

WHEN HOLDING ON MEANS LETTING GO: WHY FAIR USE SHOULD EXTEND TO FAN-BASED ACTIVITIES

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INTRODUCTION

In a celebrated children’s song, Malvina Reynolds observes that love is “just like a magic penny, / hold it tight and you won’t have any. / Lend it, spend it, and you’ll have so many / They’ll roll all over the floor.”¹ Just as love sometimes means letting go, the doctrine of fair use recognizes that the purposes of copyright are sometimes better served by allowing certain forms of infringing activity to occur. The four-factor test for fair use, codified at 17 U.S.C. § 107, affords courts sufficient latitude to fine tune the analysis in light of changing circumstances. The recent surge of interest in anime and manga, or Japanese animation and comics,² brings with it distinctive examples of what may be dubbed “fan-based activities,” which indicate how courts can adapt the fair use analysis to best balance the public’s access to creative works with the interests of copyright holders.

The joint popularity of anime and manga is no coincidence: the origin and evolution of manga is entwined with the origin and evolution of anime, representing a symbiosis between the

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¹ Charles H. Smith & Nancy Schimmel, *Magic Penny*, by Malvina Reynolds, available at <http://www.wku.edu/~smithch/MALVINA/mr101.htm>.

² See, e.g., Paul West, *Japanese Anime Imports Invade America*, THE DAILY OF THE U. OF WASH., Jan. 16, 2003, <http://thedaily.washington.edu/2003/1/16/japanese-anime-imports-invade-america/> (commenting that anime’s “worldwide popularity ranks alongside--and likely surpasses--Disney animation”); Masami Toku, *Shojo Manga: Girl Power!*, CHICO STATEMENTS, Spring 2006, http://www.csuchico.edu/pub/cs/spring_06/feature_03.html (observing that “[a]t the beginning of the 21st century, the popularity of Japanese manga has spread all over the world”).

industries that persists to this day.³ It is this symbiosis that nurtures and maintains groups of dedicated, cross-media, multinational fans, many of whom engage in two potentially copyright-infringing activities, which, despite their propensity for inflicting creative and economic injury, the respective industries tolerate, and, at times, even embrace. One of those activities, the creation and sale of fan-made comics, or doujinshi,⁴ represents a form of fan activity that paradoxically infringes upon the rights of the copyright holder, yet garners active support and participation from the anime and manga industries.⁵ The other, the production and distribution of anime episodes subtitled by fans, or fansubs,⁶ represents a form of fan activity that exploits what some characterize as a “grey area” of copyright law: the sharing of anime episodes not yet commercially licensed in the United States.⁷

³ The 1963 anime series *Astro Boy* (*Tetsuwan Atomu* or “*Mighty Atom*” in Japanese), considered by many to be the first example of the anime aesthetic, was itself adapted from a 1951 manga series under the same name. This practice of adaptation from manga to anime continues to this day (e.g., the manga series *Lucky Star*, which saw adaptation into a 2007 anime series after garnering a fervent fan following), and occasionally functions in reverse (e.g., *Neon Genesis Evangelion*, a landmark 1995 anime series that gave rise to an ongoing manga adaptation by the series’ character designer, Yoshiyuki Sadamoto). See

e.g., <https://exc2.law.du.edu/exchweb/bin/redir.asp?URL=http://www.sonic.net/~anomaly/japan/manga/matom.htm>.

⁴ “Doujinshi” are fan-made comics, commonly deriving characters and milieus from manga, anime, or video game sources, which are sold by doujinshi artists for profit without the copyright holder’s authorization. Numerous doujinshi markets are held throughout the year in Japan, the largest of which is the biannual Comic Market, or Comiket. See, e.g., <http://manga.about.com/od/glossary/g/doujinshi.htm>

⁵ See, e.g., COMIC MARKET 73 CATALOG 1169-80 (2007) (listing more than one hundred commercial vendors’ booths participating in the event) (on file with author). The catalog itself is replete with sponsoring advertisements for anime, manga, and video games.

⁶ “Fansubs” truncates “fan-subtitled anime,” which refers to the process of subtitling and releasing anime episodes for free distribution. A likeminded process exists for translating and distributing manga chapters, commonly called “scanlations.” For present purposes, this paper uses the term “fansubs” broadly to encompass both fansubs and scanlations. See, e.g.,

<https://exc2.law.du.edu/exchweb/bin/redir.asp?URL=http://www.knowledgerush.com/kr/encyclopedia/Fansub/>

⁷ See Frank Sanchez, LING 102: Sub and Dub Basics, Animeinfo.org, <http://www.animeinfo.org/animeu/ling102-p.html>. Sanchez explains:

As far as legality goes, fansubs are in a relatively grey area at the moment. Technically, they are illegal—however, fansubbers have limited their scope of influence to works which have -not- been licensed by a company for commercial release. If a certain title is commercially released, fansubbers do not make fansubs of it. If a title that was previously fansubbed becomes licensed for commercial release, fansubbers will stop distributing the title in question. This is done so that fansubbers do not take away from profits the commercial companies may make, as well as avoid legal troubles regarding license. Incidentally, fansubs and their popularity have been in some instances noticed

This paper will analyze the effects of those two intrusions on the rights of the copyright holder as well as the effects of other fan-based activities from the perspective of United States copyright law, and explain why copyright holders have chosen not to enforce their rights against doujinshi or fansubs. Based on those effects, it not only appears to be in the interest of the public, but also within the copyright holder's economic and creative interests to foster, or at least abide, fan-based infringing activities.

These observations are far from novel,⁸ but commentators thus far have either restricted their analysis to a single activity,⁹ or otherwise stopped short of proposing a refinement of the fair use analysis based on the characteristics of doujinshi, fansubs, and likeminded activities.¹⁰ Ultimately, a close examination of doujinshi and fansubs suggests a judicial-level reinterpretation of the fair use analysis—one that enables the statutory four-factor test to account for the supplementary nature of fan-based activities—may do more than further the copyright holder's interests: it may better serve copyright's constitutional goal of promoting the arts.¹¹

by the commercial companies, and some of them may even pick up a title to be commercially distributed in response to good fan opinion about it via fansubs.

⁸ See Sean Kirkpatrick, Comment, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 134 (2003) (arguing that, “as fansubs and like activities sit on the edge of fair use, public policy has a compelling reason to give some fan activities limited protection from prosecution”); Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 193 (2005) (“assert[ing] that spheres of economic and cultural activity were created [by fansub activity] that existing copyright regimes would have denied, and that these regimes directly contributed to the rapid explosion in anime consumption and profit for all parties involved”); Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports?*, 55 RUTGERS L. REV. 155, 160 (2002) (arguing that “there is evidence that the manga industry and the do[u]jinshi markets do not merely coexist; rather, they appear to provide benefits to each other”); Jaime E. Muscar, Note, *A Winner is Who? Fair Use and the Online Distribution of Manga and Video Game Fan Translations*, 9 VAND. J. ENT. & TECH. L. 223, 225 (2006) (arguing that copyright “protection stifles the very creativity it seeks to defend” when it targets “fan-translated video games . . . and that courts should modify the test for transformative use in order to promote the intended purposes of copyright law”); Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 684 (2007) (arguing that while “fanvids” may fail the fair use test, “under a market-failure theory, fanvidders should be allowed to assert [a fair use] defense”); Rebecca Tushnet, Symposium, *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, 654 (1997) (“argu[ing] that the secondary creativity expressed in noncommercial fan fiction deserves the protection of the law”);

⁹ See, e.g., Mehra, *supra* note 8.

¹⁰ See, e.g., Leonard, *supra* note 8.

¹¹ U.S. CONST., art. I, § 8, cl. 8.

Part II summarizes the comingled history of anime and manga, as well as the development of doujinshi, fansubs, and other fan-based activities. Part III explores United States copyright law with particular attention to the doctrine of fair use and judicial interpretations of its statutory four-factor test. Part IV analyzes the effects of doujinshi and fansubs on the Japanese and United States anime and manga markets, deriving from those contexts the defining characteristics of fan-based activities. Utilizing those characteristics, Part V proposes that the interest of increasing public access to creative works, coupled with the mutually beneficial relationship between fan-based activities and the creative and economic interests of the copyright holder, not only encourages looser enforcement, but also warrants a refinement of the judicial application of the four-factor test for fair use. Part VI concludes.

I. THE CONJOINED WORLDS OF ANIME AND MANGA—AND THE FANS WHO LOVE THEM

Anime and manga are not the only forms of entertainment that motivate fan endeavors. However, the symbiotic relationship between anime and manga, as well as their corresponding fan bases, highlights the defining characteristics of fan-based activities. Thus, doujinshi and fansubs serve as prime examples of infringing activities that not only provide a public benefit, but may also bolster, rather than degrade, the creative and economic interests of the copyright holder.

A. *The Cross-Media Skein of Anime and Manga*

It could be said that the anime and manga industries owe their greatest debt to one man: Osamu Tezuka.¹² Debuting as a manga artist in 1946, Tezuka won national acclaim with his manga, *The New Treasure Island (Shin Takarajima)*, which, despite being within the niche akahon¹³ market, sold approximately 400,000 copies.¹⁴ His subsequent works encountered similar success, and in 1963, his animation company, Mushi Production, released the first televised anime series with recurring characters in Japan: *Astro Boy (Tetsuwan Atomu)* based on

¹² See Profile: Tezuka Osamu, Anime Academy, http://www.animeacademy.com/profile_tezuka_osamu.php (last visited Apr. 26, 2008) (noting that Tezuka adapted the “big eyes and head” style from Disney and other contemporary American animation).

¹³ “Akahon,” or “red books,” were given their name “because of the red ink used in the covers. Akahon were a niche market at the time, mainly due to the dire postwar economic problems in Japan.” *Id.*

¹⁴ *Id.*

Tezuka's manga by the same name.¹⁵ Two years later, Mushi Productions released the first color anime, again based on one of Tezuka's manga: *Kimba the White Lion (Janguru Taitei)*.¹⁶ Until his death in 1989, Tezuka continually expanded the scope and genres of anime and manga, earning memorialization as a "god of manga" and father of anime.¹⁷

Beyond his contributions to the mediums of anime and manga, Tezuka's works and career epitomize the symbiosis between the anime and manga industries in Japan, a legacy that persists to this day. Anime adaptations of manga consistently dominate rankings of the all-time most popular anime series.¹⁸ By the same token, several original anime series have spawned successful manga adaptations.¹⁹

Today cross-media interconnections extend beyond the anime and manga industries to the video game and light novel industries as well.²⁰ The ultimate commercial result of these interconnected industries is the emergence of the thriving character goods industry,²¹ which produces consumer items based on the characters and elements of successful anime, manga, and video game franchises, from toys to household goods.²² Given this web of cross-media franchises, it is no small wonder that the anime and manga industries, along with the works that fuel their success, ensnare distinctive fan bases that are summed up best by the Japanese

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *E.g.*, AnimeNewsNetwork.com, TV Asahi Top 100 Anime, <http://www.animenewsnetwork.com/news/2005-09-23/tv-asahi-top-100-anime> (last visited Apr. 26, 2008) (listing web poll results ranking adaptations from manga as eight of the top ten television series); AnimeNewsNetwork.com, TV Asahi Top 100 Anime Part 2, <http://www.animenewsnetwork.com/news/2005-09-23/tv-asahi-top-100-anime-part-2> (last visited Apr. 26, 2008) (listing nation-wide survey results ranking adaptations from manga as nine of the top ten television series).

¹⁹ A prime example is the *Mobile Suit Gundam* series, which has not only spawned a manga adaptation, but several anime, manga, and novel spin-offs, and a fan base so large that "GUNDAM'S" stores, selling nothing but Gundam-related goods, thrive in areas like Osaka's Nipponbashi district.

²⁰ Video game adaptations include the adaptation of Square-Enix's *Kingdom Hearts* into manga, Capcom's *Devil May Cry* and Atlus's *Persona* into anime; light novels such as *Kino no Tabi* and *Suzumiya Haruhi* have been adapted into successful anime series.

²¹ Leonard, *supra* note 8, at 233.

²² *See, e.g.*, Jbox.com, Anime and Toy Items (View All), Jbox.com, <http://www.jbox.com/ANIME/> (last visited Apr. 26, 2008) (listing hundreds of anime-related items for sale).

loanword used in the United States to denote fans of anime and manga: otaku.²³ The otaku's activities, in turn, are unique among infringing uses in that they appear to garner acquiescence—and, at times, active endorsement—from copyright holders.

B. Otaku Subculture and the Rise of Doujinshi and Fansubs

1. The Doujinshi Markets

The development of grassroots doujinshi markets is exemplified by the evolution of the largest among them: Comic Market, or Comiket. The first Comiket was held in December 1975, with thirty circles, or artist groups, participating and attracting roughly seven-hundred attendees.²⁴ In December 2007, Comiket garnered the participation of approximately thirty-five-thousand circles, and boasted more than half-a-million attendees over a three-day period.²⁵ Comiket did not, however, derive its exponential growth from a vacuum; it was fueled by the outgrowth of the otaku subculture, both in Japan and abroad.

To the uninitiated, otaku subculture may seem at best odd, at worst inscrutable. The world of the otaku is, however, analogous in many significant ways to the Star Trek and Star Wars subcultures in the United States, primarily due to the common characteristics that all fan-based activities tend to share. Like the otaku subculture, both Star Trek and Star Wars fandoms feature fervent fan bases cultivated at least in part due to the cumulative output of a cross-media skein of related consumer goods, spanning the television, movie, publishing, toy-manufacturing, and video game industries. In turn, the fandoms perpetuated interest in the Star Trek and Star

²³ See Otaku – Wikipedia, the Free Dictionary, <http://en.wikipedia.org/wiki/Otaku> (last visited Apr. 26, 2008)(stating while many anime and manga fans in the U.S. identify themselves enthusiastically as “otaku,” the original Japanese word possesses a distinctly negative connotation, denoting an individual with poor social skills and an obsessive interest in an esoteric topic.)

²⁴ Comiket – Wikipedia, the Free Dictionary, http://en.wikipedia.org/wiki/Comic_Market (last visited Apr. 26, 2008).

²⁵ *Id.*

Wars franchises, carrying each beyond their respective “dry spells”²⁶—the twenty-year gaps between the original works and their canonical sequels, or prequels. A similar dynamic pervades the anime and manga industries, where continual fan interest has driven perennial anime spin-offs of the 1979 anime *Mobile Suit Gundam*—roughly twenty-five in the span of twenty-nine years²⁷—the latest of which, *Mobile Suit Gundam 00*, continues to air new episodes on Japanese TV in early 2008.

Moreover, Star Trek fans, Star Wars fans, and otaku share a deep-seeded affinity for the characters and milieus of their favorite franchises, one that transcends the original works themselves, as evidenced by the sizable market for non-canonical works²⁸ and character-related goods.²⁹ For some among all three camps, the affinity runs deeper, and they find themselves motivated to create their own storylines within the familiar trappings of their favorite franchise. Those efforts often culminate in the composition and exchange of gigabytes of fan fiction.³⁰ In Japan, however, otaku possess another viable creative outlet: the doujinshi markets.

Online publication of fan fiction and the publishing of doujinshi share several essential commonalities. Both represent forums in which fans are able to share their derivative works with a like-minded audience, a creative exchange that ultimately reaffirms interest in the work

²⁶ See, e.g., Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in “Star Trek: The Next Generation,”* 24 U. TOL. L. REV. 43 (1992) (noting that “[w]hile [Star Trek] began as a short-lived and marginally rated television series which survived only three seasons before final cancellation, the Star Trek phenomenon did not end there. . . . Star Trek conventions provide gathering points for the faithful. . . . Fan pressure prompted NASA to name the first space shuttle ‘Enterprise’ after the starship of the show”).

²⁷ Gundam – Wikipedia, the Free Dictionary, <http://en.wikipedia.org/wiki/Gundam> (last visited Apr. 26, 2008).

²⁸ This market is most strongly represented by the commercial success of the Star Wars Extended Universe, comprising the non-canonical stories told by novels, comic books, and video games based on the Star Wars milieu. See, e.g., MICHAEL A. STACKPOLE, I, JEDI (1999); MATTHEW STOVER, THE NEW JEDI ORDER: TRAITOR (Del Ray 2002) (both bestselling novels).

²⁹ A prime example of the thriving character goods industry in Japan lies in the various plastic models (“plamos,” pronounced “pu-ra-mo-z”) of mobile suits from the anime series *Mobile Suit Gundam* and its spinoffs. Plamos usually occupy a significant amount of floor space in any hobby store, and occupy an entire floor of the GUNDAM’S store in Nipponbashi, Osaka.

³⁰ See, e.g., Fanfiction.net, <http://www.fanfiction.net> (last visited Apr. 26, 2008) (archiving over ten thousand Star Trek fan fiction pieces, over nineteen thousand Star Wars fan fiction pieces, and hundreds of thousands of fan fiction pieces based on various anime and manga series).

underlying their fandom. But what distinguishes doujinshi markets from repositories of fan fiction is that doujinshi artists, by and large, create and distribute their derivative works with the express purpose of turning a profit. The pecuniary aspect of doujinshi markets makes them distinctive among fan activities—and leads to ostensible infringement under either Japanese or United States copyright law. It also makes the continued existence of doujinshi—and, to a certain extent, their endorsement by commercial vendors—all the more puzzling, and warrants a closer examination of the doujinshi markets’ effects on the interests of the copyright holder.

2. The Fansub Groups

Born of a separate collective of fans and entailing distinct goals and activities, the fansub phenomenon is a vastly different animal from the doujinshi markets. Fansub groups in the United States predate the United States anime boom by at least a decade, originating in the 1980s, at a time when the United States market for anime was virtually nonexistent.³¹ Recognizing many anime series would never see translation and release in the United States through licensed channels, fans took it upon themselves to subtitle and distribute anime episodes to “promote Japanese animation” in the United States.³² Up until the late 1990s, fansub groups distributed subtitled episodes through the mail, often from club-to-club, in a process Professor Sean Leonard describes as a “closed proselytization commons.”³³

The advent of broadband internet opened that proselytization commons and augmented its participants both within the United States and abroad. No longer limited to club-to-club transmission, fansubbers can use broadband to post episodes for download via website, peer-to-peer BitTorrent link, or Internet Relay Chat (“IRC”) server. Moreover, the internet streamlines

³¹ See Leonard, *supra* note 8, at 201 (“By 1982 the Japanese studios calculated that they were not going to succeed in the American market”).

³² *Id.* at 210.

³³ *Id.* For a similar discussion of the internet as an innovation commons, see LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 23 (Random House 2001), available at <http://the-future-of-ideas.com>.

the fansubbing process, reducing the procurement, input of subtitles, and eventual distribution of a particular anime episode to as little as a week from its original airing on Japanese TV.³⁴ Most fansub groups adhere to a self-imposed policy of ceasing fansub production and distribution once a given anime series is licensed for release in the United States,³⁵ although others continue the process until the entire series is complete. The link between the proselytization commons generated by fansub activity and the emergent popularity of anime and manga in the United States merits a closer look at the effects of fansub activity on a copyright holder's creative and economic incentives. That inquiry in turn calls for an overview of United States copyright law, with particular attention to the doctrine of fair use.

II. UNITED STATES COPYRIGHT AND THE FOUR-FACTOR TEST FOR FAIR USE

There is no worldwide copyright for creative works like anime and manga; copyright is a construct of the laws of individual countries.³⁶ While doujinshi and the rights of Japanese copyright holders fall under the Chosakuken, or the Japanese Copyright Act, rather than United States law, an examination of doujinshi under the U.S. Copyright Act, alongside United States-based fan activities, provides a broader understanding of the qualities of fan-based activities and better illustrates how courts can refine their analysis of the existing fair use test to account for those characteristics.

A. *Foundations of United States Copyright Law*

Premised on the constitutional imperative “to Promote the Progress of Science and the Useful Arts,”³⁷ the United States Copyright Act, 17 U.S.C. § 101, et seq., provides a copyright holder with a limited-time monopoly on a variety of works of authorship, including “pictorial,

³⁴ Kirkpatrick, *supra* note 8, at 135.

³⁵ See Bram Cohen, *Licensed Anime*, Animesuki.com, <http://www.animesuki.com/doc.php/licensed/> (last visited Apr. 26, 2008) (describing the policy of discontinuing distribution of licensed anime series).

³⁶ PAUL EDWARD GELLER, 1-INT INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 1[1] (2007).

³⁷ U.S. CONST. art. I § 8, cl. 8.

graphic . . . [and] audiovisual works.”³⁸ A United States copyright extends to any work of authorship for which, “on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party . . . or the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party.”³⁹

The United States Copyright Act “does not give a copyright holder control over all uses of his copyrighted work. Instead, § [106] of the Act enumerates [six] 'rights' that are made 'exclusive' to the holder of the copyright.”⁴⁰ Three of those exclusive rights are directly relevant to fan-based activities like doujinshi and fansubs: reproduction, distribution, and creation of derivative works.⁴¹ Those rights, however, are subject to a series of limitations,⁴² most notably the doctrine of fair use.

B. The Four Factors of Fair Use

The precise purpose of the fair use doctrine is debatable. Many courts have treated fair use not as a limitation on the exclusive rights of the copyright holder, as titled by the Act itself,⁴³ but as an affirmative defense to infringement.⁴⁴ As a practical matter, however, the issue is largely moot. Whether enlarging the shield or shrinking the sword,⁴⁵ the effect of the fair use doctrine is to demarcate where enforcement of the copyright holder’s exclusive rights ends and legally legitimate use begins.

³⁸ 17 U.S.C. § 102(a) (2006).

³⁹ *Id.* § 104.

⁴⁰ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 392, 393-95 (1968)).

⁴¹ 17 U.S.C. § 106(1)-(3) (2008).

⁴² *See id.* §§ 107-122 (titling sections 107-12, 117, 119, & 121-22 as explicit “limitations” on exclusive rights).

⁴³ *See id.* § 107.

⁴⁴ Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 679 (2004).

⁴⁵ *Id.* at 679 n.71 (describing the crux of the fair use debate as “whether the fair use doctrine benefits the defendant by providing the defendant with a larger shield or by limiting the plaintiff to a smaller sword”).

Section 107 of the Copyright Act provides that “the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by [§ 106] . . . is not an infringement of copyright.”⁴⁶ The statute specifies four factors that must be considered in analyzing fair use:

“(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.”⁴⁷

Section 107 notes fair use includes reproduction for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” but the listed purposes are neither exhaustive,⁴⁸ nor themselves exempt from the principle four-factor test.⁴⁹

At the same time, the four factors themselves are “‘not meant to be exclusive’ . . . but rather ‘illustrative,’ representing ‘only general guidance about the sorts of copying courts and Congress most commonly have found to be fair uses.’”⁵⁰ The result renders fair use fact-intensive⁵¹ and grossly discretionary,⁵² thereby necessitating case-by-case⁵³ analysis—much as

⁴⁶ 17 U.S.C. § 107 (2008).

⁴⁷ *Id.*

⁴⁸ H.R. REP. NO. 94-1476 at 65, 66 (1976) (noting that the “examples enumerated . . . [are] by no means exhaustive”).

⁴⁹ *Id.* at 67, reprinted in 1976 U.S.C.C.A.N. at 5680-81 (noting that the references given are “not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use”).

⁵⁰ *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) and *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994), respectively).

⁵¹ *E.g.*, Duhl, *supra* note 44, at 682 (citing Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1191 (2002) and Matthew Africa, Comment, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1183 (2000)).

⁵² *E.g.*, Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 62 (1998) (noting that some “[a]uthorities regularly call fair use so malleable as to be indeterminate”).

Judge Learned Hand described it seventy years ago, before § 107's factors.⁵⁴ While each must be considered in connection with one another,⁵⁵ the four factors form the basis of a court's assessment of fair use, and therefore warrant individual scrutiny.

1. Purpose and character of use

Courts have construed the first fair use factor to entail the assessment of three dichotomies.⁵⁶ The first dichotomy distinguishes between commercial and noncommercial purposes.⁵⁷ While commerciality does not preclude a finding of fair use, it does pull against it; noncommerciality, on the other hand, tends to lean toward fair use.⁵⁸

The second dichotomy is transformative versus non-transformative use.⁵⁹ Uses generally qualify as transformative if “they add value to the public domain and are not mere replications of what the copyright holder has already created.”⁶⁰ However, as with a finding of noncommerciality in the first dichotomy, a finding of transformative use does not by itself guarantee the use's fairness, although it does weigh in its favor.⁶¹

⁵³ *E.g.*, Duhl, *supra* note 44, at 682 (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994) and *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985)).

⁵⁴ *See* *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (dubbing the pre-1976 fair use analysis “the most troublesome in the whole law of copyright”).

⁵⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (“[T]he four statutory factors [cannot] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

⁵⁶ Duhl, *supra* note 44, at 682.

⁵⁷ *E.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (describing the inquiry as “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”).

⁵⁸ *E.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.”).

⁵⁹ *See* Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1, 4 (2002) (noting that the controversial “transformative” requirement typically enters the fair use analysis through the first factor).

⁶⁰ Duhl, *supra* note 44, at 684.

⁶¹ *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works”).

The third and final dichotomy is factual or historical⁶² versus expressive use.⁶³ Focusing on the distinction between expression—which is protectable by copyright—and ideas, facts, or history—which are not—courts usually count the copying of a mode of expression against a finding of fair use.⁶⁴ The degree to which a use borrows expression from a copyrighted work depends on whether the copyright work itself is “creative, imaginative, and original”⁶⁵ under the second fair use factor.

2. Nature of the copyrighted work

In assessing how close the copyrighted work is to “the core of intended copyright protection,”⁶⁶ the second factor asks a court to chart the position of the copyrighted work on the continuum between original, creative works and works that are primarily functional⁶⁷ or informational.⁶⁸ The closer the work is to the original, creative end of the continuum, the less likely the appropriation of that work will constitute fair use. In determining where a work lands within that spectrum, courts respect the creator’s right to choose how, when, and if a work

⁶² *E.g.*, *Harper & Row*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy”); *see also* Michael A. Einhorn, *Miss Scarlet’s License Done Gone!: Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 591 n.16 (2002) (noting that “[t]he scope of fair use is more limited with respect to non-factual works than factual works; the former necessarily involves more originality and creativity than the reporting of facts. Factual works are believed to have a greater public value and unauthorized uses of them are more readily tolerated by copyright law.”).

⁶³ *E.g.*, *Harper & Row*, 471 U.S. at 547 (noting that “copyright is limited to those aspects of a work—termed ‘expression’—that display the stamp of the author’s originality”); *Holdridge v. Knight Publ’g Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963) (rejecting the fair use claim because defendant’s work “mirrors the manner and style in which the plaintiff chose to set down the factual and historical material she used, and to express her thoughts and conclusions”).

⁶⁴ *See, e.g.*, *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.* 109 F.3d 1394, 1401 (9th Cir. 1997) (holding that a work which appropriates the style of another work without holding that style up to ridicule does not constitute fair use).

⁶⁵ *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).

⁶⁶ *Campbell*, 510 U.S. at 586.

⁶⁷ *See, e.g.*, *Baker v. Selden*, 101 U.S. 99, 104 (1879) (finding that the copyright on a book describing a system of bookkeeping does not extend to subsequent use and description of that system); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524-25 (9th Cir. 1992) (holding use of a video game’s functional elements fair).

⁶⁸ *See, e.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363-64 (1991) (finding that a telephone book was informational, lacking the *de minimis* originality for copyrightability).

should be published at all, affording unpublished or undistributed works greater protection than works that have already seen public dissemination.⁶⁹

3. Amount and substantiality of the portion used

The third factor entails an inquiry in which courts exercise a great deal of discretion. While some courts have ruled a use employing a fragmented⁷⁰ or trivial portion of a copyrighted work *de minimis*, at least one court has held “a small degree of taking [] sufficient to transgress fair use if the [portion copied] is the essential part of the copyrighted work.”⁷¹ Nevertheless, in certain instances regarding home video recording, even wholesale copying does not inherently preclude a use from being fair.⁷²

4. Effect upon potential market or value

Called “the single most important element of fair use,”⁷³ the fourth and last factor is nonetheless marred by the same ambiguity as the other three. Section 107(4) calls for an examination of the effects, both beneficial and detrimental, of the use on the potential market for the copyrighted work.⁷⁴ The burden of proof normally rests with the copyright holder to demonstrate market harm as a result of the use.⁷⁵ However, once the copyright holder establishes that a use is commercial and that there is a causal connection to a loss of revenue, the “burden properly shifts to the [alleged] infringer to show that [the] damage would have occurred

⁶⁹ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (holding that “[t]he fact that a work is unpublished is a critical element of its ‘nature,’” and that “[t]he scope of fair use is narrower with respect to unpublished works”).

⁷⁰ *Werlin v. Reader’s Digest Ass’n*, 528 F. Supp. 451, 464 (S.D.N.Y. 1981).

⁷¹ *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990) (citing *Harper & Row*, 471 U.S. at 565-66; *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977); *Roy Export Co. Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980)).

⁷² See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1994) (holding “the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use” in the case of home videotaping television programming); see also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (noting that “wholesale copying does not preclude fair use *per se*”).

⁷³ *Harper & Row*, 471 U.S. 539, 566.

⁷⁴ See 17 U.S.C. § 107(4) (2008).

⁷⁵ *Harper & Row*, 471 U.S. at 567.

[even were there] no taking of copyrighted expression.”⁷⁶ Despite the importance of the fourth factor, even “[e]vidence favorable to an alleged copyright infringer concerning relevant markets, without more, is no guarantee of a finding of fair use.”⁷⁷

III. EFFECTS OF DOUJINSHI AND FANSUBS ON CREATIVE AND ECONOMIC INCENTIVES

When examined from the perspective of United States copyright law, which grants largely the same exclusive rights to copyright holders as the Chosakuken,⁷⁸ doujinshi seem to infringe upon the copyright holder’s right to create or exploit derivative works. Likewise, fansubs appear to encroach upon the exclusive rights of copyright holders to reproduce and distribute their works. On its face, then, the continued existence of doujinshi markets and fansub groups, largely with the tacit consent of copyright holders, represents something of a conundrum.

A. *Why the Anime and Manga Industries Support Doujinshi Markets*

Contrary to the theory that more protection” fosters “more authorship,”⁷⁹ the anime and manga industries and the doujinshi markets appear to be surprisingly good bedfellows. Some of the most successful manga artists of the past decade began their careers as doujinshi artists,⁸⁰ and doujinshi publishing remains a viable means of segueing into the manga industry. In addition, several popular manga artists employ doujinshi as a medium to publish limited-edition items⁸¹ or

⁷⁶ *Id.*

⁷⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 591 n.21 (1994).

⁷⁸ Japanese Copyright Act (Chosakuken), art. 21-28, *available at* http://www.cric.or.jp/cric_e/clj/clj.html (attributing the rights of reproduction, performance, presentation, public transmission, recitation, exhibition, distribution, transfer of ownership, lending, translation, adaptation, and exploitation of a derivative work to the holder of a Japanese copyright).

⁷⁹ Mehra, *supra* note 8, at 190.

⁸⁰ The four-woman manga artist group CLAMP (composed of Nanase Ohkawa, Mokona, Tsubaki Nekoi and Satsuki Igarashi), responsible for over twenty manga series, is a prime example of a doujin-artist-turned-manga-artist. Many of their manga have been adapted into popular anime series, and several of their creations have enjoyed success in the U.S. and abroad, in both manga and anime forms.

⁸¹ *See, e.g.*, BARASUI, SUBARASUI: BARASUI’S ROUGH SKETCHES BOOK (2005) (compiling rough sketches of the characters from the artist’s popular manga series *Strawberry Marshmallow*) (on file with author).

works that otherwise might not see publication due to stricter regulations on content within official publishing circles.⁸²

Beyond serving as a recruiting ground for new talent and providing existing manga artists with an additional outlet for their creative endeavors, doujinshi markets can perpetuate interest in the original works even decades after publication.⁸³ Moreover, doujinshi themselves serve as alternative means of advertisement for current anime and manga series, attracting new fans from the hundreds of thousands of market attendees.⁸⁴ Larger doujinshi markets like Comiket provide a direct opportunity for anime studios to advertise their works by participating in the industry vendors' section of the event and handing out promotional goods.⁸⁵

Another argument could be made that doujinshi—the majority of which are adult-oriented⁸⁶—compromise the integrity of the characters and milieus they appropriate. This concern was at issue in an incident dubbed the “Pokemon doujinshi case,” where Japanese police arrested a doujinshi artist who published an adult-oriented doujinshi featuring characters from Nintendo’s Pokemon franchise.⁸⁷ Nintendo initiated the complaint that led up to the arrest

⁸² An example of a manga artist for whom doujinshi serves as an outlet for otherwise unpublishable works is Maki Murakami, author of the *Gravitation* manga series, who has published several doujinshi under the circle name Crocodile Avenue that feature her characters in non-canonical, sexually explicit situations.

⁸³ See COMIC MARKET 73 CATALOG, December 29, 2007, at 623 (listing at least fifteen circles selling new doujinshi featuring characters from Osamu Tezuka’s 1970s manga *Black Jack*).

⁸⁴ To a certain degree, determining the extent to which a given anime or manga’s popularity drives the volume of doujinshi based on it, or whether the volume of doujinshi influences the popularity of a given anime or manga, is a chicken-or-the-egg proposition. Nevertheless, the positive correlation between the popularity of a given anime or manga and the number of doujinshi featuring its characters is undeniable. See generally COMIC MARKET 73 CATALOG, December 29, 2007 (featuring hundreds of circles advertising doujinshi based on popular anime/manga like *Gintoki*, *Naruto*, and *Prince of Tennis*).

⁸⁵ See COMIC MARKET 73 CATALOG, December 29, 2007, at 1169-81. As this author learned firsthand, the industry vendors’ promotional booths are often the most popular segments of the event.

⁸⁶ See generally *id.* (listing thousands of doujinshi circles, the majority of which advertise adult-oriented doujinshi).

⁸⁷ Mehra, *supra* note 8, at 180-81.

because “even though the number of copies [was] small, the company could not overlook the fact that the pornographic contents of the work were ‘destructive’ of the Pokemon image.”⁸⁸

Despite Nintendo’s public stance on the matter, the Pokemon doujinshi case remains the sole example of a copyright holder speaking out against the doujinshi artists, and the incident appears to have done little to curtail doujinshi-related activities. Nearly ten years later, doujinshi artists continue to appropriate anime, manga, and video game characters in their works, including Nintendo’s.⁸⁹ The anime and manga industry’s endorsement of doujinshi markets indicates that, in the final cost-benefit analysis, the benefits of allowing doujinshi artists to continue their infringing conduct unabated far outweighs any pecuniary loss on the part of the industries.⁹⁰ While doujinshi artists do profit from their appropriation of characters from anime, manga, and related industries, they do so not as competition but as complementary influences whose success only bolsters the industries’ own prosperity.

B. Why the Anime and Manga Industries Tolerate Fansubs

The anime and manga industries’ tolerance of fansubs involves a more complex, but related, analysis. The complexity lies primarily in two factors: (1) the extent to which Japanese copyright law overlaps with United States copyright law, before and after a series is licensed in the United States, and (2) the reproductive and distributive, as opposed to derivative, natures of fansub activity. While the analysis diverges from the costs and benefits of the doujinshi markets, the balance still indicates that fansub activity, in aggregate, is more helpful to the U.S and Japanese anime and manga industries than it is costly.

⁸⁸ *Id.* at 180 n.136 (citing Pikachu doujinshi na henshin dame [Alteration of Pikachu in Doujinshi a Violation], Asahi Shimbun, Jan. 14 1999, at 37).

⁸⁹ *See generally* COMIC MARKET 73 CATALOG (listing several doujinshi circles offering works featuring Nintendo characters).

⁹⁰ *See Mehra, supra* note 8, at 197 (“[T]he profitable coexistence of manga and anime with [doujinshi] may suggest that the commercial nature of a work that ‘borrows’ from another copyrighted work should not necessarily give rise to negative presumptions against allowing that borrowing”).

1. Unlicensed anime and manga

The first step in the analysis considers anime or manga that is fansubbed before it is licensed in the United States. Before licensing, 17 U.S.C. § 104 affords the Japanese copyright holder of an anime or manga series the same exclusive rights § 106 grants to United States copyright holders.⁹¹ After more than two decades of fansub activity in the United States,⁹² however, a Japanese company has yet to pursue an infringement lawsuit against a fansub group in either United States or Japanese courts. The lack of enforcement is not due to ignorance of fansub activities on the part of Japanese anime and manga industries. Before the anime boom and the digital age of fansubbing, many Japanese licensors permitted conventions and associated fansub groups to subtitle and screen their works.⁹³ Today, a Japanese anime or manga executive would only need to search the internet for the word “fansub” to discover more than six-million web references, including links to many fansub distribution sites.⁹⁴

The potential reasons why the anime and manga industry in Japan turn a blind eye toward fansub activity in the United States are many. The efforts of fansub groups and anime clubs in the 1980s and 1990s may have directly contributed to the present success of United States anime and manga licensees by cultivating the nascent fan base into the blossoming otaku subculture that serves as the market for United States-licensed anime and manga.⁹⁵ Today’s digital fansub groups still serve as dowsing rods for United States distributors, who continue to look to popular

⁹¹ See 17 U.S.C. § 104 (2006); see also the Berne Convention, art. 5(3), July 24, 1971, S. Treaty Doc. No. 99-27, 1971 WL 123138. The United States and Japan are both parties to the Convention.

⁹² See Leonard, *supra* note 8, 196-216 (providing a detailed account of the growth of fansubs from their inception in the 1970s to the early 1990s).

⁹³ *Id.* at 216.

⁹⁴ Fansub – Google Web Search, <http://www.google.com> (search for “fansub”).

⁹⁵ Leonard, *supra* note 8, at 217.

fansubbed anime series for United States distribution.⁹⁶ For the Japanese licensor, fansubs provide a free means of increasing their exposure to United States fans and distributors alike, in exchange for the remote possibility that fansubs themselves might scare away potential distributors. However, United States distributors increasingly acquire licenses for a series even before it reaches production,⁹⁷ thereby decreasing the opportunity for fansubs that restrict themselves to unlicensed titles to interfere with Japanese licensors' interests. Ultimately, until a United States distributor expresses interest in licensing a title, the potential benefits of fansub distribution for the Japanese licensor usually outweigh the potential detriments.

2. Licensed anime and manga

Despite the self-imposed ethical code adopted by the majority of fansub groups, some groups continue to subtitle and distribute episodes long after they are licensed in the United States.⁹⁸ Once licensed, the rights of reproduction and distribution for a given series in the United States fall to the United States distributor, as does the capacity to enforce those rights. United States distributors have proven more aggressive than their Japanese counterparts in curbing fansub activity. At least one United States distributor has sent numerous cease-and-desist letters even before they acquired the license for corresponding series, "to remove all illegal fansubs before announcing acquisition."⁹⁹

⁹⁶ See Animesuki.com, License Database, <http://www.animesuki.com/licensed.php> (last visited Apr. 26, 2008) (cataloging literally hundreds of formerly fansubbed anime series that have since been licensed by U.S. distributors, as well as a "rumors" section indicating series that may soon be licensed).

⁹⁷ Licensed Anime, Animesuki.com, <http://www.animesuki.com/doc.php/licensed/> (last visited Apr. 26, 2008) (attributing the following quote to David Williams of the U.S. Distributor ADV Films: "One thing fans might not know is most shows are licensed now during the financing stage, before the show is even produced").

⁹⁸ See, e.g., AnimeCorpX, <http://www.animecorp.com/index.php?id=projects> (last visited Sept. 20, 2008) (listing of their DVD-quality releases, all of which were released after the anime series in question was licensed for distribution in the U.S.).

⁹⁹ Dominic von Riedemann, *FUNimation Threatens Fansubs: Distributor Sends Out Cease-And-Desist Letters For Animes* [sic] (October 6, 2006), http://animatedfilms.suite101.com/article.cfm/funimation_threatens_fansubs.

Unlike the fansubbers of unlicensed anime, groups that continue to subtitle and distribute a series after it has been licensed¹⁰⁰ present an unequivocal threat to United States distributors. Post-license groups directly compete with United States distributors, stealing away consumers who opt to download their releases in lieu of purchasing episodes from the distributor. Real economic harm necessarily ensues. Ultimately, post-license subtitling and distributing groups diverge so markedly from unlicensed fansub groups in intent and effect on economic and creative incentives for copyright holders and licensees as to fall outside the sphere of fan-based activities, as discussed below.

IV. HOW EVERYONE CAN WIN: COPYRIGHT HOLDERS, THE FANS, AND FAIR USE

The propensity of doujinshi and fansubs to increase the depth and breadth of creative works publicly accessible, coupled with their positive impacts on copyright holders' economic and creative interests, indicate infringing activities in the vein of doujinshi and fansubs actually further the countervailing goals of United States copyright.¹⁰¹ Accordingly, the continuation of beneficial, fan-based activities like doujinshi and fansubs should be more than an exercise in largesse on the part of the copyright holder; those activities should fall squarely within the penumbra of fair use. This judicial-level refinement of the fair use doctrine would enable courts to recognize fairness in situations where the typical zero-sum game of copyright, which usually pits the interests of the copyright holder against those of his audience, does not apply, because practices that benefit the fans and public at large concurrently benefit the copyright holder. Deriving criteria for a class of "fan-based" activities is the first logical step in the analysis.

A. *Drawing Connections Between Doujinshi and Fansubs*

¹⁰⁰ While these groups tend to call themselves "fansub" groups like their unlicensed anime counterparts, their efforts fall outside the sphere of fan-based activities described *infra* Part V, and therefore do not merit classification as "fansubs" in the original and primary sense of the term.

¹⁰¹ See, e.g., Duhl, *supra* note 44, at 729 (describing the "two purposes of copyright law" as "preserv[ing] an artist's or author's incentive to create," counterbalanced by "the desire to augment the quality and quantity of creative works available to the public").

The usefulness of examining doujinshi and fansubs side-by-side lies in how markedly the two activities differ from one another. Where doujinshi merely appropriate characters and settings for what otherwise might constitute original works of authorship, fansubs copy the original work in entirety; their only modicum of original input lies in the translation of dialogue and the typesetting of those translations as subtitles. By contrast, one of the primary aspects of doujinshi is that they are produced and sold for a profit, whereas fansubs are largely devoid of pecuniary interests.¹⁰² Despite these dissimilarities, however, both activities appear to benefit the copyright holder. That copyright holders find it within their interests to allow both to continue largely unabated attests to that fact.

Ultimately, the unifying thread between doujinshi and fansubs may lie in the individuals responsible for all fan-based activities: the fans. Fans represent a distinct group with a set of interests uniquely aligned with those of the copyright holder. A fan's well-being is linked to the success of the object of his or her fandom: a creator's economic or creative ruination usually spells the end of a creative work.¹⁰³ Moreover, when fan bases are characterized by strong social networks—such as those responsible for the doujinshi markets and fansub groups—the stakes for a fan are even higher, as the end of a franchise could also spell the end of the relationships garnered through interconnected fan activity. Given the alignment of interests between the

¹⁰² Admittedly, however, money does factor into some aspects of the fansub process (for example, server fees). A number of fansub sites attempt to offset this cost by providing users with the option of donating money via online services like PayPal. Others employ ad services like AdSense to generate revenue on per-click or per-thousand-impression basis. See AdSense – Wikipedia, the Free Dictionary, <http://en.wikipedia.org/wiki/AdSense> (last visited Apr. 26, 2008). While these practices have the potential to enable fansubbers to generate a profit for their activities, any revenue gleaned from these practices would have no perceivable impact on the market for or revenue from yet-to-be-licensed anime and manga titles.

¹⁰³ Cancelled television series like *M.A.N.T.I.S.* and *Dark Angel* exemplify this maxim. But see Neva Chonin, *When Fox Canceled 'Firefly,' It Ignited an Internet Fan Base Whose Burning Desire For More Led to 'Serenity,'* S.F. CHRON., available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/06/08/DDGQJD4D2O1.DTL> (last visited Apr. 26, 2008) (describing a reversal of this trend in Joss Whedon's TV series *Firefly*, which garnered a fan base so committed that it enabled Whedon to continue his *Firefly* "Verse" in the motion picture *Serenity*, three years after FOX canceled the series).

creator and the fans, the defining characteristics of fan-based activity can be derived from the examples provided by doujinshi and fansubs.

B. Defining Characteristics of Fan-Based Activities

1. The copyright holder's interests are the fans' interests

Regardless of the type or extent of infringement, or whether the fan derives a pecuniary benefit from the activity in question or not, fans are predisposed to refrain from activities that erode the copyright holder's economic or creative interests. A fan relies too much on the copyright holder's output to endanger it by engaging in competitive or predatory practices that could push the creator's works off the air or out of print. Currently airing anime and recent manga and video game releases consistently serve as the basis for the majority of new doujinshi releases,¹⁰⁴ and fansub groups could hardly continue their operations without a constant stream of new anime episodes from Japanese airwaves. Moreover, fan dependence on the copyright holder's output stretches beyond the scope of anime and manga; if fan fiction could have deterred J.K. Rowling from completing *Harry Potter and the Deathly Hallows*, it is unlikely her fans would have tempted fate by strewing reams of Potter "fanfics"¹⁰⁵ across the internet. Simply put, fans will not risk jeopardizing a creator's incentives. If the creator's work sinks, it is the fans who go down with the ship.

2. Evangelizing Evangelion: fans as missionaries¹⁰⁶

Second, fans are predisposed to engage in activities that proselytize the object of their affections. This tendency is readily corroborated by the history of United States fansubs,¹⁰⁷ but

¹⁰⁴ See, e.g., COMIC MARKET 73 CATALOG 75-411 (containing a majority of doujinshi circle listings that advertise works based on recently released manga, video games, or currently airing anime series).

¹⁰⁵ See, e.g., Fanfiction.net – Books, <http://www.fanfiction.net/books> (last visited Apr. 26, 2008) (indicating well over three-hundred thousand works of fan fiction based on J.K. Rowling's Harry Potter books).

¹⁰⁶ The 1995 anime series *Neon Genesis Evangelion* is an aptly named cult classic that has amassed a huge following outside of Japan.

holds true across the spectrum of fan-based activities. Conventions are held, websites managed, and newsletters distributed not only to maintain lines of interaction between fans, but to expand exposure to and interest in the underlying work. Numerous fans of professional football paint or garb themselves in the colors and emblems of their championed team on game day, just as many trekkies and other science fiction fans attend conventions garbed in the uniforms and attire of their favorite characters. Fans do so in part to identify with others of their fandom, but also to draw the attention of others—some of whom might, having been made aware of their fandom, join their ranks. Perhaps in part because their self-interest is so closely aligned with the interests of the creator and the success of his or her work, proselytizing activities serve to bolster simultaneously the popularity of the underlying work and, by extension, the fans' own sense of self-esteem.

3. Community values: shared interests beget a shared culture

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

Fan culture, like traditional folk culture, constructs a group identity, articulates the community's ideals, and defines its relationship to the outside world. Fan culture, like traditional folk culture, is transmitted informally and does not define a sharp boundary between artists and audiences. Fan culture, like folk culture, exists independently of formal social, cultural, and political institutions; its own institutions are extralegal and informal with participation voluntary and spontaneous. Fan texts, like may folk texts, often do not achieve a standard version but exist only in process, always open to revision and appropriation.¹⁰⁸

¹⁰⁷ See Leonard, *supra* note 8, at 213-14 (asserting that “fans built fervor for anime by constructing an open proselytization commons, whose chief aim was to spread anime as far and wide as possible”).

¹⁰⁸ Tushnet, *supra* note 8, at 656 (quoting Henry Jenkins, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 272-73 (Routledge 1992)).

Fan communities often adopt their own extralegal codes of conduct, enforcing them informally through peer pressure or ostracism from the community itself. By doing so, the community functions to a certain extent as internal regulatory force, discouraging aberrant activities that erode the original creator's incentives and threaten the existence of the community while encouraging involvement in activities that benefit both the fans and the works they adore.

4. Canon to the left of them, non-canon to the right: official versus unofficial

Fourth, the fans' own preoccupation with the delineation between canon (what may be considered "official" or to have "actually happened" within a fictional universe) and non-canon (what may not be considered "official" or to have "actually happened") prevents their activities from eroding the copyright holder's incentives. The canonical/non-canonical distinction arises from situations where a fictional franchise expands to the point where the account contained within one medium contradicts the account contained within another—for example, where an event in a manga transpires differently in the anime adaptation, or not at all.¹⁰⁹ Fan preoccupation with the canonical/non-canonical distinction occurs most prominently in the United States among fans of science fiction franchises like *Star Trek* and *Star Wars*, where fans have created entire databases to elucidate canon from non-canon.¹¹⁰ The canon/non-canon distinction preserves the creator's artistic and economic integrity, drawing a firm line between the original work and the subsequent derivative works crafted by fans.

¹⁰⁹ An example of this situation arises between the original manga version and anime adaptation of *Rurouni Kenshin*, where the events of volumes nineteen through twenty-eight of the manga are replaced by another story arc in the anime.

¹¹⁰ See, e.g., Memory Alpha, <http://memory-alpha.org> (containing a fan-maintained, Wikipedia-like database of *Star Trek* information, wherein most articles distinguish between canonical and non-canonical accounts); Firefly Wiki, <http://fireflywiki.org> (containing a similar database for the TV series *Firefly*).

The fan preoccupation with distinguishing canon from non-canon extends beyond the fictional realm. As the success of branding “official” NFL merchandise demonstrates,¹¹¹ fans will pay a premium for works and merchandise that bear the copyright holder’s seal of approval. Correspondingly, even if fans engage in an activity that seemingly encroaches on a potential market for the copyright holder—fan-made merchandise, like prop replicas, for example—the fans’ own propensity to favor the “official” over the “unofficial” will ensure fan-made products never compete with official products licensed by the copyright holder. In the fans’ eyes—and, therefore, in the marketplace—the latter will always trump the former.

5. A two-part definition for fan-based activities

The four preceding fan characteristics help to establish the principle criteria for delineating a class of fan-based activities. First, because the fan’s interests are largely entwined with those of the original creator, fan-based activities are never undertaken with the intent to exploit or profiteer from the fruits of the original creator’s labor. Instead, they are undertaken either to proselytize the underlying work or strengthen the interconnections between constituent fans and the fan community at large. Second, the tie between the fan community and the success of the underlying work means fan-based activities augment—rather than subtract from—the creator’s aggregate economic and creative incentives.

Given these criteria, an activity is fan-based if it is (1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the creator’s economic and creative interests. This definition of fan-based activity helps to clarify the extent to which the same arguments in favor of doujinshi and fansubs apply to other similar-

¹¹¹ See, e.g., Geoff Mulvihill et al., *Big Super Bowl Winners: Giants, Merchandise Sellers*, at <http://www.thespread.com/ap-news-nfl-100/big-super-bowl-winners-giants-merchandise-sellers.html> (last visited Apr. 26, 2008) (noting that “[h]ats, [t]-shirts, and other gear bearing the Giants logo started flying off the racks at sporting goods stores” shortly after the game ended).

minded activities. In addition, it allows one to draw a distinct line between fansubbers and those who subtitle and distribute episodes after a United States distributor has licensed them. Fansubbers do what they do to enable others without access to an unlicensed anime series or an understanding of the Japanese language to enjoy the anime series and participate in the fan culture that arises as a result. Their actions bring an unlicensed anime series to the attention of an audience beyond its current boundaries of viewership, and more than that, help to attract the attention of United States distributors who are in a position to allow the Japanese copyright holder to expand those boundaries. Fansubbers do so largely without adverse effect on the anime series' domestic Japanese market, and thus the aggregate effect of their activity on the creator's economic and creative incentives is positive.

By contrast, those who subtitle and distribute licensed anime series do so in the face of United States companies who, at great commercial expense, have already given United States viewership access to the series in question. They directly compete with those distributors, and, because licensing has expanded the series' boundaries of viewership to include the United States, they directly compete with the original Japanese copyright holder as well. The aggregate impact of their activities is sharply negative, and thus falls far outside the sphere of what could be properly considered a fan-based activity.

The two-part definition for fan-based activities highlights the distinction between fansubbers and the latter group; while the subtitling and distribution process for both are mechanically the same, the context in which the activity is undertaken and the aggregate effect on economic and creative incentives are not. A useful, if colorful, analogy can be drawn between fansubs and evangelism. Whereas traditional fansubs proselytize the original work by reaching out to those who have yet to hear the gospel-according-to-anime, licensed "fansubs" do

no more than preach to the choir. Not only is the latter practice unhelpful, it is downright counterproductive: the process of supplying free subtitled episodes in competition with existing licensees dilutes the existing market for the original work, creating opportunities for the existing audience to become free riders.

C. How the Four-Factor Test Misjudges Fan-Based Activities

Many uses that fall within the realm of fan-based activities fail to qualify as fair under § 107's four-factor test as courts currently interpret it. Doujinshi, for example, may satisfy the third and fourth factors, but would likely fail the first two. First, despite the characterization of doujinshi as parodies—and therefore transformative works—by the doujinshi markets, doujinshi are undoubtedly motivated by a commercial purpose. Doujinshi are printed and priced to sell at a profit, and many doujinshi artists even obviate printing and shipping costs by making their works available for purchase and download through online “markets.”¹¹² Second, anime and manga are nothing if not “creative, imaginative, and original,”¹¹³ and therefore deserve heightened copyright protection.

On the other hand, doujinshi may satisfy the third factor because they only appropriate the characters and general milieu of the copyrighted work, and otherwise constitute original works of authorship. This conclusion is debatable, however, because an argument could be made that characters and milieu are essential elements of a creative work, and therefore direct appropriation of those attributes significantly usurps a copyrighted work's mode of expression. Ironically, it is the usually ambiguous fourth fair use factor that weighs most heavily in favor of doujinshi's fairness, as doujinshi are complementary to original works rather than substitute

¹¹² See, e.g., Digiket, <http://www.digiket.com> (hosting thousands of doujinshi in digital format, available on a pay-for-download basis).

¹¹³ See *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).

goods,¹¹⁴ and therefore do not diminish the works' potential markets. Nevertheless, under the four-factor analysis, a court could very easily determine that doujinshi, as a commercial use, appropriating elements that could be considered part of the creative core of a copyrighted work, fall beyond the scope of fair use.

In contrast to doujinshi, fansubs may satisfy the first fair use factor, but they would certainly fail the second and third factors. If one includes licensed “fansubs” in the fair use calculus—as one might, without considering the two-part definition for fan-based activities—fansubs could fail the fourth as well. While fansubs are entirely non-commercial in nature, the works they appropriate are creative ones, and, to make matters worse, they appropriate the work wholesale. If a court lumps licensed “fansubs” in with unlicensed fansubs when analyzing potential market effects, it will likely find fansubs as a whole harmful to the potential United States markets for anime and manga, especially if it follows the judicial trend of focusing on adverse impacts to the exclusion of possible benefits.¹¹⁵

The analyses of doujinshi and fansubs indicate that something is fundamentally awry in the current methodology of assessing whether a given activity qualifies as a fair use. The four-factor test, as courts presently interpret it, is ill-equipped to evaluate the fairness of uses like fan-based activities, which further the constitutional core of copyright by widening the spectrum of creativity available to society while simultaneously enhancing the creative and economic incentives for copyright holders. By looking closely at how fan-based activities manage to break

¹¹⁴ See Duhl, *supra* note 44, at 690 (citing Mareen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1229 (2002) (citing *Sony Computer Entm't, Inc. v. Connectix*, 203 F.3d 596, 598 (9th Cir. 2000); *Sega Enters. Ltd. V. Accolade Inc.*, 977 F.2d 1510, 1514-16, 1522-23, 1527 (9th Cir. 1992)); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 309 n.307 (2002) (noting that “[e]conomists define a complementary good as a product whose fall in ‘price will cause the quantity demanded for the other product to rise’”) (quoting Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 49 (5th ed. 1998))).

¹¹⁵ See, e.g., *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569, 591 n.21 (describing the fourth factor inquiry as assessing “the amount of harm” to potential markets).

out of the zero-sum paradigm of copyright, which views growth of the public domain and maintenance of the copyright holder's economic incentives as diametrically opposed goals, one can discern how the four-factor test could be modified to encompass technically infringing activities that nonetheless enhance both goals.

D. Viewing Original Works and Fan Activities From Complementary Angles

The economic concept of “complementary goods” provides insight into the relationship between fan-based activities and the original works that spawn them. Goods are complementary if their cross-elasticity of demand is negative; that is, if purchasing more of one good results in the purchase of a greater quantity of the other good. Complementary goods include hot dogs and hot dog buns, computer consoles and computer monitors, and, most usefully for immediate purposes, movies based on novels and novels based on movies. In each case, a change in demand for one of the goods induces a similar change in demand for the other good. For example, one could imagine an FDA ban on hot dogs would cripple, if not destroy, the hot dog bun industry. By the same token, the popularity of J.R.R. Tolkien's *The Lord of the Rings* trilogy likely contributed to the box-office success of its movie adaptations, and, in turn, viewership of the movies increased interest in and purchases of the original novels.

Similarly, the success of doujinshi or fansubs is conjoined with the success of the underlying works they are based on. This bond makes it self-destructive for the fans behind either activity to engage in practices that compete with, and therefore erode the market for, the original work. Just as it makes little sense for hot dog bun makers to develop a food product that eliminates demand for hot dogs—and, consequently, hot dog buns—it makes even less sense for a doujinshi artist or fansubber to engage in activities that undermine the works upon which their labors are based. Instead, it behooves the doujinshi artist or fansubber to implement steps that

increase demand for the original work, because the more popular the original work becomes, the higher the corresponding demand for doujinshi and fansubs.

The complementary relationship between doujinshi, fansubs, and the anime and manga industries bears significant resemblance to the symbiosis between original works and “tie-in” media, most often seen in the United States between the publishing and movie industries. Just as there are people who would not dream of reading a book unless they saw it as a movie first (or vice versa), there are people who cannot watch an episode of anime or read a volume of manga until it has been translated and made accessible to United States shores. In the same way, just as some people discover J.K. Rowling’s Harry Potter books through movie, video game, or other media tie-ins, there are people who discover an anime or manga series solely by happening upon a well-drawn doujinshi at Comiket. All it takes for the original works to reach those people is for something to bridge the gap. Media tie-ins bridge some; fan-based activities bridge others. The only difference between media tie-ins and fan-based activities is that, while the former uses are authorized by the copyright holder, the latter are not. Whether authorized or not, however, the beneficial effects of either set of practices remain the same. In the interest of upholding the purposes of copyright, courts should be allowed to recognize as fair those uses which, in their estimation, fall within the narrow and nuanced category of fan-based activities. Accordingly, the four-factor analysis should be refined to enable courts to account for the complementary nature of fan-based activities in their fair use calculus.

E. Accounting for Fan-Based Activities in the Four-Factor Test

Although legislative reform may be the most direct way to modify the four-factor test to account for fan-based activities, it is by far the most drastic. It is also the least likely to succeed, as copyright holders and their lobbyists are unlikely to abide legislation that reduces their

enforcement rights, even if the ultimate effect of the reduction is beneficial. United States copyright holders could point to the Japanese system as an example. The Chosakuken utilizes a laundry list of exceptions in lieu of fair use, but fan-based activities like the doujinshi markets are not among them;¹¹⁶ instead, the markets exist primarily at the largesse of the Japanese copyright holders themselves.

The United States trend toward stricter enforcement, however, indicates that at least some copyright holders may ignore the complementary effects of fan-based activities and choose to enforce their rights against the fan-based activities. If copyright holders bring suit, the present judicial construction of the fair use analysis may ultimately hinder the goals of copyright rather than uphold them. By ignoring the characteristics of fan-based activities, the current fair use analysis may cause both public access to creative works and the copyright holders' incentives to suffer. Fortunately, the current four-factor test under § 107 affords the courts themselves sufficient latitude to refine the fair use analysis in light of changing circumstances.¹¹⁷ Judicial-level adjustments to the first and fourth fair use factors allow courts to consider the characteristics of fan-based activities where appropriate, and enable them to find fair a use possessing the defining characteristics of a fan-based activity—even if the copyright holder fails to recognize the fairness of the use.

Some critics may dismiss this stance as a form of judicial paternalism. Legal paternalism, however, traditionally entails a situation involving “interference with a person's liberty of action justified by reasons referring *exclusively* to the welfare, good, happiness, needs,

¹¹⁶ Japanese Copyright Act (Chosakuken), art. 30-49, *available at* http://www.cric.or.jp/cric_e/clj/clj.html.

¹¹⁷ *See* H.R. REP. NO. 94-1476, at 66, reprinted in 1976 U.S.C.C.A.N. at 5679 (noting that “the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change”).

interests or values *of the person being coerced*.”¹¹⁸ That is not the case here, as the primary reason for the proposed judicial-level refinement concerns the ability of third parties—specifically the fans—to engage in activities that further the purposes of copyright, and ultimately the right of society at large to benefit from those activities. The fact that those same activities cause no aggregate harm to the incentives of the copyright holder—or produce an aggregate augmentation of those incentives—is a secondary, albeit noteworthy, factor that underscores the need to protect fan-based activities.

In addition, some commentators believe a certain degree of paternalism may be inevitable where “preferences are unclear and ill-formed, and [] choices [are] inevitably [] influenced by default rules, framing effects, and starting points.”¹¹⁹ Given the overwhelmingly beneficial impacts of fan-based activities on copyright holders’ incentives, it seems that a desire for strict enforcement of copyright against those activities could only stem from an over reliance on the classical more-protection-equals-more-authorship rationale. A copyright holder who has grown too accustomed to associating strict copyright enforcement with the maximization of his or her interests may take actions to curtail fan-based activities on reflex or force of habit alone, all the while remaining blissfully ignorant of the benefits, both public and private, that are part-and-parcel with fan-based activities.

Worse yet, it is not only the copyright holder’s interests that are at stake in regard to the fairness of fan-based activities, but more importantly the interests of the fans and society at large. Where public interests beyond those of the decision maker are at stake, and a curtailment of the decision maker’s freedom of choice yields no private detriment, courts should be allowed to

¹¹⁸ William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1762 n.450 (1988) (quoting G. Dworkin, *Paternalism*, in MORALITY AND THE LAW 107-108 (R. Wasserstrom ed. 1971)) (emphasis added).

¹¹⁹ Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

intervene, not to protect the decision maker but to protect the public interests involved. This approach is no more paternalistic than the criminalization of certain forms of behavior: laws and courts curtail a man's freedom to assault his neighbor not because it is in his own interest—although it probably is, as a man who pummels his neighbor is likely to be pummeled himself one day—but because it is in his neighbor's, and more broadly, the public's interests. In the same way, a judicial-level expansion of the fair use doctrine curtails a copyright holder's freedom of enforcement against fan-based activities not because it is in the copyright holder's because interest—even though it is—but to preserve the interests of the fans and the public in general.

1. Complementary versus competitory purposes: a fourth dichotomy

First, the fact that an activity is undertaken by fans, and therefore carried out with a purpose complementary to that of the original work, should weigh in favor of a determination of fair use under the “purpose and character” factor. This fourth dichotomy, distinguishing between complementary and competitory purposes, more closely aligns the first factor with the purposes of copyright. Courts are thereby enabled and encouraged to find a wider range of complementary uses fair under § 107.

The integration of a complementary-versus-competitory dichotomy under the first factor instills the four-factor test with a greater scope of analysis. It softens the commercial-versus-noncommercial distinction by acknowledging that some commercial uses—specifically complementary ones—actually favor a finding of fair use. This dichotomy also brings complementary uses beyond the sphere of fan-based activities into the realm of fair use, such as unauthorized tie-in media. So long as they do not encroach upon the copyright holder's existing markets under the fourth fair use factor—and thus constitute a competitory rather than

complementary purpose—unauthorized tie-in media and related commercial activity should fall under the scope of fair use. A complementary-versus-competitory dichotomy brings them within the fair use penumbra.

One might argue the suggested dichotomy enables knock-off manufacturers to justify their activities under the fair use doctrine. For example, a manufacturer who produces Harry Potter-branded merchandise without J.K. Rowling's authorization may argue that his/her appropriation is fair because his/her activities serve to promote the characters and settings contained within Rowling's books. The complementary-versus-competitory distinction might overlook the possibility that the unauthorized manufacturer's products will hinder Rowling's ability to pursue "official" Harry Potter merchandise in the same vein. In this way, while the unauthorized manufacturers may be complementary to the Harry Potter books themselves, they nonetheless erode the creator's incentives by competing in the potential market for branded goods.

This critique, however, ignores one of the four characteristics of fan-based activities, which applies just as readily to unauthorized merchandise: the fans' propensity to distinguish the canonical from the non-canonical. Just as fans tend to prefer canonical works and merchandise to non-canonical fan-made works and goods, they will tend to gravitate toward "official" branded merchandise over unofficial, unauthorized goods. As a result, any first-to-market advantage enjoyed by the unauthorized manufacturer will evaporate the moment the copyright holder decides to enter the branded goods market. Accordingly, the activities of the unauthorized manufacturer do not erode the creator's incentives, and thus qualify as legitimate fair uses. It is important to note, however, that once "official" goods enter the market, the

activities of the unauthorized manufacturer, if continued unabated, are converted from a complementary to competitory purpose, and thereafter fall beyond the scope of fair use.

The real-life J.K. Rowling provides another example of the complementary-versus-competitory dichotomy in her lawsuit against Steven Vander Ark's "Harry Potter Lexicon."¹²⁰ The book represents an attempt by Vander Ark to publish the contents of his Harry Potter Lexicon website for \$24.95 a copy.¹²¹ Interestingly, while the lexicon in its for-profit, book form drew a lawsuit, the same content in its free, web-based form drew an award, bestowed by Rowling to "encourage an enthusiastic fan."¹²²

The complementary-versus-competitory dichotomy, coupled with the characteristics of fan-based activities, helps to justify Rowling's seemingly schizophrenic stance on the matter. In its free, web-based form, Vander Ark's lexicon exhibited all the characteristics of a fan-based activity. First, it was undertaken as a complement to, rather than in competition with, Rowling's Harry Potter books: a dictionary of Harry Potter terms and concepts is a poor substitute for the Harry Potter saga itself. The lexicon probably whetted its visitors' appetites for Rowling's fiction—or, for that matter, the movies based on it—especially if they had not read the Harry Potter series before. Second, Vander Ark's website, with roughly 1.5 million page views a month,¹²³ likely enhanced Rowling's aggregate economic and creative interests by bringing new readers into her world of muggles and wizards.

However, when converted into its for-profit, print form, Vander Ark's lexicon sheds its fan-based mantle. While still not directly competing with the market for Rowling's novels, the print-form lexicon appears to be primarily motivated by a desire to exploit rather than promote

¹²⁰ Associated Press, *J.K. Rowling Testifies: Fan's Book is 'Wholesale Theft,'* available at <http://today.msnbc.msn.com/id/24122901/>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

the underlying works. Rowling had every right to “almost choke[] on her coffee” when “she realized Vander Ark had warned others not to copy portions of his Web site”:¹²⁴ by doing so, he revealed that his goal had indeed shifted from proselytizing Rowling’s works to profiteering from them, something no true fan—nor truly fan-based activity—would seek to do.

2. Accounting for market benefits under the fourth factor

Second, the fact that fan-based activities uniformly enhance the copyright holder’s economic and creative incentives can help to refine the scope of inquiry called for under the “potential market effect” factor. The beneficial tendencies common to fan-based activities suggest that, in order to obtain a fuller and more robust understanding of the effects of a use, courts should expand their fourth-factor inquiries to include not only harmful impacts, but favorable impacts as well. Section 107(4) does not restrict the fourth-factor analysis to either harmful or beneficial effects alone, and neither should the courts. In accounting for both positive and negative market impacts, courts will be better able to discern the aggregate effect of the use in question, and thereby better serve the purposes of copyright.¹²⁵ This approach runs closer to the language of § 107 than the harm-based inquiry currently employed by the courts,¹²⁶ and enables courts to weigh a finding of beneficial market effects more strongly in favor of fair use than a finding of neither detrimental nor beneficial market effects.

Admittedly, expanding the fourth factor inquiry to consider benefits as well as harms does little to ameliorate the ambiguity that plagues both the fourth factor and the overall fair use analysis as a whole. Assessing fair use under the modified standard remains just as fact-intensive, and continues to grant courts a great deal of latitude in weighing the various factors of

¹²⁴ *Id.*

¹²⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 578 n.10 (describing the goals of copyright as “stimulat[ing] the creation and publication of edifying matter”) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1134 (1990)).

¹²⁶ *See id.* at 587 (describing the fourth factor as assessing the “likelihood of market harm”).

a fair use claim. The ambiguity, however, appears endemic to the fair use doctrine, and therefore no easy method of curtailing the current level of judicial discretion presents itself. The proposed judicial-level refinement of the four-factor test is no panacea for the test's various shortcomings; it merely represents a means by which the test can be brought into closer synchronization with the underlying purposes of copyright, and therefore denotes a single, and perhaps significant, step in the right direction.

3. The modified four-factor test

By accounting for the characteristics of fan-based activities, the proposed refinements to the first and last factors of the fair use test better align it with the purposes of copyright,¹²⁷ promoting the public domain while preserving—and, in the case of fan-based activities, enhancing—incentives for creativity. The modified four-factor test, informed by the characteristics of fan-based activities, furnishes courts with the ability to find fair use in activities that benefit both the copyright holder and the public, but would likely fall beyond the scope of the current judicial interpretation of the fair use test. These win-win scenarios demonstrate copyright need not—and should not—be viewed as a zero-sum game that inevitably pits the interests of copyright holders against the interests of their audiences.¹²⁸ At least where fan-based activities are concerned, copyright holders and their audiences can work hand-in-hand, resulting in a boon both for the copyright holder's interests and the general level of creative discourse available to society at large. Even if copyright holders themselves cannot recognize the fairness of fan-based activities, the courts should, much as they recognize and uphold more traditional

¹²⁷ See Trombley, *supra* note 8, at 683 (arguing that “when courts and legislatures seek to strike the balance between protection of property rights and freedom of expression, the value of [fanvids and similar activities] should be taken into account”).

¹²⁸ See Leonard, *supra* note 8, at 194 (noting that many commentators “instinctively or purposefully pit[] owners against audiences”).

fair uses such as parody and criticism, regardless of whether those uses meet with the copyright holder's express approval or not.

The potential advantages of this modified approach extend beyond the realm of fan-based activities. Professor Duhl advocates a similar benefit-and-harm-based approach for the fourth fair use factor on the basis of “crystalliz[ing] the tension in copyright law between private property rights and the public's interest in using and accessing creative works.”¹²⁹ However, where Professor Duhl proposes an intellectual property version of the doctrine of eminent domain as a paradigm for analyzing the non-harmful or beneficial impacts of an unlicensed use¹³⁰—which involves the added problem of calculating “compensation” for unlicensed takings¹³¹—the refinement of the four-factor test indicated by fan-based activities constitute a subtler, less drastic approach.

While there may be some advantages to importing the concept of eminent domain from real to intellectual property law, it seems likely that adoption of a solution that has already proven itself something of a mixed blessing for real property¹³² will only introduce additional problems to the fair use analysis. By contrast, the refinement raised by the characteristics of fan-based activities represents a measured approach requiring no statutory revision. It also refrains from introducing new levels of potentially controversial analysis to the already complicated fair use calculus. The proposed approach maintains the standard encapsulated in § 107, instead

¹²⁹ Duhl, *supra* note 44, at 727.

¹³⁰ *Id.* at 728.

¹³¹ See, e.g., Natasha N. Aljalian, *The Role of Patent Scope in Biopharmaceutical Patents*, 11 B.U. J. SCI. & TECH. L. 1, 62 n.231 (2005) (noting that, like the compulsory licensing scheme for patents, eminent domain regulatory taking scheme “is inadequate and unable to adequately predict and determine a royalty rate as would the competitive market”) (citing Arti K. Rai, *Fostering Cumulative Innovation in the Biopharmaceutical Industry: The Role of Patents and Antitrust*, 16 BERKELEY TECH. L.J. 813, 843 (2001)).

¹³² See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005) (in which a fractured Supreme Court broadened the scope of eminent domain to include takings for economic development); see also Scott P. Ledet, Comment, *The Kelo Effect: Eminent Domain and Property Rights in Louisiana*, 67 LA. L. REV. 171, 172-73 (2006) (noting that the “initial reaction among many is that Kelo was wrongly decided” and advocating “measures that might prevent the type of taking that occurred in Kelo” from occurring in Louisiana).

refining the existing inquiries into purpose and market effects so they account for the situations conjured by fan-based activities. In this way, the approach upholds not only the letter of the law but the *lex parsimoniae*¹³³ as well: it does nothing to the four-factor test that is not made necessary by the light cast on it by fan-based activities. Accordingly, the judicial reinterpretation of the fair use analysis suggested by fan-based activities represents the least drastic means by which the penumbra of fair use can be expanded to encompass win-win activities that benefit the copyright holder and the public alike.

V. CONCLUSION

As numerous analyses spanning the spectrum of fan-based activities have shown,¹³⁴ it is often foolish for creators to try to control how their works are interpreted once released into the public, and largely futile for them to try. Perhaps the evolution of the role-playing game *Dungeons & Dragons*, or *D&D*, epitomizes this precept. While the game's core mechanic capitalizes on the creativity of its players within the attributes of the role-playing system, TSR, the game's initial producer, pursued vigorous legal action against smaller publishers of derivative materials in the 1980s.¹³⁵ Those actions generally antagonized *D&D* fans and industry insiders alike.¹³⁶ In part due to negative fan reaction¹³⁶ to their heavy-handed management of the *D&D* franchise, TSR fell on hard financial times in the 1990s, and eventually sold its assets to Wizards of the Coast, the publisher behind the successful *Magic: The Gathering* card game.¹³⁷ Perhaps responding to the will of the fans, Wizards of the Coast reclassified the franchise under

¹³³ Also known as Occam's Razor: "*entia non sunt multiplicanda praeter necessitatem*," or "entities should not be multiplied beyond necessity." Occam's Razor – Wikipedia, the Free Encyclopedia, http://en.wikipedia.org/wiki/Occam%27s_razor (last visited Apr. 26, 2008).

¹³⁴ Mehra, *supra* note 8; Tushnet, *supra* note 8; Kirkpatrick, *supra* note 8; Muscar, *supra* note 8.

¹³⁵ Dungeons & Dragons – Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Dungeons_and_dragons (citing Bob Bledsaw, *From the Sorcerer's Scroll: What has Judges Guild done for Dungeons and Dragons*®, THE DRAGON #27 Vol. IV, No. 1, at 10-11 (TSR Hobbies, Inc. 1979)) (last visited Apr. 26, 2008).

¹³⁶ *Id.*

¹³⁷ *Id.*

the newly introduced Open Gaming License, allowing for the production of derivative materials based on the *D&D* system.¹³⁸ Under the Open Gaming License, the franchise continues to thrive to this day, with a Fourth Edition of the system's core rules due to be released in mid-2008.¹³⁹

Moreover, as others have indicated,¹⁴⁰ a copyright holder sometimes stands to benefit from loose enforcement of his exclusive rights, where fan activities serve to proselytize the copyright holder's work. Recognition of those situations should go beyond mere largesse or indifference on the part of the copyright holder. Instead, it should be reflected in the way courts interpret the four-factor test for fair use.

The alignment of the fans' interests with those of the original creator, the proselytizing function of fan activities, the internal regulatory function of the fan communities themselves, and the fans' preference for canonical over non-canonical works and goods all ensure that fan-based activities will never jeopardize the creator's economic or creative incentives. Moreover, the nature of fan interactions and their tie to the success of the underlying work predispose fan-based activities to benefit the copyright holder's economic and creative incentives. Adding a complementary-versus-competitory dichotomy to the "purpose and character of use" factor, along with accounting for beneficial as well as detrimental market impacts under the fourth and most important fair use factor, accounts for the unique characteristics of fan-based activities. This refinement welcomes a greater number of complementary and beneficial uses under the fair use penumbra, and thereby brings the four-factor test into closer synchronicity with the purposes of copyright.

¹³⁸ *Id.* (citing Wizards of the Coast, *The d20 System*, <http://www.wizards.com/default.asp?x=d20/welcome>).

¹³⁹ *Id.* (citing Bill Slavicsek, *4th Edition Player's Handbook, Dungeon Master's Guide, and Monster Manual*, <http://www.wizards.com/default.asp?x=dnd/dramp/20071019> (only viewable with a D&D Insider account)).

¹⁴⁰ Leonard, *supra* note 8.

Ultimately, to better uphold the constitutional purposes of copyright, courts must take into account the broader facets of fair use encapsulated by fan-based activities. Perhaps the song that “Browncoat”¹⁴¹ fans of *Firefly* and *Serenity* are fond of reciting sums it up best:

Take my love, take my land
Take me where I cannot stand
I don't care, I'm still free
You can't take the sky from me;
Take me out to the black
Tell them I ain't comin' back
Burn the land and boil the sea
You can't take the sky from me;
There's no place I can be
Since I found Serenity
But you can't take the sky from me . . .¹⁴²

If the post-cancellation success of the crew of the Firefly-class transport *Serenity*,¹⁴³ the uncancellation of *Family Guy*,¹⁴⁴ or the revival of the city of *Jericho*¹⁴⁵ serve as any indication, copyright holders and related powers-that-be really can't take the sky from the fans. More than that, as the benefits of doujinshi, fansubs, and other fan-based activities demonstrate, they ought not to even try.

¹⁴¹ Many *Firefly* fans assume the nickname of the Independents who lost a civil war against the Alliance at the Battle of Serenity Valley, a campaign in which *Serenity*'s captain and first officer, Malcolm Reynolds and Zoe Washburn, fought on the side of the Browncoats.

¹⁴² Joss Whedon, Firefly Theme Song, available at <http://www.fireflywiki.org/Firefly/FireflyThemeSong>.

¹⁴³ See Done the Impossible – The Fans' Tale of Firefly and Serenity, <http://www.donetheimpossible.com/about.php> (describing a documentary detailing how fans did “the impossible” by helping to resurrect the cancelled television series *Firefly* in the form of the movie *Serenity*).

¹⁴⁴ See Gary Levin, ‘Family Guy’ Un-canceled, Thanks to DVD Sales Success, USA TODAY, March 24, 2004, available at http://www.usatoday.com/life/television/news/2004-03-24-family-guy_x.htm.

¹⁴⁵ Nina Tassler, A Message From CBS Entertainment, <http://jerichoboard.cbs.com/n/pfx/forum.aspx?tsn=1&nav=messages&webtag=CBSMBJericho&tid=13329> (applauding successful fan efforts to revive the canceled television series *Jericho* by announcing the ordering of seven episodes for the series' second season).