee would copy and make use of the work.”<sup>36</sup> On their face, these criteria could apply outside the context of an existing commercial relationship, so it is worthwhile to ask whether forwarding an e-mail would meet these elements. But that is a brief inquiry, since in most cases the recipient of an e-mail did not request the e-mail. Without this first element being met, it is not relevant that the second element is satisfied, nor is it necessary to examine whether the sender demonstrated an intent that the recipient “copy and make use of” the e-mail.

However, short of a formal implied license, implied permission may be adequate in a noncommercial context.<sup>37</sup> After all, only *unauthorized* copying and distribution constitutes infringement.<sup>38</sup> It may even be possible to derive implied permission for e-mail forwarding from a course of dealing or from broader societal expectations regarding e-mail usage.<sup>39</sup> But any such defenses to infringement may fall apart in cases where the sender clearly does not authorize forwarding, such as when an e-mail specifies that it is confidential or not to be

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<sup>35</sup> *Effects Assocs. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990).

<sup>36</sup> *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010) (citing *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002)); *see also* Erik Ketzan, *Rebuilding Babel: Copyright and the Future of Online Machine Translation*, 9 TUL. J. TECH. & INTELL. PROP. 205, 230 (2007) (“Although no single test has been adopted, a number of courts have held that the touchstone for finding an implied license is intent.”).

<sup>37</sup> *See* *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006) (“[T]he Court grants Google’s motion that it is entitled to the defense of implied license, and denies Field’s cross-motion that the defense is inapplicable.”).

<sup>38</sup> 9 M. ELAINE BUCCIERI, *Cause of Action for Copyright Infringement Under the Federal Copyright Act of 1976, as amended*, 9 CAUSE OF ACTION 2D 65 (2004) (establishing a prima facie case for copyright infringement requires the plaintiff to prove that “the defendant has wrongfully copied the work . . . without the plaintiff’s consent or authorization . . .” (emphasis added)).

<sup>39</sup> Implied permission has been found in analogous cases in other contexts. *See, e.g.*, *Nicholas v. Sugar Lo Co.*, 471 A.2d 44, 48 (N.J. Super. Ct. App. Div. 1983) (“[I]t might well be reasonable to hold from a course of dealings between parties that the continuous granting of permission to use a vehicle implied permission to use it without express consent on another occasion.”); *Florida v. Jardines*, 133 S. Ct. 1409, 1420 (2013) (Alito, J., dissenting) (“The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time.”). This logic could also be applied in the e-mail forwarding context.

shared or forwarded, or rather “only for the intended recipient,” as many business footers indicate.<sup>40</sup> As such, the implied license or implied permission defense to copyright infringement for forwarding an e-mail would be unavailable in many cases.

*b. Is Forwarding a Noncommercial E-mail Protected by the Fair Use Doctrine?*  
Another possible defense to e-mail forwarding constituting copyright infringement is the fair use doctrine, under which some actions that would otherwise constitute copyright infringement may be found to be permissible.<sup>41</sup> Section 107 lists four factors for courts to consider in determining whether a fair use defense to infringement is available:

- (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.<sup>42</sup>

The Supreme Court has found that the four criteria must be considered together.<sup>43</sup> However, cases applying the fair use doctrine have weighed these factors differently, making it difficult to predict whether an apparent act of infringement is entitled to the fair use defense.<sup>44</sup> Nonetheless, it is a useful exercise to apply these four factors to forwarded noncommercial e-mail.

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<sup>40</sup> *Spare us the e-mail yada-yada: Automatic e-mail footers are not just annoying. They are legally useless*, ECONOMIST, Apr. 7, 2011, available at <http://www.economist.com/node/18529895> (“‘If this e-mail is received in error, notify the sender immediately.’ ‘This e-mail does not create an attorney-client relationship.’ ‘Any tax advice in this e-mail is not intended to be used for the purpose of avoiding penalties under the Internal Revenue Code.’ Many firms—*The Economist* included—automatically append these sorts of disclaimers to every message sent from their e-mail servers, no matter how brief and trivial the message itself might be.”).

<sup>41</sup> ALAN LATMAN, 12-S14 NIMMER ON COPYRIGHT II (“Fair use may be viewed from two standpoints. It may be considered a technical infringement which is nevertheless excused. On the other hand, it may be deemed a use falling outside the orbit of copyright protection and hence never an infringement at all.”).

<sup>42</sup> 17 U.S.C. § 107 (2012).

<sup>43</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578 (1994) (“[T]he four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

<sup>44</sup> ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, STUDIES PREPARED FOR SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SEN. COMM. ON JUDICIARY,

*i. Purpose and Character of Forwarding an E-mail.* This factor might, at first blush, appear to weigh in favor of fair use based on the noncommercial nature of forwarding an e-mail. However, the purpose factor also considers the extent to which the alleged infringer transformed the work. “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>45</sup> Transformation requires that the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>46</sup> Forwarding an e-mail could meet this test if the forwarded e-mail includes a response to or criticism of the original e-mail, but is unlikely to meet this test if the e-mail is forwarded without comment. In such a case, the first factor would tend to weigh against the applicability of the fair use doctrine.

*ii. Nature of the Copyrighted Work.* The second factor acknowledges that not all copyrighted works are entitled to the same degree of protection. In particular, unpublished works are afforded greater protection than published works.<sup>47</sup> While courts have found that posting on the internet may constitute publication,<sup>48</sup> an e-mail sent only to a single recipient is unlikely to be deemed so widely dispersed as to have been published. As such, the second factor is also likely to weigh against applicability of the fair use doctrine.

*iii. Amount of the Copyrighted Work Used.* The third factor asks what portion of the copyrighted work is being used.<sup>49</sup> Because a forwarded e-mail is copied in its entirety, this factor weighs against availability of a fair use defense.

*iv. Market Impact of the Use on the Value of the Copyrighted Work.* The fourth factor asks to what extent the use depletes the value of the copyrighted work. One commentator has suggested that because noncommercial e-mails have little

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86th Cong. 2d Sess., at 3, 8–14 (1958); LATMAN, *supra* note 41 (“There is one proposition about fair use about which there is widespread agreement: it is not easy to decide what is and what is not a fair use.”).

<sup>45</sup> *Campbell*, 510 U.S. 569, 579 (1994).

<sup>46</sup> *Id.*

<sup>47</sup> *Harper & Row*, 471 U.S. at 551 (“[T]he fact that the plaintiff’s work is unpublished . . . is a factor tending to negate the defense of fair use.” (internal quotation marks omitted)).

<sup>48</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007) (“Once Perfect 10 has exploited this commercially valuable right of first publication by putting its images on the Internet for paid subscribers, Perfect 10 is no longer entitled to the enhanced protection available for an unpublished work.”).

<sup>49</sup> *Balsley v. LFP, Inc.*, 691 F.3d 747, 760 (6th Cir. 2012) (“While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use.” (internal quotation marks omitted)).

value to start with, their unauthorized reproduction cannot harm their value.<sup>50</sup> This factor therefore weighs in favor of the applicability of the fair use doctrine.

While the economic impact on the copyrighted work is an important criterion in a fair use analysis, courts have also found other factors to be important, such as the portion of the work copied<sup>51</sup> and the nature of the work.<sup>52</sup> It is therefore not possible to conclude that the fair use defense will necessarily be available to noncommercial e-mails that are forwarded in their entirety without comment or response.

3. *Are Forwarded E-mails Gray Works?* It is easy to imagine a scenario in which the sender of a noncommercial e-mail containing an explicit instruction that the e-mail be kept private might, in response to learning that the recipient of that e-mail had forwarded it, decide to register the e-mail and to file suit in federal court. It is far more difficult, however, to anticipate how a federal judge might react to such a lawsuit. In a circumstance where there was no fair use defense available and the forwarder was unable to rebut the presumption that the forwarding had been willful, the court could, in theory, award the author of the original e-mail up to \$150,000 in statutory damages.<sup>53</sup> On the other hand, the judge could react to the suit negatively, seeing it as being an abuse of the court system. A judge might look to the course of dealing between the parties or even to broader societal expectations with respect to e-mail correspondence to find that, disclaimers to the contrary, the sender had granted permission to the recipient to forward the e-mail. This uncertainty places forwarded e-mails squarely in the gray works category.

#### B. DOES FAN FICTION INFRINGE ON THE COPYRIGHTS OF THE WORKS ON WHICH IT IS BASED?

Like many terms that do not appear in statutes, defining “fan fiction” in a legal context can be challenging. Fan fiction was defined in Rebecca Tushnet’s seminal 1997 article, *Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, as “any kind of written

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<sup>50</sup> Snow, *supra* note 19, at 546 (“The lack of a potential market for personal email suggests an absence of economic harm, thereby implying that a recipient’s forwarding use would be a fair use.”).

<sup>51</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1179 (9th Cir. 2012) (the defendant “copied 100 percent of the copyrighted photos at issue . . . far more than was necessary to corroborate its story. . . Thus, analyzing both the quantitative and qualitative aspects of the published material, this factor weighs against fair use.”).

<sup>52</sup> *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 553 (1985) (“Congress intended the unpublished nature of the work to figure prominently in fair use analysis.”).

<sup>53</sup> 17 U.S.C. § 504(c)(2) (2012).

creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”<sup>54</sup> Since then the term has been used to refer only to such fictional works that are “unauthorized and not-for-profit.”<sup>55</sup> In recent years, a subgenre of fan fiction videos or “fan films” has emerged.<sup>56</sup> This inquiry will use the narrower definition of fan fiction that is limited to works that are unauthorized and noncommercial, but the term will include such fiction in all media, including fan films.

Fan fiction can be traced back to the 1967 publication of *Spockanalia*, a “fanzine” inspired by the original Star Trek television program.<sup>57</sup> While Star Trek-related fan fiction continues to be popular today,<sup>58</sup> its prevalence is now dwarfed by fan fiction written based on other original works, such as the Harry Potter books by J.K. Rowling.<sup>59</sup> Thus, while fan fiction predated the Internet, it has proliferated since the advent of the World Wide Web.

Fan fiction is an interesting category of gray works because, on the one hand, it makes no secret of its use of copyrighted source material, but on the other hand, it is noncommercial and has been tolerated—and in some cases actively encouraged—by many authors and a number of publishers.<sup>60</sup> In fact, while 244 law review articles include the term “fan fiction,” no copyright case has ever mentioned the term.<sup>61</sup> Since authors of registered works could sue authors of fan fiction based on their works for infringement, there appears to be an uneasy truce in place in which fan fiction authors do not attempt to profit

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<sup>54</sup> Rebecca Tushnet, *Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997).

<sup>55</sup> Casey Fiesler, *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, 731–32 (2008).

<sup>56</sup> Chris Suellentrop, *To Boldly Go Where No Fan Has Gone Before*, WIRED, <http://www.wired.com/wired/archive/13.12/startrek.html> (last visited Apr. 30, 2014).

<sup>57</sup> JOAN M. VERBA, *BOLDLY WRITING: A TREKKER FAN AND ZINE HISTORY 1967, 1987*, at 1–2 (2d ed. 2003).

<sup>58</sup> A May 27, 2014 search of Fanfiction.net for “Star Trek” stories resulted in 3,109 hits.

<sup>59</sup> A May 27, 2014 search of Fanfiction.net for “Harry Potter” resulted in 530,573 hits. There is also a website dedicated to Harry Potter fan fiction that includes over 80,000 stories and bills itself as “the oldest, (and best) unofficial dedicated Harry Potter Fanfiction site on the net,” available at: <http://www.harrypotterfanfiction.com/>.

<sup>60</sup> See discussion of acquiescence defense *infra* Part II.B.3.

<sup>61</sup> LexisNexis searches for “fan fiction” or “fanfiction” conducted May 29, 2014 revealed four cases, none of which involved a copyright claim. Two of the cases relate to the same child’s eligibility for special education services: *Mr. & Mrs I. v. Me. Sch. Admin. Dist. No. 55*, 2005 U.S. Dist. LEXIS 11401 (D. Me., June 13, 2005) and *Mr. I v. Me. Sch. Admin. Dist. 55*, 416 F. Supp. 2d 147 (D. Me. 2006). The other two cases relate to denial of Social Security benefits: *Polzin v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 37898 (E.D. Mich. Feb. 15, 2013) and *Griffith v. Comm’r of Soc. Sec.*, 2014 U.S. Dist. LEXIS 38286 (E.D. Mich. Feb. 14, 2014).

from their works and authors of the original works do not sue them for authoring and distributing those works.

In examining the extent to which fan fiction infringes copyright, the first questions that must be asked are: does fan fiction involve (1) infringement of the reproduction right or (2) creation of a derivative work? To the extent that the answer to either of these questions is affirmative, it then becomes necessary (3) to ask about possible defenses to infringement before (4) concluding whether fan fiction as a class should be categorized a type of gray work.

1. *To What Extent Does Fan Fiction Copy Directly from Copyrighted Works?* To establish a prima facie case for copyright infringement, it must be shown that there has been a violation of one of the exclusive rights of a copyright holder.<sup>62</sup> The most basic of those rights is the right to reproduction or copying.<sup>63</sup> But does fan fiction necessarily copy from the copyrighted works to which it pays homage? Given the differences between fan fiction stories and fan fiction multimedia, such as fan films, it is worth examining these categories of fan fiction separately.

a. *Do Fan Fiction Stories Copy from Copyrighted Works?* Is it possible to write a Harry Potter story without reproducing copyrighted elements from J.K. Rowling's books? "[D]istinctively delineated" characters are subject to copyright,<sup>64</sup> but what if someone wrote a story about a minor character who is only mentioned in passing in the Harry Potter books? As Judge Learned Hand observed, "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."<sup>65</sup> Thus, it is possible to write fan fiction that does not violate the reproduction right. Recent court decisions extended this doctrine to stock characters.<sup>66</sup> The Ninth Circuit has gone so far as to find that characters are only copyrightable when the characters themselves are "the stor[ies] being told,"<sup>67</sup> although the decision is not followed in all circuits.<sup>68</sup>

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<sup>62</sup> 17 U.S.C. § 106 (2012); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>63</sup> 17 U.S.C. § 106 (2012); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>64</sup> 1-2 *NIMMER & NIMMER*, *supra* note 31, § 2.12 ("[I]t is clearly the prevailing view that characters per se are entitled to copyright protection. Those cases which have denied such protection are more reconcilable with those which have recognized such protection than the language in some of the opinions would seem to indicate. That is, in those cases recognizing such protection, the character appropriated was distinctively delineated in the plaintiff's work, and such delineation was copied in the defendant's work." (internal citations omitted)).

<sup>65</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>66</sup> *TMTV, Corp. v. Mass Prods., Inc.*, 645 F.3d 464, 469 (1st Cir. 2011) ("Stock characters, like stock *scènes à faire*, are not subject to copyright protection.").

<sup>67</sup> *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945, 950 (9th Cir. 1954) ("It is conceivable that the character really constitutes the story being told, but if the

Depending upon the circuit court hearing the case, it is easy to imagine that a story set in the world of Harry Potter featuring only minor or stock characters from the J.K. Rowling novels would be deemed not to reproduce copyrighted material. However, fan fiction that makes extensive use of the character Harry Potter or other main characters from the novels would likely be deemed to constitute copying from the books, even if the new story did not borrow descriptive language from the original.

*b. Do Fan Films Copy from Copyrighted Works?* Fan films based on written copyrighted works should be reviewed to determine whether they are derivative works, not whether they are directly infringing, since a motion picture version of a book is defined to be a derivative work.<sup>69</sup> However, fan films based on movies, television shows, and other original audiovisual works should be examined to determine whether they copy from those original works not only with regard to plot and character elements, but also with regard to pictures and sounds. Interestingly, the standards that apply to images are very different than those that apply to sounds. A fan film that contains an image taken from a movie could be found to have copied from that movie based on that image alone,<sup>70</sup> so long as the fan film reproduced at least one of the original elements of the image: rendition, timing, and creation of the subject.<sup>71</sup> Similarly, it is also possible that a fan film might be found to have copied sounds from the copyrighted original audiovisual work.<sup>72</sup>

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character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”).

<sup>68</sup> See, e.g., *Toy Corp. v. Kenner Prods. Div. of General Mills Fun Group, Inc.*, 443 F. Supp. 291, 301 n.8 (S.D.N.Y. 1977) (“The plaintiff relies on the 9th Circuit case of [Warner Bros.], to support its argument that the three ‘Star Wars’ characters at issue here are not within the copyright protection granted to the movie itself. This case is not the law of this circuit, and this Court declines an invitation to follow it. . . .”).

<sup>69</sup> 17 U.S.C. § 101 (2012) (“A ‘derivative work’ is 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.”).

<sup>70</sup> *Id.* § 106(5) (granting copyright holders the exclusive rights “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly . . .” (emphasis added)).

<sup>71</sup> *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451–53 (S.D.N.Y. 2006).

<sup>72</sup> In addition, the combination of copied images and sounds might invoke the synchronization right. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 527 (9th Cir. Cal. 2008) (“Though it is not explicit in the Copyright Act, courts have recognized a copyright holder’s right to control the synchronization of musical compositions with the content of audiovisual works and have required parties to obtain synchronization licenses from copyright holders.”).

Therefore, fan films that used images and sounds from audiovisual works would likely be found to have copied from the original, regardless of whether they borrowed plot elements or major, distinctive characters.

2. *When Does Fan Fiction Constitute a Derivative Work?* Even if a work of fan fiction does not copy from the original copyrighted work, the fan fiction may still infringe on the copyright of the original if it is found to be a derivative work, because the Copyright Act reserves the right to produce derivative works to the author.<sup>73</sup> The statute's definition of derivative works includes a "motion picture version, . . . abridgement, condensation, or any other form in which the work may be recast, transformed, or adapted."<sup>74</sup> Under this definition, a fan fiction story based on a movie would likely qualify as a derivative work, as would a fan fiction film based on a copyrighted novel. A more difficult question arises when the medium of the original copyrighted work and the fan fiction are the same, such as a short story based on a novel. The short story is not a "recast, transformed, or adapted" version of the novel, so it is likely not a derivative work. The distinction, however, may be immaterial, as applying the same elements that would make it a derivative work would likely constitute a violation of the reproduction right if it were not a derivative work. Therefore, in cases where the original and the fan fiction are in the same medium, it is important to examine how much of the original expression of the original—including plot and characters—is being copied. Where too much is being copied, then the fan fiction will either constitute unauthorized copying or an unauthorized derivative work, either of which constitutes infringement absent an applicable defense.

3. *What Defenses Are Available to Fan Fiction Copyright Infringement?* Because fan fiction is defined for purposes of this inquiry as being noncommercial and implied licenses generally require an existing commercial relationship, as discussed in Part II.A, an implied license defense is unlikely to be available for fan fiction. However, the equitable defense of acquiescence that is well established in trademark law may also be applicable to copyright law generally and to fan fiction in particular. This possibility is examined in part *a* of this subsection, and the fair use defense is discussed in part *b*.

*a. Might an Equitable Defense of Acquiescence Be Available to Fan Fiction?* In her 2003 article, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, Meredith McCardle argues that because

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<sup>73</sup> 17 U.S.C. § 103 (2010).

<sup>74</sup> *Id.* § 101.

many authors tolerate fan fiction writing, implied consent may be one of the strongest arguments for an infringing work of fan fiction. If the circumstances are right and the fan fiction writer borrows from a consenting copyright owner, a court should excuse the writing of fan fiction based on equitable grounds.<sup>75</sup>

Acquiescence is a form of equitable estoppel defense available in trademark cases.<sup>76</sup> Equitable defenses that apply to trademark cases also apply to copyright cases.<sup>77</sup> The acquiescence defense involves a three-pronged test: “(1) the owner actively represented that it would not assert a right or claim against the infringer; (2) the delay between the active representation and the assertion of the right or claim was not excusable; and (3) the delay caused the defendant undue prejudice.”<sup>78</sup> Fan fiction may be examined under this analysis.

*i. Has the Owner “Actively Represented That It Would Not Assert a Right or Claim” Against the Fan Fiction Author?* While some authors of works that have inspired fan fiction have actively challenged the fan fiction as infringing on their copyrights, others have welcomed and, in some cases, encouraged fan fiction. Fanlore.org has a page listing authors that support or oppose fan fiction based on their works, where ninety-six current authors are listed as being in favor and just twenty-six as having expressed opposition to fan fiction based on their works.<sup>79</sup> Among authors who were initially opposed to fan fiction based on their works, some are becoming more accepting of it. Science Fiction author Orson Scott Card wrote on his website that in 2004

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<sup>75</sup> Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 450 (2003).

<sup>76</sup> *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 67 (2d Cir. 2002) (“We have long held in the context of trademark actions that where a person entitled to exclusive use of a trademark is guilty of unreasonable delay in asserting his rights against an infringer . . . , or acquiesces in the latter’s use, . . . a court of equity has the discretionary power . . . to deny injunctive relief or an accounting.” (internal quotation marks omitted)).

<sup>77</sup> *Tolliver v. McCants*, 684 F. Supp. 2d 343, 347 (S.D.N.Y. 2010) (“[P]rinciples of estoppel applicable elsewhere in the law are equally applicable in copyright infringement actions.” (citing 4 NIMMER & NIMMER, *supra* note 31, § 13.07)); *see also* *Evergreen Safety Council v. RSA Network, Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012) (applying equitable defense of laches to a copyright infringement case).

<sup>78</sup> 684 F. Supp. 2d at 348.

<sup>79</sup> Professional Author Fanfic Policies, [http://fanlore.org/wiki/Professional\\_Author\\_Fanfic\\_Policies](http://fanlore.org/wiki/Professional_Author_Fanfic_Policies) (last visited Feb. 20, 2014) (the page also references several publishers and deceased authors who are not included in these totals).

[a]nybody writing fiction using my characters without my specifically having licensed it to them will be sued, not because I'm mean and selfish, but because this is the INHERITANCE OF MY CHILDREN, and to write fiction using my characters is morally identical to moving into my house without invitation and throwing out my family.<sup>80</sup>

However, in 2012, he indicated that he would be holding a fan fiction competition on his website and would publish the winning stories, commenting, “‘Every piece of fan fiction is an ad for my book’ . . . [w]hat kind of idiot would I be to want that to disappear?”<sup>81</sup>

Other authors have undergone similar transformations. Mercedes Lackey went from opposing fan fiction based on her works to explicitly authorizing it:

As you folks already know, my agent, Russel Galen, has in the past been opposed to fanfiction. However, he is also Cory Doctorow's agent now, and Cory is a persuasive little gnome.

As a result of this, I am happy to announce that we are officially permitting fanfiction to be licensed as derivative fiction under the Creative Commons umbrella.

What this means is: NO, you cannot make money on it. NO, you cannot self-publish a fanfiction novel of Valdemar (or any of my other stuff) and try and sell it on Amazon. And NO, I still am not going to read it, because I am already so far behind on my research reading I barely have time to read that.

But YES, you may write and post away, folks, so long as you license it as derivative and under Creative Commons. If it is anything other than PG-13, please take all the proper precautions to stick it somewhere that innocent souls won't be corrupted. Do not scare the children or the horses. Have fun!<sup>82</sup>

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<sup>80</sup> OSC Answers Questions, July 19, 2004, <http://www.hatrack.com/research/questions/q0121.shtml>.

<sup>81</sup> Alexander Alter, *The Weird World of Fan Fiction*, WALL ST. J. (June 14, 2012, 6:49 PM), available at <http://online.wsj.com/news/articles/SB10001424052702303734204577464411825970488>.

<sup>82</sup> Mercedes Lackey, *News: Concerning Fanfiction*, THE WORLD OF MERCEDES LACKEY, <http://mercedeslackey.com/news.html> (last visited May 27, 2014). See also Professional Author Fanfic Policies, *supra* note 79 (statement of author Poppy Z. Brite) (“[I]his would probably be a good time to mention that I used to be anti-fanfic . . . but no longer am . . .”).

Lackey is not the only author to authorize fan fiction based on her work. Ann McCaffrey has posted on her website a set of rules for authors of fan fiction based on her work, the first of which is “1. Fan Fiction, Fan Art, and online RPGs based on any of my literary works will now be permitted so long as they occur on a noncommercial basis.”<sup>83</sup> In addition to individual authors, institutional copyright holders have authorized and encouraged fan fiction. LucasFilm has hosted an annual fan film competition since 2002,<sup>84</sup> and CBS and its predecessor Paramount have published collections of *Star Trek* fan fiction.<sup>85</sup>

But fan fiction that is explicitly authorized does not fall within the definition of the term “fan fiction” for purposes of this inquiry, which has been defined to include only unauthorized works. Copyright law prohibits only *unauthorized* reproduction, so authorized activity does not infringe. At the other end of the spectrum, authors who make clear their strong opposition to fan fiction based on their works have in no way stated that they will not “assert a right or claim”<sup>86</sup> against such fan fiction. However, a number of authors have expressed a supportive attitude toward fan fiction without explicitly authorizing it. Some tacitly approve of it, while others state that they do not object to it, but avoid reading it; one even thanked fan fiction writers in the author’s note of one of her books.<sup>87</sup>

Since author statements run such a wide gambit from strong opposition to explicit authorization, it is reasonable to conclude that at least some authors

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<sup>83</sup> Anne McCaffrey, *Fan Fiction Rules*, THE WORLDS OF ANNE MCCAFFREY, [http://www.pernhome.com/aim/index.php?page\\_id=20](http://www.pernhome.com/aim/index.php?page_id=20) (last visited May 27, 2014).

<sup>84</sup> See StarWars.com Team, *Fan Movie Challenge Winners*, STAR WARS BLOG, <http://starwarsblog.starwars.com/index.php/2007/05/27/fan-movie-challenge-winners/>; Joe Mullin, *Disney owns Lucasfilm: Will it have Room for Star Wars Fan Movies?*, ARS TECHNICA (Oct. 30, 2012, 7:18 PM), <http://arstechnica.com/tech-policy/2012/10/disney-owns-lucasfilm-will-it-have-room-for-star-wars-fan-movies/> (“In 2007, Lucasfilm even released tools that would more easily enable remixing of Star Wars content. A top Lucasfilm lawyer, Jeffrey Ulin, began speaking at conferences and to the media about the value of fan mash-ups and remixes. Those works were ‘part of keeping the love of Star Wars and the franchise alive. . . . We’re really trying to position ourselves for the next 30 years,’ Ulin told the Wall Street Journal in 2007.”).

<sup>85</sup> See SONDR MARSHAK & MYRNA CULBREATH, *STAR TREK: THE NEW VOYAGES* (Bantam, 1998), as discussed in *Fan Fic*, TVTROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/FanFic?From=Main.FanFiction> (“Some franchises — such as Star Trek — have actually turned fan fiction into a profit center by creating Tie In Novels. These books are usually penned by young and upcoming authors, often former Fanfic writers, and represent an intermediate step between fan fiction and completely original fiction.”).

<sup>86</sup> *Tolliver v. McCants*, 684 F. Supp. 2d 343, 348 n.1 (S.D.N.Y. 2010).

<sup>87</sup> Professional Author Fanfic Policies, *supra* note 79.

have “actively represented” that they “would not assert a right or claim” against the authors of fan fiction based on their copyrighted works.<sup>88</sup>

*ii. Has There Been an Inexcusable “Delay Between the Active Representation and the Assertion of the Right or Claim”?* If an author who has been making statements for years indicating tacit approval for fan fiction based on his copyrighted works were to bring suit for copyright infringement against a fan fiction author, it would be a fact-specific inquiry regarding whether sufficient time had passed to meet this test. It is not difficult to imagine scenarios in which more than enough time would have elapsed to satisfy this prong.

*iii. Did the Delay Cause the Defendant Undue Prejudice?* As with the second prong, this would likely be a fact-specific inquiry. Undue prejudice may include expenses, loss of income, or the loss of legal rights.<sup>89</sup> A defendant who had foregone paying work to write fan fiction or who had invested in the creation of a fan film<sup>90</sup> that he reasonably believed would not constitute claim of infringement would have a very strong argument that this prong has been satisfied.

While it is not clear whether a given court would find that the equitable defense of acquiescence is available in copyright infringement cases involving fan fiction and fan film media, it is certainly possible that, with the right set of facts, all three prongs of the defense could be satisfied.

*b. Is Fair Use a Viable Defense to Copyright Infringement by Fan Fiction?* The possibility that fan fiction might be defensible under the fair use doctrine has been discussed extensively, dating back to Rebecca Tushnet’s 1997 article, in which she concluded that “even wholesale borrowing might well be legitimate if, as with fan fiction, the use is transformative, noncommercial, and not a market substitute.”<sup>91</sup> Meredith McCradle’s more recent article is essentially a tutorial on the legal issues of fan fiction for fan fiction authors,<sup>92</sup> but McCradle’s article takes a somewhat more cautious approach to the issue of the applicability of the fair use defense to fan fiction, especially in light of the Second Circuit Court of Appeals’ decision in *Castle Rock Entertainment v. Carol*

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<sup>88</sup> *Tolliver*, 684 F. Supp. 2d at 348 n.1.

<sup>89</sup> See *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 625 (5th Cir. Feb. 7, 2013) (“Therefore, the test for undue prejudice is met: had the [defendant] brought suit earlier, [the plaintiff] may not have rebuilt his business after the fires or tornado and may not have had invested millions of dollars into the business.”).

<sup>90</sup> Such a possibility is not merely hypothetical. A fan film based on *Star Trek* has raised over \$240,000 through Kickstarter. See <http://www.kickstarter.com/projects/145553614/star-trek-re-negades> (last visited May 27, 2014).

<sup>91</sup> Tushnet, *supra* note 54, at 678.

<sup>92</sup> McCradle, *supra* note 75, at 434.

*Publishing*.<sup>93</sup> This subsection will apply the four fair use factors to fan fiction in light of the analyses articulated by Tushnet and McCradle, as well as recent case law.

*i. Purpose and Character of Fan Fiction.* The purpose and character test considers two main questions: whether a work is of a commercial nature, which weighs against fair use, and whether it is transformative (as opposed to supplanting the original), which weighs in favor of fair use.<sup>94</sup> A work's transformative nature and its commercial nature are both weighed, neither being determinative in and of itself. Tushnet observes that in *Campbell v. Acuff-Rose Music, Inc.* the Supreme Court found speech to be protected fair use even though it was commercial in nature.<sup>95</sup> Both Tushnet and McCradle note the noncommercial nature of fan fiction, but McCradle also suggests that fan fiction may be educational or parody, which would weigh in favor of fair use.<sup>96</sup> Since the time of Tushnet and McCradle's articles, the Supreme Court ruled in *Golan v. Holder* that fair use protections were required by the First Amendment and that, without such protections, copyright law's free speech restrictions would not be constitutional.<sup>97</sup>

In the wake of *Golan*, free speech considerations might begin to play a more prominent role in fair use analysis compared to whether the work is commercial in nature. In another recent case, the Sixth Circuit Court of Appeals asked whether the allegedly infringing work "add[ed] any creative message or meaning" to the original.<sup>98</sup> In this analysis, transformation tests whether there is new speech in the use of the original copyrighted work. There are many instances of fan fiction that have a great deal to say that is not included in the original works on which they are based. For example, "slash fan fiction" is a subgenre that takes heterosexual characters from original stories and places those characters into same-sex relationships.<sup>99</sup> It would be hard to argue that

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<sup>93</sup> *Id.* at 463 ("The Castle Rock decision, as a whole, might prove troubling for fan fiction authors.").

<sup>94</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

<sup>95</sup> Tushnet, *supra* note 54, at 661–62 ("[T]he Supreme Court held that transformative use is favored by the law, even if the transformed text is commercial.").

<sup>96</sup> McCradle, *supra* note 75, at 454 ("Fan fiction authors may be able to argue that their development as writers fulfills an educational use."); *id.* at 455.

<sup>97</sup> *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) ("First Amendment protections are embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and in the latitude for scholarship and comment safeguarded by the fair use defense." (internal quotation marks omitted)).

<sup>98</sup> *Balsley v. LFP, Inc.*, 691 F.3d 747, 759 (6th Cir. 2012).

<sup>99</sup> *Slash Fanfiction Definition*, URBAN DICTIONARY, available at <http://www.urbandictionary.com/define.php?term=slash%20fanfiction> (last updated Mar. 27, 2005) (defining the term as

slash fan fiction does not say something new and different from the original stories on which it is based and it would therefore appear to be transformative under this evolving standard.

Similarly, it is not hard to imagine how some fan fiction might be parody, commenting on or even criticizing the original works on which they are based. Parody may be a complete defense, even when the new work fails the other prongs of the fair use test. In *Campbell*, the band “2 Live Crew” used significant parts of the Roy Orbison song “Pretty Woman” in their song by the same name, taking from an original work that was creative, not factual and, according to the court, may have harmed the market for derivative versions of the original in the rap music market.<sup>100</sup> Despite all of the other fair use factors weighing against fair use, the parodical nature of the song made it fair use.<sup>101</sup>

However, McCradle’s argument that fan fiction is educational because it helps the author to learn how to write<sup>102</sup> is unpersuasive, since by extension that logic could be applied to anyone copying elements of an original work. For example, a photographer who duplicated the copyrighted photo of another could argue that he was merely attempting to hone his skill to see if he could capture a very similar image. The Intellectual Property Clause informs us that copyright protection is afforded to “promote progress in the useful arts.”<sup>103</sup> This phrase suggests that Congress intended the educational purpose fair use defense to be available to authors whose works inform others—thus promoting the useful arts—not works that help to educate only the author of the infringing work.

Another subgenre of fan fiction, known as “crossover” fan fiction, involves taking elements from two different original stories and combining them. A classic example is to speculate who would win a battle between the Starship Enterprise from *Star Trek* and a Star Destroyer from *Star Wars*.<sup>104</sup> Similarly, crossover fan fiction may take characters from one fictional universe and place

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“fanfiction depicting a sexual and/or romantic relationship or situation between two characters of the same gender”).

<sup>100</sup> *Campbell*, 510 U.S. at 592–93 (U.S. 1994) (“2 Live Crew’s song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry.”).

<sup>101</sup> See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1272 (11th Cir. 2001) (“[N]ot every parody is a fair use.” A parody is not fair use if it “takes more of the protected elements of [the copyrighted work] than was necessary to serve a parodic function.”). However, despite this articulation of the rule and the amount of the copyrighted work taken, the fair use defense succeeded in this case.

<sup>102</sup> McCradle, *supra* note 75.

<sup>103</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>104</sup> To find out who wins, see a short fan film at <http://www.youtube.com/watch?v=iA7Be6B4kkA>.

them in a very different setting or may speculate about how characters from two different stories might interact if they were to encounter one another. Crossover fan fiction is essentially the synthesis of two different ideas, which by definition, must yield something new.<sup>105</sup> Much like slash fan fiction, it would be hard to argue that crossover fan fiction is not transformative.

Fan fiction that is both noncommercial and transformative should satisfy the first prong of the fair use defense.

*ii. The Nature of the Copyrighted Work on Which the Fan Fiction Is Based.* Since fan fiction is based on fictional works, not on factual or historical works, its source material deserves a high level of protection. At first blush, the only category of source works that appears to be deserving of a higher degree of protection under this criterion might be unpublished fictional works. Tushnet dismisses the nature of the work as having historically been an unimportant factor,<sup>106</sup> while McCradle argues that the wide distribution of the original copyrighted works on which fan fiction is based bolsters fan fiction's fair use argument.<sup>107</sup> While courts may give this factor less weight than the others, any weight that it is afforded will tend to disfavor applicability of the fair use defense to fan fiction.

*iii. The Amount of the Copyrighted Work Taken by Fan Fiction.* The amount of a copyrighted work used by fan fiction varies widely. Some fan fiction takes major characters, settings, and plot elements, while other fan fiction develops the story of a minor character from the source work or takes only a setting that may border on a *scènes-à-faire* uncopyrightability. In her analysis of this factor, Tushnet raises some interesting questions: "Have fan authors appropriated the entire character, or taken just the name and some attributes? Does it depend on how in-character that character behaves? Is a poor portrayal more of a fair use?"<sup>108</sup> The court in *Warner Bros. Entm't Inc. v. RDR Books* may have taken significant strides toward answering these questions by injecting a new test into

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<sup>105</sup> IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS (Lewis White Beck ed., Paul Carus, trans., Prentice Hall/Library of Liberal Arts 1994) ("Synthetical judgments are expansive. The predicate contains something that is not actually thought in the concept of the subject."); see also *Synthesis*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/synthesis> (last visited May 27, 2014) (defining synthesis in the context of philosophy as "[t]he combination of thesis and antithesis in the Hegelian dialectical process whereby a new and higher level of truth is produced").

<sup>106</sup> Tushnet, *supra* note 54, at 662 ("This factor is rarely significant, though it is regularly cited.").

<sup>107</sup> McCardle, *supra* note 75, at 458 (McCardle goes on to suggest that this test is primarily concerned with the efforts of the copyright holder "to keep its work closely cabined." It is not clear how the author of a book or movie could do this.).

<sup>108</sup> Tushnet, *supra* note 54, at 678.

the “amount and substantiality” fair use factor.<sup>109</sup> In that case, Warner Brothers and J.K. Rowling alleged that a book detailing terms used in the Harry Potter books infringed on the copyrights in those books. The book publisher, RDR Books, argued a fair use defense. The court agreed that a lexicon must take a substantial portion of the source material to be a useful transformative work.<sup>110</sup> However, the court discussed not just the quantity, but the type of material taken, observing that “[i]n many instances, the copied language is a colorful literary device or distinctive description, as in the [book’s] entries for ‘Clankers,’ ‘Marchbanks, Madam Griselda,’ ‘Brain room,’ and ‘Dementors.’”<sup>111</sup>

Under the *RDR Books* test for substantiality, a work of fan fiction would be evaluated based not so much on whether it has taken the ideas from a copyrighted source, or even the characters, environs, and plot elements of the original, so long as it built on those elements. The critical question would thus be whether the fan fiction took actual expressive language from the source. Of the more than half a million Harry Potter fan fiction stories on fanfiction.net,<sup>112</sup> undoubtedly there are a significant number that borrow heavily from the literary devices of the Harry Potter books and a significant number that do not. It is therefore not possible to generalize whether this factor weighs for or against a fair use defense in the fan fiction context.

*iv. Market Impact of Fan Fiction on the Value of the Copyrighted Work.* Tushnet identifies two factors that would appear to favor fan fiction authors in evaluating whether their works are likely to harm the copyrighted works from which they draw: “Under current precedent, when a use is noncommercial, there is a presumption against finding significant market harm. . . . [and] a presumption against market harm when the use is transformative, because transformation precludes simple market substitution.”<sup>113</sup> And yet, these observations merely emphasize the importance of the first fair use factor. They provide no practical guidance to a court or to a fan fiction author regarding whether the test of the fourth factor has been satisfied. In fact, Tushnet’s de-emphasis of the fourth factor is directly at odds with the Supreme Court’s observation in *Harper & Row* that “‘the effect of the use upon the potential market for or value of the copyrighted work’ . . . is undoubtedly the single most important element of fair use.”<sup>114</sup> McCradle argues that the fourth factor may favor fair use, since “[f]an fiction authors can usually argue that there is no

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<sup>109</sup> Warner Bros. Ent’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 547.

<sup>112</sup> Fanfiction.net, *supra* note 59.

<sup>113</sup> Tushnet, *supra* note 54, at 670.

<sup>114</sup> *Harper & Row*, 471 U.S. at 566 (citing 17 U.S.C. § 107(4)).

harm to the copyright holder because their practice is noncommercial and the two works are operating in different markets, the fan fiction author existing in an online format and the copyright holder existing in digital or print form.”<sup>115</sup> But in today’s age of iPads and internet-connected e-readers is there a material difference between online and digital formats? It is certainly possible to read both formats on the same device. Does it necessarily follow that reading fan fiction or watching fan films on such a device would increase the reader’s appetite for the copyrighted original or is it also conceivable that the fan-generated content might slake the reader’s thirst for the original? Is there not potential market substitution of a well-written *Star Trek* fan fiction story for an authorized spin-off? This question answers itself, since fan fiction stories have been incorporated into authorized spinoffs. While there is no doubt that not all fan fiction acts as a market substitute, it is equally apparent that some fan fiction has the potential to perform that function.

Therefore, determining whether the fourth factor favors fair use is a fact-specific inquiry that could cut either way.

Weighing all of the fair use factors together, it becomes clear that there is no ready way to predict how a court would rule on whether fan fiction qualifies for this defense. On the one hand, its noncommercial and generally transformative nature argues for fair use. However, the other three factors may weigh against application of the fair use doctrine. A particularly transformative work of fan fiction, such as a parody, slash fan fiction, or crossover piece that included social or political commentary, might qualify for fair use even if it was commercial in nature. In other words, whether a fan fiction author could rely on a fair use defense for a given work in a given courtroom is more a roll of the dice than a scientific inquiry.

4. *Should Fan Fiction Be Categorized As Gray Works?* If acquiescence was fan fiction’s only defense to infringement, it might be reasonable to categorize the class as generally infringing with limited exceptions, since most fan fiction is unlikely to qualify for an acquiescence defense, given most authors’ lack of clarity on the topic. On the other hand, if fair use was as strong a defense of fan fiction as Professor Tushnet suggests it to be, then fan fiction might be classified as generally non-infringing with exceptions. However, since the availability of fair use defenses for fan fiction is far from clear—and likely harder to show than Professor Tushnet suggests—it is reasonable to categorize fan fiction as a type of gray work.

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<sup>115</sup> McCardle, *supra* note 75, at 461–62.

C. DO OTHER NONCOMMERCIAL AUDIOVISUAL WORKS INCORPORATING COPYRIGHTED ELEMENTS HAVE DIFFERENT DEFENSES TO INFRINGEMENT THAN FAN FILMS?

What about the millions of videos on the World Wide Web that incorporate copyrighted elements but are not fan films? Are they gray works? How does the analysis of a non-fiction audiovisual work that incorporates copyrighted elements or an original fictional audiovisual work that uses such elements differ from the analysis of a fan film? Are there any fundamental differences or is the analysis the same? Three potential differences present themselves: (1) while fan fiction openly identifies its source material, authors of other audiovisual works may have an independent creation defense if they do not take images or sounds directly from another work, as in the case of a fictional video with similar characters or plotlines to a prior copyrighted work; (2) some audiovisual works may be more clearly expressive of social or political views than fan fiction works, as in the case of a political advertisement that makes use of copyrighted images or sounds in support of a candidate or cause; and (3) audiovisual works that are not focused on the subject matter of the original works from which they borrow may have a stronger argument than fan films that any images or sounds they borrow is incidental and *de minimis*.

All three of these factors have the potential to weigh in favor of fair use, but many audiovisual works will still be infringing. Therefore, it is reasonable to characterize internet videos that incorporate copyrighted elements as gray works.

D. DO MUSICAL RECORDINGS INCORPORATING COPYRIGHTED ELEMENTS FROM PRIOR COPYRIGHTED WORKS HAVE A STRONGER CLAIM TO FAIR USE THAN FAN FICTION?

Why should music sampling be treated any differently than fan fiction? Both pay homage to a copyrighted original, but are in and of themselves new transformative works of authorship. If musicians who sample can sell their works for profit, why does fan fiction need to be noncommercial? On a certain level, this question goes to the heart of copyright protection for derivative works: has it grown so broad that it encompasses and suffocates the public domain?

It would not be difficult to read *Campbell v. Acuff-Rose Music, Inc.* as protecting music sampling as fair use and therefore non-infringing. After all, the practice of taking elements from prior recordings long precedes the Internet. Jazz composers and musicians frequently borrowed from or “quoted”

earlier works.<sup>116</sup> Even classical composers were known to borrow the work of their predecessors.<sup>117</sup> However, the *Campbell* decision turned on the transformative nature of 2 Live Crew's version of "Pretty Woman," ruling that it was protected not because it was a rap version of the Roy Orbison original, but because it was a parody. Even in the wake of *Campbell*, lower courts have continued to rule against music sampling where it is non-parodical.<sup>118</sup> One commentator has suggested that current copyright law is too hostile to music sampling.<sup>119</sup>

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<sup>116</sup> Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 348 (2008) ("Most jazz music riffs on prior pieces."); see also *Miles Davis Collector's Items (Original Jazz Classics)* (reviewed by Ron Saranich) (2000), available at [http://www.cosmik.com/aa-october00/reviews/review\\_miles\\_davis.html](http://www.cosmik.com/aa-october00/reviews/review_miles_davis.html) (Sonny Rollins quoted a passage from "Anything You Can Do, I Can Do Better" in a recording of "The Serpent's Tooth"); Patrick Jarenwattanannon, *Why Jazz Musicians Love 'The Rite Of Spring'*, NPR DECEPTIVE CADENCE BLOG (May 26, 2013, 6:00 AM), available at <http://www.npr.org/blogs/deceptivecadence/2013/05/26/186486269/why-jazz-musicians-love-the-rite-of-spring> (numerous Jazz musicians, including Charlie Parker, have quoted Igor Stravinsky's orchestral score for *The Rite of Spring*); Mark Laver, "The Greatest Jazz Concert Ever: Critical Discourse, European Aesthetics, and the Legitimization of Jazz," *Critical Studies in Improvisation*, ISSN: 1712-0624, Vol. 5, No 1 (2009) ("Popular and show tunes constitute the primary resource for quotation" by jazz performers).

<sup>117</sup> For example, Frédéric Chopin quoted from Giovanni Rossini's *La Gazzza Ladra* in his *Polonaise No 15* in B flat minor. Hyperion Records web site description of Chopin's *Polonaise* in B flat minor, available at <http://www.hyperion-records.co.uk/tw.asp?w=W379&t> (last visited May 19, 2014). Similarly, Wolfgang Amadeus Mozart quoted a theme by Johann Christian Bach in his Piano Concerto No. 12. Austin Bourdon, "Johann Christian Bach's Influence on Mozart's Developing Style," Honors Thesis, Dep't of Music, Univ. of Richmond (Spring, 2010) p. 22, available at <https://dspace.lasrworks.org/bitstream/handle/10349/915/10mus-bourdon-austin.pdf?sequence=1> ("Piano Concerto no. 12 in A major . . . directly quotes the theme from the second movement of J.C. Bach's overture to opera *La calamita de cuori*"). Also, Igor Stravinsky quoted a portion of Franz Schubert's *Marche Militaire No. 1* in D in his *Circus Polka*. The Boston Conservatory Wind Ensemble concert program, Sept. 20, 2013, p. 2, available at [http://www.bostonconservatory.edu/sites/all/files/programs/WE\(Sept\)ProgramFINAL2.pdf](http://www.bostonconservatory.edu/sites/all/files/programs/WE(Sept)ProgramFINAL2.pdf) ("The work also includes an enthusiastic quotation from Franz Schubert's *Marche Militaire*. . .").

<sup>118</sup> A LexisNexis Shepard's Report conducted May 29, 2014 on *Campbell v. Acuff-Rose Music*, 510 U.S. 569, found nine lower court decisions distinguishing it. Other recent cases finding liability for music sampling do not cite *Campbell*, presumably because of the lack of parody. See, e.g., *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 486 (6th Cir. 2007) ("The jury concluded that defendants acted 'willfully' in light of evidence that defendants ignored pre-litigation letters and re-released the album knowing that it contained an unauthorized sample."); *Scipio v. Sony Music Entm't*, 173 F. App'x 385, 387-88 (6th Cir. 2006) (reversing summary judgment for the defendants in a music sampling case).

<sup>119</sup> Bambauer, *supra* note 116, at 349 ("Brian Burton, better known as Danger Mouse, had a brilliant idea: mix music from The Beatles' White Album with rap lyrics from Jay-Z's Black Album. The resulting Grey Album is popular (downloaded over one million times in a single day), creative (Rolling Stone called it 'ingenious . . . ahead of its time'), and illegal. The record label

While music sampling appears to be tolerated to a somewhat higher degree than fan fiction, it merits classification in the gray works category because of the legal cloud that hangs over musical compositions containing sampled elements.

#### E. DOES ONLINE USER-GENERATED CONTENT FALL INTO THE GRAY WORKS CATEGORY?

A great deal of creative expression takes place in online, interactive forums, including blogs, Twitter feeds, discussion groups (such as Google Group pages), and Wiki pages. Are these collaboratively-authored writings gray works? To the extent that parties contract to determine ownership of these expressions, it is possible to avoid the thorny questions of copyright ownership. For example, many sites have terms of use that assign copyright or nonexclusive licenses to reprint material posted there to the site's owner.<sup>120</sup> In other cases, to participate in an online forum, a user must register, agreeing to what amounts to a contract that may assign the user's copyright on expression in the forum to the owner of the forum. For example, the Denver Post requires visitors to register before commenting on articles. Its registration process requires users to agree that they "have no further right to control how the Post or its affiliates use the content you have provided, regardless of how the Post chooses to use that content, in whatever form, in whatever medium, for whatever purpose, forever."<sup>121</sup> But what is the default, absent a contract? Who owns the

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EMI, which owns the rights to the Beatles' musical recordings, insisted Danger Mouse cease distributing the work.").

<sup>120</sup> See CBSi Terms of Use (October 27, 2014), available at [https://cbsi.secure.force.com/CBSi/articles/FAQ/CBSi-Terms-of-Use?Template=template\\_tougl&referer=tougl.com&data=&cfs=default](https://cbsi.secure.force.com/CBSi/articles/FAQ/CBSi-Terms-of-Use?Template=template_tougl&referer=tougl.com&data=&cfs=default) (for example, CNET reserves the right "to make, duplicate redistribute, and sublicense" user submissions to its site, even after those submissions are deleted by the user). Boston.com's Terms of Service are similar:

You grant BG a perpetual, nonexclusive, world-wide, royalty free, sub-licensable license to the Submissions, which includes without limitation the right for BG or any third party it designates, to use, copy, transmit, excerpt, publish, distribute, publicly display, publicly perform, create derivative works of, host, index, cache, tag, encode, modify and adapt (including without limitation the right to adapt to streaming, downloading, broadcast, mobile, digital, thumbnail, scanning or other technologies) in any form or media now known or hereinafter developed, any Submission posted by you on or to the Services or any other Web site owned by BG, including any Submission posted on or to the Services through a third party.

Terms of Service, BOSTON.COM (Sept. 12, 2011), available at [http://www.boston.com/help/membragreement/?p1=Foot\\_ContactBostonCom\\_MemberAgreementHP#three](http://www.boston.com/help/membragreement/?p1=Foot_ContactBostonCom_MemberAgreementHP#three).

<sup>121</sup> Terms and Conditions of Use, DENVER POST, available at <http://www.denverpost.com/termsfuse> (last visited May 27, 2014).

copyright to online, interactive works in which multiple authors collaborated? What about works that are subject to ongoing changes, such as Wiki pages? Is there a threshold of user interaction at which such works enter the public domain?

One fundamental question is whether by posting a work on a freely accessible web page, an author implicitly authorizes some types of copying and reuse. For example, when a newspaper posts an article with a set of tools that permit e-mailing the article, is the newspaper authorizing the article to be e-mailed? It certainly seems like they are. But what if it is e-mailed to a discussion group, such as a Google Group, where all e-mails are posted to a web page? Does it matter whether that web page is viewable only by members of that group or is open to the entire Internet? For that matter, may that article be copied and pasted to another page if it is linked back to the newspaper's web site? What about if the purpose of the copying is to comment on the article? Or if the copier is reproducing it because they fear the original may be taken down or edited and wants to document its existence in its current form? Should the rules be any different for reproducing Twitter feeds? It is not unusual to read a web page or newspaper article in which Twitter comments are quoted, often with the indication that the Twitter user who posted the "tweets" subsequently deleted them.<sup>122</sup> Presumably, the First Amendment would be found to protect the copying of Twitter feeds of public figures for news stories,<sup>123</sup> but what about a collection of the most poetic Twitter posts? Would that be permitted by fair use or implied license?

Other sites present even thornier problems. For example, would the Internet Archive Wayback Machine ([www.archive.org](http://www.archive.org)) that attempts to archive significant portions of the Internet for future reference<sup>124</sup> be protected by fair use because it is noncommercial even though it involves wholesale copying of copyrighted content?

Would strict application of copyright law on the Internet interfere with progress in the useful arts by stifling creativity? One author argues that the collaborative nature of the Internet makes it a new and different medium that may need a different set of rules:

Some see the Internet as the final frontier of free speech.  
Internet communities seem to spring up and disappear overnight.

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<sup>122</sup> See, e.g., Leonard Greene, *'Racist' Baldwin: No tweets*, N.Y. POST, Feb. 20, 2013, available at [http://www.nypost.com/p/news/local/racist\\_baldwin\\_no\\_tweets\\_b92KSWNzUmsSWxtrJ43GfK](http://www.nypost.com/p/news/local/racist_baldwin_no_tweets_b92KSWNzUmsSWxtrJ43GfK).

<sup>123</sup> See *supra* note 97 and accompanying text (discussing *Golan v. Holder*).

<sup>124</sup> Wayback Machine Internet Archive, <http://archive.org/web/web.php> (last visited May 27, 2014).

The Internet affords individuals the ability to exchange ideas on every imaginable issue with an ever-growing world community. Individuals who collaborated by taking pieces of each other's work and building on them built the web. This collaborative individualism "is the 'open source' philosophy that pervades cyberculture," such as in webrings, where individual sites link together to create relatively cohesive communities.<sup>125</sup>

Is such collaboration encouraged or constrained by current copyright law?  
As one commentator observes,

Users, the past passive consumers, are now active creators of culture—by expressing opinions, sharing political views, writing about their lives in blogs, creating and sharing visual art like photos and video, creating stories based on existing culture—like fan fiction, and creating new stories. This UGC can be characterized as a new expression, original UGC, or a remix of existing works.<sup>126</sup>

But does a remix infringe the copyrights of the original works it remixes? Some remixes are protected by fair use, such as those that use original content to make political points. For example, "[a] famous example of remix is 'Bush and Blair's Endless Love,' which features video clips of President Bush and Prime Minister Blair who seem to lip-synch the song 'Endless Love.'"<sup>127</sup>

Both the implied license and fair use defenses may be available for creating derivative works from copyrighted content on the Internet. In *Field v. Google*, the court found both defenses to be operative. The case involved an author who had published his writings on a website without the necessary meta-tags to prevent indexing or caching by Google's search engine robots. Because the author knew of the possibility of including such tags, the court found that he had granted implied permission for his site to be indexed and cached.<sup>128</sup> The *Field* court also conducted a fair use analysis, concluding that Google's caching

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<sup>125</sup> Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 424 (2006).

<sup>126</sup> Carmit Soliman, *Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing*, 22 ALB. L.J. SCI. & TECH. 279, 283–84 (2012).

<sup>127</sup> *Id.* at 280–81 (it should be noted that this remix is also an example of an online video that borrows copyrighted material. Remixes involving written works, however, need not fall into both categories.).

<sup>128</sup> *Field v. Google Inc.*, 412 F. Supp. 2d at 1116.

qualified for fair use protection primarily because it was transformative and because it did not impact the apparently nonexistent market for the author's works.<sup>129</sup> Based on implied licenses and fair use, the court found Google's cached copies of Field's writings to be non-infringing derivative works. In a sense, by not including meta-tags telling Google's search engine robots not to copy his works, Field enlisted Google as a collaborator to promote those works. Interestingly, Google caches are probably not gray works, since Google allows authors to opt out through the use of meta-tags.

But what happens when multiple collaborators work together to compose a work online? Do they become joint authors? Most courts follow the rule that joint authorship requires that all contributors not only intend their contributions to be combined into a single work, but also intend to become joint authors for purposes of copyright.<sup>130</sup> However, the Seventh Circuit in *Gaiman v. McFarlane* adopted "Nimmers' heretical suggestion that 'if authors A and B work in collaboration, but A's contribution is limited to plot ideas that standing alone would not be copyrightable, and B weaves the ideas into a completed literary expression, it would seem that A and B are joint authors of the resulting work.'" <sup>131</sup> But even under Nimmer's more generous standard for joint authorship, intent to create a unitary work is still required, which excludes from consideration serial collaborations in which the various authors not only do not know one another but, in many cases, do not even know of one another's existence.

If a serial online collaboration is not a joint work, then the updates made by second and subsequent authors, if not contracted for, either create derivative infringing works or—if defenses to infringement such as fair use and implied license are available—non-infringing derivative works. So the original author

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<sup>129</sup> *Id.* at 1117–23.

<sup>130</sup> Teresa Huang, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673 (2005) ("[C]ourts traditionally have been stingy with grants of joint authorship status and have rewarded contributors of copyrightable material only if all parties intended to be joint authors." Ms. Huang observes that most courts follow the rule set forth by Professor Goldstein in PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 4.2.1.1 (2d ed. Supp. 2004)). See also Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 44 (1997) ("In examining cases decided under the 1976 Act, we find that courts generally show hostility to the joint work doctrine. This hostility manifests itself in a variety of ways: the language in which joint work doctrine is discussed in judicial opinions; the subordination of joint work doctrine to the work-made-for-hire doctrine; conclusory findings that contributions have not properly merged; and narrow definitions of a joint work adopted by courts.").

<sup>131</sup> Huang, *supra* note 130, at 659 (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 6.07, pp. 6–23 (2004)).

may file an infringement claim or tolerate the derivative works, but in either event is not entitled to royalties for the sale of the derivative works. Teresa Huang discusses one variation of this scenario in her article, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*:

[S]uppose a person posts a poem to a listserv or online bulletin board, a second person adds a melody and posts the modified result to the same bulletin, and then either the poet or the songwriter markets the song and makes a fortune. When the song was created, the poet did not intend to make a song at all, and so the requisite intent is absent since both parties must have intended to be joint authors at that time. But, a classification of the song as a joint work benefits all parties: one joint author gets to use and license the work, and the other shares in the profits generated. If the song is not a joint work, then it is an infringing, unauthorized derivative work or a licensed derivative work (the license being implied from the circumstances). If classified as an infringing derivative work, then the infringer cannot copyright the work (thus, losing the ability to exploit the work), and he cannot use the work without permission and is now liable to the other for damages. If considered a licensed derivative work, then the non-marketing party loses out on the profits. With both contributions being equal, the finding of a derivative work seems most unfair.<sup>132</sup>

In other words, under the Goldstein standard followed by many courts, fairness and economic value are not optimized. Also under either approach, joint authorship does not provide a sufficient escape from the ambiguity of internet collaboration to remove such writings from the gray works classification.

### III. POSSIBLE SOLUTIONS TO THE GRAY WORKS PROBLEM

It is clear that gray works present a compelling problem: banning them would stifle the very creativity that the Intellectual Property Clause seeks to encourage. But granting them blanket protection could harm the ability of copyright holders to protect their works. The uncertainty regarding the legal status of gray works casts a shadow over a wide range of creative efforts.

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<sup>132</sup> *Id.* at 692–93.

Further, the rules that make these works “gray” in the first place may have the effect of narrowing the public domain to the point where there is insufficient material on which new authors can build. A number of scholars have examined some of these types of gray works individually, offering proposed rules that would clarify the rights involved. Ideas that have been discussed or alluded to include (A) revising the joint works doctrine, (B) default contracting, (C) economic classification, (D) compulsory licensing, (E) statutory expansion of scènes-à-faire, (F) limiting copyright term, and (G) restoration of formalities.

#### A. REVISING THE JOINT WORKS DOCTRINE

Is it possible to convert some classes of gray works into joint works? Some scholars have proposed revisions to the joint works doctrine that might be helpful in this regard. For example, Laura Lape examines the question of the creation of joint works on the internet in her article, *A Narrow View of Creative Cooperation: the Current State of Joint Work Doctrine*, in which she suggests that the prevalent restrictive view of copyright “has led . . . to decisions that have denied creators who should be joint authors that status.”<sup>133</sup> Lape goes on to suggest that in the context of existing law, contributors to internet works should be clearer about their intentions, essentially recommending a contract-based solution.<sup>134</sup> But what changes could be made to the law to make joint authorship more useful in the online context? Should the intent requirement be relaxed, so that an author who does not explicitly disclaim the possibility of contributing to a joint work may become a joint author?

For instance, going back to the example of the poet whose poem is turned into song lyrics by a subsequent contributor, should the rule be that the poem’s author and the composer are joint authors of the song unless one of them objects? And under this rule, what would be the time frame and manner for expressing the objection? Would there need to be a disclaimer posted along with the poem? Perhaps a copyright notice indicating that it is a solely authored work? If not, might the composer expend time and effort working out a melody for the poem, only to be denied permission to use the song? And if a work of joint authorship is created, how much of it does each party own? Could a third person add some more verses and music and also claim to be a joint author with the first two? Huang argues for broader adoption of the Nimmer approach “because it is fairer to the parties and grants broader

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<sup>133</sup> Lape, *supra* note 130, at 84.

<sup>134</sup> *Id.*

protection in the absence of a contract.”<sup>135</sup> Would that be sufficient reform to make joint authorship a useful tool in solving the problem of gray works created on the internet?

It might be possible to develop a mechanism by which the contributions of various authors in a collaborative work may be measured and credited. This would essentially be a modern version of joint authorship where multiple collaborators work on iterations of a work. Certain types of works could be designated as collaborative, subjecting them to a new set of rules in which, rather than calling all but the first author infringers, all of the contributors would be credited with shared ownership of the copyright in the work, even absent an agreement among them—and even absent knowledge of one another. Authors could have the right to opt out of this system, essentially locking down their works as not being open to collaboration. Such blended authorship may give rise to many derivative works with different authors owning differing percentages of each such work. An obvious problem with this model is determining just how much each author contributed to each collaborative work. A law implementing such a system would need to provide either default ownership division rates and procedures or empower an agency such as the Library of Congress or the Copyright Office to develop these rules.

#### B. DEFAULT CONTRACTING

In practice, many of the problems of gray works are currently solved by contract, such as terms of use agreements on web sites. One commentator goes so far to suggest that copyright law itself is a sort of default contracting provision between authors and users of their works.<sup>136</sup> However, there are at least two major problems with relying on authors to contract with one another: first, they may not always do so and, second, the terms of these contracts may be contrary to the objectives of encouraging creation of new works. Instead, a default contracting system could be developed that would control in the absence of an explicit contract between the parties. Essentially, a default “terms of use” could be legislated for all online content that would allow certain uses of that content with attribution. One such proposal would create a new

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<sup>135</sup> Huang, *supra* note 130, at 700.

<sup>136</sup> Daniel Austin Green, *Indigenous Intellect: Problems of Calling Knowledge Property and Assigning it Rights*, 15 TEX. WESLEYAN L. REV. 335, 341 (2009) (“In the case of copyright, the law provides, in effect, a default contract between the creator and users — a contract that may be altered, as we see in the rise of alternative licensing programs like Creative Commons and Konomark.”).

copyright licensing regime because “a default position that facilitates transformative use is preferable to the current system, which discourages it.”<sup>137</sup>

One inherent problem with a default contracting regime is developing default standards that are general enough to apply to a wide range of situations, yet detailed enough to be meaningful and useful.

### C. ECONOMIC CLASSIFICATION

An approach that some courts have favored is simply to ignore copyright infringement where there is no economic benefit to the infringer or harm to the author, essentially giving the noncommercial element of the first and fourth (market impact) fair use factors far more weight than the other factors. This approach could be expanded and codified to allow greater flexibility in the creation of new works, so long as the economic value of the original author’s work is not substantially impaired.

This approach is advocated by Professor Tim Wu of Columbia School of Law, who suggests that works that complement the first generation work should not be considered derivative works, but should be considered new works themselves.<sup>138</sup> Professor Wu goes on to use the example of an answer book based on a textbook as being complementary to the textbook, such that it should be considered to be non-infringing.

Another commentator approaches this question from a different angle, suggesting that most of the weight in a fair use analysis should be given to the fourth factor: “Without a market, there is no need for copyright protection. Therefore, despite the current trend to focus more on the nature of the work, the Supreme Court’s determination that the fourth factor is most significant should still stand.”<sup>139</sup> Of course, such an approach should not be structured so as to limit uses that are otherwise allowed by fair use or other defenses to infringement simply because those uses are profitable or affect the market for the original work.

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<sup>137</sup> Tehranian, *supra* note 15, at 1244.

<sup>138</sup> Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 631 (2008) (“[A] product that is a true complement to the original work, and not a substitute for it, simply should not be considered an adaptation of the work under section 106(2). The textual basis for this idea is an argument that the work is not, in fact, being ‘adapted, transformed or recast’ when a complement is being made, but rather that a new work (which creates new value for everyone involved) is being created.”).

<sup>139</sup> Ashten Kimbrough, Note, *Transformative Use vs. Market Impact: Why the Fourth Fair Use Factor Should Not Be Supplanted By Transformative Use as the Most Important Element in a Fair Use Analysis*, 63 ALA. L. REV. 625, 640 (2012) (referring to *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

While these approaches differ in their legal construction, they essentially reach the same conclusion: uses that do not harm the value of the original work should be deemed to be non-infringing. One potential problem with this test is that it would effectively eliminate copyright protection for works that lack economic value.

#### D. COMPULSORY LICENSING

A suggestion that could greatly expand the public domain would be to extend the compulsory licensing regime that currently applies to non-dramatic musical compositions<sup>140</sup> to other classes of works, including books, movies, and television programs.<sup>141</sup> Under such a regime, all works of authorship could be made available for future authors' use, but new authors would need to pay license fees based on the amount of the original work taken. There could be set schedules where a percentage of revenue would apply for taking a major character that would be lower than the schedule for writing an unauthorized sequel, but higher than for using a setting described in the source work. Similarly, rates for music sampling and use of copyrighted elements in videos could be set. Exceptions for parody and other fair uses could be maintained.

On the other hand, compulsory licensing has been criticized as posing a number of difficulties, including setting fair rate schedules and eliminating author control.<sup>142</sup>

#### E. STATUTORY EXPANSION OF SCENES-A-FAIRE

Another approach would be to expand the public domain statutorily by classifying a wide range of works that incorporate public domain elements as being uncopyrightable or having only thin copyright. This approach would better align the law to the reality of artistic and creative discourse, in which each generation of original works necessarily provides the building blocks of future works.<sup>143</sup> One variation of this proposal would grant copyright to works that

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<sup>140</sup> 17 U.S.C. § 115.

<sup>141</sup> Matthew R. Farley, *Making Virtual Copyright Work*, 41 GOLDEN GATE U. L. REV. 1, 30 (2010) (“[A] compulsory license for derivative works would obviate the need for bargaining in certain circumstances.”).

<sup>142</sup> Radefeld, *supra* note 5, at 583.

<sup>143</sup> This approach does not appear to have been explicitly proposed in recent scholarship, but it might be inferred from the many court and law review discussions of the role of scènes-à-faire in maintaining a vibrant public domain, including Judge Posner's commentary in *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (“If standard features could be used to prove

draw heavily on public domain elements, but would not grant those works the right to exclude derivative works that draw on those same public domain elements.

#### F. LIMITING COPYRIGHT TERM

A simple way to turn gray works into non-infringing works would be to return the original works to the public domain or to shorten the duration of the right to exclude derivative works. Under another variation of this approach, some types of works could be offered full copyright protection for a short time and then be released into the public domain to allow them to be used in creating new works. For example, posts to online forums could be given short-term copyright protection with an option to extend their copyright term by using them in another work. Of course, it is also possible that all copyright terms could be shortened (not just those for gray works), although shortening these terms to less than the life of the author plus fifty years would require revisiting U.S. treaty obligations.<sup>144</sup>

#### G. RESTORATION OF FORMALITIES

To the extent that the removal of formalities was a factor in shrinking the public domain and therefore causing the proliferation of gray works, one solution might be the selective restoration of formalities. In fact, Professor Wu's proposal essentially incorporates a formality requirement by making some author rights dependent upon the author providing *ex post* notice to infringers.<sup>145</sup> Like the reduction in copyright terms, restoration of formalities runs counter to the United States' obligations under the Berne Convention.<sup>146</sup>

### IV. DECONSTRUCTING PROPOSED GRAY WORKS SOLUTIONS

The proposed gray works solutions discussed in Part III all involve one or more of the following four elements: (1) money, (2) exclusion, (3) control, and (4) recognition. In other words, the solutions affect (1) the extent to which an

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infringement . . . authors would find it impossible to write without obtaining a myriad of copyright permissions.”).

<sup>144</sup> Berne Convention for the Protection of Literary and Artistic Works, 1 B.D.I.E.L. 715 art. 7 (1971) (“The term of protection granted by this Convention shall be the life of the author and fifty years after his death . . . [but] [t]he countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available. . .”).

<sup>145</sup> Wu, *supra* note 138, at 627.

<sup>146</sup> Berne Convention, *supra* note 144.

author may monetize a work; (2) the extent to which an author may exclude others from drawing on elements of a work; (3) the extent to which an author may control how a work is used; and (4) the extent to which an author is entitled to recognition or credit by authors who draw on his copyrighted work. Since elements (2)–(4) are all forms of control over the use of the work, the proposed solutions boil down to the reallocation of two things: money and control. While the financial aspect of fair use is given great weight by many courts and commentators, authors may also value having control over their works. Especially in the context of a forwarded e-mail, money may be irrelevant. Also, the focus on monetary impacts essentially strips copyright protection from works with no monetary value since any such use amounts to a fair use if market impact is the only factor considered. Moreover, the focus on monetary considerations ignores the free speech dimension of the problem. In addition, proposals to ignore infringement by complementary works, such as the one outlined by Professor Wu in his *Tolerated Works* article, do not address an important aspect of the gray works problem: providing an incentive for the development of these derivative works so that they help to promote the useful arts. What editor will spend time reworking a fan fiction story if there is no possibility of selling the finished piece? However, there are some aspects of Professor Wu’s proposal that have great potential value, if combined with other necessary pieces of the puzzle.

One appealing piece of the Wu framework is the concept of “no-action policies” that grant blanket licenses to create derivative works under certain license terms.<sup>147</sup> This approach could be codified into law, making it mandatory, combining it with a compulsory licensing joint authorship rule that allows authors to create new works using elements from first generation works, but retaining some rights of control for the original authors, just as joint authors share control of a work under present law. As joint owners of the new work, both the original author and the author of the new work (which would not necessarily be a “derivative” under this legal rule) would have an incentive to negotiate over issues of money and control.

For example, in the fan fiction context, if the original author did not want her characters to be portrayed in a certain way, she could relinquish a portion of the royalties to which she would otherwise be entitled in exchange for changes

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<sup>147</sup> *Id.* at 633–34 (“What might a No Action Policy (NAP) look like? I envision it as a simple posting on the web or elsewhere that details the secondary uses of a work that a secondary author can make without gaining further permission of the owner. In legal terms, the copyright no action policy is a unilateral, non-exclusive, potentially revocable license from the media owner to all members of the general public who meet its terms. The No Action Policy could be specific to a given work, or could be a blanket policy for all works owned by a given media firm.”).

to the portrayal of those characters. Similarly, another author could issue a blanket license allowing unlimited use of his characters without restriction, so long as he gets seventy-five percent of all revenues generated by new works using his characters. Under such a regime, original authors of the first generation works could also be given the right to decide whether their names would be mentioned in relation to the new works. They could opt to be listed as co-authors or not to have their names used at all or to have a notice on the new work indicating that it was an “unofficial fan fiction story.”

This model would work similarly well in the internet video or music sampling context. The author of the new work that was using clips from the first generation work would have an incentive to negotiate with author of the first generation work over issues of money and control. Of course, authors would be entitled to grant blanket licenses to use their works in noncommercial ways as some fan fiction authors do now, which would likely satisfy many fan fiction authors. However, this framework would provide another option for fan fiction authors seeking to monetize their works.

This approach would also answer the criticisms of compulsory licensing, as the default rule would be a fifty-fifty financial split of profit from the new work, so there would be no need for regulatory involvement. In effect, the market would set the price. If an enterprising director made a profitable new *Star Trek* movie, CBS would be guaranteed its share of the profits.

However, another element is needed for a solution to address the forwarded e-mail variety of gray works. Authors who do not wish their e-mails to be forwarded are interested only in control, not money. This situation can be seen as a sort of moral rights question. To address the issue of authors who wish to avoid the dissemination of their writings in any form, a privacy option could be available. This could be as simple as including an e-mail footer indicating that the contents of the e-mail are private. By providing this notice, the author would prohibit all public uses of the work, including e-mail forwarding. However, any public dissemination or publication of the work by the original author would release the work as source material for new joint works of authorship.

These rules for gray works would be layered on top of existing defenses to infringement, such that parodies, political dialogue, and other uses currently protected by the fair use and implied license doctrines would not be impaired. Of course, authors of such works could opt to use the new rules to avoid exposure for infringement in the event that other defenses proved futile.

Together, these changes would have the effect of removing authors’ ability to stifle the development of new works that build on their original works, but would simultaneously preserve some author control over those derivative works

and would protect their economic incentive to create by guaranteeing them partial ownership of those new works.

#### V. CONCLUSION

Gray works present both a problem and an opportunity. They are problematic in that their creation is of uncertain legality, casting a pall over their refinement and development, which raises issues both of free speech and progress in the useful arts. They create an opportunity, however, to reform the present system and fill this gap in the public domain by enabling future generations of authors to access a rich array of source material.