

NOTES

I PUT UP A WEBSITE ABOUT MY FAVORITE SHOW AND ALL I GOT WAS THIS LOUSY CEASE-AND-DESIST LETTER: THE INTERSECTION OF FAN SITES, INTERNET CULTURE, AND COPYRIGHT OWNERS

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I. INTRODUCTION

A zealous fan of a television show may decide to learn copious amounts of information about the program's episodes, plotlines, characters, and stars. He might annoy his friends and family by reciting endlessly the information he has gathered. He can even create a scrapbook or poster his walls with images from the program to express his devotion. And now, he can build a website dedicated to the show.

On this website he might want to use images, quotes, snippets of recorded dialogue, or even video clips from the show to make his site more authoritative or attractive to web surfers. The fan could also include reviews of the show, provide commentary on his favorite character, or even posit his theories about some of the program's mysteries. Though the fan may not realize it, copyright law protects many of the items on his webpage. He creates and owns some of these materials, but others belong to the studio that produces the show. Consequently, that company may be concerned that he and other webmasters are using its intellectual property without permission.

Now that over one hundred million United States residents are online,¹ individual consumers who make unauthorized uses of copyright-protected

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material are of ever increasing concern to rights holders. One observer has described the particular controversy caused by fan sites² that utilize others' copyright-protected materials as "one of the prickliest problems facing copyright law since the codes were written."³ With Internet usage rising,⁴ the growth of people inclined to build a shrine to their favorite television show or movie may increase the number of individuals tangled in copyright disputes.

Part II of this Note focuses on public perception of copyright law. Part II then considers the effect of that understanding of the law on the Internet. Part III explores the emergence of fan websites and the copyright issues they present. Although fan sites may implicate problems in many areas of the law, including trademark law, patent law, or even unfair competition, this note will focus on the copyright issues created by these web sites. Part IV examines how Twentieth Century Fox Studios ("Fox"), as one example, has responded to fan sites and the subsequent reactions of the sites' creators. Part V considers the prevalence of these issues by briefly examining the controversy between Warner Brothers and *Harry Potter* fan sites. Part VI assesses several possible solutions to the tensions between fan sites and studios. Finally, Part VII concludes that a studio policy sensitive to the views of fan site owners may create the most effective outcomes.

II. COPYRIGHT LAW AND THE MASSES

The development of the Internet⁵ seemingly requires a shift in the public's understanding of intellectual property law. As more and more people use the Internet, a greater population has access to an increasingly wider volume of work protected by copyright law.

A. BEFORE THE INTERNET

Before the expansion of the Internet, ordinary persons did encounter intellectual property on a daily basis. Reading a book, listening to music, and watching a movie are all activities that involve accessing copyrighted material. A registered trademark may have identified the goods a person purchased. A person may have been taking a prescription medication that had been patented. These and most other uses were unlikely to infringe on

¹ Gwendolyn Mariano, *U.S. Web Usage Hits All-Time High*, NEWS.COM, Nov. 13, 2001, at <http://news.com.com/2100-1023-275807>.

² For the purposes of this Note, "fan site" will refer to a web site devoted to a particular television show or movie, which may feature copyrighted material without permission of the copyright holder or owner.

³ Constance Sommer, *Hollywood Girding for Assault of the Internet*, ASSOCIATED PRESS, Dec. 5, 1996, available at 1996 WL 4452577.

⁴ See Mariano, *supra* note 1.

⁵ For the purposes of this Note, the Internet refers to the World Wide Web facility on the Internet which "makes possible almost instantaneous exchange of information by linking documents around the world." *Internet*, COMPUTERUSER.COM HIGH-TECH DICTIONARY, at <http://www.computeruser.com/resources/dictionary/definition.html?lookup=2239> (last visited Apr. 3, 2003).

any intellectual property rights. While a fan of a movie or a television show may have created a scrapbook that included copyright-protected images and logos protected by trademark law, such behavior was unlikely to implicate serious intellectual property concerns because only a small group of people would ever view the work. In practice, copyright owners did not target these users because such claims could be difficult to prove, challenges could create negative press, and, more generally, the uses were insignificant.⁶

In light of this lack of exposure to the legal ramifications of their everyday behavior, most people probably did not understand how the copyright regime functioned.⁷ The complexities of the laws that govern copyright protection contributed to this problem.⁸ Moreover, copyright issues were unlikely to be the subject of everyday conversation.⁹ As a result, the general public likely had a poor understanding of how a work obtained copyright protection and what that protection even provided.¹⁰

Copyright disputes between corporations and individuals only occasionally received public attention.¹¹ These incidents would only educate those involved or those who may have followed the media coverage. And, unfortunately, the media's treatment of such events did not guarantee that the information presented would increase the public's understanding of copyright law.¹²

⁶ See Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995).

⁷ See Jessica Litman, *Essay: Copyright as Myth*, 53 U. PITT. L. REV. 235, 237-39 (1991) [hereinafter Litman, *Copyright as Myth*]. Professor Litman notes that the members of Congress involved in fashioning the 1976 Copyright Act could not even accurately explain the meaning of the legislation they were drafting. See also Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 878 (1987) [hereinafter Litman, *Compromise*].

⁸ See Litman, *Copyright as Myth*, *supra* note 7, at 237 (suggesting that the "mind-numbing collection of inconsistent, indeed incoherent, complexities" of copyright law make it difficult for anyone but copyright specialists to understand it).

⁹ Ann Powers, *Fans Go Interactive*, N.Y. TIMES, Sep. 20, 2000, at H25 (noting that the controversy of the file-sharing service Napster brought copyright law into the conversations of nonlawyers).

¹⁰ See Litman, *Copyright as Myth*, *supra* note 7, at 238.

¹¹ See, e.g., *Campus Life: Iowa; Suits and Debate Follow Display of Cartoon Character*, N.Y. TIMES, Nov. 25, 1990, § 1, Part 2, at 53 (discussing Twentieth Century Fox's copyright infringement suit against a right-wing University of Iowa student publication that displayed a poster with the cartoon character Bart Simpson under a caption that attacked homosexuals) [hereinafter *Campus Life*]; Steven Hegarty, *Two Men Sentenced for Copying Movies*, ST. PETERSBURG TIMES, July 19, 1998, § 3, at 3 (reporting on two men convicted of violating copyright laws by renting out illegally copied videocassettes).

¹² For example, a 1990 New York Times article mentioned the copyright infringement issue in a suit by Fox against a student newspaper, but did not explain why the newspaper's actions constituted infringement. See *Campus Life*, *supra* note 11.

B. THE INTERNET WORLD

1. *The Culture of the Internet*

The Internet has affected the mode of human interaction, but has not dramatically changed the nature of such interaction. Though people are able to send and read e-mail messages instantly, engage in real time chats through typed conversations, and read information on webpages, they are still simply acquiring knowledge from the written word, as people have done for thousands of years.¹³ However, the Internet does allow for increased levels of communication and transfers of information,¹⁴ especially between individuals who are geographically diverse.¹⁵ Moreover, the context in which these actions take place is radically different from the off-line world and may require alternate solutions to otherwise similar problems.¹⁶

The Internet's founders espoused an "open philosophy" where they allowed systems to develop communally and there were few restrictions on exchanging, copying, or modifying other people's creations.¹⁷ This mentality produced an atmosphere characterized by "a willingness to share and help others."¹⁸ While most of the people who have gone online since the mid-1990s were not a part of the original group of Internet users who shaped this ethos, the concept of information being freely shared on the Internet has remained.¹⁹ Thus, this attitude still allows communities of people living in different locations to organize around mutual interests and to trade information.²⁰ Furthermore, these Internet users can harbor keen emotional attachments to the online activities in which they participate.²¹

2. *Ease of Communication*

The development of the Internet has also created the ability to easily copy and share copyrighted material. More works are readily available to users than in the pre-Internet world.²² Images, sounds, and text can be "copied, modified and spread across the globe with a few clicks of the

¹³ See John Weckert, *What is New or Unique About Internet Activities?*, in INTERNET ETHICS 47, 47 (Duncan Langford ed., 2000).

¹⁴ *Id.* at 48.

¹⁵ *Id.* at 57.

¹⁶ *Id.* at 47.

¹⁷ See David Beckett, *Internet Technology*, in INTERNET ETHICS 13, 22 (Duncan Langford ed., 2000).

¹⁸ *Id.* at 22.

¹⁹ See STUART BIEGEL, *BEYOND OUR CONTROL?: CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 74 (2001).

²⁰ STEERING COMM. ON RIGHTS & RESPONSIBILITIES OF PARTICIPANTS IN NETWORKED CMTYS, ET AL. 6-8 (Dorothy E. Denning & Herbert S. Lin eds., 1994).

²¹ See Steven G. Jones, *Information, Internet, and Community: Notes Toward an Understanding of Community in the Information Age*, in CYBERSOCIETY 2.0: REVISITING COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY 1, 5 (Steven G. Jones ed., 1998).

²² Ginsburg, *supra* note 6, at 1468.

mouse.”²³ Not only can web surfers spread these types of media quickly and easily, the process is inexpensive and the copies are virtually identical to the original.²⁴ The ease of access to and exchange of information and ideas has led to the description of the Internet as “the best realization ever of the First Amendment.”²⁵ Internet users can almost effortlessly transmit information to a vast, global audience.²⁶

3. *How Netizens Understand Copyright*

This culture of free information can cause the activities of many netizens²⁷ to conflict with copyright laws, and these web surfers may frequently infringe on copyrights owned by others. Some users may erroneously conclude that everything online is in the public domain and can be used or distributed freely.²⁸ Some even consider the medium “a borderless, self-policing domain where traditional laws do not and should not apply.”²⁹

A contributing factor to this misunderstanding is the nature of the copyright laws in force. One characteristic of these laws is vagueness about what is and what is not permissible.³⁰ This allows courts to decide controversies on a case-by-case basis,³¹ but it does not always make the resolution of future disputes predictable.³² Even the Clinton Administration report *Intellectual Property and the National Information Infrastructure* (“*White Paper*”) acknowledged that few people understand copyright law.³³

The public believes many copyright myths. One common misconception is that copyright holders have an exclusive right to profit from their works, but that noncommercial uses by others are permissible

²³ Amy Harmon, *Web Wars: Companies Get Tough on Rogues; Studios and Fortune 500 Firms Target Unauthorized Internet Sites that Feature Their Products. Crackdown Affects Fans as Well as Foes*, L.A. TIMES, Nov. 12, 1996, at A1. See also Ginsburg, *supra* note 6, at 1468 (noting that works are easy to manipulate on the Internet).

²⁴ See Weckert, *supra* note 13, at 58.

²⁵ Cristina Fernandez, *The Right of Publicity on the Internet*, 8 MARQ. SPORTS L.J. 289, 300 (1998).

²⁶ See *id.*

²⁷ For the purposes of this Note, the terms “Internet users,” “Netizens,” and “web surfers” shall interchangeably refer to individuals who use the Internet to view and/or create webpages.

²⁸ See COMM. ON INTELLECTUAL PROP. RIGHTS AND THE EMERGING INFO. INFRASTRUCTURE, NAT’L RESEARCH COUNCIL, DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 124–25 (2000) [hereinafter DIGITAL DILEMMA].

²⁹ Erika S. Koster & Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, 15 NO. 1 COMPUTER LAW. 18, 21 (1998).

³⁰ Wyn Hilty, *Flaming the Fans*, OC WEEKLY, June 23, 2000, (Tech.), at 20.

³¹ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (clarifying that the fair use defense for copyright infringement did not create a list of specific permissible uses but rather a set of factors to be considered in individual cases).

³² See, e.g., Pierre N. Leval, *Toward a Fair Standard*, 103 HARV. L. REV. 1105, 1105–06 (1990) (noting that the fair use provisions “furnish little guidance on how to recognize fair use”).

³³ INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 204 (1995) [hereinafter WHITE PAPER].

and unaffected by copyright law.³⁴ Other copyright myths include the beliefs that sound files without copyright notices are in the public domain, that it is permissible to post content from an individual's own CDs online, that the First Amendment and fair use allow copying for personal home use, and that individuals can download and use software for twenty-four hours for free for evaluation purposes.³⁵ One television studio acknowledged that many of the fan site owners whom its representatives contacted did not realize they were violating any copyright laws.³⁶ Despite the increasing restrictiveness of copyright laws, private copying has actually increased due to "the inability of the average Netizen to understand the complexities of intellectual property law combined with the ease of use and the strong prevailing social norms that support widespread and indiscriminate copying."³⁷ Any conflict between rights holders and users must consider this disparity between the realities of copyright law and common misperceptions of the law.

Another issue that becomes more relevant with the growth of Internet use is the strict liability nature of copyright infringement. This is likely another area where the public's knowledge of the details of copyright law is weak. There is no defense of "innocent infringement" because the intent of the infringer is irrelevant to the determination of liability.³⁸ Though there are many affirmative defenses to infringement, most notably fair use, the law does not excuse every personal or good faith use.³⁹

Further, the public is often wrongly "educated" about copyright law, complicating already present misunderstandings. Media outlets applying copyright law to the Internet may misstate or oversimplify copyright law, oftentimes implying a more stringent regime than actually exists.⁴⁰ This is

³⁴ Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 35 (1994).

³⁵ DIGITAL DILEMMA, *supra* note 28, at 124.

³⁶ Laurent Belsie, *Web War: Hollywood Tangles with Fans' On-Line Sites*, THE CHRISTIAN SCI. MONITOR, Dec. 17, 1996, (Features), at 3.

³⁷ BIEGEL, *supra* note 19, at 303.

³⁸ See 17 U.S.C. § 501 (2000). See generally 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 (2001).

³⁹ See Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1143-44 (2001).

⁴⁰ For example a ZDNet News article asserts that "everything created after 1922 is protected by copyright unless: 1.) it's published by the government or 2.) the owner explicitly says the content is not protected. However, laws covering fair use and educators often allow the transmission, and even copying, of factual information." Lisa M. Bowman, *Lawyers Discuss How to Avoid Legal Liability on the Web*, ZDNET NEWS, July 15, 1998, at <http://zdnet.com/2100-11-511166.html>. These statements misstate the fair use doctrine by implying that factual information itself is copyrightable, as opposed to only the expression of that information. See 17 U.S.C. § 102(a), (b) (2000). See also *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991). Fair use may even allow copying of nonfactual information. See generally 17 U.S.C. § 107 (2000). Additionally, even in 1998 when the article was written, many works created since 1922 had lost copyright protection and fallen into the public domain as a result of improper copyright notice or failures to renew copyright protection of works under the 1909 Copyright Act. See, e.g., *Booth v. Haggard*, 181 F.2d 470, 471 (8th Cir. 1950) (holding no copyright protection because of a failure to renew as the copyright owner did not file a renewal in the last year of the first term of protection); *Schatt v. Curtis Mgmt. Group, Inc.*, 764 F. Supp. 902, 909 (S.D.N.Y. 1991) (finding an invalid copyright because notice appeared on the wrong page of a book).

also the case with cease-and-desist letters, another common way for the general public to “learn” about the restrictions of copyright law. Copyright owners may send cease-and-desist letters to people using copyright-protected materials in an unauthorized manner, requesting that the recipients refrain from further use of the works.⁴¹ The problem is that copyright law is largely misunderstood so “cease-and-desist letters carry inordinate cultural power and can chill if not directly censor expression.”⁴² Additionally, copyright warnings given by rights holders often overstate the law. The notice at the beginning of many books (e.g., “No part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission”) does not accurately reflect the legal limits of the publisher’s control over the work.⁴³ This admonition also extends to notices on many other products, including software shrink-wrap licenses and the FBI warning that appears on videocassettes and digital video discs (DVDs).⁴⁴

C. YOUNG PEOPLE, THE INTERNET, AND COPYRIGHT LAW

The public’s lack of understanding of copyright law is exacerbated in the fan site controversies because many people who create websites, especially fan sites, are teenagers or even younger.⁴⁵ They are probably uneducated about copyright law and it may be difficult to effectively explain the law to them.⁴⁶

During the year 2000, the controversy over the peer-to-peer file swapping service Napster helped bring the issue of copyright law to “people who [have] never seen a legal brief.”⁴⁷ However, a media distillation of copyright law as it related to Napster may not have been more accurate or clear than the explanations accompanying previous copyright disputes. Additionally, understanding or accepting that the use of Napster was copyright infringement did not necessarily clarify the intricacies of copyright law or create an ability to apply copyright law to other circumstances, such as fan sites. Use of Napster meant that

⁴¹ Thomas C. Inkel, Comment, *Internet-Based Fans: Why the Entertainment Industries Cannot Depend on Traditional Copyright Protections*, 28 PEPP. L. REV. 879, 902 (2001).

⁴² SIDA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 187 (2001).

⁴³ DIGITAL DILEMMA, *supra* note 28, at 128.

⁴⁴ *Id.*

⁴⁵ *E.g.*, Harmon, *supra* note 23 (nineteen year old Jim Yagmin created a “Kmart” sucks site); Powers, *supra* note 9 (sixteen year old Eric Greene created a *The Simpsons*/Fox protest site, an eighteen year old fan who goes by the name solo84 created a *Buffy, the Vampire Slayer* site, and Brian Scates, a nineteen year old music fan, created an anti-Metallica site)

⁴⁶ See Litman, *supra* note 34, at 51.

⁴⁷ Powers, *supra* note 9. See VAIDHYANATHAN, *supra* note 42, at 185.

It is also important to note that the first Napster decision was issued nearly five years after the fan site controversies first began. The first Napster decision, *A&M Records, Inc. v. Napster, Inc.*, was issued in 2000. Copy. L. Rep. (CCH) P28072, 54 U.S.P.Q.2d (BNA) 1746 (N.D. Cal. May 5, 2000). One of the first publicized cases regarding Fox and a fan site was in 1995. Harmon, *supra* note 23.

individuals could choose to forgo purchasing music. As such, a user could recognize the impropriety of acquiring a record label's copyrighted work without paying the company.

However, in the case of a copyrighted image that appears on a webpage, an analogy is not easy to make. Even if it is clear that the person maintaining the website does not own the copyright, there does not seem to be any harm to the actual copyright owner.⁴⁸ These images may not be available for purchase, so there is no immediately obvious financial damage.

For the companies, pursuing these individuals is problematic because young people who infringe on copyrights also create difficulties in terms of obtaining and enforcing judgments against them. At the very least, these defendants would have few means to pay damages.⁴⁹ Nevertheless, the No Electronic Theft Act ("NET Act"), which this note will discuss in more detail below,⁵⁰ increased the types of copyright infringements subject to federal criminal prosecution in 1997.⁵¹ This has created a problem for federal judges unaccustomed to sentencing juveniles because traditional federal defendants were not minors.⁵²

III. EMERGENCE OF FAN SITES AND THEIR COPYRIGHT IMPLICATIONS

A. FAN SITES DEFINED

Throughout the 1990s, fans created several web sites on the Internet devoted to various television shows and movies, including *Star Trek*, *Star Wars*, *Millennium*, *The X-Files*, *The Simpsons*, *Buffy, the Vampire Slayer*, and *Lois and Clark: The New Adventures of Superman*.⁵³ By the mid-1990s there were reportedly over three thousand fan sites devoted to *The Simpsons* alone.⁵⁴ Fans created these websites for a variety of reasons,

⁴⁸ See Koster & Shatz-Akin, *supra* note 29, at 21.

⁴⁹ *Id.* at 22.

⁵⁰ See *infra* Part III.B.4.

⁵¹ See generally Stephanie Brown, *The No Electronic Theft Act: Stop Internet Piracy!*, 9 J. ART. & ENT. LAW 147 (1998) (discussing the ability of the NET Act to combat multiple types of infringements on the Internet).

⁵² See Wendy R. Leibowitz, *Judges Having Hard Time With Computer Crime; Kid Stuff*, THE NAT'L L.J., July 6, 1998, at A1.

⁵³ See Powers, *supra* note 9; The Original Internet Lois and Clark Episode Guide, at <http://www.neumedia.net/~sykes/lc/index.html> (last modified July 28, 2000).

⁵⁴ *The Net: The Golden Age*, Evergreen Terrace, at <http://www.nohomers.net/info/net/> (last visited Nov. 14, 2001) [hereinafter *The Golden Age*]. As of April 4, 2003, Evergreen Terrace no longer exists at <http://www.nohomers.net> or anywhere on the web. The address <http://www.nohomers.net> is now The No Homers Club, a discussion forum, and reports that "With the FOX-caused shut downs of *Evergreen Terrace* and *The Springfield Shopper*, the board became relatively independent and moved to NoHomers.net itself in October 2002." See <http://www.nohomers.net/rules.html> (last visited Apr. 4, 2003).

including a desire to celebrate television shows and movies they loved⁵⁵ or to fill a void left by an unsatisfying official site.⁵⁶ One fan compared creating a site to “being a batboy. You don’t play the game, but you feel a part of it.”⁵⁷

Even before the emergence of the Internet, commentators analogized fan culture to traditional folk culture, where the line between artists and audiences is blurred.⁵⁸ The community of fans “exists independently of formal social, cultural, and political institutions; its own institutions are extralegal and informal with participation voluntary and spontaneous.”⁵⁹ Members of these communities share exclusive, special knowledge that others do not have.⁶⁰ Fans often consider themselves loyal guardians of their favorite television shows and movies.⁶¹ Some of these individuals are even drawn to conventions to further celebrate these programs.⁶² As a result of all this, fans are able to forge symbolic communities created by shared interests in stories as opposed to physical proximity as in traditional communities.⁶³

Thus, it is unsurprising that fan-created websites flourish on the Internet. One fan site even asserts that as long as there has been an Internet, there has probably been a fan site for *The Simpsons*.⁶⁴ These webpages become places for some fans to express their zealotry for a show or a movie and for others to obtain new information or insights and often leave their own. Fan sites can include a variety of different elements, including both copyright-protected works owned by others and original elements added by the webmaster.⁶⁵ A page, for instance, could contain any of the following: images of characters, scripts, trivia games, criticism, fan fiction,⁶⁶ frame grabs,⁶⁷ streaming or downloadable videos, quote lists,

⁵⁵ See, e.g., *Fox Update*, at <http://www.lardlad.com/fox.shtml> (last visited Apr. 4, 2003) [hereinafter *Fox Update*].

⁵⁶ FUXWorld was a parody of the then official FOX site for *The Simpsons*, which in the online *The Simpsons* community was criticized for being unimaginative and rarely updated. *The Net: The Fans Fight Back*, EVERGREEN TERRACE, at <http://www.nohomers.net/info/net/reconstruction.shtml> (visited Nov. 14, 2001) [hereinafter *Fans Fight Back*].

⁵⁷ Powers, *supra* note 9.

⁵⁸ See HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 272–73 (1992).

⁵⁹ See *id.*

⁶⁰ ROGER C. ADEN, *POPULAR STORIES AND PROMISED LANDS: FAN CULTURES AND SYMBOLIC PILGRIMAGES* 167 (1999).

⁶¹ See Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 *CARDOZO ARTS & ENT. L.J.* 365, 388 (1992).

⁶² See ADEN, *supra* note 60, at 151.

⁶³ See *id.* at 93.

⁶⁴ See *The Golden Age*, *supra* note 54.

⁶⁵ See Powers, *supra* note 9.

⁶⁶ Fan fiction consists of stories written by fans who take characters from a pop culture source, e.g., television shows, and write new stories that may include alternate plotlines or even resurrect dead characters. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L. REV.* 651, 655 (1997).

⁶⁷ Frame grabs are still images captured in digital form on a computer. See *Audio-Visual Glossary*, SHARP’S RESOURCE CENTER, at <http://sharpsav.com/resources/glossary/f.htm> (last visited Apr. 4, 2002).

fan-created art of characters, episode guides, compendiums of general information, and links to other similar sites.⁶⁸ It is possible for these elements to vary in amount from sites with vast quantities of material owned by a studio to those with mostly original work to sites with an even combination of both. Because fan sites have a different amount of a studio's copyright-protected material and varying ratios of material owned by each party, a specific analysis of liability issues would not apply well to all fan sites.⁶⁹ However, a general examination of the relevant copyright issues will be useful in gauging the problems created by these uses.

B. COPYRIGHT AND FAN SITES

A fan site creator currently must comply with the provisions of the 1976 Copyright Act,⁷⁰ the Digital Millennium Copyright Act ("DMCA"),⁷¹ and the NET Act⁷² to legally use copyrighted material.⁷³

1. *Copyright Under the 1976 Act*

Congress finds its authority to make United States copyright law in the Constitution: "The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁷⁴ Copyright law's primary purpose is to benefit the public by encouraging the creation and distribution of creative works.⁷⁵ An important secondary purpose of the copyright regime is to provide an economic incentive for authors to create and publish their works.⁷⁶

Traditional copyright law under the 1976 Act and its amendments grants the following exclusive rights to copyright holders:

- (1) reproduction;
 - (2) distribution of copies;
 - (3) public performance;
 - (4) public display;
 - (5) public performance by digital audio transmission of sound recordings;
- and

⁶⁸ See Powers, *supra* note 9 (citing a *Buffy, the Vampire Slayer* fan who downloaded video clips from fan sites to watch on her computer after every episode before she started making video clips for her own website); Fox Update, *supra* note 55; *The Golden Age*, *supra* note 54.

⁶⁹ For example, a fan site could easily contain one image owned by Fox, with several pages of commentary and personal opinion about the show, probably not creating any issues—or hundreds of images and sound, in addition to commentary, and be of great concern to a studio.

⁷⁰ See generally 17 U.S.C. § 106 (2000).

⁷¹ See generally *id.* §§ 1201–02 (2000).

⁷² See generally 18 U.S.C. § 2319 (2000).

⁷³ Lauren Yamamoto, Notes & Comments, *Copyright Protection and Internet Fan Sites: Entertainment Industry Finds Solace in Traditional Copyright Law*, 20 LOY. L.A. ENT. L. REV. 95, 101 (2000).

⁷⁴ U.S. CONST. art. I, § 8, cl. 8.

⁷⁵ See Koster & Shatz-Akin, *supra* note 29, at 19.

⁷⁶ See *id.*

(6) preparation of derivative works based upon the copyrighted work.⁷⁷

The party asserting that a violation has occurred must establish ownership of rights in the works, prove that copying has occurred, and show that more than a de minimis amount has been taken from the protected work.⁷⁸ If a user meets these criteria, a court will find that there was infringement, absent some statutory exception.⁷⁹ In the case of fan sites, it should not be controversial that a studio owns the images of its characters that it has created, the dialogue, and entire episodes or films. There may be some debate as to whether any characters have copyright protection.⁸⁰ Copying, where challenged, is determined by establishing access to the original work and similarity between the works.⁸¹ In some circuits, striking similarity between the works may compensate for weak evidence of access.⁸² Once a rights holder establishes copying, a court will only find infringement if too much copying has taken place.⁸³ The standard test for whether there has been too much copying is whether there is substantial similarity between the original work and the potentially infringing work.⁸⁴

Many items, including “text, graphics, photographs, moving images or sounds,” that may appear on a fan site are copyright-protected.⁸⁵ Fan sites may implicate the right to reproduce, the right to distribute copies, the right to publicly display, and the right to perform the copyrighted work publicly.⁸⁶ A court may also consider fan sites to be derivative works, violating the right to adapt the work.⁸⁷ Copyright law will not protect factual information that the site may contain.⁸⁸

a. *The Right to Reproduce*

The right to copy based in 17 U.S.C. § 106(1) is likely violated by fan sites that feature quotes or scripts; exhibit images that are scanned from magazines, are frame grabs, or are acquired from other websites; show videos; or provide sounds, because fans must copy these materials from some other source to place them on the fans’ websites. In *Playboy*

⁷⁷ See 17 U.S.C. § 106 (2000).

⁷⁸ See *Castle Rock Entm’t, Inc. v. Carol Publ’g Co.*, 150 F.3d 132, 137 (2d Cir. 1998).

⁷⁹ See 17 U.S.C. § 106 (2000).

⁸⁰ Tushnet, *supra* note 66, at 659.

⁸¹ *Arnstein v. Porter*, 154 F. 2d 464, 468 (2d Cir. 1946).

⁸² *Gaste v. Kaiserman*, 863 F. 2d 1061, 1067–69 (2d Cir. 1988).

⁸³ *Castle Rock Entm’t*, 150 F. 3d at 137.

⁸⁴ *Id.* at 138.

⁸⁵ See *Koster & Shatz-Akin*, *supra* note 29, at 19.

⁸⁶ *Yamamoto*, *supra* note 73, at 101–05.

⁸⁷ “A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2000). “A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” *Id.*

⁸⁸ See *Koster & Shatz-Akin*, *supra* note 29, at 19.

Enterprises, Inc. v. Webbworld, Inc.,⁸⁹ the court found that defendant Webbworld “reproduced” the plaintiff’s copyright-protected images by creating copies on each of the servers from which the defendant’s website could be accessed.⁹⁰ In *Religious Technology Center v. F.A.C.T. Net*,⁹¹ the court found unauthorized copying where the defendants scanned the copyrighted work onto their computer.⁹² In light of both *F.A.C.T. Net* and *Webbworld*, a court would likely find that the actions of many fan site webmasters violate a copyright owner’s reproduction right.

b. *The Right to Distribute*

Fan sites featuring various copyrighted media may also implicate the distribution right. The distribution right is found in § 106(2). The district court in *Webbworld* found that the defendant distributed the plaintiff’s copyrighted works by providing “virtually exact reproductions” of the images that users could print or download after accessing the site.⁹³ Thus, fan sites that offer copyright-protected materials, such as images, sounds, videos, and dialogue that web surfers can download to their computers or print from the webpage will likely infringe the right to distribute.

c. *The Right to Display Publicly*

Fan sites with images may also violate the right of public display found in § 106(4). Displaying a work is defined as showing “a copy of it, either directly or by means of a film, slide, television image, or any other device or process.”⁹⁴ A display is public if a work is “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” or if it is “transmit[ted] or otherwise communicate[d] . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”⁹⁵ In *Webbworld*, the court found unauthorized public display because users visiting the defendant’s webpage could view the plaintiff’s copyright-protected works.⁹⁶ Fan sites that feature a studio’s copyright-protected

⁸⁹ 991 F. Supp. 543 (1997).

⁹⁰ *Id.* at 551.

⁹¹ 901 F. Supp. 1519 (1995).

⁹² *Id.* at 1524.

⁹³ *Webbworld*, 991 F. Supp. at 551. *See also* *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (ruling that the right to distribute was violated when the defendant made the copies of the copyrighted work available to the public); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (holding that the copyrighted works owned by the plaintiff that were publicly available on the defendant’s bulletin board service violated plaintiff’s exclusive right to distribute).

⁹⁴ 17 U.S.C. § 101 (2000).

⁹⁵ *Id.*

⁹⁶ *Webbworld*, 991 F. Supp. at 551–52. *See also* *Russ Hardenburgh*, 982 F. Supp. at 513 (finding the public display right infringed when the defendant made the plaintiff’s copyright-protected materials available online to subscribers to the defendant’s website); *Frena*, 839 F. Supp. at 1557 (finding a public display even where the audience was limited to subscribers to the defendant’s bulletin board service).

images may infringe upon the exclusive public display right because visitors can view the works.

d. *The Right to Perform Publicly*

Additionally, some fan sites may violate § 106(5)'s public performance right. This right applies to motion pictures and other audiovisual works.⁹⁷ The statute states that “[t]o ‘perform’ a work means . . . , in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”⁹⁸ The same criteria for determining whether a work has been displayed publicly apply to analyzing whether a performance has been public. The relevant factor is whether the performance was open to the general public or was at a place open to those other than friends or family.⁹⁹

In *Columbia Pictures Industries, Inc. v. Aveco, Inc.*,¹⁰⁰ the public performance right was infringed when a defendant allowed patrons to rent videos and watch them in private rooms on the defendant's premises.¹⁰¹ Though the rooms were not open to the general public and the videos were only to be viewed in those rooms, the court found that because the store itself constituted a place open to the general public, it did not matter that the videos were viewed in individual rooms.¹⁰²

A court would probably consider videos on fan sites “performed” because they are either motion pictures or audiovisual works that the webmasters show. Fan sites are generally available to anyone on the Internet, which may be a public place. Though visitors view the work from seemingly private locations, such as homes or offices, such performances are likely public because many people can access the performances in different places at any time. Therefore, a court may find that websites allowing users to view entire or even partial episodes or films violate the public performance right.

e. *Public Performance of Sound Recordings*

Fan sites that allow copyrighted sound clips to be downloaded may violate the public performance right in digital audio transmissions secured to copyright holders in § 106(6). The copyright owner must license interactive services where a user selects and receives a transmission upon request.¹⁰³ Downloading unauthorized sound files from the Internet constitutes performance of digital sound recordings and infringes this

⁹⁷ 17 U.S.C. § 106(4) (2000).

⁹⁸ *Id.* § 101 (2000).

⁹⁹ *Id.*

¹⁰⁰ 800 F.2d 59 (3rd Cir. 1986).

¹⁰¹ *Id.* at 63.

¹⁰² *See id.*

¹⁰³ *See* 17 U.S.C. § 114(d)(3)(C) (2000).

right.¹⁰⁴ Therefore, fans who place sound files on their sites that web surfers can download may violate this right.

f. *The Right to Create Derivative Works*

Fan sites themselves may be derivative works. The Copyright Act defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹⁰⁵ Fan fiction found on these sites may also violate the right to make derivative works.¹⁰⁶ However, fan fiction may not infringe if copyright law does not protect the program’s characters themselves.¹⁰⁷

In *Castle Rock Entertainment, Inc. v. Carol Publishing Co.* (“*Castle Rock*”),¹⁰⁸ the Second Circuit found infringement where the defendant created a trivia book, a derivative work, based on the plaintiff’s television show.¹⁰⁹ The book included fictional information from many episodes.¹¹⁰ Accordingly, a court may deem fan sites which incorporate the fictional elements of a show or movie with original images or fan fiction to have adapted the original work in a way that infringes upon the copyright. Thus, some fan sites likely infringe this exclusive right.

This brief analysis establishes that studios may have a cause of action against many fan sites for copyright infringement under the 1976 Act, even before considering other claims under the provisions added by the DMCA and the NET Act. Undoubtedly, media companies that produce these works own the copyrights to them.¹¹¹ Since these images are often virtually exact copies of copyrighted material, a court will almost certainly find copying. A court may also conclude that too much copying has occurred based on the exclusive rights, and may thus find infringement absent some exception, such as fair use.

2. *The Fair Use Exception*

The implications of the fair use exception for fan sites are unresolved because they have yet to be adjudicated. The fair use exemption from copyright infringement provides a limitation on the exclusive rights of copyright holders and, thus, may allow some fan sites to use copyrighted material. Fair use allows courts to avoid applying copyright law rigidly when “it would stifle the very creativity which that law is designed to

¹⁰⁴ David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 246 (2000).

¹⁰⁵ 17 U.S.C. § 101 (2000).

¹⁰⁶ Tushnet, *supra* note 66, at 660.

¹⁰⁷ *See id.* at 659.

¹⁰⁸ 150 F.3d 132 (2d Cir. 1998).

¹⁰⁹ *Id.* at 135.

¹¹⁰ *Id.* at 135–36.

¹¹¹ *See id.* at 137.

foster.”¹¹² The statute lists an illustrative set of possible fair uses of copyrighted works: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹¹³ Courts must consider four nonexclusive factors when determining whether fair use applies:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹¹⁴

The four factors are not independent of one another, but rather, courts are to consider and weigh these factors together with copyright law’s purposes in mind.¹¹⁵

a. *Purpose and Character of the Use*

In considering the purpose of a use, a site with a commercial motive may fare poorly.¹¹⁶ Courts may find operation for profit where a site is generating advertising revenue, promoting an association that requires dues,¹¹⁷ or charging a subscription fee to view the site.¹¹⁸ However, fan site creators generally do not operate their pages for profit.¹¹⁹ Nor do these pages typically require payment to view their content.¹²⁰ Courts may view fan sites with banner ads as engaging in profit-seeking behavior even though the ads may not even generate sufficient revenue to offset the operating expenses of the website.¹²¹

This factor would favor fan sites with an educational purpose or that include criticism. Mere display of a copyrighted work is not transformative

¹¹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)

¹¹³ 17 U.S.C. § 107 (2000).

¹¹⁴ *Id.*

¹¹⁵ *See Campbell*, 510 U.S. at 577. *See also* Leval, *supra* note 32, at 1110–11.

¹¹⁶ *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (a commercial use can be found where the unauthorized user may profit from the exploitation of the copyrighted material, even if profit is not the primary motive). *See also* *Koster & Shatz-Akin*, *supra* note 29, at 19.

¹¹⁷ *See Marble-FI, Inc. v. Nat’l Sass’s of Fire Equip. Disturb.*, 983 F. Supp. 1167, 1175 (N.D. Ill. 1997) (finding that the defendant was engaged in a commercial activity where the plaintiff’s copyrighted material was obtained without paying the required fee, the defendant promoted its association which had dues-paying members, and the defendant’s site generated advertising revenue).

¹¹⁸ *See Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993) (noting that users who paid the defendant twenty-five dollars a month or purchased products from the defendant were able to access the online bulletin board that contained the plaintiff’s copyrighted material).

¹¹⁹ *See Koster & Shatz-Akin*, *supra* note 29, at 19.

¹²⁰ *See Tushnet*, *supra* note 66, at 664 (noting that no one has to pay to read fan fiction on the Internet).

¹²¹ *See* Charlie Morris, *Sell Ads on My Site?*, THE WEB DEVELOPER’S JOURNAL, at http://www.webdevelopersjournal.com/articles/sell_ads_on_my_site.html (Nov. 30, 1999) (last visited Apr. 4, 2003) (noting that banners may not create enough profit to even pay for the yearly costs of maintaining the domain name or to pay the costs of a web hosting service).

and, thus, sites whose content does not provide the public with any enlightenment will likely fail to qualify for the fair use exception. Courts instead favor a use that is “transformative,” meaning that it adds “further purpose or different character, altering the first with new expression, meaning or message.”¹²² In *Castle Rock*,¹²³ the Second Circuit found no transformative purpose when the defendant took fictional details about the plaintiff’s television show’s characters and created a trivia book because the defendant “so minimally altered” the original expression.¹²⁴ In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* (“*Netcom*”),¹²⁵ a district court found the defendant’s use was not transformative because there was little new expression added to the plaintiff’s works.¹²⁶

Great variation exists between sites with regard to whether a particular fan site makes transformative use of copyrighted material. A court would deem a site that adds little new expression nontransformative, whereas a site that encompasses fan fiction or commentary and reviews may be considered sufficiently transformative.¹²⁷ Additionally, a more transformative work may decrease the significance of the commercial nature of a use.¹²⁸ Sites that seem to regurgitate the material created by a copyright owner with no additional creative input may also find the purpose and character of the use factor favoring the studios.¹²⁹

Courts assess whether a use is transformative on a case-by-case basis and there is no set formula to determine when a use is transformative. Generally, adding creative elements increases the likelihood of a court considering a use transformative, but adding commercial elements decreases such a finding. Because of their commercial aspect, fan sites that have banner ads or sell merchandise could be deemed less transformative. Being commercial, however, may not impair the sites’ ability to claim protection under fair use because many of § 107’s illustrative uses are generally conducted for profit.¹³⁰ Ultimately, this factor may favor sites with no commercial use and significantly added creative elements.

¹²² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹²³ 150 F.3d 132 (2nd Cir. 1998).

¹²⁴ *Id.* at 143.

¹²⁵ 923 F. Supp. 1231 (N.D. Cal. 1995).

¹²⁶ *Id.* at 1243.

¹²⁷ Tushnet, *supra* note 66, at 665.

¹²⁸ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The Supreme Court held that a parody that seems to comment or criticize the original may fare favorably under this factor even if the second work is of a commercial nature. *Id.* at 583, 584.

¹²⁹ Conversely, the California federal district court in *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.* held that the noncommercial use of the plaintiff’s works tilted the balance slightly in favor of defendant, despite the “minimally transformative nature” of the use. 923 F. Supp. at 1244.

¹³⁰ *See Campbell*, 510 U.S. at 584. *See also Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Co.*, 150 F.3d 132, 142 (2nd Cir. 1998) (noting that the court gave little weight to the fact that the defendant’s trivia book based on the plaintiff’s television show was created for commercial gain).

b. *Nature of the Copyrighted Material*

Use of original copyrighted works either of great interest to the public, or having little creative input, favors a fair use defense.¹³¹ Conversely, use of a fictional work goes against the defense.¹³² In terms of television shows, courts consider a show as a single work instead of reviewing possible infringements episode-by-episode.¹³³ In *Castle Rock*, the source material for the defendant's book, the *Seinfeld* television show, was creative and fictional, and the court found for the copyright owner.¹³⁴ Television shows and movies are often original works.¹³⁵ Most fan sites will not do well on this factor because the copyrighted material found on fan sites, including scripts, sound files, and images, are usually highly creative and fictional.

c. *Amount and Substantiality of the Copyrighted Work Used*

In general, the less copyright-protected material used, the more likely fair use will apply.¹³⁶ Courts assess this factor in terms of the copyrighted work in its entirety¹³⁷ and consider how much of the original work is taken, rather than how much of the allegedly infringing work is made up of the original.¹³⁸

There is no bright line at which the courts decide that the amount of copying will be too great for fair use to apply.¹³⁹ Taking an entire work typically bars a fair use defense, but this cannot be characterized as a per se rule.¹⁴⁰ Also, it is possible for a small amount of copying to fail to meet the fair use exception if the material taken constitutes the "heart" of the work.¹⁴¹ In *Castle Rock*, the defendant created over 600 trivia questions based on the plaintiff's television show, and the court found that the amount of material taken was far greater than necessary to capture the show's essence.¹⁴² Consistent with this view is *Playboy Enterprises v.*

¹³¹ See *Koster & Shatz-Akin*, *supra* note 29, at 19–20.

¹³² See *Netcom*, 923 F. Supp. at 1245. See also *Yamamoto*, *supra* note 73, at 110.

¹³³ See *Castle Rock Entm't, Inc.*, 150 F.3d at 138.

¹³⁴ *Id.* at 143.

¹³⁵ See *id.* at 143–44. For example, *The X-Files*, a FOX network television series about FBI agents battling a government conspiracy involving an alien race; *Buffy, the Vampire Slayer*, a WB network television series produced by FOX involving a high school student who battles vampires on a weekly basis; and *Star Trek: The Next Generation*, a Paramount Pictures television series about a spaceship crew exploring new civilizations throughout the universe.

¹³⁶ See *Koster & Shatz-Akin*, *supra* note 29, at 20.

¹³⁷ See 17 U.S.C. § 107(3) (2000).

¹³⁸ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985) (quoting Judge Learned Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936), cert. denied, 298 U.S. 669 (1936), stating that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate").

¹³⁹ See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

¹⁴⁰ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50. See also *Leval*, *supra* note 32, at 1122.

¹⁴¹ *Nation Enters.*, 471 U.S. at 564–65 (finding infringement where the defendant took only 300 words of a memoir because the defendant appropriated the most important parts of the book).

¹⁴² *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Co.*, 150 F.3d 132, 144 (2d Cir. 1998).

Frena,¹⁴³ where the court found that, although the photos in *Playboy* magazine did not comprise the whole work, they were essential to the publication's fame.¹⁴⁴

Fan sites with videos of television show episodes would fare poorly under this factor because courts would probably find that such pages had taken the whole work, and it would be difficult to imagine a justification for such a large taking. A court may deem fan sites containing many images from a television show, like the site of the defendant in *Frena*, to have taken an essential part of the program.

Although images may be meaningless without the context of the actual episode or film, they may not constitute enough material for a court to conclude that the site took too much to infringe. Though the point at which the amount of material copied tilts this factor against the fan site operator is unclear, fan sites that include copious amounts of copyrighted material probably will not fare well under this factor.

d. *Effect on the Market*

This factor assesses whether the copying will harm any of the original work's markets or potential markets. Courts consider the market for the original work as well as the market for possible derivative works.¹⁴⁵ The issue is not whether the use destroys the market, but whether the second work may substitute for the original work.¹⁴⁶ In *Religious Technology Center v. Netcom, On-Line Communications, Inc.*¹⁴⁷ the defendant posted portions of various Church of Scientology texts online, but the California District court was not persuaded that such availability would deter people from paying the Church for the information because the defendant's postings were incomplete.¹⁴⁸ It is possible that a court may find fair use if the copying benefits the market for the copyrighted work or if the copyright holder could not do what the user has done with the work.¹⁴⁹ Courts presume that commercial uses negatively affect the market.¹⁵⁰

Most fan sites probably do not impair the market for original works such as television shows and movies. This exception will not favor fan site owners if the copying decreases the likelihood that people will pay for the original work.¹⁵¹ Fans do not pay to view programs on broadcast television, though they do pay for movies and cable television shows. The original market for broadcast television shows is arguably unaffected by

¹⁴³ 839 F. Supp. 1552 (M.D. Fla. 1993).

¹⁴⁴ *See id.* at 1558.

¹⁴⁵ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994).

¹⁴⁶ *Castle Rock Entm't, Inc.*, 150 F.3d at 145 (noting that while a caustic review that may destroy the demand for the original is a fair use, the trivia book at issue in that case substituted for a derivative use that the plaintiff would naturally develop).

¹⁴⁷ 923 F. Supp. 1231 (N.D. Cal. 1995).

¹⁴⁸ *Id.* at 1248.

¹⁴⁹ *Koster & Shatz-Akin*, *supra* note 29, at 20.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

fan sites, but there may be a financial impact for movies and for shows on cable.

Those sites that feature complete episodes that a web surfer may view online or download to his computer may interfere with the market in terms of the studio's ability to sell videotapes and DVDs of episodes or films. This may also harm the value of the syndication rights for the series. As derivative works, fan sites may have a negative effect on the market for studios' official sites for their shows and movies. Fox, for example, reportedly spent \$100,000 on the website it created for the television show *Millennium*.¹⁵² A significant investment may become less valuable if fans choose to visit unofficial websites. Also, the competition from such pages could be harmful if a studio chooses to sell merchandise or to support the official websites with banner ads.

Certain elements found on fan sites, such as fan fiction, may in fact benefit studios by maintaining fan interest between airings of new episodes or production of sequels, or even when a show has not aired for some time.¹⁵³ Additionally, fan-created materials will not necessarily negatively affect a seemingly similar market.¹⁵⁴ They may spark people's interest about the shows and films or cause individuals to purchase the studio's products.

e. *Fair Use Factors Balanced*

Ultimately, courts decide the applicability of the fair use exception on the facts of each case.¹⁵⁵ Previous cases may provide predictability as to what types of behaviors are permissible, but different courts may reach contrary results when considering similar facts. In *Netcom*, a California federal district court found no fair use for the posting of Church of Scientology documents online because the court believed that the defendant took too much of the original work in relation to the relatively minor criticism or commentary added.¹⁵⁶ In *F.A.C.T. Net*, however, a case decided the same year, a federal district court in Colorado ruled that a fair use defense would likely succeed where the defendant posted Scientology works on the Internet because the defendant's acts were part of a debate regarding the works, were noncommercial, and probably would not affect the market.¹⁵⁷ The difference between the two cases may seem slim because the *Netcom* defendant's use was also non-commercial, unlikely to affect the market for the works, and allegedly done as part of a criticism. Thus, the likelihood of inconsistency makes it difficult to predict the applicability of fair use in many fan site cases. As a resolution, one

¹⁵² Harmon, *supra* note 23.

¹⁵³ See Jenkins, *supra* note 58, at 65–66.

¹⁵⁴ Tushnet, *supra* note 66, at 673–74 (noting that despite the abundance of fan fiction, official Star Trek novels are successful).

¹⁵⁵ See Religious Tech. Ctr. v. F.A.C.T. Net, Inc., 901 F. Supp. 1519, 1525 (D. Colo. 1995).

¹⁵⁶ Religious Technology Center v. Netcom On-Line Communications, Inc, 923 F. Supp. 1231, 1249 (N.D. Cal. 1995).

¹⁵⁷ *F.A.C.T. Net*, 901 F. Supp. at 1525.

commentator suggested that courts may find it simply more efficient to recognize fair use for fan use of materials that are widely available on the Internet.¹⁵⁸ This view, however, would likely be vigorously opposed by rights holders and create a sweeping new exemption for individuals.

3. *The Digital Millennium Copyright Act*

The DMCA, enacted in 1998, created liability for a variety of actions on the Internet, including the circumvention of copyright protection systems.¹⁵⁹ The DMCA also created liability for anyone who removes information from a work identified as protected by copyright, e.g., the author or the title of a work.¹⁶⁰ The DMCA provided incentives for Internet Service Providers (ISPs) to comply with rights holders' requests by granting immunity from liability for ISPs who comply with procedures for removing the potentially infringing websites.¹⁶¹

The DMCA's provisions on circumventing protective measures that enforce a copyright¹⁶² would not apply to a fan site that displays images the creator scanned from a magazine.¹⁶³ They would, however, apply to a fan who acquires an image or a sound file by decrypting technological copyright protection and fan sites that remove copyright notice from a work. Most fan sites will not violate DMCA provisions because they obtain images from books, magazines, films, or television episodes; and fans are able to record sounds from televised broadcasts, videos, or DVDs. If any of those images contained a notice indicating their status as protected by copyright and a fan site creator removed it, the webmaster would then be liable under the DMCA.

Studios may most effectively use the DMCA by utilizing the provisions relating to ISPs. The DMCA provides protection from liability for ISPs that store or transmit copyrighted materials unknowingly.¹⁶⁴ For example, the DMCA states that ISPs do not infringe copyrights when "they transmit, route or provide 'intermediate and transient storage' for information provided by their customers or other persons."¹⁶⁵ Protection from liability is also provided when an ISP stores infringing materials by hosting a user's website or provides hypertext links to infringing materials at a user's request.¹⁶⁶

To take advantage of these provisions, ISPs must take certain actions.¹⁶⁷ A studio that believes its rights are being infringed on an ISP's

¹⁵⁸ See Inkel, *supra* note 41, at 910.

¹⁵⁹ See generally 17 U.S.C. § 1201 (2000).

¹⁶⁰ See *id.* § 1202(b).

¹⁶¹ See *id.* § 512(c), (i).

¹⁶² See *id.* § 1201(a).

¹⁶³ Yamamoto, *supra* note 73, at 124.

¹⁶⁴ John F. Delaney, Michelle W. Kim & Deborah H. Isser, *The Law of the Internet: A Summary of U.S. Internet Case Law and Legal Developments*, 545 PLI/PAT. 61, 94 (Jan. 1999).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 94-95.

¹⁶⁷ See *id.* at 94.

system must provide written notice to the ISP that substantially complies with several requirements.¹⁶⁸ In response, the ISP must expeditiously remove or prevent access to the material.¹⁶⁹ Failure to remove material in response to the notice will cause the ISP to forfeit its exemption from liability.¹⁷⁰ The ISPs must alert the user to the notice, but the law shields the ISP from liability for removing the material, providing that it acts in good faith.¹⁷¹

This feature of the DMCA provides a seemingly effective tool for studios. Copyright owners have already implemented targeting ISPs as a method of enforcing copyright protection.¹⁷² The procedure allows copyright holders to avoid the difficult process of identifying individuals who may be infringing¹⁷³ by allowing them to target the more easily identifiable ISPs,¹⁷⁴ who will then exert pressure upon the individuals. One problem with this solution is that a targeted fan may simply subscribe to another ISP and recreate the website with the same material.¹⁷⁵ While this provision eliminates many enforcement problems, success may be less certain than when challenging individual infringers.

4. *The NET Act*

Congress enacted the NET Act to protect electronic works.¹⁷⁶ They created the law to close the so-called "LaMacchia loophole"¹⁷⁷ created by *United States v. LaMacchia*.¹⁷⁸ In *LaMacchia*, a twenty-one year old student at the Massachusetts Institute of Technology named David LaMacchia set up an electronic bulletin board on the Internet and encouraged users to upload computer games and software.¹⁷⁹ LaMacchia then transferred these programs to a second site where others could download them.¹⁸⁰

The government charged LaMacchia with conspiring to violate the federal wire fraud statute through the creation of a system designed to further illegal reproduction and distribution of copyright-protected software without compensation to the manufacturers and vendors of the software.¹⁸¹

¹⁶⁸ See 17 U.S.C. § 512(c)(3) (2000); Delaney, *supra* note 164, at 96–97.

¹⁶⁹ 17 U.S.C. § 512(c)(1)(C) (2000).

¹⁷⁰ See *id.*; Delaney, *supra* note 164, at 97.

¹⁷¹ See 17 U.S.C. § 512(g)(1)–(2), (4) (2000).

¹⁷² Inkel, *supra* note 41, at 893.

¹⁷³ See Koster & Shatz-Akin, *supra* note 29, at 21.

¹⁷⁴ See *id.*

¹⁷⁵ See Inkel, *supra* note 41, at 893. *E.g.*, *The Net: Here We Go Again*, Evergreen Terrace, at <http://www.nohomers.net/info/net/reconstruction.shtml> (last visited Nov. 14, 2001) [hereinafter *Here We Go Again*] (describing how the site's webmasters have received cease-and-desist orders twice and have moved to new ISPs each time to avoid compliance).

¹⁷⁶ Yamamoto, *supra* note 73, at 115.

¹⁷⁷ See Richard Raysman & Peter Brown, *Internet Copyright Developments*, N.Y. L.J., Feb. 10, 1998, at 3.

¹⁷⁸ 871 F. Supp. 535 (D. Mass. 1994).

¹⁷⁹ *Id.* at 536.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

The Massachusetts District Court held that because Congress did not intend for the statute to cover copyright-related activities, the government could not charge LaMacchia under the statute.¹⁸² The court also found that the government could not criminally prosecute LaMacchia for copyright infringement under § 506 of the 1976 Copyright Act because LaMacchia was not acting for profit.¹⁸³ Congress passed the NET Act in response to *LaMacchia* to prevent similar future cases from being decided in such a way.¹⁸⁴

Under the NET Act, a person who:

[i]nfringes on a copyright either—

1. For purposes of commercial advantage or private financial gain, or
2. By the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1000¹⁸⁵

is criminally liable. The statute also notes that “evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.”¹⁸⁶

Some fan site creators who take material from a magazine or a book may know that a copyright protects the material and know that such use may constitute infringement.¹⁸⁷ By contrast, other webmasters who obtain their materials from other fan sites may not know that the material is copyright-protected, especially if the places where the original work comes from do not contain any notices. Now, however, most fan sites include disclaimers indicating that there is material on their pages for which a studio owns the copyright, sometimes because they have received cease-and-desist letters.¹⁸⁸

Selling, profiting, or attempting to profit may qualify as “financial gain” and, thus, subject the webmasters engaged in such behavior to liability for infringement under the first part of the NET Act.¹⁸⁹ The second approach to infringement under the NET Act, reproduction or distribution of over \$1000 in copyright-protected materials, would likely apply to the more typical not-seeking-a-profit site. Though it is not clear how much an individual image or sound may be worth, a site with a great deal of multimedia content may meet the \$1000 requirement. The NET Act would not impact sites with less copyrighted material.

¹⁸² *Id.* at 545.

¹⁸³ *Id.* at 541–42.

¹⁸⁴ See Brown, *supra* note 51, at 148–49.

¹⁸⁵ 17 U.S.C. § 506(a) (2000).

¹⁸⁶ *Id.*

¹⁸⁷ See Yamamoto, *supra* note 73, at 118.

¹⁸⁸ See, e.g., *The Golden Age*, *supra* note 54; *Fox Update*, *supra* note 55.

¹⁸⁹ “Financial gain” includes “receipt or expectation of receipt, of anything of value.” 17 U.S.C. § 101 (2000).

Although the DMCA and the NET Act do not likely affect a majority of fan sites, courts could find that these pages infringe on copyrights owned by a studio under traditional copyright law. Additionally, while some fan sites may find refuge in fair use, it will not protect all sites from litigation. Therefore, studios could justly encourage fans to remove offending content.

When dealing with fans, lawsuits seem to be an unfavorable remedy. Filing a lawsuit, even to protect the legitimate interest, would likely cause a backlash from fans online and may create negative press for studios by challenging the very people who support the shows or movies. Moreover, a lawsuit would need to be filed against each fan site owner individually in order to garner the most comprehensive results, but the result could produce a dangerous precedent if a court ruled against the studio.¹⁹⁰

IV. THE WEB WAR

The tensions between Fox and fan sites dedicated to the studio's shows ignited a protracted battle in 1995. One commentator succinctly noted the impulses of the factions:

Both the fans and the media companies want to cheat a little. The media companies want to parade their web savvy in the marketplace *and* they want to funnel all the Net traffic into a few commercial sites. The fans want to have freedom of speech and assembly in sites of their own choosing *and* to have fewer constraints on the use of copyrighted materials than in any other medium.¹⁹¹

A. FOX'S MOTIVATIONS AND ACTIONS

Starting in the mid-1990s, Fox was caught in an unenviable position as fan sites dedicated to Fox-produced television shows began to appear on the Internet, many containing large amounts of the studio's copyrighted material. Fox wanted to preserve creative control over its works, while avoiding the alienation of fans by vigorously enforcing its rights under the law.¹⁹²

Additionally, Fox did not want to risk forfeiting its right to take action against a possible infringer. Knowing that a webmaster was using the studio's copyrighted works while the studio stood idly by could have permanently foreclosed Fox's right to challenge the infringer.¹⁹³ A fan site owner sued by Fox in such a case could then defend himself or herself by asserting an implied license¹⁹⁴ or by claiming that by not acting, the studio waived its right to sue.¹⁹⁵ Courts may not be sympathetic to a claim by the studio that it waited for a minor, seemingly innocuous use of its intellectual

¹⁹⁰ See Inkel, *supra* note 41, at 909–10.

¹⁹¹ Steve Silberman, *The War Against Fandom*, WIRED NEWS, June 4, 1997, at <http://www.wired.com/news/print/0,1294,4231,00.html>.

¹⁹² See Yamamoto, *supra* note 73, at 98.

¹⁹³ See Koster & Shatz-Akin, *supra* note 29, at 18.

¹⁹⁴ NIMMER & NIMMER, *supra* note 38, § 10.03[A].

¹⁹⁵ *Id.* §§ 12.06, 13.07. See Koster & Shatz-Akin, *supra* note 29, at 18.

property on a fan site to escalate to objectionable levels.¹⁹⁶ However, some commentators have argued that failing to challenge minor, but possibly infringing, uses will not diminish a studio's rights against commercial infringers because copyright protection is not lost through lack of enforcement.¹⁹⁷ Even if copyright protection is lost by finding an implied license or undue delay, it only forecloses or limits a judgment against a particular offender, not all infringers.¹⁹⁸

Fox asserted that it did not want to shut down legitimate fan sites,¹⁹⁹ but it wanted to retain the "creative integrity" of its shows.²⁰⁰ Fox was particularly concerned about sites that made "excessive use of copyrighted images, that [did not] contain copyright . . . notices, and that use[d] the materials in a profit making venture."²⁰¹ Fox worried that these sites might infringe on several of the exclusive rights granted by the Copyright Act.²⁰²

Additionally, Fox felt financial pressures to shut down fan sites. Fox asserted that it had "contracts with creative guilds and licensors [containing] pay-per-use provisions" that limited the studio's ability to use the shows it produced.²⁰³ The studio could face costly lawsuits if a guild member's work was used on an unauthorized fan website.²⁰⁴ Additionally, fan sites might take valuable traffic from an official studio site that sold merchandise, leading to a decline in revenue.²⁰⁵

Another concern was that webmasters might distort a show's characters by turning "them [into] parodic or even pornographic" images.²⁰⁶ Harm to a studio's reputation could be severe, especially if sites displayed the characters in obscene positions or in a manner that the target audience found offensive. Although copyright law permits some parodies,²⁰⁷ a studio would not wish to see its copyrighted material used in such a way.²⁰⁸

Interestingly enough, Fox's actions did not always comport with the feelings those of the actual creators of the shows. Creators expressed enjoyment of the fan sites and did not always agree with the studio's

¹⁹⁶ See Koster & Shatz-Akin, *supra* note 29, at 18.

¹⁹⁷ Goldstein, COPYRIGHT § 9.3, at 9:11–13 (2d ed. 2002).

¹⁹⁸ See Koster & Shatz-Akin, *supra* note 29, at 18.

¹⁹⁹ See *A Statement from Fox Regarding Fan Web Sites*, FOX.com, at <http://www.fox.com/community/askfox/answer13.htm> (last visited Apr. 4, 2003).

²⁰⁰ Belsie, *supra* note 36.

²⁰¹ *Id.*

²⁰² See *supra* text accompanying notes 77–110.

²⁰³ Powers, *supra* note 9.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–80 (1994).

²⁰⁸ Powers, *supra* note 9.

actions.²⁰⁹ But the studio, not the creators, usually controls the copyrights to these; thus, it was Fox's choice to pursue legal action.²¹⁰

In 1995, Fox began to contact fan sites by issuing cease-and-desist letters.²¹¹ One of the most publicized early cases involved a letter sent to Gil Trevizo, who created a *Millennium* fan site that he posted online before the show even premiered.²¹² An example of the form that these letters could take is a cease-and-desist order sent in 1999 to the webmasters of the now-defunct *The Simpsons* fan site "Evergreen Terrace."²¹³ The letter stated that copying and transmitting *The Simpsons* copyrights were prohibited and unauthorized uses that could lead to criminal and civil penalties.²¹⁴ Fox's attorneys also asserted that the site's creators might be liable for contributory copyright infringement if any of the sites to which they provided links contained infringing material.²¹⁵ While Fox stated that some images could remain on the website as long as there was a disclaimer, the letter made it clear that the studio was not waiving any of its rights by allowing such action.²¹⁶ However, the letter also asserted that, whenever possible, Fox was supportive of its fans.²¹⁷

B. FAN SITE REACTIONS

Cease-and-desist letters effectively eliminated many fan sites.²¹⁸ Though Fox contended its goal was not to eradicate fan sites, that was the ultimate effect of its cease-and-desist letter campaign.²¹⁹ For example, twenty-six of the forty-three websites devoted to *The Simpsons* listed at Evergreen Terrace as receiving letters in 1997 or later have shut down.²²⁰ Seventeen others complied with the demands of the cease-and-desist letter

²⁰⁹ For example, Joss Whedon, creator of *Buff, the Vampire Slayer*, reportedly "avidly supported" fan-created shrines to the show, but he was apparently content with Fox's explanations of its actions. See Powers, *supra* note 9.

²¹⁰ *The Simpsons* executive producer David Mirkin remarked in 1995 that the show's creators enjoyed one comprehensive fan site but that he was "sure the lawyers would get into that at some point and probably muck it all up quite a bit." Richard Ruelas, *Homer's Home Page; Fans Love "The Simpsons" Internet Site, but Fox's Lawyers Don't*, THE PHOENIX GAZETTE, June 19, 1995, at G1.

²¹¹ *The Net: The Hunt is On*, Evergreen Terrace, at <http://www.nohomers.net/info/net/fox.html> (last visited Nov. 14, 2001) [hereinafter *The Hunt*].

²¹² Harmon, *supra* note 23.

²¹³ See E-mail from Dennis L. Wilson, Esq., Keats McFarland & Wilson LLP, to Eric Winarten, Lee Kaldany, Russ Chaney, Richard Winograd, Ryan Pritchard (Sept. 7, 1999) available at <http://www.nohomers.net/info/net/c&d.txt> [hereinafter Wilson E-Mail]. A cease and desist letter sent in 1995 to a fan site creator provides an example of a less permissive attitude from Fox. See Letter from David G. Oaks, Counsel, Legal Affairs, Twentieth Century Fox Licensing & Merchandising, to Jeanette Foshee (Oct. 19, 1995), available at <http://www.snpp.com/news/iconscds.html>.

²¹⁴ See Wilson E-mail, *supra* note 213.

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *The Net: Pushed to Extinction*, Evergreen Terrace, at <http://www.nohomers.net/info/net/fox.html> (last visited Nov. 14, 2001) [hereinafter *Pushed to Extinction*].

²¹⁹ See *id.*

²²⁰ See *id.* (noting that a fraction of fan sites received cease-and-desist letters).

by removing copyright-protected materials.²²¹ According to Fox, many fan site creators were unaware that they were infringing on any copyright and were willing to remove the objectionable material.²²²

These letters, however, were not universally successful. One fan site owner asserted that the orders did not “discourage the webmasters at all.”²²³ Several re-opened their websites, featuring the same multimedia content that caused Fox’s complaints.²²⁴ Additionally, some fan sites did not comply until they had received multiple cease-and-desist letters.²²⁵ Some may have simply believed that the law could not possibly proscribe their behavior.²²⁶ Others acknowledged that Fox owned the copyrights and the associated privileges but believed that the level of control that Fox was claiming was unreasonable.²²⁷

Several fans believed that Fox’s actions were unjust. One fan site owner described cease-and-desist orders as “a fancy way for FOX to bring down its wrath on teenage webmasters who are simply appreciating a work of brilliance.”²²⁸ Another fan argued that Fox was really seeking “complete and total control over how every facet of [its] company [was] portrayed on the Internet.”²²⁹ Many people were particularly offended because they believed that they were actually offering free publicity for the television shows and the studio.²³⁰ Fans also asserted that they were exercising their free speech rights.²³¹ These webmasters further pointed out that they do not profit from the fan sites.²³² Contributing to the reaction of these fan site owners was the incorrect belief by some that if “uploading, posting, downloading, or copying does not . . . hurt anybody or is just good free advertising, then it is permissible.”²³³

Another problem with cease-and-desist letters was that Fox did not send them out consistently. Several fan sites for *The Simpsons* received

²²¹ See *id.* (noting that five of the sites eventually re-opened with the offending content re-added).

²²² See Belsie, *supra* note 36.

²²³ *The Net: Reconstruction*, Evergreen Terrace, at <http://www.nohomers.net/info/net/reconstruction.shtml> (last visited Nov. 14, 2001) [hereinafter *Reconstruction*] (listing sites that reopened with even larger amounts of multimedia than they had when they were sent their original cease and desist letters).

²²⁴ *Id.*

²²⁵ *Id.* (providing the Simpsons Sourcebook as an example of a fan site that received three cease and desist letters before removing their multimedia content). Another example is the fan site Evergreen Terrace, which received one cease and desist letter, simply changed the URL of the site, received a second cease and desist order, and then changed URLs again. *Here We Go Again*, *supra* note 175.

²²⁶ See Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 239 (1997) (explaining that people will not obey a law if they do not “believe the law says what it in fact says,” and governments will eventually stop enforcing those laws).

²²⁷ Belsie, *supra* note 36.

²²⁸ *Fox Update*, *supra* note 55.

²²⁹ Belsie, *supra* note 36 (quoting Lori Bloomer, an organizer of the protest group XFACTOR).

²³⁰ See *Fox Update*, *supra* note 55.

²³¹ Harmon, *supra* note 23.

²³² *Fox Update*, *supra* note 55.

²³³ DIGITAL DILEMMA, *supra* note 28, at 125.

letters throughout 1996 and 1997.²³⁴ In 1998, Fox did not send any letters to *The Simpsons* fan sites, leading many webmasters to believe they had convinced Fox that its policy had been misguided.²³⁵ Much to the disappointment and outrage of several such individuals, Fox started to issue cease-and-desist letters again in 1999 to *The Simpsons* fan sites.²³⁶ While it may be impractical to suggest that Fox could have remedied the problem by vigilantly mailing cease-and-desist letters, courts may view this as a lack of diligence.²³⁷ Conversely, the cease-and-desist letters, as the Evergreen Terrace letter, likely included a statement that Fox was not waiving any of its rights;²³⁸ thus, fan site owners may not have justifiably considered the quiet period a victory.

Many webmasters sought to communicate their frustrations to Fox. Letter-writing campaigns were one way to convey their views. Web surfers flooded Fox with letters and e-mails expressing their disdain.²³⁹ Fan sites often made this task easier by listing e-mail addresses, street addresses, and telephone numbers of Fox Studios' attorneys and executives.²⁴⁰ Some sites also offered sample letters that web surfers could send to Fox.²⁴¹ One group even encouraged *Buffy, the Vampire Slayer* fans to mail garlic to Fox executives to protest the studio's actions.²⁴²

The emergence of protest groups escalated the controversy between fan sites and Fox. Major protest sites included FIST,²⁴³ FUXWorld,²⁴⁴

²³⁴ *Pushed to Extinction*, *supra* note 218.

²³⁵ *See Here We Go Again*, *supra* note 175.

²³⁶ *See id.*

²³⁷ *See* Koster & Shatz-Akin, *supra* note 29, at 18. *See also* Inkel, *supra* note 41, at 909–10.

²³⁸ *See* Wilson E-mail, *supra* note 213.

²³⁹ *See* Kevin V. Johnson, *Show's Fan Sites Fight Off "Demon": Fox Production Company Cites Its Copyrights*, USA TODAY, Dec. 23, 1999, at 4D; Powers, *supra* note 9.

²⁴⁰ *See, e.g., Contacting the Media*, The Bringers: Version 3.0, at <http://web.ukonline.co.uk/bringers/mediaaddy.html#p1> [hereinafter *Contacting the Media*] (last visited Apr. 4, 2003); *The Net: What Now?*, Evergreen Terrace, at <http://www.nohomers.net/info/net/reconstruction.shtml> [hereinafter *What Now?*] (last visited Nov. 14, 2001); *XFACTOR: Free Speech is Out There*, The Wonderous World of Tenofdiamonds, at <http://members.tripod.com/~tenofdiamonds/xfactor.html> (last visited Apr. 4, 2003) [hereinafter *XFACTOR*].

²⁴¹ The Evergreen Terrace site provides such a letter which asserts that the fan sites are designed to give *The Simpsons* as much exposure as possible, do not intend to hurt or change what the show itself has accomplished, and that webmasters respect the work of those involved in the show. *What Now?*, *supra* note 240. The letter also expresses frustration at Fox's claim that only authorized uses are permissible, while simultaneously refusing to authorize uses. *Id.* The letter finally asserts that the fan sites are necessary because the official *The Simpsons* is lacking in the type of content fans want. *Id.*

²⁴² *See Garlic Campaign*, The Bringers: Version 3.0, at <http://web.co.uk/bringers/garlic.html> (last visited Feb. 12, 2002) (noting that this was to remind Fox that fans with *Buffy, the Vampire Slayer* had not stopped fighting).

²⁴³ FIST is no longer an active site, but an archived version from May 8, 1999 is available at <http://web.archive.org/web/19990508065129/jujubee.cob.ohio-state.edu/~christy/fist/> (last visited Feb. 19, 2002) (on file with author). The goal of this site was apparently to inform web surfers "about Fox's actions and how they could help stop" fan sites from being shut down. FIST united fans of the Fox shows *Millennium*, *X-Files*, *King of the Hill*, and *The Simpsons*. *Fans Fight Back*, *supra* note 56.

²⁴⁴ FUXWorld is no longer an active site, but an archived version from Mar. 3, 2000 is available at <http://web.archive.org/web/20000303212055/http://nerd.simplenet.com/fuxworld/sampsons/index.htm> (last visited Apr. 4, 2003). FUXWorld was a parody of the official FOX.com *The Simpsons* site.

Webmaster War III,²⁴⁵ XFACTOR (X-Philes²⁴⁶ For Abolishing Censorship Threatening Our Rights),²⁴⁷ and the Buffy Bringers. XFACTOR's motto, "Free Speech is Out There,"²⁴⁸ explained the movement's goals succinctly. Groups like these sought freedom to control their fan sites' content without interference from Fox. Protest sites reportedly enlisted hundreds of members.²⁴⁹ Currently only the Buffy Bringers exist as an active force online,²⁵⁰ but many sites still include references to the previous battles and protest groups or have simply left their protest pages up as a memorial to the controversy.²⁵¹

Fan site webmasters also employed other protest methods such as holding demonstrations²⁵² and organizing blackouts "to show Fox what the 'net would be like without fan sites."²⁵³ There is no real information available to gauge the success of any of the blackouts organized, but one protest rally outside Fox's studios in Los Angeles drew fewer than ten participants.²⁵⁴

Additionally, protesters unevenly engaged news media. For example, the Buffy Bringers have attempted to garner media attention by providing addresses and contact information for media outlets²⁵⁵ as well as a sample letter.²⁵⁶ News articles in major publications have mentioned and quoted various protest groups.²⁵⁷ For instance, a *New York Times* article prominently mentioned Webmaster War III.²⁵⁸ One journalist even gave Fox "The No Publicity is Better than Good Publicity Award" for shutting down fan sites, asking "what huge entertainment company would want hundreds of volunteers working long hours to promote its shows?"²⁵⁹ Though generally sympathetic to fan sites, these articles typically

Perhaps not coincidentally, FOX redesigned the official site soon after FUXWorld debuted. See *Fans Fight Back*, *supra* note 56.

²⁴⁵ Webmaster War III detailed the history of sites shut down by Fox, coordinated letter writing campaigns and offered legal tips on challenging Fox's cease and desist letters. See Powers, *supra* note 9.

²⁴⁶ An "X-Phile" is a fan of *The X-Files*. See ADEN, *supra* note 60, at 151.

²⁴⁷ Fans created XFACTOR to protect fan sites celebrating *The X-Files* and *Millennium*. XFACTOR, *supra* note 240.

²⁴⁸ A play on *The X-Files*' motto "The Truth Is Out There."

²⁴⁹ See Powers, *supra* note 9.

²⁵⁰ At <http://web.ukonline.co.uk/bringers/> (last visited Apr. 4, 2003).

²⁵¹ See, e.g., *This X-Files Protest Page No Longer Exists*, at <http://www.chanel1.com/users/pisces/xprotest.html> (last visited Apr. 4, 2003) [hereinafter *Protest Page*].

²⁵² See Powers, *supra* note 9.

²⁵³ *Here We Go Again*, *supra* note 175; *Fox Update*, *supra* note 55.

²⁵⁴ See Powers, *supra* note 9.

²⁵⁵ *Contacting the Media*, *supra* note 240.

²⁵⁶ See *id.* (noting that protests are useless unless the general public and not just their online comrades know about the issue, suggesting that hard copy letters would be more effective than e-mails and faxes, and imploring fans to be polite when contacting the media).

²⁵⁷ See, e.g., Belsie, *supra* note 36; Harmon, *supra* note 23.

²⁵⁸ Powers, *supra* note 9.

²⁵⁹ Wyn Hilty, *Cash Cow!*, OC WEEKLY, Apr. 7, 2000, at 20.

acknowledged both the tension of the situation and the legitimacy of Fox's concerns and actions.²⁶⁰

To understand these Internet protesters, one must consider the very culture of the Internet. Some fan site creators recognized that Fox owned rights to the television shows it produced and the characters therein, but viewed Fox's actions against the sites as improper.²⁶¹ This feeling stems not from a sense of general lawlessness in society, because people generally abide by the laws, but from established Internet norms.²⁶² However, on the Internet, unlike in the offline world, people copy others' copyright-protected works daily.²⁶³

In comparing fan sites to scrapbooks, it may not make sense to a lay person that it is probably permissible to or at least unlikely to rile copyright owners by creating a scrapbook devoted to one's favorite show, but creating a website containing the same elements will probably lead to trouble. It may have likewise surprised Fox to have fan site owners respond as they did. However, such a reaction is predictable when considering the association of the Internet for individual users as a place where they can freely obtain and distribute information, the strong emotional attachments of fans zealous enough to create websites, and the seemingly inconsistent idea that acceptable offline activities become violations online.

C. AND THEN THERE WAS PEACE

Currently, Fox does not go after fan sites that do not make excessive use of its copyrighted material, and a typical fan site will include a legal disclaimer.²⁶⁴ It is unclear whether fan site protesters Fox's change in behavior. Fox claims those groups "have little effect" on Fox's actions.²⁶⁵ The studio's current attitude seems to be that a fan utilizing minimal copyrighted material is not a concern.

Another possible explanation is simply that fan site creators and the organizers of the protest groups have moved on. Fox cancelled *Millennium* in 1999,²⁶⁶ and a fan of the show may have felt little incentive to continue to battle Fox when the existence of the site became moot. Also, it is possible that someone who created a comprehensive site devoted to *The X-Files* in 1996 would not maintain an interest in the show or the battle with Fox six years later. One *The X-Files* fan site webmaster offered this explanation at the location of her former protest page: "I had gotten kind of

²⁶⁰ See, e.g., Belsie, *supra* note 36; Harmon, *supra* note 23; Powers, *supra* note 9.

²⁶¹ See, e.g., *Hunt Is On*, *supra* note 211. See also Belsie, *supra* note 36.

²⁶² See BIEGEL, *supra* note 19, at 97.

²⁶³ See *id.* at 280–81.

²⁶⁴ For example, one site contains this common disclaimer: "*The Simpsons* TM and Copyright FOX and its related companies. All rights reserved. This web site, it's [sic] operators, and any content contained on this site relating to *The Simpsons* are not authorized by Fox." *Fox Update*, *supra* note 55.

²⁶⁵ Powers, *supra* note 9.

²⁶⁶ "*Millennium*" (1996), Internet Movie Database, at <http://us.imdb.com/Title?0115270> (last visited Apr. 4, 2003).

annoyed with the show, since it wasn't as good any more, and had moved on to bigger and better things."²⁶⁷

V. NEW BATTLEFRONTS

Although the Fox fan site disputes have reached a resolution, the controversy is instructive for future conflicts. That the outcome of every dispute is isolated to a specific studio blocks the achievement of effective, widespread resolutions in the debate. Arguably, Fox and the fan sites have identified the other's limits, but for other studios battling fan sites, protest groups may still emerge merely because the two sides have not yet struggled to an acceptable *détente*.

Even though fan sites for Fox shows generally no longer contain the types of copyrighted material caused Fox to balk, other people, particularly young people, still lack copyright education and, thus, history can easily and unsurprisingly be repeated. A perfect example was the struggle in 2000–2001 between Warner Brothers Studios and fans of the *Harry Potter* book series. In that battle, many fans who created *Harry Potter* sites were teenagers and were thus targets with whom the media could sympathize.²⁶⁸

Responding to the apparent threat, Warner Brothers sent standard cease-and-desist letters to these sites, prompting an immediate backlash. Perhaps learning from their predecessors in the one way that the studio probably feared the most, some angry *Harry Potter* fans organized themselves as the Defense Against the Dark Arts.²⁶⁹ The group proposed a boycott of the *Harry Potter* movie and was effective at garnering media attention and support.²⁷⁰

Faced with the negative publicity, Warner Brothers quickly resolved all of its cases.²⁷¹ Though Warner Brothers claimed protest actions had little to do with changes in policy,²⁷² the *Harry Potter* situation indicates that protests, if they are well-publicized and effectively portray a corporation as preying on innocent fans, can have an impact. It is likely that Fox's and Warner Brothers' statements about the ineffectiveness of protesters stem, in part, from a desire to prevent similar actions in the future. A studio does not want the public to perceive it as vulnerable to being held hostage by the demands of its fans at the expense of enforcing its rights.

²⁶⁷ *Protest Page*, *supra* note 251 (noting also that the protest efforts "died off").

²⁶⁸ See, e.g., Elizabeth Weise, "Potter" Fans Put Hex of a Boycott on Warner Bros., USA TODAY, Feb. 22, 2001, at 1D (noting that one *Harry Potter* boycott organizer was 16 and quoting a 13 year old who received a cease and desist letter).

²⁶⁹ See Magera McGonagall & Alastair Alexander, *Defense Against the Dark Arts Manifesto*, Defense Against the Dark Arts, at <http://www.dprophet.com/dada/manifesto.html> (last Apr. 4, 2003).

²⁷⁰ See, e.g., *Big Harry Deal! It's an Image Thing*, CHI. TRIB., Feb. 27, 2001, at C5; Peter DeMarco, *Legal Wizards Crack Whip at Harry Potter Fan Sites*, DAILY NEWS, Feb. 22, 2001, at 4; Weise, *supra* note 268.

²⁷¹ See *Our New Mission*, Defense Against the Dark Arts, at <http://www.dprophet.com/dada/mission.html> (last visited Apr. 4, 2003).

²⁷² Powers, *supra* note 9.

VI. POSSIBLE SOLUTIONS

Various solutions to this problem exist. Proponents of the different views believe that their plans will reduce the problems that plague the unpredictable conflict between copyright laws and the Internet.

A. EDUCATION

Educating the general public about copyright law represents a possible solution.²⁷³ The *White Paper* suggests raising public awareness about copyright law and its provisions, creating “model curricula” for educators to use at all education levels, and providing easily accessible information on the current state of copyright law.²⁷⁴ The *White Paper* seeks to have intellectual property become a “household word” and its importance reinforced throughout the public.²⁷⁵

One concern this proposal raises is the question of when schools would teach copyright law. The *White Paper* suggests providing information to educational institutions, keeping in mind the age, activities, and exposure to intellectual property laws of the target audience.²⁷⁶ Core concepts would be taught in elementary school when children learn to use the Internet, taking advantage of their understanding of ownership of physical property and the need to ask for permission before using someone else’s property.²⁷⁷ In later years, schools would teach students the constitutional basis of copyright law and the economic benefits of intellectual property, including the sustenance of industries that employ millions of Americans.²⁷⁸ The *White Paper* also asserts that any educational program should focus on the permissiveness of copyright law, e.g., the ease of licensing, as opposed to concentrating on what users cannot do.²⁷⁹ Teaching schoolchildren about copyright law may prevent them from considering the ease of unauthorized copying on the Internet permissible or desirable.

Previous attempts by industries to educate the public have been unsuccessful.²⁸⁰ For example, the music industry has tried to control the unauthorized performance of recorded music by restaurants and other

²⁷³ See, e.g., WHITE PAPER, *supra* note 33, at 203; Brad Templeton, *10 Big Myths About Copyright Explained*, BRAD TEMPLETON’S HOMEPAGE, at <http://www.templetons.com/brad/copymyths.html> (last visited Apr. 4, 2003).

²⁷⁴ WHITE PAPER, *supra* note 33, at 203–04.

²⁷⁵ *Id.* at 204–05.

²⁷⁶ *Id.* at 205.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 206.

²⁷⁹ *Id.* at 207–08.

²⁸⁰ See, e.g., Litman, *supra* note 34, at 48–49 (observing that compliance is inconsistent for the requirement to license performance rights of music played in business open to the public, despite efforts at education by the music industry). Professor Litman also notes that the situation is compounded by the counterintuitive nature of the exceptions to the licensing requirement, pointing out that 17 U.S.C. § 110 creates a situation where a bar with one twenty-seven inch television would not need a license but a bar with two thirteen inch screen televisions would. *Id.* 49–50.

businesses.²⁸¹ However, this campaign has largely failed, in part because the laws are not clear and enforcement has been uneven.²⁸²

Additionally, commentators have described copyright law as extremely complicated²⁸³ and impossible to teach in elementary and secondary schools.²⁸⁴ One reason for this is that the laws are “long, complex, and counterintuitive,” and people are reluctant to accept laws that make no sense.²⁸⁵ Teaching copyright law in elementary or secondary schools may be valuable, but not all children will build fan sites and thus many students would not necessarily need the education. However, while most eight year olds probably cannot grasp copyright law, some third graders can build web sites. Almost any grade would be too early to begin learning about copyright for some, too late for others, and irrelevant for many. Thus, education in the schools may not be an effective, practical, or useful approach.

B. MODIFICATION OF COPYRIGHT LAWS

Congress could revise copyright laws either to strengthen copyright holders’ rights or to give fan site creators more security from prosecution. As discussed earlier, at least part of the problem studios encounter stems from ignorance or lack of understanding about copyright law and what it allows creators and users to legally do.²⁸⁶ Professor Jessica Litman’s concern that “laws that people don’t believe in suffer from an absence of legitimacy”²⁸⁷ is implicated because fan site owners who feel they are doing nothing wrong, or at least nothing illegal, would be reluctant to concede that the studio’s position is correct. Professor Litman asserts that if everyone with access to a computer does not comply with copyright law, that law may become irrelevant.²⁸⁸

In promoting change to copyright law, major rights holders are predictably the ones who call for strengthening the exclusivity of copyright protection. Advocates of altering copyright law come from a variety of sources, including fans and educators.²⁸⁹

²⁸¹ *Id.* at 49.

²⁸² *Id.* at 49–50.

²⁸³ See Litman, *supra* note 226, at 241.

²⁸⁴ See Litman, *supra* note 34, at 51 (arguing that neither elementary school students nor their teachers could understand the current copyright laws).

²⁸⁵ *Id.* at 50.

²⁸⁶ See *infra* Part II.B.3.

²⁸⁷ See Litman, *Copyright as Myth*, *supra* note 7, at 248. Professor Litman also provides a distillation of what the general public may misunderstand copyright to be, including a lack of understanding about the level of creativity required, the point at which copyright protection vests in a work, and what rights protection entails. See *id.* at 238–39.

²⁸⁸ Litman, *supra* note 226, at 237.

²⁸⁹ See BIEGEL, *supra* note 19, at 74–77.

1. *Maintaining the Status Quo*

Some experts argue that Congress need not change copyright law because the mere threat of legal action often deters infringement.²⁹⁰ This applies to the discussion of educating people about copyright²⁹¹ and to the assessment of individual studio policy considered below.²⁹²

2. *Strengthening Copyright Protection*

Some commentators have suggested that the best solution is to further strengthen copyright law.²⁹³ Copyright-rich industries are concerned that the ease of production and distribution of perfect copies needs to be controlled.²⁹⁴ Current stakeholders prefer a regime that extends existing rules to maintain the current balance when applying the law to Internet uses.²⁹⁵ The ease of piracy, costs of enforcement, and problems locating defendants are major impediments to using current copyright law as an effective weapon against potential Internet infringers.²⁹⁶ Electronic safeguards for copyrighted works and the criminalization of decrypting such systems under the DMCA²⁹⁷ have been one step toward bolstering copyright law.

However, strengthening copyright law may further disrupt the balance in the law between giving authors an incentive to create and allowing the public to benefit from new works. Technological copyright protection systems that prevent users from accessing and legitimately utilizing information may impair fair use. Additionally, facts and ideas may end up locked in technologically protected works.²⁹⁸ Such actions could prevent the public's legitimate access to certain public domain materials, limiting the traditional rights held by non-copyright owners.

Furthermore, one commentator has argued that the increase in copying that followed the strengthening of laws in the late 1990s has discredited this position.²⁹⁹ Stricter provisions have not created any greater adherence to the law. Furthermore, calls to strengthen copyright protections conflict with the perception of the Internet as a place where users can freely and easily access information. Such proposals would likely eliminate many fan sites. Fan sites could subsist with little or none of a studio's copyright-

²⁹⁰ See Belsie, *supra* note 36, at 2.

²⁹¹ See *supra* Part VI.A.

²⁹² See *infra* Part VI.C.

²⁹³ See, e.g., Inkel, *supra* note 41, at 881.

²⁹⁴ See BIEGEL, *supra* note 19, at 282.

²⁹⁵ See Litman, *supra* note 226, at 242.

²⁹⁶ See Inkel, *supra* note 41, at 905–07 (noting that Internet connection speeds have dramatically increased over time, the anonymity of the Internet impedes identifying defendants, and the fact that an action against a fan site could hurt a studio's reputation, would be uncertain and also that a defendant would be unlikely to have deep pockets).

²⁹⁷ See 17 U.S.C. § 1201 (2000).

²⁹⁸ See BIEGEL, *supra* note 19, at 283.

²⁹⁹ *Id.* at 304.

protected multimedia,³⁰⁰ but this may greatly diminish the appeal and excitement of such sites for creators and visitors.

3. *Weakening Copyright Protection*

Others believe that the entire copyright regime has shifted too far in favor of copyright holders and away from the original purpose of the law to the public's detriment. These commentators advocate a weaker copyright protection regime.³⁰¹ Promoters of this position worry that the balance between the needs of the public and copyright holders improperly favors copyright holders.³⁰² There is also a fear that the balance may tip so far as to essentially destroy fair use.³⁰³ Advocates of weakening protection are concerned that Congress and others have ignored the public's interests in policy discussions and the revision of copyright law and instead favored the needs and wants of copyright-rich industries, such as television, film, and software.³⁰⁴ This occurs because these industries are involved in the negotiations to rewrite copyright law,³⁰⁵ but no participant acts as the representative of the public.³⁰⁶

Thus, these commentators advocate a reconsideration of current copyright laws from the public's viewpoint.³⁰⁷ Resetting the balance between the public and copyright owners requires removing the advantages that the owners have in the system.³⁰⁸ "Thin" copyright protection would presumably encourage creativity and provide a broader fair use exception, in contrast to "thick" copyright protection that currently chills some creativity by subsequent users.³⁰⁹ Further, rules that Congress creates in light of public interest that are "sensible, intuitive, and short" could be taught to elementary school children.³¹⁰ Even more appealing, the system

³⁰⁰ For example, fans consider The Simpsons Archive one of the most popular *The Simpsons* fan sites despite being largely devoid of any multimedia. See *Reconstruction*, *supra* note 223.

³⁰¹ See VAIDHYANATHAN, *supra* note 42, at 5. This "thin" copyright protection could be "strong enough to encourage and reward aspiring artists, writers, musicians, and entrepreneurs, yet porous enough to allow full and rich democratic speech and the free flow of information." *Id.*

³⁰² Litman, *Compromise*, *supra* note 7, at 899. See VAIDHYANATHAN, *supra* note 42, at 181.

³⁰³ See VAIDHYANATHAN, *supra* note 42, at 182.

³⁰⁴ See *id.* at 5 (asserting that "[c]opyright should not be meant for Rupert Murdoch, Michael Eisner, and Bill Gates at the expense of the rest of us"). See also Litman, *supra* note 34, at 38–39 (noting that the copyright laws have been written from the point of view of "copyright-intensive businesses" interacting with other similar businesses and does little to address the activities of consumers).

³⁰⁵ Litman, *Compromise*, *supra* note 7, at 860–61.

³⁰⁶ See Litman, *supra* note 226, at 242.

³⁰⁷ Litman, *supra* note 34, at 33–34.

³⁰⁸ Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 43 (1996).

³⁰⁹ See VAIDHYANATHAN, *supra* note 42, at 15–16.

³¹⁰ Litman, *supra* note 34, at 52. Professor Litman argues that such a law would be "about three pages long, should strike more folks than not as more fair than not, and should be sufficiently intuitive to appeal to school children." *Id.* at 53.

would operate better if Congress enacts laws with which people would voluntarily comply.³¹¹

However, weakening copyright protection risks stifling the incentive to create. It cannot be established at what point the incentive to create becomes too much or too little.³¹² Weakening copyright law to allow only thin protection may please fan site owners and disappoint studios, but it may go too far and impair the goals of copyright law. A weaker regime of copyright protection may encourage fewer people to create because the monopoly over their works they would acquire would be more limited. Even if studios would not lose money under such a plan, they would still fret over any change that restricts their ability to control the presentation of their copyrighted works.

Weaker copyright protection would likely work well with the open, free flow of information currently found on the Internet. Fans may benefit from a weaker regime that permits much of their current behavior on their sites. However, it is likely that even a weaker copyright protection system would still not permit all the activities in which fan sites may wish to engage. For example, it is difficult to imagine a viable scheme that would permit fan sites to allow users to watch entire episodes. The impact of any reformation to weaken copyright law would be varied but would probably favor many fan sites.

4. *Creation of a Personal Use Exception*

A fourth possibility is simply a clarification of the law that would not substantially change copyright, but would sharpen the lines where fair use ends and infringement begins. Deborah Tussey has suggested that “clarify[ing] the nature and permissible scope of noncommercial use by individual users” could protect both sides.³¹³ She advocates a legislatively created personal use privilege.³¹⁴ Such a scheme would shield noncommercial web sites from liability as long as they significantly transform the original work, provide disclaimers indicating they have done so, and provide links to the original work.³¹⁵ Those who provide free distribution of unaltered works would be liable for infringement; however, the creation of a royalty scheme could best address this issue.³¹⁶

Such a proposal would comport well with the Internet and its goals. This plan recognizes that the Internet cannot be a venue for lawlessness but that there can be ways for people to lawfully use others’ copyrighted materials. Tussey designed this scheme in consideration of the Internet and

³¹¹ See Litman, *supra* note 226, at 245 (noting that such laws would be superior to those that required outlays of resources as education, criminalization, and technological protections would).

³¹² See Litman, *supra* note 308, at 32. *But see* Litman, *supra* note 34, at 44–46 (noting that the necessary level may not be that high since there is no copyright protection for recipes or fashion designs yet expensive gourmet restaurants, cookbooks and designer clothing lines continue to exist).

³¹³ Tussey, *supra* note 39, at 1132.

³¹⁴ See *id.* at 1181–83.

³¹⁵ See *id.* at 1188.

³¹⁶ See *id.* at 1188–89.

its special concerns, problems, and uses.³¹⁷ While some fan site activity would still be impermissible, such a regime could foster fan sites that are willing to add creative input.

All of the proposed changes may increase certainty about acceptable behavior but may not satisfy all the parties involved. Strengthening the copyright laws will likely please copyright holders while effectively destroying fan sites with any studio-produced copyrighted content altogether. Restructuring the balance in the laws so they remove some of the owners' advantages in favor of providing users with more rights would likely cause an uproar among the owners, even though their profit margins may not decline. However, considering the trend in copyright revision to incorporate the views of copyright-rich industries without advocates for the general public at the bargaining table,³¹⁸ the only provision that seems likely is the adoption of rules or norms that will limit personal uses and expand the control of copyright owners.

C. INDIVIDUAL STUDIO POLICY

Allowing individual studios to set their own policy is a final method for resolving these controversies. Currently, Fox has halted its campaign against fan sites, presumably because it has managed to shut down or achieve modifications of those sites with the most egregious uses of the studio's copyrighted material. Fox has allowed images to remain on the websites as long as there is a disclaimer and a legal notice, but the studio has required webmasters to remove video clips. Limited permissiveness is also the current approach of Warner Brothers towards *Harry Potter* fan sites³¹⁹ and Viacom subsidiary Paramount Studios towards *Star Trek* fan sites.³²⁰ Ultimately, as the studios rightfully own copyrighted works, they currently decide to what extent they will or will not enforce their rights.

However, there are risks to this approach. As this Note has shown, reputational harm caused by outraged fans and a press that is often sympathetic to those fans presents a very real problem. A policy that seems unnecessarily harsh may fuel future backlashes, and news of a studio's seemingly unfair policies may spread quickly through the Internet and traditional media.³²¹

Moreover, this proposition generally leads to fan sites learning about copyright laws from copyright holders, who have no incentive to state the

³¹⁷ See generally *id.* (discussing how the law should treat personal use of copyright-protected works on the Internet).

³¹⁸ See Litman, *supra* note 225, at 242.

³¹⁹ See, e.g., *Warner Bros. Backs Off Harry Potter Fight*, ZDNET NEWS, Mar. 16, 2001, at <http://news.com.com/2100-1023-254289.html?legacy=cnet>.

³²⁰ At one time, Paramount Pictures challenged fans who distributed pictures from the *Star Trek* films and television shows. See Ross Kerber, *Vigilant Copyright Holders Patrol the Internet*, WALL ST. J., Dec. 13, 1995, at B1. However, Paramount has become tolerant of fan site use of Paramount's copyright-protected images. See Matthew Broersma, *Trekkers Staging an "Insurrection"?*, ZDNET NEWS, at <http://zdnet.com.com/2100-11-513085.html> (Dec. 10, 1998).

³²¹ Koster & Shatz-Akin, *supra* note 29, at 22.

law objectively.³²² While Fox is almost certainly correct to claim in several instances that the actions of fan site creators do constitute copyright infringement, it may be misstating the law by claiming that links to other fan sites will create liability for contributory infringement,³²³ because the courts have not clearly resolved that issue.³²⁴

A studio wanting to eliminate the presence of most fan sites could utilize the DMCA to get ISPs to remove offending sites. However, as noted above, fans may simply subscribe to another ISP and recreate an identical fan site, requiring the studio to find the new site and send notice to the new ISP.³²⁵ This approach is appealing to fans because it would not be effective against all targeted fan sites.

Another problem is the studios' inconsistent actions in enforcing their rights. As previously stated, after sending cease-and-desist letters to several *The Simpsons* sites for over a two year period, Fox ceased its attack for a year before contacting the sites again.³²⁶ Thus, while this approach may have put many on notice that they were possibly offending Fox's rights, there may have been a general belief that Fox had changed its position. Fan site creators could easily misunderstand a studio's actions.

Further complicating the issue of allowing individual studios to set copyright policy is the inconsistent treatment of fan sites across the entertainment industries. In the video game industry, for example, designers provide updates on their latest games to fan sites, and game companies feed news to such sites.³²⁷ Even a movie production studio has embraced fan sites. New Line Cinema, in preparing for the debut of its feature film *Lord of the Rings*, allowed fan sites to become involved in the process of promoting the film online.³²⁸

The most serious problem with allowing individual studios to set such policy is that it creates no more certainty than currently exists. While adopting any set of behaviors may allow for stability on both sides of the debate, the ability of a studio to change its mind at any time perpetually haunts such a solution. Such policies would be purely voluntary and provide no legal guarantees or certainty for fan sites.

However, studio policy does not have to create controversy or irk fans. As noted above, New Line Cinema's actions to embrace fans and involve them in the promotional process reveal that a company can benefit from

³²² See VAIDHYANATHAN, *supra* note 42, at 186–87.

³²³ See Wilson E-mail, *supra* note 213.

³²⁴ See Mark Sableman, *Link Law Revisited: Internet Linking at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1316–29 (2001) (examining cases that have addressed liability for linking to illegal activity and noting possible defense and justifications).

³²⁵ See *supra* notes 173–175 and accompanying text.

³²⁶ See *supra* notes 235–238 and accompanying text.

³²⁷ See Inkel, *supra* note 41, at 908 (citing the fan news site for the game “Jagged Alliance” where a lead developer of the game posted to the discussion board thirty-one times without mentioning that the site was decorated with intellectual property he created).

³²⁸ See Powers, *supra* note 9.

authorizing fans to use its intellectual property.³²⁹ Studios could provide a reservoir of images that fans could freely use on their sites.³³⁰ Additionally, an entertainment company could license fan sites to use copyrighted images for free, with an agreement containing the requirement that the images remain unaltered and asserting that the studio may terminate the contract if the fan site fails to comply.³³¹ Such actions would show the fans and the media that the studio appreciates the fans' support for their shows and movies,³³² but still plans to retain ownership of the protected material.

Additionally, studios that continue to send cease-and-desist letters may consider rephrasing such communications to take into account the possibility that the recipients may be young or uneducated about copyright law, or likely to respond negatively to a perceived attack. Dutton Children's Books, which holds the copyright to the *Winnie the Pooh* series, has sent letters gently explaining that the company owns the copyright to the books and wants to make sure that it is credited.³³³ Christopher Franceschelli, the publisher, has personally sent letters and refrained from making threats or using menacing legal jargon.³³⁴ Adopting a similar perspective, studios could create simple, easily understandable boilerplate letters that address fan site owners in a non-threatening manner.

Fans would likely respond to overtures that recognize that they are on the same side of the equation as the studio. Indications that the studio is willing to compromise may pacify many webmasters.³³⁵ Furthermore, fans may not react so dramatically if a studio announces the alleged infringement by a personal letter instead of an accusatory one.

Another advantage of more understanding and permissive studio policies is that protesters have sought these all along. Fan sites did not lobby Congress, but rather appealed to the studios themselves and the media to try to enact a change in treatment. Fan site protests generally occurred in an extralegal forum, where challengers did not advocate the creation of different laws but rather different policies. Fans sought a compromise between themselves and the studios.³³⁶ Therefore, adopting the above practices would likely quell the concerns of fan site creators.

In light of the respective cultures of the Internet and fans, and the obstacles to implementation, the best solution may be to allow studios to set their own policies because that does not require any legislative action.

³²⁹ See *id.*

³³⁰ Koster & Shatz-Akin, *supra* note 29, at 22.

³³¹ Sony Music Entertainment, Inc. has suggested resolving its conflicts with fans of one of its bands, Pearl Jam, by allowing such a use. See Kerber, *supra* note 320, at 81. See also Koster & Shatz-Akin, *supra* note 29, at 22.

³³² See Koster & Shatz-Akin, *supra* note 29, at 22.

³³³ See Edward A. Mazza, *Copyright Holders Wage War on Net*, THE DAILY YOMIURI, Jan. 21, 1997, at 9. See also Harmon, *supra* note 23.

³³⁴ See Harmon, *supra* note 23.

³³⁵ See Belsie, *supra* note 36 (quoting a fan site owner who asserted that Fox had been unwilling to cooperate and that fans were willing to fight in the absence of a peaceful compromise).

³³⁶ See *id.*

However, studio policy does not have to inspire the reactions it has in the past. While many fan sites probably infringe, these sites often benefit the studios more than they harm them. Studios could avoid problems by establishing fair guidelines that involve licensing or providing fan sites with some latitude to utilize copyrighted works. Additionally, fan sites would likely respond favorably to more benign and pleasant correspondences from a studio.

VII. CONCLUSION

Studios and other copyright owners will probably conflict with fans as long as the Internet exists. Though the copyright owners possess some rights, the enforcement of those rights through legal action or threats of legal action may not be the most beneficial way to protect that intellectual property. When dealing with fans, the risk of a backlash is ever-present. The tension between the parties must be recognized and can be remedied. Though many possible ways to minimize conflicts exist, allowing studios to designate acceptable levels of permissiveness may be the simplest and most effective solution. However, studios must, in return, appreciate fans' emotional attachment to the television shows and movies they celebrate and acknowledge that fans are citizens of an Internet that encourages free exchange of information.