

# ALL OF THIS HAS HAPPENED BEFORE AND ALL OF THIS WILL HAPPEN AGAIN<sup>1</sup>: INNOVATION IN COPYRIGHT LICENSING

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## I. INTRODUCTION: REBOOTING LICENSING?

Claims that copyright licensing can substitute for fair use are nothing new. Among other iterations, they've been made on behalf of the dream of a "celestial jukebox" that would charge audiences anew for each enjoyment of a copyrighted work<sup>2</sup> and on behalf of large publishers hoping to be paid for every photocopy of a journal or newspaper article.<sup>3</sup> This cycle of the debate, however, promises to offer a few tweaks, on which Article focuses. First, the new arrangements offered by large copyright owners often purport to allow (or is it tolerate?<sup>4</sup>) the large-scale creation of derivative works, rather than the mere reproduction that was the focus of earlier blanket licensing efforts. Second, the new licenses are often free, or even offer opportunities for licensees to profit. Rather than demanding royalties, copyright owners just want a piece of the action—along with the right to claim that unlicensed uses are infringing. In a world where licenses are so readily and cheaply available, the argument will go, it is unfair not to get one.<sup>5</sup>

These new attempts to expand licensing in ways that take into account the digital economy and the rise of "user-generated content" also face a fair use doctrine that is in some ways less favorable to copyright owners than it was several decades ago, when a few key decisions supported the rise of (allegedly) blanket reproduction licenses.<sup>6</sup> Even then it was plain that copyright owners' desire to license had the potential to make the "effect on the market" factor of fair use analysis weigh inevitably in favor of a plaintiff, who could always assert that it would have received a licensing fee had the defendant not made its unauthorized use. Courts responded by saying that the presence of a licensing scheme wasn't dispositive, even if they then ruled as if it was.<sup>7</sup>

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<sup>1</sup> See *Battlestar Galactica* (NBC Universal Television 2004–2007; Universal Media Studios 2007–2009).

† Thanks to Julie Cohen for helpful comments.

<sup>2</sup> See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (rev. ed. 2003).

<sup>3</sup> See *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

<sup>4</sup> See Tim Wu, *Tolerated Use* (Columbia Law Sch. Law & Econ. Working Paper Grp., Paper No. 333, 2008), available at <http://ssrn.com/abstract=1132247>.

<sup>5</sup> Other countries currently without fair use are facing the same questions. See AUSTRALIAN LAW REFORM COMM'N, *COPYRIGHT AND THE DIGITAL ECONOMY* (ALRC REPORT 122) 50 (2014) ("A key issue in this Inquiry is whether unremunerated use exceptions should apply 'if there is a licensing solution' applicable to the user. On one view, 'in principle, no exception should allow a use that a user can make under a licensing solution available to them'") (citing submission by Copyright Agency/Viscopy).

<sup>6</sup> See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

<sup>7</sup> See *Am. Geophysical Union*, 60 F.3d 913.

Subsequently, courts developed a few tools to limit the circularity of the licensing argument. Many cases say that a foregone license fee should only be considered in “traditional, reasonable, or likely to be developed” markets.<sup>8</sup> Another way of explaining the limit looks to the underlying justification for fair use, which is that some uses of copyrighted works shouldn’t be under the copyright owner’s control, because sometimes freedom serves copyright’s goals of encouraging creation and dissemination of expression better than centralized control. More recent decisions hold that, even if copyright owners would like to license “transformative” uses of their works that provide new meanings and messages, these uses aren’t within the scope of the right, and failure to receive a license fee for transformative uses therefore can’t be counted as a harm.<sup>9</sup>

While copyright owners have lost some significant cases in court, they are trying to change the facts on the ground to achieve many of the same benefits that they could get from a legally established right to license transformative uses.<sup>10</sup> Once again, copyright owners are claiming that licensing is always the answer, and that every use of an expressive work should involve a commercial transaction. For example, the musical work licensing organization Harry Fox claims that “licensing is just the first step in a process intended to result in accurate payment by users to songwriters and music publishers for *each and every use* of their songs.”<sup>11</sup> To these rights-owners, fair use is expropriation: “[L]egalizing the unauthorized use of preexisting material triggers a form of class warfare between appropriation artists and original artists. Instead, public policy should incentivize and promote collaboration between appropriation and original artists, including the voluntary licensing requirement that is at the core of the free marketplace collaborative relationship.”<sup>12</sup>

This Article describes three key examples of recent innovations in licensing-by-default, or something like licensing, in the noncommercial or formerly noncommercial spheres—Getty Images’

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<sup>8</sup> *E.g.*, *Kane v. Comedy Partners*, No. 00 Civ. 158(GBD), 2003 WL 22383387, at \*6–7 (S.D.N.Y. Oct. 16, 2003), *aff’d*, 98 F. App’x 73 (2d Cir. 2004).

<sup>9</sup> *See, e.g.*, *Authors Guild, Inc. v. HathiTrust*, --- F.3d ---, 2014 WL 2576342, at \*9–10 (2d Cir. June 10, 2014); *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); Nat’l Ctr. for Jewish Film v. Riverside Films LLC, No. 5:12-cv-00044-ODW(DTBx), 2012 WL 4052111 (C.D. Cal. Sept. 14, 2012); *Warren Pub. Co. v. Spurlock*, 645 F. Supp. 2d 402 (E.D. Pa. 2009).

<sup>10</sup> *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 899–903 (2007) (discussing effect of licensing on development of copyright law).

<sup>11</sup> NAT’L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01

POST-MEETING COMMENTS OF THE HARRY FOX AGENCY, INC. 4 (Jan. 23, 2014), [http://www.ntia.doc.gov/files/ntia/the\\_harry\\_fox\\_agency\\_inc\\_post-meeting\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/the_harry_fox_agency_inc_post-meeting_comments.pdf) (emphasis added); *see also* NAT’L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., WRITTEN COMMENTS OF COPYRIGHT CLEARANCE CENTER, INC. 7 (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/copyright\\_clearance\\_center\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/copyright_clearance_center_comments.pdf) (advocating for a pay-per-use system and arguing that “if you do get rights right, the market then changes,” meaning that licensing should take over).

<sup>12</sup> NAT’L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01, REPLY COMMENTS OF ASCAP ET AL. 3 (2013), [http://www.ntia.doc.gov/files/ntia/ascap\\_bmi\\_cmpa\\_nsai\\_nmpa\\_riaa\\_sesac\\_post-meeting\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/ascap_bmi_cmpa_nsai_nmpa_riaa_sesac_post-meeting_comments.pdf) (footnote omitted); *see also id.* at 3 (“As a practical matter, the digital licensing ecosystem in place today is much better than in the past and will only continue to improve going forward. The contractual deal points in digital sample licenses have become standardized and are relatively easy to negotiate.”) (footnote omitted).

new free embedding of millions of its photos, YouTube's Content ID, and Amazon's Kindle Worlds—and discusses how uses of works under these initiatives differ from their unlicensed alternatives in ways both subtle and profound. These differences, which change the nature of the communications and communities at issue, illustrate why licensing can never substitute for transformative fair use, even when licenses are routinely available.

Initiatives such as those I discuss here attempt to get internet users accustomed to copyright owner supervision—with a very light, rarely visible touch—of uses that are individually low-value but might produce some aggregate income, or at least some consumer behavior data that could itself be monetized. While there's room in the copyright ecosystem for these initiatives, it would be a grave mistake to conclude that the problem of licensing has finally been cracked and that fair use can now, at last, retreat to a vestigial doctrine. Ultimately, as courts have already recognized,<sup>13</sup> the mere desire of copyright owners to extract value from a market—especially when they desire to extract it from third parties instead of licensees—should not affect the scope of fair use. Because this principle is already present in copyright law, I hope its defense will be easier than fending off other expansive copyright claims has been.<sup>14</sup> But the argument will need to be made, because no matter what the law says, some copyright owners would like to replace fair use with a right to collect for every exposure to their works.

## II. THERE ARE MANY COPIES, AND THEY HAVE A PLAN: THREE EXPERIMENTS IN LICENSING OR NEAR-LICENSING

This Part offers a detailed look at the three examples of large-scale attempts to control and monetize previously unauthorized online uses, rather than simply attempting to suppress such uses. As I will argue, these initiatives are not replacements for fair use, because the project of monetization and control requires significant changes in practice. My examples work across different genres—photography for Getty Images; music and video for YouTube's Content ID; books and videogames for Amazon's Kindle Worlds. But they all have the same aspirations. The aim is not just to put the genie of frictionless copying back into the bottle, but also to make it start granting copyright owners' wishes. As a result, certain themes will recur in my discussion: the systems' abilities to suppress uses deemed unacceptable by copyright owners; their expansive and potentially invasive data collection; and their concentrating effect on markets for expressive works.

Each of these themes deserves careful consideration, especially when pervasive licensing is offered as a substitute for fair use. The themes are tightly linked: control via large-scale licensing invites the exercise of power to keep certain viewpoints and uses off-limits; it enables and generates returns from extensive data mining; and it assists with controlling market structures, not just individual works. Proponents of licensing describe it as a way to embrace online cultures while still making a profit, instead of making futile attempts to suppress all unauthorized uses. But as one

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<sup>13</sup> See *supra* note [] and accompanying text.

<sup>14</sup> See, e.g., *Eldred v. Ashcroft*, 537 US 186 (2003) (approving copyright term extension); *Golan v. Holder*, 132 S. Ct. 873 (2012) (approving copyright restoration of foreign works previously in the public domain).

commentator on Kindle Worlds noted, “[e]mbrace is always enclosure! The industry’s arms are made of fences!”<sup>15</sup> Once penned in, individual participants can be counted, marked, moved around, and cut out of the herd (to be shorn, or even to be slaughtered if they’re more trouble than they’re worth).

Only the first theme—suppressing unpopular uses—is routinely considered part of copyright policy. The fact that a copyright owner may try to prevent uses of which it disapproves on noneconomic grounds is generally considered an important reason to have fair use.<sup>16</sup> But while privacy and competition are not explicitly part of most copyright analysis,<sup>17</sup> I will suggest that they too help explain why pervasive licensing shouldn’t contract fair use, and why the presence of such licensing even increases the need for a broad fair use doctrine. Pervasive control and surveillance shape what people create and imagine themselves creating, and a dominant intermediary can harm individual creators. Thus, even someone only concerned with authors should consider privacy and competition relevant to copyright policy.

#### A. GETTY IMAGES: PICTURE PERFECT CONTROL

Getty Images is the youngest of the three regimes I will discuss, and its contours are thus less developed. However, its aspirations are as great—to control, monitor, and monetize ordinary online image uses. Getty recently made 35 million images available for automatic, payment-free use.<sup>18</sup> Uses must be “noncommercial,” which Getty defines to include standard reporting such as that found in the *New York Times*. Getty seems to mean something like “noncommercial according to the First Amendment,” which means that the uses must not propose a commercial transaction.<sup>19</sup> Users must embed the images using Getty’s proprietary code, which means that they are not actually copying the image—they are simply linking to an image hosted by Getty itself.

Indeed, to lump this initiative in with “licensing” is to give Getty much more than may first appear. In the United States, linking to an image hosted elsewhere does not constitute a direct

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<sup>15</sup> Mel Stanfill, *Kindle Worlds, Part 1: The Economic Raw Deal*, MELSTANFILL.COM (May 27, 2013, 12:00 PM), <http://www.melstanfill.com/kindle-worlds-part-1-the-economic-raw-deal/>.

<sup>16</sup> See 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).

<sup>17</sup> Software copyright cases do regularly consider competition issues, because software is so often functional, but otherwise the concept rarely arises. As for users’ privacy, it is more often a looming concern that can be teased out of results than an explicit consideration. See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2591 (2009) (explaining how fair use can support privacy).

<sup>18</sup> Olivier Laurent, *Getty Images Makes 35 Million Images Free in Fight Against Copyright Infringement*, BRIT. J. PHOTOGRAPHY., Mar. 5, 2014, available at <http://www.bjp-online.com/2014/03/getty-images-makes-35-million-images-free-in-fight-against-copyright-infringement/> [hereinafter *35 Million Images*].

<sup>19</sup> See *id.* (explaining that Getty considers ad-supported blogs and editorial websites, including the *New York Times* and Buzzfeed, to be noncommercial; a license is only required “if they used our imagery to promote a service, a product or their business”); cf. Olivier Laurent, *10 Facts You Need to Know About Getty Images’ Embed Feature*, BRIT. J. PHOTOGRAPHY., Mar. 6, 2014, available at <http://www.bjp-online.com/2014/03/10-facts-you-need-to-know-about-getty-images-embed-feature/> [hereinafter *10 Facts*] (“However . . . the image library doesn’t believe these news websites will want to feature an embed player with Getty Images’ branding in their design, especially since the player cannot be resized. Plus, later on, Getty Images will feature ads in its player, which would compete with news organisations’ own advertising models.”).

exercise of any exclusive right protected by copyright.<sup>20</sup> This remains true even if the hypertext markup language employed to embed the image makes the image appear to a user as if it was a seamless part of the linker's webpage.<sup>21</sup> Even in Europe, with its far more restrictive rules, unauthorized linking to an image lawfully present on a website doesn't infringe the copyright owner's rights.<sup>22</sup> If the image is itself infringing, there might be secondary liability under United States law for linking to it in certain circumstances; but if the image is hosted with the permission of the copyright owner, that liability too is impossible, since there's no primary infringement. As a result, what Getty is doing isn't "licensing" any copyright rights at all. Getty is using various technological measures to make it difficult to embed images *without* using Getty's proprietary code,<sup>23</sup> and so users are getting something out of the deal, but what they are getting is not a copyright license. However, Getty presents its move as a way of recognizing the inevitability of the circulation of images online while moving today's countless unauthorized, purportedly infringing speakers into the space of copyright licensing.<sup>24</sup>

### 1. *Technical Tethering*

Getty's control over embedded images is near total, limiting potential uses in many ways that fair use does not. While its consumer-facing website promises that "[o]ur new embed feature makes it easy, legal, and free for *anybody* to share our images on websites, blogs, and social media platforms,"<sup>25</sup> in fact, Getty reserves the right to demand that any particular use stop at any time. According to Getty's terms, Getty embeds may only be used in relation to "events that are newsworthy or of public interest," and they may not be used "in a defamatory, pornographic or otherwise unlawful manner," to be defined by Getty itself.<sup>26</sup>

This control is more than contractual—it is artistic. A Getty embedded image cannot be resized, edited, or cropped for editorial purposes;<sup>27</sup> it may be removed or changed at any time; and Getty

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<sup>20</sup> See, e.g., *Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146, 1160-61 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>21</sup> See *Perfect 10*, 653 F.3d at 1161.

<sup>22</sup> See Case C-466/12, *Nils Svensson v. Retriever Sverige*, (Feb. 13, 2014), available at <http://curia.europa.eu> (accessed by searching for C-466/12 in the Case number index).

<sup>23</sup> Circumventing those technological measures might implicate the quasi-copyright rights conferred by the Digital Millennium Copyright Act, 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2010); 28 U.S.C. § 4001 (2012).

<sup>24</sup> Joshua Brustein, *Since It Can't Sue Us All, Getty Images Embraces Embedded Photos*, BUSINESSWEEK (Mar. 6, 2014), <http://www.businessweek.com/articles/2014-03-06/since-it-cant-sue-us-all-getty-images-embraces-embedded-photos> ("Anyone can now visit [Getty's] website, grab some embed code, and display an image on blogs and social media pages without paying a licensing fee. . . . The problem of purloined images is too big to solve on a lawsuit-by-lawsuit basis. . . . People are inevitably going to display images publicly on blogs and social media feeds, so the only way to remain relevant is to provide them with a viable legal alternative.").

<sup>25</sup> *Embed Images*, GETTY IMAGES, <http://www.gettyimages.com/Creative/Frontdoor/embed> (last visited Mar. 7, 2014) (emphasis added).

<sup>26</sup> *Terms of Use*, GETTY IMAGES, <http://www.gettyimages.com/Corporate/Terms.aspx> (last updated Mar. 2014).

<sup>27</sup> Laurent, *10 Facts*, *supra* note 19 ("The embed player has a width of 594 pixels and a height of 465 pixels. It cannot be resized. It includes the image, without a watermark, with the name of the photographer and the collection, plus Getty

may run ads over it. All of these limits make a Getty embed a very different artifact, expressively speaking, from an image that is not tethered technologically. A Getty embed can't be Photoshopped; it can't be turned into a meme;<sup>28</sup> it can't, in other words, be put into circulation in terms of *meaning*. It can be seen, but not shared. It therefore lacks many of the distinctive features of digital remix culture. The multiple variations that evolve on sites like Tumblr and Know Your Meme depend on freedom to edit, crop, and alter. This flexibility is an underappreciated aspect of current infrastructure, but one that Getty embeds make more salient. Getty's control suppresses the mutability of images that is important to the creation and transmission of meaning online.<sup>29</sup>

## 2. *Effortless Data Gathering*

But one digital innovation is central to a Getty embed: pervasive automated monitoring. Consistent with the expansionist dreams of Big Data, Getty will collect information on how each image is used and who is using and viewing it, and intends "to utilise that data to the benefit of our business."<sup>30</sup> Although Getty hasn't figured out the advertising model yet, that just makes Getty more determined to make the program pay somehow, for example by using data to figure out which images Getty photographers should be creating in the future.<sup>31</sup> It's this very uncertainty about monetization that makes control of all the data seem so valuable. While the shift to centralization seems to require individuals to give up very little (only the screen real estate that allows Getty to run ads), this move towards tracking every interaction with an image fits well into what Julie Cohen calls the "surveillance-innovation complex"<sup>32</sup>: apparent crowd-friendliness in rhetoric conceals and

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Images' logo. This information cannot be removed."). As a result, a Getty embed does not show up as a thumbnail image in various contexts, such as when a post using a Getty embed is shared on Facebook.

<sup>28</sup> See generally LIMOR SHIFMAN, MEMES IN DIGITAL CULTURE (2013) (discussing memes as transmissible and, crucially, *reconfigurable* units of culture); Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235 (2013) (arguing that memes are fair use).

<sup>29</sup> See Patel, *supra* note 28, at 252:

[Image-based memes] advance culture. They are a system of explaining events by reducing them to a simple and well-known joke. Their fast dissemination, imitation, and mutation causes them to become cultural phenomena that are recognizable not because of the underlying works, but because of the meme itself. This is significant because, while a single meme in and of itself cannot cause cultural advancement, it is not the meme itself that is important, but the fact that memes provide more avenues of expression, thus increasing the chance that a message can be transmitted to someone in an effective way. In other words, when society and intellectual property laws allow memes to develop, the arsenal of means of expression to the average Internet originator—and to those referring to memes in regular conversation in order to elucidate their argument—expands.

<sup>30</sup> Laurent, *35 Million Images*, *supra* note 18 (quoting Craig Peters, senior vice president of business development, content and marketing at Getty Images).

<sup>31</sup> *Id.* ("The stock agency will also use the data it will draw from the player to perfect its collections. 'We'll be working with the creative and editorial teams at Getty Images to better understand how our imagery is being used and how they can better create imagery' [says a Getty representative]."). Getty's terms of service provide that it may share all the information it collects with third parties, without limitation. *Terms of Use*, *supra* note 26 ("Getty Images (or third parties acting on its behalf) may collect data related to use of the Embedded Viewer and embedded Getty Images Content . . .").

<sup>32</sup> Julie E. Cohen, *The Surveillance-Innovation Complex*, BALKINIZATION (Mar. 11, 2014, 11:03 PM), <http://balkin.blogspot.com/2014/03/the-surveillance-innovation-complex.html>.

legitimizes architectures of control, diminishing privacy in the name of technological innovation and easy (but not free) speech.

As Cohen presciently noted, tightening copyright controls of this sort presume, and require, the elimination of readers' and viewers' privacy.<sup>33</sup> Getty will be able to track not only the people choosing to use embeds in their blog posts, but also the readers of those blog posts, whose computers will be communicating directly with Getty's.

### 3. *Market Control*

In a final theme that will be echoed in the remaining examples, Getty would like to control the platform, with all that potentially lucrative data. It is interested in "shar[ing]" its embed feature with other content creators, presumably by licensing it to other image copyright owners for a cut of the proceeds.<sup>34</sup> Operating in a highly-fragmented market, such a licensing scheme will only benefit certain participants.<sup>35</sup> Moreover, and again presumably in the service of constructing the largest possible database, Getty photographers are not allowed to opt out of the program.<sup>36</sup> It may not be surprising, therefore, that various photography organizations reacted with some disquiet to the new program, seeing it as a measure that might benefit Getty, but would not put money in the pockets of individual photographers.<sup>37</sup>

## B. GOOGLE'S CONTENT ID: LICENSING THIRD PARTIES, NOT CREATORS

Google's Content ID for YouTube is a massive undertaking in which copyright owners register works of video and audio with YouTube, and Google scans uploaded video for video and audio matches. When a match (including a partial match, where only some of the upload contains video or audio in the Content ID database) is found, a copyright owner can choose to run ads on the uploaded video without the permission of the uploader.<sup>38</sup> Content ID participants, in fact, have

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<sup>33</sup> See, e.g., JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 155–86 (2012) (discussing the relationship between copyright enforcement and architectures of control and surveillance online); Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003).

<sup>34</sup> Laurent, *35 Million Images*, *supra* note 18.

<sup>35</sup> See NAT'L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEPT OF COM. GREEN PAPER, COPYRIGHT POLY, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01, DEVIANTART 28, (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/deviant\\_art\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/deviant_art_comments.pdf)

("There are very few licensing agents even for top line commercial artists such as professional photographers and graphic artist[s] working at the peak of their profession. The assumption that the work of these artists flows to corporate owners who can act as surrogates is false. Most works in the visual arts are not works made for hire. Licensing of these works remains non-uniform.") (footnotes omitted).

<sup>36</sup> Laurent, *35 Million Images*, *supra* note 18.

<sup>37</sup> Olivier Laurent, *Industry Concerned About Getty Images' Free-for-All Approach*, Brit. J. Photography, Mar. 7, 2014, available at <http://www.bjp-online.com/2014/03/industry-concerned-about-getty-images-free-for-all-approach/>.

<sup>38</sup> In Google's words:

Rightsholders deliver to YouTube reference files (these can be audio-only or video) of content they own, metadata describing that content, and policies describing what they want YouTube to do when it finds a match. Rightsholders can choose between three policies when an upload matches their content: 1) make money from them (for monetized videos the majority of the revenue goes to rightsholders); 2) leave them up and track viewing statistics; or 3) block them from YouTube

many choices. If they don't want to run ads, they can just block uploads that include content matches. Or they can block full uploads (e.g., a complete song) while monetizing or allowing shorter clips. Revenue splits are possible if the uploader is trying to monetize her stream, or the revenue may be demanded entirely by the copyright claimant. The Content ID claimant may also choose to block the video if the uploader is trying to monetize her own uploads, but not block the video and just run ads on it if she's not.

According to Google, as of 2014, more than five thousand entities use Content ID, including “major US network broadcasters, movie studios and record labels,” with more than twenty-five million reference files in Google's database.<sup>39</sup> More than 200 million videos have been claimed through Content ID,<sup>40</sup> leading to the allocation of hundreds of millions of dollars in ad revenue.<sup>41</sup> Indeed, Content ID claims make up one-third of monetized YouTube views.<sup>42</sup> According to the recording industry itself, it is “making more money from fan-made mashups, lip-syncs and tributes on YouTube than from official music videos.”<sup>43</sup>

What this means in terms of marketers' access to data on their audiences remains to be seen, or more likely unseen.<sup>44</sup> I won't have much to say in this section about data collection, but it underlies Google's increasingly successful monetization of YouTube. To the extent that centralized commercial “sharing” platforms replace other sources for video—including individual webpages and cloud storage services—privacy interests are also affected. Google aggregates video watching data, search data, email, and other information about users for its own commercial benefit, and YouTube is a vital part of that strategy, even if the revenues have to be shared with copyright owners.

As much as major copyright owners hate Google,<sup>45</sup> they are enthusiastic about pointing to Content ID as a technology that will obviate the need for fair use. In a Green Paper released in

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altogether. Content ID compares videos uploaded to the site against those reference files, automatically identifies the content, and applies the rightsholder's preferred policy.

NAT'L TELECOMM. & INFO. ADMIN, REQUEST FOR COMMENTS ON DEP'T OF COM. GREEN PAPER, COPYRIGHT POL'Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01, GOOGLE 3, (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/google\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/google_comments.pdf) [hereinafter Google NTIA Comments].

<sup>39</sup> *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited May 4, 2014).

<sup>40</sup> Google NTIA Comments, *supra* note 38, at 4.

<sup>41</sup> *Statistics*, *supra* note 39.

<sup>42</sup> Google NTIA Comments, *supra* note 38, at 4.

<sup>43</sup> Joel Eastwood, *Recording Industry Earns More from Fan Videos than from Official Music Videos*, THESTAR.COM (Mar. 18, 2014), [http://www.thestar.com/entertainment/music/2014/03/18/recording\\_industry\\_earns\\_more\\_from\\_fan\\_videos\\_than\\_from\\_official\\_music\\_videos.html](http://www.thestar.com/entertainment/music/2014/03/18/recording_industry_earns_more_from_fan_videos_than_from_official_music_videos.html).

<sup>44</sup> Google's deep pockets, which allowed it to create Content ID and to negotiate deals with major content owners, depend on integrating data across its platforms. YouTube is a piece of its data collection and an increasingly important one. The scanning, data analysis, and large scale of Content ID are a part of what makes privacy concerns so salient online.

<sup>45</sup> My editors wanted a footnote here. It is hard to fully document the visceral distaste for the search giant that I have seen expressed by representatives of major copyright owners, though reading through the Green Paper comments cited herein might give a bit of the flavor. They don't like that Google makes money from the existence of their content, one way or another, and they don't like that Google continues to index search results that allow users who are looking for unauthorized streams or downloads to find them, even though it also takes down millions of infringing results. Without



2013, the government suggested that Content ID could provide a model for “less risky” licensing alternatives to fair use.<sup>46</sup> But many copyright owners’ responses read “less risky” to mean “appropriate substitute for.”<sup>47</sup> Even the Association of American Publishers, which doesn’t represent copyright owners who own works Content ID can recognize, touted Content ID as evidence that there was no need for any legal solicitude for remix.<sup>48</sup> Google’s limited success in identifying songs and video is now being offered as evidence that automated procedures “generally” can identify copyrighted works of all kinds across the entire internet.<sup>49</sup> As with Getty Images, however, Content ID’s architectures of control serve particular private interests, not the copyright system as a whole. Content ID’s limitations are both practical and conceptual, and greater reliance on Content ID instead of fair use would only harm freedom of expression and increase Google’s market dominance, to the detriment of creativity.

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mentioning Google specifically, Jessica Litman has given a general description of the climate of distrust and anger that surrounds much copyright discourse (though she might well think I’m contributing to it). See Jessica Litman, *The Politics of Intellectual Property*, 27 *Cardozo Arts & Ent. L.J.* 313 (2009).

<sup>46</sup> *Copyright Policy, Creativity, and Innovation in the Digital Economy*, DEP’T OF COMMERCE INTERNET POLICY TASK FORCE 29 (July 2013), <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (identifying Content ID as “[p]articularly promising” because it enabled users to make remixes, not just copies).

<sup>47</sup> See, e.g., NAT’L TELECOMM. & INFO. ADMIN, REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01, COMMENTS OF MOTION PICTURE ASS’N OF AM. 5 (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/motion\\_picture\\_association\\_of\\_america\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/motion_picture_association_of_america_comments.pdf) [hereinafter MPAA Comments] (discussing both Content ID, labeled “Content Management System” by the MPAA, and Kindle Worlds as appropriate frameworks for licensing remixes); NAT’L TELECOMM. & INFO. ADMIN, REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., COMMENTS OF NAT’L MUSIC PUBLISHERS’ ASS’N 3–4 (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/national\\_music\\_publishers\\_association\\_et\\_al\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/national_music_publishers_association_et_al_comments.pdf) (“[T]he authors of all ‘derivative works’ – including mash-ups, remixes, and those works incorporating digital samples – must *always* license the pre-existing material (both sound recordings and underlying musical compositions) because there is a viable commercial marketplace in existence for the licensing of these works . . . .”) (emphasis added); NAT’L TELECOMM. & INFO. ADMIN, REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01, COMMENTS OF RECORDING INDUS. OF AM., INC. 6–7 (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/recording\\_industry\\_association\\_of\\_america\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/recording_industry_association_of_america_comments.pdf) (claiming that licensing through YouTube is a flexible response to new uses).

<sup>48</sup> NAT’L TELECOMM. & INFO. ADMIN, REQUEST FOR COMMENTS ON DEP’T OF COM. GREEN PAPER, COPYRIGHT POL’Y, CREATIVITY, & INNOVATION IN DIGITAL ECON., NO. 130927852-3852-01, ASS’N OF AM. PUBLISHERS 2 (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/association\\_of\\_american\\_publishers\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/association_of_american_publishers_comments.pdf) (arguing that remix culture doesn’t need specific legal protection because “there is clear evidence that content and technology companies are working together on this issue to create market solutions, such as YouTube’s Content ID system”).

<sup>49</sup> *Notice and Takedown Provisions under the DMCA § 512: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6–7 (2014) (testimony of Sean M. O’Connor, Professor of Law and Founding Director, Entrepreneurial Law Clinic, University of Washington (Seattle)), available at [http://www.judiciary.house.gov/?a=Files.Serve&File\\_id=F87934CD-04E2-4A6F-84DF-01CB91919B63](http://www.judiciary.house.gov/?a=Files.Serve&File_id=F87934CD-04E2-4A6F-84DF-01CB91919B63) (“We know that Content ID and other systems are reasonably effective at identifying copyright works generally.”).

### 1. *The Heavy Hand of Automatic Control: No Filters for Fairness*

Like Getty Images, Content ID doesn't involve a typical copyright license. Content ID is an arrangement with Google, not with individual uploaders, who don't receive any rights.<sup>50</sup> Even if Content ID is a license, it is not a blanket license. Content ID participants retain the right, and often exercise the power, to suppress uses that they don't like—precisely the uses that are most likely to be critical, uncomfortable, or otherwise transformative.<sup>51</sup>

Because Content ID does not require claimants to disclose their rules for what content will be blocked and what monetized, it's hard to identify traditional attempts to suppress disfavored viewpoints. The censor's hand, however, operates even when it operates lightly. Content ID always allows the claimant to choose its preferred treatment of an identified work. And this explicit control is joined by the more subtle shaping of culture that occurs when remix artists internalize the limits imposed by copyright owners and avoid certain music or other content that is always blocked on YouTube, sacrificing better artistic results in order to keep their work available on a broader platform.

Unsurprisingly, one result of Content ID's affordances is that copyright owners suppress messages that aren't acceptable to them. Jonathan McIntosh created a remix that criticized the *Twilight* series for its regressive gender stereotypes, and found his work blocked because he refused, on moral grounds, to allow the copyright owner of *Twilight* to profit from his work. In other words, the owner was using Content ID to prevent criticism. McIntosh's work was ultimately restored, but his case was unusual because he managed to get publicity and legal representation to establish that he was protected by fair use.<sup>52</sup> In another reported case, a noncommercial video analyzing remix culture and copyright law, which used clips from a viral remix video that itself combined a song with video clips from John Hughes films, was taken down as a result of a claim. The creator's appeal was "rejected," despite Google's promise that an appeal of a Content ID determination would require the claimant to turn to the DMCA process.<sup>53</sup>

Content ID can even directly conflict with copyright's incentive system. To the extent that a video has copyrightable elements that aren't owned by the claimant, the claimant has no legal right to exploit those elements. Although it might have the right to remove the video, that is different from having the right to monetize it; Content ID allows the latter as the price of not removing the

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<sup>50</sup> See DeviantART, *supra* note 35, at 29 n.72 ("The greatest drawback of the YouTube process is that copyright owners license YouTube only. The license does not 'pass through' to the user who generated the work and who may have created a derivative work. The user remains an infringer while the redistribution becomes licensed.")

<sup>51</sup> See, e.g., Katie Allen, *Google Seeks to Turn a Profit from YouTube Copyright Clashes*, THE GUARDIAN (Nov. 1, 2009), <http://www.guardian.co.uk/technology/2009/nov/01/google-youtube-monetise-content> (reporting that video content owners block about 20% of detected uses "for reasons such as a user piggybacking on footage to push their own website or because the use does not fit the original's values," for example when the original is "a family brand" and the use isn't family-friendly).

<sup>52</sup> COMMENTS OF OTW, *supra* note [], at 72–73.

<sup>53</sup> Mike Masnick, *Video About Fair Use, Remix & Culture Taken Down Over Copyright Claim (Of Course)*, TECHDIRT.COM (Nov. 8, 2012, 7:27 AM), <http://www.techdirt.com/articles/20121107/18062520968/video-about-fair-use-remix-culture-taken-down-over-copyright-claim-course.shtml>.

work, even if the video isn't an infringing derivative work but is instead a fair use. In such cases, the claimant is simply appropriating a noninfringing copyrighted work for its own benefit<sup>54</sup>—something that in other contexts the same claimants are very happy to call “piracy.” Copyright owners have used Content ID to control revenues from standard reviews and reporting—classic fair uses even when done for profit—taking money from the creators of those reviews.<sup>55</sup> As one reviewer points out, he's now forced to choose between the quality of his review, which often depends on illustrating a point with evidence, and his ability to earn a living.<sup>56</sup>

Separately, there are numerous reports of misidentification and abuse of Content ID by claimants who don't even have legitimate claims to components of user-uploaded videos.<sup>57</sup> Major rightsholders, such as the Harry Fox Agency (which licenses musical works), assert rights over works that are plainly in the public domain.<sup>58</sup> In order to dispute such invalid claims, individual users have to know enough law to be willing to face down a large entity. Abusive claimants may well simply reinstate a claim after a challenge, as Harry Fox did with the 164-year-old Radetzky March by Johann

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<sup>54</sup> See Mona Ibrahim, *Deconstructing Let's Play, Copyright, and the YouTube Content ID Claim System: A Legal Perspective*, GAMASUTRA.COM (Dec. 12, 2013, 1:16 PM), [http://www.gamasutra.com/blogs/MonaIbrahim/20131212/206912/Deconstructing\\_Lets\\_Play\\_Copyright\\_and\\_the\\_YouTube\\_Content\\_ID\\_Claim\\_System\\_A\\_Legal\\_Perspective.php](http://www.gamasutra.com/blogs/MonaIbrahim/20131212/206912/Deconstructing_Lets_Play_Copyright_and_the_YouTube_Content_ID_Claim_System_A_Legal_Perspective.php).

<sup>55</sup> Owen Good, *Game Critic Says YouTube Copyright Policy Threatens His Livelihood [Update]*, KOTAKU.COM (Dec. 12, 2013), <http://kotaku.com/game-critic-says-youtube-copyright-policy-threatens-his-1482117783> (reporting that Content ID has deprived a videogame critic of the ability to earn ad revenue from his videogame reviews and interviews, thus threatening his livelihood).

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., Tim Cushing, *Copyright Killbots Strike Again: Official DNC Livestream Taken Down By Just About Every Copyright Holder*, TECHDIRT.COM (Sept. 5, 2012, 1:32 AM), <http://www.techdirt.com/articles/20120904/22172920275/copyright-killbots-strike-again-official-dnc-livestream-taken-down-just-about-every-copyright-holder.shtml> (reporting that automated content protection measures suppressed a stream of an awards show because officially licensed clips from Dr. Who were present, but the automated system couldn't detect the licensing; the same thing happened to the Democratic National Convention's official channel, on behalf of multiple copyright claimants); Owen Good, *The Most Ridiculous Victim of YouTube's Crackdown is a BASIC Game*, KOTAKU.COM (Dec. 17, 2013), <http://kotaku.com/the-most-ridiculous-victim-of-youtubes-crackdown-is-a-1484998183> (“This guy just got flagged for a playthrough video of a game. A game he programmed.”); Ben Jones, *Why YouTube's Automated Copyright Takedown System Hurts Artists*, TORRENTFREAK.COM, February 23, 2014, <http://torrentfreak.com/why-youtubes-automated-copyright-takedown-system-hurts-artists-140223/> (arguing that Content ID ignores fair use and allows multiple claims; one artist explains: “It is up to me to prove myself innocent by asking eighteen different publishing companies through an automated system to revoke the automated claims. Each publisher has a month to reply, with no obligation to even do so. If even one of the eighteen publishers says ‘nope’ then it's back to square one . . . . Any financial loss or restrictions on my channel are entirely on me, and will not be compensated for once the claim is lifted.”).

<sup>58</sup> See Mike Masnick, *Harry Fox Agency Claims Copyright Over Public Domain Work By Johann Strauss*, TECHDIRT.COM (Nov. 6, 2012, 10:02 AM), <https://www.techdirt.com/articles/20121102/13164120919/harry-fox-agency-claims-copyright-over-public-domain-work-johann-strauss.shtml>; Chris Morran, *YouTube's Content ID System Will Take Away Your Money If You Dare Sing “Silent Night,”* CONSUMERIST.COM (Dec. 26, 2013), <http://consumerist.com/2013/12/26/youtubes-content-id-system-will-take-away-your-money-if-you-dare-sing-silent-night/> (“YouTuber Adam ‘The Alien’ Manley ran up against the idiocy of Content ID twice in the last week, with multiple music publishers claiming that his recent rendition of ‘Silent Night’ violated their copyright, in spite of the fact that the song, an English version of a nearly 200-year-old German Christmas carol . . . has been in the public domain for more than a few years.”).

Strauss. Even an invalid claim can prevent a legitimate uploader from monetizing a work for thirty days.<sup>59</sup>

Though Google has made efforts to improve the transparency of the claiming process, there are still frequent reports of problems, and, unlike a fair use assertion that can ultimately be litigated, a Content ID rejection is unreviewable. The automated nature of Content ID can lead to extreme frustration, since creators may be unable to reach a human with responsibility for a decision.<sup>60</sup> It is likely that the percentage of troublesome Content ID determinations is quite low. But because the amount of video on YouTube is so large, even a small percentage of problematic “matches” can translate into large absolute numbers, and fair uses are disproportionately likely to be found in that population, since fair uses that involve quoting audio or video will produce matches.

Commendably, Google agrees that Content ID is not a substitute for fair use. Google notes that even an endeavor with the scale of Content ID simply can’t keep up with the massive volume of copyrighted content online.<sup>61</sup> Further, even if an automated system could identify every copyrighted work, it couldn’t identify which were fair uses. Content ID doesn’t analyze transformativeness, the amount of the work taken, or other fair use factors. Google recognizes that a copyright owner who hasn’t chosen to use Content ID to monetize uploads could simply block a fair use, or monetize it despite having no right to do so.<sup>62</sup> As Google notes, “The second case can be particularly galling to a remix creator whose fair use video is intended as a criticism or parody of the rightsholder or work in question.”<sup>63</sup> Google contends that it offers procedures to ameliorate these problems,<sup>64</sup> but they still rely on users understanding and exercising their fair use rights in the face of a complex and often-changing process that doesn’t seem to work as well in practice as Google claims it does—and they still operate only within the Google ecosystem rather than as part of copyright law.<sup>65</sup>

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<sup>59</sup> See Morran, *supra* note 58 (“When a monetized video is flagged, YouTube takes away the ads and therefore any money that clip would be earning, which would be fine if Content ID weren’t such a tin-eared agent bent in favor of the recording industry.”).

<sup>60</sup> Owen Good, *YouTube’s Copyright Crackdown: Everything You Need To Know*, KOTAKU.COM (Dec. 18, 2013), <http://kotaku.com/youtubes-copyright-crackdown-simple-answers-to-compli-148599937/> (“When people are told they are violating a law or a rule, they expect to be able to confront or reason with the enforcer of that rule or the person they’ve wronged, however unwittingly. With a YouTube scanning program making these calls on behalf of others, who sometimes aren’t aware of the claims made in their name, it can be very hard to get someone on the line to hash things out.”).

<sup>61</sup> Google NTIA Comments, *supra* note 38, at 4 (“As an initial matter, Content ID will never include reference files for every copyrighted work that might be included in every remix uploaded to the site. While Content ID currently has over 15 million reference files in its database, that represents a tiny fraction of all the audio, video, and imagery that falls within the scope of copyright. In other words, no matter how comprehensive Content ID’s database of reference files may one day become, there will always be an important role for fair use when it comes to remixes on YouTube.”).

<sup>62</sup> *Id.* at 5.

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

<sup>64</sup> *Id.* & n.10 (explaining the dispute and appeal process).

<sup>65</sup> Google also suggests that rightsholders should adopt best practices to prevent overclaiming; it does not contend that rightsholders routinely follow this advice. *Id.* at 5-6. Still, Google’s modest conclusion is that “intermediary licensing can be a pragmatic, efficient, scalable solution to *some* of the legal uncertainties facing *some* remix creators with respect to *some* copyrighted works. These kinds of content identification and licensing systems should be viewed as a supplement to

## 2. *Competition: Crowding Out Smaller Creators and Newer Intermediaries*

Content ID's reliance on a private company's technology and self-interest, instead of on copyright law, creates other systemic issues. Content ID, like Getty Images, has anti-competitive elements, both in terms of creators and in terms of intermediaries. On the creator side, only large aggregators who own rights to popular content are entitled to use Content ID: "To be approved, [copyright owners] must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community."<sup>66</sup> To those who have, more is given.<sup>67</sup> Smaller entities can send DMCA takedowns, but they can't monetize or otherwise take advantage of the virality of their works on YouTube. Moreover, Google has recently announced that it will block videos from musicians who refuse to sign up with its new subscription streaming media service and who want to continue to rely on advertising instead, meaning that popular "indie" artists such as Adele could be excluded.<sup>68</sup> (Google seems to hope that Chris Anderson was right when he argued that free content could be used as a gateway drug: "People will pay if you make them (once they're hooked)."<sup>69</sup>) Though such musicians could still send DMCA notices, they might not be able to use Content ID without signing a broader deal with Google.<sup>70</sup> Although it's not clear how this

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other mechanisms, such as fair use and 'best practices' efforts ... [to] facilitate noninfringing forms of remix creativity." *Id.* at 6 (footnote omitted).

<sup>66</sup> *How Content ID Works*, GOOGLE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited May 4, 2014). In addition, for understandable reasons, Google requires Content ID participants to have exclusive rights to their works—people who make remixes or derivative works that could otherwise be commercialized still can't use Content ID, nor can people who use Creative Commons noncommercial licenses. *Qualifying for Content ID*, GOOGLE, <https://support.google.com/youtube/answer/1311402> (last visited May 4, 2014).

<sup>67</sup> Individual artists may occasionally qualify for Content ID, but they don't make much money from it. Independent musician Zoe Keating explained: "I had about 2 million views in 2013 but nearly all of them are 3rd party videos. If I choose to monetize them I get, I think, 35% of the revenue share (the total revenue share being 55% to the copyright holders and 45% to Google). Given that, 3rd party videos will never amount to much. In my case I think of the 6,565 videos Youtube CMS has found so far, 90% of them are smalltime dance performances, rehearsals, films, art projects etc." *Zoë Keating Puts Her Revenue Figures Into Perspective*, HYPEBOT.COM (Mar. 3, 2014), <http://www.hypebot.com/hypebot/2014/03/zo%C3%AB-keating-puts-her-revenue-figures-into-perspective.html>. Keating also objects to the fact that she can't control the ads that will run when she opts to monetize using Content ID; they include ads for products she doesn't support. *Id.* Because the backlash from fans when their videos are claimed isn't worth the small amount of money she receives, Keating has decided to end monetization of her works and instead target only commercial film, TV, and advertising uses. *Id.*

<sup>68</sup> See Ben Popper, *Youtube Will Block Videos from Artists Who Don't Sign Up for Its Paid Streaming Service*, THE VERGE, June 17, 2014, <http://www.theverge.com/2014/6/17/5817408/youtube-reportedly-block-videos-indie-artists>.

<sup>69</sup> Anderson, *supra* note [], at 242.

<sup>70</sup> See Sandra Aistars, *Why Are Artists Disappearing from the Internet?*, THE HILL, June 24, 2014, <http://thehill.com/blogs/congress-blog/technology/210113-why-are-artists-disappearing-from-the-internet> (reporting that "[r]umors are that those who don't accept YouTube's take-it-or-leave-it licensing deal for its new streaming service will be barred from offering their own channels on YouTube and prevented from using tools like Content ID to identify their music when it is posted by others without authorization," though ignoring the DMCA when claiming that this scheme means that unauthorized, infringing versions will stay up so that Google alone can profit).

subscription service will affect remix videos posted by third parties,<sup>71</sup> what is clear is that Google is already using its growing power to shape the music video market.

On the intermediary side, licensing schemes presuppose that some larger entity will negotiate with rightsholders, given that individual users have neither the knowledge nor the ability to negotiate licenses. Yet most sites can't afford the investment required to create a Content ID system. As the visual art site DeviantART explained:

YouTube's content identification system ... is very complex and very expensive. It requires registration of works, digital fingerprinting and a constant review and frequent interdiction of incoming user generated content. ... It hopefully goes without saying that very few enterprises can afford this approach. The technology required to (i) store metadata, (ii) identify works at nanosecond speeds, (iii) seamlessly execute on permission sets after identification, (iv) place advertising inventory in front of the work and finally (v) generate a revenue share payment to the copyright owners reflects a level of engineering excellence also beyond the reach of most enterprises.<sup>72</sup>

Google itself has argued that its system is not an appropriate model for the internet in general, pointing out that Content ID's development was incredibly expensive (it has given both thirty million and sixty million dollars as estimates)<sup>73</sup> and resource-intensive, requiring more than 50,000 engineering hours.<sup>74</sup> Startup competitors couldn't replicate it.<sup>75</sup>

Moreover, 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. YouTube hasn't yet been around for a decade. To conclude that current intermediaries have solved the problem of licensing poses significant risks on both sides. On the one hand, the licensing model risks entrenching YouTube's near-monopoly on the market because other competitors don't have access to the same licensed content.<sup>76</sup> On the other hand, if the market changes and YouTube goes the way of AOL's walled garden, Blackberry, MySpace, Alta Vista, and many other formerly dominant digital entities, its licensing "solutions" will decline and fall with it. As we've seen with the nightmare that is digital

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<sup>71</sup> A leaked version of the contract appears to include "User Video with Provider Sound Recording" in the list of content to which Google will have the ability to apply its new subscription rules, which would cover many common forms of remix, but how this would work in practice is not yet public. See Paul Resnikoff, F\*&K It: Here's the Entire YouTube Contract for Indies..., *Digital Music News*, June 23, 2014, <http://www.digitalmusicnews.com/permalink/2014/06/23/fk-heres-entire-youtube-contract-indies>.

<sup>72</sup> DeviantART, *supra* note 35, at 28-29 (footnote omitted).

<sup>73</sup> Google NTIA Comments, *supra* note 35, at 4 ("more than \$30 million"); *Hearing on S. 512 of Title 17 Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2014) (testimony of Katherine Oyama, Sr. Copyright Policy Counsel, Google Inc.), available at [http://judiciary.house.gov/\\_cache/files/be93d452-945a-4fff-83ec-b3f51de782b3/031314-testimony---oyama.pdf](http://judiciary.house.gov/_cache/files/be93d452-945a-4fff-83ec-b3f51de782b3/031314-testimony---oyama.pdf) ("more than \$60 million").

<sup>74</sup> Google NTIA Comments, *supra* note 38, at 4.

<sup>75</sup> See Testimony of Katherine Oyama, Sr., *supra* note 73 ("YouTube could never have launched as a small start-up in 2005 if it had been required by law to first build a system like Content ID.").

<sup>76</sup> Cf. Jeff Macke, *E-Book Ruling Cements Amazon's Virtual Monopoly*, YAHOO FINANCE – BREAKOUT (Jul. 11, 2013), <http://finance.yahoo.com/blogs/breakout/e-book-ruling-cements-amazon-virtual-monopoly-150844210.html> (noting Amazon's increasing monopoly over e-book content).



radio licensing, new entrants can rarely cut the same deals as earlier ones.<sup>77</sup> Whether or not Google is too big to fail, its present existence shouldn't be used to delegitimize fair use.

Content ID is a successful monetization model for large copyright owners in online video. What it is not, despite those copyright owners' claims, is a good replacement for fair use generally. It gives some copyright owners too much control to suppress unfavorable uses, leaves others out in the cold, and hands Google too much power to structure creative markets.

C. KINDLE WORLDS: PAID TO PLAY?

Recently, Amazon's Kindle Worlds has been added to Content ID as major copyright owners' proof of concept that licensing is always available, and that all creativity should be monetized.<sup>78</sup>

<sup>77</sup> See, e.g., Rick Marshall, *The Quest for "Parity": An Examination of the Internet Radio Fairness Act*, 60 J. COPYRIGHT SOC'Y U.S.A. 445 (2013) (examining some of the multiple different licensing regimes applicable to entities based on their size, technologies, and whether they existed in 1998).

<sup>78</sup> See Copyright Alliance, *re: Department of Commerce Green Paper "Copyright Policy, Creativity, and Innovation in the Digital Economy"*, COPYRIGHT ALLIANCE 5 (Jan. 17, 2014), available at [https://copyrightalliance.org/sites/default/files/final\\_copyright\\_alliance\\_iprf\\_reply\\_comment.pdf](https://copyrightalliance.org/sites/default/files/final_copyright_alliance_iprf_reply_comment.pdf) (arguing that licensing "demonstrates a vibrant and legal market for remixes," including Kindle Worlds, which allows "creators of fan fiction to easily make commercially profitable uses of the underlying works"); MPAA Comments, *supra* note [], at 5 (same). Another author has confidently asserted that Kindle Worlds precludes a fair use defense for fan fiction, at least for non-sexually explicit fan fiction, showing a serious but unsurprising misunderstanding of fair use doctrine:

By licensing fan-fiction publication rights to Amazon, Alloy adds Kindle Worlds to the "potential market" considered in fair use's fourth factor ("the effect of the use upon the potential market for or value of the copyrighted work" ...). As free fan-fiction would naturally (and negatively) impact a market, a court is likely to find that this factor favors the copyright owner, Alloy.

Arguably, fan-fiction rated R and NC-17 should be excluded here, given that Kindle Worlds' ... "Content Guidelines" prohibit "[p]ornography" and "[o]ffensive [c]ontent" .... Ergo, sites featuring only blue fan-fiction do not impact the same market(s) as their unobscene peers.

Kindle Worlds content is available only through Amazon's website. The program builds on and distorts the concept of "fan fiction," new unauthorized stories written by fans (or sometimes anti-fans) of an existing copyrighted work.<sup>79</sup> Online, fan fiction circulates noncommercially. In Kindle Worlds, by contrast, both author and copyright owner receive payment when a reader buys a Kindle Worlds e-book, as does Amazon. This makes it the most directly monetized of the new semi-blanket, semi-licensing initiatives. Relatedly, it's the most limited. Most content owners are still nervous about "letting" other people make money using their works. Moreover, extensive participation by film and television properties is unlikely, given standard Writers' Guild of America contracts requiring payment to the writers of the initial scripts.<sup>80</sup> Thus, participation in Kindle Worlds is restricted to hand-picked franchises, rather than huge blocks of corporate-owned content. The fan fiction generated by all those TV shows and movies, which are generally the most popular inspirations for fan fiction, must continue to rely on fair use.

### 1. *Control: Building the Fence and Culling the Herd*

Even if Kindle Worlds could license every popular media property, it would remain highly constrained, and no substitute for transformative fair uses. The language of control and exploitation predominates even in favorable descriptions of Kindle Worlds. Fans are raw material, resources to be exploited, data to be mined.<sup>81</sup> Reflecting these perceptions of fan authors, Kindle Worlds is a bad deal for creators compared to other forms of commercial authorship (which are not known for their massive payouts in the first place).<sup>82</sup> Kindle Worlds authors give up many more rights than

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Hence, Kindle Worlds gives Alloy and Amazon an incentive to seek damages and the shutdown of free fanfiction sites ..., and places the odds of winning firmly in their favor. Over time, fear of large damage awards and litigation costs would likely lead to voluntary site shutdowns and the gradual extinction of free fan-fiction.

And thus, what is currently an impetus to pay for fan-fiction could become a necessity ....

Sarah Katz, Amazon Kindle Worlds: Fan-Fiction's New Normal, May 29, 2014, Screen Invasion, <http://screeninvasion.com/2014/05/amazon-kindle-worlds-fan-fictions-new-normal>.

<sup>79</sup> See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

<sup>80</sup> See Rebecca Tushnet, Copyright Society: Fan Productions, <http://tushnet.blogspot.com/2014/06/copyright-society-fan-productions.html>, June 9, 2014 (reporting comments of Matt Bloomgarden, VP Business & Legal Affairs, Alloy Entertainment/Warner Bros. Television).

<sup>81</sup> See, e.g., Alexandra Alter, *'Vampire Diaries' Writer Bites Back*, WALL ST. J (April 17, 2014), <http://online.wsj.com/news/articles/SB10001424052702304058204579495491652398358?> ("Now, entertainment companies are searching for new ways to make money off fan writing and harness the next potential breakout hit. . . . 'At the very least, it's additional promotion, and in the best-case scenario, there are ideas for new properties that we can mine' [the president of a major Kindle Worlds participant said].").

<sup>82</sup> Alter, *supra* note 72 ("Amazon grants fan-fiction writers 35% of net revenue for works that are 10,000 words or longer, and 20% of revenue for shorter works. But that's much smaller than the 70% of royalties that a self-published author can get for an original work published through Amazon."); Francesca Coppa, *Fuck Yeab, Fandom is Beautiful*, 2 J. FANDOM STUD. 73, 80 (2014) (stating that Kindle Worlds is "inserting itself into the process by which some fans become professionals, and potentially taking a cut of those creative works large enough to stop most people from making a living at it").



conventional authors.<sup>83</sup> *Fifty Shades of Grey*, the bestselling erotic novel that began life as *Twilight* fan fiction, provides an instructive contrast. While there are questions surrounding the book's transition from fanwork to paid work,<sup>84</sup> and while some fans of the fan fiction series felt exploited by the author's use of their enthusiasm to convert her work into a commercial success, it's notable that the economic payoff for *Fifty Shades* was far greater than that available through Kindle Worlds. By "filing off the serial numbers" and converting the story into one that no longer starred Bella and Edward from *Twilight*, but rather a more generic insecure young woman and powerful older man, the writer E.L. James was able to become the world's highest-earning author, keeping a much larger percentage of her earnings than available through Kindle Worlds.<sup>85</sup> In addition, she was able to sell the movie rights, something else Kindle Worlds doesn't allow.

Kindle Worlds may be fandom's "Sugarhill moment," in Abigail DeKosnik's words: "the moment when an outsider takes up a subculture's invention and commodifies it for the mainstream before insiders do."<sup>86</sup> DeKosnik's prescient words evoke what happened to rap music, where a relatively few people made millions of dollars, but many of them didn't come from the communities that originated the form; instead, rap musicians were integrated into the large-scale commercial music system, and rarely saw much economic benefit from it.<sup>87</sup>

With commercial exploitation comes a lack of creative freedom. Even more explicitly than Getty Images or Content ID, Kindle Worlds has serious content restrictions. Just to begin with, Amazon bans the popular "crossover" genre, in which characters or settings from one world intersect with another. Sex and violence are, naturally, risky topics. Although Amazon is coy about the limits of its ban on sexually explicit content—it wouldn't want to lose out on the next *Fifty Shades of Gray*, after all—given Amazon's history of suppressing gay and lesbian content and "kinky" content,<sup>88</sup> it seems likely that explicit sexuality is more likely to survive if it is otherwise conventionally heterosexual. And because Amazon maintains tethered control over "purchased" copies, any work may be pulled or edited for causing controversy, and its content will disappear from users' devices. Kindle Worlds

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<sup>83</sup> See Alter, *supra* note 81 (quoting Francesca Coppa, an English professor at Muhlenberg College, who says "It feels like a land grab. . . . Big companies are trying to insert themselves explicitly to get people who don't know any better to sign away rights to things that might be profitable.").

<sup>84</sup> Bethan Jones, *Fifty Shades of Exploitation: Fan Labor and Fifty Shades of Grey*, 15 TRANSFORMATIVE WORKS & CULTURES (2014), <http://journal.transformativeworks.org/index.php/twc/article/view/501/422>.

<sup>85</sup> Alter, *supra* note 81 (reporting that James made an estimated \$95 million in 2013).

<sup>86</sup> Abigail De Kosnik, *Should Fan Fiction Be Free?*, 48 CINEMA J. 118, 119–20 (2009).

<sup>87</sup> See *id.*

<sup>88</sup> See, e.g., Pete Cashmore, *Amazon Accused of Removing Gay Books from Rankings*, MASHABLE (Apr. 12, 2009), <http://mashable.com/2009/04/12/amazon-accused-of-removing-gay-books-from-rankings/> (describing previous controversy over Amazon making LGBT content harder to find); Adam L. Penenberg, *Amazon's Monster Porn Purge*, PANDODAILY (Jan. 1, 2014), <http://pando.com/2014/01/01/amazons-monster-porn-purge/> (describing Amazon's fluctuating bans on unusual sexual content based on its prohibition of "pornography" and "offensive depictions of graphic sexual acts").

works aren't available in print, so any suppression will be total, hard to document, and perhaps even unnoticed, unlike suppression of a printed work, where copies may survive the censor's sweep.<sup>89</sup>

Making prediction about content rules even more difficult, each copyright owner sets its own limits. For example, *Bloodshot's* "world" includes multiple restrictions, from standard bans on "erotica" and "offensive content" to the vague requirement that characters be "in-character," along with bans on "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>90</sup> In *G.I. Joe* works, meanwhile, the character Snake Eyes can't be portrayed as a Yankees fan.<sup>91</sup> While this control is perfectly appropriate from the perspective of copyright owners claiming absolute rights over their works,<sup>92</sup> it also suppresses the most transformative and critical reworkings.

In addition, Amazon requires writers to be at least 18 years old, excluding the many young people who discover, and benefit so much from, creative fandom. Many of the benefits writing in an existing world can offer, in terms of developing literacy and other skills, are particularly valuable for younger creators.<sup>93</sup> Young writers often lack access to supportive communities; in noncommercial fan fiction communities, others' enthusiasm for the shared world translates into assistance with writers' development, since everyone wants more stories.<sup>94</sup> But who would routinely pay money in order to help a young writer develop and improve her skills? When markets are involved, we are rarely happy paying for someone else's training, and we usually consider our money payment enough without additional feedback to assist artistic improvement. But Kindle Worlds does not allow authors to circulate works for free, even if young authors were allowed to use it.

Kindle Worlds even requires works to be of a certain length, which is understandable for a commercial enterprise but deadly for social practices that thrive on spontaneity, experimentation, and flexibility. Although fannish poetry has a long history, there will be no *Vampire Diaries* sonnets on Amazon. The innovations of noncommercial remix are unlikely to take root in such sanitized soil. As media scholar Catherine Tosenberger argues, fanworks are "unpublishable," which leaves its creators free to disregard traditional publishing conventions. This lack of commercial consequence

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<sup>89</sup> See Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES, July 17, 2009, [http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?\\_r=0](http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0) (reporting on an earlier instance of Amazon's content erasure).

<sup>90</sup> See *Bloodshot*, KINDLE WORLDS, [https://kindleworlds.amazon.com/world/Bloodshot?ref\\_=kww\\_home\\_ug\\_Bloodshot](https://kindleworlds.amazon.com/world/Bloodshot?ref_=kww_home_ug_Bloodshot) (last visited May 21, 2014).

<sup>91</sup> Alter, *supra* note 81.

<sup>92</sup> See *Copyright Alliance*, *supra* note 78, at 6 (claiming falsely that copyright law always protects creators "from having their works used in advertising against their will, to cast them in an unflattering light, or by groups or individuals morally or politically opposed to them") (footnotes omitted).

<sup>93</sup> See NAT'L TELECOMM. & INFO. ADMIN, REQUEST FOR COMMENTS ON DEP'T OF COM. GREEN PAPER, COPYRIGHT POLY, CREATIVITY, & INNOVATION IN DIGITAL ECON., COMMENTS OF ORG. TRANSFORMATIVE WORKS (OTW)38–61 (Nov. 13, 2013), [http://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf) [Hereinafter COMMENTS OF OTW].

<sup>94</sup> See *id.*

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....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>95</sup>

It's in these unpublishable works that new types of creativity and otherwise marginalized creators are free to develop. We don't know what other new forms Amazon's length and content restrictions will preclude—and that's the problem.

## 2. *Commodification: Undermining the Creative Spirit of Communities*

If fan fiction is corralled into Amazon's ecosystem, a huge amount of creative energy will be excluded, and many opportunities for educational and creative development will be lost. Even if, counterfactually, Kindle Worlds provided creative freedom, the context of a paid platform works additional changes in the creative environment—distortions in incentives that change the substance of the works created, and distortions in the overall “market” for creative works. Getty embeds and Content ID raise issues of “digital sharecropping” in which large corporations profit from the uncompensated creative labor of individual producers. But Amazon's version of monetization, which offers creative individuals a small share of the proceeds, may not be the appropriate solution—certainly not as a substitute for fair use.

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<sup>95</sup> Henry Jenkins, *Gender and Fan Studies (Round Five, Part One): Geoffrey Long and Catherine Tosenberger*, CONFESSIONS OF AN ACA-FAN (June 28, 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 (Univ. of Fla. 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.”); Kristina Busse, *Online Roundtable on Spreadable Media*, 53 CINEMA J. 152, 153 (2014) (expressing concern for “the marginal media fan, who was mostly commercially nonviable, often resistant, and uncooperative, and whose dedication to a gift economy was often in spite of capitalist alternatives and not because they didn’t exist” and for “audiences whose practices may have been adapted and adopted and celebrated but whose presence is ultimately not desired in this brand-new, commercially viable fan universe”); Liz Gannes, *NTV Predictions: Online Video Stars*, GIGAOM (Dec. 30, 2007, 9:00 AM), <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*, ARS TECHNICA (Apr. 3, 2008, 10:17 AM), <http://arstechnica.com/articles/culture/book-review-2008-04-1.ars/3> (discussing in an interview with Clay Shirky valuable group productions whose transaction costs mean that they can only take place voluntarily, outside the market and the firm).

Creativity, though it often comes from individuals, always arises from a context, and can't be understood without attention to creators' communities.<sup>97</sup> The basic issue with monetizing fan fiction is that organic, noncommercial communities that create transformative remixes cannot be moved into the commercial sector without being fundamentally altered and diminished.<sup>98</sup> The market changes what it swallows.

Begin with the consumption side: Extensive research has shown that people behave differently when they don't have to pay money for a benefit.<sup>99</sup> A single penny payment can change behavior substantially, even though it's essentially equivalent to zero in rational economic terms: "If you charge a price, any price, we are forced to ask ourselves if we really want to open our wallets. But if the price is zero, that flag never goes up and the decision just got easier."<sup>100</sup> With fan fiction, what that means is that people consume more—and differently—when they can read for free. The idea that free fan fiction substitutes for what would otherwise be paid purchases ignores that significant difference in decisionmaking.

"Free," in increasing consumption, also decreases concern for quality.<sup>101</sup> This change in preferences of course has downsides, but lowers barriers to entry for new creators by providing an enthusiastic and often quite forgiving audience. And since the usual path to good art involves producing bad art first, this tolerance benefits the quality and variety of creative expression in the long run. "Free" triggers gift and reciprocity norms, which in the context of creative production support the development of community through feedback, discussion, and the encouragement of further participation as creators respond to each other.

Other profound effects of noncommerciality operate more directly on creators. The empirical evidence indicates that noncommercial production in a digital economy is not just detached from monetary exchange. It can be subject to crowding out: noncommercial motives can be eliminated

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<sup>97</sup> See R. Keith Sawyer, *Explaining Creativity: The Science of Human Innovation* 209 (2d. 2012) ("Individual-level explanations are the most important component of the explanation of creativity . . . . But individuals always create in contexts, and a better understanding of those contexts is essential to a complete explanation of creativity.").

<sup>98</sup> See COMMENTS OF OTW, *supra* note 93, at 62–75; Henry Jenkins, *Afterword: Communities of Readers, Clusters of Practices, DIY MEDIA: CREATING, SHARING AND LEARNING WITH NEW TECHNOLOGIES* 231, 239 (Michele Knobel & Colin Lankshear eds., 2010) ("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.").

<sup>99</sup> See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 55–74 (2008) (describing research); David Adam Friedman, *Free Offers: A New Look*, 38 N.M. L. Rev. 49, 71–81 (2008) (same); Kristina Shampianier et al., *Zero as a Special Price: The True Value of Free Products*, 26 *Marketing Sci.* 742, 745–48 (2007) (explaining the "zero price effect," in which demand increases for chocolate candy reduced from one cent to free, but decreases for an inexpensive but higher-quality alternative when its price is also reduced by one cent but not to zero); see also CHRIS ANDERSON, *FREE* (2009) (book-length treatment of the power of "free"); Dan Ariely, *The Power of Free Tattoos*, DAN ARIELY (Nov. 10, 2010), <http://danariely.com/2010/11/10/the-power-of-free-tattoos/> (concluding that "free" overwhelmed other potential concerns for consumers even for permanent changes such as tattoos).

<sup>100</sup> ANDERSON, *supra* note [], at 59.

<sup>101</sup> ARIELY, *supra* note **Error! Bookmark not defined.**, at 58.

when money is on offer, leading to less overall creativity and less social benefit.<sup>102</sup> Studies of creativity have shown that extrinsic rewards regularly diminish creative motivations and the creativity of the resulting works, as judged by objective evaluators. People in commercialized environments seem to attribute their involvement in the task to the extrinsic reward, not to any enjoyment they might have gotten from performing the creative activity.<sup>103</sup>

But not all extrinsic rewards are the same. Money often decreases intrinsic creative motivation, while positive feedback—the “currency” used in fan communities—enhances intrinsic motivation.<sup>104</sup> Fandom has long operated as a “gift economy.”<sup>105</sup> People who enjoyed a fanwork are expected or exhorted to give feedback and thanks, and within a community, people regularly make fanworks for each other. These nonmonetized rewards can be understood as incentives, but with different effects than money.

In the words of Cyndi Lauper, money changes everything. As sociologist Viviana Zelizer has explained, defining an activity as noncommercial changes how people feel and reason about it compared to activities defined as commercial.<sup>106</sup> Specifically, money is corrosive of communities whose members support each other:

It turns out that when [experimental] participants are paid with goods that have clear monetary value but are not mediums of exchange—like candy—they favor equal distribution [for work they’d done as a group], and everyone gets the same share. When participants are compensated with money, they favor a compensation scheme in which everyone gets a share proportional to the work he or she accomplished. As [Barry] Schwartz notes, “Human

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<sup>102</sup> See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 94–95 (2006) (“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.”); 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).

<sup>104</sup> See Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 *J. Personality & Soc. Psychol.* 105, 114 (1971); cf. Karim R. Lakhani & Robert G. Wolf, *Why Hackers Do What They Do: Understanding Motivation and Effort in Free/Open Source Software Projects*, in *Perspectives on Free and Open Source Software* 3 (J. Feller et al. eds., 2005) (“We find . . . that enjoyment-based intrinsic motivation—namely, how creative a person feels when working on the project—is the strongest and most persuasive driver.”).

<sup>105</sup> See Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 *CINEMA J.* 113, 117 (2009) (noting that fandom’s gift economy is both protective against legal claims and a way for fan communities to preserve their “own autonomy while simultaneously solidifying the group”).

<sup>106</sup> See VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994).

beings are ‘unfinished animals’; what we can reasonably expect of people depends on how our social institutions ‘finish’ them.”<sup>107</sup>

Money encourages people to think of themselves as autonomous actors, and also to think of *others* that way, which means that they have less impetus to support other people. Experimental research has shown that evoking the concept of money, compared to evoking neutral concepts, leads people to ask for less help and to be less willing to provide help to others. People primed with the concept of money “preferred to play alone, work alone, and put more physical distance between themselves and a new acquaintance.”<sup>108</sup> These results occur even when people aren’t consciously aware of the changes.<sup>109</sup> Once money is in the picture, being reminded of community in the form of friends and family doesn’t help; money still leads to greater preferences for distance from others.<sup>110</sup>

Relatedly, the *way* in which money enters a relationship matters. One benefit of a market system is that one doesn’t need to be friends with the butcher and the baker to get one’s food at the standard price. This is an important freedom—but it also makes relationships less durable, compared to relationships in which rewards come in the form of entitlements or gifts.<sup>111</sup> Kindle Worlds is a transactional, atomized economy: a reader pays a set price and receives a set amount of content in return. Mel Stanfill notes that Amazon is addressing fans as individuals only, rather than as people who understand themselves as being committed to a larger community. As she notes, Kindle Worlds “is part of a broader shift to incite fans-the-individuals to ever greater investment and involvement but manage them through disarticulating them from the troublesome resistive capacity of fandom-the-community.”<sup>112</sup>

Given the way in which Kindle Worlds is presented—as a series of autonomous transactions—the volume and variety of fan creation will predictably be much lower, to the long term detriment of culture. Before the rise of the internet, fans of Marion Zimmer Bradley’s groundbreaking, popular

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<sup>107</sup> EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE 304 (2013) (citing Barry Schwartz, *Crowding Out Morality: How the Ideology of Self-Interest Can Be Self-Fulfilling*, IDEOLOGY, PSYCHOLOGY, AND LAW 160 (Jon Hanson & John Jost eds., 2012)).

<sup>108</sup> Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 SCIENCE 1154, 1154, 1156 (2006) (“Relative to people not reminded of money, people reminded of money reliably performed independent but socially insensitive actions. The magnitude of these effects is notable and somewhat surprising, given that our participants were highly familiar with money and that our manipulations were minor environmental changes or small tasks for participants to complete.”) (citations omitted).

<sup>109</sup> Kathleen D. Vohs et al., *Merely Activating the Concept of Money Changes Personal and Interpersonal Behavior*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 208 (2008) (finding that even subtle reminders of money resulted in substantial behavior changes, including making people less helpful than others not reminded of money as well as making people work harder; reminders could be as subtle as rearranging word tasks where the words referenced money, or a screensaver with a picture of money).

<sup>110</sup> See *id.* at 210 (finding that reminders about money led to fewer charitable donations).

<sup>111</sup> VIVIANA A. ZELIZER, ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY 137 (2010) (“On the whole, entitlements and gifts imply a more durable social relation between them than does compensation.”).

<sup>112</sup> Mel Stanfill, *Kindle Worlds II: The End of Fandom as We Know It?*, MEL STANFILL (June 3, 2013, 7:48 AM), <http://www.melstanfill.com/kindle-worlds-ii-the-end-of-fandom-as-we-know-it/> (citation omitted); see also Matt Bloomgarden, *Fan-Fiction Overview*, at 12 (n.d.) (explaining “strategic benefits” of Kindle Worlds entirely in terms of copyright owner’s relation to the “fan base,” without mention of community or fan-to-fan interaction).

*Darkover* universe wrote fan fiction extensively. Following a dispute with a fan writer, Bradley purported to ban fan fiction, unless it was published in one of the commercial anthologies she edited—a small-scale precursor of Kindle Worlds. Fans mostly complied, and *Darkover* fandom entered a downward slide from which it has never recovered.<sup>113</sup> The experience of American hip-hop likewise shows a decline of experimental and political art as the industry converted to an always-license model.<sup>114</sup> Meanwhile, copyright owners that learned not to suppress fan creativity or corral it into “authorized” channels continue to have robust and profitable fandoms, with prominent examples including *Harry Potter*, *Star Wars*, *Twilight*, and Marvel’s comic book universes. Content industries touting the always-license model are, it seems, eating their own seed corn—at least if fair use doesn’t remain a robust alternative.

So far, Kindle Worlds is behaving as the existing evidence about commercialization would lead one to expect, both in volume and content. For example, the popular *Pretty Little Liars* series, created by the book packaging company Alloy, showed 46 Kindle Worlds works in June 2014, while there were nearly 6000 such works on the popular Fanfiction.net site; the smaller and younger Archive of Our Own hosted over 370.<sup>115</sup> At a more general level, a search on Fanfiction.net’s “Just In” feature<sup>116</sup> revealed over 100 stories posted in the last *hour*. Amazon’s total for all 24 Worlds with content in June 2014, after over a year of availability (plus a pre-launch period in which Amazon solicited specific authors to write), was 538.<sup>117</sup>

An examination of Kindle Worlds content found it to be very different from the content of traditional, unlicensed fandom: “When you look at the Kindle Worlds bestseller list, there’s virtually no overlap in topic, content, or source material between the type of writing people want to pay for on Kindle Worlds, and the type of writing that leads more than a million people to flock to [fan-run]

<sup>113</sup> AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION 112–14 (2011) (describing the dispute); *id.* at 116 (explaining that, after the creative fandom was suppressed, “*Darkover* . . . faded from the prominence it enjoyed in genre fiction in the 1970s and 1980s”).

<sup>114</sup> Erik Nielson, *Did the Decline of Sampling Cause the Decline of Political Hip Hop?*, THE ATLANTIC (Sept. 18, 2013, 2:18 PM), <http://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791/>.

<sup>115</sup> See <https://www.fanfiction.net/tv/Pretty-Little-Liars/> (reporting approximately 5700 results for stories based on the TV series); <https://www.fanfiction.net/book/Pretty-Little-Liars-series/> (reporting 198 results for stories based on the book series); <https://archiveofourown.org/tags/Pretty%20Little%20Liars/works> (reporting 370 results for the TV show); <https://archiveofourown.org/tags/Pretty%20Little%20Liars%20Series%20-%20Sara%20Shepard/works> (reporting 11 results for the book series). Some of this can be attributed to time—Kindle Worlds hasn’t been operating for as long as the series has been around, while FanFiction.net has been—but not all. The distinctly unpopular *Ravenswood* TV series, which did launch after Kindle Worlds, yields 5 results on Kindle Worlds, and a total of 16 on Fanfiction.net—9 *Ravenswood* stories, and 7 crossovers with *Pretty Little Liars*; crossovers as a genre are not allowed on Kindle Worlds. <https://www.fanfiction.net/tv/Ravenswood/>; <https://www.fanfiction.net/crossovers/Ravenswood/10913/>.

<sup>116</sup> Just In, <https://www.fanfiction.net/j/0/0/0> (visited June 26, 2014).

<sup>117</sup> Kindle Store › Kindle Worlds › Worlds,

[http://www.amazon.com/gp/search/other/ref=lp\\_6118587011\\_sa\\_p\\_lbr\\_fan\\_fiction\\_un?rh=n%3A133140011%2Cn%3A%21133141011%2Cn%3A6118587011&bbn=6118587011&pickerToList=lbr\\_fan\\_fiction\\_universes\\_browse-bin&ie=UTF8&qid=1403819648](http://www.amazon.com/gp/search/other/ref=lp_6118587011_sa_p_lbr_fan_fiction_un?rh=n%3A133140011%2Cn%3A%21133141011%2Cn%3A6118587011&bbn=6118587011&pickerToList=lbr_fan_fiction_universes_browse-bin&ie=UTF8&qid=1403819648) (visited June 26, 2014).

Archive of Our Own (AO3) each day.”<sup>118</sup> Kindle Worlds bestsellers look a lot like other bestsellers, with crime fiction, thrillers, and young adult supernatural fiction as highly popular genres. By contrast, traditional fan fiction features much more in the way of male/male romance, “short stories based around tropes like bodyswap or time travel, and multi-chapter adventure stories with lots of unresolved sexual tension.”<sup>119</sup> And, unlike most fan fiction communities, which are largely populated by women or people who don’t identify as men, the authors of Kindle Worlds stories generally at least present themselves as men.<sup>120</sup>

One fan writer offered a useful metaphor:

After several months of operation, Amazon’s Kindle Worlds marketplace does not show the continuous, exciting [user-generated content] activity of a typical fanfic site. If the website were a playground, the Kindle Worlds market would have five quiet, clean, polite children carefully playing together while helicopter parents hovered overhead. Meanwhile, at the community-run fanfic site across the road, mobs of screaming children are climbing unsupervised over the swingsets and throwing gravel at each other. Whatever Amazon has created, there is no life in it. Why is this?

No one goes to Amazon to enjoy themselves or talk with their friends. On a real fanfic site, there are writing contests and games, other fans to chat with, free daily story updates from your favorite authors, instant reviews and “likes” on your work, feedback from “beta readers” who provide advice on how to improve your story, discussion groups where you can trade ideas with fellow fans, a huge free archive of previously published work to browse through, constantly updated user blogs, group writing projects, and more. Amazon doesn’t have any of that. They just sell books.<sup>121</sup>

There is, therefore, a connection between Kindle Worlds and other attempts to monetize “sharing” and gift economies. They fundamentally change the nature of the relations at issue, not only by adding money but also by adding hierarchy: someone in charge making the rules, someone who profits not by participating but by taking a chunk of the transaction. Instead of reciprocity—relations involving thanks, later contributions, mutual obligation, and ties extending across time since no one interaction is ever a complete relationship—there is an immediate “squaring up” of cash for product.<sup>122</sup>

This is not to say that writing for money is wrong, or less valuable than writing for free. Money’s incentives are often useful,<sup>123</sup> and there can be community and creativity in paid markets. There is

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<sup>118</sup> Gavia Baker-Whitelaw, *Here’s Proof Amazon’s Fanfic Venture is Working*, THE DAILY DOT (Mar. 3, 2014), <http://www.dailydot.com/fandom/neal-pollack-kindle-worlds-fanfic/>.

<sup>119</sup> *Id.*

<sup>120</sup> *See id.*

<sup>121</sup> *Lost Opportunities: Is Copyright Disincentivizing Creativity?*, NTIA/PTO COMMENTS 2–3 (Nov. 19, 2013), <http://www.uspto.gov/ip/global/copyrights/Anonymous.pdf>.

<sup>122</sup> Andrew Leonard, “*Sharing Economy*” *Shams: Deception at the Core of the Internet’s Hottest Businesses*, SALON (Mar. 14, 2014), [http://www.salon.com/2014/03/14/sharing\\_economy\\_shams\\_deception\\_at\\_the\\_core\\_of\\_the\\_internets\\_hottest\\_businesses/](http://www.salon.com/2014/03/14/sharing_economy_shams_deception_at_the_core_of_the_internets_hottest_businesses/).

<sup>123</sup> *See* Vohs et al., *supra* note 109, at 211 (noting that money “leads to a perspective on the world that emphasizes inputs and outputs with an expectation of equity” and increases striving for results).



room for dialogue on new ways of melding creativity and commerciality. Going forward, if there is to be compensation for some forms of fanworks, one crucial issue will be whether creators are getting a fair share of the return for subjecting themselves to copyright owners' control.<sup>124</sup>

For my purposes, however, the key point is that noncommercial fanworks protected by fair use and commercialized fanworks are not substitutes for one another, whether at the individual level or in terms of creative communities. There are communities in which intrinsic rewards are both important and vulnerable to crowding out by money. *Both* kinds of opportunity, free and paid, should be options, especially for developing artists who aren't able to earn a living in the paid market and can benefit disproportionately from other forms of reward. Noncommercial communities encourage more creators to enter, as well as more diversity of content, than commercial communities (where new artists are after all competitors). Licensing's incentivizing virtues come with costs, and so we should protect diverse sources of support for creativity—including voluntary expression, distinct from market exchange.

### 3. *Competition: Distorting the Market for Professional Creative Works*

Kindle Worlds may also have structural effects on the market for individual creators. This new form of licensing has the potential to drive down the return to authors who do seek to compete in the commercial market. Professional writers have noted that rather than being like conventional fan fiction, Kindle Worlds is more like the established market for authorized tie-in novels for franchises such as *Star Trek*, *Star Wars*, and the like. But unlike tie-in authors, Kindle Worlds authors need be paid nothing in advance.<sup>125</sup> Hugo-winning writer John Scalzi sums up his concerns:

I would caution anyone looking at this to be aware that overall this is not anywhere close to what I would call a good deal. Finally, on a philosophical level, I suspect this is yet another attempt in a series of long-term attempts to fundamentally change the landscape for purchasing and controlling the work of writers in such a manner that ultimately limits how writers are compensated for their work, which ultimately is not to the benefit of the writer.<sup>126</sup>

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<sup>124</sup> See ZELIZER, *supra* note 111, at 293 (“We should stop agonizing over whether or not money corrupts but instead analyze what combinations of economic activity and caring relations produce happier, more just, and more productive lives. It is not the mingling that should concern us but how the mingling works. If we get the causal connections wrong, we will obscure the origins of injustice, damage, and danger.”). For some good discussions of commercializing noncommercial fandom, see, e.g., Nele Noppe, *Why We Should Talk about Commodifying Fan Work*, 8 TRANSFORMATIVE WORKS & CULTURES (2011), available at <http://journal.transformativeworks.org/index.php/twc/article/view/369> (emphasizing that commercialization is worth considering only in a context in which the gift economy also survives); Suzanne Scott, *Repackaging Fan Culture: The Regifting Economy of Ancillary Content Models*, 3 TRANSFORMATIVE WORKS & CULTURES (2009), available at <http://dx.doi.org/10.3983/twc.2009.0150> (discussing the risks of exploitation through commercial entities' “regifting” a constrained version of fandom to the public).

<sup>125</sup> John Scalzi, *Amazon's Kindle Worlds: Instant Thoughts*, WHATEVER, (May 22, 2013), <http://whatever.scalzi.com/2013/05/22/amazons-kindle-worlds-instant-thoughts/> (noting Kindle World's potentially significant effects on the existing media tie-in market and professional writers who participate in that market).

<sup>126</sup> *Id.*

*The Vampire Diaries*, a franchise participating in Kindle Worlds, provides an object lesson in the use of competing pieceworkers to drive down prices to the detriment of individual creators and to the benefit of Amazon as middleman: Alloy, the packager who owns the rights to the series, initially hired L.J. Smith to write the books, but fired and replaced her over creative differences. But she still loves the characters she created so much that she's taken to Kindle Worlds to finish the story the way she wanted, even though her royalties are low and much of the revenue goes to the company that fired her. An Alloy representative's description of the affordances of Kindle Worlds encapsulates the way in which copyright ownership is being used to minimize the return to creative contributions: "One of the benefits of Kindle Worlds is that *any fan, even the author of the original work*, can participate."<sup>127</sup> In the new economy, creators will all apparently survive on micropayments. (Of course, unpaid fan creativity can also be seen as competing with paid writing—but, as I argued above, noncommercial works and communities have some significant differences that deserve legal support even as we support well-paid creativity as well.)<sup>128</sup>

Even if its compensation scheme were closer to traditional royalty amounts, Kindle Worlds would be of concern because it promotes monopolization of the market for creative works.<sup>129</sup> Amazon has a vested interest in making content exclusive, and thus unavailable to nonusers of its system—the Kindle e-book reader or Kindle app.<sup>130</sup> People who post fan fiction on fanfiction.net or other popular fan sites make their works available to anyone around the world with internet access;<sup>131</sup> people who use Kindle Worlds can only make their works available to others who are part of the Amazon universe, and they can't make their stories available for free. People who do want to read more stories about their favorite characters, and who might otherwise have gone elsewhere and

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<sup>127</sup> Alter, *supra* note 81 (emphasis added).

<sup>128</sup> Cf. Livia Penn, *Two Really Good Reasons Why Kindle Worlds is Bullshit*, DREAMWIDTH (May 23, 2013, 6:23 AM), <http://liviapenn.dreamwidth.org/530961.html> ("I keep seeing people saying 'you'll get 20% to 35% of the profit. And that's better than nothing!' (Well, sidebar: I don't get 'nothing' from writing fanfic. If you're not a fanfic writer who shares their fic with a community of readers, it would take me another two thousand words to explain what you \*do\* get, but trust me. It isn't nothing.')").

<sup>129</sup> Kindle Worlds content also raises preservation issues. While physical books can be preserved by archives and libraries, and while there are major efforts to preserve large online sites that are (or have been) freely accessible, Kindle Worlds is, like other Kindle content, legally off-limits for preservation. Public libraries may license certain Kindle books to provide them to their patrons, but they don't own or even deliver the licensed files from their own servers. This is also a competition issue in the sense that libraries and archives offer alternatives to market forces that discard everything without a sufficient present value, and allow audiences to access works even when individual audience members can't pay.

<sup>130</sup> Recently, Amazon bought a specialized comics app, Comixology, that was successful in bringing in more casual readers—something comics have struggled with for decades. Amazon quickly moved to degrade the user experience on Apple devices, presumably to make the Kindle relatively more attractive. Gerry Conway, *Gerry Conway: The Comixology Outrage*, COMICBOOK.COM (Apr. 27, 2014), <http://comicbook.com/blog/2014/04/27/gerry-conway-the-comixology-outrage/>.

<sup>131</sup> Filtering by repressive regimes excepted, though fan fiction often escapes filters. Fan fiction based on Western media is highly popular in China, see Liz Carter, *Benedict Cumberbatch Is a Gay Erotic God in China*, FOREIGN POLICY, Nov. 15, 2013, [http://www.foreignpolicy.com/articles/2013/11/15/erotic\\_benedict\\_cumberbatch\\_fanfiction\\_in\\_china](http://www.foreignpolicy.com/articles/2013/11/15/erotic_benedict_cumberbatch_fanfiction_in_china). Some bilingual speakers translate English stories for other Chinese-speaking fans, and native speakers also write their own stories, often at some personal risk due to Chinese repression of "pornography" and homosexual content.

discovered fan communities, may instead be guided into Amazon's control. To the extent that monopolization of delivery and publishing systems is bad for authors in general, Amazon's ambitions are dangerous to all authors.

### III. THERE MUST BE SOME WAY OUT OF HERE

The previous Part explained that none of these three schemes to replace fair use are what they seem. Despite the promises of those who claim that licensing could easily replace fair use if courts would only start finding unlicensed uses to be unfair, the current fair use doctrine remains sound even in a pervasively digital world. The always-license model *means* pervasive suppression of expression, further threats to privacy, and constrained competition. Fair use, by contrast, supports independence and variety in individual works and also in the intermediaries and communities that support them.

These examples reinforce some key lessons. First, privately negotiated licenses will never be comprehensive.<sup>132</sup> Licenses will inevitably leave many creators out in the cold, especially noncommercial remixers.<sup>133</sup> To claim that licenses can replace fair use because *some* participants within each market are willing to license *most* of the time is to advocate the suppression of all fair uses that rely on works that aren't within the licensing scheme. Getty, Google, and Amazon are not outliers in covering only a subset of existing content within their respective genres. Even the extremely vague and general promises regarding 'user-generated content' in the European Union initiative 'Licences for Europe – ten pledges to bring more content online'<sup>134</sup> covered only a tiny fraction of the creative industries, whereas remix cultures regularly bring in text, audio, video, and visual arts.<sup>135</sup> "In the music businesses, the one sector of copyrighted content headed to this model [of identifying and licensing everything], they are far from perfecting it despite nearly a century of good work towards it."<sup>136</sup> As much music as there is, there are exponentially more written texts and images.

Second, privately negotiated licenses that purport to allow works to be used in new creative contexts will always retain censorship rights,<sup>137</sup> thus leaving creators of transformative noncommercial works at risk of suppression. The works that will be suppressed are precisely those that are most expressive, critical, and necessary.<sup>138</sup> Licensors repeatedly tell prospective creators that

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<sup>132</sup> Compulsory licensing, including extended compulsory licensing for orphan works, poses different issues.

<sup>133</sup> COMMENTS OF OTW, *supra* note 93, at 67–69 (discussing unavailability of licenses for many forms of content, such as art and photography, and for many specific works even within genres in which licensing schemes allegedly exist).

<sup>134</sup> *Licences for Europe*, European Commission 6 (Nov. 13, 2013), [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

<sup>135</sup> DeviantART, *supra* note 35, at 6–7.

<sup>136</sup> DeviantART, *supra* note 35, at 31.

<sup>137</sup> True blanket licensing generally requires either legislative intervention (the statutory license for mechanical works) or judicial intervention (the antitrust consent decrees that shape ASCAP and BMI licensing).

<sup>138</sup> COMMENTS OF OTW, *supra* note 93, at 69–71; *see also, e.g.*, MARK DUFFETT, UNDERSTANDING FANDOM: AN INTRODUCTION TO THE STUDY OF MEDIA FAN CULTURE 176 (2013) ("Elvis Presley Enterprises offers another example of a media organization that has *incorporated and licensed* fan creativity on one hand—adding fan art at Graceland and

they are supposed to “celebrate the story the way it is”<sup>139</sup> and “stay within the lines” of the copyright owner’s coloring book.<sup>140</sup> Classic defenses of fair use often focus on the individual uses that are banned by copyright owners. Those may be a smaller percentage of remixes in a license-everything world, bans on portraying a GI Joe character as a Yankees fan notwithstanding, simply because digital technologies have massively increased the total number of remixes. Yet because the impact of the most critical uses can be outsized, it’s still important to support transgressive reworkings, such as Alice Randall’s rewriting of *Gone with the Wind* to address the racism and sexual politics of the original.<sup>141</sup>

Third, creators benefit from the ability to escape pervasive data collection. People produce different kinds of works when they think of themselves as being under scrutiny.<sup>142</sup> A journal kept in school so that the teacher can read it will differ in content from letters to friends. A Kindle Worlds novella, for which the author can only be paid by handing over her real name and contact information to Amazon, or a post whose content hinges on a Getty embed, will be crafted with awareness of that controlling party, at least in the back of the creator’s mind. Fair use enables creators to experience themselves as independent of copyright owners’ surveillance.

Fourth, fair use protects competition compared to a licensing-only world. A more standard competition story in copyright is about devices: fair use enabled Sony to escape liability as the manufacturer of the VCR, a device with substantial noninfringing uses. (It’s worth noting that one of the alternatives to fair use suggested by Sony’s opponents was some sort of blanket licensing scheme.)<sup>143</sup> The VCR then proved a huge economic boon to the movie industry, even as Sony’s Betamax technology fell to the more flexible VHS. Freedom spurred innovation as competitors fought in the marketplace. By contrast, devices that existing content industries controlled have

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turning fan artist Betty Harper’s sketches into postcards—and *simultaneously attempted to scotch or rein in fan expressions* when they ran counter to its financial interest.” (citing TIM WALL, *STUDYING POPULAR MUSIC CULTURE* 205–10 (2003)); Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, 48 *CINEMA J.* 125 (2009) (discussing earlier experiments with domesticating fanworks, including fanworks for *Battlestar Galactica*).

<sup>139</sup> Simone Murray, “*Celebrating the Story the Way It Is*”: *Cultural Studies, Corporate Media, and the Contested Utility of Fandom*, 18 *CONTINUUM: J. MEDIA & CULTURAL STUDIES* 7 (2004).

<sup>140</sup> *The Amazing Fan-Powered Media Event*, FANLIB 3, [http://fanlore.org/w/images/4/42/FanLib\\_info.pdf](http://fanlore.org/w/images/4/42/FanLib_info.pdf) (from marketing material for a for-profit, licensed-material-only site released in 2003) (accessed June 19, 2014):

MANAGED & MODERATED TO THE MAX

All the FANLIB action takes place in a highly customized environment that YOU control.

As with a coloring book, players must “stay within the lines”

Restrictive player’s terms-of-service protects your rights and property

Moderated “scene missions” keep the story under your control

Full monitoring & management of submissions & players

Automatic “profanity filter”

Completed work is just 1st draft to be polished by the pros.

<sup>141</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>142</sup> See, e.g., Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373, 1425 (2000); Sonia K. Katyal, *Privacy vs. Piracy*, 7 *YALE J.L. & TECH.* 222, 316–34 (2005); Daniel J. Solove, *A Taxonomy of Privacy*, 154 *U. PA. L. REV.* 477, 493–94 (2006).

<sup>143</sup> *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981).

usually been so weighted down with anti-consumer features that they fail. When was the last time you used a digital recorder subject to the Audio Home Recording Act and its mandatory royalty scheme?

But fair use has other competition-protecting features as well. Licensing protects monopolies by creating higher barriers to entry than fair use. For example, when Google was sued for scanning hundreds of thousands of library books, it initially supported a settlement that required it to pay licensing fees, but that was rational for many reasons, including the fact that it created significant barriers to entry for potential competitors.<sup>144</sup> By contrast, the finding that scanning in order to create “snippets” and analyze the books for content was fair use allows other entities to do the same thing,<sup>145</sup> even though most probably won’t have Google’s resources.

Finally, these new initiatives to control all uses have made more salient the fact that monopolies aren’t just bad for welfare in general; they’re bad for creators. When we defend fair use, it is also necessary to talk about and defend communities of practice, from which many fair uses arise.<sup>146</sup> Shakespeare emerged from a vibrant community of playwrights and actors. Most likely, so will his next successor. Widespread, freewheeling environments in which everything is up for reuse and transformation are what enable the best creators to learn and succeed. If only the most transgressive and unpopular themes can escape licensing, then even if they successfully do so, their creators will be isolated from the interactions and incentives that a larger community of transformative users can offer.

Alternative, unlicensed forms of infrastructure, not just individual works, are important for creative freedom. A blogger on WordPress can format and transform images she uploads any way she likes, and can swap tips and tricks with others like her to improve her work—unless Getty embeds take over. Specialized video sites with subcultural or niche appeal can use the DMCA to protect against copyright liability and allow the development of fair use and other norms—unless Content ID screening becomes a requirement.<sup>147</sup> As Francesca Coppa, one of the founders of the nonprofit Organization for Transformative Works, says:

Today, when I talk about the importance of fan writing, I don’t just mean fiction and nonfiction: I mean contracts and code. In the old days, fans self-published their fiction . . . , they distributed their own VHS cassettes and digital downloads, and they coded and built their own websites and created their own terms of service. Today, enormous commercial

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<sup>144</sup> Ariel Katz, *Fair Use for the Google Goose; Fair Use for the Book Gander*, ARIEL KATZ (Nov. 26, 2013), <http://arielkatz.org/archives/2992>.

<sup>145</sup> See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

<sup>146</sup> See PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).;

<sup>147</sup> See *In Medias Res*, <http://mediacommons.futureofthebook.org/imr/> (curated scholarly collection of significant multimedia works, including video); cf. Darnell Witt, *Copyright Match on Vimeo*, Staff Blog, May 21, 2014, <https://vimeo.com/blog/post:626> (discussing video site Vimeo’s recent decision to go beyond the DMCA and filter audio content, with an appeals system for mistaken decisions whose contours are as yet undefined).

entities—YouTube, Amazon, LiveJournal, Wattpad, Tumblr—own much of this infrastructure.<sup>148</sup>

As Coppa points out, none of these new services

has anything like the track record of the average fandom or fannish institution; consider how much younger they are than Sherlock Holmes, Doctor Who, or even Supernatural fandom [which began in 2004]. In the best case, these companies may fail and become a disruptive force in relatively stable and long-term communities; in the worst case, they may exploit and betray their users.<sup>149</sup>

The internet is littered with the corpses of business models that were supposed to last a very long time—including models specifically designed to exploit noncommercial creativity.<sup>150</sup>

When a gold rush ends, the result is stripped hills and ghost towns, not communities and thriving ecosystems. The new licensing gold rush risks the same consequences if we don't defend permissionless alternatives to licensing. Current doctrine correctly recognizes that copyright owners' willingness to license, control, or monetize a use does not mean that the use is unfair if unauthorized. Indeed, even countries that don't have a fair use defense have increasingly recognized the merits of allowing certain unauthorized uses. In the United Kingdom, for example, the government proposed to change copyright law to make clear that the availability of a license isn't an absolute bar to certain unauthorized uses. Other factors are also relevant to whether a use constitutes a permissible fair dealing: "the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders." Thus, the government rejected the argument that the "mere availability of a licence should automatically require licensing a permitted act."<sup>151</sup>

Despite copyright owners' claims that this time is different, we've seen this show before. Markets are transforming, as they regularly do. But fair use shouldn't contract in response.

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<sup>148</sup> Francesca Coppa, *Participations: Dialogues on the Participatory Promise of Contemporary Culture and Politics*, 8 INT'L J. COMM. 1069, 1072 (2014).

<sup>149</sup> *Id.*

<sup>150</sup> See, e.g., FANLIB, <http://fanlore.org/wiki/FanLib> (last visited May 14, 2014) (recounting the launch, and subsequent disappearance, of a venture capital-funded initiative designed to commercialize fan fiction on behalf of content owners and allow fan authors to win content owner-run sweepstakes). Lucasfilms once offered Star Wars fans free web space on [starwars.com](http://starwars.com), as well as "unique" authorized content for their sites, but only under the condition that whatever they created would be owned by the studio. See HENRY JENKINS, CONVERGENCE CULTURE 152, 156–57 (2006). Today, [starwars.com](http://starwars.com) still exists, but the free web space for fans is gone.

<sup>151</sup> *Modernising Copyright: A Modern, Robust and Flexible Framework*, UK GOVERNMENT 13 (Dec. 2012), <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>.