

THE RIGHT TO MARY SUE

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Lieutenant Mary Sue took the helm of the Starship Enterprise, saving the ship while parrying Kirk's advances. At least she did so in the unofficial short story by Trekkie Paula Smith. "Mary Sue" has since come to stand for the insertion of an idealized authorial representative in a popular work. Derided as an exercise in narcissism, Mary Sue is in fact a figure of subaltern critique, challenging the stereotypes of the original. The stereotypes of popular culture insinuate themselves deeply into our lives, coloring our views on occupations and roles. From Hermione Granger-led stories, to Harry Potter in Kolkata, to Star Trek same-sex romances, Mary Sues re-imagine our cultural landscape, granting agency to those denied it in the popular mythology. Lacking the global distribution channels of traditional media, Mary Sue authors now find an alternative in the World Wide Web, which brings their work to the world.

Where copyright law gives rights to derivative works to the original's owners, we argue that Mary Sues that challenge the orthodoxy of the original likely constitute fair use. The Mary Sue serves as a metonym for all derivative uses that challenge the hegemony of the original. Scholars raise three principal critiques to such fair use: (1) why not write your own story rather than borrowing another's? (2) even if you must borrow, why not license it? and (3) won't "recoding" popular icons destabilize culture itself? Relying on a cultural theory that prizes voice, not just exit, as a response to hegemony, we reply to these objections here.

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“Gee, golly, gosh, gloriosky,” thought Mary Sue as she stepped on the bridge of the Enterprise. “Here I am, the youngest lieutenant in the fleet - only fifteen and a half years old.” Captain Kirk came up to her.

“Oh, Lieutenant, I love you madly. Will you come to bed with me?”

“Captain! I am not that kind of girl!”

“You’re right, and I respect you for it. Here, take over the ship for a minute while I go get some coffee for us.”

Mr. Spock came onto the bridge. “What are you doing in the command seat, Lieutenant?”

“The Captain told me to.”

“Flawlessly logical. I admire your mind.”

- Paula Smith, *A Trekkie’s Tale* (1974)¹

Going where only men had gone before, Lieutenant Mary Sue took the helm of the Starship Enterprise, performing to acclaim and earning the Vulcan Order of Gallantry. This was, of course, fantasy, but doubly so. By 1974, no woman had commanded the Enterprise bridge, according to the *official* Star Trek fantasy. Indeed, it would take another two decades before a woman would command the Enterprise in a later Star Trek series. Trekkie Paula Smith, however, was impatient. So she inserted the young Lieutenant Mary Sue into the Star Trek universe, not as communications officer, nurse, the voice of the onboard computer, or passing Kirk love-interest, but as commander. In so doing, Smith began the modern incarnation of an old and often celebrated phenomenon—retelling a canonical story to better represent oneself.²

The name of her character has come to stand for all such characters in the universe of fan fiction.³ Fan fiction spans all genres in popular culture, from anime to literature. In every fan literature, there is the Mary Sue: “She fences with Methos and Duncan MacLeod; she saves the

¹ Paula Smith, *A Trekkie’s Tale* (1974), reprinted in CAMILLE BACON-SMITH, *ENTERPRISING WOMEN: TELEVISION FANDOM AND THE CREATION OF POPULAR MYTH* 94 (1992).

² See Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 8 n. 34 (2002) (offering examples of retellings from a different character’s perspective, including Tom Stoppard’s *Rosencrantz and Guildenstern Are Dead* (a play on *Hamlet*), Jean Rhys’s *Wide Sargasso Sea* (a play on *Jane Eyre*) and Henry Fielding’s *Joseph Andrews* (a play on *Pamela*)).

³ Fan fiction is “fiction written by people who enjoy a film, novel, television show or other media work, using the characters and situations developed in it and developing new plots in which to use these characters.” WIKIPEDIA, *Fan Fiction*, at http://en.wikipedia.org/wiki/Fan_fiction (last visited Dec. 11, 2005).

Enterprise, the *Voyager*, or the fabric of time and space; she fights with Jim Ellison in defense of Cascade; she battles evil in Sunnydale alongside Buffy Summers.”⁴ She stands as the only female member of the fellowship of the ring.⁵ According to Wikipedia, a “Mary Sue” is “a fictional character who is an idealized stand-in for the author, or for a story with such a character.”⁶ A Mary Sue might appear in the form of a new character beamed into the story or a marginal character brought out from the shadows. Hermione Granger stars in her own popular stories, which recast the sidekick as leader or find her a new romance, especially in Harry, Draco Malfoy, or Ginny Weasley.⁷ One of the most important recent copyright cases⁸ revolves around a Mary Sue: for much of a century, the most popular account of life on a slave plantation has been *Gone with the Wind*; Alice Randall disturbed Margaret Mitchell’s idyll in *The Wind Done Gone*, exposing oppression through a slave protagonist while imbuing the African American characters with complexity and agency.

Our Essay has two goals, one practical and the other theoretical. First, we hope to clarify the law so that writers of Mary Sues will not be chilled by possible legal threats to such speech. We argue that such authors should not readily “cease and desist,” as might be demanded by copyright owners. Rather than illegal art, Mary Sues may well constitute fair use. Second, we use Mary Sues to probe the theory of fair use itself. Mary Sue becomes a metonym for fair uses that rewrite the popular narrative. Implicitly, we defend fair use against efforts to narrowly interpret it as merely a response to transactions cost-induced market failure, an explanation that leads ultimately to its evisceration as technologies reduce transactions costs.⁹ Under that story, the cultural and speech consequences of transformative uses of copyrighted works lie hostage to the ability of the transformers to pay. We also defend against the foremost *cultural* critique of fair use—that reinterpretation (or “recoding”) of the text destabilizes

⁴ Pat Pflieger, *Too Good to be True: 150 Years of Mary Sue*, available at <http://www.merrycoz.org/papers/MARYSUE.HTM> (dated 2001) (last visited Dec. 18, 2005).

⁵ greendaychica365, *Friends til the End*, LORD OF THE RINGS FAN FICTION (2005), at (<http://www.lotrfanfiction.com/viewstory.php?sid=5770&i=1>).

⁶ WIKIPEDIA, *Mary Sue*, at http://en.wikipedia.org/wiki/Mary_Sue_fanfiction (visited on December 11, 2005).

⁷ Harry Potter fan fiction is wildly popular, with some 235 thousand entries on FanFiction.net alone. *Books*, FANFICTION.NET (last visited Mar. 5, 2006).

⁸ SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

⁹ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

cultural foundations.¹⁰ This critique, forcefully offered in 1999, remains largely unanswered to this day.¹¹ We respond here.

Wikipedia observes that “Mary Sue” is a pejorative expression, derided in fandom as narcissistic.¹² We dissent from this view. In this essay, we rehabilitate Mary Sue as a figure of subaltern critique and, indeed, empowerment.¹³ As exemplified by Lieutenant Mary Sue, she serves to contest popular media stereotypes of certain groups such as women, gays, and racial minorities. Where the popular media might show such groups as lacking agency or exhibiting other negative characteristics, Mary Sues are powerful, beautiful, and intrepid.¹⁴ We are not content here to limit “empowerment” to the ability to participate in cultural meaning-making.¹⁵ Rather, we connect that cultural power with economic power through social science investigations that reveal how media affects our racialized and gendered view of occupations.¹⁶

Before the World Wide Web, Mary Sue authors might have stashed what they penned in a drawer, distributed xeroxed copies,¹⁷ or, at most,

¹⁰ Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940-966 (1999).

¹¹ See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP 36-37 (2004) (accepting cultural destabilization as one cost of his preferred semiotic democracy); cf. Note, “Recoding” and the Derivative Works Entitlement: Addressing the First Amendment Challenge, 119 HARV. L. REV. 1488, 1507 (2006) (“Even if recoding threatens a meaning change, copyright owners may also be well enough endowed from their success to meet the recoding challenge head-on by spending money on preservation of the old meaning.”). An important exception is Mark Lemley, who offers a different set of responses than the ones we offer. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 82 TEX. L. REV. 1031, 1056 n. 103 (2005). See *infra* note 122.

¹² Keidra Chaney & Raizel Liebler, *me, myself & i*, 31 BITCH 52 (2005).

¹³ This essay itself becomes then an exercise in recoding. Cf., e.g., Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) (recoding Nazi pink triangle); Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996) (recoding Irish-American parade).

¹⁴ The gendered appellation for this form—Mary Sue—reflects its popularity among female authors, who often work against the gender stereotypes of the canon work.

¹⁵ Cultural studies scholars define “empowerment” “as a function and possibility of participation in popular culture.” Cheryl Harris, *A Sociology of Television Fandom*, in THEORIZING FANDOM: FANS, SUBCULTURE AND IDENTITY 41, 42 (Cheryl Harris & Alison Alexander eds., 1998). We see empowerment also in terms offered by the civil rights movements—as increasing social, economic and political power.

¹⁶ In another paper, Madhavi Sunder sees intellectual property as the fulcrum linking recognition and redistribution. Madhavi Sunder, *IP³* (draft March 28, 2006); see also IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 105 (2000); NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE (2003); RICH FORD, RACIAL CULTURE (2005).

¹⁷ See BACON-SMITH, *supra* note 1.

published their work in an underground magazine. The emergence of the World Wide Web offers writers a relatively inexpensive and simple mass distribution vehicle. Posting a story to a fan fiction website is literally free, at least for those with access to the Internet. Lacking the global distribution channels of print media, Mary Sue authors now find an alternative in the World Wide Web, which brings their work to the world. The increasing power and affordability of digital tools may make it possible to go beyond rewriting stories in words, to permit video and audio mash-ups. They usher in a whole new universe of imagined possibilities—if the law will allow us there.

Our Essay proceeds in two parts. Part I explores the cultural background against which Mary Sues are drawn. As we show, Mary Sues challenge a patriarchal, heterosexist, and racially stereotyped cultural landscape. Popular stereotypes have subtle yet important consequences for our social, political, and economic relations, as social science research reveals. The phenomenon of rewriting the story to revalue your place in it is not simply an exercise in narcissism. Mary Sues offer important epistemological interventions in the reigning discourse, confronting the traditional production of knowledge by reworking the canon to valorize women and marginalized communities. They exemplify the tactic that Appadurai describes as *commodity resistance*.¹⁸

Mary Sues that challenge the orthodox representations in the original work should often constitute fair use under U.S. copyright law, we argue in Part II. Trademark claims against such Mary Sues, too, typically should fail. Yet, the skeptic will ask: Why not write your own original story rather than inserting yourself into a story written by someone else? If not that, then why not license the original? These critiques go far beyond Mary Sues: They represent the fundamental challenges to *any* fair use claim. We respond to these challenges here, relying upon theories of cultural critique and change. Specifically, we argue that semiotic democracy¹⁹ requires the ability to re-signify the artifacts of popular culture to contest their authoritative meaning. We show that concerns for resulting cultural destabilization misunderstand the nature of culture itself.

¹⁸ See Arjun Appadurai, *Introduction: Toward an Anthropology of Things*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 3, 30 (Arjun Appadurai, ed., 1986) (citing as an example Gandhi's tactics regarding cloth, see C. A. Bayly, *The origins of swadeshi (home industry): cloth and Indian society*, in *THE SOCIAL LIFE OF THINGS* 285).

¹⁹ On semiotic democracy, see FISHER, *supra* note 11, at 30-31; Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1491 (2002).

I. MARRY, SUE!

In 1966, when *Star Trek* debuted on television, it was groundbreaking. Its creator, Gene Roddenberry “envisaged a multi-racial and mixed-gender crew, based on his assumption that racial prejudice and sexism would not exist in the 23rd century.”²⁰ Lieutenant Uhura was the first African American woman to be featured in a major television series.²¹ Officer Sulu offered a rare Asian American face outside a martial arts milieu.

But despite these laudable aspirations, equality was not yet truly complete in Federation space. Uhura, of course, was relegated to the communications station. Women generally played secondary roles, often serving as episode-long love interests for the White male members of the crew. Uhura herself broke ground again when she participated in network television’s likely first interracial kiss—with Captain Kirk, of course.²² Same sex romantic relationships apparently did not survive into our future.

A. Popular Media’s Persistent Stereotypes

Women, gays, and racial minorities have certainly made major strides over four decades of television. *Star Trek*, for example, evolved: In 1993, an African-American would command the station in the *Star Trek* series *Deep Space Nine*. And, in 1995, more than two decades after Lieutenant Mary Sue, Captain Kathryn Janeway would command the deck of the starship in *Star Trek: Voyager*, the only *Star Trek* series to have a lead female captain.²³

Yet, there remains a long way to go. Take American television, a principal source of information about our world. A recent report of *Children Now* shows that male characters remain dominant, consistently

²⁰ WIKIPEDIA, *Star Trek: The Original Series*, at http://en.wikipedia.org/wiki/Star_Trek:_The_Original_Series (last visited Dec. 18, 2005). YVONNE FERN, GENE RODDENBERRY: THE LAST CONVERSATION 107 (1994) (quoting Roddenberry as saying, “One of the things *Star Trek* says is that when the future comes, we will have successfully dealt with all of those issues of race and sex and class, and we will have evolved...”).

²¹ BBC UK, <http://www.bbc.co.uk/1extra/bhm05/years/1969.shtml> (last visited June 16, 2006).

²² BBC, *Lt. Uhura*, at <http://www.bbc.co.uk/cult/st/original/uhura.shtml> (the kiss “essentially takes place off-screen, because of the network’s concerns about upsetting viewers in the southern states”) (last visited Dec. 18, 2005).

²³ *Star Trek*, <http://www.startrek.com/startrek/view/series/VOY/cast/69079.html> (last visited June 16, 2006).

outnumbering female characters by nearly two to one since 1999.²⁴ Prime time television portrays “a world in which women are significantly younger than their male counterparts and where older women are hard to find.”²⁵ Perhaps especially telling is the occupational differentiation of men and women: “Male characters outnumbered female characters as attorneys (71% were male), executives/CEOs (80%), physicians (80%), law enforcement officers (82%), paramedics/firefighters (84%), elected/appointed officials (92%) and criminals (93%).”²⁶

Studies correlate high television watching with stereotyped views of gender occupations and traits. In one study, children in grades 1, 3, 5 and 7 were asked to choose between two male and female silhouette figures in response to a given trait, such as shyness or confidence. The answers were then categorized into stereotypically male (including traits such as ambitious, independent and coarse), and stereotypically female (including traits such as fickle, sentimental, and meek). Children who watched 25 hours or more of television per week demonstrated an increase with age in the number of male-stereotyped answers, while those who watched less than 10 hours of television per week demonstrated a decrease in such answers. No conclusion was reached for female-stereotypes.²⁷ In another study, children between the ages of three and six were asked about their career aspirations. The result showed that 76% of children who were classified as “heavy viewers” chose professions stereotypical for their gender, compared with 50% of “moderate viewers” who chose stereotypical professions.²⁸

The racial divide on prime time television remains alarming, as the Children Now survey shows. While 40 percent of American youth ages 19 and under are children of color,²⁹ nearly three-quarters of all prime time characters during the 2003-2004 television season were white. The racial diversity that does exist can be found mostly during the 10 o’clock hour, when American children are least likely to be watching: “The 8 o’clock hour remained the least racially diverse hour in prime time with one in five shows (20%) featuring mixed opening credits casts.”³⁰ Latino characters are often cast in “low-status occupations.”³¹ Even when they were

²⁴ CHILDREN NOW, FALL COLORS: PRIME TIME DIVERSITY REPORT, 2003-2004, at 11 (2004), *available at* http://publications.childrennow.org/publications/media/fallcolors_2003.cfm.

²⁵ *Id.* at 7.

²⁶ *Id.* at 8.

²⁷ Paul E. McGhee & Terry Frueh, Television Viewing and the Learning of Sex-Role Stereotypes, 6 SEX ROLES 179 (1980).

²⁸ Ann Beuf, *Doctor, Lawyer, Household Drudge*, 24 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 142, 144 (Spring 1974).

²⁹ *Id.* at 1.

³⁰ *Id.* at 4.

³¹ *Id.* at 6.

represented, Asian American characters “were far less likely than characters from other racial groups to appear in primary roles.”³² An earlier study by Children Now concluded that a youth watching primetime television would most likely see a “world overwhelmingly populated by ablebodied, single, heterosexual, white, male adults under 40.”³³ When minority groups are depicted in the media, they are generally stereotyped, with Asian women, for example, cast as “China dolls” or “dragon ladies” and Asian men denied any positive sexuality.³⁴ Latinos are commonly depicted as “criminals, buffoons, Latin lovers, or law enforcers.”³⁵

Movies may not be much better. In a study of Black female characters in the top movies of 1996, 89% were shown using profanities, 56% were shown being physically violent and 55% were shown being physically restrained. By contrast, 17% of White female characters were depicted using profanities, 11% were shown being physically violent and 6% were shown being restrained.³⁶

Other popular media evince similar disparities. Take Winnie-the-Pooh. The lovable bear is Disney’s most valuable character, generating revenues of a billion dollars annually.³⁷ But despite his apparent wide appeal, the bear’s universe is quite narrow. In the nearly dozen characters in the Hundred Acre Wood, only one is female—Kanga, Roo’s mother, who often dons an apron. Winnie-the-Pooh and his friends, of course, were created in a different era, written to cheer a young boy.

³² *Id.* at 3. The Children Now report does not break down roles according to the intersection of race and gender.

³³ CHILDREN NOW, FALL COLORS: PRIME TIME DIVERSITY REPORT, 2000–01, at 2 (2001).

³⁴ See A MEMO FROM MANAA TO HOLLYWOOD: ASIAN STEREOTYPES (Media Action Network for Asian-Americans), available at <http://www.manaa.org/articles/stereo.html> (last visited Dec. 19, 2005). See also DAVID L. ENG, RACIAL CASTRATION: MANAGING MASCULINITY IN ASIAN AMERICA 15–19 (2001) (describing the feminization of the Asian-American male in the U.S. cultural imagination); GINA MARCHETTI, ROMANCE AND THE “YELLOW PERIL” 2 (1993) (noting that Asian men are depicted as either “rapists or asexual eunuch figures,” while Asian females are depicted as “sexually available to the white hero”); DARRELL HAMAMOTO, MONITORED PERIL 6–31 (1994) (discussing how racist images have been imposed upon Asian-Americans on television); Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in M. Butterfly, The World of Suzie Wong, and The Adventures of Priscilla, Queen of the Desert*, 5 ASIAN L. J. 99 (1998).

³⁵ Dana E. Mastro & Bradley S. Greenberg, *The Portrayal of Racial Minorities on Prime Time Television*, J. BROADCASTING & ELECTRONIC MEDIA 690, 691 (Fall 2000).

³⁶ Robert M. Entman & Andrew Rojecki, *The Entman-Rojecki Index* (2000), <http://www.press.uchicago.edu/Misc/Chicago/210758.html> (last visited February 13, 2006).

³⁷ Meg James, *Ruling on Pooh Is a Setback for Disney*, L.A. TIMES, p.3-1, May 3, 2003 (“At the peak of Winnie the Pooh’s popularity in the late 1990s, it brought in more than \$1 billion in revenue annually to Disney and companies it licensed to produce Pooh products.”).

While Winnie-the-Pooh is the British literary creation popular among younger children, older children are currently entranced by the magic of Harry Potter. But despite the fact that the stories are penned by a woman, J. K. Rowling, the lead role is played by a boy, and the principal parts are mostly male. Moreover, Hogwarts, in both teachers and pupils, is very largely white, especially so among the principal characters.³⁸

A study on children's books published in the early 1980s showed that adult male characters appeared almost three times more frequently than females.³⁹ Even more importantly, central characters were almost two-and-a-half times more likely to be boys than girls.

The consequences of these stereotypes are felt across the globe. Hollywood and other American media multinationals have globalized American television shows, the Hundred Acre Wood, and Harry Potter. The fictional worlds envisioned therein now charm the real world's youth. Disney offers its fare on television channels it owns around the world. Hollywood's global cultural hegemony translates Hollywood's prejudices to the world.

B. The Effects of Stereotypes

Psychological and sociological research reveals that media representations have economic consequences.⁴⁰ Racial and gender stereotypes depicted in popular media impact children's perceptions of career paths. Children "as young as five years of age learn to gender stereotype occupations based on the gender of a television role model."⁴¹

The results of one particular study are especially informative. Researchers Rebecca Bigler *et al.* invented new, fictional occupations and presented various combinations of white and black persons in those occupations to children. Poorer African American children were less likely to aspire to jobs that had been depicted with white workers exclusively.⁴² Bigler *et al.* point out the potential for a vicious cycle:

³⁸ Non-whites in the Harry Potter novels are specifically identified by race, while whiteness is assumed for all others. Keith Woods, *Harry Potter And The Imbalance of Race*, POYNTERONLINE, July 15, 2005, at <http://www.poynter.org/column.asp?id=58&aid=85445> (visited Dec. 24, 2005).

³⁹ Elizabeth Grauerholz & Bernice A. Pescosolido, *Gender Representation in Children's Literature: 1900-1984*, 3 GENDER AND SOCIETY 113, 118 (Mar. 1989).

⁴⁰ Cf. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1549-53 (2005) (describing cognitive process of internalizing bias from violent crime news).

⁴¹ Mark Watson & Mary McMahon, *Children's career development: A research review from a learning perspective*, 67 J. VOCATIONAL BEHAV. 119, 124 (2005) (citing S.L. O'Bryant & C. R. Corder-Bolz, *The effects of television on children's stereotyping of women's work roles*, 12 J. VOCATIONAL BEHAV. 233 (1978)).

⁴² Rebecca S. Bigler *et al.*, *Race and the Workforce: Occupational Status, Aspirations, and Stereotyping Among African American Children*, 39 DEVELOPMENTAL PSYCH. 572,

“... African American children, especially those from disadvantaged backgrounds, may preferentially seek out low-status jobs in which minorities are well represented and thereby ensure that such jobs remain overpopulated by minorities, thus perpetuating the skewed models for new generations of poor African American children.”⁴³

The importance of televised role models is not lost, even on the National Aeronautics and Space Administration. It hired Nichelle Nichols, who had played Lieutenant Uhuru, to help recruit women and African-American astronauts.⁴⁴

Even limiting oneself to magazines written specifically for girls does not guarantee an empowering experience. Reviewing *Seventeen* magazine, sociologist Kelley Massoni observes that “men dominate its pages, as both subjects and job holders.”⁴⁵ This may not be surprising as such magazines are “the products of companies often owned and controlled by elite men.” As for work, Massoni concludes: “In the occupational world of *Seventeen*, Prince Charming still exists as the ultimate goal.”⁴⁶ *The implicit instruction in the pages of teen girl magazines: “Marry, Sue!”*

It is not only what is depicted that is important. It is also what is omitted. Magazines for teenage girls, according to Massoni, “overtly suggest, through content and pictures, how women should look, dress, and act; they more subtly suggest, *through exclusion of pictures and content*, what women should not do, be, or think.”⁴⁷

Whether because of media depictions or otherwise, even by the age of five, American children have internalized gender and racial stereotypes of occupations. In one study, five and six-year-olds were shown four films of less than two minutes each and questioned afterwards about what they had seen.⁴⁸ Each film presented two actors who portrayed doctors and

578 (2003). Interestingly, richer African American children were more likely to aspire to jobs that they saw performed solely by whites or by both whites and blacks than by blacks exclusively. *Id.*

⁴³ *Id.*

⁴⁴ http://en.wikipedia.org/wiki/Nichelle_Nichols (last visited Dec. 19, 2005).

⁴⁵ Kelley Massoni, *Modeling Work: Occupational Messages in Seventeen Magazine*, 18 GENDER & SOC’Y 47, 56-7(2004).

⁴⁶ *Id.* at 58.

⁴⁷ *Id.* at 49 (emphasis added). Indeed, even Mary Sue is influenced by this culture; Mary Sue is often conventionally beautiful and perfectly coiffured. The worlds we imagine are crucially influenced by the worlds we inhabit. Yet, there is a difference between the agency reflected in the Mary Sue and in those offered in teen magazines. Cf. Margaret Jane Radin & Madhavi Sunder, *Foreword: The Subject and Object of Commodification*, in *Rethinking Commodification* (Martha M. Ertman & Joan C. Williams eds. 2005).

⁴⁸ Glenn D. Cordua *et al.*, *Doctor or Nurse: Children's Perception of Sex Typed Occupations*, 50 CHILD DEVELOPMENT 590, 591 (June 1979).

nurses in various gender combinations. Of the films with a female doctor and a male nurse, 53% of the children stated that they had seen a movie about a male doctor and a female nurse. In contrast, 100% of the children correctly identified the actors' genders in the film with a male doctor and a female nurse.⁴⁹

The effects of media portrayals reach beyond children. One study asked college students to complete questionnaires about their racial and gender attitudes after they viewed stereotypic or non-stereotypic racial and gender portrayals in a newsletter. Those who first viewed stereotypical portrayals were more likely to offer policy judgments against blacks or women.⁵⁰

Minorities internalize the stories they read, see and hear everyday. One author concludes that "the exclusion of Blacks from television is destructive to Black children's self-concept because it minimizes the importance of their existence. The television roles in which Blacks are cast communicate to Black children the negative value society places on them."⁵¹ A U.S. Civil Rights Commission study found that minority stereotypes in the media reinforced the negative beliefs that minorities feel about themselves.⁵²

C. Self-Insertion as Self-Empowerment

Lieutenant Mary Sue and those Mary Sues that have followed in her wake appear against this backdrop. Yet, within fan subcultures, Mary Sues are typically derided because of their perfection. Indeed, websites offer tutorials to budding writers instructing them how to avoid the pitfall of writing a Mary Sue.⁵³ "Flaming" and negative reviews are deployed to

⁴⁹ *Id.*

⁵⁰ Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 AM. ACADEMY POLITICAL & SOCIAL SCIENCE ANNALS 165, 168-69 (Nov. 1998).

⁵¹ Amber McGovern, *Neutralizing Media Bias Through the FCC*, 12 DEPAUL-LCA J. ART & ENT. L. 217, 222-223 (2002) (citing Carolyn A. Stroman, *Television's Role in Socialization of African-American Children and Adolescents*, 60 J. NEGRO EDUC. 314, 315 (1991)).

⁵² Minn. Advisory Comm'n to the U.S. Comm'n on Civil Rights, *Stereotyping of Minorities by the News Media in Minnesota* 35 (1993). <http://www.usccr.gov/pubs/sac/mn1203/mn1203.pdf> (providing 2003 update to 1993 study); see also Camille O. Cosby, *Television's Imageable Influences: the Self-Perceptions of Young African-Americans* 25 (1994).

⁵³ See, e.g., TA Maxwell, *The Mary Sue Manual*, Nov. 6, 2003, at <http://www.fictionpress.com/read.php?storyid=1440163>; Flourish, *Mary Sueage (And How to Avoid It)* (undated), at <http://www.lumosdissendium.org/essays/ms.htm.l>; James Lyn, *Saving Mary Sue*, at http://www.reflectionseidge.com/archives/dec2004/sms_jl.html; Melyanna, *The Trouble with Mary*, TheForce.Net (July 1, 2002), at <http://fanfic.theforce.net/articles.asp?action=view&ID=33>; Merlin Missy, *The (Original)*

discipline fan fiction writers who stray from acceptable additions to the particular fictional universe.⁵⁴ Where texts have long been subject to socially authorized *readings*,⁵⁵ the fan fiction community—formed today principally through cyberspace—extends this discipline even to acceptable *reworkings* of the text.

We seek here to reclaim Mary Sue not only from the *official guardians* of the *official story*, but also from the *unofficial guardians* of the *unofficial story*. The fact that Mary Sues are marked by relentlessly superlative qualities becomes more understandable when viewed against a popular culture that marginalizes certain groups. Flattering self-insertion offers a partial antidote to a media that neglects or marginalizes certain groups. Victims of prejudice often internalize its claims; oppressive societies have often relied on this psychological trick to maintain hierarchies.⁵⁶ A process of consciousness-raising, self-empowerment requires that one recognize one's own potential, even if others do not. Denied the principal role in the official canon, Mary Sue is no passive peripheral character: "She *does*, not just simply *exists*. She slays, she runs a starship, she types, she wields a sword."⁵⁷ Mary Sues help the writer claim agency against a popular culture that often denies it.⁵⁸

Some commentators worry that the "Mary Sue often reinforces the impossible idea that women must strive for effortless perfection."⁵⁹ But would not the intrepid Captain Kirk or the invincible Superman suggest the same goal for men? Based on the social science literature canvassed above, we suggest instead that relentlessly positive portrayals of people who look like you are likely to lead (1) to people thinking that people who look like you are capable and desirable; and (2) to you believing in your own

Mary Sue Litmus Test (for Gargoyles fan fiction) (1997, modified 2005). For a remarkable electronically scored personality test variant, see *The Original Fiction Mary-Sue Litmus Test*, at <http://www.ponylandpress.com/ms-test.html>.

⁵⁴ Fiona Carruthers, *Fanfic is Good for Two Things - Greasing Engines and Killing Brain Cells*, 1 PARTICIP@TIONS (May 2004).

⁵⁵ Speaking of the disciplining of the consumption of texts, the French theorist Michel de Certeau's observes: "By its very nature open to plural reading, the text becomes a cultural weapon, a private hunting reserve, the pretext for a law that legitimizes as 'literal' the interpretation given by *socially* authorized professionals and intellectuals..." MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 171 (translated by Steven Rendall 1984) (emphasis in original).

⁵⁶ See FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963).

⁵⁷ <http://www.merrycoz.org/papers/MARYSUE.HTM> (last visited Dec. 18, 2005) (emphasis in original).

⁵⁸ See Chaney & Liebler, *supra* note 12, at 54 ("The desire to insert take-charge female characters especially makes sense considering that the source texts for so much fan fiction—from Lord of the Rings to HBO prison series Oz—feature male characters running the show.").

⁵⁹ *Id.* at 57.

capability and self-worth. Rewriting popular culture is a step towards breaking the cyclic reproduction of dominance.

Take three examples.

1. *Kirk/Spock*

Even though Star Trek envisioned a purportedly egalitarian future, the reality it posited was far from the ideal. Just as Paula Smith had introduced Lieutenant Mary Sue to make up for the absence of female leaders, early fan fiction writers often imagined same-sex romantic relationships among the ship's crew. Referenced often as "K/S" for "Kirk/Spock," such same-sex pairings in fan fiction came to be known as "slash."⁶⁰ Slash thus functions as a kind of Mary Sue, reflecting a desire to introduce homosexuality where it is omitted.

This is true even when the author is a heterosexual woman. Consider the following accounts of why women write male same-sex pairings:⁶¹

- Even for the female reader, there are reasons to identify with the hero, not the heroine, and to use the hero to "'feel' the adventure" with⁶²;
- Rewriting masculinity to place emotional responsibility on men⁶³;
- Male slash is erotic to the female writer⁶⁴; and
- It rearranges the expected sexuality.⁶⁵

The ripping, mixing, and slashing of traditional sexual roles allows the writers to reimagine their own place in the sexual order.⁶⁶

2. *The Adventures of Hermione Granger*

Some Harry Potter fan fiction gives center stage to Hermione Granger.⁶⁷ Given that Hermione already is depicted with extraordinary, positive characteristics, it may have seemed unnecessary to rewrite her

⁶⁰ Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, J. GENDER, RACE, & JUSTICE (forthcoming 2006) (arguing in favor of permitting slash fan fiction in order to allow recoding of texts).

⁶¹ Shoshanna Green *et al.*, *Normal Female Interest in Men Bonking in THEORIZING FANDOM*, *supra* note 15, at 9.

⁶² *Id.* at 16-7.

⁶³ *Id.* at 19-20.

⁶⁴ *Id.* at 30-4.

⁶⁵ *Id.* at 19-20.

⁶⁶ We do not mean to suggest an entirely sanguine view of slash or other fan fiction. For example, the typically male focus of slash leads to concerns for misogyny, as even women in the original story may be written out of the slash. *Id.* at 36.

⁶⁷ See, e.g., wolfgirlami, *The OFA Series: Book One: The Miraculous Miracle*, available at <http://www.fanfiction.net/s/2523593/1/> (imagining Hermione's home life, focusing on Hermione's relationships with her mother and baby sister).

story. But the stories offer two twists on the official tale. First, they make it *her* story, not someone else's story in which she plays a part. Second, the stories often find her a romantic partner, especially Ginny Weasley, Draco Malfoy, or Harry Potter. As one critic points out, the last pairing is especially satisfying for some: "As the Potter series' brilliant bookworm, Hermione is a role model for smart girls (and boys) who find themselves overshadowed by their flashier peers. There's a certain appeal to thinking that a young academic could couple with the hero of the wizarding world...."⁶⁸

3. *Harry Potter in Kolkata*

"Harry gets onto his Nimbus 2000 broom and zooms across to Calcutta at the invitation of young boy called Junto," reads the text of an Indian tale, *Harry Potter Kolkataye—Harry Potter in Kolkata*.⁶⁹ Written in Bengali, the book brings Harry Potter to Kolkata where he "meets famous fictional characters from Bengali literature."⁷⁰ Uttam Ghosh, the author, describes the story as a "poor man's Potter," costing just 30 rupees—less than one U.S. dollar. But does this poor man's Potter simply further insinuate a foreign character into the imagination of Bengali youth? To some extent, yes, but we must not overlook the power of global mass media, which makes Potter difficult to avoid even for the middle class Kolkata youth likely to buy the book.⁷¹ *Harry Potter in Kolkata* is yet another variant of the Mary Sue. It introduces a young Indian boy into the Harry Potter legend and also a new environment—Kolkata—rather than Harry's familiar England. By situating Harry in Kolkata, it makes it easier to imagine the local street corner as a place of magic.⁷²

⁶⁸ Neva Chonin, *If you're an obsessed Harry Potter fan, Voldemort isn't the problem. It's Hermione versus Ginny*, S.F. CHRON., Aug. 3, 2005.

⁶⁹ *Potter translations withdrawn*, May 1, 2003, at http://www.news24.com/News24/Entertainment/Abroad/0,,2-1225-1243_1354257,00.html (last visited Dec. 18, 2005). For a somewhat similar example, see Dissipate (two minor South Asian female characters from *Harry Potter* visit India), at <http://www.fictionalley.org/authors/pogrebin/dissipate01a.html>.

⁷⁰ Manjira Majumdar, *When Harry Met Kali*, OUTLOOK (India), July 7, 2003. The fictional characters include Professor Shanku, a protagonist in science fiction stories by Satyajit Ray. See "Professor Shanku," Wikipedia, at http://en.wikipedia.org/wiki/Professor_Shanku (last visited March 2, 2006). Potter also meets historical figures, such as Satyajit Ray's father. Priyanjali Mitra, *Bengali Babu*, INDIAN EXPRESS, April 20, 2003, at http://www.indianexpress.com/full_story.php?content_id=22323 (last visited March 2, 2006).

⁷¹ Chander, *Whose Republic?*, *supra* note 19.

⁷² Cf. Joyce S. Sih, *Just a Japanese Girl Prodigy* (Harry Potter meets a Japanese girl with magical powers of her own), at <http://pottersues.livejournal.com/277924.html>. The website which reposts this story ridicules Harry Potter Mary Sues.

II. SUING MARY

*P*otter in Kolkata was quickly pulled. Indian lawyers for Rowling and Warner Brothers issued a cease and desist letter to the Indian publisher of the “pirate” work, which quickly complied.⁷³ J. K. Rowling, however, has generally tolerated literally hundreds of thousands of other fan fiction stories (largely non-commercial and web- rather than print-based) based on her characters, including stories that focus on Hermione. The owners of the Star Trek franchise contemplated legal action against Star Trek slash, but demurred because of strategic considerations.

What are the respective legal rights of the owner of the official work and the author of the Mary Sue? We argue that both U.S. copyright and trademark law permit many Mary Sues that challenge the orthodox depictions in the original.

A. The Fair Mary

United States law permits the copyright owner to claim not only his or her own stories, but also the characters in those stories.⁷⁴ The author of a derivative work such as fan fiction cannot claim a copyright in that work. This places the fan fiction writer at the mercy of the copyright owner, unless the fan fiction constitutes fair use. Thus, a fan fiction writer can pen

⁷³ The letter asserted copyright, character merchandise, trademark, and fraud claims. Urmi A. Goswami, *Illegally cashing in on Harry Potter*, Apr. 3, 2003, available at <http://economictimes.indiatimes.com/cms.dll/html/uncomp/articleshow?msid=42205835> (last visited March 2, 2006). The book included stills from the film *Harry Potter and the Sorcerer's Stone*. See Mitra, *supra* note 70.

⁷⁴ See Judge Posner's list of cartoon characters in *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 25, 28 (2d Cir.1982) (Batman, though assumed rather than actually determined to be copyrightable); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 753- 55 (9th Cir.1978) (Mickey Mouse *et al.*); *Detective Comics v. Bruns Publications*, 111 F.2d 432, 433-34 (2d Cir.1940) (Superman); *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 278 (2d Cir.), cert. denied, 294 US 717 (1934) (Betty Boop). See also Judge Jon Newman's list of even earlier cases: *King Features Syndicate v. Fleischer*, 299 Fed. 533 (2d Cir. 1924) (Barney Google's horse, Spark Plug); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914) (Mutt and Jeff); *Empire City Amusement Co. v. Wilton*, 134 F. 132 (C.C.D. Mass. 1903) (Alphonse and Gaston). Cartoon characters seem to have received greater protections than literary characters. Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 451. Gregory S. Schienke, *The Spawn of Learned Hand--A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told?*, 9 MARQ. INTELL. PROP. L. REV. 63 (2005); Cathy J. Lalor, *Copyrightability of Cartoon Characters*, 35 IDEA 497 (1995). Even the setting—the world created by a writer devoid of its specific characters—will likely be subject to copyright. Pupiling Hogwarts with newly invented characters is not enough to escape Rowling's copyright claim.

stories employing such characters only if: (1) the copyright owner explicitly permits such fan fiction; (2) the copyright owner chooses not to pursue legal action against the fan fiction writer; or (3) the fan fiction constitutes fair use of the copyrighted work.

This third avenue allows fan fiction writers the freedom to create using existing creative worlds without needing the permission—either explicit or tacit—of the copyright owner. If a use is judged “fair,” then the copyright owner cannot bar it. Whether a use is fair depends on a number of factors, including the purpose of the work (including whether the use is commercial or not-for-profit) and whether the use injures the copyright owner’s market for his or her work. Whether a use is fair or not is left to the judgment of a court, interpreting a provision in the copyright statute, as well as a long case history.

The leading case defining the contours of fair use concerns a rap group’s reworking of an earlier song, “Oh, Pretty Woman.” In *Campbell v. Acuff-Rose Music, Inc.*, the owner of Roy Orbison’s song sued the rap group 2 Live Crew for copyright infringement for their song “Pretty Woman.”⁷⁵ The Supreme Court reversed the trial court’s grant of summary judgment in favor of the copyright owner, holding that 2 Live Crew’s parody of the original might constitute fair use. Justice Souter, writing for the Court, characterized 2 Live Crew’s version as a parody of the original:

“[W]e think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.”⁷⁶

The Court observed that parodies like 2 Live Crew’s “Pretty Woman” transform the original, providing “social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁷⁷ Even the commercial nature of 2 Live Crew’s work did not defeat the group’s claim to making a fair use, though the Court remanded the case for fact-finding as to whether the 2 Live Crew rap parody harmed the copyright owner’s market for a *non*-parodic rap version of the song.⁷⁸

⁷⁵ 510 U.S. 569 (1994).

⁷⁶ *Id.* at 583.

⁷⁷ *Id.* at 579.

⁷⁸ *Id.* at 593-94.

Similarly, many Mary Sues comment on or criticize the original, while at the same time creating something new. They highlight the absence in the original of society's marginal voices, the stereotyped actions or inactions of certain characters, and the orthodoxy of social relationships in the original. Lieutenant Mary Sue beamed on board, finally bringing a leading woman character to the bridge, repelling Captain Kirk's advances along the way.

Mary Sues help us rewrite not just the future, but also the past. For most of a century, the most popular account of life on a slave plantation has been Margaret Mitchell's literary classic *Gone With the Wind* ("GWTW"), a book second only to the Bible in worldwide sales.⁷⁹ That account presented an idyll disturbed only by the actions of the North:

In the world of GWTW, the white characters comprise a noble aristocracy whose idyllic existence is upset only by the intrusion of Yankee soldiers, and, eventually, by the liberation of the black slaves. ... Mitchell describes how both blacks and whites were purportedly better off in the days of slavery: "The more I see of emancipation the more criminal I think it is. It's just ruined the darkies," says Scarlett O'Hara.... Free blacks are described as "creatures of small intelligence . . . [l]ike monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild"⁸⁰

In *The Wind Done Gone* ("TWDG"), Alice Randall, an African-American novelist, retold the tale from the perspective of a slave, Cynara, on the O'Hara plantation. Mitchell's heirs sued for copyright infringement. At trial, Randall's lawyer asked the court, "Who controls how history is imagined?"⁸¹ Yet the trial court held that Randall had infringed Mitchell's work. On appeal, the Eleventh Circuit reversed, holding that TWDG likely constituted a parodic fair use.⁸² The two novels' depictions of race and sex relations could hardly be more different, as characterized by the Eleventh Circuit:

It is clear within the first fifty pages of Cynara's fictional

⁷⁹ SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001).

⁸⁰ SunTrust Bank, 268 F.3d at 1270.

⁸¹ Julie Hilden, "*Gone with the Wind* Versus *The Wind Done Gone*": Parody, Copyright, African-Americans, and the First Amendment, FINDLAW.COM, Apr. 30, 2001, at <http://writ.news.findlaw.com/hilden/20010430.html>.

⁸² Other recent cases (often tellingly involving the female nude) reaffirm that parody often constitutes fair use. See, e.g., Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003) (Pregerson, J.) (upholding photographs of nude Barbie in various sexualized positions as parodic fair use); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114-15 (2d Cir.1998) (Jon O. Newman, J.) (upholding photograph of "pregnant" nude actor Leslie Nielson as parodic fair use of photograph of pregnant nude Demi Moore).

diary that Randall's work flips GWTW's traditional race roles, portrays powerful whites as stupid or feckless, and generally sets out to demystify GWTW and strip the romanticism from Mitchell's specific account of this period of our history...

... In GWTW, Scarlett O'Hara often expresses disgust with and condescension towards blacks; in TWDG, Other, Scarlett's counterpart, is herself of mixed descent. In GWTW, Ashley Wilkes is the initial object of Scarlett's affection; in TWDG, he is homosexual....⁸³

The Sueification of the African Americans in the story is unmistakable. As the Eleventh Circuit noted, "In TWDG, nearly every black character is given some redeeming quality – whether depth, wit, cunning, beauty, strength, or courage – that their GWTW analogues lacked."⁸⁴ Recognizing the inequitable backdrop under which these characters are drawn, however, the redemption of the African Americans seems understandable and appropriate.

Whether Mitchell's heirs must tolerate *The Wind Done Gone* did not turn on whether either they or *even the public* liked the retelling. Courts have insisted that "public majority opinion" is irrelevant to the inquiry as to whether a work is a parody;⁸⁵ making the inquiry a question of law helps insulate uses disfavored by society. Of course, relying upon judges to make the parody determination inserts judges' own prejudices into the decision-making.⁸⁶ Courts have on occasion endorsed as fair use parodies they find personally objectionable.⁸⁷

While parodies often constitute fair use, satires often do not (though they may⁸⁸). Satires employ the original work "as a vehicle for commenting on some individual or institution and not on the work itself."⁸⁹ As the Supreme Court explained in the 2 Live Crew case: "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."⁹⁰ That decidedly does not mean that parodies cannot comment simultaneously

⁸³ SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

⁸⁴ *Id.* at 1271.

⁸⁵ *Mattel Inc.*, 353 F.3d at 801.

⁸⁶ Consider, for example, the appellate court opinion in *Campbell*. Yet, we rely in part on Ely's admittedly optimistic vision of judges as platonic guardians for the powerless in society. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁸⁷ For example, the Second Circuit upheld an actor's right to poke fun of the pregnant female body, even though it found the act "unchivalrous[.]" *Leibowitz*, 137 F.3d at 115.

⁸⁸ *Campbell*, 510 U.S. at 581 n.14.

⁸⁹ PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* §12.2.1(b) (3rd ed. 2005).

⁹⁰ *Campbell*, 510 U.S. at 580-81.

on the underlying work *and* on society at large. Indeed, this is the norm for parodies that courts have found fair. Justice Souter recognized that a particular work might exhibit both satire and parody: “[N]o workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its artifacts, or that a work may contain both parodic and nonparodic elements.”⁹¹

Uses do not have to be non-commercial to be fair.⁹² Indeed, the history of fair use is replete with commercial uses, including all of the cases cited above.⁹³ In *Campbell*, the Supreme Court declared “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁹⁴ While amateur fan fiction is typically authored without remuneration in mind, a noncommercial motive is not true of all Mary Sues. Randall, for example, found a commercial publisher for her story. The possibility of remuneration is important, spurring creation by allowing writers a livelihood in such work—and giving them perhaps the financial means to reach a larger audience. Alice Randall, for example, will have the right to challenge Mitchell’s film version with her own, should she be able to gather studio support.

The depiction of Lieutenant Mary Sue served to challenge the original in a uniquely powerful way. It demonstrated the glaring lacuna in the original, despite its pretensions of egalitarianism (exemplified in the first *Star Trek* movie’s risible use of “Mr.” to reference both male and female crew members). Such Mary Sues comment on the disappointments of the original, particularly its racial, gender, and sexual hierarchy.

We cannot offer a definitive conclusion that all Mary Sues that challenge stereotypes constitute fair use under existing law. Fair use is a contextualized, fact-specific determination, carefully considering the factors enumerated in the statute. In considering a claim for fair use, a court must “work its way through the relevant factors, and . . . judge[] case by case, in light of the ends of copyright law.”⁹⁵ A Mary Sue masquerading as the canon work would, for example, likely go too far.⁹⁶

Like any claim to use another’s original work, the author of a Mary Sue will face three fundamental objections:

(1) Why not write your own entirely original story?

⁹¹ *Campbell*, 510 U.S. at 581.

⁹² *See, e.g.*, *Leibowitz*, 137 F.3d at 110 (noting that commercial use weighed against holding of fair use, but did not prohibit such holding).

⁹³ GOLDSTEIN, *supra* note 89, at § 12.2.2, 12:38 (“by far the great bulk of decisions finding fair have involved commercial rather than noncommercial uses”).

⁹⁴ *Campbell*, at 579.

⁹⁵ *Campbell*, 510 U.S. at 581.

⁹⁶ Fan fiction authors have developed conventions to avoid such false advertising.

- (2) Why not license the original? and
- (3) Won't liberal recoding of icons destabilize culture?

These objections are raised with respect to a wide variety of fair use claims. We respond to all three critiques here.

B. Critique #1: Why Not Write Your Own Entirely Original Story?

Why not simply write your own story from whole cloth rather than borrow from a canon work? In *Campbell v. Acuff-Rose*, the Supreme Court indicated its distaste for someone who borrows someone else's copyrighted work merely "to avoid the drudgery in working up something fresh."⁹⁷ Indeed, as the skeptic might ask: Why not simply write your own world? In a letter to her fans, this is precisely the advice of the writer Anne Rice:

"I do not allow fan fiction. The characters are copyrighted.... I advise my readers to *write your own original stories* with your own characters."⁹⁸

Both the preference for parody over satire and the penchant for entirely original stories turn on the underlying notion of *substitutability*. The critical legal inquiry is: Is there a viable substitute for the copyrighted work? Can the later writer license a copyrighted work, employ a public domain work, or invent a wholly original work as an alternative vehicle for expressing his or her critique? Paul Goldstein expresses his confidence that, for satire at least, such alternatives will be readily available: "There will rarely be a shortage of works, including public domain works, that with some ingenuity can be made to serve as equally effective vehicles for the intended satire."⁹⁹

But there is only one Superman.¹⁰⁰ Parodic social commentary gathers its unique power *because* of its use of cultural icons. The abstract statement will not hold the same cultural currency as the one directed at, and employing, Superman. Thus, it is not the absence of creative genius on the part of the later author that requires the utilization of the earlier work. The canon work has unique cultural power. While the canon work's inventiveness or brilliance might have contributed to its current cultural status, it is the very popularity of the canon work that is the focus of the

⁹⁷ 510 U.S. at 580.

⁹⁸ http://www.annerice.com/fa_writing_archive.htm (emphasis added).

⁹⁹ GOLDSTEIN, *supra* note 89, at §12.2.1(b). Hughes' optimism that there are alternatives for the bulk of intellectual properties seems more far-reaching than Goldstein, who after all limits his claim to satire, as that term has come to be understood in law. Hughes, *supra* note 10, at 969-72.

¹⁰⁰ Of course, this is untrue—there are multiple *official* Supermans. See *infra* note 113 and accompanying text.

Mary Sue.¹⁰¹ Of course, by piggybacking on the canon work, the Mary Sue cannot guarantee itself a share in the original's popularity. Rather, for the author and a particular set of readers, the Mary Sue helps re-imagine the world by reworking the elements of popular culture. Borrowing from de Certeau, Henry Jenkins describes fan fiction as "textual poaching," in which fans "reconstruct meanings according to more immediate interests."¹⁰² Often it involves the recreation of social meanings about a particular community.¹⁰³ Keith Aoki describes the need to open up "more cultural space for 'talking back' at, or *through*, the pervasive and dense media languages which constitute much of our social environment."¹⁰⁴ Rosemary Coombe powerfully asks: "What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and connotations we cannot contest?"¹⁰⁵

There are, of course, brilliant, entirely original texts that reflect an egalitarian worldview. Yet, for whatever reason, few such texts have attained the popular cultural status of a small set of iconic works. Popularity might arise through a grassroots, word-of-mouth groundswell (this is increasingly possible because of the Internet), but it is more often carefully cultivated by media corporations. Such an effort requires a large capital investment, generally out of reach of many marginalized communities.¹⁰⁶

Even when popular alternatives emerge, they can often be co-opted by the dominant players simply through acquisition. Take the alternative teenage girl magazine *Sassy*, which was purchased by *Teen* magazine, "which first integrated it as a column and later phased it out completely."¹⁰⁷ *Teen* itself was later acquired and integrated into *Seventeen* magazine.¹⁰⁸

¹⁰¹ There are many Mary Sues of texts that are not broadly popular, but Mary Sues tend to focus on texts that are popular within certain subcultures at a minimum.

¹⁰² HENRY JENKINS, TEXTUAL POACHING 35 (1992).

¹⁰³ See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863-64 (1991) (defining recoding as "productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas").

¹⁰⁴ Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding Rights,"* 68 CHI-KENT L. REV. 805, 836 (1993) (emphasis added).

¹⁰⁵ Coombe, *supra* note 103, at 1879.

¹⁰⁶ Cf. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1351-52 (2004) (explaining why few developing country corporations have successfully commercialized traditional knowledge for a global consumer market).

¹⁰⁷ Massoni, *supra* note 45, at 50.

¹⁰⁸ *Id.* To take another well-known example, BET (Black Entertainment Television) emerged as a music television alternative to MTV and VH1, only to be bought by MTV's and VH1's owner, Viacom. Lynette Clemetson, *Chief of BET Plans to Broaden Programming Appeal*, N.Y. TIMES, Jan. 10, 2006, at E1.

Yet another obstacle to “wholly” invented alternatives is the possible use of intellectual property law by dominant players against newcomers. For example, Marvel and DC Comics both claim a joint trademark in “Super Heroes” for use in comic books. Faced with a threat of suit, the producers of the comic book “Super Hero Happy Hour” changed their comic’s name to “Hero Happy Hour.”¹⁰⁹ While there are reasons to doubt the validity of the “Super Heroes” mark (e.g., the term “super hero” is generic; the mark owners have failed to meet their obligation to police unauthorized uses of the mark¹¹⁰), Marvel and DC can employ their questionable trademark against parties without the resources to test their claims in court.

C. Critique #2: Why Not License the Original?

Why not require that the Mary Sue be licensed from the copyright owner?

For its part, copyright law assumes that copyright owners will be reluctant to license criticism of their work.¹¹¹ The Supreme Court so stated in *Campbell v. Acuff-Rose*: “Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”¹¹² The Court accordingly concluded that, if there is no derivative market for criticism, criticism of the original work cannot interfere with the potential market for the copyrighted work. This supports the conclusion that critique of the work itself will likely constitute fair use.

But some might argue that this is too pessimistic. If there’s a market for a work, then the copyright owner should seek to maximize his or her profit by exploiting it—even if it means tolerating criticism. (An alternative view is that rather than calling for fair use for criticism, any reluctance to license criticism should simply imply a compulsory license, requiring a royalty payment in lieu of a royalty-free use.) Bruce Keller and Rebecca

¹⁰⁹ USPTO registration #73222079 purports to give Marvel and DC exclusive rights to the name in the marketing of “publications, particularly comic books and magazines and stories in illustrated form.” Todd Verbeek, *Super-Heroes® a Trademark of DC and Marvel*, http://briefs.toddverbeek.com/archives/SuperHeroes_a_Trademark_of_DC_and_Marvel.html (Jan. 30, 2004); Editorial, *Set our Super Heroes (trademark symbol) free*, L. A. TIMES, Mar., 26 2006.

¹¹⁰ See 74 AM. JUR. 2D TRADEMARKS AND TRADENAMES § 31 (2005).

¹¹¹ See, e.g., Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 103-07 (1991) (arguing that copyright owners targeted by parodies are often unwilling to sell because of emotional reasons).

¹¹² 510 U.S. at 592. The Court bolstered the point with literary support: “‘People ask ... for criticism, but they only want praise.’ S. Maugham, *Of Human Bondage*....” *Id.*

Tushnet point out that DC Comics, the owner of Batman, Superman, and other popular characters, has authorized “Bizarro World” alternative universes, in which the heroes are villains, and the villains, heroes.¹¹³ Lucasfilms even provides a forum for fan fiction and fan art on its website.¹¹⁴

Two recent moves by corporate America suggest that “Official Mary Sues” are not entirely unlikely. Marvel Enterprises, Inc. licensed an Indian version of Spider-Man, with the superhero donning a traditional Indian loincloth and sparring with the Green Goblin recast as a rakshasa, a demon from Hindu cosmology (see figure 1).

Figure 1: Spider-Man India (by Jeevan J. Kang)



As the Indian publisher announces:

Spider-Man India interweaves the local customs, culture and mystery of modern India, with an eye to making Spider-Man’s mythology more relevant to this particular audience. Readers of this series will not see the familiar Peter Parker of Queens under the classic Spider-Man mask, but rather a new hero – a young, Indian boy named Pavitr Prabhakar. As Spider-Man, Pavitr leaps around rickshaws and scooters in Indian streets,

¹¹³ Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REPORTER 979, 996 (Sept.-Oct. 2004).

¹¹⁴ See TheForce.Net Fan Fiction, <http://www.theforce.net/fanfiction/>.

while swinging from monuments such as the Gateway of India and the Taj Mahal.¹¹⁵

Near the end of 2005, Disney announced that it would revise its most lucrative story, Winnie-the-Pooh, by replacing Christopher Robin with a “red-haired six-year-old tomboy” girl.¹¹⁶ The reaction to Disney’s announcement was mixed. Nicholas Tucker, author of *The Rough Guide to Children’s Books*, declared the new character “a huge error,” explaining that the original stories are “built around a boy who arrives and puts things right, like little boys do.”¹¹⁷ Yet another scholar of children’s literature doubts whether the absence of female characters in Winnie-the-Pooh has a deleterious effect: Kathleen Horning, who instructs children’s book librarians at the University of Wisconsin-Madison, reports that, “growing up, I had no problem relating to Christopher Robin. He almost had a non-specific gender.”¹¹⁸

Do these two events—involving what are likely to be the single most popular superhero in the world and the single-most popular children’s cartoon character—suggest that underground versions of popular culture are unnecessary?

The possibility of an official Mary Sue is inadequate for at least three reasons. First, Disney’s move comes after almost 80 years of the male-dominated Hundred Acre Wood; Spider-man’s new ethnicity comes after more than 40 years of a white-only superhero. It seems unreasonable to expect the world’s women and minorities to wait patiently for each such move. Second, the official Mary Sue may still leave much to be desired in the characterization of the newly represented group. Third, even where it expands the representation, it still leaves large omissions: we hazard to predict that the new tomboy girl replacing Christopher Robin will be white. Finally, the masters of popular characters are unlikely to license the most disfavored uses.¹¹⁹ For example, while DC Comics produced an alternative strip featuring an evil Batman, it issued a cease and desist letter to an artist

¹¹⁵ http://www.gothamcomics.com/spiderman_india/ (last visited January 11, 2006).

¹¹⁶ BBC News, *New-look Pooh “has girl friend,”* Dec. 9, 2005, at <http://news.bbc.co.uk/2/hi/entertainment/4512770.stm>.

¹¹⁷ Will Pavia, *My, Christopher Robin, you’ve changed*, THE TIMES (LONDON), December 9, 2005, at 5.

¹¹⁸ Marco R. della Cava, *Disney lets girl into Winnie’s world*, USA TODAY, Dec. 7, 2005, at 1D.

¹¹⁹ When the Mitchell estate sought out an author of a sequel to *Gone with the Wind*, it required a pledge that the author “will under no circumstances write anything about miscegenation or homosexuality.” *Suntrust Bank*, 268 F.3d at 1282 (Marcus, J., concurring).

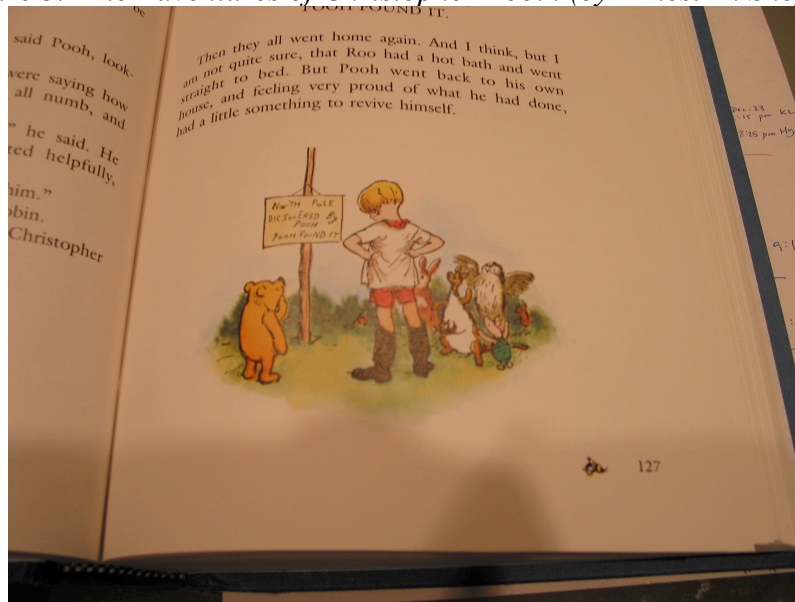
depicting Batman and Robin as lovers (sometimes explicitly) (see figure 2).¹²⁰ An evil Batman, it seems, is more palatable than a gay one.

Figure 2. Batman and Robin (by Mark Chamberlain)



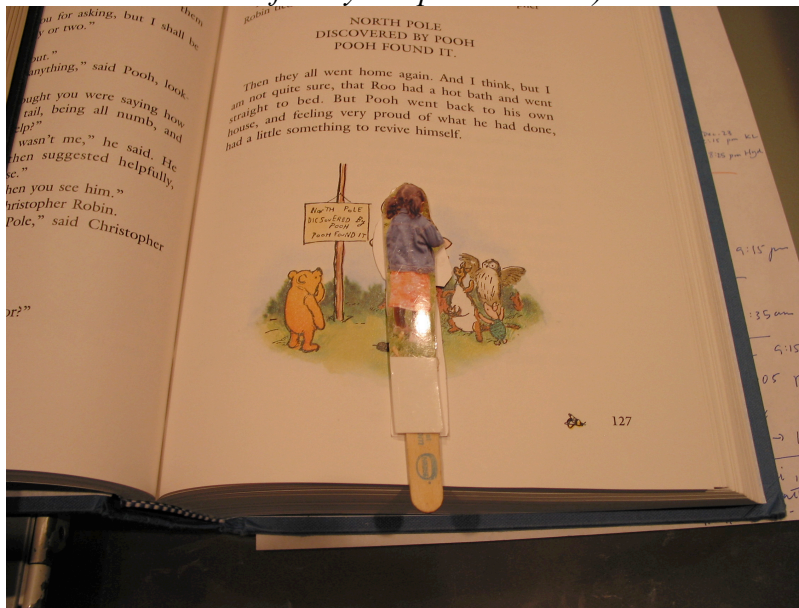
In our own household, we have been unwilling to wait. A popsicle stick and glue help us recreate the popular images with which our daughter grows up. Compare the following two figures.

Figure 3. The Adventures of Christopher Robin (by Ernest H. Shepard)



¹²⁰ "Gay Batman" Artist Gets "Cease & Desist," ARTNET.COM (Aug. 18, 2005), at <http://www.artnet.com/magazineus/news/artnetnews/artnetnews8-18-05.asp> (last visited January 11, 2006).

Figure 4. *The Adventures of Anoushka Chander* (by Ernest H. Shepard, as modified by Anupam Chander)



C. Critique #3: Won't "Recoding" Popular Icons Destabilize Culture?

Justin Hughes worries that a permissive attitude towards transforming social meanings will undermine cultural stability.¹²¹ Hughes worries that a generally passive audience will suffer as cultural minorities disturb their icons. We disagree for four reasons.¹²²

First, human beings have the capacity to hold multiple, even contradictory, meanings simultaneously. Despite the multiplicity of

¹²¹ Hughes, *supra* note 10; see also William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 486-88 (2003) (arguing that consumers desire uniformity in their cultural icons).

¹²² Compare Mark Lemley's critique of the stability argument:

First, this effect would seem to apply only to the subset of works that have become cultural icons around which people have expectations.... Second, there is substantial social value to allowing people to criticize and subvert cultural icons. At a minimum, that social value needs to be weighed against any demand-reducing effect. Third, the problem seems self-limiting. If customers want the original *Gone With the Wind*, not the rather more sordid story of Alice Randall, *The Wind Done Gone* (2001), there won't be a large market for the latter, and we shouldn't expect them to proliferate sufficiently to drive out demand for the former.... Fourth, the prospect of competition to produce sequels may actually spur creators to write their own sequels more quickly and make them better.... Even if these negative externalities were a significant concern, copyright owners can and occasionally do take steps to deal with them even without a right to control negative portrayals.

Lemley, *supra* note 11, at 1056 n. 103 (internal citations omitted).

meanings that any given word can hold, communication stumbles on. This may at times require disambiguation,¹²³ but that does not seem an unreasonable price for a richer discourse.

Second, the canonical text itself might have multiple interpretations, both official or unofficial. Literary criticism does not seek to uncover the one authentic meaning of a text, but rather understands that it can accommodate multiple interpretations. Homosexual readings of Batman have been offered since at least the 1950s, yet Batman's womanizing remains a popular motif.¹²⁴ Official owners have "forked" meanings themselves—consider Frank Miller's "grittier" Batman offered by DC Comics to revive the classic character.¹²⁵

Third, the meaning of a text evolves over time, and cannot be firmly fixed to some romantic original intention. This reflects the contemporary understanding of culture, rejecting the static, thing-like terms of early cultural anthropology.¹²⁶ Culture must be understood as "traveling," engaging in both internal and external dialogue along the way.¹²⁷

Fourth, demeaning representations in popular culture require contestation. A semiotic democracy in which the power of meaning-making has been democratized cannot declare certain icons sacred, even more so for icons that valorize only the already dominant segments of society.¹²⁸ While many in society may not wish to despoil their romance with Scarlett and Rhett Butler, the pair's position in the fiction as lords of a slave plantation cannot be whitewashed.

¹²³ We use this word in the sense employed by Wikipedia—as a process for resolving ambiguities arising from multiple meanings for a single word or phrase. <http://en.wikipedia.org/wiki/Disambiguation>.

¹²⁴ <http://en.wikipedia.org/wiki/Batman>.

¹²⁵ Wikipedia, *Batman*, at <http://en.wikipedia.org/wiki/Batman>; Wikipedia, *The Dark Knight Returns*, at http://en.wikipedia.org/wiki/The_Dark_Knight_Returns. See also *infra* note 115 and accompanying text (describing official Indian Spider-man).

¹²⁶ Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 509-516 (2001).

¹²⁷ JAMES CLIFFORD, ROUTES: TRAVEL AND TRANSLATION IN THE LATE TWENTIETH CENTURY 43 (1997); Sunder, *Cultural Dissent*, *supra* note 126, at 519.

¹²⁸ Wikipedia's entry on "semiotic democracy" goes so far as to cite Harry Potter slash as its exemplar. Wikipedia, *Semiotic Democracy*, http://en.wikipedia.org/wiki/Semiotic_democracy (last visited March 23, 2006).

CONCLUSION

“Everyone’s a superhero, everyone’s a Captain Kirk.”

- Nena, *99 Red Balloons*

“One does not love a place the less for having suffered in it...”

- JANE AUSTEN, *PERSUASION* (Vol. 2, Ch. 8, 1818).

Reworking the proprietary icons of our age offers one counter-economic strategy. Media stereotypes play an important role in educating us about the capacities of others. More sinister yet, they play an important role in educating us about our own capacities. Given a popular media that marginalizes various segments of society, the act of reworking popular stories to assert one’s own value is empowering. That act opens the path to new livelihoods and roles. Self-insertion changes popular meanings, laying the foundation for economic change.

The act of copying can be simultaneously homage and subversion.