

Analysis of Fair Use and Fan Culture on the Internet

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1 Introduction

In the early days of the internet, some of the first web users made sites to praise their favorite television shows and films. These types of sites are deemed fan sites, which come in a number of forms. Some simply discuss the events, characters, and various other aspects of the work, while others publish fan fiction created by visitors of the site and distribute portions of the original material. Some sites are show-specific or franchise-specific, while others are open to general discussion of various franchises. The producers of these film and shows, however, were wary in the ways fans were using their material and in the way in which these uses were being distributed.

While sharing amongst fans and fan fiction are not a recent creation, the movement of such fan activities to the internet has changed the dynamic in which the entertainment industry, which creates the media and holds the copyright to such works, and fans, who consume and use such material, interact. The two groups had reached equilibrium in the era before the internet age, where fan culture was largely an underground phenomenon, allowing media companies to ignore the ways in which this subculture used their works. The emergence of fan sites on the internet caused members in the entertainment industry to again examine the ways in which fans used their works and found some usages made by fans were not to their liking. In reaction, the industry started to protect their copyright-protected material by suing individual fans and fan sites they believed infringed upon the exclusive rights given to them through copyright law.

My paper focuses upon fan usage of copyrighted materials and the battles over this practice. Spotlighting conflicts from fans using materials copyrighted television and film, my thesis will support Henry Jenkin's argument that the entertainment industry's protection of copyrighted works directly conflicts with the standard creative process, which usually bases new works on already established forms. I will first focus the legal framework behind these online battles, discussing United States copyright and trademark laws, fair use defenses, and relevant court cases that have defined the fair use defense. After creating the legal framework, I will spotlight various conflicts between fans and the entertainment industry, the main issues behind these conflicts, and some pertinent examples of online the battles between fans and copyright holders on accepted use. I will then analyze the policy employed by the entertainment industry and demonstrate that such policy contradicts the intention of copyright and that such actions are bad business. I will then present various legal and political solutions to these problems, explaining how each component will help to clarify acceptable fair use on the internet and how the change would benefit the parties involved.

2 Legal Issues

2.1 Industry Protections

The original producers of new material (for the purposes of this paper, the entertainment industry) have a number of protections under United States law. These laws create the legal framework that the industry uses to control the uses of its original material. In the context of copyright owners and fan sites, the most pertinent laws are in copyright law and several trademark laws that give the industry far-reaching control over its creations.

2.1.1 Fundamental Copyright Law

The Copyright Act, as written in Title 17 of the United States Code (17 U.S.C. §106 (2003)), gives the copyright owner explicit powers over the work created. While the protections and exceptions change between mediums, the majority of media (literary works, musical works, pictorial, graphical and sculptural works, sound recordings and motion pictures and audiovisual works) have the same protections under the law¹.

2.1.1.1 Right to reproduce

Provision 106(1) of Title 17 gives the copyright owner the exclusive right to reproduce copyrighted works in copies or records. Any copies made without the consent of the copyright owner is infringement. Thus, any site that posts transcripts of a television series, displays pictures or video clips of a show or movie, or provides sounds recordings from the material are making copies of the original copyrighted work². If they do not receive consent from the copyright holder, they are infringing copyright.

2.1.1.2 Right to produce derivative works

Provision 106(2) gives the copyright owner exclusive rights to prepare derivative works based upon the copyrighted work. Under this provision, any work fans base upon copyrighted material, such as fan fiction or the site in and of itself (since it bases itself on the copyrighted material it analyzes) violates the copyright of the owner.

2.1.1.3 Right to distribute

Provision 106(3) gives the copyright owner sole right to distribute copies of the copyrighted work to the public. As a result, any site that allows visitors to access and download copyrighted material, such as photographs, music clips, or entire episodes, infringe upon the owner's copyright.

2.1.1.4 Right of public performance

Under Provision 106(4), the copyright owner has exclusive rights to perform the specified work publicly. Since the court deems most fan sites as public areas (since they are open to the general public, even if they require memberships or subscriptions), any

¹ Halpern, Sheldon W., Nard, Craig Allen, Port, Kenneth L (1999). Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark. Boston: Kluwer Law International. P.66-112.

² Ogbu, Cecilia (Spring 2003). "Note: I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners." Southern California Interdisciplinary Law Journal.

showing of motion pictures or audiovisual work would violate the copyright given to the work.

Provision 106(6) gives the copyright owner exclusive rights to perform sound recordings publicly when performed in a digital format. This provision was added to explicitly protect music recordings performed over the internet. Any site that allows visitors to download sound recordings of copyright-protected materials is infringing copyright.

2.1.1.5 Right of public display

Provision 106(5) also gives the copyright owner exclusive rights to display the copyrighted work publicly. A site that features a copyright-protected image will infringe copyright if it allows visitors of the site to view such works.

2.1.2 The No Electronic Theft (NET) Act

The No Electronic Theft Act³ makes those who willfully infringe copyright for profit, or who infringe more than \$1000 worth of copyright-protected materials criminally liable. The provisions also state that evidence of the reproduction and distribution alone does not constitute willful infringement. This law leaves a dangerous grey area for creators of fan sites, since the copyright owner must prove that the website creator knowingly stole copyrighted materials, but could result in jail time if the owner proves the fan had such knowledge. This result is that many site administrators include disclaimers that state they do not own the copyright to the material posted on their sites in an effort to prevent willful infringement.

2.1.3 Trademark Laws

Several trademark laws also protect the creations of producers. Though courts generally analyze these cases with less scrutiny than copyright laws, the entertainment industry effectively uses these laws to protect certain aspects of created works that are not explicitly protected under copyright law.

For example, while an image of Barbie would be protected under copyright law, the actual character of Barbie itself might not be protected⁴, since the courts have not resolved whether the character should be allowed copyright (based on the level of character development⁵) or should not be copyrighted independently from their source material⁶. Nevertheless, the character Barbie is protected, albeit not on the same grounds, under trademark law by Mattel.

³ 18 U.S.C. § 2319 (2003); 17 U.S.C. §506(a) (2003).

⁴ See Halpern, Sheldon W. et al (1999). P. 38-40.

⁵ *Silverman v. CBS, Inc.*, 870 F.2d 40 (2d Cir.), cert. denied 492 U.S. 907, 109 S.Ct. 3219 (1989).

⁶ *Olson v. National Broadcasting Co.*, 855 F.2d 1446 (9th Cir, 1988); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132, 99 S. Ct. 1054 (1979).

2.1.3.1 *Federal Trademark Dilution Act of 1995*

The Federal Trademark Dilution Act of 1995 (15 U.S.C. § 1051, 1125-1127 (1996)) amended Section 43(c) of the Lanham Act⁷, which defines trademarks and creates a right of incontestability. The Dilution Act gave the trademark holder the right to receive retribution if the trademark was diluted by the use of another symbol. Under this provision, any site that uses the names of characters or other trademarks (eg., Superman's cape or *Star Trek* character Spock's Vulcan ears⁸) can be liable for trademark infringement if the trademark holder proves that the use of the symbol in question lessens the distinctive quality of the famous mark⁹.

While the court formulated a distinctive test for evaluating the likelihood of dilution¹⁰, there has been no consistency from the courts on whether dilution has occurred¹¹. As a result, this kind of protection is much weaker than the more traditional copyright laws.

2.1.3.2 *Anticybersquatting Consumer Protection Act (ACPA)*

The Anticybersquatting Consumer Protection Act (15 U.S.C. § 1125(d)) follows the Federal Trademark Dilution Act in protecting the trademark of famous brands. With the intent of preventing profiteers from holding URLs of famous trademarks, such as www.nbc.com or www.thesimpsons.com ransom, the act finds certain holders of URLs liable for civil action. If the owner of the URL obtains the rights in a malicious manner to make a profit and holds the URL of a famous trademark, the owner will violate trademark.

In practice, the entertainment industry regularly tries to stop fan sites that use trademarked names, such as <http://www.nohomers.net>, which bases its URL on *The Simpsons* character Homer Simpson. Of the thousands of cease-and-desist letters presented on these grounds, very few fan sites have taken their case to court, thus leaving the effectiveness and breath of this law unresolved.

2.2 *Fan Defenses*

While the industry has a number of legal protections for works they own, consumers and fans have protection under the law as well. These protections mainly fall under specific exceptions of copyright and protection of free speech, as described in the First Amendment.

2.2.1 **Fair Use**

While fans have rights to modify copyrighted materials under the First Amendment's protection of parody, much of fan protection comes through the fair use exception¹² in the Copyright Act. While other sections of the Copyright Act (17 U.S.C. §108-121 (2003)) list specific limitations to copyright holders' exclusive rights, fair use is a more general

⁷ 15 U.S.C. § 1127 (1997).

⁸ Jenkins, Henry. "Digital Land Grab." *Technology Review*. March/April 2000.

⁹ 15 U.S.C. § 1125(c).

¹⁰ *Mead Data Central v. Toyota Motor Sales, U.S.A., Inc.* 875 F.2d 1026 (2d Cir. 1989).

¹¹ See Halpern, Sheldon W. et al (1999). P.335.

¹² 17 U.S.C. §107 (2003).

limitation. Its purpose is to “[permit] and [require] courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹³

After years of conflicting court cases that muddled what purposes could constitute fair use¹⁴, the Supreme Court tried to create a fundamental fair use principle with which to analyze claims. In *Campbell v. Acuff-Rose Music, Inc.* (510 U.S. § 569), the court found that the four factors involved in considering an exception of fair use — (1) purpose and character of use, (2) nature of copyrighted work, (3) amount and substantiality of portion used, and (4) effect of value or potential market of copyrighted work — had to be weighed together and viewed as a whole¹⁵.

2.2.1.1 Purpose and character of use

The first factor examines “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” Additionally, the court may also examine whether the appropriated work is transformative in the sense that the infringer is reworking purpose to the work. This transformative quality is usually the more heavily weighted of the two, since allowing the transformation of copyrighting material sponsors more creativity in society, thus fulfilling the original intent of copyright.

For fan sites, this means that with all other factors being equal, commercial fan sites (including sites that generate revenue solely from selling advertising space) that offer criticism, commentary and creative works would have better copyright protection than sites that are nonprofit, but do not change the copyrighted work in any appreciable way. Here, the court would view the vast amounts of criticism and commentary more creative than a site that merely reposts original pictures, meaning the former site is greatly transforming the original work and should be more likely to receive exemption under a fair use defense.

Additionally, transformation is seen as a qualitative, so converting a file from one format to another or from an analog copy to a digital copy is not seen as transformative if the final output of the file (the media as seen) is qualitatively equivalent to the user. Thus, saving an analog broadcast of a television episode into a digital format does not constitute a transformative work because the viewer sees the same content when played.

2.2.1.2 Nature of copyright work

The second factor analyzes the nature of the copyrighted work. This factor checks to see how strong the protection for a specific copyrighted work should be. The court deems that creative works should be better protected by copyright than factual works. As a

¹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

¹⁴ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218 (1985).

¹⁵ “Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” (510 U.S. § 569).

result, it is more difficult to use a fair use defense when using copyrighted creative works than when using copyrighted factual data or news reports.¹⁶

In most cases, the nature of the copyrighted work is the same throughout most fan sites, since most of the copyrighted material originates from creative expression, as opposed to factual reporting. The only differences come when a site reposts a news article about the show in question (such as newspaper articles), or when it gives information about an actor outside the context of the show, since these works are factual in nature.

2.2.1.3 Amount and substantiality of portion used

The third factor looks at “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” This is mainly a qualitative factor that examines how the portion of material taken relates to the work as a whole. Since it is qualitative, the court also takes into account significance of the portion taken in the new work, since a small portion of an original work greatly used in the new piece has to be significant; otherwise, it would not have been used so extensively in the new work.

Fan sites that base most of their materials on the original copyrighted material would not be able to use a fair use defense in most cases. Usually, such fan sites include sites that either uses entire works (like posting entire songs or television episodes) or have portions of the original work constitute a significant portion of the new piece (e.g., audiovisual frame grabs, character biographies, show trivia, etc.). However, there is no standard measure that states how large a (qualitative) portion another user can use while still being exempt under fair use.

2.2.1.4 Effect on the potential market for or value of the protected work

The fourth and final factor examines “the effect of the use upon the potential market for or value of the copyrighted work.” This factor is usually the most heavily weighted, since it most directly affects the holder of the copyright.¹⁷ It looks at how the infringement affects already existing markets and reasonably developing markets (since every use is potentially a future market, the court limited the scope of future markets.¹⁸) and sees if the infringing work usurps a market that should be an exclusive right to the copyright owner.

This factor protects criticism that dissuades people from buying an original work, but also does not protect works that would revive or generate a new market for the original material¹⁹. As such, a site that sharply criticizes original works, like “Television Without

¹⁶ *Stewart v. Abend*, 495 U.S. 207, 237, 110 S. Ct. 1750 (1990). (“In general, fair use is more likely to be found in factual works than in fictional works.”)

¹⁷ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566, 105 S. Ct. 2218, 2234 (1985). (“This last factor is undoubtedly the single most important element of fair use.”)

¹⁸ *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 81 (2d Cir. 1997). (“We have endeavored to avoid the vice of circularity by considering ‘only traditional, reasonable, or likely to be developed markets’ when considering the challenged use upon a potential market.”)

¹⁹ *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980).

Pity”²⁰, which goes in great depth to ridicule approximately 40 television series, would fair well in this analysis, since it uses portions of copyright-protected works to emphasize criticism.

Alternatively, sites that either adapt copyright-protected works to another medium (such as creating a filmed adaptation of a novel) or trade copies of material not yet on market (such as tape swapping of cancelled television series) would not stand well against this examination, since these efforts usurp the need for future markets, such as film or DVD markets. This factor also looks at the effect of the fan site to the official site made by the copyright holder. If the plaintiff proves that unofficial fan sites usurp the need (and therefore, value) of the official site, the fan site would not fair well in this factor.

2.2.2 Parody

In the eyes of copyright infringement, parody is a special protection for fans because it is protected by the First Amendment’s right to free expression. Since parody must substantially mimic the original work for it to be effective, the right to free expression outweighs many of the exclusive rights of the copyright owner, even if such new work creates market confusion.²¹ The court finds that “a parody is entitled at least to ‘conjure up’ the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.”²²

This qualifier distinguishes parody from satire, which uses the original work to comment on social matters without ridiculing the work it is emulating. While the court finds that “parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright laws,”²³ only parody has special protection from copyright infringement. In *Campbell v. Acuff-Rose Music Inc.*, the court found that parody must mimic the work it is mocking to make its point, whereas satire can stand on its own and must justify borrowing from the original work.²⁴ The result of this ruling is that fans have plenty of freedom when creating parodies, but do not have any extended liberties if the new work is a satire, that is, the court deems the satire on the level as simply copying the original piece for transformative use.

²⁰ <http://www.televisionwithoutpity.com>

²¹ *Cliffs Notes, Inc., v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (1989).

²² *Elsmere Music, Inc., v. National Broadcasting Co.*, 623 F.2d 253 (2d Cir. 1980).

²³ *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

²⁴ “If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” (510 U.S. 569).

3 Current Battles

The penalties for copyright infringement, when not criminal, are potentially very hefty.²⁵ As a result, most fans when ordered by a copyright holder to cease-and-desist their activities generally do so without defending themselves in court. What this also means is that there is no substantive case history on what the court deems fair use in the hands of most fans in terms of usage on the internet.

The most relevant case that describes the legal interaction between copyright holders and fans is *Campbell v. Acuff-Rose Music, Inc.* While *Campbell* was helpful in defining how new works should be evaluated under fair use to evaluate infringement, the court may find the use of original material on fan websites has little in common with Campbell's work. The main contrasting detail is that court saw the song as a clear parody of Roy Orbison's song "Oh, Pretty Woman," the song upon which Acuff-Rose Music claimed Campbell infringed. Since it was a parody, the group was given much more leeway to copy the original work than if the new song was not a parody. While this case may help fans that produce parodies of original works, it says nothing about other transformative works that are not parodies or non-transformative works.

The lack of case history only allows political history (such as the battles between Warner Brothers and legions of young Harry Potter series fans) to be pertinent and leaves much room for speculation over what would constitute copyright infringement. Even if more cases were to be decided in court, this type of speculation is still necessary, since each transgression of copyright is analyzed on a case-by-case basis. In addition, most fan-produced works differ in multiple factors used for analysis when the court evaluates fair use. The only clear-cut conclusion can be drawn when a copyright-owner claims exclusive rights over uses it does not control, such as claims for second sale of a work.

3.1 Main Issues

While there is no case law on these alleged infringements, many copyright holders in the entertainment industry use the law to try and stop fan websites they claim violate their exclusive rights given through copyright. Since most sites simply try to avoid litigation by removing the alleged-infringing works, there is no evidence to cite how a court would rule in many of these situations.

3.1.1 Distribution

The main issue that arises from fan use on the internet is that any use by fans of copyright-protected material without the copyright owner's consent is violation of at least the owner's exclusive right to distribution. This is usually what makes cases involving fan use on the internet different from earlier cases of individual fair use. Where a fan may see simply an easier way to share the same uses enjoyed before the advent of the internet, the copyright owner and courts see a much more efficient distribution center that

²⁵ Damages are either the sum of the actual damage and the infringer's profit, or a statutory damage between \$750-30,000. Depending on the type of infringement (willful or innocent), statutory damage can decrease to \$200 or increase to \$150,000 per act of infringement. (17 U.S.C. § 504(c)).

has a higher potential of negatively affecting existing and future markets of the original work.

3.1.2 Fan Sites as Commercial Interests

Another factor that is consistent throughout most cases is the court's view that fan sites which collect advertising revenue should be seen as commercial sites. Many fan sites collect advertising revenue to offset the cost of maintaining the site, meaning the cost of bandwidth and servers. This income usually does not pay the creators of the media of the site. For example, a site that serves as a place to write stories about *Xena: The Warrior Princess* would accrue advertising income to pay its internet service provider for bandwidth and also to pay for maintenance of its servers. This income would not go to any of the fan writers. Since many fans and site administrators do not profit from these site, they believe that the site would not be seen as commercial. This difference of viewpoint has caused many to misinterpret their position relative to fair use, since many think that the court would favor the defendant in view of the first factor of fair use (purpose and character of use).

3.1.3 Use of Characters in Transformative Work

Another issue that comes forward in analysis of fan's copyright infringement is the use of copyright-protected characters. The copyright law gives exclusive right to produce and distribute derivative works to the copyright holder. This is intended to keep others from making alternate movies of popular originals, reducing possible future earnings to the copyright holder. However, the same law that keeps profiteers from making a knock-off movie featuring the character James Bond also prevents schoolchildren from posting their stories about Harry Potter and Hogwarts on the internet.

There is no factor in fair use that would differentiate these two uses. The only difference between the two uses is the former was explicitly made for profit. While the latter had no intention for a commercial purpose, posting the story on a site that accrues revenue would make the two works equivalent in the eyes of the copyright holder and the courts. Since both have potential to usurp the future market of the original work (sequels and written derivative works are traditional markets), the courts would likely find that neither could evoke a fair use defense.

However, the protection of the fictional character by itself is contentious. The past decisions by the Second and Ninth Circuit courts created conflicting tests on whether a character should gain copyright protection, as well as created a debate over when the court should evoke trademark tests. At first, the Second Circuit court in deciding *Nichols v. Universal Pictures Corp.* created the "sufficient delineation test," a test that mandates characters can only be protected if they are sufficiently developed in the underlying work.²⁶ In a later case, the Ninth Circuit court decided that a character can only be

²⁶45 F.2d 119 (2nd Cir. 1930) ("the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly.")

protected if he or she “really constitutes the story being told.”²⁷ This means that the character has to be developed outside the context of the story. This test is, in turn, much harder to apply than the sufficient delineation test. The courts also use tests associated with trademark law, such as the “look and feel” test, which examines whether the new character has the same look and feel as the original, to decide copyright cases.²⁸ This is problematic for fans because copyright has much better protection than trademark.

3.1.4 Implied Consent

Many fans believe they can present a defense of implied consent. Implied consent is given when a copyright holder has known about the fan’s works and either encouraged such use or allowed fans to continue without contention. Since the holder implicitly consented, he cannot later attempt retribution for the creation of infringing works or distribution of original works on the site. This is strongest when “there is express consent by the copyright owner or [he gives] some statement that he does not regard the defendant's acts as infringing or that he has no objection to the defendant's work”²⁹ While this is usually a very strong defense, many fans believe they have implied consent to post derivative works on the internet when the author has given no such right. This usually occurs either when the author implies consent for derivative works, but does not extend that consent to works posted on the internet. This also occurs when multiple entities hold copyright to the same material, such as when J.K. Rowling, author of the Harry Potter series, gave consent for fan fiction on the internet, while Warner Bros., who holds the copyright for the *Harry Potter* films, did not give such consent. While Warner Bros.’ refusal to give consent alone does not mean fans were guilty of infringement infringement, fans cannot use the implied consent defense in these cases.

3.1.5 Plot Synopsis and Screenplay Excerpts

A large number of fan sites give either plot synopsis of every episode of a particular television series or plot and screenplay excerpts from a film. Based on similar cases involving print media,³⁰ such recapping would not be defended under fair use, since recounting the events in a fictional work is non-transformative. The synopsis also copies from the heart of the original work, since it only details the most important plot points and quotations from the original work. As such, some fans might substitute the plot synopsis for watching the original work, which negatively affects the market of the original work, thus making most of the factors used in assessing fair use favor the copyright holder. Thus, in order to invoke fair use, a fansite must inject creative original content into each plot summary to make the summary transformative An example of such synopsis are the plot summaries at “Television Without Pity”, which detail television episodes in their entirety, but maintain a running commentary throughout that is almost as substantial as the television episode the writer is recounting.

²⁷ *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954). (“It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright.”)

²⁸ 562 F.2d 1157, 1169 (9th Cir. 1977); 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979).

²⁹ *Coleman v. EPSN, Inc.*, 764 F. Supp. 290, 296 (S.D.N.Y. 1991) in context of equitable estoppel, which is similar to implied consent.

³⁰ *Twin Peaks Prod., Inc. v. Pub. Int’l, Ltd.*, 996 F.2d 1366

3.1.6 Sampling

Some fan websites use small portions of an original work in otherwise original works. This usually takes the form of either referencing an aspect of the original work, or incorporating small clips of the original in the story itself. Many commercial films partake in this practice as well. Most of the time, referencing the original material (when the original material comes from a literary or audiovisual source) comes in the form of parody and as such, enjoys fairly strong defense against infringement claims. However, when the new work does not explicitly parody the original work, it is much more likely to be guilty of infringement outside of the defense of fair use. The main issue here is the extent of the portion used. When taking quotations from a television series episode or film, the duration of the clip is very short and constitutes a very small percentage of the original work. Alternatively, portions taken from a sound recording usually constitute a larger portion of the original work and are much more likely to replicate the heart of the original.³¹

3.1.7 Parody as a Special Defense

Parody enjoys a defense separate from all other kinds of literary devices in respect to use of copyright-protected material. This helps fans in that it gives them more leeway in using copyright-protected material, but it also limits the types of stories can construct. As seen by *Dr. Seuss Enterprises v. Penguin Books*,³² the court very strictly examines the construction of parody, leaving other styles of writing that require large amounts of the original material in order to be effective uncovered.

For example, a large amount of fan fiction comes in the form of “slash” where fan authors have characters that are heterosexual in the original work pursue homosexual relationships in the fan work. While the plots have almost nothing to do with the original work (and at some point, neither do the characters), they have a much weaker defense than a story that explores the same relationship in order to ridicule the original work. Also, creators of parody in the fan fiction world tend to be male, whereas the creators of slash tend to be female, so the current special defense of parody effectively bars females from the creating the types of stories they prefer.³³

3.1.8 Trademark Dilution

Copyright holders deem some fan sites that use URLs associated with aspects of their work protected under copyright (such as “TheForce.net”) as cybersquatters, meaning the administrator of the site maliciously obtained the right to the domain name in order to make a profit by selling it to the original copyright owner. The copyright holder tries to attain the rights to a domain name through the Uniform Dispute Resolution Policy, which allows those with trademark rights in domain names to have the name transferred to them

³¹ *Princeton Univ. Press v. Michigan Document Serv., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996). (Noting that a taking of even 5% of a work was not “insubstantial,” although the value of the portion taken is also relevant)

³² 109 F.3d 1394. The court found that the rhyming structure, while mimicking Dr. Seuss’ style in his children’s book *The Cat in the Hat*, is not a parody because it does not mimic the book itself, but rather uses the structure to commentate on a different subject matter, making the book a satire, instead of a parody.

³³ Jenkins, Henry. Telephone Interview. 26 11 2003.

through arbitration.³⁴ Through this policy, copyright holders have the ability to transfer URLs in a cheaper way than obtaining them through copyright litigation.

This policy is more powerful than intended because many fan sites shut down before the decision comes from arbitration. Many times, the very threat of losing the name causes site administrators to shut down sites before ever reaching arbitration. This stems from the fact that many people confuse the rights extended from copyright to the rights extended from trademarks. People therefore assume that because they used a URL that contained a copyright-protected name, they must be in violation. However, trademark only sees a violation if such a URL causes brand confusion with the trademark of the owner. In many cases, the courts do not find confusion and rule against the trademark owner, but many fan sites do not want to take this risk.

3.2 *Pertinent Cases*

While there is not much case law that directly correlates to fan usage on the internet, there is some history behind the industry's protection of copyright through litigation. In these cases, the copyright holder served fan sites with cease-and-desist orders. The sites did not respond in court; these fans went outside of the courtroom to gain support for their cause with differing results.

3.2.1 Harry Potter Series

Around the time Warner Bros. released the first film adaptation of the Harry Potter series, *Harry Potter and the Sorcerer's Stone*, there were a large number of fan sites dedicated to the character and the series of novels. Many of these sites were run by schoolchildren and they consisted of forums where other fans could post their fiction onto the internet. The author of the series, J.K. Rowling, encouraged this practice, believing that such writing helped literacy among the children. Scholastic, who publishes the novels, was also tolerant of the practice.³⁵

Warner Brothers, however, became leery of the tremendous volume of fan fiction and fan sites being generated, and started sending a large volume of cease-and-desist orders to site administrators, almost at random, not accounting for who was using the site and what types of fiction were being posted.³⁶ In response, many of these children writers banded together and began the "Harry Potter Wars," which were mainly fought throughout the internet and in traditional media. In the public eye, Warner Bros. looked like it was picking on a bunch of little kids, which after causing a great deal of negative publicity, along with the alienating its main fan base, resulted the company recalling their cease-and-desist orders. Afterwards, the fans appreciated the company's gesture and saw it as an act of good faith and felt that the company was trying to work with them.

³⁴ See policy at <http://www.icann.org/udrp/udrp.htm>.

³⁵ "Writers University Fan Fiction Policy: J.K. Rowling and Harry Potter!" <http://www.writersu.net/?link=authpolicy&id=108>

³⁶ Jenkins, Henry. Telephone Interview. 26 11 2003.

3.2.2 *Star Wars*

George Lucas' and Lucas Films' policy towards fan fiction in relation to the Star Wars enterprise has changed over time. At approximately the time the internet became popular in the United States, the owners of the Star Wars copyright tolerated some fan fiction, stipulating that such fiction could only be published were it not for commercial gain and did not contradict the family-friendly image of the original work.³⁷ The proliferation of the internet in conjunction with the production of the movie, *Star Wars Episode 1: The Phantom Menace*, resulted in Lucas Films changing their policy so that they were against any type of fan fiction whatsoever.

Slightly easing their policy, the copyright owners allowed the fan fiction under the same restrictions as before, but asked for fans to post these works on the official site for *Star Wars* fan fiction (fan.starwars.com). Fans of the series greatly protested Lucas Films' attempt to control their creative works and made many sites to directly contest the official fan site. The conflict between Lucas Films and unofficial *Star Wars* sites has since subsided. Additionally, George Lucas has a tendency to give larger leeway to fan filmmakers than to writers, a result of his early work before becoming a commercial filmmaker.³⁸ He also restricts the types of stories being told, restricting the official fan works competition Lucas Films sponsors to only include works that are either parodies or documentaries.

4 Contradictions in Policy

Though copyright law intends to sponsor creativity in the arts, the policies practiced by those who hold the exclusive rights to popular works contradict this very purpose. The industry usually protects the copyright of a work in order to maximize profits from the markets created by the work. This is logical because financial gain is a main reason to create and distribute a creative work. However, policies that protect these exclusive rights by attacking their main consumers undercut this intended purpose. Fans only create new media for works with which they find a deep connection.

Additionally, fans that spend the energy to create, discuss, and distribute parts or copies of the original work are usually the most dedicated and the most likely to nurture future markets for the work. For example, fans of the television series *Family Guy* traded episodes of the series on the internet when the series was cancelled. This underground fan base was part of the reason why Cartoon Network picked up syndication rights for *Family Guy* and why Fox produced DVD box sets of the series. While the distribution of the work clearly violated copyright, the practice helped sustain an otherwise dead series (and revenue stream), while Fox's copyright policy would have destroyed sites that shared these episodes or published clips and quotations from the series.

³⁷ "Writers University Fan Fiction Policy: Star Wars! Policy: No commercial gain, Doesn't sully image." <http://www.writersu.net/?link=authpolicy&id=112>

³⁸ See Jenkins Interview.

4.1 Original Industry Works Derivative

Studios claim fan fiction is a violation of copyright because the use of copyright-protected characters and environments violates the copyright holder's exclusive rights to derivative works. While studios do have a legitimate legal claim to exclusive rights for derivative works, they are holding their fans to a standard they themselves cannot uphold. Major studio works regularly derive much of their creative content from copyright-protected works, with little or no consent from the original copyright holder. Additionally, some studio works regularly derive content from the public domain and later claim the content is protected by copyright because of its inclusion in the studio work.

4.1.1 Kill Bill

Quentin Tarantino's most recent film, *Kill Bill*, comes from a plethora of influences, listing 88 references in Tarantino's film to earlier films.³⁹ If held to the same standards as fans, Tarantino would have needed consent from each entity that held copyright to each of the films he referenced (mainly because such references were laudatory, as opposed to being part of a parody). Were Tarantino unable to attain consent from the copyright owner, he would need to change his script in an effort not to incorporate copyright-protected ideas into his otherwise original screenplay.

While Tarantino and his production company, A Band Apart, had the resources to find the copyright holders for each of the referenced films and gained permission to use part of these works, most fans do not have the man power or the influence to attain these permissions. As a result, the creative freedom usually enjoyed by writers, directors, and producers already in the industry is unavailable to those who have yet to enter. This creates a division on the amount of creativity allowed based on one's standing in the industry, allowing only established artists creative freedom that is assumed to be universal.

In Tarantino's case, he was not referencing the large volume of movies in a fit of conceptual laziness, but rather because he absorbed the storytelling structure and characters presented in works he saw and incorporated these ideas into his own creative endeavors. This is a standard practice by those who regularly watch media.⁴⁰ Basing new creative works on already established premises and characters has historically been part of mass media arts and copyright holder's efforts to stop this process impedes creativity and runs counter to the original intention of copyright.⁴¹

4.1.2 Disney's Feature Films

Disney's feature films of classic folk and fairy tales are example of a studio's derivation of material in the public domain and subsequent protection of the same characters and plots under copyright law. Most of Disney's featured animated films, such as *Cinderella*,

³⁹ "Movie links for: Kill Bill, Vol. 1 (2003)" <http://www.imdb.com/title/tt0266697/movieconnections>.

⁴⁰ Thorburn, David. "Television as an Aesthetic Medium." *Critical Studies in Mass Communication* 4 (1987) : 161-173.

⁴¹ See Jenkins, Henry. "Digital Land Grab."

Sleeping Beauty, *The Little Mermaid*, and *Mulan* were based on centuries-old tales and folklore with established storylines and characters. Because these stories were so old, they were in the public domain, allowing anyone to take parts of the story or the entire story itself.

If an author were to base any fiction on the Disney's interpretation of these already-established characters (like fan fiction based on Disney's interpretation of *Aladdin* or *Beauty and the Beast*), the author would infringe upon the copyright of Disney.⁴² This makes little sense because the fan author at worst is making a derivative work of already-derivative work. While Disney made a significant creative effort in changing some of the character traits and plotlines when converting a story into an animated feature, the same amount of change occurred when the author made a tangential story from the events that occurred in the feature. The fact that the story has similarities to the derivative work created by Disney should not prevent the fan author from writing stories similar to that of Disney, mainly because they should both be seen as derivative works from the original that is in the public domain. This is also why the Harry Potter fan writers should be given creative freedom because the author of the original works (J.K. Rowling) gave implied consent, whereas the creator of the derivative works (Warner Bros., who made the film adaptations) did not. The status of the original work should take precedent over the status of the derivative works.

4.2 Industry Legal Practices

Without accounting for the originality of the work, entities in the entertainment industry maintain policies that stretch protection beyond the original intention of copyright. Through various tactics, companies in the entertainment industry are able to scare fans from producing works using copyright-protected material even when the fan has the legal right to do so.

4.2.1 Overreach Through Cease-and-Desist Orders

The first step companies in the entertainment industry take in protecting their exclusive rights is to send cease-and-desist orders to the alleged infringers. In cases where the alleged infringers are also corporate entities (such as in *Campbell v. Acuff-Rose*, where the distributor was Luke Skywalker Records), these cease-and-desist orders usually lead to court appearances with a judge making a decision.

However, when copyright holders distribute these orders to administrators of fan websites, the subsequent reaction is to close the site rather than engage in litigation. This is because it is prohibitively expensive for administrators of these sites to obtain legal representation, mainly because these sites do not operate for profit, and thus have to pay lawyers from personal expenses. This lack of representation legally, coupled with little understanding of copyright and trademark laws, cause fans to believe that their content is illegal.

⁴² Lessig, Lawrence. "Free Culture: Keynote from OSCON 2002." Lecture. 15 08 2002.

The holders of copyright have seen this pattern and continue to hand out cease-and-desist orders expecting fans to obey the order rather than contest it in court. The expectation has led companies to overreach in their protection of copyright and send cease-and-desist orders in cases where the infringer is obviously working within the confines of fair use (such as in the Harry Potter cases, where fans received implied consent from the author). While this is not illegal, it is a policy that alienates the company's primary fan base. This practice also might undercut the legitimacy of more heinous infringement, where infringers believe the company is sending out orders to anyone who supplies copyright-protected works, regardless of the manner in which it is used.⁴³

4.2.2 Use of Trademark to Strengthen Copyright

Though trademark and copyright are two separate fields of intellectual property law, courts have combined the two in making rulings on the use of content. This combination has helped strengthen the control held by the copyright holder because trademark case law includes tests, such as the "look and feel" test, that protects more aspects of a creative work than copyright.⁴⁴

Under the look and feel test, for example, a person would be in violation if a new character has the same look and feel as the trademarked work. This then gives exclusive rights found in copyright to works that are only protected in trademark. As copyright gives much more control than trademark, the use of trademark test therefore gives more control to holders of these rights than originally or logically intended.

5 Solutions

The interaction between copyright holders in the entertainment industry and fans on the internet is a complex issue on both legal and political grounds. Therefore, a simple legal or political solution is insufficient, as these solutions would too greatly shift the power in one direction. There must be changes in both intellectual property law and in industry policy in order to fans have interact with protected media with little or no conflict.

A change in only copyright laws would either take too much control from or give too much power to the copyright holder. For example, no longer protecting derivative works would take away control initially given to copyright holders, whereas adding trademark tests and protection to copyright would give the copyright holder too much control.

Additionally, only changing industry policy would not solve this problem, as the legal background behind the policy change is not firm. If production companies universally changed their policy and gave implied consent to fans to use their works, there is no disincentive that prevents them from lifting such consent some time in the future. This change in policy would quickly come to an end if fans got too greedy and claimed acts of willful infringement (such as file-sharing of television episodes and movies as a substitute for the original work), were approved under implied consent.

⁴³ See Jenkins Interview.

⁴⁴ See 562 F.2d 1157, 1169 (9th Cir. 1977).

5.1 Court Challenges

The first step towards reaching a solution to many of these major issues is through decisions in court. A sizeable case history of courts analysis of fair use issues, like the use of sampling, characters, and derivative works by fans on the internet would help solidify speculation based on earlier fair use cases. Earlier fair use cases are an insufficient foundation for complete analysis because of the way the internet changes the uses of a work. As such, the factors used in fair use analysis changes significantly. Thus, a relevant case history would greatly help fans and copyright holders find an acceptable set of uses that are not dependent on the approval of the copyright holder.

5.2 Changes in Copyright Laws

There are some changes in copyright law that will better define both the exclusive rights of the copyright holders and fair use of fans on the internet. These suggested changes are mainly to clarify grey areas that produced some of the major conflicts between producers and consumers. Most of the confusion comes from the change in the nature of the usage when material is posted on the internet, coupled with various federal circuit court decisions that muddled the analysis of fair use.

5.2.1 Better Define Internet Use

The internet changes the nature of various uses of copyrighted works. If one tapes a television episode and gives it to a friend, the action is considered fair use, whereas posting the same episode on a public forum on the internet is considered infringement because of the much larger scale potential for distribution and public performance. In order for the court to properly rule on infringement of copyright holder's exclusive rights, such as rights to distribution and to public performance and display, the court must first rule if the internet infringes on these rights and if so, to what scale.

The definition for distribution needs to examine whether personal and community websites also serve as large distribution centers. This is important because some sites are semi-private in that they require membership for access, which causes limited distribution of content to only members of the site. It is unclear whether a court would find sites that make efforts to limit the extent of distribution to small numbers still violate the exclusive rights of distribution held by the copyright holder. If there is a distinction (other than that anything available on the internet constitutes appropriate means for distribution), it gives fans some freedom in posting materials without infringing on the rights of the copyright holder. Similarly, courts need to make the same kind of examination about the internet's role in public displays and performances. One of the primary uses the internet offers is to provide an easy way to present works to the public at little cost. The court needs to rule if there are ways individuals can post works on the internet without it being considered a public display.

Currently, courts consider most uses on the internet as potentially violating exclusive rights to display and public performance/display. Subsequent rulings examining specific implementation of websites, such as restriction of access, would at worst codify the court's previous assumptions and in more optimistic cases, deem some site architectures as not infringing the rights of the copyright holder. While most fan sites would likely not

comply with these implementations (most fan sites try to be as public as possible), the court could give fans options that would not automatically violate copyright and help to limit the control copyright holders have on fan websites.

5.2.2 Deem Fan Sites as Noncommercial

One factor that consistently favors the copyright owner in fair use decisions is that most fan sites obtain advertising revenue and thus any use of copyright-protected material is a commercial use. This is problematic because most fan sites do not obtain advertising revenue for profit. Rather, they use their income exclusively to offset the cost of using an internet service provider's bandwidth and the cost of the servers used. As such, they do not run the site for profit or even pay the major contributors.

The government makes a distinction in the real world between corporations run for profit and corporations that are not for profit. Non-profit companies are allowed to accrue income in these instances while maintaining this distinction. The government should make an equivalent distinction on the internet for personal and communal sites that accumulate income but are not run for profit. This distinction would view fan sites as noncommercial and therefore favor fans when evaluating the first factor of fair use.

5.2.3 Limiting Protection of Fictional Characters

Fictional characters now are protected as intellectual property under two separate pieces of intellectual property law: copyright and trademark law. Because of this dual protection, holders of a character's rights have much more protection than any other piece of intellectual property. For example, if a fan work either is a derivation of the original work in which the character is based, or if the work dilutes the value of the character on the market, the fan is violating law (albeit different codes of law).

The first step would be to separate trademark and copyright protection, thus making courts use separate tests to assess the legitimacy of a claim. Thus, even if a fan's work used a character that had the same look and feel as a trademarked character, it would not be enough evidence to prove that it is a violation of copyright. Though this is technically what should happen now, some cases have shown that sometimes the courts combine these rights.⁴⁵ Another step would be to limit the exclusive rights to derivative works that significantly change the traits of characters (such as when slash fiction changes the sexual orientation of characters from heterosexual to homosexual). In these cases, the author is no longer using the character as defined in the original work and thus should be given the freedom to create an alternate environment and situations based on the original premise.

5.2.4 Separate Trademark and Copyright Protection

As stated in relation to protection of fictional characters, a way to clarify intellectual property law would be to separate trademark and copyright protections. Though they are technically separate in the federal code, plaintiffs continually file suits that claim both copyright and trademark violation. The courts then view the allegations as a joint violation of intellectual property, as opposed to separate acts of copyright and trademark

⁴⁵ See 562 F.2d 1157, 1169 (9th Cir. 1977).

infringement. In many cases, a fan might copy a portion of a copyrighted work that is trademarked, but might do so under fair use while not violating any trademark law. By separating the two sets of laws, the court should find that the fan is not in violation, whereas if the two codes were unified, the court would probably see that the fan conducted some form of infringement.

5.2.5 Limit Exclusive Rights to Future Markets

Fans regularly violate copyright by creating and distributing in markets that the holders of the copyright have not yet fulfilled. An example of this would be the sharing of cancelled television series on the internet that have not yet seen home video or DVD releases. While the copyright holder has some rights to distribute such materials, there should be some limitation to how long a copyright holder can maintain exclusive rights to future markets before such markets can be free.

Before television production companies began converting their large library of television programs to DVD, fans would archive and distribute digital copies of episodes that have long left the air. Sites like the Digital Archive Project⁴⁶ would facilitate the collection and dissemination of cancelled niche television series that have little chance of commercial home release. The shows they archived, such as *The Adventures of Pete and Pete*, *Max Headroom*, and *The State* also were not in syndication and completely unavailable to those who did not see them when first aired. The law should recognize when a copyright holder actively decides not to pursue a future market and should give others the freedom to pursue such uses without prosecution. Such a limitation could be as short as two years after cancellation or as long as twenty, but it should allow others to fulfill the market the copyright holder has decided not to enter.

5.3 Change Industry Policy

While changing various intellectual property laws helps to clarify some of the complex issues surrounding fan's usage of copyrighted materials, various changes in policy would also help to bridge this gap without drastic changes in traditional copyright protection. For instance, in order to allow children to write about their favorite characters, the government could drastically change the definition of derivative works, which would also allow imitation versions of Harry Potter stories to come to market without recourse, or the industry could give consent to those who write stories for noncommercial use. The second version would be of better interest to the copyright holder because it still retains exclusive rights over derivative works.

Also, the industry policies are not as permanent as intellectual property law and thus can adjust better to new uses and technologies. A policy that permitted the sharing of copyrighted material for noncommercial use could change in reaction to massive peer-to-peer file sharing than could a federal statute regulating the use. While this also has the drawback for fans of being only semi-permanent and subjective to the good graces of the industry, it is better for the industry because they have better control over what exclusive rights they are willing to ignore and which rights they actually value.

⁴⁶ <http://dapcentral.org/index.php>

5.3.1 More Implicit Consent

The policy change that would have the greatest impact would be for copyright holders to give implicit consent for certain usages more frequently. This would be helpful for fans because it would give the most useful defense if later sued for copyright infringement. This would also help copyright holders that do not mind certain types of infringement by garnering appreciation from the fan community. When the “Harry Potter Wars” over fan fiction ended, many fans appreciated the effort given by Warner Brothers to negotiate and were less likely to conduct more viscous forms of copyright infringement, such as sharing copies of the feature film on file-sharing networks.⁴⁷

5.3.2 Private Licensing

Private licensing gives more control to the copyright holder than implicit consent, but still allows fans to use copyrighted work outside of the defense of fair use. A private license is an agreement between parties, the details being upheld mainly through contract law. Lucas Films uses private licensing on their official website, which limits use of works to personal, noncommercial uses. While Lucas extended some liberties to fans, the terms of the agreement were under the discretion of only Lucas. If Lucas wrote such an agreement that limited use of copyright-protected works, excluding the use of parody, any fan that complies would be in violation of contract if he or she made any parody of a Lucas-held material.

5.3.3 Compulsory Public Licensing

Section 118 of the Copyright Act specifies the distribution of a compulsory public license, which allows public broadcasting entities to reproduce various published audio and visual works in order to broadcast such works.⁴⁸ The section specifies arbitrations that set the royalty rates for use of published works. This is similar to the licenses given to radio and cable broadcasting stations. The license and the royalty structure would be more complicated than the other licenses because of the large number of different media coverage necessary in order for the license to be effective.

This would benefit the fans because copyright holders would be more willing to surrender certain exclusive rights if properly compensated. This would also benefit the copyright holders because they are compensated for loss of exclusive rights and they still maintain control over other exclusive rights given by copyright.

The effectiveness of compulsory public licensing on the internet is dependent upon the royalty structure negotiated. The industry can construct a uniform, reasonable pricing structure based on the portion of the protected material used and the way in which they are used. This license would only be necessary for fan uses not defended under fair use, so it would be a structure that would maintain the fan site culture while also compensating the copyright holders.⁴⁹

⁴⁷ See Jenkins Interview.

⁴⁸ 17 U.S.C. § 118.

⁴⁹ Elliot, Jessica (Fall 2001). “Copyright, Fair Use and Private Ordering: Are Copyright Holders and the Copyright Law Fanatical for Fansites?” Depaul University Journal of Art and Entertainment Law.

5.4 Industry-Fan Collaboration

The entertainment industry's stance on fan culture and fan creation can also change through a change in attitude towards these kinds of producers. Recently, there has been a general shift by the industry in which corporate entities interact with fan cultures in collaboration instead of contention. When the industry first started protecting copyrighted works from unfair use on the internet, the type of material created by fans was deemed the worse violation of the industry's exclusive rights. After the proliferation of mass file-sharing networks created by systems like Napster and Kazaa, the industry had a greater evil to quash and needed the help of its most dedicated fans, who also supplied the greatest demand for such files. Through collaboration, the industry is able to avoid alienating its fan base, find cheap ways to market their products, and protect their exclusive because fans are less likely to become either confused or disgruntled and maliciously infringe copyright.

5.4.1 Feedback

While searching various fan sites for copyright infringement, many producers in the industry began to see the importance of fan sites in terms of a cheap research tool that readily told what consumers wanted from their products. Public forums on various fan sites were filled by fans evaluating works such as screenplays and television episodes minutes after initial release. This type of feedback also came at no cost to the producers, since they did not moderate the site and thus did not pay the maintenance costs for such sites. Such instant feedback allows producers to see what consumers want immediately and adapt to these changing needs, helping to retain an audience and capture new members.

5.4.2 Fan Appreciation

As stated in the case study on the "Harry Potter Wars," fans appreciate the efforts made by the media companies to negotiate acceptable use of copyrighted materials by fans. In these efforts, the company looks empathetic and willing to listen, as opposed to greedy exploiters of culture. When not seen as evil, fans are much less inclined to be malicious towards the producers of the media they use and are less likely to willful infringe copyright (such as sharing files) or boycott a franchise. Hence, collaboration leads to fan retention because the company is seen as showing good will towards its best consumers.

6 Conclusion

The contention between fan sites and the internet is becoming less of an issue for a number of reasons. First, the advent and proliferation of file-sharing networks has generated a shift in concern by those in the entertainment industry. Industry leaders no longer see these networks of fan sites as the greatest threat to their works and profit, but rather the massive volumes of trading on peer-to-peer networks without compensation. Additionally, the industry has seen the value of a rabid, creative fan base, as seen by the interaction between the motion picture industry and the Marvel comics fan base, which provided a consistent audience for their films. This general shift towards collaboration has caused some of the battles over usages of copyright-protected materials on the internet to subside, while many questions remain unanswered.

In order to reach a proper conclusion, some issues dealing with fair use on the internet still need to be settled in court. The court needs to define how posting works on the internet changes use and how this factors into a fair use defense. The court also needs to create consistent standards for sampling, use of material in transformative works and use of material in non-transformative works so that fans understand when what they do is legal and when they cross the line. Additionally, the entertainment industry needs to reassess its policy in regards to fan usage and weigh whether stringent prosecution employed to protect outweigh the benefits received from collaboration with an active fan base. With concerted efforts employed by lawmakers, the courts, members of the entertainment industry and fans, the interact between the industry and fans will again reach equilibrium that will satisfy both producers of original content and its consumers.