

Tushnet

copyright law, fan practices, and the rights of the author

Fans of popular media who write stories about their favorite characters, draw pictures of them, and edit music videos reworking the original sources occasionally stop to think about whether what they are doing is legal under copyright law. Many fans assume that these creations are technically illegal—in copyright-specific terms, infringing—but not harmful to copyright owners and therefore not truly wrong, at least as long as fans keep relatively quiet about their creative practices (e.g., Brook n.d.). Others think that fan creations count as “fair use,” and thus as noninfringing, at least as long as no one is making any money from selling them (e.g., Gran 1999). Either way, fans tend to see their legal status as similar to their social status: marginal and, at best, tolerated rather than accepted as a legitimate part of the universe of creators.

Shortly after I found online fandom, I wrote an article on the subject, which is now often cited in fan discussions, and occasionally in discussions with skeptics who find fan fiction immoral and infringing (Tushnet 1997). I concluded that most fan fiction, particularly that disseminated on the Internet, would be classified as fair use under U.S. copyright law.¹ Since then, fan fiction has attracted more attention from “free culture” advocates who are concerned about copyright owners’ attempts to channel and control popular culture. Some copyright owners have also taken an aggressive stance against fan creativity, sending enough cease-and-desist letters threatening lawsuits to fan websites that the Electronic Frontier Foundation’s anti-censorship website, chillingeffects.org, has a section dedicated to fan fiction.

Tushnet

The formal legal landscape is more favorable to fans than it was eight years ago, as courts have been more willing to protect “transformative” unauthorized uses against copyright owners’ allegations of infringement. Transformative uses are uses that add new insights or meaning to the original work, often in ways that copyright owners don’t like. Like a book review that quotes a work in order to criticize it, a retelling of a story that offers the villain’s point of view sympathetically or adds explicit sexual content can be a transformative fair use. Recent cases emphasize that copyright owners can’t suppress unwanted interpretations of their works by asserting copyright. The most notable litigation involved a book by Alice Randall, *The Wind Done Gone*, which retold the story of Margaret Mitchell’s *Gone With the Wind* from the perspective of a new character, the mixed-race daughter of a slave and a master. A federal court of appeals held that Randall’s book was likely to be a fair use, largely because of the ways in which it criticized the racism of the original (*SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)).

Legal doctrine is not all that matters, however. When copyright owners aggressively allege infringement, threatening fans with massive civil penalties, fans may naturally choose to shut down or hide their activities rather than standing their ground. The *Wind Done Gone* case involved a publisher-defendant whose monetary interests justified a full-scale defense. No similar cases from the fan community have been litigated.

Despite the absence of cases, fan practices do offer lessons for copyright law. In particular, fan practices provide insights into moral rights, a category of author’s rights that is well-recognized in Europe but has been far less successful in the U.S. Various

Tushnet

types of moral rights allow an author (or an author's heirs) to control the attribution of a work, to withdraw it from circulation, or to protect it from mutilation or distortion by unwanted adaptations or alterations. Moral rights theory posits a deep and unique connection between author and text such that an insult to the text is an assault on the author. Moral rights thus seem inherently in conflict with fans' willingness to take liberties with source texts. Yet not all moral rights claims are inconsistent with fan interpretive practices. Although protection against *distortion* conflicts with much fan creative activity, moral claims to *attribution* are widely recognized in fandom, and attribution rights are far less disruptive to ordinary interpretive practices than other kinds of moral rights. At the same time, fan practices demonstrate that attribution can come from context, while the law has tended to assume that only explicit credit suffices to give authors proper acknowledgement.

A second, related point illustrated by fan practices of alteration and attribution is that the fair use concept of transformation needs to be better theorized. Courts are more likely to find a use fair when it comments on the underlying work—when it brings out in the open what was present in the subtext or context—and common fan understandings of good characterization are consistent with that idea. If that is so, however, then the original author is partly responsible for later interpretations. Thus, a determination of transformative fair use is often a judgment that the original author did not have full control over the original text—that the text was not received in just the way she wanted it to be received. While this is a perfectly standard result from the perspective of literary theory, the law has yet to make explicit what fans have always known, that meaning

Tushnet

cannot be imposed by authors or owners but rather is negotiated among texts, authors, and audiences.

fan creativity and its dissemination in the internet era

Because search engines have made it simple for anyone to find stories and art featuring copyrighted characters behaving in unauthorized ways, fan creations are now easily found by copyright owners, as well as by non-fans. The popular Television Without Pity website, for instance, has many user forums which include discussions of fan creations, and TV producers regularly read the fan forums (though they may not read the fan fiction threads in those forums) (Sella 2002). Someone who enjoys watching a show may thus slide easily into the world of fan-generated content, without any prior screening and without much effort. This accessibility means that a reader's view of Harry Potter may be altered by an unexpected encounter with a sexually explicit or graphically violent story about him, increasing copyright owners' anxieties about losing control of their characters' images.

The Internet, and the widespread deployment of broadband access, have increased accessibility to fan creations in several ways. First, the number of fandoms represented has exploded. When I wrote about fan fiction in 1997, it was possible for a diligent person to attempt a comprehensive listing of fan fiction sites, from *The A-Team* to *Zorro* (KSNicholas n.d.). I was amazed by the scope of online fandom—there were hundreds of sites listed. Today, Google lists over 1.2 million results for a search of the phrase “fan fiction.” If you're one in a million, you can find a 250-person mailing list of people just

Tushnet

like you. Even if your fandom is smaller, there's the yearly Rare Fandoms Challenge to connect the one person who wants to read a story with the one person who wants to write it (*The Yuletide FAQ* 2005). Second, the quality of what is available varies wildly. In the bad old days, when fans distributed work via mimeographed or photocopied zines, editors usually reviewed content. Now, anyone can post a story minutes after writing it, before even using a spellchecker. To put it more positively, today anyone can post a story on her own web page even if its content is not popular enough to support a zine. Third and relatedly, the people who participate and their reasons for doing so vary widely—there are twelve-year-olds just having fun sharing stories with their friends and there are published writers practicing their craft for a guaranteed audience. Fourth, now that text-only browsers are a fading memory, the *types* of fan productions are more varied: fan fiction is the phenomenon to which scholars have paid most attention, but fan drawings, photomanipulations, and music videos are also widely available.²

This visibility is important. Fans who find fan fiction, art, and videos often feel a sense of validation, and they may feel that their own interests are more normal. Whether this reassurance is a good thing or not depends on what we think of the value of fan creativity. Online support groups for young gays and lesbians in conservative small towns are a lot more appealing than online support groups for girls who are anorexic and want to stay that way. Countervailingly, the fact that these creations are no longer mimeographed and circulated among a circle of friends who already knew one another can create a greater sense of exposure, and a certain fear that the powers that be might crack down if the fans aren't careful. Visibility invites study, and sometimes legal threats,

Tushnet

as shown by the section of chillingeffects.org that hosts copies of cease and desist letters received by various fan sites.

who gets the credit?

When I first wrote about fan fiction, disclaimer statements by fan authors were common and prominent: the author would state that she did not own the copyright in the characters and situations, name the entity that did (or the original creator, who is usually not the copyright owner), and sometimes add a request that the copyright owner not sue her.

While I have not conducted a scientific survey, my strong impression is that disclaimers are less common today. When they are present, they may not seem all that much like pleas for forbearance. For example, the tone of a disclaimer discussed in Esther Saxey's essay on *Buffy the Vampire Slayer* fan fiction (2002: 208) is casual enough that it is difficult to tell what is being disclaimed: "Joss moves in mysterious ways. But, damn his eyes, he owns the two lovlies and their auras. He created them, made them what they are, and I bow to you [sic]."

I think this informality in disclaiming ownership is tied to a sense of greater normalcy. Fewer fan creators are worried that they are somehow doing something wrong, and they are more likely to expect that their readers will understand their basic premises. After four hundred disclaimers, the four hundredth and first is likely to seem a lot less important. Another likely related factor is that with the increasing variety and visibility of fan creativity, new fans are not always initiated by more experienced ones. They may not

Tushnet

learn the norms of the preexisting community when they start sharing their own stories and art, including norms of explicitly disclaiming ownership.

One question about this normalization of creating and disseminating unauthorized derivative works is whether it is related to “Napsterization” of intellectual property—is it part of a breakdown of respect for intellectual property and authors’ interests? I think the answer is generally no. In fact, fans who create derivative works tend to be sensitive to the interests of copyright owners in getting attribution for the original, canonical versions of their characters, offering “subversive respect” (Saxey 2002 208). Fans acknowledge copyright owners’ legitimate economic interests, but maintain that their activities do not hurt and even help revenues from authorized works, by increasing loyalty to and interest in the official versions (Tushnet: 669). A Lockean theory of adding value through labor plays a role in fan concepts of artists’ rights, where it does not for music downloaders; few downloaders would claim to have invested labor in any relevant sense when they search for and select music to copy. Fan authors and artists, by contrast, seek recognition from their peers for adding new perspectives and twists to the official texts.

An absence of disclaimers might be thought to show unconcern for proper attribution. But that interpretation would ignore the importance of context: if I say that life is “A tale/Told by an idiot, full of sound and fury/Signifying nothing” without attribution, I don’t expect you to think I made up those words myself. No more do fans expect other fans—their intended audience—to think that they created Superman or Captain Kirk. Indeed, fan creators are usually highly concerned with proper attribution. Plagiarism, that is, verbatim copying without attribution where the copier apparently expects to receive credit for the words or images as if they were her own, is one of the

Tushnet

most serious offenses against the fan community, and when discovered the plagiarist is generally publicly excoriated (e.g., Lady Macbeth 2004; *The Lois & Clark Fanfic Archive FAQ* n.d.).

Disclaimers were never intended to inform other fans; it was always fairly easy to tell an authorized *Star Trek* novel from an unauthorized fan creation. Rather, disclaimers were directed at an imagined audience, the copyright owners/original creators—disclaimers often included the request “Please don’t sue.” At the same time, most fans never thought that the copyright owner would actually read fan fiction in the first place.³ The ebbing of the disclaimer may indicate that fan creators feel less of a need to justify themselves, but it does not signal a sea change in fans’ attitudes towards authors’ rights.

Fan practices surrounding attribution may have several lessons for the law. Trademark law is centrally concerned with attribution: its goal is to help consumers easily find the products they want, ensuring that a can of Coke is really made in a Coca-Cola bottling plant. Trademark can also protect against false claims of credit, for example if a new soda company put Coke in its bottles in order to deceive people into thinking that the new soda was just as good. In the past, authors have used trademark law to assert their rights to get proper credit and to keep their names off of unwanted projects, as when Stephen King stopped a movie studio from calling its film *Stephen King’s The Lawnmower Man* (*King v. Innovation Books*, 976 F.2d 824 (2d Cir. 1992)).

Recently, the Supreme Court decided *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), which involved a videotape series about World War II that was mostly composed of footage from an earlier series; the earlier series was no longer protected by copyright. A lower court had ruled that Dastar, the series producer,

Tushnet

had violated federal trademark law by failing to attribute the footage to the (former) copyright owner, Fox, which had purchased the rights from Time-Life. The Supreme Court disagreed with the lower court, holding that using trademark law as a means to enforce attribution rights would threaten infinite battles over the true source of a work's ideas or expressions—some of the footage in the Time-Life series, for example, came from films made by servicemen for the U.S. government. Justice Antonin Scalia, engaging in unattributed borrowing from *Dastar*'s briefs (Band & Schreurs 2005: 15), refused to require later creators to engage in a “search for the source of the Nile and all its tributaries” (*Dastar*: 36).

As fan practices reveal, however, there can be a social consensus within a relevant community about how far to trace and when, providing the limiting principle that Justice Scalia felt was absent.⁴ Trademark law often takes account of what consumers think is true about the connection between a trademark owner and a product, such as whether a T-shirt maker needs a trademark owner's permission to put the trademark on a shirt. The law could also look to consumer beliefs in determining whether the absence of credit to a more or less distant creator of a film was misleading. Often, missing credits aren't deceptive. Justice Scalia's uncredited borrowing from a party's legal brief escapes condemnation because the social context of his copying makes him a jurist, not a plagiarist. Similarly, fan creations, even without disclaimers, usually announce their unauthorized status so clearly through context that no deception is likely.

Nonetheless, traditional trademark law presumes that the presence or absence of a name is important. False advertising law is a better model for issues about attribution of texts, because that body of law takes into account whether a particular claim or omission

Tushnet

makes a difference to consumers' decisions. An advertisement that does not mention an item's price is not therefore misleading; consumers know that goods have prices.

Analogously, in the fan context, lack of explicit attribution may not be a material omission because the audience already knows that the fan is not the original creator.

Moreover, fans are unlikely to know or care about the complex web of contracts and law that regulates relations between individual creators and the large corporations that usually own the rights to popular works. Though fans sometimes offer explicit disclaimers that refer to a specific creator or copyright owner, the relevant information is that the fan makes no ownership or authorship claims to the characters and situations.

Fan practices are not unique in their contextualization of the idea of proper credit. Jonathan Band and Matt Schruers point out that historical scholarship has similar norms that distinguish between the attribution owed when dealing with the in-group and that acceptable when dealing with the out-group (2005: 16-17). That is, historians expect that scholarly monographs will credit the work of other historians much more often and more specifically than popular historical works such as textbooks and encyclopedia entries (American Historical Association 2005). Historians, who generally rely on reputation more than money as compensation for their contributions to the sum of knowledge, care more about proper attribution within the profession than outside it.

More generally, audiences value attribution in a different way than they value trademarks for ordinary goods like soda. Authorization, which is what trademark law protects, is different from authorship. Consider a copy of Tom Clancy's *The Hunt for Red October* published by a pirate publisher in India versus an authorized "Tom Clancy's Op Center" novel written by a ghostwriter. Even if the pirate introduced a number of

Tushnet

typographical errors into *The Hunt for Red October*, many of us would feel that the pirated book had a stronger claim to being a real Tom Clancy novel than the authorized book.

Fan texts are a third type of creation, neither pure copies of another author's work nor authorized additions to the original. Fan authors are often explicit about their relationship to the real, canonical texts: the fan creations lack the authority of official texts. Because they are not canonical, fan stories can offer a thousand different ways that Mulder and Scully first slept together, none of which contradict the others, or one author can write "Five Things That Never Happened"—five alternate histories for a favorite character, all of which are, as the title states, repudiated by the author (*Because AUs Make Us Happy* n.d.). Lack of authority, which stems from lack of authorization, allows a freedom unavailable to an official canon striving for internal consistency.

who gets the blame?

Related to attribution and to moral rights against distortion is the question of who is *responsible* for the interpretations of the original text provided by fan creators. Texts invite interpretation, and making a text available to the public necessarily cedes some control over it, though copyright law has struggled to deal with this truism. The rhetoric used by courts in transformative use cases suggests that, to be fair, a transformative use must add new material that reflects critically on the original. According to the Supreme Court, a parody, by distorting elements of the original, causes readers to rethink the messages of the original, while a satire merely uses the original to "avoid the drudgery in

Tushnet

working up something fresh” and does not challenge readers to reassess the original (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)). Under the definitions used by fair use doctrine, a parody mocks the original specifically, like Weird Al Yankovic’s “This Song Is Just Six Words Long,” which is set to the tune of “I Got My Mind Set on You.” A satire borrows a familiar work to get its audience’s attention and to make fun of something other than the original, like a satirical song using a popular tune to lambaste a politician. Although both parody and satire require the addition of creative labor to change a work into a caricature of itself, a parody is more likely to succeed on a fair use defense than a satire is, because the parody has a better reason to copy from the original.

Using the parody/satire division as a guide, courts find that a legitimate transformation exists when the new work makes overt that which was present in the original text covertly (at least as some readers saw it): transformative fair uses make subtext text. In two important parody cases involving the Barbie doll, for example, Mattel’s attempts to protect its doll’s image by using copyright law were thwarted by courts that found that overtly sexualizing Barbie constituted commentary on Barbie because Barbie already had sexual connotations. (*Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002)). Another court used similar reasoning to reject Mattel’s trademark claims against Aqua’s popular novelty song “Barbie Girl” (*Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002)).

Even more fascinating is the discussion in the *Wind Done Gone* case about the relevance of homosexuality and miscegenation to fair use. The Mitchell estate didn’t

Tushnet

want *Gone with the Wind* to be associated with such controversial topics. The Eleventh Circuit Court of Appeals held that Alice Randall's insertion of homosexuality, in the form of a gay Ashley Wilkes, into the world of *Gone with the Wind* was an important part of what made her book transformative. The court quoted *Gone with the Wind*'s description of the Wilkes family as artistic and "queer" (*Suntrust*: 1270 n.26), a term already widely used to describe homosexuals when Mitchell wrote the novel (*Dictionary of American Slang* 1967: 415). (The similarities to slash fan fiction, which picks up on homoerotic elements in the original texts, are evident.)

In other words, the court held that transformation consists of making clear or exaggerated what was opaque or limited in the original text.⁵ As a result, the legal defense of parodies and other literary transformations protects critics as creators in their own right only when they draw deeply from a preexisting well. Because courts require a second-comer to criticize an element in the text rather than using the text to criticize something else—the parody/satire distinction—the fair use test asks whether the critic has found something in the original or has simply added unrelated content to it. As applied to fan creations, then, the test would find transformation if the new work was far enough from the original, but not too far.

A court's determination that a work is critically transformative is therefore also a ruling that the original author is partly responsible for the content of the critical work, often content the author finds extremely objectionable. There is, however, tension between courts' requirement that a transformative fair user must bring some subtext to light and their simultaneous celebration of the transformative fair user as an original creator in her own right. If adding new material were all that was required for

Tushnet

transformative fair use, as many legal theorists believe it should be, then the parody/satire distinction would be unnecessary. The persistence of the parody/satire divide indicates that courts are concerned with giving proper credit—or proper blame—to authors whose works inspire others to react by altering the original: if there is no real connection between an original and an unauthorized transformation, then it isn't fair, and isn't fair use, to connect the author with the new work. But if there is a connection, then the author's disagreement with or distaste for an interpretation isn't a justification for suppressing it.

Within fandom, the question of proper attribution often comes up as a question of characterization. Most fan creators are concerned to some extent with making the characters they use recognizable as related to the official versions. If they show Captain Kirk and Mister Spock having a sexual relationship, they want readers to see them as extensions of the canonical characters, not as two random men who happen to have the names "Kirk" and "Spock." Different readers may disagree about whether proper characterization has been achieved, but the goal itself is common, if not universal. Fans, like courts analyzing transformative fair uses, see their work as inextricably related to the source texts, bringing meaning out as much as they are putting meaning in.

attribution and moral rights

Lawyers have begun to warn copyright owners that fans make texts and that these texts must be taken account of in any strategy for managing relationships with fans.

Reciprocally, fans often have at least vague ideas about how copyright law would apply

Tushnet

to their activities. Concepts of proper attribution and credit play a major role in fan creators' theories of intellectual property (Tushnet 1997: 678-680). The practices of a community may provide attribution where it is not apparent on the face of the text, and the connections between original and fan creations are complex, with credit properly going in part to the original author and in part to the fan.

The doctrine of transformative fair use has difficulty with attribution when it ascribes creative labor to critics of a work who are restating what they see in the original. The more successfully a work is transformed in the technical legal sense, the more we are likely to be able to see that the evidence supporting the transformation was present all along in the original. The legal concept of transformative use denies the author the authority to control all interpretations of his text, not just practically but conceptually. This is in obvious tension with moral rights against distortion, and many legal scholars thus conclude that moral rights don't fit into the American copyright system. But, as fan practices demonstrate, not all moral rights are the same: attribution, though it may not be explicit, can and should be given to creators even if total control is denied them.

By contrast, moral rights against distortion appear even more ill-suited to the realities of creativity once we accept that criticism, mockery, and other uncomfortable transformations draw on material present in the original works. What an author intends to produce and what others understand her to have produced often diverge. Fan practices which emphasize the indelible connections between originals and unauthorized creative responses can thus help illuminate the meaning and implications of copyright just as copyright's fair use doctrine gives fans reasons why their unauthorized creations are neither unlawful nor immoral.

Tushnet

notes

1. My focus has been on U.S. law even though media fandom is a global phenomenon because U.S. law is unusually open-ended, whereas many other countries have limited exceptions to copyright for which fan creations are less likely to qualify, and also because U.S. copyright owners, like many other U.S. entities, are relatively swift to threaten lawsuits when they perceive an interference with their rights.

2. While I concluded in my article on the topic that fan fiction was generally fair use, I am not as confident about all fan creativity. In particular, the use of music in fan music videos is often hard to defend as transformative. Though editing footage to music often works as insightful commentary on the original movie or TV show, the music usually serves its ordinary function and doesn't gain new meaning, at least not in the way that a court is likely to accept as transformative for purposes of the fair use test.

3. Disclaimers in fan fiction are something like the "mouseprint" in ads, which is not really for consumers, who tend to skim over it, but works as a signal to regulators and competitors that the advertiser is aware of various legal requirements.

4. As Francesca Coppa pointed out to me, the social consensus about credit might be morally questionable, as when white performers take credit for popularizing African-American forms of music, and a consensus might also change over time as political and social trends lead to different origin stories. This is another reason that using law to enforce credit-tracing norms might not be a good idea.

Tushnet

5. Miscegenation, the other taboo topic, is even more deeply buried in *Gone with the Wind*. One might say that, in a slave society, miscegenation is inevitably part of the context.

bibliography

American Historical Association 2005, *Statement on Standards of Professional Conduct*.

Retrieved December 14, 2005, from

<http://www.historians.org/pubs/Free/ProfessionalStandards.cfm>

Band J & Schruers M 2005, "Dastar, Attribution, and Plagiarism," 33 *AIPLA Quarterly Journal*, vol. 33, pp. 1-23.

Because AUs Make Us Happy n.d. Retrieved December 13, 2005 from

<http://strangeplaces.net/challenge/five.html>

Brook, M n.d., *The Fan Fiction FAQ*. Retrieved December 13, 2005, from

<http://www.meljeanbrook.com/fanficread.php?file=fanficfaq.html&title=The%20Fan%20Fiction%20FAQ>

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994)

Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)

Dictionary of American Slang 1967, Thomas Y. Crowell, New York.

Gran, J 1999, *Fan Fiction and Copyright*. Retrieved December 13, 2005, from

<http://www.alternateuniverses.com/judygran/copyright.html>

KSNicholas n.d, *Site Map*. Retrieved October 27, 2004, from

<http://web.archive.org/web/20031014110731/members.aol.com/ksnicholas/>. This

Tushnet

page is no longer available on AOL's site. The Internet Archive has several versions, the last saved October 2003.

Lady Macbeth 2004, *Plagiarism—Please Help Stop Its Spread*. Retrieved December 13, 2005, from <http://forum.mediaminer.org/index.php?t=msg&goto=620709&>

The Lois & Clark Fanfic Archive FAQ n.d. Retrieved December 13, 2005, from http://www.lcfanfic.com/faq_archive.html#plagiarism

Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002)

Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002)

Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003)

Saxey E 2002, "Staking a Claim: The Series and Its Slash Fan Fiction," in R Kaveney ed., *Reading the Vampire Slayer: The Unofficial Critical Companion to Buffy and Angel*, I.B. Tauris & Co., London, pp. 187-210.

Sella, M 2002, "The Remote Controllers," *N.Y. Times (Magazine)*, Oct. 20, 2002, p. 68.

SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001)

Tushnet, R 1997, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law," *Loyola L.A. Entertainment Law Journal*, vol. 17, pp. 651- 686.

The Yuletide FAQ 2005. Retrieved December 13, 2005, from

<http://www.yuletidetreasure.org/faq.shtml>