

**Comments of the Organization for Transformative Works (OTW)**

**Summary.....2**

**I. The current legal framework is generally favorable to remix, especially noncommercial remix..... 5**

    A. Fair use favors transformativeness and noncommercial remix..... 5

    B. Current, broad understandings of transformativeness are correct..... 7

**II. Remix is a large, healthy part of American culture..... 12**

**III. Remix provides uniquely valuable content unavailable in other forms..... 17**

    A. Remix is at the core of human creative practices..... 17

        1. Remix has a long and honorable history..... 17

        2. Creators often feel compelled to remix..... 19

    B. Remixes offer critical and transformative perspectives on popular culture..... 20

        1. Remix empowers new speakers..... 20

            a. Making remix provides personal benefits..... 24

            b. Remix provides rich political and cultural insights..... 26

        2. Remix offers particular benefits to otherwise marginalized speakers..... 29

            a. Underrepresentation is pervasive in mass media..... 30

            b. Remix offers unique opportunities for women..... 31

            c. Remix recognizes alternative sexualities and sexual identities..... 33

            d. Remix can combat racial stereotypes and underrepresentation..... 35

            e. Remix offers new visions of disability..... 37

    C. Remix cultures inspire and teach important skills..... 38

        1. Non-native speakers use remix to learn English..... 40

        2. English speakers use remix to learn other languages..... 42

        3. Remix teaches writing and editing skills..... 43

        4. Remix teaches skill in visual art..... 50

        5. Remix teaches video creation and editing skills..... 52

        6. Remix develops numerous technical skills, often in combination..... 54

        7. Remix is also a powerful educational tool in formal educational settings..... 57

        8. Remix teaches respect for the appropriate boundaries of copyright..... 60

**IV. Fair use remains vital to remix cultures; there is no substitute..... 62**

    A. Noncommercial creativity is different from, and not replaceable by, commercialized creativity..... 62

    B. Licensing is Pervasively Inadequate..... 67

        1. Licenses are regularly unavailable..... 67

        2. Licenses invite censorship..... 69

        3. Case study: Amazon’s Kindle Worlds is a commercial innovation that uses the language of remix, but fails to provide its benefits..... 70

        4. Summary: copyright law has the right answer now—some markets aren’t copyright owners’ to control..... 71

    C. Suppression remains a real risk for transformative remixers..... 72

**V. Copyright reform should have the protection of remix cultures as a key goal..... 76**

    A. Section 1201 is an example of what not to do..... 76

    B. Fair use and best practices offer a path forward..... 78

    C. A safe harbor is worth considering..... 79

### Summary:

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to promote the acceptance of noncommercial fanworks as legitimate creative works, to preserve the history of fan culture, and to protect and defend fanworks from commercial exploitation and legal challenge. “Fanworks” are new creative works based on existing media; outside media fandom, the term “remix” is often used. The OTW provides services to fans who need assistance when faced with related legal issues or media attention. Our nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 200,000 registered users and receives over 3.6 million unique visits per month. The OTW submits this comment to make the NTIA/PTO aware of the richness and importance of noncommercial remix communities and the works they produce.

In the pages that follow, the OTW will offer some of the voices of individual remixers themselves, speaking directly about why they remix and how participating in remix culture has helped them. This sampling only scratches the surface, but we believe that copyright policy will be improved by listening to these creators.

1. NTIA/PTO requested comment on five issues, including the legal framework for the creation of remixes, on which this comment will focus. Fair use protects transformative uses, including remix. Core copyright law presently encourages the production of noncommercial and transformative works, despite the barriers posed by “paracopyright” in the DMCA.
2. Remix is a large and growing part of American culture. Substantial percentages of Americans online create remix, and millions more enjoy the results.
3. Noncommercial remix cultures provide important benefits to participants and to society at large. Historically, painters have learned to paint by studying, and copying, the work of existing painters. By beginning with a clear model, painters develop their techniques and learn to create their own styles, both building on and diverging from what’s gone before. Composers historically have followed a similar arc; singers also regularly learn their craft from singing existing songs and learning from existing performers’ styles. So too with writers, who often begin with pastiche as they master the relevant skills. And so too with more recent arts, including audio editing and video editing. Noncommercial remix creators in their own words confirm what studies from multiple disciplines have found: remix plays a unique and positive role in American society.

Transformative uses provide people around the country with an entry point into creative endeavors. The passion that brings fans together also impels them to make new art, and support each other’s creations, in ways that support skills that will be of lifelong use. People become connected because of shared love for existing texts, or sometimes a shared desire to fix the problems in those texts. A fannish creative community can provide a safe space for otherwise isolated creators to discover their own talents, sexual orientations, and political commitments. The noncommercial,

make-it-yourself nature of fanish communities makes them easy to enter, even for people who lack economic resources. Because transformative fandoms thrive on variation and new works, they encourage even very beginning artists to experiment and find unique voices. This kind of support, predicated on shared interests, isn't readily available outside noncommercial remix communities.

Remixes produce valuable cultural and political commentary. They are particularly attractive to groups underrepresented in American mass culture—women, nonwhites, and LGBT individuals, among others—who use remix to talk back to that culture, to identify what it's leaving out and explain what they see. Furthermore, remix cultures teach numerous skills and competencies that have value inside and outside their communities. These skills are particularly important for members of underrepresented groups, who can use them as alternate pathways to success when conventional, majority groups are unwelcoming.

4. Fair use is vital to noncommercial remix cultures. For reasons both practical and normative, fair use law is clear that a mere desire to license transformative works is insufficient to justify a copyright owner's right to control licensing. Even when most remixes are left alone, suppression is a continuing risk, especially for the most transformative and critical works. Commercialization and licensing have roles to play in other areas of copyright policy, but cannot substitute for the unique incentives and dynamics afforded by transformative, noncommercial use. These well-functioning, healthy communities should not be disrupted, whether deliberately or incidentally, for the prospect of some hypothetical future gain.
5. Copyright reform should recognize and protect the conditions for noncommercial remix. The organic pathways through which noncommercial remix cultures have developed can be compared to natural wetlands, which have many recognized benefits to the environment as a whole that can't be replaced by planning and regimentation. If we allow copyright owners free reign to cut off the noncommercial pathways by which people traditionally discover their own creative talents and impulses, we will be threatening the future of creativity, with no demonstrated benefits even to existing business models, much less future ones.

Current fair use law appropriately favors transformative uses. Likewise, the law appropriately recognizes the value of noncommercial uses. The freedom to make transformative uses plays an important role in our cultural, educational, and political lives—so much so that other countries, including civil law countries, are increasingly looking to adopt fair use principles. Any reform of the legal structure relating to remix should reaffirm the value of these core protections for transformativeness and noncommerciality. NTIA/PTO could consider the Canadian model, which explicitly provides for freedom from liability for noncommercial remix. Any reform should adhere to the basic fair use principle that fair use does not require permission, and that a copyright owner cannot create a right to control a transformative use merely by being willing to accept payment for it.

## Organization for Transformative Works

While this comment focuses on the basic legal framework for remix, noncommercial uses routinely implicate issues regarding §§ 512 and 1201 of the DMCA. In particular, no consideration of changes in notice and takedown should ignore the burdens on remix artists, who generally lack legal counsel and need robust counternotification procedures as well as a legal framework that protects intermediaries from becoming overly risk-averse.

We urge NTIA/PTO to avoid proposals that could interfere with thriving, productive communities of practice. The law should provide explicit support for noncommercial, transformative uses and for the people who make them.

## Organization for Transformative Works

I. The current legal framework is generally favorable to remix, especially noncommercial remix.

A. Fair use favors transformativeness and noncommercial remix.

Remix is the condition of much creative work throughout history. Celebrated novelist Michael Chabon explains:

All enduring popular literature has this open-ended quality, and extends this invitation to the reader to continue, on his or her own, with the adventure.... [I]t creates a sense of an infinite horizon of play, an endless game board; it spawns, without trying, a thousand sequels, diagrams, and Web sites.... Through parody and pastiche, allusion and homage, retelling and reimagining the stories that were told before us and that we have come of age loving—amateurs—we proceed, seeking out the blank places in the map that our favorite writers, in their greatness and negligence, have left for us, hoping to pass on to our own readers—should we be lucky enough to find any—some of the pleasure that we ourselves have taken in the stuff we love: to get in on the game. All novels are sequels; influence is bliss.<sup>1</sup>

While copyright doctrine lost track of that fact for a time, courts have increasingly recognized the importance of building on existing work to creating new works, both through the idea/expression distinction and through the fair use doctrine. Most remixes that borrow from in-copyright works while adding creative elements of their own have strong claims to fair use.

*Campbell v. Acuff-Rose Music* marked the Supreme Court’s recognition of the importance of adding new meaning or message in the fair use inquiry. Transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”<sup>2</sup> As the Second Circuit noted, a transformative work “is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”<sup>3</sup> Copying in order to craft commentary or new messages is highly favored, because they further a key goal of copyright: encouraging the production of new, creative works.<sup>4</sup>

While commercial transformative uses are regularly protected as fair uses, noncommercial remixes are especially likely to be fair uses. Noncommercial copying is presumptively fair even without transformation, according to the Supreme Court.<sup>5</sup> As we will explain in more detail in Part IV, noncommerciality has a special relationship to transformativeness—creators’ noneconomic motivations deserve protection precisely because they aren’t motivated by the

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<sup>1</sup> Michael Chabon, *Maps and Legends: Reading and Writing Along the Borderlands* 56-57 (2008).

<sup>2</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>3</sup> *Castle Rock Entm’t, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998).

<sup>4</sup> See, e.g., *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013) (use of image in music video that gave the image a new, religious meaning was transformative and fair); *Prince v. Cariou*, 714 F.3d 694 (2d Cir. 2013) (use of numerous photographs in appropriation art was transformative and fair); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (use of concert posters in timeline of Grateful Dead’s history was transformative and fair); *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (rewriting of *Gone with the Wind* from the perspective of Scarlett O’Hara’s mulatto half-sister was likely transformative and fair).

<sup>5</sup> *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 449 (1984) (noncommercial uses are presumptively fair).

## Organization for Transformative Works

incentives that copyright provides, and they can easily be suppressed by a legal system that does not acknowledge multiple sources of creativity.

The other § 107 fair use factors also regularly favor a finding that a remix is fair. For factor two, the nature of the work, most remixes are based on works that have already been published and readily available to the public. Because the copyright owner has already had an opportunity to exploit the work commercially, and because public works invite commentary and response, the published “nature” of the work favors fair use.<sup>6</sup> As for the third factor, the amount taken, many forms of remix, including fan fiction and fan video, involve taking only small parts of the original works in the course of creating new works. Even substantial copying in the service of transformation can be fair, as long as it results in a new meaning or message.<sup>7</sup>

As for the fourth fair use factor, effect on the market, again noncommercial uses are presumptively not harmful.<sup>8</sup> Separately, courts have recognized that transformative uses are unlikely to supplant copyright owners’ legitimate markets.<sup>9</sup> This is consistent with the consensus of researchers who study remix cultures, who conclude that remixers support and extend existing markets, rather than supplanting them—*Star Trek* and *Harry Potter* are only two examples of well-known franchises that were sustained, even through long delays between canonical productions, by the transformative works produced by fans.<sup>10</sup> As award-winning screenwriter

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<sup>6</sup> See, e.g., Seltzer, 725 F.3d at 1178; *Kelly v. Arriba Soft Corp.*, 336 F.3 811, 820 (9th Cir. 2003) (published works are more likely to be subjects of fair use because “the first appearance of the artist’s expression has already occurred”); *Arica Inst., Inc. v. Palmer*, 970 F.2 1067, 1078 (2d Cir. 1992) (fact that copied work was “published work available to the general public” weighed in favor of defendant on second factor).

<sup>7</sup> See, e.g., Seltzer, 725 F.3d at 1178-79; *Bill Graham*, 448 F.3d at 613; *Kelly*, 336 F.3d at 820-21.

<sup>8</sup> *Sony*, 464 U.S. at 451.

<sup>9</sup> See, e.g., *Campbell*, 510 U.S. at 591; *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 967 (9th Cir. 1992) (computer program that allowed Nintendo players to change character attributes was fair use, in large part because it had the potential to improve the market for the original by adding variety to it).

<sup>10</sup> See, e.g., W. Michael Schuster II, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340235](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340235) (Oct. 14, 2013) (finding that unauthorized song sampling increased sales of sampled works); see also Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture* 68-70 (1992) [hereinafter Jenkins, *Textual Poachers*] (finding that fan remixers become evangelists for official releases); Nathaniel T. Noda, *When Holding On Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities*, 2008 U. Denver Sports & Ent. L.J. 64, 78-79 [hereinafter Noda, *Holding On*] (case study of doujinshi, unauthorized derivative works of Japanese anime and manga—doujinshi provides artists training and pathways into commercial markets, and allows artists to publish limited editions and content that wouldn’t be accepted in the main market; it also enhances interest in the original works for decades after publication, bringing in new fans); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 Loy. L.A. Ent. L.J. 651, 669 (1997) (“Fan fiction keeps its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.”); *id.* at 672-73 (case study of *Star Trek*); cf. Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. Rev. 1551, 1561 (2005) (“Highly engaged fans, those most likely to participate in reading and writing fan fiction, ‘reread’ the original source repeatedly for their own entertainment and are eager to introduce their fandom friends to new media, providing more opportunities for producers to reap profits from activities that are central to the ‘economic structure of . . . [their] industries.’ . . . Because fans base their perceptions on characters’ experiences, each new addition to the canon, consumed in the order the producer chooses to present it, is important as a means of ‘shedding light on character psychology and motivations.’”) (citations omitted); Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 57 J. Copyright Soc. USA 987, 1001-02 (2010) (“The fundamental role that canonicity plays in setting an original author’s work apart from the derivative works of fan-authors and others can be seen in the way that fans carefully

and author Saundra Mitchell explains, “Fans are evangelists—people who cannot get enough of your work convince more people to partake. Fans are ardent, fans are consumers, and they are a valuable part of word-of-mouth marketing. There has never been a property in the history of fan fiction that was ever harmed because its fans loved it so much they just had to write more about it.”

Mizuko Ito, who has engaged in extensive research into online video remix, provides support for these conclusions in her study of Anime Music Videos (AMVs), which are re-edited versions of Japanese anime that tell new stories using existing footage.<sup>11</sup> The anime industry, recognizing the true economic benefits of a thriving creative fan culture, “has even gone so far as to commission commercial remixes by well-known AMV editors.”<sup>12</sup> This welcoming treatment may be related to the Japanese experience, in which numerous artists remix the popular genre of manga; these remixes are known as doujinshi and are often commercialized. Japanese copyright owners have recognized that freely operating remix cultures result in larger revenues overall.<sup>13</sup>

Independently, it is well established that a copyright owner does not have rights in the market for transformative works, any more than it has rights to control the market for reviews.<sup>14</sup> This rule is necessary in order to prevent copyright owners from suppressing uses that they feared would be controversial, or simply just disagreed with.<sup>15</sup>

B. Current, broad understandings of transformativeness are correct.

In some instances, lawyers are tempted to argue that a use isn’t transformative because it doesn’t have a specific critical message. However, transformativeness is highly variable and even audience-specific. Research in media studies has shown that different audiences read mainstream works differently, meaning that there is no one original message that a transformative user could then reject and criticize.<sup>16</sup> For example, prejudiced and unprejudiced viewers ascribed different meanings to *All in the Family*, as evidenced by the fact that “some viewers write letters . . . which applaud Archie for his racist viewpoint, while others applaud the show for effectively making fun of bigotry.”<sup>17</sup> Indeed, it’s possible to read many popular works in directly

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distinguish between canon and non-canon. . . . The original author’s works enjoy economic superiority in that, if forced to choose between the author’s works and near-identical fan-based works, the fans themselves will always opt for the works of the original author. . . [T]he stamp of canonicity assures the primacy of the original author’s works over those of fan-authors, providing an additional layer of protection for the interests of the original author.”) (citations omitted).

<sup>11</sup> Letter from Mizuko Ito, Research Scientist, Univ. of Cal., Irvine, to U.S. Copyright Office, Library of Cong. 3-4 (Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/mizuko-ito-20.pdf>.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> See, e.g., Sean Leonard, Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation, 12 UCLA Entertainment L. Rev. 189 (2005); Noda, Holding On, *supra* note 10.

<sup>14</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001), 252 F.3d at 1270-71.

<sup>15</sup> See *Campbell*, 510 U.S. at 592-93.

<sup>16</sup> See, e.g., John Fiske, *Reading the Popular* (1989); John Fiske, *TV: Re-Situating the Popular in the People*, 1 Continuum: Austl. J. Media & Culture 56 (1987); Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 Cardozo Arts & Ent. L.J. 647, 652 (2007).

<sup>17</sup> Neil Vidmar & Milton Rokeach, *Archie Bunker’s Bigotry: A Study in Selective Perception and Exposure*, 24 J. Comm. 36, 37-44 (1974).

## Organization for Transformative Works

contradictory ways—this openness may be part of why they are popular. As a result, there is room for contradictory transformative reactions to the original, even when a judge might not herself see a new message.

“Nondiscrimination” is a fundamental principle of modern copyright law: courts and lawyers are not art critics.<sup>18</sup> Avoiding aesthetic judgments in copyright whenever possible also means assessing transformativeness from multiple perspectives, with a degree of epistemological humility.<sup>19</sup> In particular, using a work as a building block for an argument, or for an expression of the subsequent creator’s imagination, is a transformative purpose, in contrast to consuming a work for its entertainment value.<sup>20</sup>

Recent significant fair use cases have correctly followed this approach to transformativeness. We will discuss three: *Prince v. Cariou*, *Seltzer v. Green Day*, and *Kienitz v. Sconnie Nation LLC*. (Again, these are all commercial transformative uses; noncommerciality remains an independent factor favoring fair use.)

*Cariou v. Prince* involved Richard Prince, a well-known appropriation artist, who made a series of collages featuring photographs taken by Patrick Cariou. Prince refused to say that he intended any specific critique of Cariou’s work. The Second Circuit held that this was fair use didn’t require Prince to comment on the original artist, the original work, or aspects of popular culture closely associated with Cariou or the photos. “[T]he fair use determination is an open-ended and context-sensitive inquiry.”<sup>21</sup> The court quoted Judge Leval’s influential article on transformativeness, stating that “if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”<sup>22</sup>

While many types of fair use, such as satire and parody, will comment on, relate to the historical context of, or critically refer back to the original works, this isn’t a requirement. What is required is alteration of the original with new expression, meaning, or message. Prince’s artworks “manifest[ed] an entirely different aesthetic from Cariou’s photographs.” Cariou offered “serene and deliberately composed portraits and landscape photographs depict[ing] the natural beauty of Rastafarians and their surrounding environs,” while Prince’s “crude and jarring works” were “hectic and provocative.” Overall, the “composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the

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<sup>18</sup> See *Campbell*, 510 U.S. at 582–83 (quoting Justice Holmes’s caution against judging artistic merit in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

<sup>19</sup> Cf. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (“While individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection. Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act.”) (citation omitted).

<sup>20</sup> R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 *Colum. J.L. & Arts* 101, 118 (2008) (“In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant’s purpose in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work.”) (emphases in original).

<sup>21</sup> *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

<sup>22</sup> *Id.* at 706.



## Organization for Transformative Works

expressive nature of Prince’s work,” as shown in Prince’s *Djuana Barnes* and Cariou’s corresponding photo:

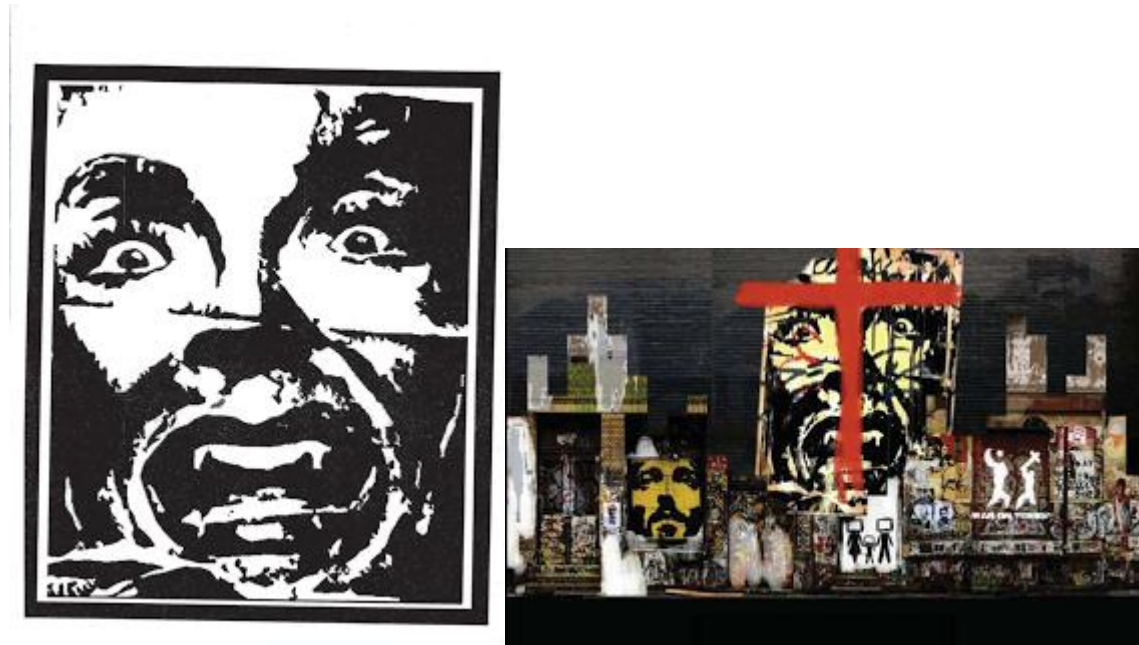


Rather than asking whether Prince *intended* some specific commentary or could articulate his intended meaning in words, the proper approach was to consider how his works could reasonably be *perceived*—and an audience could readily find new meaning and message in these artworks.<sup>23</sup>

*Seltzer v. Green Day* likewise found transformativeness when there was a debate over the meaning of the parties’ works. Green Day used Seltzer’s image as a prominent part of the backdrop for its music video:

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<sup>23</sup> Id. at 708.



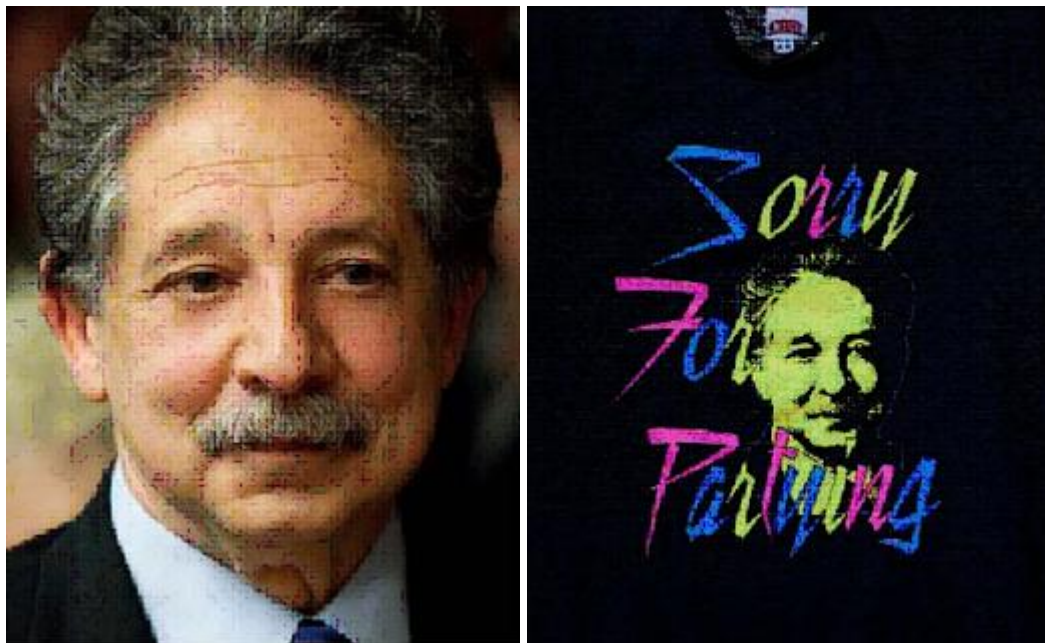
Again, the court noted that transformativeness means providing new meaning or purpose for a work. Under this standard, Green Day’s use was transformative. Seltzer’s work was “only a component of what is essentially a street-art focused music video about religion and especially about Christianity.” By contrast, the message and meaning of the original work was debatable (though it clearly said nothing about religion). “[I]n the context of a song about the hypocrisy of religion, surrounded by religious iconography, [the video backdrop using the image] conveys ‘new information, new aesthetics, new insights and understandings’ that are plainly distinct from those of the original piece.”<sup>24</sup>

Finally, *Kienitz v. Sconnie Nation LLC*<sup>25</sup> demonstrates that courts across the country can properly apply transformativeness, rather than requiring defendants to identify a critique with which the court agrees before finding fair use. Kienitz, a professional photographer, took a photo of Madison, Wisconsin’s mayor, Paul Soglin, and authorized Soglin to use it as his official portrait. Though Soglin had been arrested in 1969 at a student street fair that thereafter became an annual event, and though he owed his initial political success to the student vote, in recent years he’d become a critic of the street fair and hoped to shut it down. Defendants created a T-shirt using an altered version of Soglin’s face and the slogan “sorry for partying”:

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<sup>24</sup> Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013)

<sup>25</sup> — F. Supp. 2d —, 2013 WL 4197454 (W.D. Wisc. Aug. 13, 2013).



Kienitz sued. The court rejected Kienitz’s argument that the shirt wasn’t transformative because it wasn’t a commentary on his photo, but rather on its subject matter. While “the garishness of Soglin’s re-colored visage could be viewed as mocking the gravitas and rectitude with which Kienitz’s now-official portrait imbues the mayor,” the loose targeting of the *subject* was also transformative because of its new meaning and message even without commentary on the original photo or its author.<sup>26</sup>

These cases represent the dominant approach to transformativeness in U.S. courts, and clearly provide a legal basis for the protection of remixes that offer their own new meanings and messages to audiences—even in commercial contexts. As the next sections will show, however, noncommercial remix is even more prevalent than commercial remix, and has distinctive features of its own deserving legal protection.

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<sup>26</sup> Id. at \*5.

## II. Remix is a large, healthy part of American culture.

Noncommercial remix can be found everywhere. It is most accessible online, where remixes in every medium are readily available. Most people online are familiar with remixed images, often with humorous or political captions, and photomanipulations, but that is only one genre of remix. We will focus on fanworks—fan fiction and fan video, which remix existing media such as television shows, movies, and books—because (1) they make up a large portion of remix activity; (2) there is a wealth of research on them; and (3) they powerfully illustrate the benefits of noncommercial remix.

There is a vast universe of fanworks. In text, for example, FanFiction.net, the largest general-purpose fan fiction website online, hosted over 3 million individual stories as of January 2011 (the last date for which public statistics are available).<sup>27</sup> The contents run the gamut of size and subject matter, from 663,000 *Harry Potter* stories to 5 stories based on *Everything Is Illuminated*; from 31,000 Star Wars stories to stories based on Contact and Casino; from 99,000 Glee stories to a few hundred based on Mad Men, 68 based on The Mary Tyler Moore Show, and 38 based on The Fresh Prince of Bel Air – and almost everything else.<sup>28</sup> Essentially, if it exists, there is probably someone who loved it enough to ask “What if?” and to provide their own answer to that question.

Fan fiction operates as critical commentary on the original, using the medium of fiction instead of nonfiction. As Henry Jenkins, a leading scholar of new media literacies, explains:

I regard all or at least most fan fiction to involve some form of criticism of the original texts upon which it is based — criticism as in interpretation and commentary if not necessary criticism as in negative statements made about them. . . .

Just as a literary essay uses text to respond to text, fan fiction uses fiction to respond to fiction. That said, it is not hard to find all kinds of argumentation about interpretation woven through most fan produced stories. A good fan story references key events or bits of dialogue to support its particular interpretation of the character’s motives and actions.

. . . [F]an fiction emerges from a balance between fascination and frustration. If the original work did not fascinate fans, they would not continue to engage with it. If it did not frustrate them in some level, they would feel no need to write new stories — even if the frustration comes from an inadequate amount of material. In most cases, the frustration takes the form of something they would change in the original — a secondary character who needs more development, a plot element that is underexplored, an ideological contradiction that needs to be debated.<sup>29</sup>

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<sup>27</sup> FanFiction.Net Fandoms: Story and Traffic Statistics, <http://ffnresearch.blogspot.com/2011/01/fanfictionnet-fandoms-story-and-traffic.html> (Jan. 11, 2011).

<sup>28</sup> See <http://www.fanfiction.net/book/>; <http://www.fanfiction.net/movie/>; <http://www.fanfiction.net/tv/>.

<sup>29</sup> Henry Jenkins, Fan Fiction as Critical Commentary, Confessions of an Aca-Fan, (Sept. 27, 2006) [http://henryjenkins.org/2006/09/fan\\_fiction\\_as\\_critical\\_commen.html](http://henryjenkins.org/2006/09/fan_fiction_as_critical_commen.html).

Textual remix is only the beginning of what's available. Video remix has been around as long as film has existed, but like many other genres it has exploded online. According to the Pew Internet & American Life Project, video uploading has doubled in only four years. Eighteen percent of American adult internet users upload or post videos they created themselves, and 40% of those report that they post videos that mix content and material in a creative way—remix.<sup>30</sup> This is an increase over the 2010 results surveying teens: in that year, 21% of online teens reported remixing digital content, with girls outnumbering boys (26% vs. 15%), but with no other significant differences based on race, parental education, or family income. Remixing among both male and female adults over the age of thirty increased significantly (from 8% in 2005 to 13% in 2010).<sup>31</sup>

Remix seems natural to younger Americans. As Owen Gallagher, who runs Totalrecut.com, explains:

My brother and I were the proud owners of many Star Wars figures and vehicles, Transformers, Thundercats, MASK, He-Man, G.I. Joe, Action Man and a whole host of other toys from various movies and TV shows. Our games always consisted of us combining these different realities and storylines, mixing them up and making up our own new narratives. It was not unusual to have Optimus Prime fighting side by side with Luke Skywalker against Mumm-Ra and Skeletor. So, from a very early age it seemed completely normal for me to combine the things I loved in new ways that seemed entertaining to me. I think that my generation and those younger than me have grown up expecting this sort of interaction with their media, on their own terms.<sup>32</sup>

Not only are the percentages of remixers online high, but the absolute numbers of remixes are also striking. Based on samples of uploads to YouTube, Professor Michael Wesch, an ethnographer, concludes that between 2000 and 6000 original videos that include clips from film or television sources are being uploaded to YouTube alone each day.<sup>33</sup> A number of popular video genres frequently depend on clips from existing sources, including:

- *Movie trailer remixes*: original “trailers” for famous films, often for a humorous purpose.<sup>34</sup>
- *Film analysis*: amateur film critics provide commentary and criticism in conjunction with clips taken from the films being analyzed—an estimated 10,000 on YouTube as of 2009, as well as in many other locations.<sup>35</sup> For example, the film analysis site Press Play

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<sup>30</sup> Kristen Purcell, Online Video 2013, Pew Internet (Oct. 10, 2013), <http://pewinternet.org/Reports/2013/Online-video>, at 14.

<sup>31</sup> Amanda Lenhart et al., Social Media and Young Adults, Pew Internet (Feb. 3, 2010)

<http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults/Part-3/6-Content-Creation.aspx>.

<sup>32</sup> Henry Jenkins, “What is Remix Culture?”: An Interview with Total Recut’s Owen Gallagher (Part One), Confession of an Aca-Fan (June 2, 2008) [http://henryjenkins.org/2008/06/interview\\_with\\_total\\_remixs\\_ow.html](http://henryjenkins.org/2008/06/interview_with_total_remixs_ow.html).

<sup>33</sup> Comments of the Electronic Frontier Foundation in RM 2011-07, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, December 1, 2011, at 39 [hereinafter EFF 2012 Request], available at <http://www.copyright.gov/1201/2011/initial/eff.pdf>.

<sup>34</sup> See, e.g., The Shining Recut, YouTube (Feb 7, 2006) [https://www.youtube.com/watch?v=KmkVWuP\\_sO0](https://www.youtube.com/watch?v=KmkVWuP_sO0).

<sup>35</sup> EFF 2012 Request, *supra* note 33, at Appendix G.

ran a series of in-depth examinations of films combining classic written film criticism with shot-by-shot analysis of film clips.<sup>36</sup>

- *Movie mistakes*: film buffs collect and comment on anachronisms, continuity errors, and other “mistakes” found in films and television programs.
- *Comic juxtaposition* remixes: often humorous videos created by combining video clips from one film with audio clips from another.
- *Political commentary*: videos intended to make a political statement that borrow clips from film or television to illustrate their message.
- *Political criticism of movies*: videos that utilize clips in the course of explicitly criticizing the underlying themes or politics of a film.<sup>37</sup>
- “*YouTube Poop*”: absurdist remixes that ape and mock the lowest technical and aesthetic standards of remix culture to comment on remix culture itself.
- A genre of recent vintage, *supercuts*, “fast-paced video montages that assemble dozens or hundreds of short clips on a common theme.”<sup>38</sup>

As the emergence of supercuts demonstrates, we don’t know what artistic innovations will come next from remix culture, but we can be confident that there will be more.

In addition, there are also remix genres of long standing that have moved online, including the tradition of fan video, known as “vidding.” Vidders make vids: reedited footage from live-action television shows and movies, set to music that directs viewers’ attention and guides them through the revisioned images. This practice traces its genealogy from early 1970s slideshows carefully coordinated with music, through vids made using VCR technology, and now through computer editing.<sup>39</sup> Francesca Coppa, professor of film studies at Muhlenberg College, explains that “[v]ids are arguments. A vidder makes you see something. Like a literary essay, a vid is a close reading. It’s about directing the viewer’s attention to make a point”:<sup>40</sup>

Unlike professional MTV-style music videos, in which footage is created to promote and popularize a piece of music, fannish vidders use music in order to comment on or analyze a set of preexisting visuals, to stage a reading, or occasionally to use the footage to tell new stories. In vidding, the fans are fans of the visual source, and music is used as an

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<sup>36</sup> See, e.g., Jim Emerson, *In the Cut: Salt*, (Sept. 13, 2011), [http://blogs.indiewire.com/pressplay/IN\\_THE\\_CUT\\_Salt\\_by\\_PhillipNoyce#](http://blogs.indiewire.com/pressplay/IN_THE_CUT_Salt_by_PhillipNoyce#).

<sup>37</sup> E.g., *Disney Racism*, YouTube (Mar. 21, 2011) <https://www.youtube.com/watch?v=jHyzAbV6nuM>.

<sup>38</sup> Andy Baio, *The Video Remix ‘Supercut’ Comes of Age*, *Wired* (Nov. 1, 2011) <http://www.wired.com/business/2011/11/supercut/>. See EFF 2012 Request, *supra* note 33, at 39.

<sup>39</sup> See Francesca Coppa, *Women, Star Trek, and the Early Development of Fannish Vidding*, 1 *Transformative Works & Cultures* (2008), <http://journal.transformativeworks.org/index.php/twc/article/view/64> [hereinafter Coppa, *Women*].

<sup>40</sup> Jesse Walker, *Remixing Television*, *Reason*, <http://www.reason.com/news/show/127432.html> (last visited Nov. 30, 2011) (interview with Francesca Coppa); see also Francesca Coppa, *An Editing Room of One’s Own: Vidding as Women’s Work*, 26 *Camera Obscura* 123, 123 (2011) [hereinafter Coppa, *An Editing Room of One’s Own*]; Henry Jenkins, *DIY Media 2010: Fan Vids (Part One)*, *Confessions of an Aca-Fan* (Nov. 24, 2010), [http://henryjenkins.org/2010/11/diy\\_media\\_2010\\_fan\\_vids.html](http://henryjenkins.org/2010/11/diy_media_2010_fan_vids.html) (“Vids can make very sophisticated arguments about the source text’s plot and characters, and even its ideology. While some vids are edited to broadly emphasize certain themes, images, or characters, and are thus easily understandable to the uninvested spectator, other vids are made specifically for fellow fans who are assumed to be familiar not only with the source text but also with the conventions and established aesthetics of vidding.”).

## Organization for Transformative Works

interpretive lens to help the viewer to see the source text differently. A vid is a visual essay that stages an argument, and thus it is more akin to arts criticism than to traditional music video.<sup>41</sup>

USC professor and media scholar Henry Jenkins described the art of vidding not only as an important form of cultural creation, but as a way of maintaining the fan community, creating a source of pride and articulating the commonalities of the group.<sup>42</sup>

There are multiple types of vids. Some rearrange the narrative to focus on secondary characters (often women or minorities) or subplots;<sup>43</sup> others explore generic conventions found in mystery, science fiction, police dramas, and the like; others create dramatically different reactions to familiar elements by juxtaposing images with music or with other images, recontextualizing them; others bring repressed subtext to the surface, suggesting the existence of romantic or sexual relationships not present in official texts and turning a mystery into a romance; and so on.<sup>44</sup>

The fan video community has flourished online and has recently begun to intersect with other communities of video artists. Professor Coppa estimates that there are already tens of thousands created by self-identified vidders hosted on sites other than YouTube, including personal sites (for historical reasons, vidders were less likely to put their works on YouTube than other remix artists). Technical developments have made vidding increasingly accessible to newcomers and increasingly engaged with other artistic traditions. Non-linear editing software is now widely available, as are DVDs and other legitimate sources of footage. Vids, along with technical advice, commentary, and vid recommendations, are easier to find online than when vids were only shown at fan conventions and traded through the mail. Given the greater ease of creation and sharing, the audience for vids has expanded, and now includes younger fans and even nonfans (people who do not generally participate in media fan cultures, but might watch a video online). New vidders constantly emerge, many of them “inventing” the form for themselves without first being connected to the broader vidding community, just as in previous generations budding writers and artists emerged from a variety of backgrounds.

Vidding has a number of characteristics that make it important to copyright and cultural policy. It is both a popular and an outsider art, combining mass culture with individual artistic visions from people who don't participate in the conventional art world. People create vids to share their views about some piece of culture that is important to them. Vidding disproves the facile assumption that all that ordinary people do with popular media is make pirate copies.

As the Copyright Office twice determined, a substantial number of these noncommercial remix videos have strong claims to fair use.<sup>45</sup> In the next section, we will discuss why the Copyright

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<sup>41</sup> Francesca Coppa, *Women*, supra note 39.

<sup>42</sup> Jenkins, *Textual Poachers*, supra note 10, at 223-49.

<sup>43</sup> See, e.g., mresundance, *Commentary on “Glorious” by such\_heights*, LiveJournal (Oct. 15, 2009) [http://community.livejournal.com/vid\\_commentary/11372.html](http://community.livejournal.com/vid_commentary/11372.html).

<sup>44</sup> See Trombley, supra note 16, at 651-53.

<sup>45</sup> Recommendation of the Register of Copyrights in RM 2008-8, *Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 66-68 (June 11, 2010)

## Organization for Transformative Works

Office was so clearly right: remixes offer unique perspectives on cultural, political, and social issues, providing voices for people who otherwise would not be able to be heard.

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<http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> [hereinafter 2010 Recommendations]; Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention 125-127 (Oct. 12, 2012) [http://www.copyright.gov/1201/2012/Section\\_1201\\_Rulemaking\\_2012\\_Recommendation.pdf](http://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf) [hereinafter 2012 Recommendations].



III. Remix provides uniquely valuable content unavailable in other forms.

Fan fiction and fan video provide helpful examples of the benefits of remix that might otherwise be overlooked in legal contexts. The benefits they offer to both creators and audiences are exemplary, but far from unique among types of remix. This section briefly discusses the centrality of remix to culture in general, and then the centrality of remix to individual creators. The resulting works offer critical and transformative perspectives, empowering new speakers and particularly benefiting members of otherwise marginalized groups. We will first examine the *results* of remix—the transformative content. But many of the people whose voices are represented here will also mention the *skills* produced by creating noncommercial remix. In practice, these are linked, because of the inspiration creating in a community of similarly minded fans offers.

Individual creators often say that participating in fandom communities changed their lives. As we share a few of their stories here, we emphasize that each of these profoundly meaningful personal experiences fits into a larger context, enabled by fair use. The benefits of remix communities are not often visible to outsiders, but they are extremely powerful. The freedom to make remix is particularly important to people who don't see themselves and their interests reflected in popular culture: remix attracts members of groups who traditionally have difficulty finding representation in mass media.

A. Remix is at the core of human creative practices.

1. Remix has a long and honorable history.

Fan fiction and other forms of fan art have predecessors at the heart of the Western literary canon (as well as in numerous other literatures). Ancient and medieval writers freely used existing characters and stories. Homer, Shakespeare, and Milton are only a few of the household names whose fame derives from what they did with existing characters—and sometimes, particularly in Shakespeare's case, from very detailed copying, while also adding his own genius.<sup>46</sup> As Henry Jenkins summarizes:

Most forms of human creative expression have historically built on borrowed materials, tapping a larger cultural “reservoir” or “commons” understood to be shared by all. Our contemporary focus on “originality” as a measurement of creativity is relatively new (largely a product of the Romantic era) and relatively local (much more the case in the West than in other parts of the world.) This ideal of “originality” didn't exist in the era of ancient bards, out of which sprang the works of Homer; .... The ideal of “originality” only partially explains the works of someone like Shakespeare, who drew on the material of other playwrights and fiction writers for plots, characters, themes, and turns of phrase.

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Our focus on autonomous creative expression falsifies the actual process by which meaning gets generated and new works get produced. Many core works of the Western

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<sup>46</sup> Sheenagh Pugh, *The Democratic Genre: fan fiction in a literary context* (Feb. 3, 2004), <http://refractory.unimelb.edu.au/2004/02/03/the-democratic-genre-fan-fiction-in-a-literary-context-sheenagh-pugh/>.

canon emerged through a process of retelling and elaboration: the figure of King Arthur goes from an obscure footnote in an early chronicle into the full-blown text of *Le Morte d'Arthur* in a few centuries, as the original story gets built upon by many generations of storytellers.<sup>47</sup>

These processes of remix were not just the province of published authors. In early modern England, for example, literate people often kept commonplace books, transcribing fragments of texts that caught their attention, arranged together in what we would now call collage or montage.<sup>48</sup> The process of selecting, copying, and arranging helped create the reader-turned-author as a citizen, developing his sense of himself as an autonomous individual with specific preferences and beliefs.<sup>49</sup> Now that we communicate predominantly with audiovisual material, fan fiction, vidding and similar practices offer the same opportunities for self-constitution and self-exploration.

Although modern copyright slowed the recognition of the value of remix in high culture, important rewritings of canonical works continue to be produced.<sup>50</sup> Jean Rhys's *Wide Sargasso Sea* (based on Charlotte Brontë's *Jane Eyre*) and Tom Stoppard's *Rosencrantz and Guildenstern Are Dead* (based on *Hamlet*), and Gregory Maguire's *Wicked* (based on *The Wizard of Oz*) are only a few of many examples.

We do not contend that the average work of remix will stand the test of time and emerge as part of a future literary canon. Much online remix can seem amateurish and not particularly valuable (like much conventionally published output). Even if the self-expressive value of remix to the remixer herself wasn't important—and even if most great artists didn't begin with works of lesser sophistication—considerations of average quality would still be misguided. No culture produces a Shakespeare without also producing a great number of prosaic and easily-forgotten playwrights. It is from the vast numbers of people experimenting that we get the peaks of human achievement. Even indifferent remixes should thus be understood as products of the freedom that also produces artistic triumphs. Time and judgment will sort the good from the bad; the law should not.

Before introducing the voices of remixers themselves, we want to be clear that it's a profound mistake, contrary to the very heart of copyright, to require artists to justify their artistic choices, especially to people unfamiliar with the artform.<sup>51</sup> Thus, we focus on the *meaning* of remix

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<sup>47</sup> Henry Jenkins & Wyn Kelly, *Reading in a Participatory Culture: Remixing Moby-Dick for the Literary Classroom* 107 (2013).

<sup>48</sup> Robert Darnton, *Extraordinary Commonplaces*, N.Y. Rev. Books (Dec. 21, 2000), <http://www.nybooks.com/articles/archives/2000/dec/21/extraordinary-commonplaces/?pagination=false> (“Reading and writing were therefore inseparable activities. They belonged to a continuous effort to make sense of things, for the world was full of signs . . . by keeping an account of your readings, you made a book of your own, one stamped with your personality.”).

<sup>49</sup> See Kevin Sharpe, *Reading Revolutions* 277, 280-81 (2000).

<sup>50</sup> Jenkins & Kelly, *supra* note 47, at 139 (“If anything, modern conceptions of copyright have slowed down a long-standing tendency of people to retell existing stories. Fan fiction revitalizes that creative impulse, operating in a world where many different people might retell the same story and, in the process, expand the range of potential interpretations of the source material.”).

<sup>51</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the

creativity to the remixers themselves and to their audiences—just as commercial copyright owners focus on the overall market value of their works rather than on the average quality of commercial works.

### 2. Creators often feel compelled to remix.

There are multiple paths to creative expression. Some of them travel explicitly through remix, which can offer creative outlets to people who otherwise would stay silent. Many creators, both in commercial and noncommercial markets, explain their creative works as a product of compulsion: they wrote or drew or sang what they *had* to, in order to survive.<sup>52</sup> Making things can simply be a source of great pleasure.<sup>53</sup>

For example, one commercially successful fantasy author, Steven Brust, wrote an unauthorized novel starring characters from the TV series/movie *Firefly/Serenity* and released it under a Creative Commons license, because—in his own words—he “couldn’t help [him]self.”<sup>54</sup> This is a common phenomenon: because creators begin with what they know, and because what they know in modern times often comes from private, copyrighted sources, creators regularly feel that they have no choice but to respond to existing works.<sup>55</sup> Only reworking can satisfy their creative impulses. Noted artist J.S.G. Boggs puts it this way:

Creative people are prisoners. That is to say that they get “captivated,” and the only way out is to beat a path away from the point of captivity. If my attention is “captured,” it is impossible to simply get away. The bars are not physical. They are produced by the intellectual, the emotional, or, more usually, a combination of the two. But, they are as functional as any jail cell you will ever construct in the material world.<sup>56</sup>

Nor is this compulsion limited to well-recognized artists. People who don’t primarily work as artists feel it too. Clive Young’s study of fan-made films based on existing media investigated why ordinary people would spend so much of their own time and money on noncommercial artistic productions:

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narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”), quoted in Campbell, 510 U.S. at 582 (applying nondiscrimination principle to fair use).

<sup>52</sup> See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 *Wm. & Mary L. Rev.* 513 (2009).

<sup>53</sup> See, e.g., Erik Jacobson, *Music Remix in the Classroom*, *DIY Media: Creating, Sharing and Learning with New Technologies* 27, 31 (Colin Lankshear & Michele Knobel eds., 2010) (“There are many reasons for why people get involved in remixing music, but most seem to do so for pleasure, politics, or the intersection of the two. Just as is the case with traditional instruments, people simply like to create music. The fact that it can be done on computers using samples doesn’t alter this pleasure. There is a creative and artistic urge satisfied by making remixes. For other people, there is a simple pleasure in working with new digital technologies to produce new music. Many people just like to play around with software or hardware by taking them for a test spin.”).

<sup>54</sup> See Tushnet, *supra* note 52, at 532.

<sup>55</sup> See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *Yale L.J.* 1533, 1569 (1993) (“Some poems, some ideas, some works of art, become ‘part of me’ in such a way that if I cannot use them, I feel I am cut off from part of myself. I would prefer never to have been exposed to them rather than to experience that sort of alienation.”) (citation omitted).

<sup>56</sup> J.S.G. Boggs, *Who Owns This?*, 68 *Chi.-Kent L. Rev.* 889, 889 (1993).

[For many people, making a fan film is] a stepping stone to reawakening their creativity, opening up the door to a whole side of themselves that may not have seen the light of day in some time. Kids are encouraged to be creative—then they grow up a bit and society recommends that they cut it out, fall in line, get it together, act their age, and make some money. Ironically, the money part is what causes many people to start making fan films—because without disposable income, how would they buy the equipment?<sup>57</sup>

Adria, a fan, put it even more succinctly when she wrote the OTW:

For a few years in high school I was hovering on the edge of suicide. Fanfiction literally saved my life. Not only could I read and watch the stories I loved, but I could write them, get that pain and hopelessness out in characters and worlds that I knew as well as my own.

We don't often choose our passions; they choose us. This is the source of much remix.

B. Remixes offer critical and transformative perspectives on popular culture.

1. Remix empowers new speakers.

The presence of remix culture is a vital indicator of the health of democratic discourse. The process of speaking produces more speakers, and this happens even when the remixes don't themselves seem to have obvious political import. Legal scholar Jack Balkin has identified this process of self-constitution as a speaker as one of the most important benefits of the new freedoms of the digital age:

First, culture is a source of the self. Human beings are made out of culture. A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them.

Second, participation in culture has a constitutive or performative value: When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free. That freedom is something more than just choosing which cultural products to purchase and consume; the freedom to create is an active engagement with the world.<sup>58</sup>

Remix teaches people that they can be makers, and that their expression is valuable because they made something new.<sup>59</sup> This process can be seen in the story of Alice Randall, whose retelling

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<sup>57</sup> Clive Young, *Homemade Hollywood: Fans Behind the Camera* 261 (2008).

<sup>58</sup> Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 35 (2004).

<sup>59</sup> See, e.g. Coppa, *An Editing Room of One's Own*, *supra* note 40, at 124 (“A vidder can tailor-make her media to be as she likes it, and can convey her preferred reading of a text by showing us exactly what and how she sees.”);

of *Gone with the Wind* ultimately led to an important fair use decision. Randall began her imaginative career by remixing Batman, and her experimentation empowered her to take on Scarlett O'Hara and race relations:

*The Wind Done Gone* is a story of reading, writing, and redemption, the story of a woman, a black woman, who reads her way into writing and writes her way into redemption. It is in some sense my story. When I was a girl of six or seven I fell in love with the television series Batman. And like many loves, there was something I hated in it too: I hated the fact that no one who looked like me was in the story. For two weeks after that awareness I was frustrated. The third week I wrote myself in. I literally began to write out Batman scripts and write a part for me into them, a Bat Girl part. My Bat Girl wasn't a sidekick; she was a catalyst; every time I wrote her into a story, she changed its ending. When they took Batman off the air, I made my first long-distance phone call. I wanted to save the show.

Later, when I read *Gone With the Wind* (GWTW), I fell in love with another pop culture artifact. This was a troubled love from the beginning. I had to overlook racist stereotyping and Klan whitewashing to appreciate the ambitious, resilient, hardworking, hard-loving character who is Scarlett. Like so many others, I managed to do it. Then one day, rereading the novel, an enormous question arose for me from the center of the text. Where are the mulattos on Tara? Where is Scarlett's half-sister? Almost immediately I knew I had to tell her story, tell the story that hadn't been told. Tell it because the silence injured me.<sup>60</sup>

Joe Sabia, a digital remix artist, video director, and creative consultant, likewise mixes cultural and political commentary in his work. By starting with existing works, he's able to reach people through the common ground of popular culture—a commonality that he demonstrates often extends far beyond what many Americans might assume. Sabia's videos include *Seven Minute Sopranos*, a first of its kind video recap of the entire Sopranos series, which inspired numerous other recaps and was cited as the reason for the launch of CBS's *Eyelab*; *Tupac in Kazakhstan*, a music video that sought to depict the culture of Kazakhstan by including 40 of its natives singing Tupac Shakur's "Changes"; *Alex Presents Commando*, in which a Tanzanian boy recaps the 1985 Schwarzenegger film "Commando," which kicked off a campaign for an Africa-focused charity, Mama Hope, focusing on potential rather than pity; and *Obama Raps Kanye*, which uses over 90 speeches given by Barack Obama to find lyrics that match Kanye West's hit "Stronger."<sup>61</sup>

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Jacobson, *supra* note 53, at 32 ("Remix, as a particular form of [the principle that you don't have to be a virtuoso or have a band to make music], teaches people that anybody can comment on or interpret already existing music. Finally, as with punk, the expectation is not that you are remixing to secure immortality. The idea is that doing it yourself (DIY) is a worthwhile activity in and of itself.>").

<sup>60</sup> A Conversation with Alice Randall, Houghton Mifflin Harcourt, [http://www.hmhbooks.com/readers\\_guides/wind\\_done\\_gone/index2.shtml#conversation](http://www.hmhbooks.com/readers_guides/wind_done_gone/index2.shtml#conversation) (last visited Nov. 11, 2013).

<sup>61</sup> See Joe Sabia, *Remixes*, The Internet Portfolio of Joe Sabia, <http://www.joesabia.co/remix.html> (last visited Nov. 11, 2013).

While Randall and Sabia's stories of individual authorship are powerful, one particular strength of remix communities is that they are *communities*: groups of people with shared interest in the subject matter, able to support each other. The MacArthur Foundation identified such communities as key to the rise of "participatory culture," in response to "the explosion of new media technologies that make it possible for average consumers to archive, annotate, appropriate, and recirculate media content in powerful new ways."<sup>62</sup> A participatory culture needs relatively low barriers to artistic expression and civic engagement; strong support for creating and sharing creations with others; informal mentorship, so that the most experienced can share their knowledge with novices; reasons for members to believe that their contributions matter; and some social connections, at least in that members care about others' reactions to what they create.<sup>63</sup> Remix cultures are perfectly suited to form the backbone of participatory culture, because they offer all these features.

Remix practice is generative: people who realize that a remix was made by another fan or anti-fan feel empowered to try it themselves.<sup>64</sup> Mimi Ito explains that the accessibility of remix is empowering:

In contrast to their relation to professionally created videos, fans see [anime music videos, or AMVs] as an accessible media practice that they can aspire to. The fannish appreciation of anime and AMVs is integrally tied to the impulse to create. One aspiring editor, Starfire2258[,] describes how after viewing his first AMV competition "that inspired me immediately to 1) Find out how to get more of these awesome creations . . . 2) Watch some of the cool anime series that these AMVs showed me and 3) Figure out if I could create one myself."<sup>65</sup>

Political remix artist Jonathan McIntosh observes of his experiences teaching others to remix, "[a]fter engaging in remix culture, people young and old find it nearly impossible to experience media in a passive or uncritical way. As members of that remix culture even if we never make a remix video ourselves, we can't help but make imaginary mash-ups in our heads when watching television or movies."<sup>66</sup> In the context of student video editing, Professor Christina Spiesel and her colleagues likewise noted that "[a]ll it takes is the experience of lifting a sound track from one clip and attaching it to another for students to know with certainty that everything on film is constructed and that they can be builders in this medium."<sup>67</sup> Because it allows people to

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<sup>62</sup> Henry Jenkins et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* 8 (2006).

<sup>63</sup> *Id.* at 7.

<sup>64</sup> EFF 2012 request, *supra* note 33, at Appendix H; see also Mimi Ito, *Media Literacy and Social Action in a Post-Pokemon World* (Feb. 24, 2009), [http://www.itofisher.com/mito/publications/media\\_literacy.html](http://www.itofisher.com/mito/publications/media_literacy.html) (explaining that "it is the flow between the serious and the playful where we are seeing so much energy and engagement" and arguing that fandom played a major role in political mobilization of young people, particularly women, in South Korea, whose "participation in the protests was grounded less in the concrete conditions of their everyday lives, and more in their solidarity with a shared media fandom.").

<sup>65</sup> Mizuko Ito, *The Rewards of Non-Commercial Production: Distinctions and Status in the Anime Music Video Scene*, 15 *First Monday* (2010), <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2968/2528>.

<sup>66</sup> Henry Jenkins, *DIY Media 2010: Fan Vids (Part Three)*, *Confessions of an Aca-Fan* (Feb. 4, 2011), [http://henryjenkins.org/2011/02/diy\\_media\\_2010\\_video\\_blogging.html](http://henryjenkins.org/2011/02/diy_media_2010_video_blogging.html)

<sup>67</sup> Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, in *Contemporary Issues of the Semiotics of Law* 231, 252-53 (Anne Wagner et al. eds., 2005); see also *id.* at 253-54 ("[M]aking digital

demonstrably, physically rewrite culture, making a tangible intervention into the world of meaning, the experience of remixing encourages more speech.

Remix can also be uniquely persuasive, because it begins with something with which the audience is already familiar. Visuals often stand for truth in Western culture: we believe what we see, and the folk wisdom is that a picture is worth a thousand words. By utilizing the actual source material, a vid is obviously a reinterpretation of that material. In that way, the comment or critique has a fundamental sense of truth about it that can be more powerful than written commentary. According to a reverend who uses DVD decryption software to create film clips for use in his sermons, “When we use a clip from a popular film, people tend to remember it better than if we just used an anecdote or story,” [because] “We live in a visual age.”<sup>68</sup>

Joe Sabia concurs. The Lear Center and the ACLU commissioned him to create a remix video in conjunction with a study they conducted on “the kinds of narratives about the War on Drugs and the War on Terror that are being told in mainstream television and to assess how these stories reflect or reimagine reality.”<sup>69</sup> The resulting video combines clips from several popular primetime TV episodes depicting the “war on terror” including *NCIS*, *CSI*, *Law & Order* and *24*. Some of the clips were altered by adding graphics and/or voiceovers or manipulating the speed. *Prime Time Terror* comments on and critiques the ways in which television presents and shapes popular understandings. He explained that the video enriched the study and made its conclusions accessible to more people:

Despite being open to the general public’s consumption, this [written] research most likely finds itself trapped in the realm of peer-reviewed academia. Not surprisingly, it doesn’t break out into the public.... But by creating a remix video, you’re creating art on top of the research. And with new art, you can control the pace, the mood, the tenor of the experience. It ends up injecting color into this normally drab research paper existence.... Acquiring the public’s attention requires creativity in doing much more than publishing a hundred pages of text.

Remix thus offers many creators the ability to communicate persuasively and to see themselves as having something worthwhile to say. This is exactly what we should want from our citizens. The benefits are both individual and societal.

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videos allows students to discover how easy it is to access and manipulate information today (it’s all zeroes and ones), and how easy it is to represent reality in multiple ways. This in itself makes them more critical consumers of mass media; as students tell us, ‘I’ll never watch TV the same way again.’”)

<sup>68</sup> J. D. Lasica, *Darknet: Hollywood’s War Against the Digital Generation* 128 (2005). See also Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 74 (2008) (discussing a video that mashes up Lionel Richie’s “Endless Love” with visuals of Bush and Blair carefully edited to appear to be lip-synching the song, operating as a criticism of Blair’s closeness to Bush; “a remix like this can’t help but make its argument, at least in our culture, far more effectively than could words. ... [A] mix of images and sounds makes its point far more powerfully than any eight- hundred- word essay in the New York Times could. ... This video is a virus; once it enters your brain, you can’t think about Bush and Blair in the same way again.”)

<sup>69</sup> Joe Sabia, *Prime Time Terror*, YouTube (Sept. 6, 2011), [http://www.youtube.com/watch?feature=player\\_detailpage&v=8XIUCJ9ymrs](http://www.youtube.com/watch?feature=player_detailpage&v=8XIUCJ9ymrs); *Primetime War on Terror*, Lear Center, <http://www.learcenter.org/html/projects/?cm=mcd/drugsterror> (last visited Nov. 11, 2013).

a. Making remix provides personal benefits.

Not all authors will end up commercially published, but they still gain in many ways from finding their voices through remix. Libitina described her experience to the OTW:

I have a B.A. in Classical Studies from a small liberal arts college on the eastern seaboard. And yet I almost didn't because while I passionately loved the subject material and the learning process and the research, the production of an essay was painfully laborious. ... I entered fanfiction writing communities after I graduated college. The spirit of community was not something I expected. I started off just consuming product – reading fanfiction, watching vids, listening to podcasts. And then one hooked me that was deeply intriguing but had flaws, and unlike almost any other medium, I was able to write to that author and begin a dialogue. Then for years I would offer editorial critique of her writing. ... I also found myself writing long and detailed explanations of why I thought a certain edit was important - with citations from the source material.

As I gained confidence not only in my opinions (because how far does that get you), but also the language of backing these arguments up and presenting parallel possible interpretations, I found that I was producing essays – proper collegiate essays – with ease.

Now part of that ease came from being able to have opinions on one movie .... But it also came from finding a voice. I'd always thought of one's writing style as something that pertained to fiction writers and was sort of a stylistic quirk and something artistic. I thought that scholarly writing all had to have the same scholarly voice. But letting myself have my own voice, and having the time, space, and encouragement to find that voice – is what fandom gave me.

That transferred to my work, where I produce procedural documentation and lobby for policy changes.

And it has also transferred back to my academic life, where I gained the tool that was most holding me back from pursuing graduate studies.

Part of the way in which remix supports expression is that noncommercial remix communities allow creators to produce types of works that the commercial marketplace wouldn't support, as Elisa D.'s story illustrates:

I am disabled and forced to work out of my home. I slid into a deep, thick depression and thought about suicide. But then, from following one of my favorite TV shows on discussion boards, I discovered fan fiction. It was great to see people who shared my interests. More important, it started me writing again. I used to be a professional writer, and for several years I had severe writer's block. Freed from the constraints of publication, etc., I was able to write stories again. One story in particular, which turned into a comic novel, gave me something to get out of bed for. The fact that other fans



were enjoying the story and waiting for the next installment was incredibly helpful. Most readers are not interested in traditional serial-fiction. But fan fiction lovers adore serials. I write humor, and fan fiction fulfills my need to write little funny stories as much as I want.

Media fandom is often the subject of popular scorn (unlike sports fandom, which is generally considered completely understandable). But that prejudice is unjustified. Serendipitous engagement with remix cultures restored Balun S.'s ability to create and help other people:

I was an engineer, or at least I had been, I had lost my job and was dealing with the hopelessness and depression that are part and parcel of long term unemployment and dwindling savings. ... I turned yellow and racked up two years gross wages in debt in just a few days in medical bills. I was beyond low. I was in the dark place where staying alive was no longer a priority and death would have been a release, a kindness. However, we received gift cards for dinner and a movie. We saw Disney's *Tangled*. It was fun, but they skipped over some obvious things to get to the happily ever after in a reasonable amount of time.

It bothered me, and there was no way Disney would ever do that part of the story, so I did. ... I posted to FanFiction.net and people liked what I wrote. For the first time in years I received validation that I was a worthwhile human being! Something a job had never given me. Life was worth living again!

Through my fanfiction, I worked through my emotional pain. Then I found that others shared that pain. People would read and re-read my stories to help them out of depression and suicidal thoughts. We would communicate and I helped lead them through their own dark places. I have had several people tell me that they are alive now and wanting to stay alive because of my stories and our interactions, all because we are able to connect through the shared love of a movie ....

I would like to help people, but the only way I know to find some of these people in trouble is through the love that is shared with a movie or other story.

Lauren B.'s story is similar:

Fanfiction has given me innumerable gifts, but the most important one is that it's helped me navigate my own struggles with mental illness. When clinical depression hit me hard several years ago, I happened to be in the *Buffy the Vampire Slayer* fandom. The show is unique in that it has an entire season dedicated to the main character's mental health struggles—Season 6 is a prolonged exploration of life with depression and PTSD. It's wrenching and often painful to watch, but at the same time it was absolutely inspirational to me to see a heroic character who I admired going through hard times that were similar to the ones I was going through.

Just viewing that story was so helpful to me, but what allowed me to take some actual steps forward was interacting with fandom and writing fanfiction about *Buffy* and her

mental health problems. In Buffy fandom, I found multiple other people who also dealt with various mental health problems, and we formed one of the most important communities of my life. In this community, it was safe to talk about your own struggles and no one would judge because all of us had been there and all of us had been drawn together by the story we saw on our television screen. That community was absolutely vital to giving me reasons to actually look forward to something during a time when it was really difficult to not just want to stay in bed all day.

And then there was writing fanfiction about Buffy: through her—a character already established as heroic, strong, kind, and admirable—I was able to work through some of my own pain, exploring it in the context of a character whose worth was unquestionable. I was able to really look at my own experiences, and when other people read the stories and expressed compassion for my-turned-Buffy’s experiences and admiration for her strength, it provided me with some healing.

Fandom and fanfiction did not cure my depression, of course. Time and medication did that. But they absolutely did help me journey through that time of depression, gave me some insight into myself, gifted me with a community that understood and supported me, and even gave me a little bit of hope I wouldn’t have had otherwise.

b. Remix provides rich political and cultural insights.

While we will discuss the specific benefits of remix to disempowered groups below, remix offers tools for political and cultural engagement of all kinds. Vidding, for example, involves extensive critical engagement, both from creators and from their audiences. “Vidders and academics often engage in similar analytic processes to comparable critical ends; vids offer condensed critiques of media texts that would take dozens of pages to unravel in academic analysis and whose impact would fall short of the emotional power of the vid.”<sup>70</sup>

Many popular online videos use remix to engage in commentary or criticism. In one supercut, “The Price is Creepy,” Rich Juzwiak uses short clips to call attention to the sexist behavior of famous TV game show host Bob Barker of *The Price is Right*.<sup>71</sup> In 2009-10, many vidders started creating “Downfall” parodies, or remixes of the bunker scene from the German film *Downfall: Hitler and the End of the Third Reich* (aka *Der Untergang*). The parodies comment on everything from the misuse of DMCA to problems with new technologies and cultural events.<sup>72</sup> A video by 16-year-old vidder ImaginarySanity comments on sexism in popular culture by juxtaposing clips from *Star Trek* with Britney Spears’ pop hit, “Womanizer.”<sup>73</sup> Jonathan McIntosh mashes up *Buffy the Vampire Slayer* with *Twilight* to illustrate the criticism that the Twilight phenomenon celebrates female disempowerment and romanticizes male stalking,

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<sup>70</sup> Kristina Busse & Alexis Lothian, Scholarly Critiques and Critiques of Scholarship: The Uses of Remix Video, 26 *Camera Obscura* 77: 139, 142 (2011).

<sup>71</sup> Jonathan McIntosh, The Price is Creepy-Bob Barker Supercut, Political Remix Video (Nov. 8, 2011) <http://www.politicalremixvideo.com/2010/11/08/the-price-is-creepy/>.

<sup>72</sup> Top 10 Hitler Downfall Parodies of All Time, Ranker, <http://www.ranker.com/list/top-10-hitler-downfall-parodies-of-all-time/the-master> (last visited Nov. 12, 2013).

<sup>73</sup> Captain Kirk is a Womanizer, Political Remix Video (Mar. 7, 2009) <http://www.politicalremixvideo.com/2009/03/07/kirk-is-a-womanizer/>.

leading to over 4 million views, translation into over 30 languages, and even positive reactions from young *Twilight* fans.<sup>74</sup>

Political remix videos (PRVs) engage with electoral and direct politics. These types of remixes predated the internet,<sup>75</sup> but now routinely circulate online. “At the heart of political remixing lies an impulse to rebut mainstream media and promote contemporaneous critiques of culture through alternative channels free from endemic corporate censorship in journalism.”<sup>76</sup> PRVs are powerful and persuasive because they can take advantage of shared public knowledge while commenting on public issues. Millions of viewers have watched one or more PRVs.

For example, “Fellowship of the Ring of Free Trade” adds subtitles to clips from the popular movie *The Lord of the Rings* to comment on the recent history of international free trade agreements and the efforts to oppose them, equating corporate power with the villain Sauron.<sup>77</sup> The Move Your Money project, which encourages citizens to move their bank accounts from the banks that received bailout funds, came to popular attention in part through a remix video created by documentary filmmaker Eugene Jarecki drawing on clips from *It’s a Wonderful Life*.<sup>78</sup> Arab-American artist and filmmaker Jacqueline Salloum created “Planet of the Arabs,” combining clips from decades of popular movies and television shows to comment on the demonization of Arabs in American media.<sup>79</sup> “Homophobic Friends,” by remixer Tijana Mamula, combines short clips from the popular TV show *Friends* to comment on homophobia in popular media.<sup>80</sup>

Nor are these solely individual productions; *Prime Time Terror* is just one remix created for an advocacy organization. GreenPeace’s OnSlaught(er) video remix, for example, was created to draw attention to the rainforests GreenPeace contends are being destroyed in order to extract palm oil used in Dove products, and has been viewed over 1.5 million times.<sup>81</sup>

These important cultural and political benefits of video remix have begun to be recognized by traditional cultural gatekeepers.<sup>82</sup> For example, traditional art-world institutions are bringing

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<sup>74</sup> See Jonathan McIntosh, *Buffy vs. Edward Remixed*, *Rebellious Pixels* (June 20, 2009) <http://www.rebelliouspixels.com/2009/buffy-vs-edward-twilight-remixed> (noting coverage in outlets ranging from NPR to the New York Post to Vanity Fair).

<sup>75</sup> See, e.g., *Cultural Borrowings: Appropriation, Reworking, and Transformation*, 76-91 (Ian Robert Smith ed. 2009), available at [http://www.scope.nottingham.ac.uk/cultborr/Cultural\\_Borrowings\\_Final.pdf](http://www.scope.nottingham.ac.uk/cultborr/Cultural_Borrowings_Final.pdf) (describing a history of “found footage” culture on the internet).

<sup>76</sup> *Id.* at 80.

<sup>77</sup> St01en Collective, *Fellowship of the Ring of Free Trade*, YouTube (Nov. 24, 2006), <http://www.youtube.com/watch?v=vkmczhkrKYA>.

<sup>78</sup> Eugene Jarecki, *Move Your Money*, YouTube (Dec. 29, 2009), <http://www.youtube.com/watch?v=IcqrX0OimSs>.

<sup>79</sup> hnassif, *Planet of the Arabs*, YouTube (Apr. 14, 2006), <http://www.youtube.com/watch?v=MilZNEjEarw>.

<sup>80</sup> Tijana Mamula, *Homophobic Friends*, *Political Remix Video* (July 11, 2011), <http://www.politicalremixvideo.com/2011/07/11/homophobic-friends>.

<sup>81</sup> GreenpeaceVideo, *Dove Onslaught(er)*, YouTube (Apr. 21, 2008), <http://www.youtube.com/watch?v=odI7pQFyjs0>.

<sup>82</sup> See, e.g., *Fan Video Bibliographies*, Organization for Transformative Works, <http://transformativeworks.org/projects/fan-video-bibliographies> (listing substantial and growing body of scholarly work on vids) (last visited Nov. 11, 2013); *24/7 A DIY Video Summit: Overview*, University of South Carolina Institute for Multimedia Literacy, <http://www.video24-7.org/overview/>.

vids into museums and other high art venues.<sup>83</sup> Vids represent a grassroots form of the collage art and appropriation art found in major modern art museums.<sup>84</sup> The University of Iowa Press is about to publish the first fan fiction reader, recognizing fan fiction as an object of literary study, not just sociological inquiry.

But the transformation worked by participatory culture is just beginning. Fan remix communities are increasingly a source of overt political energy. Harry Potter fans, for example, have organized to further various causes, including a campaign to get Warner to commit fair trade practices in its production of Harry Potter chocolate products.<sup>85</sup> Henry Jenkins explains how the habits developed within remix culture become confident participation in other areas of public life:

[T]hese 21st century activists reflect the tendency among American youth towards what researchers working with the MacArthur Foundation describe as “participatory politics.” ... “These practices are focused on expression and are peer based, interactive, and nonhierarchical, and they are not guided by deference to elite institutions....The participatory skills, norms, and networks that develop when social media is used to socialize with friends or to engage with those who share one’s interests can and are being transferred to the political realm.... What makes participatory culture unique is not the existence of these individual acts, but that the shift in the relative prevalence of circulation, collaboration, creation, and connection is changing the cultural context in which people operate.”

Everyday experiences within a more participatory culture shift expectations about what constitutes politics, what kinds of change are possible. Right now, young people are

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<sup>83</sup> See Lim, Us, <http://mediacommons.futureofthebook.org/imr/2008/02/01/us-a-multivid-by-lim> (used as part of ethnographer Michael Wesch’s Anthropological Introduction to YouTube, [http://www.youtube.com/watch?v=TPAO-lZ4\\_hU](http://www.youtube.com/watch?v=TPAO-lZ4_hU), and exhibited at the California Museum of Photography); Spectacle: The Music Video, <http://www.movingimage.us/exhibitions/2013/04/03/detail/spectacle-the-music-video/> (exhibition at the Museum of the Moving Image featuring vids). See also The Twenty (Intentionally) Funniest Web Videos of 2007, N.Y. Mag. (Nov. 11, 2007), <http://nymag.com/movies/features/videos/40663/index1.html> (identifying a “lush, hilarious” fanvid as one of the best of the year’s videos); Logan Hill, The Vidder: Luminosity Upgrades Fan Video, N.Y. Mag. (Nov. 12, 2007), <http://nymag.com/movies/features/videos/40622/>.

<sup>84</sup> Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. Davis L. Rev. 1151, 1183 (2007) (“[T]hese modern variants are not fundamentally different from older forms of creative practice. Across the spectrum of creative practice, manipulation of preexisting texts, objects, and techniques figures centrally in processes of cultural participation.”).

<sup>85</sup> Henry Jenkins, From Culture Jamming to Cultural Acupuncture 6 (forthcoming 2014) [hereinafter Jenkins, Culture Jamming] (“My research team at the University of Southern California has been developing case studies across a range of different movements, interviewing young activists, monitoring their media productions, observing their social interactions, and otherwise, attempting to understand the processes by which they recruit, train, motivate and mobilize their participants. Writing about The Harry Potter Alliance and the Nerdfighters, two of our cases, Neta Kligler-Vilenchik describes the proceses of ‘translation’ through which these organizations tap the cultural fantasies and social connections these young people feel towards forms of popular culture franchises for launching political awareness campaigns. In particular, she stresses three dimensions of these groups – their creative deployment of shared mythologies, their encouragement of grassroots media production and circulation, and their willingness to provide a space where political conversations are accepted as a normal part of the group’s activities – which contribute to their ability to bridge between members’ cultural and political interests.”) (citation omitted); Henry Jenkins, ‘Cultural Acupuncture’: Fan Activism and the Harry Potter Alliance, *Transformative Works and Cultures*, no. 10, doi:10.3983/twc.2012.0305 (2012).

significantly more likely to participate in cultural activities rather than political ones. As a consequence, those activist groups that have been most successful at helping find their civic voice have done so often by tapping into participants' interests in popular and participatory culture. Cohen, Kahne, and their colleagues found that youth who were highly involved in interest-driven activities online were five times as likely as those who weren't involved to engage in participatory politics, and nearly four times as likely to participate in forms of institutional politics when measured in their survey.<sup>86</sup>

In other words: people who begin participating in culture as fans, remixing popular culture without anyone's permission, are much more likely to expand their horizons and start participating more broadly as free citizens.

## 2. Remix offers particular benefits to otherwise marginalized speakers.

Historically, remix comes disproportionately from minority groups: women;<sup>87</sup> gay, lesbian, bisexual, transgender, and queer people;<sup>88</sup> and racial minorities of all sexes and orientations.<sup>89</sup>

This is unsurprising, because "talking back" to dominant culture using its own audiovisual forms can be particularly attractive to disempowered speakers.<sup>90</sup> Remix is appealing to women

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<sup>86</sup> Jenkins, *Culture Jamming*, supra note 85, at 5 (citations omitted); see also Neta Kligler-Vilenchik & Sangita Shresthova, *Learning through Practice: Participatory Culture Civics, Youth and Participatory Politics Research Network*, Macarthur Foundation (2012), [http://ypp.dmlcentral.net/sites/all/files/publications/Learning%20Through%20Practice\\_Kligler-Shresthova\\_Oct-2-2012.pdf](http://ypp.dmlcentral.net/sites/all/files/publications/Learning%20Through%20Practice_Kligler-Shresthova_Oct-2-2012.pdf).

<sup>87</sup> See Kristina Busse, *Introduction*, 48 *Cinema J.* 104, 105-06 (2009); Francesca Coppa, *A Fannish Taxonomy of Hotness*, 48 *Cinema J.* 107, 107 (2009); Posting of Micole (Women's Art and "Women's Work") to *Ambling Along the Aqueduct*, <http://aqueductpress.blogspot.com/2007/08/womens-art-and-womens-work.html> (Aug. 29, 2007, 11:15 EST).

<sup>88</sup> Fan videos have been identified as a queer genre. See Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, 48 *Cinema J.* 125, 126 (2009) ("[Fan videos] celebrate, critique, and de- or reconstruct mass media ... engaging the source via its own images ... and visual language. In many cases, they render queer dimensions of these sources visible by telling stories of same-sex romance (known as 'slash') through sophisticated viewing and editing techniques." (citation omitted)); cf. Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 *Am. U. J. Gender Soc. Pol'y & L.* 461, 468-69 (2006) (discussing the role of slash in making queer meanings).

<sup>89</sup> See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 *N.C. L. REV.* 547, 561, 622 (2006); K.J. Greene, "Copynorms," *Black Cultural Production, and the Debate over African-American Reparations*, 25 *Cardozo Arts & Ent. L.J.* 1179, 1186 (2008); Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 *U. Ill. L. Rev.* 559, 588-89 (1992) ("The rap genre is based on and built up around digital sampling. Rap began, before sampling existed, by singing original lyrics over cassette tapes of songs or rhythm tracks."); Olufunmilayo B. Arewa, *Seeing but Not Hearing Music: How Copyright Got (And Didn't Get) the Blues* 55 (Oct. 14, 2008) (manuscript), available at [http://law.scu.edu/wp-content/uploads/hightech/Seeing%20But%20Not%20Hearing%20Music\\_\\_\\_by%20Olufunmilayo%20B\\_%20Arewa.pdf](http://law.scu.edu/wp-content/uploads/hightech/Seeing%20But%20Not%20Hearing%20Music___by%20Olufunmilayo%20B_%20Arewa.pdf) ("[I]ncumbent creators have been permitted to borrow from certain traditions, particularly traditions from groups such as African Americans, who historically have been at the bottom of most societal hierarchies of status and power. Many of these incumbents may then be able to use copyright to block borrowings from their works, despite the fact that such works borrow extensively. The operation of copyright as a property rule also disfavors certain aesthetics of cultural production, including those that use extensive borrowing, particularly when borrowing is undertaken by those with relatively low status, limited resources or less power relative to those from whom they borrow.").

and minorities because it readily permits critique of existing structures—by creating possibilities and alternatives, remixes demonstrate that there is no single, necessary story.<sup>91</sup> As fan N.J.B. wrote to the OTW:

In the early aughts, many social scientists deliberated on the “democratizing effect of the internet” and of technological knowledge in general. In fanfiction, we see that democratization. It is the response to many who feel alienated by the dominant paradigm (indeed, who at times does not feel alienated, for there is not such thing as a “normal” person.) Fanfiction is the supportive, creative space for blacks who after seeing a movie in which all the main characters are white, thinks, “I would do it differently, and here’s how.” Fanfiction is for the girls who read a comic book in which the heroes are all men, and imagines herself as Captain America. Fanfiction is for all those who watch/listen/read to a story and cannot empathize with the characters as they are, but see potential in tweaking, recreating, and re-imagining the story to fit and resonate with their own lives. Finally, fanfiction is for all groups of people misrepresented in our mass media, and it gives them a space to create alternatives which are as empowering for the producer as the consumer.

New technologies allow people with limited financial resources to talk back to mass culture in language that audiences are ready to hear, both because they are familiar with the referents in a remix and because the quality of a remix can now be sufficient to keep it from being dismissed out of hand as ludicrously amateurish or unwatchable.<sup>92</sup>

While it is easy to find aesthetically and critically powerful remixes, including fan fiction and vids, much of the cultural force of remix comes because it empowers individuals to make new meanings regardless of whether anyone would ever praise the results as brilliant artworks. The following subsections discuss problems of underrepresentation of mass media and identify a few of the groups for whom remix is therefore especially significant.

a. Underrepresentation is pervasive in mass media.

Women and minorities are significantly underrepresented in mainstream media. A study by the Center for the Study of Women in Television and Film found that, of the top 100 US films in 2011, women accounted for 33% of all characters and only 11% of the protagonists. The

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<sup>90</sup> Cf. Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 *UCLA Ent. L. Rev.* 237, 258 (2009) (remix allows average citizens who lack political power under China’s authoritarian regime to “appropriate and democratize their own cultural benchmarks, encouraging the kind of cultural participation that is vital to the development of ‘a just and attractive society.’”) (citation omitted); *id.* at 258-59 (concluding that making parodies allows Chinese youth to define themselves and find a broader world of activism, using a medium that is within their reach (online video) to target otherwise inaccessible traditional media, and concluding that “[t]his popular consciousness has the potential to expand beyond cultural matters alone, into a burgeoning political consciousness, or perhaps even activism.”).

<sup>91</sup> *Id.* at 76.

<sup>92</sup> Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 *Vand. J. Ent. & Tech. L.* 889, 903–05, 930 & n.168 (2010); see also Marcus Boon, *In Praise of Copying* 147 (2010) (montage “is a poor people’s art,” based on limited resources) *available at* <http://www.hup.harvard.edu/features/boon/In-Praise-of-Copying-by-Marcus-Boon-HUP-free-full-text.pdf>.

## Organization for Transformative Works

Annenberg Public Policy Centre at the University of Pennsylvania likewise reported that the ratio of male to female characters in 855 top box-office films from 1950-2006 has remained at about two to one for at least six decades. Women were twice as likely to be seen in explicit sexual scenes as men. The women who do appear are significantly younger than male counterparts, and older women are rare.<sup>93</sup>

Racial divides are similar. “While 40% of American youth ages nineteen and under are children of color, nearly three-quarters of all primetime characters during the 2003-04 television season were white.”<sup>94</sup> Racial diversity is greatest at hours when children are least likely to be watching. Latinos are often shown in low-status occupations; Asian Americans are rare in primary roles and are regularly stereotyped; disabled and non-heterosexual characters are often absent.<sup>95</sup> Movies are generally not much better, nor are popular books—including children’s books.<sup>96</sup>

These absences and stereotypes are not benign. Children readily acquire gender and racial stereotypes from media representations.<sup>97</sup> Even adults are swayed by exposure to stereotypical portrayals, though they may be unaware of the effects.<sup>98</sup> In this context, remix has unique power to fight back against these portrayals. “Rewriting the popular narrative becomes an act of not only trying to change popular understandings, but also an act of self-empowerment.”<sup>99</sup>

### b. Remix offers unique opportunities for women.

Literary scholars recognize that “many subordinate cultures throughout history, especially women and ethnic minorities, have chosen to record and/or publicize their opinions by writing archontic [explicitly intertextual] literature.”<sup>100</sup> In fact, the first original prose fiction by a woman in English was explicitly based on an existing work in order to respond to it, as was the first published play by a woman in English. These works are read today as early feminist works because they critique the patriarchal society of the time. “Fan fiction, too, is the literature of the subordinate, because most fanfic authors are women responding to media products that, for the most part, are characterized by an underrepresentation of women.”<sup>101</sup>

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<sup>93</sup> Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of ‘Mary Sue’ Fan Fiction as Fair Use*, 95 *Calif. L. Rev.* 597, 603 (2007).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 604-05.

<sup>97</sup> *Id.* at 606-07.

<sup>98</sup> *Id.* at 607; see also, e.g., Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 *Am. Psychologist* 613 (1997) (discussing the concept of stereotype threat—internalized reaction to perceived stereotypes—and the research revealing that evoking stereotypes dramatically depress the standardized test performance of women and African Americans).

<sup>99</sup> Chander & Sunder, *supra* note 93, at 619-20; see also, e.g., Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 *J. Personality & Soc. Psychol.* 800 (2001) (explaining that images of admirable members of minority groups can counter the effects of stereotypes)

<sup>100</sup> Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *Fan Fiction and Fan Communities in the Age of the Internet* 61, 67 (Karen Hellekson & Kristina Busse eds., 2006).

<sup>101</sup> *Id.* at 71.

It is therefore unsurprising that fanwork production, including fan fiction and fan video, is a female-dominated form in the U.S., recontextualizing and critiquing popular culture to make it more responsive to women's concerns.<sup>102</sup> While female content producers are underrepresented in commercial spheres, their participation in noncommercial remix is a move towards greater equity in representations—and the representations themselves change as a result.

Fan writers and vidders regularly focus on developing marginalized, often female or feminist, perspectives that aren't present in original texts.<sup>103</sup> For example, Obsessive24's "Piece of Me" uses a combination of DVD footage from Britney Spears' videos and other sources to explore the singer's sexualization and the simultaneous hostility and sexism she faced from giving the media exactly what it demanded from her. "While the official video to 'Piece of Me' creates fake tabloid covers and paparazzi video, Obsessive24 uses the real thing to heartbreaking effect."<sup>104</sup> On the comedic side, "Star Trek Dance Floor" criticizes the 2009 *Star Trek* movie to great effect—2009's vision of the future has even fewer women than 1967's, and the vid points out that this isn't good for anyone.<sup>105</sup> Another exemplary vid, "Women's Work," is a critique of the sexualized violence on television, using footage from the cult hit *Supernatural*. "Women's Work" succeeded because its target was recognizable and comparatively well-known, sparking an extensive conversation in the audience about representations of women in popular media.<sup>106</sup> Another vid, "The Price," began a heated online discussion about narratives of masculine suffering in mainstream media.<sup>107</sup>

Women have also been primary producers of "slash" fiction, art, and video. Slash, broadly speaking, takes characters who are usually shown in official texts as heterosexual and portrays them in same-sex relationships.<sup>108</sup> This contrast between the official and the unofficial challenges mainstream gender norms and stereotypes, allowing fans to identify alternative sexualities everywhere and anywhere—same-sex relationships or other unconventional gender relationships can be consistent with being a macho cop or a space explorer. "By taking

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<sup>102</sup> U.S. Copyright Office, Public Hearings: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 0108.20-0111.15 (May 7, 2009) (statement of Francesca Coppa), available at <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-7-09.txt>; Abigail Derecho, Gender and Fan Culture (Round Eight, Part One): Abigail Derecho and Christian McCrea, Confessions of an Aca-Fan (July 26, 2007) [http://henryjenkins.org/2007/07/gender\\_and\\_fan\\_culture\\_round\\_e.html](http://henryjenkins.org/2007/07/gender_and_fan_culture_round_e.html) ("[D]igital remix culture owes a substantial debt to minority discourse. Three genres of digital remix were pioneered between 1986 and 1996: digital music sampling, video game mods, and online fanfic. Of those three, the first was the invention of African American men (most of them were men, not all) and the third was the invention of white American women (most of them were white, most of them were women, not all). . . . It is vital that we media (especially digital media) scholars depict accurately the history of women media fans as not only highly competent, but inventive in their uses of a wide array of technological platforms and tools.")..

<sup>103</sup> Coppa, Women, supra.

<sup>104</sup> Francesca Coppa, An Editing Room of One's Own, supra note 40, at 125, 127.

(2011). See Test Suite of Fair Use Vids, Organization for Transformative Works, <http://transformativeworks.org/projects/vidtestsuite> (obsessive24, following accepted vidding practices, purchased Spears's videos on DVD in order to create the vid, *Piece of Me*).

<sup>105</sup> On the Dance Floor, YouTube (June 8, 2009), <https://www.youtube.com/watch?v=deQuFc3BP74>.

<sup>106</sup> Posting of sockkpuppett to Livejournal (New Vid – Women's Work (Supernatural)), <http://sockkpuppett.livejournal.com/442093.html?thread=4893421#t4893421> (Aug. 13, 2007 03:13).

<sup>107</sup> See Thingswithwings, Some Thoughts on Manpain, Jan. 16, 2011

<http://thingswithwings.dreamwidth.org/145564.html> (listing 287 comments as of February 26, 2012).

<sup>108</sup> Katyal, supra note 88, at 467.



traditional male heroes and reworking their characters and performances, slash writers are able to dissect, appropriate, and then deconstruct the various elements of male dominance. For example, in stark opposition to the typical dominant male/passive female theme one often sees in popular culture texts, slash depicts two equals involved in a romantic relationship and negates the uneven power balance afforded to women and men by simply removing ‘gender as a governing and determining force in the love relationship.’”<sup>109</sup> By rewriting official texts, slash writers reimagine what is possible. “In the process, they not only escape the inequalities of the real space marketplace of speech, but they create a new world—one in which the gender of the author plays a minimal role in the construction of the marketplace of expression.”<sup>110</sup>

Another common variant in fanworks is the “Mary Sue,” a power fantasy in which a female character representing the author joins the main characters and proves to be the best of them all. This type of rewriting “offers a partial antidote to a media that neglects or marginalizes certain groups. Victims of prejudice often internalize its claims; indeed, oppressive societies have often relied on this psychological trick to maintain hierarchies. A process of consciousness-raising and self-empowerment requires that one recognize one’s own potential, even if others do not. . . . Mary Sues help the writer claim agency against a popular culture that repeatedly denies it.”<sup>111</sup> Given the social science evidence on the importance of representations, Mary Sue remixes can help combat the toxic effects of stereotyping and underrepresentation.<sup>112</sup> (Indeed, Alice Randall’s *The Wind Done Gone* challenges *Gone with the Wind*’s racism and sexism precisely through the addition of a beautiful, accomplished African-American character in the Mary Sue mold.)<sup>113</sup>

Given this pattern of critique through remix, a legal regime in which remix is threatened with sanctions has particularly damaging effects on members of marginalized groups who are already likely to be nervous about expressing themselves.<sup>114</sup> Female vidders have historically been reluctant to step up and claim cultural legitimacy, and legal uncertainty hinders both production of transformative works and remixers’ ability to achieve mainstream recognition.<sup>115</sup>

c. Remix recognizes alternative sexualities and sexual identities.

Slash is only one of the possibilities available in remix, but it is a powerful one, especially for people who are dissatisfied with rigid gender roles for both men and women.<sup>116</sup> Henry Jenkins

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<sup>109</sup> Id. at 486 (citation omitted).

<sup>110</sup> Id. at 489.

<sup>111</sup> Chander & Sunder, *supra* note 93, at 608 (footnotes omitted).

<sup>112</sup> See *id.* at 599-600, 610; see also *id.* at 613 (Mary Sues “comment on or criticize the original, while at the same time creat[ing] something new. They highlight the absence of society’s marginal voices in the original works, the stereotyped actions or inactions of certain characters, and the orthodoxy of social relationships in the original.”).

<sup>113</sup> Id. at 601.

<sup>114</sup> Library of Congress Rulemaking Hearing Section 1202, Testimony of Francesca Coppa 0119.4-0120.4, May 7, 2009, available at <http://www.copyright.gov/1201/hearings/2009/transcripts>.

<sup>115</sup> Id. at 0120.5-0120.17.

<sup>116</sup> See Henry Jenkins, *Confessions of a Male Slash Fan*, 1 *Strange Bedfellows* (May 1993):

When I try to explain slash to non-fans, I often reference that moment in *Star Trek: The Wrath of Khan* where Spock is dying and Kirk stands there, a wall of glass separating the two longtime buddies. Both of them are reaching out towards each other, their hands pressed hard against the glass, trying to establish physical contact. They both have so much they want to say and so little time to say it. Spock calls Kirk his

describes slash as “a reaction against the construction of male sexuality on television and in pornography; slash invites us to imagine something akin to the liberating transgression of gender hierarchy. . . .”<sup>117</sup> “Slash does this by rejecting the notion that gender roles are fixed and predetermined and embraces the idea that sexuality can be fluid and filled with various erotic possibilities.”<sup>118</sup> Slash offers new visions of equality in sexual and romantic relationships, not just for same-sex couples but for everyone.<sup>119</sup>

These new possibilities are not merely theoretical. Chelsea S., for example, explained:

[F]anfiction gave me a small segue into some insight about myself. I am bisexual. If I think hard, my first crush on a girl was probably in the first grade. Not that I could ever admit it to myself. Growing up in east Texas, one just didn't do that. Even my own brother coming out of the closet couldn't assist me in what should have been a comparatively small step. It wasn't until I was older and stumbled upon the infamous 'slash fiction' that I saw one of my favorite television characters, one with whom I identified deeply, recast as a bisexual man. His character was not significantly altered, he didn't suddenly become something unrecognizable. The stories I read featured him having more or less the same adventures he always had. It was the first step to greater tolerance and greater self acceptance for me.

Lauren S. concurred, writing that “Fanworks were and are vitally important to my acceptance of my queer sexuality, as they provide a world where non-heterosexuality is accepted and celebrated. If they were to be made unavailable, queer youth would lose a source of support in an often still shockingly hostile world.”

Lillian K. had a similar experience encountering asexuality through fandom:

Fandom and fan works, specifically fanfiction, helped me explore my sexuality in a minimally intrusive way.

The availability of non-heteronormative narratives in mainstream media is, rather unfortunately, slim. As I was going through puberty, I relied on fanfiction to give me these queer storylines and explore as proxy the spectrum of sexuality and gender. I could read all the plots- cliché, subverted cliché, or original idea- but now with a same-sex

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friend, the fullest expression of their feelings any where in the series. Almost everyone who watches that scene feels the passion the two men share, the hunger for something more than what they are allowed. And, I tell my nonfan listeners, slash is what happens when you take away the glass. The glass, for me, is often more social than physical; the glass represents those aspects of traditional masculinity which prevent emotional expressiveness or physical intimacy between men, which block the possibility of true male friendship.

<sup>117</sup> Jenkins, *Textual Poachers*, supra note 10, at 189 (1992).

<sup>118</sup> Katal, supra note 88, at 486.

<sup>119</sup> Anne Kustritz, *Slashing the Romance Narrative*, 26 *J. Am. Culture* 371, 377 (2003) (“[Slash writers] tear down the traditional formula of romance novels and films that negotiate the submission of a heroine to a hero by instead negotiating the complicated power balance between two equally dominant, independent, and masculine characters. This friendship-based love narrative, along with an equality-centered relationship dynamic, is the overwhelming preoccupation of slash narratives.”).

couple, or a trans\* protagonist, and not have it be A Big Deal, because it wasn't. And it shouldn't be.

It is through fanfiction that I first learned the term “asexual,” which, after further research, I now identify as. It is through fanfiction that I lost that unfamiliar-idea-uneasiness regarding non-heterosexual, non-cisgender identities and people, which made me a better, more accepting person.

Because of the ability to look beneath the surface of conventional characters, to suggest alternate identities and sexualities for them, remix will remain an important way to challenge conceptions of sexual identity.

d. Remix can combat racial stereotypes and underrepresentation.

For similar reasons, remix provides ways to challenge conventional racial narratives and stereotypes.<sup>120</sup> Alice Randall's *The Wind Done Gone* is an obvious example, with its reversal of the racist stereotypes of *Gone with the Wind*,<sup>121</sup> but its critiques can also be found in noncommercial remix as well.<sup>122</sup> The common practice of “racebending” replaces white heroes with nonwhite casts, envisioning how the story would change if white people were no longer the default.<sup>123</sup> In video, numerous remixes mock the “Mighty Whitey” trope of a white savior rescuing “savages” from other white oppressors by combining footage from James Cameron's film *Avatar* with audio from the Disney film *Pocahontas* and vice versa.<sup>124</sup> Music remix has proven particularly attractive for some immigrants and African-Americans negotiating their relationships with majority white culture.<sup>125</sup>

Refocusing existing narratives to highlight minority characters can be a powerful transformative tool. One vidder of color, Talitha78, responded to debates over race in popular culture by

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<sup>120</sup> Derecho, supra note 100, at 69 (explaining that many authors have used existing works to critique racism and colonialism, including many versions of Shakespeare's *Tempest*, multiple retellings of *Jane Eyre* (including Jean Rhys' *Wide Sargasso Sea*), rewritings of *Robinson Crusoe*, David Henry Hwang's *M. Butterfly* retelling Puccini's opera, Sena Jeter Naslund's *Ahab's Wife* (retelling *Moby Dick*), Alice Randall's *The Wind Done Gone*, and Nancy Rawles' *My Jim* (retelling *Huckleberry Finn* from the perspective of the slave Jim and his wife)).

<sup>121</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1272 (11th Cir. 2001).

<sup>122</sup> See *Teland.com*, *Remember Us*, <http://www.teland.com/remember/index2.html> (July 21, 2007) (characters of color archive); *Yahtzee*, *Them Mean Ol'*, *Low-Down*, *Lando Calrissian Blues*, <http://www.thechicagoloop.net/yahtzee/chivalry/chivfic/LCBlues.htm> (in which a number of African-American sidekicks from various television shows meet and commiserate) (last visited Nov. 12, 2013).

<sup>123</sup> See, e.g., *Racebent Disney*, <http://racebentdisney.tumblr.com/>; *Dark Agenda*, *Racebending Revenge Fanworks Challenge*, <http://dark-agenda.dreamwidth.org/tag/challenge:+racebending+revenge> (producing fanworks based on any source, in any medium); *Chromatic Recasting*, [http://fanlore.org/wiki/Chromatic\\_Recasting](http://fanlore.org/wiki/Chromatic_Recasting) (listing fanworks that have recast various TV shows and movies).

<sup>124</sup> Posting of Jonathan (*Avatar Equals Pocahontas*) to *Political Remix Video* (Mar. 3, 2010), <http://www.politicalremixvideo.com/2010/03/03/avatar-pocahontas/>.

<sup>125</sup> See, e.g., Kevin Driscoll, *Stepping Your Game Up: Technical Innovation Among Young People of Color in Hip-Hop* (MIT master's thesis, 2009); Jacobson, supra note 53, at 43 (“Many of our students are using their own homemade remixes to make similar commentaries [to those of politically outspoken rapper M.I.A.] about their own identities and border crossings. Indeed, this connection of remix technology to daily decisions around how we perform and/or resist cultural, economic, or gender identities means that we have to listen for the new ways in which our students are working through long-standing issues.”).

creating a vid, “‘White’ and Nerdy,” focused on an African-American character on the TV show *Psych*. She explained: “putting this together became a way of working through my issues with regard to [fan debates over race known as] RaceFail 2009. Like Gus, I am a nerd of color in a society where nerdiness is frequently coded as ‘white.’ With this vid, I want to subvert that stereotype ....”<sup>126</sup>

Tea F.’s experience highlights the reasons that everyone needs, and deserves, representation—including by putting themselves in the story:

I spent about five years running an online fanfiction-based roleplaying website, from 2002 to 2007. Perhaps one of the most powerful stories from my time running that website came at the hands of one of my youngest users— a fourteen-year-old from Somerville, Massachusetts. Let’s call her C.

One day, C contacted me, very distraught, to tell me she would no longer be allowed to use my website, because she was getting Ds in English class, and had to pull her grades up. I was shocked— C was an exceptionally talented writer for her age, and wrote several hundred words a day on my website. She was exactly the kind of young woman whom I expected to be getting As in her English classes. I talked to C. And her father at length about the problem.

It turned out that she was getting frustrated in English class because, as a female Chinese-American immigrant, she couldn’t relate to the readings in class, that were mostly written by and featuring European-American men. She much preferred writing fanfiction where she could explore other Chinese-American girl characters, rather than writing about characters and authors who had nothing in common with her and bored her to tears.

I asked her and her father if it would be okay for me to talk with her teacher. They agreed. I emailed C’s teacher, and talked to her about C’s problems with English class. I showed her teacher some of the writing C had done on my website. She was amazed: she had no idea that C was such a talented writer.

We came to an agreement: as long as C completed her homework each night, she could get extra credit for writing fanfiction.

Seven years later, C is a senior in college double-majoring in English and photography. She finished that year with a B+ in English, largely thanks to her skillfully-written fanfiction, and she eventually decided that English was her very favorite subject.

In all my years on the Internet, helping C realize that her love of fanfiction and her ability to write about her favorite books and share her writing with her friends on the Internet was just as valuable as writing essays about old, dead white men with whom she couldn’t identify.

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<sup>126</sup> talitha78, *White and Nerdy*, YouTube (Mar. 31, 2009), <http://www.youtube.com/watch?v=Iquni9PMBMk>; see also talitha78, *Comment to New Psych Vid: "White" & Nerdy (Gus)* (Apr. 23, 2009) <http://talitha78.livejournal.com/191915.html>.

Because of the freedom to imagine alternatives that is at the core of remix cultures, they are often open to discussions of racial stereotypes and ways in which narratives could be improved.

Beatrice O. explains:

Fanfic has probably most impacted me in the area of gender and race relations. This is a constant topic of discussion in fannish circles, either because we are studying/analyzing the source material or critiquing one another's work. For example, the 2009 Star Trek reboot movie sparked a lot of discussion about race, best summarized in The Spock/Uhura Racefail Prevention Post (<http://mods-su.livejournal.com/7931.html>). That discussion greatly impacted my fanfic story *The Desert Between* (<http://archiveofourown.org/works/85864>), which is about cultural imperialism and biology and how that impacts Spock and Uhura's relationship; it's one of my most popular stories. That discussion has also given me a lot of resources for real life. In training for my career, I regularly had to sit through race-relations seminars; the essays linked to from the Spock/Uhura Racefail Prevention Post were often clearer and more helpful than the resources the seminar leaders had. So I passed them on when I thought they might be helpful; those resources have also shaped how I respond to certain situations when they crop up in my day-to-day life. So learning about bias, bigotry, and racism in fiction helped give me resources to use in real life.

Transformative fandoms are not utopian spaces. But they do encourage participants to think about how the world might be different, opening up space for new visions of equality and respect for difference.

e. Remix offers new visions of disability.

In some ways, the representational gaps in mainstream culture may be at their greatest when it comes to disability. Remix cultures are beginning to address this near-absence. Medellia's story explains why noncommercial remix was so important to her, and prompted her own creativity in response:

My participation in *X-Men: First Class* fandom helped me deal with my disability in ways that just watching the movie would not have been able to. I use a wheelchair, and due to my medical problems, I knew I would eventually be using one when the movie came out in 2011. I had mobility problems already, and did not often go out. This is a huge part of the reason I identified with the movie's version of Charles Xavier, a famous wheelchair user who doesn't become paraplegic until the end of the movie. He was a younger version of the character, and got more screentime and attention as a protagonist than the more familiar older version of him did, but disability was always going to be in his future and a big part of who he is. The movie itself was pretty uneven in quality, and I might otherwise have enjoyed it and forgotten about it, but my involvement in fandom—enjoying it with other people—led me to watch it several times in the theater and buy a copy of the DVD, as well as renewing my interest in X-Men comics in general.

There are relatively few stories in pop culture about people with disabilities, fewer where they're main characters, even fewer in genre fiction. . . . [I]n that little corner of the internet, I found more depictions of a wheelchair user having power, respect, love and adventures than I've ever seen in "real" entertainment. Even seeing him as a future wheelchair user was a comfort I had been missing. I know it wouldn't sell a big-budget movie, but it doesn't have to in fanfiction, because fanfiction is a hobby and a social outlet, not a moneymaking venture. There truly are stories out there as good as published fiction, even by published authors, but I enjoy the participation as much as the finished project. I have friends and allies who share my interests, and we can tell the stories and make the art we want to see, for each other. It wouldn't have worked the same for us to individually make up stories for original characters; that's lonely work and we never would have come together if not for our interest in characters we knew and loved. Plus, I only draw, and having other artists and writers and people who suggest ideas creates a momentum I wouldn't have by myself.

The connections enabled by shared interest in a mainstream text, combined with the freedom to remix it, create spaces for diversity of all kinds. Amanda B.'s story is very different from Medellia's, but it similarly emphasizes the uniqueness of noncommercial remix culture:

I can honestly say that fandom helped me survive my teenage years. Because fanfiction is written mostly by amateurs, it is largely based on how the writers are feeling and the kinds of experiences they are familiar with. This gives fanfiction an unparalleled amount of honesty and allows the reader to emotionally connect with the characters' situations like I have never found to be true in any other type of media—and I have been reading my entire life. I am an aromantic, asexual autistic with an anxiety disorder and I knew *none* of that throughout nearly my entire high school career. . . . Fanfiction truly, honestly, was the only thing that got me out of bed some days. When I was so angry I couldn't speak, I went to fanfiction. When I was so depressed I wanted to die, I went to fanfiction. When I was so ecstatically joyous that I felt like multicolored sparks of light were zipping around my insides, ricocheting off the prison of my skin--it was probably because of fanfiction. Fandom has allowed me to connect with three of the best friends I have ever had in my life and I absolutely believe it has made me a better person. It has given me, an autistic woman who cannot read faces or body language, cannot hold a conversation, cannot stand to be touched, a way to feel less alone. At the end of the day, the most important thing is what keeps us breathing, and for me, fandom is exactly that.

The variety and freedom of noncommercial remix allows for these kinds of engagements, and many others. These stories only scratch the surface of the incredible diversity of remix cultures, and the incomparable benefits they provide to those who love them.

### C. Remix cultures inspire and teach important skills.

Art has historically not been created solely by those who have had formal art training or who have been paid for their work. Even professional artists generally begin as amateurs, working in their medium in order to learn and grow. Remix generates skills because we learn what we love: the ability to engage with a beloved text can inspire much more effort and engagement than

## Organization for Transformative Works

assigned schoolwork. We also learn what we think is possible for us: Seeing other people just like them—ordinary, nonprofessional creators—make works gives new creators the confidence to try it for themselves. Relatedly, remix offers participants unique access to an audience that is engaged with the subject matter, conversant in the fine details of the relevant art form, and eager to offer feedback. Remix therefore is an important way in which creators learn the skills they'll need throughout their creative and professional careers.

The following stories from award-winning, best-selling authors summarize these benefits.

Naomi Novik, <http://www.temeraire.org/>:

I started writing fan fiction in 1994. I sold my first novel in 2004. Those two events are inextricably linked. I'd written nearly 300,000 words of fanfic before I was ready to sit down to write the first volume of the *New York Times* best-selling *Temeraire* series, which is closing in on a million copies in print and has been translated into 30 languages and was optioned by Peter Jackson.

Participating in the fanfiction community gave me not merely better writing skills, but a community in which to learn taste and get feedback. A dozen people from that community gave me feedback on that critical first novel as I wrote it, the feedback of passionate readers instead of other writers or editors. I have never gotten comparable feedback in any writers' workshop or from any instructor ever.

I'll also add that because I am passionate about the value of fanfiction provided me, I make a deliberate effort to speak at my public appearances and in interviews about my fanfic-writing roots, to encourage others to value the skills they develop in that community. As a result, I routinely have the experience of having young women come up to me and tell me how important fan fiction is to them, how it is a fundamental part of their engagement with media, and how for many of them it is a part of their own journey towards becoming the creative professionals of ten years from now.

Claudia Gray, <http://www.claudiagray.com/>:

I learned a great deal from writing fan fiction that has helped me in my professional writing career. Fanfic provides a way to experiment with stories on every level - voice, length, tense, structure – in a context where those experiments are welcomed and embraced. The fiction market isn't always generous to a young writer trying something new, but in fan fiction, these experimental stories can be shown to an audience without racking up soul-killing, slow-coming rejections. The feedback I received taught me a lot about where my writing worked – just like the deafening lack of feedback let me know where it didn't.

Furthermore, fan fiction is free from the boundaries set by the marketplace. I could write works that were 100 words long or 150,000. By doing so, I learned how much story and complexity it takes to “fill” a short story, or a novel. One of the most common errors aspiring writers make is attempting to write a novel around an idea that just isn't big

enough to support that many words – but because I had written fan fiction, I was able to avoid this pitfall from the very beginning.

Although I have published seven books and made the *New York Times* bestseller list three times, I continue to write fan fiction. It is useful to me as a professional because it gives me a way to reconnect with writing as play, and to discover what story elements ignite my imagination the most. Fan fiction is my playground and my school, and I believe I will always be able to learn from it, and enjoy it.

Seanan McGuire, <http://www.seananmcguire.com/>:

Writing fan fiction allowed me to develop and hone the skills that would later allow me to become a multiple-time *New York Times* best seller. Without fan fiction and the “safety net” of familiar, established settings to act as “training wheels,” I would not have been able to learn my craft nearly as quickly, or as well. What’s more – and I feel this is almost more important in the modern culture of criticism and casual cruelty in the name of humor – writing fan fiction taught me how to handle negative reviews without damaging my reputation or my career. Very few of the “authors behaving badly” that crop up from time to time came out of the fan fiction community; we had a safe place to learn how to deal with critique that was not necessarily intended to be constructive.

Writing fan fiction has also given me a much more profound understanding of the shape of story, and the pettiness of the idea. Ideas are cheap. Execution is everything. By participating in transformative works, watching others do the same, and seeing transformative creativity applied to my own creations, I have been able to better understand the building blocks of story, which has been absolutely essential in establishing and strengthening my career.

The following sections demonstrate that these stories are unusual only because there aren’t that many bestselling authors. The skill benefits of noncommercial remix culture are widespread and powerful, and they reach across multiple media: language skills, writing, visual art, video, and other technical fields. While all these types of learning take place outside of school, it should be no surprise that remix also has powerful educational benefits in formal settings. Furthermore, remix participants engage in the kind of ethical reflection on the proper limits of appropriation that can provide support for the copyright system, in contrast to the widespread disapproval that has accompanied overreaching enforcement attempts.

1. Non-native speakers use remix to learn English.

Rebecca Black’s empirical research has revealed that young writers using online fan fiction sites can effectively learn English, as well as different cultural perspectives, through interaction with an English-literate online community.<sup>127</sup> Love of the original source motivates people to spend

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<sup>127</sup> See, e.g., Rebecca W. Black, Access and Affiliation: The Literacy and Composition Practices of English Language Learners in an Online Fanfiction Community, 49 *J. Adolescent & Adult Literacy* 118 (2005) [hereinafter Black, Access and Affiliation]; Rebecca W. Black, Language, Culture, and Identity in Online Fanfiction, 3 *E-Learning* 170 (2006).



hours writing and reviewing in English. Transformation of existing material is the glue that creates the community—audience members, even strangers, volunteer to help creators improve because they want more commentary on their favorite sources.<sup>128</sup> This provides new learners with powerful motivation to continue writing and posting. The community encourages writers to develop original and innovative storylines using existing characters. For example, when one study participant realized that many of her readers didn't know much about Chinese and Japanese history, she wrote stories responding to that gap.<sup>129</sup>

The OTW has heard from many others in similar situations. Ania, whose first language is Polish, agreed that fandom helped her learn English, which also allowed her to improve her grades and get a summer job at a Harry-Potter themed summer camp. Noel Olafsen writes, "Before I found fandom, and started creating fanworks, I hated reading and I really despised English. ... Fandom changed my view of English completely, because now, I read, speak and consume English daily." Noel's English grades went from middling to top-tier.<sup>130</sup> Maëlle P. agrees: fandom "forced and helped me to learn English, which I now speak as well as my first language." Tonje A., another non-native speaker, credits fandom with improving her English far beyond what she learned in school, so much so that she is now pursuing a Masters in English literature. "Being in a community that encouraged and praised my attempts at writing stories, and interacting with and critiquing fiction has been invaluable for my current academic 'career.'"

Because of the depth of the skills they teach, remix cultures can have the same effects in higher education. Nele Noppe wrote:

Being in fandom taught me how to write long texts in English (I'm a Dutch speaker). ... Now my work involves constant writing of long texts in English, and writing a lot of fan fiction in English has made me so good at that that I can focus on my research work without worrying .... My academic writing is often praised for being clear and engaging, and I never would have known how to communicate science in a clear and engaging way if writing fan fiction hadn't taught me how to construct a story and tell it with the right words to appeal to readers. Having this skill has undoubtedly helped me along in my career. I'm being invited to contribute to books and journals, thanks in no small part to the quality of my writing, and those publications are giving me a leg up now that it's time for me to apply for jobs in academia.

Nadja Rehberger has a similar story:

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<sup>128</sup> Black, *Access and Affiliation*, supra note 127, at 123-24.

<sup>129</sup> See Rebecca W. Black, *Access and Affiliation: Adolescent English Language Learners Learning To Be Writers in an Online Fanfiction Space* 16 (dissertation, 2006).

<sup>130</sup> Noel continues: "[N]ot only has fandom taught me things from English to photoshop to webdesign, it has taught me how to be a better person with how it breaks down problematic content and works to better it. Most importantly though, it saved my life. Fandom and fanworks has been my way of escaping to a safe place when real life became too much to bear, and without it, I don't know where I would have been today or if I would even be alive. I've found passions I never knew I had, I've learned to know myself better in ways I don't think I would otherwise. Today I'm teaching myself German, webdesign, sign language and much more, all because of fandom. Fandom and fanworks means so much to me, and it's such a huge and integrated part of my life today. Honestly, it's a part of me now and I don't think I'd survive without."

## Organization for Transformative Works

I am not a native speaker of English, yet today, at 27, I am doing my PhD in English Literature. This is largely due to the fact that I have been reading and writing in English ever since I was about 13 years old. What have I been reading and writing? Fanfiction, i.e. transformative works written by fans for fans. Fanfiction was free, it was about things that I, as a teenager, loved passionately, and most of all, it meant that I could participate and have an audience of my own. Most of it, especially the high quality works, were in English, so I was highly motivated to hone my English skills until I was capable of writing in this foreign language. As a result, my grades in English were always straight As. My teachers wondered how someone with no English relatives who had never been to the US or the UK could possibly develop such a large vocabulary ... I can honestly say that without fanfiction, I wouldn't be where I am now, career-wise!

Similarly, the feedback Anna Marie M. received from people who shared an interest in the same characters taught her enough about style and about English that she has begun publishing ebooks. Anatsuno's language skills led to her current career: "Taking part in online English-speaking fandom and consuming, then creating, English-language transformative works has been a *huge* influence on my English literacy levels, and has no doubt thus played a direct role in my decision to start working in an entirely new professional field and become a literary translator (English to French)."

### 2. English speakers use remix to learn other languages.

The same phenomenon works in the other direction. Remix creators often translate foreign-language texts into English (or their own native languages), in order to understand the original better and create new works based on the originals. According to academic studies, this provides a powerful motivation for learning languages.<sup>131</sup>

Ricarda F., who holds an MA in Japanese studies, spent significant amounts of time translating Japanese source material for non-Japanese speaking fans. This gave her a translation portfolio, and she was ultimately hired by the very company that produced the original Japanese texts of which she was a fan. "This is how fandom has given me the chance to further hone my skills, by providing a platform where feedback was almost instantaneous, where the curiosity about a specific topic and other people seeking help in understanding source material created a motivating drive much more effective than anything I have ever encountered in a formal study of language setting. And I have learned so much from discussing the cultural and linguistic differences between Japan, the USA, and other European nations." Natalie B.'s story is similar: "writing anime and manga fanfiction brought me to the attention of people at US publishing

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<sup>131</sup> See, e.g., Chatarina Edfeldt et al., Fan Culture as an Informal Learning Environment, NGL 2012 Next Generation Learning Conference, <http://du.se/Global/dokument/NGL/NGL%202012/Conference%20proceedings.pdf#page=109> (investigating translation practices in informal fan environments and concluding that they provide strong motives for non-Japanese-speaking students to learn Japanese and engage in dialogue with native speakers); Kara Lenore Williams, *The Impact of Popular Culture Fandom on Perceptions of Japanese Language and Culture Learning: The Case of Student Anime Fans* (Doctoral thesis, University of Texas-Austin, 2006) (concluding that that generating or capitalizing on interest in the popular culture of the target language group may be a useful tool in motivating language students, given the challenges many language programs face in attracting and retaining students).

houses who then gave me freelance work based on my skills and reputation. (I've done proofreading and rewriting of Japanese manga and light novels as well as Korean manhwa.)”

### 3. Remix teaches writing and editing skills.

Even within one's native language, motivation and support are vital to learning. Communities of participatory culture have long been recognized as potential environments for learning. Education Professor James Paul Gee calls these informal learning cultures “affinity spaces,” and includes fan communities as an example along with scientific colleagues and networked teams of businesspeople.<sup>132</sup> Affinity spaces are sustained by common passions and endeavors that cut across demographics, bringing participants together regardless of age, class, race, gender, or educational level. These communities encourage distributed knowledge, each member's skill set becoming a potential resource for others.<sup>133</sup>

Henry Jenkins has investigated the benefits of fannish remix for writing skills.<sup>134</sup> In fandom, “much of what is being mastered are things that schools try—and too often fail—to teach their students.”<sup>135</sup> Kids “learn more, participate more actively, and engage more deeply with popular culture than they do with the contents of their textbooks.” As one 16-year-old Harry Potter fan told Jenkins, “It's one thing to be discussing the theme of a short story you've never heard of before and couldn't care less about. It's another to be discussing the theme of your friend's 50,000-word opus about Harry and Hermione that they've spent three months writing.”

Online remix communities offer teens a head start, allowing them to publish and get feedback on their work while they're still in high school. Peer review and mentoring are readily available in remix communities. Starting with a well-known source like *Harry Potter* not only provides a built-in, supportive audience, it helps young authors develop their own senses of plot and characterization: “writers are able to start with a well-established world and a set of familiar characters and thus are able to focus on other aspects of their craft. Often, unresolved issues in the books stimulate them to think through their own plots or to develop new insights into the characters.”

Jenkins also emphasizes the way in which remix provides new perspectives not just on existing texts, but on teens' own lives: “adolescents often have difficulty stepping outside themselves and seeing the world through other people's eyes. Their closeness to Harry and his friends makes it possible to get some critical distance from their own lives and think through their concerns from a new perspective.” As a result,

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<sup>132</sup> James Paul Gee, *Situated Language and Learning* 87 (2004).

<sup>133</sup> *Id.* at 89.

<sup>134</sup> Henry Jenkins, *Why Heather Can Write*, MIT Technology Review (Feb. 6, 2004), <http://www.technologyreview.com/news/402471/why-heather-can-write/> [hereinafter Jenkins, *Why Heather Can Write*]; see also A.H. Dyson, *Writing Superheroes: Contemporary Childhood, Popular Culture, and Classroom Literacy* (1997) (superhero writing helps students make sense of the world); Kelly Chandler-Olcott & Donna Mahar, *Adolescents' Anime-Inspired "Fanfictions": An Exploration of Multiliteracies*, 46 *J. Adolescent & Adult Literacy* 556 (2003) (fan fiction can help students become more aware of the elements of composition by giving them well-understood starting points).

<sup>135</sup> Jenkins, *Why Heather Can Write*, *supra* note 134.

Harry Potter fan fiction yields countless narratives of youth empowerment as characters fight back against the injustices their writers encounter everyday at school. Often, the young writers show a fascination with getting inside the heads of the adult characters. Many of the best stories are told from a teacher's perspective or depict Harry's parents and mentors when they were school aged. Some of the stories are sweetly romantic or bittersweet coming-of-age tales; others are charged with anger or budding sexual feelings, themes that could not be discussed so openly in a school assignment and that might be too embarrassing to address through personal narratives or original characters. As they discuss such stories, teen and adult fans talk openly about their life experiences, offering each other advice on more than just issues of plot or characterization. Having a set of shared characters creates a common ground that enables these conversations to occur in a more collaborative fashion.<sup>136</sup>

These interactions turn adolescents into sophisticated readers and writers:

Through online discussions of fan writing, the teen writers develop a vocabulary for talking about writing and they learn strategies for rewriting and improving their own work. When they talk about the books themselves, the teens make comparisons with other literary works or draw connections with philosophical and theological traditions; they debate gender stereotyping in the female characters; they cite interviews with the writer or read critiques of the works; they use analytic concepts they probably wouldn't encounter until they reached the advanced undergraduate classroom.

Jenkins concludes that, while schools can incorporate similar activities into the classroom, the scope and freedom offered by non-institutional remix cultures has special value, because the fan community has flexibility to support writers at many different stages of development and can accept young people as leaders and mentors, even for adults.<sup>137</sup> Moreover, "[e]ven the most progressive schools set limits on what students can write compared to the freedom they enjoy on their own":

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<sup>136</sup> Id.; see also Black, *Access and Affiliation*, supra note 127, at 123-24 ("It is not uncommon for authors to insert themselves into their fictions as characters that possess a mixture of idealized and authentic personality traits. . . . There are also many fictions in which the author essentially hybridizes his or her identity with that of a preexisting media character to express interests, issues, or tensions from his or her own life. For example, many of the texts on fanfiction.net depict the characters from the Card Captor series dealing with issues that are never raised in the anime or manga, such as teen pregnancy, school violence, and suicide. Through these hybrid characters, fanfiction authors are able to use literacy skills to articulate and to publicly enact concerns from their daily lives."); Jenkins et al., supra note 62, at 33 ("Mapping their emotional issues onto pre-existing characters allows young writers to reflect on their own lives from a certain critical distance and work through issues, such as their emerging sexualities, without facing the stigma that might surround confessing such feelings in an autobiographical essay. These students learn to use small details in the original works as probes for their own imagination, overcoming some of the anxiety of staring at a blank computer screen.")

<sup>137</sup> Jenkins, *Why Heather Can Write*, supra note 134. See also Jenkins & Kelly, supra note 47, at 88-89 ("As educational researcher Rebecca Black argues, the fan community can often be more tolerant of linguistic errors than traditional classroom teachers and more helpful in enabling learners to identify what they are actually trying to say because reader and writer operate within the same frame of reference, sharing a deep emotional investment in the content being explored. The fan community promotes a broader range of different literary forms—not simply fan fiction but various modes of commentary—than the exemplars available to students in the classroom, and often they showcase realistic next steps for the learner's development rather than showing only professional writing that is far removed from anything most students will be able to produce.") (citation omitted).

Many young fan writers aspire to professional writing careers; many are getting accepted into top colleges and pursuing educational goals that stem from their fan experiences. Fandom is providing a rich haven to support the development of bright young minds that might otherwise get chewed up by the system, and offering mentorship to help less gifted students to achieve their full expressive potential. Either way, these teens are finding something online that schools are not providing them.<sup>138</sup>

It is also worth noting that many teens first find their way into creative remix as readers and fans. Seeing what others like them have done encourages them to try their own versions.<sup>139</sup> The presence of a vibrant, readily available community of like-minded people is therefore vital— inventing remix purely in private wouldn't have the same synergistic benefits.

The OTW heard from numerous individuals reinforcing these educational researchers' conclusions. These are a few of their stories:

Angelica S. explains that remix cultures provide social and cultural to people who would otherwise be denied them:

I'm a 28 year old woman from a low income background who's currently in a PhD program. It isn't a path that anyone in my family understands or could have expected. I've had to work very hard to get where I am, but the skills I learned in fandom really made the difference for me. They were the reason why it even seemed like a possibility.

After high school I didn't have any hopes for a college education. It took me years to even start taking classes at my local community college. But I spent a lot of time in fandom: I loved TV and film and the vids, fic, and meta analysis people made about them. I'd spend hours reading the discussions fans from all education levels and walks of life would have. I became familiar with a far wider group of people than my small, largely low income community could offer. I read and admired fanworks and commentary by women who were medical doctors and grad students in media studies and visual artists and published fiction writers. I wanted to be part of those discussions, but doing so required me to "lurk" long enough to build my critical thinking and writing skills. My first attempts at engaging weren't that great, but people were kind and welcoming and slowly I built my own analytical and creative voice.

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<sup>138</sup> Jenkins, *Why Heather Can Write*, supra note 134. See also Rebecca W. Black & Constance Steinkuehler, *Literacy in Virtual Worlds*, in *Handbook of Adolescent Literacy Research* (2009) (identifying fandom and fan fiction as sources of sophisticated literary practices requiring deep engagement with multiple literatures and rewarding linguistic and cultural diversity; "many such practices are perfectly within the realm of what various national standards and other policy documents indicate we, as a society, value and ought to foster in our youth").

<sup>139</sup> Jenkins & Kelly, supra note 47, at 87-88:

Educators like to talk about "scaffolding," the ways that a good pedagogical process works in a step-by-step fashion, encouraging kids to try out new skills that build on those they have already mastered, providing support for these new steps until the learner feels sufficient confidence to take them on her own. In the classroom, the teacher provides this scaffolding. In a participatory culture, the entire community takes on some responsibility for helping newbies find their way. . . . At first, they might only read stories, but the fan community provides many incitements for readers to cross that last threshold into composing and submitting their stories. And once a fan submits, feedback inspires further and improved writing.

## Organization for Transformative Works

I had no idea at the time that these skills would help me in other ways. However, when I started taking classes at community college I kept getting As! My instructors told me that my writing and analytical skills were some of the best they'd seen. My aspirations grew with each success: at first I had just wanted to get an AA degree and leave, but then I started researching 4 year universities, and then I started considering grad school. My instructors taught me the specifics of how to write for my projects and how to apply critical thinking in discipline specific ways, but the habits of thought underlying the whole thing were built during years of critically analyzing TV shows, movies, and fanworks.

Fandom made up for the limits of the K-12 education my family was able to afford. Based on my successes at community college, I was ultimately accepted into UCLA. Not only did the creative community of fandom teach me the skills necessary to get to that place, but once I was there the people I knew from fandom who came from higher class and highly educated backgrounds supported me! They gave me advice my parents couldn't, since neither of them had been to college. They encouraged me and told me I was smart enough and good enough.

It gave me the courage to seek out and talk to my professors. I'd spoken to women in fandom who were professors and that made it less frightening to seek out my own professors. I took on special projects. I did an honors thesis. I earned scholarship help and letters of recommendation for my PhD program. At every stage, the skills I learned in fandom and the people I'd been able to meet helped make things possible for me that I would have never had the cultural or social capital to achieve otherwise. I am who I am today because of fandom. Every vid I watched and engaged in discussion about, every discussion of the thematic nuance of a TV episode, every work of fanfic I praised or criticized for its writing and ethical implications, every person I met who I would never have met otherwise, all the ideas I came in contact with and the sheer passionate, creative energy of the people – all of that has helped drive me to do things I never imagined doing before.

I'm writing this because I want the young women and men who come along after me to have the same opportunity to find what I've found in fandom.

Allison C. found education outside the formal system:

I've spent quite a few hours reading fanworks, helping friends edit their fics, and writing some of my own. I am currently 30 years old. When I was 18 and ignorant as all get out, I dropped out of high school one semester shy of graduation. Two weeks ago, I went to take my GED tests so I could tell my own children how important school is without feeling too guilty. There is absolutely *zero doubt* in my mind that the time I spent reading, writing, and editing gave me knowledge and skills I didn't get in school, and gave me the ability to score honors level on my GED test.

## Organization for Transformative Works

Sarah D. valued fandom's attentive audiences and models of continued improvement through hard work:

For me, reading fanfiction improved my story telling skills, my vocabulary, my critical analysis. Most of what I read in high school for fun was fanfiction and I believe that the huge volume of well written fics that I read was responsible for my perfect score on the reading part of the SAT. Reading fanfiction gave me more confidence in my own writing – when I read fics especially by new authors I could see how their abilities improved the longer the story went on. This impressed on me the importance of practice and learning from past mistakes. In the same vein, when I posted my first fics on fanfiction.net I was able to get a lot of constructive criticism on my writing. I would not have had access to such constructive criticism had I posted only original works. I know this because when I posted my original writing on fanfiction.net's sister site, I received one comment whereas my fic would get at least 20. The resources available to fanfiction writers are amazing - from beta readers to peer reviews. Those who participate in fandom are invested in the fics, because everyone wants good fics to read. In a way, a fic writer can get more personal attention than a student in English class.

Angela B. likewise was able to develop her craft and get useful feedback:

The fanworks community structure not only provides free access to audience feedback, but free access to more critical, editorial review during the writing process. Writers learn to work with an editor and receive honest, targeted critiques and advice in regards to specific aspects of their writing.

As a writer I cannot overstate how valuable it has been for me to have had frequent practice in a free and positive forum. My work is archived online, so I can track my own progress. As a volunteer editor my editing skills have sharpened as well; I'm much more aware than I used to be of errors in spelling and grammar, punctuation, and sentence structure, as well as characterization or plot arc weaknesses. These writing and editing skills have already been and will continue to be of use to me in other areas of my life (academic, professional), as well as invaluable to me when I write and attempt to publish my own original novel-length fiction.

Samantha C. emphasizes the value of remix communities to adolescents struggling to form adult identities:

Fanworks ... are an outlet for adolescents in an unstable and shifting time in their lives when they are discovering themselves. Adolescence is generally when people reach the developmental stage where they come to question what they have learned and begin to think critically. Fanworks have proven to be a valuable tool for all of us who indulged in them during that time.

Perhaps, you think, I'm making this sound too important. It is important, though. It was for me at least. I graduated cum laude from Gonzaga University with a Bachelor of Arts in English with a Writing Concentration. ...

These achievements of mine come from humble beginnings: terrible fanfiction. It's not something writers like to admit to, but we all began as laughably bad writers. Fanfiction, in a way, acts like training wheels for a writer. Media provides archetypes and a story formula. The writers can choose to try and follow the formula and make their story as close to the style of the original as possible, teaching them good form and consistency of character, or they can choose to question aspects of the media and make entirely new stories that are only a step down from original works. Fanfiction is an arena where writers can try everything, good or bad, and learn to write better. It's a self-teaching tool.

... Learning through trial and error, I improved slowly but surely. These were all hard lessons that I picked up myself in a high school environment that was so busy with giving me the basics of every subject that I took Creative Writing twice because there weren't other writing options.

... Online, I had an outlet I'd never had before. No matter what fandom I was interested in writing for, someone was there to read it and tell me they enjoyed it. I wasn't used to that sort of confidence boost. You can't walk around school offering people copies of your most recent writing and ask for opinions.

... Once I didn't believe I could be a writer. It is only through years of making transformative works and experimentation that I have become the artist and writer that I am. It is through transformative works that I share my skills and passion with friends and find like-minded people. I practice editing by reviewing friends' stories. A large portion of my knowledge base has come from personal research for myself and others for the sake of accurate stories. People in fandoms have provided me with resources and networking to share my work and abilities.

I owe who I am and what I can do to the incredibly vast communities that have built themselves around sharing transformative works.

Nicky found that analytical skills developed in remix culture paid dividends in her school and career:

One of fandom's greatest strengths is that it is not only creates dedicated consumers of media, but encourages them to analyze and engage with it. Alongside evangelizing it's favorite TV shows and ships, fandom has complicated, important conversations about gender, sex, race and class that equal and exceed most of the discussions I had in college. Because they are taking place online, their audience and participants are huge and hugely varied, and it was easy for a newcomer like me to catch up on the basics. When I walked into my first gender studies course in college, I was miles ahead of the curve, already conversant in the vocabulary, well used to deconstructing media, statistics, and press, and with a better understanding of the complexity and depth of the issues. That knowledge and enthusiasm later led to an internship with one of my publishing heroes and my first post-college job.



## Organization for Transformative Works

While more abstract academics are important too, fandom works more accessibly, analyzing media that 16 year old me was invested in, and it kept records in places I didn't need college admission or a journal subscription to get to. Our culture is saturated with images, with advertising, with media of every kind, and as a young woman, having the tools to describe and deconstruct the flood was invaluable.

Tassos found in writing remixes the confidence to start a new career:

I've always loved making up stories, but I never had that kick in the pants to start really writing and *finishing* stories till I found fandom. *Farscape* was my first fandom when I was 16, and I wrote my first fic then too. Writing in fandom was both work and play. Work because writing is hard; play because I got to experiment with different ideas, different styles, got instant feedback both good and bad, write stories that failed, write stories that succeeded, learn about my own process, became part of a community where I could do all that and where my off the wall ideas and enjoyment of fandom was valued.

Fast forward ten years. I'm 25, in my first job after college as a science major working in a university lab as a lab tech and manager. I hate my job. It's stressful, it's going nowhere, my college friends are all scattering and I'm depressed and feeling like I'm stuck in a rut and don't know what to do with my life. I hear about science journalism as a possible career path, and one of the big reasons my depressed self doesn't talk myself out of this big huge change in direction is because I know I can write. I have the confidence from having written fic for ten years that I can make it and get paid to write for a living in a very competitive field.

So that's what I did, and the fan community and my best friend who I met through fandom were among the people I leaned on during that last year of that job (which got worse). I got into grad school for writing and am currently happily employed as a science writer, making more money than I did at the lab. It's a different kind of storytelling but it's still storytelling.

Sandra Mitchell, a screenwriter and novelist, credits fandom for her success:

I'm a published author writing young adult fiction, and I wouldn't be here without fanfic. Not only did I learn to write in fannish communities, I've also made some of my most enduring connections with other creative professionals in these communities. If I hadn't been writing *Smallville* fan fiction, I never would have talked to my first literary agent-- a connection made because of my fannish writing, not in spite of it. My fifteen year career as a screenwriter and published novelist began in fan fiction. It's an invaluable tool in a writer's toolbox, a community that offers feedback freely and openly, and a starting ground to become a creative artist yourself.

... This is my story: I'm an award-winning novelist and screenwriter, because I was a fan writer first.

## Organization for Transformative Works

Each person is unique, but their experiences of artistic and personal growth through creating remixes are common.

### 4. Remix teaches skill in visual art.

Historically, painters learned technique and developed their own styles by copying existing works, learning how they were constructed and how to produce various effects. Vincent van Gogh, to take a famous example, made 21 copies of paintings by Millet, both clearly copies and distinctively van Gogh's work; he also copied several Japanese woodcuts.<sup>140</sup> Remix creators today, similarly, learn and develop by creating visual art based on existing characters and worlds.<sup>141</sup>

Nicky's budding career, for example, comes out of creating fannish art:

[F]andom's gift based economy and penchant for sharing expertise profoundly shaped my creative process. Today, I cover the cost of my student loans by working as a freelance illustrator, and I wouldn't have the skills I have in photoshop, nor the ability to present and market myself online, without the foundation fandom laid for me. I learned digital painting, perspective, lighting, some code, and fair pricing practices from fandom creators. Those abilities have made my life richer and less stressful, granting me friends, and the chance to work one job instead of two to make ends meet. I honestly don't know where I'd be without fan culture.

Through creative fandom, Amanda M. found her pathway to a life in the visual arts:

There was a series I was very passionate about, and I discovered other people online who felt the same way. And they drew and wrote and made videos and I couldn't do the latter two things, but maybe the former was within my reach...?

So I started drawing fanart, though I had only a vague interest in art before that point. I ended up drawing nearly every day and improving quickly, motivated to draw for and contribute to the fandom I had joined. I made friends. I got better. I no longer felt inferior in my family situation, as I had discovered something unique I could throw my all into. Even if people thought I was a little strange for caring so much about fictional characters, it became a very important part of my life.

I auditioned for and got into an art school, and the next four years I worked hard to develop as a person and as an artist. Even when I was completely drained from the pressures of life and school and only wanted to flop into bed and sleep forever, my fandoms (for I joined and traveled through many) motivated me to keep drawing. Most of

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<sup>140</sup> See Influences: Jean-Francois Millet, Vincent, <http://www.vggallery.com/influences/millet/main.htm> (last visited Nov. 12, 2013); Japonisme, Van Gogh Gallery, <http://www.vangoghgallery.com/influences/japonisme.html> (last visited Nov. 12, 2013).

<sup>141</sup> See Marjorie Cohee Manifold, Fanart as Craft and the Creation of Culture, 5 *International Journal of Education Through Art* 7 (2009).

the friends I made in school were the same. I can't speak for them, but for me it was worth it.

... [P]roducing and consuming fan-created media has remained a constant for all of these years. I'm not saying that they've been easy ones, but the community has helped me through. On my darker days, I'm able to funnel my negativity through art rather than through violence, and it has been five years since I last took a blade to my own skin. I can't say I'm one of the people who would not be alive today without fandom, but I certainly would not be the same person.

Rabby took the Japanese approach to remixes as a model, and used fandom to get the feedback so vital to every developing artist:

I grew up knowing that I wanted to be an illustrator – not necessarily someone with a story to tell, but someone who wanted so badly to create images for people to enjoy. So creating art for fandoms was one of the most obvious choices. I was hugely inspired by the copyright laws in Japan, which allow for doujinka (fan comic artists) to create their books and distribute them without breaking copyright laws. Those lucky fans could begin to hone their craft with established fandoms/universes and many even rose to fame! (Think of CLAMP, who are famous manga artists known throughout the world for their many titles and universes! They started off as a doujinshi circle!)

I loved that concept that Japan saw their own artistic future in the young fans eager to create fanworks, and supported them in this way, and so I began creating my own doujinshi (fanbooks) of manga, anime, novels and video games. ...

I attended a lot of conventions selling my illustrations and my fanbooks, and met so many amazing fans who were delighted to talk to me, offer feedback, and sometimes even purchase my works. What was most amazing, however, was that feedback. I could create an original character any day of the week, but any image I drew of, say, Harry Potter received about 90% more comments and feedback (if not more), while my original pieces brought in very little attention. Because other people already had a pre-existing “relationship” with those characters rather than my original characters, they were more willing to comment, to leave feedback, and even offer critiques. I met many friends through those comments back and forth, and continue to give and receive critiques with the friends I have made through that forum that I would not have found had we not been sharing fandom-related artwork.

In short, illustrating (and writing) for fandom universes has enabled me to make friends, but to further my illustrative and narrative skills. I attended a post secondary institution where admission is highly sought-after, largely because fandom enabled me to get invaluable interest and feedback that otherwise I would likely have not had access to.

Transformative practices reach every corner of the creative world. Megan D. credits fandom with improving multiple skills, but perhaps the most distinctive is crafting: “I have honed my skills mostly through making fannish crochet patterns; I now have my own modestly successful

Etsy account, offering primarily original items, and sell some of my finished work through a local store.” As these stories attest, the medium may differ, but the mechanisms of skill development through creating remixes are the same.

5. Remix teaches video creation and editing skills.

The vidding community is a perfect example of the way in which remix cultures build 21<sup>st</sup>-century skills. Even in the pre-Internet days of the art, fans held workshops to help teach techniques, and encouraged apprentice-like relationships where a new fan would learn tricks by working alongside a more experienced vidder.<sup>142</sup> Today, vidding technology has changed substantially, but it still involves learning complicated software and editing techniques. The Internet has also made it easier for vidders to maintain a community of practice and bring in new members. For example, on just one blogging community, Livejournal, the “Vidding Discussion” group has over 2200 members, and there are also groups specifically for teaching and learning such as “Vidding Newbies.”<sup>143</sup> Additionally, experienced vidders often post walkthroughs of their process and explanations of techniques for specific vids so that others can learn by example.

The vidding community has been particularly valuable as a “female training ground,” teaching technical skills to women: web design, coding, video and image editing, and filmmaking.<sup>144</sup> Creators and consumers in the vidding community also engage with issues of race and representation in media culture,<sup>145</sup> music theory and composition,<sup>146</sup> how hip-hop can inspire vidding,<sup>147</sup> comparing vidding to writing,<sup>148</sup> and video editing in Soviet Russia.<sup>149</sup> Because of the engaged audience, participants can receive far more focused and intensive assistance developing their craft than is available even in the most dedicated formal training programs. A school semester offers only a few opportunities to evaluate each student’s creative work, while a fan community has almost limitless capacity to respond to fanworks.<sup>150</sup>

The related but distinct AMV community has similar capacities. Larry Lessig notes, “The work [of video editing] is extremely difficult to do well. Anyone who does it well also has the talent to

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<sup>142</sup> Jenkins, *Textual Poachers*, supra note 10, at 247.

<sup>143</sup> See Vidding Community Profile, Livejournal, <http://community.livejournal.com/vidding/profile> (last visited February 26, 2012) (listing 2212 members on March 2, 2012); Vidding Newbies, Livejournal, <http://community.livejournal.com/viddingnewbies> (last visited February 26, 2012).

<sup>144</sup> Jesse Walker, *Remixing Television*, Reason Magazine, August/September 2008.

<sup>145</sup> See VividCon 2010 Fanlore Page, Fanlore (last updated December 7, 2011) [http://fanlore.org/wiki/Vividcon/Vividcon\\_2010#Con\\_reports.2C\\_Convention\\_Posts.2C\\_Panel\\_Notes\\_and\\_Vid\\_Recs](http://fanlore.org/wiki/Vividcon/Vividcon_2010#Con_reports.2C_Convention_Posts.2C_Panel_Notes_and_Vid_Recs) (describing talitha78 and Deepa D.’s panel “Race and Representation in Vidding”) [hereinafter VividCon 2010 Fanlore Page].

<sup>146</sup> See VividCon 2008 Fanlore Page, Fanlore (last updated February 1, 2012) [http://fanlore.org/wiki/Vividcon/Vividcon\\_2008](http://fanlore.org/wiki/Vividcon/Vividcon_2008) (describing nestra’s “Music and Composition” panel) [hereinafter VividCon 2008 Fanlore Page].

<sup>147</sup> See VividCon 2007 Fanlore Page, Fanlore (last updated November 27, 2011) [http://fanlore.org/wiki/Vividcon/Vividcon\\_2007](http://fanlore.org/wiki/Vividcon/Vividcon_2007) (describing Anna Tree’s “Hip Hop Vidding” panel).

<sup>148</sup> See VividCon 2008 Fanlore Page, supra note 146 (describing a panel moderated by Blacksquirl, KK, and Kat A. on the comparison between vidding and writing).

<sup>149</sup> See VividCon 2010 Fanlore Page, supra note 145 (describing hollywoodgrll’s panel “In Soviet Russia Vid Edits You”).

<sup>150</sup> According to Ania, “I got more practice with video- and audio-editing doing *Sherlock* fanvids than I did at uni, even though my studies are related to that (telecommunication with focus on audio processing).”

do well in the creative industries. This fact has not been lost on industry, or universities training kids for industry.”<sup>151</sup> He continues by telling the story of a young man who couldn’t get into college until he used his AMVs to get into “one of the best design schools in America.”<sup>152</sup>

Isabel H. describes making her first AMV after seeing photomanipulations of two Teen Titans cartoon characters kissing: “It was awful. But I was still pretty proud of it.” She kept making videos; they kept being awful. “But a few months passed and I started getting better. Completely self taught in Windows Movie Maker, I was developing a steady style. At one point, I’d hit 100 subscribers on *Teen Titans* videos alone. Then I got Sony Vegas Movie Studio 9 and began to teach myself how to use that too. I started branching out to using different fandoms for my videos instead of just using *Teen Titans* exclusively. A year or so later, I got Sony Vegas Pro 8. 200, 300, 400, 500 subscribers. I’m obsessed with editing. This past Christmas, I got Sony Vegas Pro 11. Then I hit 1000 subscribers.” And the story continues: “Now, I’m at the Columbus College of Art and Design in pursuit of a degree in Cinematic Arts so I can be a professional film editor. All because that roughly 6 years ago, I got into the Teen Titans fandom. I have discovered what I am passionate about because of that one fandom, and the others I have joined over the years. I feel most myself when editing videos.”<sup>153</sup>

Laisserais S. has a similar story: “In fandom I learned how to edit audio and video files by making fanvids and other forms of visual art. I subsequently leveraged those skills to gain my current job, where I use these skills nearly every day. Had it not been for fandom, I do not think I would have successfully gotten this job.” Another remixer, Lyle, said: “I began vidding in 1999 as a teenager living in Australia, mainly in *The X-Files* fandom and long before the days of YouTube. The advent of that site gave a much larger audience for my work, including some Creative Directors at various trailer houses who began offering me paid work and beginning my career as a trailer editor and producer. I now live in New York city cutting high end theatrical trailers for cinema. The point is, had I not had the outlet such as YouTube to conceive, develop and showcase my work, I would not be in this profession today. There is a great need for trailer cutters in my highly competitive and niche industry, and we need to develop as many of the best next generation of trailer editors as we can. The recent DMCA clarification can hopefully allow for that.”<sup>154</sup> Another vidder secured a contract with the producers of *House* because of the editing capability she demonstrated in her *House* vids.<sup>155</sup>

These experiences are consistent with the research literature, which indicates that video remix develops digital literacy—the ability to communicate persuasively with audiovisual materials.<sup>156</sup>

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<sup>151</sup> Lessig, *supra* note 68, at 77.

<sup>152</sup> *Id.*

<sup>153</sup> Cf. Michele Knobel, Colin Lankshear and Matthew Lewis, *AMV Remix: Do-It-Yourself Anime Music Videos*, in *DIY Media: Creating, Sharing and Learning with New Technologies*, at 205 (Colin Lankshear & Michele Knobel eds., 2010) (AMV remix is a cultural practice that aids effective learning and fosters high levels of personal involvement and motivation in learning, and whose lessons can be brought into the classroom).

<sup>154</sup> He was referring to the 2010 exemption to §1201 for noncommercial remix granted by the Librarian of Congress. Section 1201 poses unique barriers to video remixers because their sources, unlike books and most music, are protected by anticircumvention measures.

<sup>155</sup> See *There is Hope for Vidders*, Live Journal, <http://vidding.livejournal.com/2751680.html> (last visited Nov. 12, 2013).

<sup>156</sup> See Kyle D. Stedman, *Remix Literacy and Fan Compositions*, 29 *Computers and Composition* 104 (2012).

6. Remix develops numerous technical skills, often in combination.

Many people end up developing multiple skills to support engagement in remix communities. Amalthia developed extensive coding and other skills through her involvement:

I would not be in my current job position if not for all the skills I've learned as a fan. To begin with I learned HTML/CSS/PHP and other content management technologies through the running of my first two archives. I also increased my css and ebook knowledge through running the Ebook Library and creating ebooks of fanfiction.

My current job uses my web design skills every day as I am now in charge of creating an intranet for our libraries. I also used the knowledge I learned on how to create and modify graphics in my workplace. By joining challenge communities I've learned how to use Photoshop/GIMP2/and video editing software which has come in handy for my current job and I used this knowledge in previous jobs.

Fandom pushes me to keep learning new skills and not stagnate.

Web-based skills are quite common for fans who want to showcase their works (or those of fellow fans). According to Kristen:

I've developed many technical skills as a result of my participation in fandom.

I joined online fandom as a teenager in the mid-1990s and decided that I wanted to have my own website to house my fanfiction. I taught myself HTML by looking at other fans' websites and created my first website at age 17. This led to an ongoing love of web design. I continued to develop my skills, sometimes by looking at other people's sites and sometimes by attending workshops, and eventually learned XHTML, CSS, and Web usability principles. After being introduced to a new technique, I would go home and practice by implementing the technique on my fannish websites. For example, I attended a workshop to learn the basics of CSS, but I didn't really master it until I had spent several months using CSS to redesign all of my own websites.

As an adult, I have used these skills in every job I've ever had. Most notably, I was part of a Web team that managed a large network of sites for a university alumni association and was responsible for implementing a major redesign. I have also designed websites on a freelance basis to supplement my income.

In 2008 I began volunteering as a webmaster with the fannish nonprofit Organization for Transformative Works (OTW). In that role I worked collaboratively with other fans as we helped each other learn Drupal, an open-source content management system that none of us had used before. Within a year I had gained enough skill to build a Drupal-based website entirely on my own. This is a valuable skill since many websites today, including those at my place of employment, are moving away from hand-coded XHTML toward the use of content management systems. As an OTW webmaster I also learned how to

## Organization for Transformative Works

administer WordPress, how to convert video into different formats and stream it from a website, how to work with a revision control system, and how to use CiviCRM, an open-source constituent relationship management software for nonprofits.

In recent years I have also developed an interest in making podfics (audiobooks of fanfiction). Through my participation in podfic fandom I have learned how to use audio editing software and how to stream audio from a website.

Indeed, the OTW's Archive of Our Own represents the largest majority-female open source project of which we are aware. In the course of creating a website optimized for transformative works, our coders are enhancing their software skills and combating the significant gender disparities in software programming generally and open source in particular.

People who have been in creative fandom for a long time tend to pick up multiple skills. Morgan Dawn's experience is not atypical:

When I first started in fandom 20 years ago, I had few technical skills and in fact, as a woman, I was not expected to be particularly "techie" or handy. But fandom soon changed that. Working first as a "vidder," I learned how to edit video using two VCRs, videotape, and a lot of patience. Then in the early 2000s younger fans migrated to digital editing on their computers. Not wanting to be left behind, I first mentored with one of the newer digital editors who taught me how to video edit on her Apple computer. Then I started editing on my own, and in turn I helped another, older vidder remaster her own vids.

Fandom opened up my life far beyond what I ever expected: I learned how to build websites (to host my fan fiction). I learned how to make book covers using photo editing software. Most recently, I learned how to design book layouts so I could put some of my fan fiction into printed format. Now that books are moving into digital formats, I am learning about ePub, Calibre library software and PDFs. And because so much knowledge has moved to the Internet, I, for the first time, began contributing to Wikipedia which meant learning how to write in Wiki code....

I have worked with people all over the world on fandom projects. And I discovered that a shared passion really does bridge language and culture gaps.

And all of this happened because, as a teenager, I watched Star Trek reruns on TV and thought: "Hey! I bet I can do all that too!"

Helen Todd moved quickly from writing to audio recording:

Two years ago, I discovered fanfiction. About three weeks after that, I wrote my first story. I'd spent most of my adult life as a software engineer. I had no background in creative writing, but seeing what others had written inspired me to take a leap I'd never have normally considered.

## Organization for Transformative Works

Writing about characters from shows I was familiar with was far less intimidating than creating my own from scratch. If I'd had to create both plot and characters in the beginning, I doubt I'd have started. The immediate feedback I received from the fandom community gave me confidence. I kept writing. I was struggling with newly-diagnosed bipolar ii disorder at the time, and writing for hours on end took my mind off my problems.

Two years later, I've written over 350,000 words of fanfiction - approximately five novel's worth. Some of my stories have been translated into Chinese and Russian. I never imagined I'd have any audience, let alone one that spanned continents. The experience I've gained has improved both my writing and my confidence, and I'm currently working on two original novels....

More recently, I've started recording my stories as "podfic" – audio fanfiction. I learned how to use audio editing software and set up my first "studio" in a walk-in closet (to reduce external noise). I've shared my techniques with others online and am part of a very supportive podfic community - one where everyone strives to make the best recordings possible.

If someone had told me, two years ago, that I'd be writing novels and recording audiobooks, I would have laughed. It would never have seemed possible. And yet here I am. Fanfiction has altered the course of my life in ways I never could have dreamed.

Anatsuno also developed audio editing and general management skills through participating in remix communities:

Transformative works and their communities are the reason I developed my specific audio/podcast skill set, through podfic - I have taught myself, with the help and encouragement of others, to record, edit, produce, add effects and music to audio tracks, making them into audiobooks complete with covers, etc - as well as to publish them as a podcast, to embed them in a website, to broadcast their RSS feed, and more.

Being in fandom and taking part in the creation of transformative works has also impacted the way I approach collaboration in "real" life, be in in my professional endeavors or my volunteering for various organizations. I have learned then applied (then taught to others) many a technical skill, many a specific platform or tool, and many a wise approach from my life in fandom, in areas as varied as collective action, conflict resolution, scheduling, publishing, public relations, leadership, community organisation (and more).<sup>157</sup>

Anne Hawley also wanted to record podfic. She explains, "I learned to use Audacity, built a mini-studio in my home, took voice lessons, and discovered that what I really love reading is

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<sup>157</sup> See also Jenkins et al., *supra* note 62, at 10 (arguing that participation in affinity spaces such as fandom develops skills with workplace as well as civic and personal value, including comfort communicating in many modes, the ability to multitask and make quick decisions, the ability to use information from a variety of sources, and the ability to collaborate with diverse groups).



non-fiction. I've begun marketing my voice to authors of independent self-help and inspirational books.”

7. Remix is also a powerful educational tool in formal educational settings.

Remixing has been recognized as an important pedagogical practice at every educational level.<sup>158</sup> Every genre, from fan fiction<sup>159</sup> to fan art<sup>160</sup> to fan video,<sup>161</sup> can be used to improve education. Literacy experts have recognized that appropriating elements from preexisting stories is an important part of the process by which children develop cultural literacy, and educators have suggested using fan fiction writing in a classroom context.<sup>162</sup>

Erik Jacobson, discussing the pedagogical value of music remix, identifies three educational benefits: “(1) its connection to other skills needed in the contemporary world; (2) the way it opens up discussions about the nature of artistic creation; and (3) the fact that it offers students a chance to discover and articulate their own ideas about hermeneutics, or text analysis and interpretation. Each of these is worthwhile on its own (that is, in relation to remixing music) but can also be applied usefully to other creative works (including those based on print) and academic disciplines.”<sup>163</sup> Video remix in particular is now an important method of academic communication for students and teachers alike. Education requires an idiom that students can understand, and video remix is a useful tool precisely because it is now so understandable.<sup>164</sup>

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<sup>158</sup> See, e.g., Colin Lankshear & Michele Knobel, *Remix: The Art and Craft of Endless Hybridization*, 52 *Journal of Adolescent & Adult Literacy* 22-33 (2008), available at <http://extendboundariesofliteracy.pbworks.com/f/remix.pdf>; Catherine Latterell, *Remix: Reading and Composing Culture* (2005).

<sup>159</sup> Fay Jessop, *Exploring Fandom: Teaching Narrative Writing Through Fanfiction*, *English Drama Media*, No. 18 (Oct. 2010) (getting students to write fanfiction removes some of the fear of original writing, while respecting students' own interests in reading and viewing); Kerri L. Mathew & Devon Christopher Adams, *I Love Your Book, but I Love My Version More: Fanfiction in the English Language Arts Classroom*, 36 *ALAN Review* (Assembly on Literature for Adolescents of the National Council of Teachers of English) 35 (Summer 2009); Steve Vosloo, *Fan Fiction: Improving Youth Literacy*, *Thought Leader*, Jan. 22, 2008, <http://www.thoughtleader.co.za/stevevosloo/2008/01/22/fan-fiction-improving-youth-literacy/> (“Fanfic communities represent youths who self-organise and voluntarily engage in narrative writing, reviewing and metatalk about writing. Fanfic sites scaffold the development of these literacy skills. . . . [E]ducators should at least recognise the catalytic aspects of the informal, voluntary world of fan fiction and apply those to school-based literacy instruction.”); see also J. Williamson, *Engaging Resistant Writers Through Zines in the Classroom*, *The Book of Zines: Readings from the Fringe* (ed. Chip Rowe, 1994).

<sup>160</sup> Marjorie Cohee Manifold, *What art Educators Can Learn from the Fan-Based Artmaking of Adolescents and Young Adults*, 50 *Studies in Art Education* 257 (2009).

<sup>161</sup> Catherine Burwell, *The Pedagogical Potential of Video Remix*, *Journal of Adolescent & Adult Literacy* (2013) DOI: 10.1002/jaal.205 (explaining how video remix can be used in classrooms as part of education about representation in popular media, creativity, and copyright).

<sup>162</sup> Henry Jenkins, *Convergence Culture* 177 (2006) [hereinafter *Jenkins, Convergence Culture*]; see, e.g., Margaret Mackey, *Pirates and Poachers: Fan Fiction and the Conventions of Reading and Writing*, 42 *English In Education* 131 (2008).

<sup>163</sup> Jacobson, *supra* note 53, at 41.

<sup>164</sup> See Letter from Peter Decherney et al., Univ. of Pa., to U.S. Copyright Office, Library of Cong. 10 (2009), available at <http://www.copyright.gov/1201/2008/responses/peterdecherney-university-pennsylvania-21.pdf> (“Online remix video has emerged as an important new cycle in the history of remixing, one that is of great interest to scholars of art, media, and culture. Books and articles are written about remix culture. Courses are taught on remix culture. And students are taught to make remix videos in classes. An exemption is necessary to allow this important form of expression to continue to develop unhampered by the ban on circumvention, which not only interferes with fair use in this case but also stifles the growth of an art form.” (citation omitted)).

The MacArthur Foundation is investing tens of millions of dollars in research to improve education in new digital spaces, including guidance for teachers whose students expect to participate in remix culture. Part of the challenge for educators is to help students think critically about their practices and enable them to “meaningfully sample and remix media content.”<sup>165</sup> Such educational initiatives are part of a process of working out the boundaries of transformative fair use and educating students about intellectual property.<sup>166</sup>

While remix is flourishing outside formal institutions, school-based remix can improve the “participation gap” in which there is “unequal access to the opportunities, experiences, skills and knowledge that will prepare youth for full participation in the world of tomorrow.”<sup>167</sup> We think of young people as a pervasively connected generation, but the skills and habits that lead to success are unevenly distributed, particularly along axes of race, gender, and class. Schools have sought to address the technical aspects of the “digital divide,” but they also need to teach creative skills and practices to fix the participation gap. Henry Jenkins summarizes the results of his extensive research into digital learning: “These [do-it yourself, remix] practices are important gateways into larger learning cultures that help support young people as they construct their identities and navigate their social surroundings. Bringing some of these meaningful practices into the classroom allows young people to deploy more effective learning strategies and to take greater control over their education.”<sup>168</sup>

Remix enables interest-based learning. “When kids get to do work that they feel passionate about, kids (and, for that matter, adults) learn more and learn more effectively.”<sup>169</sup> For example, Kevin Driscoll’s work with inner city and minority youth shows how hip hop fans can gain technical expertise through sampling and other forms of creation, fighting stereotypes about their

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<sup>165</sup> Jenkins et al., *supra* note 62, at 4.

<sup>166</sup> See *id.* at 33-34 (listing several programs that systematically encourage young people to create unauthorized derivative works for educational purposes as examples of what ought to be done to take advantage of the learning potential of new media environments).

<sup>167</sup> *Id.* at 3.

<sup>168</sup> Henry Jenkins, Afterword: Communities of Readers, Clusters of Practices, 231, 231-32, in *DIY Media: Creating, Sharing and Learning with New Technologies* (Colin Lankshear & Michele Knobel eds., 2010) [hereinafter Jenkins, Afterword]; see also Jacobson, *supra*, at 43:

Indeed, what might be distinct about remix (compared to the traditional production of music) is how heavily it draws on some of the other “21st Century” skills identified by Jenkins. Most importantly, the technical or mechanical aspects of remix (e.g., finding the source song, identifying the sounds or materials that will be used in the remix, sharing the song on the internet) are both individual and communal in nature. To participate in online remix communities means to recognize where resources are stored, how to access them, and how to share them in return. Being an active member of a music remix chat room or discussion board means you are willingly sharing resources and are open to the idea that knowledge is an assemblage of ideas and experiences generated by novices and experts alike. This use of networking, distributed cognition and collective intelligence is the hallmark of online life and students must be comfortable with each of them for meaningful participation to occur. For some students, remixing might provide the perfect invitation to join this kind of communal work. It certainly can be argued that sharing music remixes (and advice about how to remix) is a much better use of social networking technology than page after page of photos of adolescents getting drunk or throwing faux gang signs. Remixing provides opportunities for the kinds of project-based, collaborative learning for which teachers strive.

<sup>169</sup> Lessig, *supra* note 68, at 80.

capacity for and interest in technical subject matter.<sup>170</sup> Creating a remix requires students to learn about the structure of narrative and argument. As always, there are good and bad remixes. “But just as bad writing is not an argument against writing, bad remix is not an argument against remix.”<sup>171</sup> And this is nowhere more true than when people are just learning a craft.

One high school teacher summarized to the OTW the benefits remix cultures have provided to her and her students. Not only did fandom and fan fiction inspire her to learn Japanese—“becoming a learner again in middle age has put me in a much better position to understand my students and the struggles they are going through”—and improve her editing skills, which she uses with her students, but she has adapted many fan fiction techniques to classroom practice, using exercises in which students write extensions of and alternative endings to the works they study. Because her students know that she writes fan fiction, they feel supported in their own remix activities. She has also become familiar with many online sites frequented by students, such as Fanfiction.net and Tumblr, which gives her greater insight into their lives and makes her a more effective teacher. Joan Curtin, a librarian, concurs that fandom has made her a more effective librarian by exposing her to new genres and strengthening her advisory skills. “Because I am more open to accepting pop culture as a influence in our everyday lives, I connect well with patrons of all ages, sexual orientation and racial backgrounds, which is certainly an advantage in a library with a culturally diverse patron base.”

At the college level, courses increasingly also incorporate remix content. Professor Jane Tolmie notes that developing an ability to critique visual media is a critical skill for a generation of students that has been inundated with audiovisual works. Vids are a powerful means of teaching this skill:

Exposure to a particular fanvid based on Joss Whedon’s *Firefly* series taught the class about the unreflexive white privilege involved in producing a show in which the main characters all speak Chinese but there are no Asian actors. Exposure to a fanvid on the rebooted *Star Trek* franchise taught the students that the action movie, no matter how ‘futuristic,’ is still considered primarily a theatre for men. These lessons were all the more effective for being delivered as miniature and coherent visual spectacles, with the scenes and actions of the shows themselves being deployed to convey the key lessons.<sup>172</sup>

Robin Anne Reid, a scholar of fandom, teaches writing at the university level and has used remix culture to successfully co-write grants from the National Endowment for the Humanities and to develop new courses in which students study fan works to understand how popular texts reflect existing beliefs and attitudes, and also create their own remixes. Likewise, at the University of Houston, with a high percentage of non-native English speakers, the Digital Storytelling project “has produced an extraordinary range of historical videos, created by students who research the story carefully, and select from archives of images and sounds the mix that best conveys the argument they want their video to make.”<sup>173</sup> Remix can be a powerful educational tool—if educators and schools aren’t deterred from allowing it by overreaching copyright claims.

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<sup>170</sup> Jenkins, *Convergence Culture*, supra note 162, at 237; citing Driscoll, supra note 125.

<sup>171</sup> Lessig, supra note 68, at 81.

<sup>172</sup> EFF 2012 Request, supra note 33, at 55.

<sup>173</sup> Lessig, supra note 68, at 81.

8. Remix teaches respect for the appropriate boundaries of copyright.

Finally, participating in remix culture also develops in creators an appreciation for the benefits of properly limited intellectual property rights. Remix creators are *creators*, and this matters to them; they learn to draw boundaries and consider fair use rather than ignoring intellectual property law entirely.<sup>174</sup> This engagement, instead of alienation, is exactly the kind of reflective citizenship our law and culture should encourage. Anatsuno concurs that “being part of communities reflecting upon creation and copyright, interrogating the ideas of community and ownership, of ethics and duty and culture and the passing of time, has also led me to learn more about law both national and international, to think about the fabric of the communities I belong to more deeply, and has overall made me a more engaged and more clear-headed citizen of the world.” We close this section with an example of the ethical deliberation encouraged by remix, from L.A. Fricke:

I was always of the opinion that writing not-for-profit fan fiction was a culturally licit and legally valid activity. However, I’m also someone who likes to review the validity of my opinions from time to time, so I recently signed up for a pioneering MOOC course about copyright law offered by Harvard Law’s Professor Fischer through EduX. The class was fun and intriguing, and I managed to walk away with a certificate of completion after a few months’ work.

However, during this fandom-spurred class, I discovered that the tiny retail company for which I then served as a corporate officer wasn’t securing proper transfers of intellectual property rights for the advertising sketches and written reviews we’d been commissioning from local creators. Instead, we’d been assuming (erroneously) that these creative works fell under U.S. work-for-hire statutes. This obviously needed to be fixed. And, it was fandom experience that gave me the background to realize that our commercial lapse was not just leaving our micro-corporation vulnerable to legal difficulties but also squandering a chance to help our creators learn how to protect themselves if they continued creating original works for profit.

Working with an IP lawyer, my company put together not only the agreements we needed for properly transferring rights – agreements that favored our creators as much as we could manage – but accompanying explanatory sheets that commented on every single clause of legalese in the agreements using standard English so that our creators might know in the future what they could expect, what they could hope for, and what they should beware of when confronted by intellectual property transfer agreements.

I’m proud of the work we did and proud of fandom for teaching me not merely the potential value of a broader and more flexible copyright system for me as a fan or even for our society as whole, but also the worth of my interacting with intellectual property law as an engaged individual and small businessperson rather than as a passive consumer.

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<sup>174</sup> See Henry Jenkins et al., *supra* note 62, at 10 (“[Y]oung people who create and circulate their own media [including remixes] are more likely to respect the intellectual property rights of others because they feel a greater stake in the cultural economy.”).

## Organization for Transformative Works

I doubt I ever would have bothered doing work that ultimately strengthens intellectual property law if fandom hadn't taught me copyright's rationales, its limits, and its possible strengths. For me, fandom has not been just a source of cultural creativity but also an encouragement to democratic engagement and commercial development.

IV. Fair use remains vital to remix cultures; there is no substitute.

It may well be that the large content owners who participate in these proceedings will disavow any intent to interfere with thriving fan communities (at least as long as the fans remain respectful). Indeed, many copyright owners have learned that the people who create remixes are also the fans at the core of commercial success, and do not usually interfere with fan communities and productions.

Given this general harmony, there is no reason to allow any legal changes that would give content owners an unnecessary *right* to suppress noncommercial remixes, and every reason to reinforce the fair use doctrine's favorable treatment of such transformative works. This will provide remixers the security they need against even the unusual copyright owner who tries to suppress transformative or critical works. In fact, the OTW has recently dealt with several copyright owners who claimed the right to suppress noncommercial, transformative works of fan fiction. Fair use is still very necessary to deal with these situations. General toleration cannot sustain a noncommercial community without a background of fair use rights.

More generally, NTIA/PTO should resist the temptation to assume that thriving, organic communities can be incorporated into a formalized and commercialized structure—that fair use is no longer necessary as long as copyright owners are willing to accept compensation for any use. Henry Jenkins has explained why attempts to monetize noncommercial remix practices are likely to destroy the very things that make them educationally valuable:

Many web 2.0 sites provide far less scaffolding and mentorship than offered by more grassroots forms of participatory culture. Despite a rhetoric of collaboration and community, they often still conceive of their users as autonomous individuals whose primary relationship is to the company that provides them services and not to each other. There is a real danger in mapping the web 2.0 business model onto educational practices, thus seeing students as “consumers” rather than “participants” within the educational process.<sup>175</sup>

The following sections detail why commercial and licensing models—even “act first, license later” models—can never substitute for communities built on fair use.

A. Noncommercial creativity is different from, and not replaceable by, commercialized creativity.

Although economic incentives play a role, especially in large-scale creative works, creativity is not just a behavior that responds to economic incentives. It is far more complicated and profound. Respect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy. Economic reward and control rights are likely to be part of the proper balance, but only part. Noncommercial creativity deserves special treatment from copyright law, precisely because it is not incentivized by copyright but can be suppressed by it.

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<sup>175</sup> Jenkins, Afterword, *supra* note 168, at 239.

First, by its very independence from the incentives of formal markets, noncommerciality signals the presence of expression tied to a creator's personhood, which deserves special consideration and sensitivity to free speech concerns. Outsiders often view noncommercially motivated creators as quixotic. Justice Souter expressed a common attitude in *Campbell v. Acuff-Rose* when he quoted Samuel Johnson's statement that "[n]o man but a blockhead ever wrote, except for money."<sup>176</sup> No one who has ever made up a story to amuse a child should accept this characterization. The relationship between fair-use transformation and commerciality is not simply that noncommercial uses require less in the way of critical transformation than commercial uses before they should be deemed fair use. Many commercial uses are transformative and fair, but noncommerciality is an independent factor that creates a presumption of fair use.<sup>177</sup> Noncommercial creative uses, precisely because they are not motivated by copyright's profit-based incentives, are more likely to contain content that the market would not produce or sustain, and thus should be more readily recognized as transformative and expressive of a creator's personhood.

Second, the market changes what it swallows: the proposition that existing forms of creativity could persist in a world in which the formal, monetized market was everywhere is empirically mistaken. Yochai Benkler has investigated the noncommercial production of information goods in a digital economy. The evidence indicates that noncommercial production is not just detached from monetary exchange. It can be subject to crowding out—noncommercial motives can be eliminated when money is on offer, leading to less overall creativity and less social benefit:

Across many different settings, researchers have found substantial evidence that, under some circumstances, adding money for an activity previously undertaken without price compensation reduces, rather than increases, the level of activity. . . . The results of this empirical literature strongly suggest that across various domains some displacement or crowding out can be identified between monetary rewards and nonmonetary motivations.<sup>178</sup>

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<sup>176</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (internal citation omitted); cf. Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 *Vand. J. Ent. & Tech. L.* 841 (2008) (“[T]echnological advances have greatly reduced the costs of creating and distributing new works of authorship. Thanks to that deflation, we can increasingly count on authors who care little about the lucre of copyright—‘blockheads,’ as Samuel Johnson called them—to supply us with original expressive works.”).

<sup>177</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

<sup>178</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 94-95 (2006) [hereinafter Benkler, *Wealth of Networks*]; see also Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 *Yale L.J.* 273, 323-24 (2004) (“A simple statement of this model is that individuals have intrinsic and extrinsic motivations. . . . Extrinsic motivations are said to “crowd out” intrinsic motivations because they (a) impair self-determination—that is, a person feels pressured by an external force, and therefore feels overjustified in maintaining her intrinsic motivation rather than complying with the will of the source of the extrinsic reward; or (b) impair self-esteem—they cause an individual to feel that his internal motivation is rejected, not valued, leading him to reduce his self-esteem and thus to reduce effort.”); Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 *Am. Econ. Rev.* 746, 746 (1997); Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 *J. Econ. Survs.* 589, 591 (2001); Wendy J. Gordon, *Discipline and Nourish: On Constructing Commons*, 95 *Cornell L. Rev.* 733, 749 (2010); Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 *U. Chi. L. Rev.* 75, 88 (2004).

## Organization for Transformative Works

Introducing a monetary reward could, in fact, corrode incentives to participate in creative projects. “For all of us, there comes a time on any given day, week, and month, every year and in different degrees over our lifetimes, when we choose to act in some way that is oriented toward fulfilling our social and psychological needs, not our market-exchangeable needs. It is that part of our lives and our motivational structure that social production taps, and on which it thrives.”<sup>179</sup> It is for this reason that scholars have concluded that monetization would harm existing noncommercial remix communities.<sup>180</sup>

This is especially true given that any expected return from monetization of noncommercial works would be small for any given individual. No matter how robust copyright rights become, most artists will never be able to make a living selling their works, because audiences won’t pay enough. This reality—sad from creators’ perspectives, sensible from audiences’ perspectives—enhances the risk of destroying nonmonetary incentives through small monetary incentives. As Benkler explains,

Where intrinsic motivation is an important factor because pricing and contracting are difficult to achieve, or because the payment that can be offered is relatively low, the aggregate effect [of monetary rewards] may be negative. . . . Negative effects of small payments on participation in work that was otherwise volunteer-based are an example of low payments recruiting relatively few people, but making others shift their efforts elsewhere and thereby reducing, rather than increasing, the total level of volunteering for the job.<sup>181</sup>

Sociologist Viviana Zelizer’s research on the social meaning of money further helps elucidate the qualitative as well as quantitative differences in noncommercial creative works. Defining an activity as noncommercial, even if it takes place in spaces where other people are making money (such as YouTube), changes how people feel and reason about it.<sup>182</sup> “Earmarking” – treating value differently depending on the social context in which it is exchanged – is pervasive, not just for money but for everything from “tokens and commercial paper to art objects, and even including kitchen recipes or jokes—anything, in fact, that is socially exchangeable.”<sup>183</sup> Earmarking is an excellent way of “[e]stablishing or maintaining individual or group identity.”<sup>184</sup> In the context of noncommercial creativity, works created by authors who think of themselves as

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<sup>179</sup> Benkler, *Wealth of Networks*, supra note 178, at 98.

<sup>180</sup> John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 *Hastings Comm. & Ent. L.J.* 203, 214-15 (2008) (“[A]mateur creators do not have commercial interest as their primary motivating force, and so propertization of their work is irrelevant to their production of innovative material. But more than this, propertization may be inconsistent with their continued creativity and so may not just be irrelevant but actively inimical to the development of this modality of production.”).

<sup>181</sup> Benkler, *Wealth of Networks*, supra note 178, at 95; see also Lessig, supra note 68, at 232 (“If the hybrid feels too commercial, that saps the eagerness of the volunteers to work. Brewster Kahle founded the nonprofit Internet Archive after profiting from many commercial enterprises, as he told me: ‘If you feel like you are working for the man and not getting paid, visceral reactions will come up. . . . People have no problem being in the gift economy. But when it blurs into the for-pay commodity economy . . . people have a “jerk reaction.”’ A ‘jerk reaction’: the feeling that they, the volunteers, are jerks for giving something to ‘the man’ for free. No sense could be more poisonous to the hybrid economy . . .”).

<sup>182</sup> See Viviana A. Zelizer, *The Social Meaning of Money* (1994).

<sup>183</sup> *Id.* at 29.

<sup>184</sup> *Id.* at 26.



creating for free—for the joy of sharing with other people—will think differently about their works from authors who hope to sell their output in the open market. And their works, as a result, will be systematically different from works produced by copyright’s incentives.<sup>185</sup>

As media scholar Catherine Tosenberger argues, noncommercially generated works are often “unpublishable,” and this is a virtue of the form:

Because fanfiction circulates unofficially, it isn’t bound by the conventions and limitations of institutionalized publishing. And that’s a big deal; it allows people to stake claims over texts that they wouldn’t normally be allowed to if they wanted to publish, and frees them to tell the stories they want to tell. You can do things in fanfiction that would be difficult or impossible to do in fiction intended for commercial publication, such as experiments with form and subject matter that don’t fit with prevailing tastes. This freedom is especially felt in representations of romantic and sexual relationships—and this is a major reason, I think, why women, queer folk, and young people have found fanfic so appealing, because these are all groups whose sexual expressions have been heavily policed. It’s a way of asserting rights of interpretation over texts that may be patriarchal, heteronormative, and/or contain only adult-approved representations of children and teenagers.<sup>186</sup>

This freedom—including freedom to be bad—allows new talents to develop, whether or not they ultimately join the mainstream or continue producing within a noncommercial niche. By contrast, copyright-incentivized works will seek to appeal to more consumers. Even when they target niche markets, they will target markets—people who can pay for something specialized.<sup>187</sup>

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<sup>185</sup> See Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 Berkeley Tech. L.J. 785, 797-803 (2004) (arguing that copyright supported industries engage in winner-take-all fights for attention and focus on works that can most easily be sold to the largest audiences, even within niche markets). This is not to say that commercial production is bad—rather, commercial production is *different*, and truly diverse creativity requires multiple spaces, including noncommercial spaces, in which differently motivated creators can work. Cf. Pierre Azoulay, Wavery Ding & Toby Stuart, *The Impact of Academic Patenting on the Rate, Quality and Direction of (Public) Research Output*, 57 J. Indus. Econ. 637 (2009) (suggesting that the introduction of intellectual property into academic science shifted research towards different, more commercially oriented questions).

<sup>186</sup> *Gender and Fan Studies (Round Five, Part One)*: Geoffrey Long and Catherine Tosenberger, July 1, 2007, [http://henryjenkins.org/2007/06/gender\\_and\\_fan\\_studies\\_round\\_f\\_1.html](http://henryjenkins.org/2007/06/gender_and_fan_studies_round_f_1.html); see also Catherine Tosenberger, *Potterotics: Harry Potter Fanfiction on the Internet 34-35* (dissertation, University of Florida 2007) (“[F]andom is a space where freedom to read and write whatever one wants are felt in a much more concrete way than in more ‘official’ spaces. . . . Fanfiction is, in many ways, given life by what other spaces don’t allow.”); Liz Gannes, *NTV Predictions: Online Video Stars* (Dec. 30, 2007), <http://gigaom.com/2007/12/30/ntv-predictions-online-video-stars/> (“Fans, operating outside of the commercial mainstream, have the freedom to do things which would be prohibited [to] those working at the heart of a media franchise—explore new stories, adopt new aesthetics, offer alternative interpretations of characters, or just be bad in whatever sense of the word you want. And much of the online video content thrives because it is unpublishable in the mainstream but has strong appeal to particular niches and subcultures.”) (quoting Henry Jenkins; alteration in original); Timothy B. Lee, *Ars Book Review: “Here Comes Everybody”* by Clay Shirky, Apr. 3, 2008, <http://arstechnica.com/articles/culture/book-review-2008-04-1.ars/3> (interview with Clay Shirky discussing valuable group productions whose transaction costs mean that they can only take place voluntarily, outside the market and the firm).

<sup>187</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 362 (1996) (“[E]xpansive copyright owner control over existing expression may exacerbate the problem of market-based hierarchy. Given authors’ needs to draw on the existing images, sounds, and texts that make up our cultural milieu,

Not incidentally, people who can pay are less likely to be young, relatively poor, female, or otherwise part of culturally devalued groups, since cultural and economic power are often related.<sup>188</sup> Nor will consumers paying for entertainment, as with Amazon's Kindle Worlds, be invested in helping creators practice and improve their skills—in the paid economy, we want our providers to be good already. Copyright's incentivizing virtues come with costs, and so we should protect diverse sources of support for creativity—including voluntary expression, understood by both author and audience to be distinct from the sphere of market exchange.

Hip-hop music provides another cautionary tale, in which commercialization via licensing destroyed the creative freedom of samplers, making multiple samples economically infeasible, and in the process made it harder to engage in political speech through sampling:

To this day, sample-based rap remains a shadow of its former self, practiced only by hip hop's elite—those with the budgets to clear increasingly expensive samples or defend lawsuits when they don't. Some of the consequences for rap music as a genre are clear, the most obvious being that the sound of the music has changed. The relatively sample-free soundscapes of producers like Timbaland or the Neptunes are a testament to that fact, as are the songs that rely on just one or two samples rather than 20 or 30....

It's notable, for instance, that at the same time sampling was curbed by new copyright enforcement, we also witnessed the sunset of rap's "golden age," a time when dropping socially or politically engaged lyrics didn't automatically relegate artists to "the underground." As someone who studies and teaches about hip hop (and who's been listening to the music for 25 years), I'm not sure that's a coincidence. After all, sampling provided an important engagement with musical and political history, a connection that was interrupted by *Grand Upright* and the cases after it [requiring sampling to be authorized], coinciding with a growing disconnect between rap music and a sense of social responsibility....

But as Hank Shocklee, pioneering member of Public Enemy's production team The Bomb Squad, told me, having open access to samples often did significantly impact artists' lyrical content: "A lot of the records that were being sampled were socially conscious, socially relevant records, and that has a way of shaping the lyrics that you're going to write in conjunction with them." When you take sampling out of the equation, Shocklee said, much of the social consciousness disappears because, as he put it, "artists' lyrical reference point only lies within themselves."<sup>189</sup>

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conglomerate control over existing expression would continue to subvert the democratization of public discourse even in a digital age in which many authors no longer rely on conglomerates to market and distribute new works.").

<sup>188</sup> See Tosenberger, *supra* ("[I]ssues of gender, race, class, sexuality ... have affected who has *access* to that institutional approval .... Fandom is a space where people who have historically been denied access to institutional narrative creation have said, 'Well, then, we'll tell this story *our way*.' .... The Internet has exacerbated fandom's anarchic tendencies, and all those old cultural hierarchies -- creator/consumer, male/female, straight/queer, art/crap—are getting shaken up .... In fandom, you don't have to be anointed by the Official Culture Industry to be an artist, to share your work and have it be appreciated.").

<sup>189</sup> Erik Nielson, *Did the Decline of Sampling Cause the Decline of Political Hip-Hop?*, Atlantic (Sept. 18, 2013), <http://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791/> (discussing the multiple samples in the first 30 seconds of Public Enemy's 1991 "Can't

## Organization for Transformative Works

Only uncleared mixtapes offer the kind of creativity that was widespread at hip-hop's inception, and even mixtapes increasingly attract lawsuits.<sup>190</sup>

### B. Licensing is Pervasively Inadequate.

Even aside from the special role of noncommerciality in shaping communities and the content of transformative works, there are two key reasons that voluntary licensing schemes cannot supplant fair use. First, they will never be comprehensive, leaving many remix creators out in the cold. Second, they will always retain censorship rights, which is exactly the problem that transformative fair use doctrine exists to solve.

#### 1. Licenses are regularly unavailable.

The world of remix is as vast as the world of art. It would be a mistake to assume that licensing is a realistic possibility for remix in general. In photography, for example, there is no organized licensing regime that would assist remixers or appropriation artists like Richard Prince—even if his subjects would agree to the license. In music, there is no such thing as noncommercial remix licensing, although commercial sampling is negotiated on an individual, and highly expensive, basis. A detailed study of the music business concluded that, while there was some room for reform, the chance of a comprehensive licensing solution for remix was very low.<sup>191</sup>

In film, there are now a few options for licensing one or two movie clips at a time, including Movieclips.com. However, as Professor Peter Decherney of the University of Pennsylvania has noted, clip selection is limited, and prices are set for the commercial market, out of reach even for educators. The Copyright Office's 2012 rulemaking recognized the inadequacy of these services for educators, remixers, and documentarians, and accordingly allowed these groups to make their own, editable clips from DVDs and online sources.<sup>192</sup>

Licensing is not an option for noncommercial video remixers: there is no mechanism by which a noncommercial user can select and receive high-quality clips of a range of television shows and

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Truss It," with "an entire storyline of samples underpinning the lyrics.... The complex use of samples to comment on and reinforce the song's message continues throughout .... Calling and responding to one another, the samples and the lyrics create complementary, interconnected narratives that take listeners on a historical tour through music and politics, in the process offering a reminder that rap music resides within creative, intellectual, and communal traditions that are, in the words of Dead Prez, 'bigger than hip hop.'")

<sup>190</sup> Id.

<sup>191</sup> Kembrew McLeod & Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* 28 (2011). The authors conclude, based on extensive interviews and other empirical evidence, that sampling more than one work per song is now cost-prohibitive, making some kinds of creativity—the very kinds that spawned an entire new genre, rap—legally impossible. Such sampling continues, but under the radar, by artists who are therefore prevented ever from making the jump into the aboveground economy, the way their predecessors did.

<sup>192</sup> 2012 Recommendations, *supra* note 45, at 131 ("The record clearly shows that clip licensing is not a reasonable alternative. The record establishes that the scope of content offered through reasonably available licensing sources is far from complete. Furthermore, requiring a creator who is making fair use of a work to obtain a license is in tension with the Supreme Court's holding in *Campbell v. Acuff-Rose Music, Inc.* that rightsholders do not have an exclusive right to markets for commentary on or criticism of their copyrighted works.") (footnotes omitted).

movies (since remixer comment on many different sources) suitable for *editing*.<sup>193</sup> Studios occasionally offer selected clips for fans to embed on their own sites or otherwise promote the optical version, but that does not enable remix or commentary.<sup>194</sup> Indeed, in the most widely discussed example of such authorized fan activity, the rebooted *Battlestar Galactica* franchise offered clips of ships fighting space battles for fan uses, but no clips featuring any characters.<sup>195</sup> Anyone interested in illustrating or discussing the show's treatment of race, gender, torture, or politics (just to take the most obvious examples) would have been unable to do so using these clips.

Even if they ever began to offer noncommercial options, licensing sites will only ever represent a very small portion of the material that educators, vidders, and others need to access. Among other things, most older movies are unavailable; most foreign works, including the anime that represents a huge source of material for AMV makers, are unavailable; and TV shows are also largely unavailable, despite being much more significant for most vidding and cultural commentary purposes than individual movies.<sup>196</sup> An entirely separate and insurmountable concern for remixer is that clip licensing sites *do not allow remix*. They are set up to license individual clips for unaltered display. Vidders cannot edit them. Transformation is neither allowed by the license nor possible (at least without circumventing technical measures).

Discussions of video inevitably raise the question of YouTube's Content ID. Along with the suppression issues discussed below, Content ID cannot deal with the many vidders who wish to host their own work on their own websites, so they can better control its distribution and avoid commercialization in any form, including the ads YouTube runs alongside and even over video content when Content ID has been deployed. For a noncommercial artist trying to convey a specific message, these ads are destructive to the message and artistic effect. Separately, Content ID is irrelevant to video *source*, whose acquisition is still governed by § 1201—in the absence of an exemption for noncommercial remix, a content owner could assert a violation of § 1201 and sidestep Content ID and fair use altogether.

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<sup>193</sup> As testimony in the 2009 hearings indicated, many if not all studios have agreements with actors that generally prevent the grant of free or low cost licenses, which is why the best they can offer to professors is a letter promising not to assert their own claims – which, notably, does not enable the recipients to circumvent. *See, e.g.*, Library of Congress Rulemaking Hearing Section 1202, Testimony of Peter DeCherney, May 6, 2009, available at <http://www.copyright.gov/1201/hearings/2009/transcripts/>

<sup>194</sup> See Comments of the Advanced Access Content System Licensing Administrator LLC (“AACSLA”), Library of Congress Copyright Office, at 8-9, available at [http://www.copyright.gov/1201/2012/comments/Bruce\\_H\\_Turnbull.pdf](http://www.copyright.gov/1201/2012/comments/Bruce_H_Turnbull.pdf) [hereinafter AACSLA Comments]. The available licenses allow revocation of a license for any reason, including disagreement with the message being conveyed.

<sup>195</sup> Julie Levin Russo, User-Penetrated Content: Fan Video in the Age of Convergence, 48 *Cinema J.* 125, 126 (2009) (“[U]ser-generated advertising typically features a top-down arrangement that attempts, through its interface and conditions, to contain excessive fan productivity within proprietary commercial spaces. . . . [The *Battlestar Galactica* contest’s] conception of sanctioned derivative filmmaking is extremely narrow, notably excluding the character-based dramatic scenes that make up the majority of the show.”).

<sup>196</sup> 2012 Recommendations, *supra* note 45, at 112 (noting that content owners identified no “mechanism by which a noncommercial user – as opposed to a commercial entity – could select and receive suitable high-quality content from a range of movies and television shows”); *id.* at 114 (noting testimony that “the material offered on the licensing websites identified by opponents is limited to a very narrow catalog as compared to the vast offerings available through DVD or online distribution services”).

The development of clip licensing models in which large content owners seek to create new sources of revenue but their offerings do not match existing practices is not an isolated or accidental mismatch. It is the standard way in which commercialization flattens and disregards diversity in noncommercial practices in search of greater control over uses. This inadequacy is why noncommercial uses need continued legal protection even if large content owners expand the number of movies from which they are willing to license selected clips to other commercial entities.

## 2. Licenses invite censorship.

The “blankets” of voluntary licensing always, in practice, have holes. Existing licensing options for user-generated content (other than Creative Commons) always retain the option to censor.<sup>197</sup> Official fan communities want fans to “celebrat[e] the story the way it is,”<sup>198</sup> not to explore ways in which it might be different. Several years ago, *Star Wars* created a space for certain kinds of fan creativity, but the rules discriminated against largely female forms of fan creativity while purporting to allow only the types of works that would already be fair use—parodies and documentaries.<sup>199</sup> YouTube’s Content ID, likewise, allows copyright owners to object to works for any reason, and YouTube’s appeal process (even when available) does not substitute for a true determination of fair use.

But it’s their very freedom to experiment that makes fanworks so vibrant, innovative, and potentially critical of the originals. The copyright owners of *24* and *Law & Order* couldn’t be expected to let the Lear Center use them as centerpieces of an analysis of how popular media misrepresent terrorism in *Prime Time Terror*, and they wouldn’t let individual artists create lesbian love stories (a popular *Law & Order* genre) or critiques of the American use of torture.<sup>200</sup>

For another example of criticism copyright owners would not license, the artist Gianduja Kiss made a vid, “It Depends on What You Pay.”<sup>201</sup> The vid argues that the television show *Dollhouse*, created by critically acclaimed TV auteur Joss Whedon, endorses and excuses rape. On the show, characters repeatedly had their minds wiped and personalities implanted, often to fulfill another’s sexual desires. The show tried very hard to distance itself from rape both by

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<sup>197</sup> YouTube’s Content ID system always provides copyright owners the option to block content for any reason, as does Amazon’s Kindle Worlds. How Content ID Works, Google Support: YouTube, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Nov 12, 2013); Content Guidelines and Review Process, <https://kindleworlds.amazon.com/faq?topicId=A2W2IF5J2WZDKT>; The Vampire Diaries, [https://kindleworlds.amazon.com/world/VampireDiaries?ref\\_=kww\\_home\\_ug\\_VampireDiaries](https://kindleworlds.amazon.com/world/VampireDiaries?ref_=kww_home_ug_VampireDiaries) (providing representative content guidelines, including bans on “erotica” and “offensive content”); Bloodshot, [https://kindleworlds.amazon.com/world/Bloodshot?ref\\_=kww\\_home\\_ug\\_Bloodshot](https://kindleworlds.amazon.com/world/Bloodshot?ref_=kww_home_ug_Bloodshot) (along with standard bans on “erotica” and “offensive content,” requiring characters to be “in-character,” and banning “profane language,” graphic violence, “references to acquiring, using, or being under the influence of illegal drugs,” and “wanton disregard for scientific and historical accuracy”).

<sup>198</sup> Amy Harmon, ‘Star Wars’ Fan Films Come Tumbling Back to Earth, N.Y. Times, at B28 (Apr. 28, 2002), <http://www.nytimes.com/2002/04/28/movies/film-star-wars-fan-films-come-tumbling-back-to-earth.html>.

<sup>199</sup> Henry Jenkins, Fan Fiction as Critical Commentary, Confessions of an Aca-Fan, (September 27, 2006), [http://henryjenkins.org/2006/09/fan\\_fiction\\_as\\_critical\\_commen.html](http://henryjenkins.org/2006/09/fan_fiction_as_critical_commen.html).

<sup>200</sup> Cf. AACS LA Comments, supra note 194, at 9 (“the studio reviews the request and, if the studio agrees to the license, responds with a link to the desired clip”) (emphasis added).

<sup>201</sup> See <http://transformativeworks.org/projects/vidtestsuite>.

appealing to concepts of prior consent (even as the narrative explained that, at minimum, several key characters had not consented) and by defining and distinguishing “real” rapists from the other people responsible for the scenario. Gianduja Kiss uses a song that used to be part of the musical *The Fantasticks*, which was removed because of its explicit endorsement of rape, to make her argument: repeated rape references accompany scenes of apparently consensual, tender encounters that in fact involve the un-consenting, brainwashed “dolls,” as well as scenes that showcase actresses’ bodies for the audience’s delectation. The vid quickly moves to scenes of physical and sexual violence, highlighting the continuity between the dolls’ coerced happiness and coerced suffering. The juxtaposition of the now-suppressed song with the images from *Dollhouse* forces the ugly premise of the show to the surface. The vid argued that *Dollhouse* was part of rape culture: a failure to see rape as rape, which the holders of the second view then enacted. It is a classic example of critical work whose authorization should not depend on copyright owners’ consent.

An environment in which a blanket may be tugged away at any moment does not encourage creativity. Under this reserved power to suppress, the very works likely to be disallowed by a “blanket” license are those that have the best fair use cases. But because the blankets are tuggable, there is no certainty for any fan creator, and authorized spaces are no substitute for more freewheeling noncommercial spaces. As a result, the potential for quasi-blanket licensing should not be accepted as any reason to cut back on fair use.

3. Case study: Amazon’s Kindle Worlds is a commercial innovation that uses the language of remix, but fails to provide its benefits.

Amazon’s Kindle Worlds program provides limited opportunities to monetize certain stories based on existing TV shows and books—essentially, Amazon has changed the production model for official tie-in novels, which used to involve commissioning writers to write more books set in a series universe. Now, anyone can submit a tie-in of a certain length to Amazon for one of several properties owned by Alloy Entertainment (a packager that develops concepts for young adult books and television series) or for Kurt Vonnegut’s novels. Kindle Worlds is an interesting experiment that reveals that licensing can never take the place of transformative fair use.

First, Kindle Worlds does not substitute for noncommercial uses. Anyone in the program is, in fact, not allowed to distribute her work for free; Amazon controls its price. They are also locked into Amazon’s ecosystem. They may not use other publishing platforms, nor may they avoid Amazon’s DRM (digital rights management) technology even if they wish to distribute their work without DRM, as numerous small publishers such as DAW Books do. Another way in which Kindle Worlds is hostile to the circulation of culture is its treatment of libraries: while fair use remixes can be and are being preserved in museums and libraries,<sup>202</sup> Amazon’s licensing

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<sup>202</sup> See, e.g., Fandom-Related Collections at the University of Iowa, University of Iowa Libraries Special Collections and University Archives <http://www.lib.uiowa.edu/spec-coll/resources/FandomResources.html> (cataloging numerous physical artifacts from media fandom, including fan fiction and vids) (last visited Nov. 12, 2013); morgandawn, Filking History & Orphans, *The Here and Now* (Jan. 20, 2013), <http://morgandawn.dreamwidth.org/1214319.html> (discussing filk—songs created as part of fandom—archive at Texas A&M).

terms do not allow libraries to preserve Kindle Worlds works, as they traditionally have done—and, as noted above, there are no alternative sources.

Second, Kindle Worlds has significant content limitations, and authors must adhere to any limits on content set by the owner of the “World” at issue—this includes restrictions on sexual content, prohibitions on the popular “crossover” format in which characters from one world encounter another, and of course prohibitions on anything transformative but not part of the licensed properties, which is to say the hundreds of thousands of books, movies and other media that aren’t part of Kindle Worlds. Like Content ID, Kindle Worlds is a “tuggable” blanket, and there is no appeal process or transparency about why works can be rejected other than a list of general prohibitions.<sup>203</sup> Licensor control of content will prevent experimentation and criticism of the premises of the licensor’s world—precisely the most valuable kinds of transformative works.

Third, Kindle Worlds requires the author to share revenue with the original copyright owner, even if the use would be deemed fair by a court. Fair users need not pay licensing fees, and the law should reject any scheme that would require them to do so. When Alice Randall wrote *The Wind Done Gone* to criticize and challenge the racist and sexist aspects of *Gone With the Wind*, it would not just be wrong to suppress her work—it would be wrong to make her pay the estate of the very author who did her harm with those racist and sexist elements.

One final caution: Kindle Worlds, like YouTube’s Content ID, is a system put in place by a currently dominant market participant. But we do not know what markets will look like in ten years (neither the Kindle nor YouTube have yet been around for a decade). To conclude that Amazon and YouTube have solved the problem of licensing poses significant risks on both sides—on the one hand, the licensing model risks entrenching their near-monopolies on the market because other competitors don’t have access to the same licensed content;<sup>204</sup> on the other, if the market changes and either entity goes the way of AOL’s walled garden, Blackberry, MySpace, Alta Vista, and many other formerly dominant digital entities, their licensing “solutions” will disappear with them.

#### 4. Summary: copyright law has the right answer now—some markets aren’t copyright owners’ to control.

Creativity is often spontaneous and unpredictable.<sup>205</sup> If people have to take a license before writing 500 words about Harry Potter, they will make other plans. This is especially true for younger (and less experienced) writers. In any event, because of the social benefits of transformative uses, it is standard copyright doctrine that the copyright owner’s mere willingness to be paid for allowing book reviews, critical commentary, or other transformative works isn’t a reason to give her a right to payment.<sup>206</sup> There are normative limits on the proper scope of

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<sup>203</sup> See Anna Veh, *Kindle Worlds: Bringing Fanfiction Into Line But Not Online?*, June 25, 2013, <http://publishingperspectives.com/2013/06/kindle-worlds-bringing-fanfiction-into-line-but-not-online/>.

<sup>204</sup> Cf. Jeff Macke, *E-Book Ruling Cements Amazon’s Virtual Monopoly*, July 11, 2013, <http://finance.yahoo.com/blogs/breakout/e-book-ruling-cements-amazon-virtual-monopoly-150844210.html> (noting Amazon’s increasing monopoly over ebook content).

<sup>205</sup> Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. Davis L. Rev. 1151 (2007).

<sup>206</sup> See, e.g., *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 617 (2d Cir. 2006).

copyright owners' rights.<sup>207</sup> This rule has served copyright well for decades. It should continue to protect transformative remixers.

### C. Suppression remains a real risk for transformative remixers.

Permission-based regimes give copyright owners too much control over fair users, which they readily use to suppress criticism, however fair. Recently, Jonathan McIntosh faced demands that the copyright owner of *Twilight* be allowed to monetize his *Buffy vs. Edward*, a remix in which he brutally criticized the gender politics of *Twilight* by contrasting it with *Buffy the Vampire Slayer*, using 1 minute and 48 seconds of *Twilight* footage. This powerful critique has been seen over 4 million times on YouTube, with subtitles translated into 30 different languages. Multiple news outlets including the *LA Times*, *Boston Globe*, *Salon*, *Slate*, *Wired*, *Vanity Fair*, *Entertainment Weekly*, and NPR radio, have reported on it. It has been adopted as part of media studies and gender studies courses around the country, and sparked numerous online debates about the popular representation of stalking-type behavior as deeply romantic. The Copyright Office specifically cited it as one of the fair uses justifying an exception to § 1201's anticircumvention provisions for noncommercial remix.<sup>208</sup>

Especially since McIntosh doesn't profit from his work, he believed that the target of his criticism should not either. Despite having actual knowledge that *Buffy vs. Edward* was a well-recognized fair use, Lionsgate first abused YouTube's Content ID process, then sent serial DMCA takedown notices after McIntosh declined to allow monetization, and his work was suppressed for a significant period of time.<sup>209</sup> Only intervention by lawyers restored his work, and most noncommercial remix creators by definition lack legal representation. New Media Rights, which represented him, reported that his story, while extreme, was far from unique: "there are large media companies that intend to blindly monetize every reuse of content, even if it means steamrolling fair use and the freedom of speech."<sup>210</sup>

Like overreaching Content ID claims on YouTube,<sup>211</sup> overreaching DMCA takedowns are a small but persistent category, and when improperly motivated they risk suppressing precisely the

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<sup>207</sup> See Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. Mary L. Rev. 1525, 1672 (2004) ("[N]oncommercial' use consists of a pattern in which consumption or use of the work is structured on nonmarket grounds, that is, according to the norms and conventions of an 'embedded' rather than price-based economy.... [This standard] has the virtue of depending on evidence other than whether or not the defendants received, or avoided having to spend, cash.") (internal citation omitted).

<sup>208</sup> 2012 Recommendations, *supra* note 45, at 133.

<sup>209</sup> NMR Helps Remix Artist Jonathan McIntosh Fight Lionsgate's YouTube Takedown of "Buffy vs. Edward, New Media Rights, (Jan. 9, 2013), [http://www.newmediarights.org/copyright/NMR\\_helps\\_remix\\_artist\\_jonathan\\_mcintosh\\_fight\\_lionsgate\\_youtube\\_takedown\\_buffy\\_v\\_edward](http://www.newmediarights.org/copyright/NMR_helps_remix_artist_jonathan_mcintosh_fight_lionsgate_youtube_takedown_buffy_v_edward)

<sup>210</sup> *Id.*

<sup>211</sup> See, e.g., Parker Higgins, Copyright Vampires Attempt to Suck the Lifeblood Out of Fair Use Video, Jan. 10, 2013, <https://www.eff.org/deeplinks/2013/01/copyright-vampires-attempt-suck-lifeblood-out-fair-use-video> (explaining how copyright owners can abuse Content ID in cases of fair use); Tim Cushing, YouTube's ContentID Trolls: Claim Copyright On Lots Of Gameplay Videos, Hope No One Complains, Collect Free Money [Updated], Feb. 28, 2013, <https://www.techdirt.com/articles/20130227/20563322144/youtubes-contentid-trolls-claim-copyright-lots-gameplay-videos-hope-no-one-complains-collect-free-money.shtml> (explaining how Content ID can be misused). Content ID also operates in a nontransparent way, denying some users the ability to contest claims. See Ed, YouTube Quietly Disables Content ID Appeals, Putting Copyright Owners Back in Control, Oct. 2013



most valuable, critical and transformative speech.<sup>212</sup> For example, portrayals of characters as not conventionally heterosexual—as in the popular genre of slash—are particularly likely to attract negative attention from copyright owners.<sup>213</sup> The OTW understands that other commenters will be focusing on DMCA issues, but urges NTIA/PTO to recognize that overreaching does the greatest harm to the smallest speakers—those who already face many barriers to their speech, and can rarely find lawyers to assist them. Any discussion of the DMCA should take into account the interest of ordinary citizens in being able to navigate claims and defend their fair use rights without first going to court (which will almost never happen).

Even setting DMCA abuses aside, institutional uses of remix, such as educational uses, are also endangered by overaggressive copyright claims. Schools can be particularly risk-averse unless the law is clear in favor of transformative noncommercial use. Eric Faden, associate professor of film and media studies at Bucknell University, created the important and widely disseminated remix *A Fair(y) Use Tale* using multiple Disney clips to explain and criticize copyright law.<sup>214</sup> He reports:

I have had students in the past literally afraid to do a project. I know that sounds ridiculous. And in fact that's how I knew—I tell this anecdote a lot—that's how I knew *A Fair(y) Use Tale* was a really great film, because when we were in the middle of cutting it, we showed it to a class of students that had not seen it before, and there was this girl who was squirming and I could tell she was uncomfortable, and she said, “Are we going to get into trouble for watching this?” ... [T]here is so much good that's come out of [having an exemption for noncommercial remix]. ... And so what they're doing is really taking advantage of a rich media environment but they need to have that legal room to be able to do that. Because I don't think in a university classroom we should necessarily be teaching students to express themselves vis a vis breaking the law.<sup>215</sup>

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<http://eheldman3.blogspot.com/2013/10/youtube-quietly-disables-content-id.html> (describing inability to appeal). People with prior “strikes” or multiple pending appeals can't appeal additional Content ID claims, which means that the many users who simply decide not to contest a strike may find themselves precluded from asserting fair use in the future—something they're highly unlikely to know when they make the initial decision.

<sup>212</sup> See, e.g., Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 *Harvard J.L. & Tech.* 171 (2010) (empirical study finding significant numbers of illegitimate takedown requests); Jennifer M. Urban and Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 *Santa Clara Computer & High Tech. L.J.* 621 (2006) (same); Oday, *DMCA Double Jeopardy*, *YouTomb* (Oct. 31, 2009), <http://youtomb.mit.edu/blog/>; M.G. Siegler, *Hitler is Very Upset That Constantin Film is Taking Down Hitler Parodies*, *TechCrunch* (Apr. 19, 2010), <http://techcrunch.com/2010/04/19/hitler-parody-takedown/> (reporting on the removal of the popular Hitler internet memes); Jacqui Cheng, “DMCA Abuse Extends to Twitter Posts,” *Ars Technica*, April 26, 2010, <http://arstechnica.com/tech-policy/2010/04/dmca-abuse-extends-to-twitter-posts/>; Mike Masnick, “Major Hollywood Studios All Sent Bogus DMCA Takedowns Concerning The Pirate Bay Documentary,” *TechDirt*, May 20, 2013, <http://www.techdirt.com/articles/20130520/11552823150/major-hollywood-studios-all-sent-bogus-dmcatakedowns-concerning-pirate-bay-documentary.shtml>.

<sup>213</sup> See Chander & Sunder, *supra* note 93, at 623 (“[W]hile DC Comics produced an alternative strip featuring an evil Batman, it issued a cease and desist letter to an artist depicting Batman and Robin as lovers (sometimes explicitly). An evil Batman, it seems, is more palatable than a gay one.”) (citation omitted).

<sup>214</sup> Eric Faden, *A Fair(y) Use Tale*, *The Center for Internet and Society* (Mar. 1, 2007), <http://cyberlaw.stanford.edu/documentary-film-program/film/a-fair-y-use-tale>.

<sup>215</sup> Interview with Eric Faden (Nov. 20, 2011); ; see also Patricia Aufderheide, *Remix Culture: The Good, the Bad and the Confusing*, Apr. 25, 2007, <http://cmsimpact.org/blog/fair-use/remix-culture-good-bad-and-confusing> (study

Legal scholar Peter Jaszi echoes these concerns:

As distinctions between teachers, students, makers, users and distributors continue to blur, we are all becoming more and more dependent on fair use – whether we know it or not. ... [Y]oung people are learning about media from one another, by taking advantage of all the new tools that permit them to be makers rather than mere consumers of content. This is a powerful social development, but it also is a fragile one. Nothing threatens it more than inappropriate applications of copyright discipline. The last lesson we want to teach young people as a society is that it is wrong to participate actively in one's own culture, and that the choice they face is between compliance and transgression. Whichever choice they make will represent destructive mislearning.<sup>216</sup>

We end this section with a plea from an ordinary remix creator, reminding lawyers of the intimidating effect of even a misguided legal claim. Ashley's story highlights the benefits of remix culture as well as its vulnerability to suppression:

I was born with a physical disability called Cerebral Palsy .... While my grades maintained a top of the class average, and my reading, writing, and vocal comprehension skills were always high, people took one look at my canes and decided I was stupid as well as crippled – like having physical difficulties was directly related to mental incompetence! When I discovered fandom in the seventh grade, with it came, for the first time in my life, honest-to-God friends, who just wanted to be around me because we all enjoyed the same book series. ... Because of our shared fandom, for once, somebody was looking at *me*, and not my *body*.

As the years went by and I joined other fandoms, created work and finally get the nerve to post it where anyone could see it, I gained other friends. Friends whose only connection to me was their usernames, their own fanfiction profiles and stories, and the way we all messaged and encouraged one another to write. I learned that it wasn't okay for my family to think I was sick and wrong ... just for being bisexual and not homophobic; I learned that if a dedicated writer could overcome dyslexia (like one of my friends), then it wasn't so far-fetched to try and apply that to myself and my CP; ... and I learned what it felt like to be surrounded by a community that could accept me for myself – disability, non-normative sexuality, crazy thoughts, and tendency toward social awkward bluntness – completely and wholly, in a world that – outside of fandom – never had, or could, or likely ever would.

I've never had a lawsuit brought against me for a fanwork I've created, but I've seen what it does to those it does hit. I've seen how it intimidates new fans who see it – how their works suffer, or even are never seen, because they fear the same. How fans who are hit sometimes don't come back. Every fan has a story to tell, and someone out there who

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finding that college students care about copyright, but don't understand their rights, and therefore sometimes make creative decisions based on misinformation).

<sup>216</sup> Recut, Reframe, Recycle: An Interview with Pat Aufderheide and Peter Jaszi (Part Two), Feb. 8, 2008, [http://henryjenkins.org/2008/02/recut\\_reframe\\_recycle\\_an\\_inter.html](http://henryjenkins.org/2008/02/recut_reframe_recycle_an_inter.html):

## Organization for Transformative Works

*needs* to hear it, even if the author/artist is not aware. Fandom gives people hope and love and shelter if they can find it. Being hit with a lawsuit only takes away that one work that could have helped someone in real life ....

Creators like Ashley need, and deserve, a legal system in which they don't just exist on sufferance.

V. Copyright reform should have the protection of remix cultures as a key goal.

Pathways forward for copyright reform should ensure the protection of noncommercial remix, through fair use as well as through safe harbors. The legal framework should also not make remix practices illegal, as §1201 now does (in the absence of the noncommercial remix exemptions granted by the Copyright Office in 2010 and 2012).

The most important feature of remix cultures to keep in mind from a legal perspective is that one cannot assume that noncommercial remix will remain unaffected by laws targeted at other kinds of uses. Professors Andrew Torrance and Eric von Hippel have identified “innovation wetlands”: largely noncommercial spaces in which individuals innovate that can easily be destroyed by laws aimed at large, commercial entities, unless those individuals are specifically considered in the process of legal reform.<sup>217</sup> Their description fits remix cultures well:

The practice of innovation by individuals prominently involves factors important to “human flourishing,” such as exercise of competence, meaningful engagement, and self-expression. In addition, the innovations individuals create often diffuse to peers who gain value from them ....<sup>218</sup>

Innovation requires that individuals have rights to make, use, and share their new creations, collaborating with others to improve them, as remix authors do. Given the small scale and limited resources of most individuals, “[a]nything that raises their innovation costs can therefore have a major deterrent effect.” As a result, “heedless government actions currently have significant impacts upon the fragile ‘innovation wetlands’ environment within which individual innovators operate.”<sup>219</sup>

Copyright law, particularly the anticircumvention provisions of the DMCA, can inflict this kind of collateral damage.<sup>220</sup> Torrance and von Hippel have one overriding message: policymakers should pay attention to innovation wetlands, and not assume that creativity will continue to be naturally provisioned or that only commercial entities’ incentives need to be considered. This is exactly the kind of “environmental impact” analysis that NTIA/PTO should carry out with respect to remix cultures.

A. Section 1201 is an example of what not to do.

The experience under § 1201 of the DMCA provides an object lesson of the dangers that should be avoided (and the problems needing correction). Under § 1201, taking short clips from DVDs in order to make a noncommercial remix is illegal even though the resulting work is a fair use. The Librarian of Congress can grant short-term exemptions to this prohibition, though they must

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<sup>217</sup> Andrew W. Torrance & Eric A. von Hippel, Protecting the Right to Innovate: Our ‘Innovation Wetlands’ (Oct. 9, 2013), available at SSRN: <http://ssrn.com/abstract=2339132> or <http://dx.doi.org/10.2139/ssrn.2339132>.

<sup>218</sup> Id. at 2 (citation omitted).

<sup>219</sup> Id.

<sup>220</sup> Id. at 18 (“Like a stream providing water to an ecological wetland that is dammed or diverted, access to the flow of digital resources that provides a feedstock to creativity within the innovation wetlands has been damaged by the DMCA legislation. ... [I]ndiscriminate application of intellectual property rights to the activities of individual innovators risks doing substantial harm to the innovation wetlands.”).

be renewed through a complicated and difficult process every three years. Vidders were not the target of §1201, and suppressing noncommercial remix isn't necessary to anticircumvention law—as two rounds of successful exemptions demonstrate<sup>221</sup>—but they were collateral damage, unable to assert fair use defenses when any test of those defenses would expose them to absolute liability for circumvention.<sup>222</sup>

Section 1201 is an example of unnecessary complexity affecting nonprofessionals and contributing to popular distaste for copyright law. Because the vast majority of vidders are amateurs who engage in video creation as a hobby, they are unlikely to have access to copyright counsel to explain the subtleties of the DMCA to them and are usually unaware of the counterintuitive nature of circumvention liability as applied to DVDs. Vidders—especially the tens of thousands of young people who are inventing and reinventing the form for themselves, without an established connection to a larger community—risked becoming liable or having their fair uses suppressed simply because they did what seemed like the fairest thing for the copyright owner and paid for a copy from which they could clip, rather than downloading an unauthorized copy without copy protection.<sup>223</sup> As a result, many vidders were unknowingly violating § 1201(a)(1) in the absence of an exemption. Indeed, the few remixers who did know about the DMCA were pushed into illegitimate markets.<sup>224</sup>

We have enough experience with § 1201 to know that it hasn't prevented the widespread availability of circumvention technology. The Librarian of Congress has repeatedly determined that circumvention technology has remained readily accessible to anyone with an internet connection.<sup>225</sup> The reason most people don't use circumvention technology on DVDs is that they don't need to: for pure consumption purposes, either illegal downloads or, increasingly, legitimate services are generally available. Ironically, anticircumvention thus weighs most heavily on remixers and others who need to do more than just consume, and who usually have legitimate fair use or educational needs to use short excerpts. Section 1201 is an arrow that has fatally missed its mark.

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<sup>221</sup> As the Register noted, “CSS-protected DVDs have continued to be the dominant format even though circumvention tools have long been widely available online . . . at this point in time, the suggestion that an exemption for certain non-infringing uses will cause the end of the digital distribution of motion pictures is without foundation.” 2010 Recommendations, *supra* note 45, at 57.

<sup>222</sup> Without an exemption, the main effect of the anticircumvention prohibitions on remixers was to surprise them when they received a takedown notice, believed they had a valid fair use defense, and discovered that the DMCA made that fair use defense irrelevant because of how they had acquired the footage they used. The OTW's experience under the 2009 exemptions indicates that such remixers are now able to contest notices, asserting their fair use arguments, and that they have been able to successfully use counternotifications under the DMCA as well as other dispute resolution mechanisms such as those provided by YouTube.

<sup>223</sup> Rather than distinguishing methods of obtaining files, vidders use a much more intuitive and fair calculus: “[T]he big legal line many vidders draw [is] between ‘paying’ and ‘not paying’ for source footage.” 2012 EFF Proposal, *supra* note 33, at 63 (citing Francesca Coppa).

<sup>224</sup> Interview with Jonathan McIntosh, Nov. 17, 2011 (“Before the exemptions many remixers would be afraid of making a fair use video commentary with DVD footage even if they owned the disc(s). Some remixers, including myself, would resort to using the bit torrent file sharing protocol to download DVDs ripped by others rather than decrypting the DVDs from our own home collections.”); Lucas Hilderbrand, *Inherent Vice: Bootleg Histories of Videotape and Copyright* 79 (2009) (“[W]hen people learn about the extent of the DMCA restrictions, they respond with shock and outrage, which tends to turn either to pessimism or to willful disregard for the law.”).

<sup>225</sup> 2012 Recommendations, *supra* note 45, at 135 (noting wide availability of circumvention tools through two rounds of § 1201 rulemaking).

B. Fair use and best practices offer a path forward.

Ordinary artists are much more aware of copyright than of paracopyright. Transformative fair use is a reasonably intuitive concept, as is the distinction between transformation and pure copying. American University's Center for Social Media has developed best practices for fair use in online video,<sup>226</sup> along with numerous other best practices statements for different communities of fair users. These communities offer the prospect of understandable copyright rules that individuals can respect. One reason so many laypeople are dismissive of copyright law is because it is counterintuitive and arcane, resulting in seeming unfairness and futility. Jessica Litman has explained:

The less workable a law is, the more problematic it is to enforce. The harder it is to explain the law to the people it is supposed to restrict, the harder it will be to explain to the prosecutors, judges, and juries charged with applying it. The more burdensome the law makes it to obey its prescriptions, and the more draconian the penalties for failing, the more distasteful it will be to enforce. The more people the law seeks to constrain, the more futile it can be to enforce it only sporadically. Finally, the less the law's choices strike the people it affects as legitimate, the less they will feel as if breaking that law is doing anything wrong. In other words, if a law is bad enough, large numbers of people will fail to comply with it, whether they should or not.<sup>227</sup>

The United Kingdom's Intellectual Property Office surveyed numerous copyright stakeholders, and heard the same point that simple rules promote understanding and compliance:

[Some stakeholders] saw the complexity of copyright as the main challenge to lawful use of works. In their view, the current situation online was too confusing to understand and as a result many people gave up trying. Even some long-time professionals in the creative industries indicated a lack of knowledge of all relevant copyright developments in their area.

The copyright system suffers from a marked lack of public legitimacy. . . . The system is often unable to accommodate certain uses of copyright works that a large proportion of the population regards as legitimate fair and reasonable. . . . The problems become more pronounced as people feel a sense of ownership or attachment to material in which the

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<sup>226</sup> Center for Social Media at American University, Code of Best Practices in Fair Use for Online Video, (June 2008) <http://www.cmsimpact.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>; see generally Patricia Aufderheide & Peter Jaszi, Reclaiming Fair Use: How to Put Balance Back in Copyright (2011) (explaining best practices in fair use generally).

<sup>227</sup> Jessica Litman, Digital Copyright 195 (2001); see also Joyce E. Cutler, On Copyright's 300th Anniversary, Scholars Question Effectiveness of Current Formulation, 15 Electronic Com. & L. Rep. 641 (2010) ("Copyright law is 'out of balance' and action must be taken to restore the public's respect for copyright, [then-]Register of Copyrights Marybeth Peters said. . . . '[W]e have lost the respect of the public in many ways,' Peters said. . . . Copyright law should be understandable so that people will obey and respect it, Peters said. Further, the way copyright is viewed has changed, and there are lots of new players, including consumers, who Peters said 'are really key in the copyright debate.'").

copyright is owned by others. Consumers may have strong ties to material . . . because of the time and effort they have devoted to it . . . .<sup>228</sup>

While they encourage disrespect from some people, incomprehensible rules also deter risk-averse remixers from making fair uses. The solution, as the UK IPO report put it, is to “hid[e] the wiring”—to simplify copyright law so that it comes into better alignment with lay logic.<sup>229</sup> This can be done through fair use and best practices, but a safe harbor for noncommercial remix could also be part of the solution.

C. A safe harbor is worth considering.

As noted in the executive summary, Canada has recently adopted a statutory safe harbor for noncommercial remix.<sup>230</sup> Although experience is as yet limited, there has been no reported outbreak of misuse, nor would we expect one, given the evidence that remix cultures foster engagement with creative ethics and responsibilities. Canada’s protection could offer a model for reform here as well.<sup>231</sup> Even supporters of expanded liability for unauthorized reproduction also acknowledge the need to protect noncommercial remix. Peter Menell, for example, has advocated increased enforcement against pure copying, but also proposes “insulat[ing] fans from liability for expressive, non-commercial activities. . . . [A] formal statutory safe harbor for noncommercial fan fiction and related activities (e.g., fan sites, Pinterest) would encourage more such activity as well as send an affirming message to new and existing generations of fans.”<sup>232</sup>

As with the educational use provisions of 17 U.S.C. § 108, a safe harbor for noncommercial uses would remain supplemented by fair use, both for commercial transformative uses and for uses that might not fit the ordinary definition of noncommercial remix.<sup>233</sup>

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<sup>228</sup> U.K. Intellectual Prop. Office, © the Way Ahead: A Strategy for Copyright in the Digital Age 24, 27 (2009), available at <http://www.ipo.gov.uk/c-strategy-digitalage.pdf> (citations omitted).

<sup>229</sup> U.K. Intellectual Prop. Office, *supra*, at 33 (“Calls have been made for solutions which lessen or remove a non-commercial consumer’s need to understand copyright law. The analysis above would suggest that ‘hiding the wiring’ by simplifying the situation for users could help tackle some of the problems of the copyright system.” (citation omitted)).

<sup>230</sup> See Graham Reynolds, *Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression*, in Michael Geist, ed., *From “Radical Extremism” to “Balanced Copyright”*: Canadian Copyright and the Digital Agenda 395 (2010).

<sup>231</sup> See also Lessig, *supra* note 68, at 254 (pointing out that U.S. copyright law already draws commercial/noncommercial distinctions and arguing for exemptions for noncommercial use).

<sup>232</sup> Peter S., Menell, *This American Copyright Life: Reflections on Re-equilibrating Copyright for the Internet Age*, at 113, (Oct. 30, 2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347674). He continues: “More generally, the copyright law ought to authorize, or at least cabin or eliminate statutory damages with respect to, non-commercial educational and experimental uses of copyrighted works. Often the best way to learn a musical instrument or develop artistic or creative writing skill is to imitate the works of others. Yet these acts, if publicly performed or recorded and uploaded to a social media website, create risk of copyright liability. The past decade indicates that copyright owners need not worry about these uses. Fan fiction has enriched their coffers. More importantly, there is no better way to promote progress than to nurture artistic, musical, and literary skills among the next generation of creators.” *Id.*

<sup>233</sup> *Authors Guild, Inc. v. HathiTrust*, 902 F.Supp.2d 445, 459, 464 (S.D.N.Y. 2012).

Organization for Transformative Works

However the copyright reform project proceeds, it is vital that it not ignore the legitimate interests of the remixers who are working in every form of media. They are the future of our culture. Artists, not lawyers, should determine the shape of works to come.

Dated: November 13, 2013

Respectfully submitted,

ORGANIZATION FOR  
TRANSFORMATIVE WORKS

A handwritten signature in black ink that reads "Rebecca" followed by a large, stylized flourish that loops around and ends in a horizontal line.

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