LICENSE TO REMIX

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INTRODUCTION

> *"As Batman so sagely told Robin, 'In our well-ordered society, protection of private property is essential.'"*[1]

Consider the Batman. The superhero vigilante was created by Bob Kane and Bill Finger way back in 1939,[2] but continues to enjoy widespread popularity to this day. Batman has been portrayed as both hero and anti-hero; in stories that have been mysterious, campy, or gritty; and in a wide range of media, from comic books to television shows, films, and video games.[3] Copyright serves as the bedrock upon which DC Comics can maintain control over the character of Batman, coordinating with partners, licensees, and an army of creators to bring to life such a wide variety of stories that resonate with audiences both new and old.

But with increasing frequency over the past two decades, copyright law is criticized as creating a "permissions culture," one that is "hostile" to remix and at odds with how people create.[4] Critics adhering to this view

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[1] DC Comics v. Towle, 802 F.3d 1012, 1027 (9th Cir. 2015).

[2] Graeme McMillan, *DC Entertainment To Give Classic Batman Writer Credit in 'Gotham' and 'Batman v Superman' (Exclusive)*, HOLLYWOOD REP. (Sept. 18, 2015, 9:41 AM), http://www.hollywoodreporter.com/heat-vision/dc-entertainment-give-classic-batman-824572.

[3] Andy Isaacson, *How the Dark Knight Became Dark Again*, ATLANTIC (July 17, 2012), http://www.theatlantic.com/entertainment/archive/2012/07/how-the-dark-knight-became-dark-again/259923/.

[4] Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1193 (2007) ("Critics of copyright maximalism have long argued that overly rigid control of access to and manipulation of cultural goods stifles artistic and cultural innovation, and a growing body of anecdotal evidence suggests that copyright's 'permission culture' does exert a substantial constraining influence on creative practice."); *see also* Amy B. Cohen, *When Does a Work Infringe the Derivative Works Right of a Copyright Owner?*, 17 CARDOZO ARTS & ENT. L.J. 623, 646 (1999) ("[T]here is significant commentary criticizing in economic and policy terms an overly broad derivative works right."); Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES MAG. (Jan. 25, 2004), http://www.nytimes.com/2004/01/25/magazine/the-tyranny-of-copyright.html?_r=0.

have advanced numerous proposals intended to correct this, and policymakers are increasingly looking to see if changes in copyright law are needed to remove perceived barriers and promote cumulative creativity and "remix."[5]

But is it really the case that copyright stifles creativity? Contrary to criticisms, copyright law recognizes that "[t]he thoughts of every man are, more or less, a combination of what other men have thought and expressed."[6] Creators and copyright owners exercise their derivative works right through licensing to create a robust and thriving marketplace for "remixes"—new works explicitly built on existing works that include everything from adaptations, to sequels, tie-ins, mashups, crossovers, and beyond. At the same time, authors are free to draw inspiration from, and remix ideas of, existing works through the idea/expression dichotomy. It is important for both courts and policymakers to recognize that the existing legal framework for remixes enables production of new works that is both economically significant and culturally relevant. Any legal changes to address concerns at the margins could upset this core.

This Article provides an important counter to the "remix critique" by surveying the landscape of remix made within the copyright marketplace. The focus is primarily on narrative works based on existing works in the entertainment industries—film and television studios, book publishers, record labels, and video game publishers—that produce and distribute creative works to mass markets. Part I looks at both the doctrinal and theoretical background involved. Part II examines the development and content of the "remix critique" as well as current policy developments concerning remix. Part III surveys the landscape of licensing of derivative works such as adaptations, sequels, spin-offs, and mashups to provide a better idea of the scope and operation of authorized remix. Part IV explores the benefits derived under the current legal framework and responds to major elements of the remix critique. Finally, Part V looks at some of the policy and legal implications that follow from this discussion.

I. BACKGROUND

Copyright serves as one of the economic foundations and building blocks for a number of industries, including book publishers, film and television studios, music publishers and record labels, as well as individuals like photographers, graphic artists, songwriters, recording artists, authors, etc. In the United States, these industries and individuals contributed over $1.1 trillion to the U.S. GDP—6.71 percent of the economy—and directly

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5 *See infra* Section II.A.

6 Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

employed 5.5 million employees in 2013.[7] Setting aside software, the largest sectors relying on copyright are "recorded music; motion pictures, television and video; . . . [and] newspapers, books, and periodicals."[8] To give an idea of their relative sizes, the Bureau of Economic Analysis reports the value added in 2012 of motion pictures and sound recordings at $113.2 billion, broadcasting and telecommunications industries at $391.9 billion, and publishing (except Internet) at $191.5 billion.[9]

Licensing is central to the functioning of these industries. Rights are rarely sold or transferred outright to producers and distributors of expressive works.[10] And supply chains from creation to distribution can be complex, rarely involving only a few participants. Copyright creates the legally recognizable interest that underlies such transactions and is currently governed in the United States by the 1976 Copyright Act, as amended.[11] Copyright generally provides exclusive rights to authors of expressive works—books, films, music, photographs, software, etc.—once they are fixed in a tangible form.[12] Under U.S. law, these rights include the rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

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7 STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 2 (2014), http://www.iipa.com/pdf/2014CpyrtRptFull.PDF.

8 *Id.* at 15.

9 *Id.* at 22 tbl.B.1.

10 *See* ROB H. AFT & CHARLES-EDOUARD RENAULT, WORLD INTELL. PROP. ORG., FROM SCRIPT TO SCREEN: THE IMPORTANCE OF COPYRIGHT IN THE DISTRIBUTION OF FILMS 45 (2011), http://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo_pub_950.pdf; DAVID GREENSPAN ET AL., WORLD INTELL. PROP. ORG., MASTERING THE GAME: BUSINESS AND LEGAL ISSUES FOR VIDEO GAME DEVELOPERS 108 (2013), http://www.wipo.int/edocs/pubdocs/en/copyright/959/wipo_pub_959.pdf ("Usually, a developer or publisher . . . may want to incorporate licensed property into their game under a number of different scenarios including: (1) basing their game on another party's intellectual property (i.e., a game based on a movie or book or a toy); and/or (2) incorporating into their game intellectual property owned or controlled by another party to provide more realism for the game player." (footnotes omitted)).

11 17 U.S.C. §§ 101-1332 (2012).

12 *Id.* § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."). Note that the definitions of these categories are broad. *See* H.R. REP. NO. 94-1476, at 53 (1976); *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (describing copyright generally as "the exclusive right of a man to the production of his own genius or intellect").

> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
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> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
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> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[13]

The right to prepare derivative works is at the heart of remix. The Copyright Act defines a "derivative work" in relevant part 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.[14]

The final House Report of the 1976 Act indicates that a right to prepare derivative works could conceivably be covered within the right to reproduce, but to avoid doubts, it was recommended that the statute should include a specific reference to the right to prepare derivative works.[15] The distinction between the two rights is not important for present purposes, and this Article will refer to the types of works being discussed as "derivative works" whether or not they would be protected under the right to reproduce or prepare derivative works.

Whether formally falling under the derivative works right or not, the ability of copyright owners to make new works based on existing works plays an important role in the discussion to follow. But copyright contains a number of other relevant doctrines.

Though infringement actions typically refer to particular works, some courts have also recognized that characters within works can be independently copyrightable.[16] This is important since many derivative works, like sequels or tie-ins, rely on the same characters but share no other simi-

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13 17 U.S.C. § 106.

14 *Id.* § 101.

15 H.R. REP. NO. 94-1476, at 62.

16 Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003); Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 235 (2d Cir. 1983); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2015) ("Although there has been some conflict in the cases, it is clearly the prevailing view that characters *per se* are entitled to copyright protection." (footnotes omitted)). It's worth noting that trademark protection for characters may overlap with copyright protection for characters. *See* Jane C. Ginsburg, *Licensing Commercial Value: From Copyright to Trademarks and Back* 2-3 (Colum. Law Sch. Ctr. for Law and Econ. Studies, Working Paper No. 516, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613195.

larities in terms of plot or expression of existing works.[17] In addition, it is common business practice to license characters for use in new works.[18]

Courts that have found characters independently copyrightable have done so when "the character appropriated was distinctively delineated in the plaintiff's work,"[19] or when they are "'especially distinctive' or the 'story being told.'"[20] Examples include Amos 'n' Andy,[21] James Bond,[22] Betty Boop,[23] Freddy Krueger,[24] Godzilla,[25] Holden Caulfield from *Catcher in the Rye*,[26] Jonathan Livingston Seagull,[27] Scarlett O'Hara and Rhett Butler from *Gone with the Wind*, Tom and Jerry,[28] Walt Disney's Mickey Mouse and Donald Duck,[29] and characters from *The Wizard of Oz*.[30] Even inanimate objects, such as the Batmobile, may be independently copyrightable as characters if they "convey[] a set of distinct characteristics."[31]

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17 Benjamin A. Goldberger, *How the "Summer of the Spinoff" Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 302 (2003) ("Characters are central to the most common types of recycling and reuse in the entertainment business."); *see also* 1 NIMMER, *supra* note 16, § 3.04[A].

18 *See, e.g.*, Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 611-12 (2d Cir. 1982) (involving license granting rights to produce original story with the character *Tarzan*); DC Comics v. Towle, 989 F. Supp. 2d 948, 962 (C.D. Cal. 2013) ("[L]icensing agreements between Plaintiff and its licensees indicate that Plaintiff reserved all rights to the characters and elements depicted in the *Batman* television series and the 1989 *Batman* film . . . ."); Fleischer Studios, Inc. v. A.V.E.L.A., Inc., 772 F. Supp. 2d 1135, 1140 (C.D. Cal. 2008) (referencing agreement that transfers interest in, inter alia, "*all characters contained therein*"). Fictional characters may simultaneously be protected under trademark and unfair competition laws. Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 939 (2009).

19 Salinger v. Colting, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009) (quoting 1 NIMMER, *supra* note 16, § 2.12), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010).

20 *Rice*, 330 F.3d at 1175.

21 Silverman v. CBS Inc., 632 F. Supp. 1344, 1355 (S.D.N.Y. 1986), *aff'd in part, vacated in part*, 870 F.2d 40 (2d Cir. 1989).

22 Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

23 *Fleischer Studios*, 772 F. Supp. 2d at 1147.

24 New Line Cinema Corp. v. Bertlesman Music Grp., Inc., 693 F. Supp. 1517, 1521 n.5 (S.D.N.Y. 1988).

25 Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998).

26 *Salinger*, 641 F. Supp. 2d at 266.

27 Bach v. Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1110, 1118 (W.D. Wash. 2007).

28 Warner Bros. Entm't, Inc. v. X One X Prods., 644 F.3d 584, 597 (8th Cir. 2011).

29 Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757-58 (9th Cir. 1978).

30 *Warner Bros. Entm't*, 644 F.3d at 597.

31 DC Comics v. Towle, 989 F. Supp. 2d 948, 967 (C.D. Cal. 2013) (ruling that the Batmobile is entitled to copyright protection as a character), *aff'd*, 802 F.3d 1012 (9th Cir. 2015); *see also* Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1225 (9th Cir. 2008) (remanding question of copyrightability of "Eleanor," a 1967 Shelby GT-500 appearing in Disney's 2000 film *Gone in 60 Seconds*); New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001) (finding copyright protection in Freddy Krueger's glove).

Copyright provides a cause of action against anyone who infringes on a copyright owner's exclusive rights.[32] The Act does not define what it means to "infringe." It is clear that the exact reproduction of an entire work would be infringement,[33] but where copying has not been wholesale and literal, courts have developed the doctrine of "substantial similarity" to determine whether a new work infringes on a work protected by copyright.[34] Courts use a variety of tests to analyze substantial similarity.[35]

Copyright's distinction between ideas and expression, as explained in more detail below, plays a crucial—though severely underappreciated[36]—role in determining what types of copying are actionable and which are allowed. While most observers refer to this doctrine as the idea/expression dichotomy, the term is not entirely accurate. Ideas do not stand in contradiction to expression; rather, the two exist upon a spectrum. Judge Learned Hand's language from *Nichols v. Universal Pictures Corp.*[37] is instructive and often cited:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.[38]

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32 17 U.S.C. § 501(a) (2012).

33 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case.").

34 1 NIMMER, *supra* note 16, § 13.03[A].

35 ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 3 (2015).

36 Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 976-77 (1990) ("The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect. . . . The concept that portions of works protected by copyright are owned by no one and are available for any member of the public to use is such a fundamental one that it receives attention only when something seems to have gone awry. Although the public domain is implicit in all commentary on intellectual property, it rarely takes center stage." (footnote omitted)).

37 45 F.2d 119 (2d Cir. 1930).

38 *Id.* at 121; *accord* Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513-14 (1945) ("No doubt, the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of the characters.").

"Concrete" expression is protected while more general aspects are not.[39] In their economic analysis of copyright law, Professor William M. Landes and Judge Richard A. Posner explain this distinction further:

> Although the line between expression and idea is often hazy, there are clear cases on both sides of it. If an author of spy novels copies a portion of an Ian Fleming novel about James Bond, he is an infringer. If, inspired by Fleming, he decides to write a novel about a British secret agent who is a bon vivant, he is not an infringer. If an economist reprints Professor Coase's article on social cost without permission, he is an infringer; but if he expounds the Coase Theorem in his own words, he is not.
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> In both of these cases the original work (novel or article) is the joint output of two types of input, only one of which is protected by copyright law. In the case of the novel, the reason for the limited protection is easily seen. The novelist creates the novel by combining stock characters and situations (many of which go back to the earliest writings that have survived from antiquity) with his particular choice of words, incidents, and dramatis personae. He does not create the stock characters and situations, or buy them. Unlike the ideas for which patents can be obtained, they are not new and the novelist acquires them at zero cost, either from observation of the world around him or from works long in the public domain.[40]

Copyright similarly does not protect *scènes à faire*, standardized or common elements,[41] or elements that flow from the logic or necessities of the premise, format, or genre of a work.[42] The end result is a set of legal rules that enables commercialization of creative and expressive assets—allowing authors to "realize whatever exchange value (if any) their works of authorship are capable of commanding"[43]—while providing room for downstream creators to draw inspiration from existing works.

II. COPYRIGHT'S REMIX CRITIQUE

But not everyone agrees with the above premise. In 2011, filmmaker Kirby Ferguson released a four-part series *Everything is a Remix*. In it, Ferguson says,

> Copy, transform and combine. It's who we are, it's how we live, and of course, it's how we create. Our new ideas evolve from the old ones. But our system of law doesn't

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39 Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985); Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984) ("Any similarities in plot exist only at the general level for which plaintiff cannot claim copyright protection.").

40 William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 349-50 (1989) (footnote omitted).

41 Litman, *supra* note 36, at 968, 987-88.

42 *Berkic*, 761 F.2d at 1293; Barris/Fraser Enters. v. Goodson-Todman Enters., No. 86 Civ. 5037 (EW), 1988 WL 3013, at *5 (S.D.N.Y. Jan. 4, 1988).

43 Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 301-02 (2011).

> acknowledge the derivative nature of creativity. Instead, ideas are regarded as property, as unique and original lots with distinct boundaries.[44]

The premises established above form the core of what this Article calls the "remix critique." But before describing the critique in more detail, it is important to look at how it has developed.

A. *Development of the Critique*

The remix critique has risen and taken shape largely over the past two decades. A series of policy and legislative efforts in the mid-to-late 1990s, primarily addressing copyright law's application to the online environment, galvanized some academics, non-profits, IT industry associations, and activists to action. These efforts—including the National Information Infrastructure White Paper,[45] the Digital Millennium Copyright Act[46] ("DMCA"), and the Sonny Bono Copyright Term Extension Act[47] ("CTEA")—launched a new era of skepticism toward the present scope of copyright that continues to dominate IP scholarship to this day.[48]

Though criticisms of the law and its recent innovations were widely varied, a group of articles emerged that specifically criticized copyright's treatment of derivative works.[49] Some took a general approach. For example, Professor Mark A. Lemley looked at how patent and copyright handle what he called "improvements," asserting that copyright is "hostile" to such improvements.[50] He worried that that improvers are "at the mercy of the original intellectual property owner, unless there is some separate right that

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44 Kirby Ferguson, *Everything is a Remix Part 4 Transcript*, EVERYTHING IS A REMIX (Feb. 15, 2012), http://everythingisaremix.info/blog/everything-is-a-remix-part-4-transcript.

45 INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995), http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf. For contemporary criticism, see, for example, Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996, 12:00 PM), http://archive.wired.com/wired/archive/4.01/white.paper_pr.html.

46 Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

47 Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

48 *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (2001); Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987-2012*, 14 YALE J.L. & TECH. 162 (2012).

49 *See generally* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213 (1997).

50 Lemley, *supra* note 49, at 1029.

expressly allows copying for the sake of improvement."[51] Professor Glynn S. Lunney, Jr. expressed concerns that expanded copyright protection would shift too much investment into works of authorship and specifically called for a narrowing of the derivative works right.[52]

Others tackled themes that would specifically become prevalent as the remix critique developed, such as the ease that digital technologies afforded the ability to reuse audiovisual works in particular and a perceived rise in noncommercial, amateur remix. Naomi Voegtli said, "The new digital technology has made it easier to 'raw materialize' copyrighted works."[53] This, combined with skepticism toward the Romantic "image of a great author as someone who creates a truly original work in a solitary environment" led to her conclusion that "current copyright law seems, at least, counter-intuitive."[54] Professor Rebecca Tushnet echoed Voegtli's observation, saying "new technologies that allow individuals to produce and distribute information easily" have made copyright law "increasingly relevant to common activities."[55] Tushnet is especially concerned with copyright's effect on fan fiction. She asserts, "[M]odern secondary creativity allows fans to transcend passive reception, using material to which they have easy access;" however, "most readily available and widely known characters are now corporate creatures."[56]

Around the same time, Harvard Law School professor Lawrence Lessig agitated for broader exclusion of noncommercial remix from copyright law. In his book *Free Culture*, Lessig asserted that the law no longer takes care to draw a distinction between "republishing someone's work on the one hand and building upon or transforming that work on the other."[57] Lessig describes this in stark terms:

> Just at the time digital technology could unleash an extraordinary range of commercial and noncommercial creativity, the law burdens this creativity with insanely complex and vague rules and with the threat of obscenely severe penalties. . . .
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> . . . .
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> . . . In response to a real, if not yet quantified, threat that the technologies of the Internet present to twentieth-century business models for producing and distributing culture, the law and technology are being transformed in a way that will undermine our tradition of free culture. The property right that is copyright is no longer the balanced right that it was, or was intended to be. The property right that is copyright has become unbalanced, tilted toward an

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51 *Id.* at 991.

52 Lunney, *supra* note 49, at 653.

53 Voegtli, *supra* note 49, at 1214.

54 *Id.* at 1215-16.

55 Tushnet, *supra* note 49, at 651.

56 *Id.* at 652.

57 LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 19 (2004).

> extreme. The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer.[58]

A number of other scholars, such as Professors James Boyle, Siva Vaidhyanathan, and Yochai Benkler wrote about similar themes in books aimed at the general public in the early 2000s.[59]

A 2004 New York Times article by Robert Boynton profiled this burgeoning "copy left" movement.[60] Boynton said of the proponents of this movement, "While the American copyright system was designed to encourage innovation, it is now, they contend, being used to squelch it. They see themselves as fighting for a traditional understanding of intellectual property in the face of a radical effort to turn copyright law into a tool for hoarding ideas."[61] The article discusses the ideas of Lessig, Benkler, Vaidhyanathan, and Boyle, as well as Professor Jonathan Zittrain—"a cofounder of the Berkman Center for Internet and Society at Harvard Law School, the intellectual hub of the Copy Left"—and law professors William Fisher and Charles Nesson.[62] It notes some of the motivations of the copy left movement: the aforementioned DMCA and CTEA, along with the filesharing lawsuits filed by the Recording Industry Association of America ("RIAA").[63] The zeal of the copy left was unabated; Lessig is quoted as saying "in the cultural sphere, big media wants to build a new Soviet empire where you need permission from the central party to do anything."[64] Boynton goes on to write:

> One of the central ideas of the Copy Left is that the Internet has been a catalyst for reengaging with the culture—for interacting with the things we read and watch and listen to, as opposed to just sitting back and absorbing them. This vision of how culture works stands in contrast to what the Copy Left calls the "broadcast model"—the arrangement in which a

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58 *Id.* at 19, 173.

59 JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 278 (2006) ("Ranging from judicial interpretations of copyright law to efforts to regulate the hardware and software of the networked environment, we are seeing a series of efforts to restrict nonmarket use of twentieth-century cultural materials in order to preserve the business models of Hollywood and the recording industry. These regulatory efforts threaten the freedom to participate in twenty-first-century cultural production, because current creation requires taking and mixing the twentieth-century cultural materials that make up who we are as culturally embedded beings.").

60 Boynton, *supra* note 4.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

> small group of content producers disseminate their creations (television, movies, music) through controlled routes (cable, theaters, radio-TV stations) to passive consumers.[65]

And while the proponents of the copy left are also motivated by enforcement issues or anti-circumvention, the centerpiece of the movement is the idea that copyright serves as a barrier to the way individuals communicate and create in the digital era.

> Yochai Benkler, the law professor at Yale, argues that people want to be more engaged in their culture, despite the broadcast technology, like television, that he says has narcotized us. "People are users," he says. "They are producers, storytellers, consumers, interactors—complex, varied beings, not just people who go to the store, buy a packaged good off the shelf and consume."[66]

In 2001, Lessig turned his critique into practice by launching Creative Commons (along with "James Boyle, Michael Carroll, Molly Shaffer Van Houweling, MIT computer science professor Hal Abelson, lawyer-turned-documentary filmmaker-turned-cyberlaw expert Eric Saltzman, and public domain Web publisher Eric Eldred"), a non-profit organization known primarily for a suite of public licenses it first released in December 2002.[67] The licenses provide authors with a variety of options for what they want to permit, ex ante, third parties to be able to do with licensed works.[68] Lessig explained during the launch, "Our licenses build upon their creativity, taking the power of digital rights description to a new level. They deliver on our vision of promoting the innovative reuse of all types of intellectual works, unlocking the potential of sharing and transforming others' work."[69] Currently, the organization provides seven licenses, giving licensors options as to whether to allow commercial uses, permit creation of derivative works, or require downstream works to be licensed on the same terms, as well as to waive all rights to a work.[70] Creative Commons, it might be said, institutionalized the remix critique.

A number of developments over the next decade would serve to further galvanize the remix critique and push it outside academia. In late December, 2003, underground hip-hop producer Brian Burton, who went by the stage name Danger Mouse, released online the *Grey Album*, an unau-

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65 *Id.*

66 Boynton, *supra* note 4.

67 *History*, CREATIVE COMMONS, http://creativecommons.org/about/history/ (last visited May 12, 2016); Press Release, Creative Commons, Creative Commons Unveils Machine-Readable Copyright Licenses (Dec. 16, 2002) [hereinafter Creative Commons Press Release], http://creativecommons.org/press-releases/entry/3476.

68 Creative Commons Press Release, *supra* note 67.

69 *Id.* (internal quotation marks omitted).

70 *About the Licenses*, CREATIVE COMMONS, https://creativecommons.org/licenses/ (last visited May 12, 2016).

thorized mashup of vocals from hip-hop artist Jay-Z's *Black Album* (2003) laid on top instrumentation composed entirely of samples from the Beatle's *White Album* (1968).[71] The album was well-received online.[72] In early February, EMI Music, which owned the publishing rights to the *White Album*, sent a cease and desist letter to Burton regarding his distribution of the album.[73] When word got out, a number of online sites launched a "protest."[74]

The event brought out familiar proponents of the remix critique—the New York Times quoted Jonathan Zittrain as saying, "The flourishing of information technology gives amateurs and home-recording artists powerful tools to build and share interesting, transformative, and socially valuable art drawn from pieces of popular culture. There's no place to plug such an important cultural sea change into the current legal regime."[75] It also attracted new participants in the critique from activist groups such as the newly formed "Downhill Battle," whose co-founder Nicholas Reville was quoted as saying, "To a lot of artists and bedroom D.J.'s, who are now able to easily edit and remix digital files of their favorite songs using inexpensive computers and software, pop music has become source material for sonic collages."[76]

Later that year, the Sixth Circuit released its decision in *Bridgeport Music, Inc. v. Dimension Films*,[77] a case involving the alleged unauthorized sampling of the music group Funkadelics' sound recording by recording artists NWA.[78] The court interpreted the exclusive rights of a sound recording owner broadly by holding that any amount of copying from a sound recording amounted to infringement—there is no de minimis taking or analysis of substantial similarity.[79]

The ruling did not stop recording artist Girl Talk, who released a series of albums in the 2000s composed primarily from hundreds of samples from existing sound recordings without authorization.[80] Girl Talk's albums and live performances achieved some level of popularity; in particular, he became a mascot of sorts for the copy left, sharing their sentiments. As Rob

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71 *The Mouse That Remixed*, NEW YORKER (Feb. 9, 2004), http://www.newyorker.com/archive/2004/02/09/040209ta_talk_greenman.

72 *Id.*

73 Bill Werde, *Defiant Downloads Rise From Underground*, N.Y. TIMES (Feb. 25, 2004), http://www.nytimes.com/2004/02/25/arts/defiant-downloads-rise-from-underground.html.

74 *Id.*

75 *Id.*

76 *Id.*

77 410 F.3d 792 (6th Cir. 2005).

78 *Id.* at 796.

79 *Id.* at 801-02.

80 Rob Walker, *Mash-Up Model*, N.Y. TIMES MAG. (July 20, 2008), http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?partner=rssnyt&emc=rss&_r=0.

Walker wrote in a New York Times Magazine profile of Girl Talk, "Maintaining that copyright law stifles creativity, [Girl Talk] ignored it."[81]

This combination of events contributed to a critical mass of the remix critique. The Sixth Circuit's admonition of "get a license or do not sample," combined with EMI Music's assertion of rights against Burton and Girl Talk's rise in prominence sparked a cottage industry in law review articles (mostly from law students) decrying copyright's ill fit with creativity and calling for (mostly similar) solutions.[82]

The remix critique continued to migrate to more popular forms of media. For example, documentary filmmaker Brett Gaylor released the film

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81 *Id.*

82 *See, e.g.*, Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 889, 904 (2011) (suggesting a change to legislatively overturn *Bridgeport v. Dimension Films*) ("[T]he right to exclude seems to be used more as a weapon than as a tool of innovation."); Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009); Elina Lae, *Mashups—A Protected Form of Appropriation Art or a Blatant Copyright Infringement?*, 12 VA. SPORTS & ENT. L.J. 31, 57-62 (2012) (proposing a long-term compulsory licensing scheme); Tracy Reilly, *Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in* Metall auf Metall, 13 MINN. J.L. SCI. & TECH. 153, 209 (2012) (suggesting altering fair use to test "whether the plaintiff's sound recording is substantially recognizable to the average listener as is appears in the defendant's song"); Reuvan Ashtar, Note, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 317 (2009) (proposing a compulsory licensing scheme); Daniel Cherry, Comment, *Blanch It, Mix It, Mash It: A Fair Use Framework for the Mashup*, 28 T.M. COOLEY L. REV. 495 (2011); Kelly Cochran, Note, *Facing the Music: Remixing Copyright Law in the Digital Age*, 20 KAN. J.L. & PUB. POL'Y 312, 327 (2011) ("Removing regulation of noncommercial copying from the law and preserving the commercial rights of the copyright owners serves the interests of both consumers and creators."); Joanna E. Collins, Note, *User-Friendly Licensing for a User-Generated World: The Future of the Video-Content Market*, 15 VAND. J. ENT. & TECH. L. 407, 440 (2013) (proposing a modified compulsory licensing scheme); Kerri Eble, Note, *This Is a Remix: Remixing Music Copyright to Better Protect Mashup Artists*, 2013 U. ILL. L. REV. 661; Vera Golosker, Note, *The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights*, 34 HASTINGS COMM. & ENT. L.J. 381 (2012); Emily Harper, Note, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 HOFSTRA L. REV. 405 (2010); David Mongillo, Note, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, 9 U. PITT. J. TECH. L. & POL'Y 1 (2009); Shervin Rezaie, Comment, *Play Your Part: Girl Talk's Indefinite Role in the Digital Sampling Saga*, 26 TOURO L. REV. 175 (2010); Anna Shapell, Note, *"Give Me a Beat:" Mixing and Mashing Copyright Law to Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519, 560-64 (2012) (proposing the expansion of compulsory license for samples); Katie Simpson-Jones, Comment, *Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to "Recast, Transform, or Adapt" Copyright*, 43 J. MARSHALL L. REV. 1067, 1089 (2010) (suggesting a derivative-works-right exception for mashups); Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811 (2011) (arguing for a compulsory licensing scheme). *But see* Michael Allyn Pote, *Mashed-Up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639 (2010) (arguing current copyright law appropriately balances interests of current artists and future artists).

RiP!: A Remix Manifesto in 2008, which explored, among other things, Lessig's ideas and Girl Talk's music.[83] The film argues, "1. Culture always builds on the past. 2. The past always tries to control the future. 3. Our future is becoming less free. 4. To build free societies you must limit the control of the past."[84] Benjamin Frazen's 2009 documentary *Copyright Criminals* looked specifically at the effect of copyright on hip-hop and digital sampling.[85] And, as mentioned above, Kirby Ferguson would explore the critique in his 2011 series *Everything is a Remix*.

The critique continues to this day with no signs of dissipating. For example, in a June 2015 article in WIPO Magazine, WIPO consultant Guilda Rostama, citing Lessig, writes, "The remix culture raises important challenges, not only for cultural industry stakeholders, legal practitioners and scholars, and policy makers, but also for members of the public."[86]

B. *Description of the Critique*

The premise of the remix critique is that copyright does not recognize that "everything is a remix" and, by securing exclusive rights to creative works, copyright actually serves as a barrier to the creativity it purports to incentivize. In addition, the critique asserts that modern creativity is particularly reliant on explicit remixing. And given the expansion of copyright over time, the problem is only getting worse.

Christopher Sprigman describes creativity as it is viewed by proponents of the remix critique thusly:

> Most artists, if pressed, will admit that the true mother of invention in the arts is not necessity, but theft. And this is true even for our greatest artists. Shakespeare's Romeo and Juliet (1591) was taken from Arthur Brooke's poem Romeus and Juliet (1562), and most of Shakespeare's historical plays would have infringed Holingshead's Chronicles of England (1573). For the third movement of the overture to Theodora, Handel drew on a harpsichord piece by Gottlieb Muffat (1690-1770). . . .
>
> Cultural giants borrow, and so do corporate giants. Ironically, many of Disney's animated films are based on Nineteenth Century public domain works, including Snow White and the Seven Dwarfs, Cinderella, Pinocchio, The Hunchback of Notre Dame, Alice in Wonderland, and The Jungle Book (released exactly one year after Kipling's copyrights expired).
>
> Borrowing is ubiquitous, inevitable, and, most importantly, good. Contrary to the romantic notion that true genius inheres in creating something completely new, genius is of-

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83 RIP!: A REMIX MANIFESTO (Nat'l Film Bd. of Can. 2008).

84 *Id.*

85 COPYRIGHT CRIMINALS (Benjamin Franzen 2009).

86 Guilda Rostama, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WIPO MAG. (June 2015), http://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html.

> ten better described as opening up new meanings on well-trodden themes. Leonard Bernstein's reworking in West Side Story of Romeo and Juliet is a good example.[87]

While the remix critique recognizes that individuals can seek permission from copyright owners to borrow from existing works, this is often portrayed as futile. Permission or licensing, especially of works under corporate control, is argued to be out of reach of ordinary people.[88] At times, the picture painted of the licensing landscape is considerably bleak.[89] Giancarlo F. Frosio writes that "transformative use, characters, and cultural icons are locked into the dungeons of copyright, the constant enlargement of which has tightened the chains holding them."[90] During a public United States Patent and Trademark Office ("USPTO") hearing regarding its Green Paper (a process this Article describes in more detail later),[91] Teri Karobonik of the organization New Media Rights said:

> I think with licensing we often at these panels create this false sense of—almost that it's easy to get a license that, oh, yes, absolutely. Just get a license. Well, I've had the "just get a license" conversation with a wide variety of users. Some of them have been high school students that don't have jobs. Some of them—understandably some of them have been college students. Some of them have been young documentary filmmakers.

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87 Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and* Eldred v. Ashcroft, FINDLAW'S WRIT (Mar. 5, 2002), http://writ.news.findlaw.com/commentary/20020305_sprigman.html.

88 *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 28 (2014) (statement of Naomi Novik, Author and Co-Founder of Organization for Transformative Works) [hereinafter Novik Testimony] ("Licensing is not a realistic option for most artists and communities who rely on fair use. On the purely practical level, the vast majority of remix artists doing noncommercial work simply don't have any of the resources to get a license—not money, not time, not access."); Giancarlo F. Frosio, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 341, 378 (2014) ("[T]he individual is often practically incapable of clearing the complex bundle of rights involved in copyrighted content."); Lemley, *supra* note 49, at 1061 ("[L]icensing intellectual property is costly and uncertain. Despite the property rights model of efficient transactions, in the real world one cannot always expect that efficient transactions will occur."); Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 55 (2014) ("[Artists] encounter high transaction costs in obtaining licenses to use copyrighted works."); Eble, Note, *supra* note 82, at 687 ("[T]o license a sample can cost millions of dollars.").

89 Evans, *supra* note 82, at 904 ("[T]he right to exclude seems to be used more as a weapon than as a tool of innovation."); MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL, at ii (2005) ("[T]he 'clearance culture' [created by copyright], . . . assumes that almost no quote can be used without permission from the owner."), http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf; Parker Higgins, *Why Isn't Gatsby in the Public Domain?*, ELEC. FRONTIER FOUND. (May 7, 2013), https://www.eff.org/deeplinks/2013/05/why-isnt-gatsby-public-domain ("Rightsholders have the power to veto derivative works simply by refusing to license the works.").

90 Frosio, *supra* note 88, at 380.

91 *See infra* note 106-20 and accompanying text.

> If you do not and cannot afford a zealous advocate—a zealous advocate who is a music copyright licensing attorney, often the licensing is pretty much closed off to you. That's just the reality, and I think that's a problematic world.[92]

C. *Policy Developments*

The outcome of these charges have been a number of proposals made in the academic literature over the past several decades aimed at addressing the perceived inadequacies of copyright law in dealing with cumulative creativity. One of the primary villains in this critique is the derivative works right. Professor Derek Bambauer writes bluntly that the derivative works right "blocks creativity" and should be done away with.[93] Professor Tushnet has said, "[M]odern copyright law has discouraged overt reliance on earlier works, now that the reproduction and derivative works rights encompass far more than exact copying and translation into a new medium. Expansive rights conflict with the human propensity to respond to stories by altering and retelling them." [94] Some have called for overall changes to copyright law, such as rolling back the length of copyright protection.[95] Less dramatically, Professor Lunney argues in favor of significantly narrowing the scope of the derivative works right, such that it protects only "exact or near exact duplication" and "any significant transformation of or variation from the underlying work should preclude a finding of infringement even if the underlying work remains recognizable."[96] Peter S. Menell and Ben Depoorter argue for a fee-shifting mechanism that seeks greater ex ante certainty of fair uses.[97] A deluge of other articles have called for a specific exception for noncommercial "remix";[98] a compulsory license similar to the one for "cov-

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92 DEP'T OF COMMERCE INTERNET POL'Y TASK FORCE, GREEN PAPER ROUNDTABLE ON COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 72 (July 29, 2014) [hereinafter THIRD GREEN PAPER ROUNDTABLE] (remarks by Teri Karobonik), http://www.uspto.gov/sites/default/files/ip/global/copyrights/la_transcript.pdf.

93 Derek E. Bambauer, *Faulty Math: The Economics of Legalizing* The Grey Album, 59 ALA. L. REV. 345, 346 (2008).

94 Rebecca Tushnet, *The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity*, *in* DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 294, 302 (Irene Calboli & Srividhya Ragavan eds., 2015).

95 *See, e.g.*, Robert E. Shepard, Note, *Copyright's Vicious Triangle: Returning Author Protections to Their Rational Roots*, 47 LOY. L.A. L. REV. 731, 765-69 (2014).

96 Lunney, *supra* note 49, at 649-50.

97 Menell & Depoorter, *supra* note 88, at 53.

98 Eble, Note, *supra* note 82, at 692; Elton Fukumoto, Comment, *The Author Effect After the "Death of the Author": Copyright in a Postmodern Age*, 72 WASH. L. REV. 903, 932-33 (1997) ("Interpretation of section 107 should be expanded to include a pastiche category of fair use."); Harper, Note, *supra* note 82, at 442; Simpson-Jones, Comment, *supra* note 82, at 1089 (proposing an "exception for mashups as a protected class of derivative works").

er" songs;[99] or blanket licensing, similar to that employed by ASCAP and BMI for public performance of musical compositions.[100]

More recently, Menell has actively advocated in favor of his proposal for a compulsory license for (musical) remixes. As he explains:

> Under a hypothetical Remix Compulsory License Act (RCLA), a remix artist seeking to develop a sound recording that comprises more than five existing sound recordings would be eligible for a compulsory license by paying 18.2¢ for a five-minute song (or less; with escalations for longer songs) into the RCLA Fund. The basic idea is that the remixer would be building his or her work on both musical composition and sound recording works and hence the baseline for the entire work should be double the musical composition cover license rate. By making the compulsory license rate 100% of the baseline for just the musical composition copyright, the remixer would effectively be credited with half of the total value of the remixed work (assuming that the musical composition and sound recording copyrights were treated symmetrically). Thus, by paying 18.2¢, the remixer could clear all sample licenses needed for a mashup of five minutes (or less).[101]

This proposal is fleshed out in greater detail in Menell's *Adapting Copyright for the Mashup Generation*.[102]

The issues raised by the remix critique have started to appear on the policy agenda. In 2013, House Judiciary Committee Chairman Bob Goodlatte announced that his Committee would be conducting a review of the U.S. copyright law, beginning with a comprehensive series of hearings.[103] During these hearings, the Committee heard from a number of witnesses making the remix critique. For example, during a hearing on the scope of fair use, Naomi Novick of the Organization for Transformative Works, a nonprofit organization established in 2007 in part to promote the acceptance of noncommercial "fanworks" as legitimate creative works, urged Congress to "add a specific exemption for noncommercial remix that would supplement fair use, the same way that libraries and teachers have specific exemp-

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99 *See, e.g.*, Caroline Kinsey, *Smashing the Copyright Act to Make Room for the Mashup Artist: How a Four-Tiered Matrix Better Accommodates Evolving Technology and the Needs of the Entertainment Industry*, 35 HASTINGS COMM. & ENT. L.J. 303, 324-29 (2013); Voegtli, *supra* note 49, at 1264; Harper, Note, *supra* note 82, at 442; Alexander C. Krueger-Wyman, Note, *Mashing Up the Copyright Act: How to Mitigate the Deadweight Loss Created by the Audio Mashup*, 14 U. DENV. SPORTS & ENT. L.J. 117, 126-27 (2013); Andrew S. Long, Comment, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 357-60 (2007); Vrana, Note, *supra* note 82.

100 *See* Harper, Note, *supra* note 82, at 442-43.

101 Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 356 (2013).

102 Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441 (2016). *But see* Dina LaPolt, Jay Rosenthal & John Meller, *A Response to Professor Menell: A Remix Compulsory License Is Not Justified*, 38 COLUM. J.L. & ARTS 365 (2015).

103 Press Release, House Judiciary Committee, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (April 24, 2013), http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

tions."[104] During a hearing on moral rights, advocacy group Public Knowledge said:

> Expanding the term of copyright comes at a cost. By giving an author a monopoly on an expression, it prevents other people from building on that expression to create new works. Shortening the term of copyright to life plus 50 years would enrich the public domain by shortening the term of protection, while still maintaining compliance with international treaty obligations.[105]

Perhaps most relevant is a recently concluded proceeding by the Internet Policy Task Force ("IPTF"), a Department of Commerce working group comprised of representatives from the USPTO, National Telecommunications and Information Administration, National Institute of Standards and Technology, and International Trade Administration.[106] In July 2013, the IPTF released a Green Paper titled *Copyright Policy, Creativity, and Innovation in the Digital Economy*, which is described as, "the most thorough and comprehensive analysis of digital copyright policy issued by any administration since 1995."[107] Following the release of the Green Paper, the IPTF solicited public comments "to continue a dialogue on how to improve the current copyright framework for stakeholders, consumers, and national economic goals."[108] It identified four issues raised by the Green Paper that would be the subject of public roundtables; those issues included "the legal framework for the creation of remixes."[109] According to the Green Paper, "The question is whether the creation of remixes is being unacceptably impeded."[110]

On October 3, 2013, the IPTF published a notice of public meeting and a request for public comments on the identified issues.[111] Two rounds of

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104 Novik Testimony, *supra* note 88, at 30.

105 *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 92 (2014) (statement of Public Knowledge).

106 DEP'T OF COMMERCE INTERNET POL'Y TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) [hereinafter DIGITAL ECONOMY GREEN PAPER], http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf.

107 Press Release, U.S. Dep't of Commerce, U.S. Dep't of Commerce Produces Comprehensive Analysis Addressing Copyright Policy, Creativity and Innovation in the Digital Economy (July 31, 2013), https://www.commerce.gov/news/press-releases/2013/07/us-department-commerce-produces-comprehensive-analysis-addressing; *see also* DIGITAL ECONOMY GREEN PAPER, *supra* note 106.

108 Press Release, U.S. Dep't of Commerce, U.S. Dep't of Commerce to Host Meeting and Seek Comments on Recent "Copyright Policy, Creativity, and Innovation in the Digital Economy" Report (Oct. 1, 2013), http://www.uspto.gov/about-us/news-updates/us-department-commerce-host-meeting-and-seek-comments-recent-copyright-policy.

109 *Id.*

110 DIGITAL ECONOMY GREEN PAPER, *supra* note 106, at 29.

111 Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013).

comments were collected and a meeting held December 12, 2013.[112] Subsequently, four public roundtables on the legal framework for remixes and the other three issues were scheduled and held across the country.[113]

A variety of viewpoints were heard during the roundtables, mirroring those expressed in the public comments. A number of commenters, primarily from the media and entertainment industries, said that the current legal framework for remixes was working.[114] For example, David Given, an attorney for clients in the creative arts, said, "I'm not aware of any empirical evidence, any academically vetted study or survey that suggests in direct answer to this task force question, is creativity being impinged."[115] But other participants in the roundtables made the point that the legal framework for remixes created "uncertainty"[116] or asserted that licensing was overly burdensome.[117] When asked for proposals, some participants raised the idea of a compulsory license.[118] Others called specifically for some type of remix "safe harbor."[119] Concerns were raised that statutory damages prevent law-

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112 *See* Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 66,337, 66,337 (Nov. 5, 2013).

113 Notice of Public Meetings on Copyright Policy Topics (as Called for in the Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy), 79 Fed. Reg. 21,439, 21,439 (Apr. 16, 2014) ("The four roundtables are scheduled to be held in: (1) Nashville, TN on May 21, 2014, (2) Cambridge, MA on June 25, 2014, (3) Los Angeles, CA on July 29, 2014, and (4) Berkeley, CA on July 30, 2014.").

114 *See, e.g.*, Am. Society of Composers, Authors & Publishers, et al., Post-Meeting Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, http://www.uspto.gov/ip/global/copyrights/comments/ascap_bmi_cmpa_nsai_nmpa_riaa_sesac_post-meeting_comments.pdf; Copyright Alliance, Post Meeting Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, http://www.uspto.gov/ip/global/copyrights/comments/copyright_alliance_post-meeting_comments.pdf; Dina LaPolt, Comment Letter on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (Feb. 10, 2014) [hereinafter LaPolt Comment], http://www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf.

115 DEP'T OF COMMERCE INTERNET POL'Y TASK FORCE, GREEN PAPER ROUNDTABLE ON REMIXES, FIRST SALE DOCTRINE, AND STATUTORY DAMAGES 14 (July 30, 2014) [hereinafter FOURTH GREEN PAPER ROUNDTABLE] (remarks by David Given), http://www.uspto.gov/sites/default/files/ip/global/copyrights/berkeley_transcript.pdf.

116 DEP'T OF COMMERCE INTERNET POL'Y TASK FORCE, GREEN PAPER ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE 121 (May 21, 2014) [hereinafter FIRST GREEN PAPER ROUNDTABLE] (remarks by Daniel Gervais & Aaron Perzanowski), http://www.uspto.gov/ip/global/copyrights/Nashville_Transcript_-_RT_-_Revised_Nov_2014.pdf.

117 FIRST GREEN PAPER ROUNDTABLE, *supra* note 116, at 137 (remarks by John Strohm) ("I've seen situations where my client is a songwriter who contributed to the writing of the composition, and then the recording artist has to go give 80 percent of the copyright to, you know, to some, you know, classic rock band, or something like that, then there's only 20 percent left of the pie to split between the songwriters, and I see that as a problem.").

118 *Id.* at 124 (remarks by Dr. E. Michael Harrington).

119 THIRD GREEN PAPER ROUNDTABLE, *supra* note 92, at 88 (remarks by Betsy Rosenblatt) ("Remix creators need to know that they have a right to create without permission, and they don't just exist

suits, chilling potentially noninfringing remix.[120] There were also concerns that licensing, at least in some circumstances, could be detrimental to fair use.[121]

The IPTF released its White Paper on January 28, 2016, containing its recommendations on the legal framework for remixes (as well as the other topics identified in the Green Paper). It concluded that the current framework of copyright law allowed remixes to thrive and no legislative changes, such as a statutory exemption or compulsory license, are warranted, though it did recommend the development of guidelines and best practices to provide more clarity for fair use along with urging improvements to voluntary licensing options such as micro-licensing, collective licensing, and intermediary licensing.[122]

It is worth noting in passing that the issue of remix has received attention outside the United States as well. In 2011, as part of a broader copyright revision, Canada passed what has been called a "user-generated content exception."[123] The amendment provides:

> It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual—or, with the individual's authorization, a member of their household—to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

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at the sufferance of copyright owners, and the law should expressly permit noncommercial remix through doctrines very much we have now, fair use, safe harbors but—and these should be flexible—but not permit the sort of uncertainty we have now.").

120 FOURTH GREEN PAPER ROUNDTABLE, *supra* note 115, at 17 (remarks by Corynne McSherry).

121 *See, e.g.*, *id.* at 31 ("The whole point of fair use is if it's fair use, you don't need a license. You don't need permission. You don't need to seek permission. You don't have to sign up for a license. You don't have to do any of that. And I worry very much that if we create a licensing regime, then we create also an expectation that everybody will participate in that regime even if what they are doing actually they don't need a license for in the first place."); THIRD GREEN PAPER ROUNDTABLE, *supra* note 92, at 77 (remarks by Jennifer Rothman) ("People are making collages. People are making diaries. They're doing their term papers online. They're doing new transformative creations, parodies, critical commentaries, all in the context of what might be categorized as a remix. I think it's very important as we move forward that we do provide space and protect a zone of fair use for those sorts of uses."); DEP'T OF COMMERCE INTERNET POL'Y TASK FORCE, PUBLIC ROUNDTABLE PANEL DISCUSSION ON GREEN PAPER ON COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 37 (June 25, 2014) [hereinafter SECOND GREEN PAPER ROUNDTABLE] (remarks by Kyle Courtney) ("I'm always concerned about the proliferation of licensing as a detriment to fair use."), http://www.uspto.gov/ip/global/copyrights/Cambridge_Green_Paper_RT_Transcript_Revised_Nov_2014.pdf.

122 DEP'T OF COMMERCE INTERNET POL'Y TASK FORCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES 24-33 (2016), http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf.

123 Michael A. Gunn, *Peer-to-Peer File Sharing as User Rights Activism*, 5 WESTERN J. LEGAL STUD, issue no. 3, 2014, at 1, 14, http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1114&context=uwojls.

> (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
>
> (b) the source—and, if given in the source, the name of the author, performer, maker or broadcaster—of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
>
> (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
>
> (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter—or copy of it—or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.[124]

At least one scholar, Professor Peter K. Yu, has already begun a push to transplant this user-generated content exception to other jurisdictions.[125] Vice-President of the European Commission for the Digital Agenda Neelie Kroes approvingly cited the Canadian exception in a 2014 speech addressing copyright reform.[126]

In January 2015, the Committee on Legal Affairs in the European Parliament presented a draft report reviewing the EU's 2001 copyright directive, written by rapporteur Julia Reda.[127] Echoing the remix critique, at one point the draft report "[n]otes with interest the development of new forms of use of works on digital networks, in particular transformative uses."[128] This provision was later amended to add that the Parliament "stresses the need to examine solutions reconciling efficient protection that provides for proper remuneration and fair compensation for creators with the public interest for access to cultural goods and knowledge."[129] The entire report with amendments was adopted by the full Parliament at a July 9 plenary report, though it carries no legal weight since the European Commission has not yet proposed any legislation.[130]

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124 Copyright Modernization Act, S.C. 2012, c. 20, sec. 22, § 29.21(1) (Can.).

125 Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 175, 177 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405821.

126 Neelie Kroes, Vice-President, European Comm'n for Digital Agenda, Address at the Information Influx International Conference at Institute for Information Law, University of Amsterdam: Our Single Market is Crying Out for Copyright Reform (July 2, 2014), http://europa.eu/rapid/press-release_SPEECH-14-528_en.htm.

127 *Draft Report on the Implementation of Directive 2001/299/DC on the European Parliament* (Jan. 15, 2015), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-546.580+02+DOC+PDF+V0//EN.

128 *Id.* at 6.

129 *Report on the Implementation of Directive 2001/29/EC of the European Parliament* 12 (June 24, 2015), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0209+0+DOC+XML+V0//EN.

130 Monika Ermert, *EU Parliament Adopts Reda Report on Copyright Reform*, IP WATCH (July 9, 2015), http://www.ip-watch.org/2015/07/09/eu-parliament-adopts-reda-report-on-copyright-reform/.

As the next Part explains, the remix critique is based on a number of errors, and if they are not corrected, courts and policymakers may receive an inaccurate picture of the legal framework of remixes. While there may be issues at the periphery, the core of copyright helps facilitate cumulative creativity. The idea/expression distinction plays a pivotal role here, and licensing enables a vibrant and robust marketplace for derivative works and remixes. The result of the following discussion is that the proposals suggested above should be approached with caution.

III. EVERYTHING IS A REMIX

Creativity and remix is alive and well under copyright law. For purposes of this Article, a "remix" is defined as "a work that incorporates existing material to the extent that it would likely be prima facie infringing absent permission or a fair use defense." This definition encompasses many traditional types of derivative works, including adaptations, sequels, and tie-ins, as well as new versions, reboots, or mashups. Excluded from this definition of remix are "incorporative" uses—uses of material expression from existing works in works that would not be considered an extension of the existing work in the same way that adaptations or sequels are. This would include such uses as incidental uses and uses with different expressive purposes—transformative uses that are, as Professor Christopher M. Newman puts it, "designed to facilitate second-order informational uses rather than consumption of the aesthetic expressive experiences the works were designed to convey."[131] Incorporative uses might include an art poster hanging on a television set,[132] images in a cultural history book,[133] or a logo appearing in a historical documentary.[134] This does not necessarily mean that the discussion in this Article is or is not applicable to these types of uses, but I believe they are sufficiently distinguishable from the above definition of remix to merit a separate discussion beyond the scope of this Article.

Authorized remixes are incredibly popular with audiences. Benjamin Goldberger notes that "[a]daptations of literature initially comprised over one-third of all the films released"; today over half of Hollywood films are adaptations, remakes, and sequels.[135] Of the top ten highest grossing films

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131 Newman, *supra* note 43, at 311.

132 *See* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 72 (2d Cir. 1997).

133 *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006).

134 *See* Bouchat v. Baltimore Ravens Ltd. P'ship, 737 F.3d 932, 935 (4th Cir. 2013).

135 Goldberger, *supra* note 17, at 328; *see also* AFT & RENAULT, *supra* note 10, at 47 ("Films are often based on works such as novels, comic books, news stories, short fiction and even songs that are the work of previous authors.").

worldwide of all time (as of May 13, 2016), six were sequels.[136] Additionally, two were adapted from books[137] and three incorporated characters from comic books.[138] The top twenty-five highest-grossing franchises and film series have collectively grossed over $98 billion in total worldwide box office (as of May 13, 2016).[139] The increasing prevalence of franchises and series has corresponded with an increasing explosion in financial performance—from the genesis of the motion picture through 2011, only ten movies had grossed over $1 billion total at the box office;[140] though today, looking only at 2015 releases, five are currently well over the billion-dollar mark.[141] The most critically acclaimed TV series of all time[142] include adaptations,[143] tie-ins,[144] spin-offs,[145] and reboots.[146] Tie-in novels are "published by the all of the major publishing companies, sell tens of millions of copies

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136 *All Time Highest Grossing Movies Worldwide*, NUMBERS, http://www.the-numbers.com/movie/records/All-Time-Worldwide-Box-Office (last visited May 13, 2016) (listing *Star Wars Ep. VII: The Force Awakens*, *Jurassic World*, *Furious 7*, *The Avengers: Age of Ultron*, *Harry Potter and the Deathly Hallows: Part II*, and *Iron Man 3*).

137 *Id.*

138 *Id.*

139 The earliest of these is the James Bond film Dr. No, released in 1962, though roughly 20 percent of the films have been released since 2000. *Movie Franchises*, NUMBERS, http://www.the-numbers.com/movies/franchises/sort/World (last visited May 13, 2016). Note that the number above is the total for the top 26 franchises excluding *Iron Man*, since that franchise is a part of (and thus its box office revenues are included in) the *Marvel Cinematic Universe*.

140 Pamela McClintock, *10 Billion Dollar Babies that Have Crossed the 10 Figure Mark*, HOLLYWOOD REP. (July 6, 2011), http://www.hollywoodreporter.com/gallery/8-films-have-grossed-more-208472/1-transformers-dark-of-the-moon.

141 *Top 2015 Movies at the Worldwide Box Office*, NUMBERS, http://www.the-numbers.com/movie/records/worldwide/2015 (last visited May 13, 2016). It should be noted that none of the numbers are adjusted for inflation. *Id.*

142 Bruce Fretts & Matt Roush, *TV Guide Magazine's 60 Best Series of All Time*, TV GUIDE (Dec. 23, 2013), http://www.tvguide.com/news/tv-guide-magazine-60-best-series-1074962.aspx.

143 *M*A*S*H* was adapted from the 1970 film of the same name, itself based on a 1968 novel. Eric D. Snider, *What's the Big Deal?: MASH (1970)*, MTV NEWS (Jun. 14, 2011), http://www.mtv.com/news/2766384/whats-the-big-deal-mash-1970/. *Sex and the City* was based on a Candace Bushnell book of the same name. CANDACE BUSHNELL, http://candacebushnell.com/bio.html (Last visited May 13, 2016). *Homicide: Life on the Streets* was adapted from the nonfiction book *Homicide: A Year on the Killing Streets*. *101 Best Written TV Series*, WRITER'S GUILD AM., http://www.wga.org/content/default.aspx?id=5012 (last visited May 13, 2016).

144 The characters of *Buffy the Vampire Slayer* first appeared in a 1992 film. Britt Hayes, *See the Cast of 'Buffy the Vampire Slayer' Then and Now*, SCREENCRUSH (Jan. 31, 2014), http://screencrush.com/buffy-the-vampire-slayer-then-and-now/.

145 *Dallas* spun off a subplot from the 1978 film *Comes a Horseman*. *TV: Linda Gray on Filming Dallas Without Larry Hagman*, GLOUCESTERSHIRE ECHO (Aug. 27, 2014), http://www.gloucestershireecho.co.uk/TV-Linda-Gray-filming-Dallas-Larry-Hagman/story-22833284-detail/story.html.

146 *Battlestar Galactica* was a new take on the 1978 television series of the same name. Ben Child, *Is Battlestar Galactica Wise to Go Back to the 1978 Original for Inspiration?*, GUARDIAN (Nov. 17, 2011), http://www.theguardian.com/film/filmblog/2011/nov/17/battlestar-galactica-film-tv-original.

worldwide, and regularly appear on the *New York Times*, *USA Today*, and *Publishers Weekly* bestseller lists."[147] Franchises like *Star Wars* and *Star Trek*, and characters like Superman and James Bond remain popular across media and generations.

A. *The Robust Licensing Marketplace*

It's important that policymakers have an accurate understanding of the licensing landscape for derivative works, which the academic literature has largely overlooked. In reality, licensing has produced a robust and diverse marketplace for remixes and other derivative works. Surveying the landscape of derivative works in the creative fields, this Article focuses primarily on narrative uses—those works that reuse or remix elements such as plot, character, or setting. It will set aside semantic and semiotic uses—where elements from existing works are used for what they signify or the information they convey—and aesthetic uses—such as when a music producer uses a sample that is musically complementary with the rest of the work. This Section proceeds roughly as follows: first looking at different types of works where narrative fidelity is preserved (e.g., adaptations and remakes), then looking at new works based on one or more narrative elements from an existing work (e.g., sequels, spin-offs, and franchises), and finally looking at works using a combination of narrative elements from multiple existing works (e.g., mashups, collage, and pastiche). It concludes with a discussion of "user-generated content" which, though much of it may fall within the previously mentioned categories, contains some distinctions worth noting.

1. Retellings

The *adaptation*—a retelling of a story in a different medium[148]—is perhaps the oldest form of remix.[149] For centuries, stories have been adapted for the stage or opera. For example, Mozart's *Marriage of Figaro*, premiering May 1, 1786, was based on a stage comedy by Pierre Beaumarchais, *La folle journée, ou le Mariage de Figaro*.[150] Nearly anything can—and has—

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147 Lee Goldberg, *Introduction* to TIED IN: THE BUSINESS, HISTORY AND CRAFT OF MEDIA TIE-IN WRITING 1 (Lee Goldberg ed., 2010) [hereinafter TIED IN]; *see also* Goldberger, *supra* note 17, at 325 (noting, as of article date, that every *Star Trek* tie–in novel since July 1986 had made the *New York Times* bestseller list and had combined worldwide sales over 30 million copies).

148 Goldberger, *supra* note 17, at 320.

149 Mark Brokenshire, *Adaptation*, CHICAGO SCH. MEDIA THEORY, https://lucian.uchicago.edu/blogs/mediatheory/adaptation/ (last visited May 13, 2016).

150 Beaumarchias's play itself was a sequel of *Le Barbier de Séville* (The Barber of Seville). DONALD N. FERGUSON, MASTERWORKS OF THE ORCHESTRAL REPERTOIRE: A GUIDE FOR LISTENERS 402 (1954).

been adapted from one medium to another. Movies, for example, have been based off books,[151] plays,[152] newspaper articles,[153] and even video games[154] and theme parks rides.[155] Movies have also been adapted to the stage; the successful Broadway shows *The Producers* and *The Lion King* were both based on movies.[156]

A hallmark of the adaptation is fidelity to the source work, though the new work will often be altered to account for the nature and limitations of the new source medium.[157] Works may also be altered to appeal to a different audience than the source text, for example by "updating" elements of an older work to appeal to a modern audience, or altering elements to appeal to a different culture.[158]

Adaptation is a very broad term, one that includes a number of more specific terms. A *novelization* is a specific type of adaptation referring to a film, television show, or video game adapted into a book.[159] A *remake* is a new version of an existing work in the same medium, usually with the same characters, plot, and theme, though the setting may sometimes be updated.[160] This may perhaps include Roman versions of Greek plays, adapted to the sensibilities of Roman audiences.[161] The reimagining of classic plays has been commonplace in the theater world for decades.[162] Directors take Greek plays, or Shakespeare plays, and "transpose" the setting to a different time period. In 1996, for example, director Baz Luhrmann filmed a version of Shakespeare's *Romeo and Juliet* set in contemporary Southern California.[163]

Works may be remade to take advantage of advances in a medium's technique or technology, or they may be done to address different social,

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151 *E.g.*, THE HUNGER GAMES (Lionsgate 2012).

152 *E.g.*, AUGUST: OSAGE COUNTY (Weinstein Co. 2013).

153 Rudie Obias, *17 Movies Based on Magazine and Newspaper Articles (And Where to Read Them)*, MENTAL_FLOSS (Apr. 7, 2014), http://mentalfloss.com/article/56054/17-movies-based-magazine-and-newspaper-articles-and-where-read-them.

154 *E.g.*, RESIDENT EVIL (Constantin Film Prod. 2002).

155 *E.g.*, THE COUNTRY BEARS (Walt Disney Pictures 2002) (based off Disneyland's Country Bear Jamboree). You thought I was going to say Pirates of the Caribbean, didn't you? *See* Ashley Lee, *Do Disney Films Based on Theme Park Attractions Ride High to Box-Office Success?*, HOLLYWOOD REP. (May 24, 2015), http://www.hollywoodreporter.com/gallery/tomorrowland-disney-films-based-theme-797479/4-the-country-bears-2002.

156 Goldberger, *supra* note 17, at 326.

157 Brokenshire, *supra* note 149.

158 *Id.*

159 Goldberg, *supra* note 147, at 1.

160 Goldberger, *supra* note 17, at 320.

161 *See, e.g.*, GESINE MANUWALD, ROMAN REPUBLICAN THEATRE 282-83 (2011).

162 AMY S. GREEN, THE REVISIONIST STAGE: AMERICAN DIRECTORS REINVENT THE CLASSICS 11 (1994).

163 Peter Travers, *William Shakespeare's Romeo + Juliet*, ROLLING STONE (Nov. 1, 1996), http://www.rollingstone.com/movies/reviews/william-shakespeares-romeo-juliet-19961101.

political, or ideological perspectives from the original.[164] An example of this is when the British television sitcom *The Office* was adapted to air in the United States: "While the medium of the text itself did not change, elements such as scene locations, dialogue (including slang and cultural references), the look and demeanor of the characters, and even the storylines, were all changed to meet the sensibilities of an American audience."[165]

Closely related to the remake is the *reboot*. A reboot is similar to a remake but is used most often to apply to franchises or serial stories (both discussed in more detail below).[166] The reboot discards all previous continuity and begins from scratch.[167] The past decade in film has seen a good deal of reboots, including *The Texas Chainsaw Massacre* (New Line Cinema 2003), *Batman Begins* (Warner Bros. 2005), *Casino Royale* (Columbia Pictures 2006), and *Star Trek* (Paramount Pictures 2009). DC Comics has rebooted its entire comics universe several times, including in 1985 and 2011.[168] A reboot may be done to provide a fresh take on a property or to attract new fans.[169]

2. Sequels and Beyond

The next group of remixes involves new works that combine new narrative elements with ones from existing works. A *sequel* "involves a creator's re-use of his principal and secondary characters in new situations."[170] The value of sequels is tremendous. Film sequels alone average nearly $2 billion annually in box-office revenue today, more than double what they

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164 Victor Ginsburgh, et al., *Are Remakes Doing as Well as Originals?* 2 (Ecole de Gestion de l'Université de Liège, Working Paper 200705, 2007), http://www.hec.ulg.ac.be/sites/default/files/workingpapers/WP_HECULG_20070501_Ginsburgh_Pestieau_Weyers.pdf.

165 Brokenshire, *supra* note 149.

166 Alex Billington, Editorial, *Sunday Discussion: The Mighty Hollywood Reboot Trend*, FIRST SHOWING (Oct. 6, 2008), http://www.firstshowing.net/2008/sunday-discussion-the-mighty-hollywood-reboot-trend/.

167 Ben Fritz & Steve Zeitchik, *Hollywood Gets a Kick out of 'Rebooting'*, L.A. TIMES (Sept. 10, 2010), http://www.latimes.com/business/la-et-reboot-20100909-story.html.

168 Laura Hudson, *What is Going on With DC Comics' Super Confusing Convergence?*, WIRED (Nov. 19, 2014), http://www.wired.com/2014/11/dc-comics-convergence/.

169 Chris Baker, *Meet Leland Chee, the Star Wars Franchise Continuity Cop*, WIRED (Aug. 18, 2008), http://archive.wired.com/entertainment/hollywood/magazine/16-09/ff_starwarscanon?currentPage=all ("After a while, the retcons and inconsistencies can become off-putting to fans and render once-beloved universes impenetrable to newcomers. One solution: a reboot. Start from scratch, like [Ron] Moore did with [*Battlestar*] *Galactica*. Clever preservation of original story elements retains the old fans, and streamlining and modernizing lets newbies spend their hard-earned quatloos, too.").

170 D.L.A. Kerson, Comment, *Sequel Rights in the Law of Literary Property*, 48 CALIF. L. REV. 685, 685 (1960); *see also* Goldberger, *supra* note 17, at 320 ("A sequel is a new work that follows the main characters or action of the original work into the future.").

earned in the 1990s.[171] But authors have recognized the value of sequels for centuries. In the early seventeenth century, an author using the pen name Alonso Fernández de Avellaneda published an unauthorized sequel to Miguel de Cervantes' story *Don Quixote*.[172] Cervantes responded with a sequel of his own. As Adrian Johns recounts,

> Cervantes' volume has its hero repeatedly encounter readers of the spurious volume and characters from it. Indeed, the plot itself turns on this. Don Quixote alters his course, heading to Barcelona rather than Zaragoza, solely in order to depart from the story of the unauthorized book and therefore prove it inauthentic. Once in Barcelona, he enters a printing house and finds the workers engaged in correcting the imposter book itself. And at the end of the tale Don Quixote dies, just (or so Cervantes says) to make certain that no more bogus sequels can be foisted on the public.[173]

But sequels have arguably become more prevalent than ever. In the past decade, the film industry has seen an explosion of sequels in the "non-theatrical" market, including new installments that have little to do with the original titles, like *Jarhead 2*.[174] The traditional "direct-to-video" market has shifted from DVD rental to digital sell-through on sites like iTunes, Netflix, and Amazon.[175] *Grantland* writer Matt Patches explained the process behind Universal Entertainment Executive Vice President Glenn Ross's approach to production:

> Why make a sequel to a movie like Jarhead? It's still playing big where it matters. The numbers make sense. The EVP's team looks at DVD rentals, iTunes downloads, streaming numbers, TV distribution, and international markets. . . . Ross could produce a wartime movie that doesn't infringe on the legacy of Jarhead, but slapping it with a stagnant IP gives it automatic legs. "It does some marketing for you. You come to it with a built-in consumer. . . ," Ross says.[176]

Disney provides another example of success in sequel productions. It has had success in the non-theatrical market with sequels of its theatrical films since the early 1990s, when it released *The Return of Jafar*, a sequel to its 1992 hit *Aladdin*, and sold 11 million units, earning $100 million.[177]

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171 Sanjay Sood & Xavier Drèze, *Brand Extensions of Experiential Goods: Movie Sequel Evaluations*, 33 J. CONSUMER RES. 352, 352 (2006).

172 *Don Quixote: A Surreal Success*, BBC (Feb. 10, 2005, 6:39 PM), http://news.bbc.co.uk/2/hi/entertainment/4254511.stm.

173 ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 9-10 (2009).

174 Matt Patches, *Why Exactly is There a 'Jarhead 2'? Hollywood's Secret-Sequel Economy*, GRANTLAND (Aug. 19, 2014), http://grantland.com/hollywood-prospectus/why-exactly-is-there-a-jarhead-2-hollywoods-secret-sequel-economy/.

175 *Id.*

176 *Id.*

177 Goldberger, *supra* note 17, at 330-31 & n.209 (quoting KERRY SEGRAVE, MOVIES AT HOME 154 (1999)).

Closely related to the sequel is the *serialized story*. Author Robert Greenberger traces the modern day roots back to the pulp magazines of the nineteenth century.[178] When printing technology grew cheaper, publishers fueled public demand for "engrossing throwaway publications."[179] Publishers reduced prices further by using pulp paper and relying on lesser-known writers.[180] Says Greenberger:

> In just six years, sales increased to an amazing half a million per issue and trust me, it was noticed then imitated. Argosy imitated itself with All Story and weekly serials were rotated so as one feature drew to a close, another was kicking off and people were coming back in droves to see what would happen next. One such serial was Under the Moons of Mars a 1912 offering from a newcomer named Edgar Rice Burroughs. Its success led Munsey to buy additional stories from Burroughs, including a little something called Tarzan of the Apes.
>
> From this point forward, the pulps became a birthing ground for popular culture heroes and villains who would endure through radio programs, movie serials, comic strips, comic books, and novels. Among these characters would be Robert E. Howard's Conan and King Kull, Philip Francis Nowlan's Buck Rogers, and Lester Dent's Doc Savage.[181]

Plenty of media are built off serialized stories: comic books, soap operas, and, increasingly, mainstream television.[182]

Tie-ins involve new stories based on existing properties—television shows, movies, video games, and comic books.[183] The rights owners of these properties license tie-ins to publishers. Publishers usually enter into an agreement for a set number of a books and a specified period of time.[184] The agreements are generally royalty-based, with the licensor receiving 6 to 8 percent of the cover price and the author receiving 1 to 3 percent.[185] Lee Goldberg, a successful tie-in author, describes the purpose of tie-ins:

> I think my responsibility is to be true to the series . . . to the characters and voice of the show . . . but to go beyond that, creating an experience that's deeper and more satisfying than an episode would be.
>
> . . . I've tried . . . [to] go to places, emotional and geographical, that an episode never could. I try to dig deeper into the characters and their motivations without violating what we already know about who they are . . . and, if possible, shed light on aspects of their personalities that were never revealed before. I don't want to write episodes in book-form . . .

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178 *See* Robert Greenberger, *The Pulp Connection*, *in* TIED IN, *supra* note 147, at 99, 99-105.

179 *Id.* at 99.

180 *Id.*

181 *Id.* at 100.

182 *See* Brad Adgate, *Serialized TV is All the Rage this Fall*, FORBES (May 16, 2014), http://www.forbes.com/sites/bradadgate/2014/05/16/serialized-tv-is-all-the-rage-this-fall/.

183 Goldberg, *supra* note 147, at 1.

184 A Roundtable Discussion, *The Business and Craft of Tie-In Writing*, *in* TIED IN, *supra* note 147, at 27, 29-32.

185 *Id.* at 31. Gaming-related tie-ins typically pay a royalty rate of 4-6 percent with modest advances ($4-6 thousand). Sometimes authors are provided a choice between larger advance with no royalties. In addition, cross-collaterization is common in multiple book contracts (all books involved have "to earn out before royalties are paid"). *Id.* at 31-32.

> but books that satisfy the reader in the same way an episode of the show could . . . and then offer something more lasting.[186]

Tie-ins also include video games based off existing works. Publishers have long licensed film and television properties for video games,[187] a practice that continues in the newer world of mobile gaming, with such titles as Rovio's *Angry Birds: Star Wars*.[188]

Closely related to the tie-in is the *spinoff*, which is a new work where the lead character previously appeared as a minor or supporting character in an existing work.[189] Spinoffs are particularly prevalent in television.[190] *Happy Days* (ABC 1974-84), for example, led to seven spinoffs, including *Mork & Mindy* (ABC 1978-82), *Laverne & Shirley* (ABC 1976-83), and *Joanie Loves Chachi* (ABC 1982-83).[191] Spinoffs are not solely the province of broadcast television. In February 2015, AMC premiered *Better Call Saul*, a spinoff of its popular series *Breaking Bad*.[192] The first season was the "highest-rated new cable series of the broadcast season."[193]

When a particular character or setting has been used across a range of media, it is typically referred to as a *franchise*.[194] One of the earliest is square-jawed detective Dick Tracy, who debuted as a comic strip in the Detroit Mirror on October 4, 1931.[195] Within a year, the character became the first comic strip to be turned into prose, when the Big Little Book series began by publishing *The Adventures of Dick Tracy*.[196] A radio series began

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186 *Id.* at 44-45.

187 Robert Levine, *Story Line is Changing for Game Makers and Their Movie Deals*, N.Y. TIMES (Feb. 21, 2005), http://www.nytimes.com/2005/02/21/technology/story-line-is-changing-for-game-makers-and-their-movie-deals.html.

188 GREENSPAN ET AL., *supra* note 10, at 108.

189 Goldberger, *supra* note 17, at 321.

190 *Id.*

191 Daniel Lehman, *Sitcom Spin-Offs and Their Place in Prime Time*, DANIEL LEHMAN (Apr. 28, 2006), https://danielmlehman.wordpress.com/2006/04/28/sitcom-spin-offs-and-their-place-in-prime-time/; Robert V. Bellamy, Daniel G. McDonald & James R. Walker, *The Spin-Off as Television Program Form and Strategy*, 34 J. BROAD. & ELEC. MEDIA 283, 286-88 (1990).

192 David Segal, *'Better Call Saul' Recap: A Premiere With 'Breaking Bad' in Its DNA*, N.Y. TIMES (Feb. 8, 2015), http://artsbeat.blogs.nytimes.com/2015/02/08/better-call-saul-recap-in-the-premiere-plenty-of-nods-to-breaking-bad/.

193 Rick Kissell, *Ratings: AMC's 'Better Call Saul' Cable's Top New Show of Season*, VARIETY (Apr. 13, 2015), http://variety.com/2015/tv/news/ratings-amcs-better-call-saul-cables-top-new-show-of-season-1201471324/.

194 *See* MARTIN DALE, THE MOVIE GAME: THE FILM BUSINESS IN BRITAIN, EUROPE AND AMERICA 27 (1997) ("Sequels are usually dependent on a lead character who can be followed through a series of adventures. This character thereby becomes a 'franchise' which can be exploited for future films, and also for television series, consumer products and theme parks.").

195 Zlati Meyer, *This Week in Michigan History: 'Dick Tracy' Makes Its World Premiere in Detroit Paper*, DETROIT FREE PRESS, Sept. 30, 2012, at 18A.

196 GARYN G. ROBERTS, DICK TRACY AND AMERICAN CULTURE: MORALITY AND MYTHOLOGY, TEXT AND CONTEXT 205 (1993).

in 1934, and Dick Tracy moved to the big screen in 1937.[197] The character continued to appear in multiple media since—Warren Beatty directed, produced, and starred in a 1990 film version—and the comic strip continues to this day.[198] Other popular franchises that need little introduction include *Star Wars*, *Star Trek*, and the *Marvel Universe*.

Distinguished from the franchise, which includes multiple works created from a common core of narrative elements, is the *mashup*. A mashup is a single work composed of elements from multiple works. One writer has defined the mashup as "any video or audio work comprised of two or more segments of pre-existing copyrighted material."[199] The term is most commonly applied to audio and audiovisual works; the use of the pre-existing material is deliberate and not incidental.

There are a number of examples of authorized mashups—works using multiple, existing works where the use might otherwise be infringing *sans* license. *The Lego Movie* includes a number of existing characters from various sources interacting in the same story in a way that could be considered a mashup. While some are public domain—Abraham Lincoln, Shakespeare, Michelangelo—others are controlled by Warner Bros., including Batman, Superman, Wonder Woman, Green Lantern, the Flash (DC Comics), and Dumbledore from *Harry Potter*; the film included copyrighted characters from other sources, such as Michelangelo from the *Teenage Mutant Ninja Turtles*; Milhouse from *The Simpsons*; and characters from *Star Wars*. Warner Bros. producer Dan Lin has said, "Such matchups can be a licensing nightmare," but "Lego helped bring the non-Warner characters into the film."[200] Lego movie writer and director Chris Miller has added, "And, you know, each one of them involved, even the ones that were Warner movies involved a lot of legal rights negotiations. But it was really important to us that we had a lot of different universes and a lot of different worlds colliding that had never collided before."[201]

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197 *Id.* at 250; JIM COX, RADIO CRIME FIGHTERS: MORE THAN 300 PROGRAMS FROM THE GOLDEN AGE 98 (2002).

198 Vincent Canby, *Review/Film; A Cartoon Square Comes to Life in 'Dick Tracy'*, N.Y. TIMES (June 15, 1990), http://www.nytimes.com/1990/06/15/movies/review-film-a-cartoon-square-comes-to-life-in-dick-tracy.html.

199 Kinsey, *supra* note 99, at 306 (internal quotation marks omitted).

200 Don Steinberg, *Building 'The Lego Movie,' One Brick at a Time*, WALL ST. J. (Jan. 30, 2014), http://www.wsj.com/articles/SB10001424052702303553204579347031590079364.

201 Germain Lussier, *Film Interview: Phil Lord and Chris Miller Discuss 'The Lego Movie' Spoilers*, /FILM (Feb. 7, 2014), http://www.slashfilm.com/film-interview-phil-lord-and-chris-miller-talk-the-lego-movie-spoilers/. Another interview confirms that licensing rights for Warner properties also involved "a lot of legal wrangling." Borys Kit, *Inside the 'Lego Movie' Premiere with Chris Pratt and Will Arnett*, HOLLYWOOD REP. (Feb. 02, 2014, 6:00 AM), http://www.hollywoodreporter.com/heat-vision/inside-lego-movie-premiere-chris-676347. Superman was the subject of a lot of "legal rights stuff that happened"; at one point being removed from the script. Jami Philbrick, *Directors Phil Lord and Chris Miller Talk 'The Lego Movie' and '22 Jump Street'*, I AM ROUGE (Feb. 4, 2014, 10:12 AM),

The 1998 Walt Disney film *Who Framed Roger Rabbit* similarly featured characters from multiple copyright owners.

> [Steven] Spielberg was instrumental in the licensing negotiations, however. Working closely with studios such as Warner Bros. Fleischer Studios, Felix the Cat Productions, Turner Entertainment, and Universal Pictures, Spielberg's name and smooth negotiating convinced the separate studios to "lend" their characters to the production at an unbelievable flat rate of $5000 per character. That was it. No backends, no residuals, just a one-time flat fee and some good will. And, a few additional stipulations on behalf of the studios for some of their major properties. For instance, Warner Bros. stipulated that their characters such as Daffy Duck and Bugs Bunny must receive equal screen time, dialogue, and billing as Disney's Donald Duck and Mickey Mouse.[202]

3. Raw Materials and User-Generated Content

Since much commentary discusses the challenges faced by amateurs or industry outsiders to licensing copyrighted content, it's worth looking at some of the marketplace solutions that have emerged to bring them within the licensing sphere. The marketplace has long provided "raw materials" for authors who need video, images, sounds, or music but are otherwise unable to produce or procure them themselves, whether due to cost or talent. These stock elements offer the benefit of lower transaction costs than one may find elsewhere.

For stock footage, "the standard transaction paradigm is evolving from a rights-managed model to a rights-managed/royalty-free hybrid and both the demand for and supply of HD footage are on the rise."[203] The stock footage market is estimated to be $552 million a year.[204] The stock photography industry has been estimated at $2 billion annually.[205]

Stock photography has been available since the 1920s.[206] It began by providing "outtakes" from commercial magazine assignments, but by the 1980s, agencies began to specialize in producing their own stock photos.[207]

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http://www.iamrogue.com/news/interviews/item/10606-iar-exclusive-interview-directors-phil-lord-and-chris-miller-talk-the-lego-movie-and-22-jump-street.html.

202 *A Rabbit's Tale: The Making of Who Framed Roger Rabbit*, HDNET MOVIES (Dec. 30, 2013, 2:12 PM), http://www.hdnetmovies.com/bts/a-story-of-a-rabbit-the-making-of-who-framed-roger-rabbit/.

203 *New Study Charts Evolution of Stock Footage Industry*, FOCAL INT'L (Jan. 11, 2012), http://www.focalint.org/member-news/news/1230/new-study-charts-evolution-of-stock-footage-industry.

204 *Executive Summary: ACSIL Global Survey of Stock Footage Companies 3*, THRIVING ARCHIVES, http://www.thrivingarchives.com/ags3-executive-summary (last visited May 13, 2016).

205 *Id.*; Sandra O'Connell, *For Best Results, Work the Crowd: An Open Call for Services Can Help Firms Engage with Customers*, SUNDAY TIMES, Jan. 16, 2011, Business, at 9.

206 Amber Leigh Turner, *The Evolution of Stock Photography*, NEXT WEB (Aug. 6, 2015), http://thenextweb.com/creativity/2015/08/06/the-evolution-of-stock-photography/.

207 *Id.*

The beginning of the twenty-first century saw the emergence of "microstock" services, which offered images for a fraction of the license fee.[208]

Stock music is also available, though it is perhaps more commonly referred to as production music or library music. The longest running independent production music library is De Wolfe Music, which began its recorded music library in 1927.[209] Newer services, like Rumblefish, Audiosocket, and Indaba Music have made licensing stock music easier through online tools and partnerships with online platforms.[210]

Licensors and other digital intermediaries continue to experiment with other ways to allow informal, ad hoc creators to create and share derivative works. In 2011, the National Music Publishers' Association ("NMPA") reached an agreement with YouTube that provided music publishers with "the opportunity to enter into a license agreement with YouTube and receive royalties from YouTube for musical works in videos posted on the site."[211] The License Agreement, administered by the Harry Fox Agency, "enable[s] music publishers to grant the rights necessary for the synchronization of their musical works with videos posted by YouTube users and to receive royalties from YouTube for user-generated videos for which YouTube receives advertising revenue worldwide."[212]

Google's Fred von Lohmann explained that YouTube has licensed "older catalog material" and "done licensing agreements with an enormous number of music publishers, the major labels, a number of independent labels, motion picture studios, television networks, not just in the U.S. but around the world."[213]

During the IPTF Green Paper Roundtables, NMPA General Counsel Jay Rosenthal explained:

> There have been examples of smaller collectives being created to allow people to do mashups. One in particular that was created out of Washington, D.C. that I was involved in as their attorney was something called outer-national music, which stems from ESL Music,

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208 Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U. L. REV. 1935, 1966-68 (2014).

209 *Nitrate to Bitrate: 100 Years of De Wolfe Music*, DE WOLFE MUSIC, http://www.dewolfemusic.com/files/nitrate_to_bitrate.pdf (last visited May 13, 2016).

210 *See* Mike Shields, *Audiosocket's Easy Listening Solution for Digital Music Rights*, ADWEEK (Sept. 16, 2013), http://www.adweek.com/news/technology/audiosocket-s-easy-listening-solution-digital-music-rights-152424; Scott Steinberg, *CDBaby, Rumblefish Partner for Online Music Licensing Program*, ROLLING STONE (Dec. 8, 2011), http://www.rollingstone.com/culture/news/cd-baby-rumblefish-partner-for-online-music-licensing-program-20111208; Eliot Van Buskirk, *Indaba Online Remix Contest Lets Crowd Work with Celebs*, WIRED (Oct. 2, 2009), http://www.wired.com/2009/10/indaba-online-remix-contest-lets-crowd-work-with-celebs/.

211 Ed Christman, *NMPA Resolves Copyright Lawsuit with YouTube*, SONGTRUST (Aug. 17, 2011), http://blog.songtrust.com/music-publishing-news/nmpa-resolves-copyright-lawsuit-with-youtube/.

212 Kyle Rambeau, *Music Publishers Settle with YouTube*, BIEDERMAN BLOG (Aug. 23, 2011), http://biedermanblog.com/music/music-publishers-settle-with-youtube/.

213 FOURTH GREEN PAPER ROUNDTABLE, *supra* note 115, at 73 (remarks by Fred von Lohmann).

> which is a very high-end electronic label. The main act on this label is Thievery Corporation.
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> They decided to offer to a collective of deejays the right to take all of the ESL releases, which were maybe 150 at that point, of 12 to 13 different acts that they have signed to their label to allow these remixers to do whatever they want with these works: mash them up, remix them, whatever, add new material to them, give them back to the label.
>
> The label goes out to try to monetize this by placing them in commercials or movies, and then it's a 50/50 net split with the original remixer and the label itself.[214]

Amazon launched "Kindle Worlds" in 2013, a platform that allows writers to publish and sell books based on existing worlds.[215] The platform currently licenses over thirty properties, including *G.I. Joe*, *Gossip Girl*, *Veronica Mars*, and the works of author Kurt Vonnegut.[216] As of August 2014, the platform had published over 600 titles, with an average customer review of four out of five stars.[217] Other licensors and publishers have increasingly experimented with licensing fan fiction and user-generated content involving their properties.[218]

Though nothing has been launched yet, the RIAA and NMPA in 2013 worked on the development of a microlicensing platform that would "make it easier for occasional users of music to get proper licensing at a reasonable rate."[219] These and other organizations remain actively engaged in developing this platform and meeting with vendors.[220]

Even further, the concept of the "public license" has taken root in recent decades. Essentially, a public license is offered to anyone willing to abide by the terms, no prior negotiation necessary, but it is otherwise no different from any other license.[221] Public licenses began in the software

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214 SECOND GREEN PAPER ROUNDTABLE, *supra* note 121, at 18-19 (remarks by Jay Rosenthal).

215 Donald Melanson, *Amazon Launches Kindle Worlds Publishing Platform for Fan Fiction, Will Pay Royalties to Writers and Rights Holders*, ENGADGET (May 22, 2013), http://www.engadget.com/2013/05/22/amazon-kindle-worlds-fan-fiction/.

216 *Kindle Worlds*, AMAZON, http://www.amazon.com/gp/feature.html?docId=1001197421 (last visited May 13, 2016).

217 Jeff Roberts, *Amazon's Fan-Fiction Portal Kindle Worlds is a Bust for Fans, and For Writers Too*, GIGAOM (Aug. 17, 2014, 8:00 AM), https://gigaom.com/2014/08/17/amazons-fan-fiction-portal-kindle-worlds-is-a-bust-for-fans-and-for-writers-too/. (quoting Jeff Belle, Vice President, Amazon Publ'g).

218 Karen Raugust, *Fan Fiction Becomes a Boon for Licensors and Publishers*, PUBLISHERS WEEKLY (May 15, 2015), http://www.publishersweekly.com/pw/by-topic/industry-news/licensing/article/66650-embracing-the-fans.html.

219 Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue*, BILLBOARD (June 13, 2013 5:11 AM), http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could.

220 Nat'l Music Publishers' Ass'n, Inc. & The Harry Fox Agency, Inc., Comments in Response to March 17, 2014 Notice of Inquiry (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/NMPA_HFA_MLS_2014.pdf.

221 *See* Jacobsen v. Katzer, 535 F.3d 1373, 1378 (Fed. Cir. 2008).

world but have since moved beyond.[222] Creative Commons is the most popular example of a "public licensing" paradigm for expressive works. The Creative Commons organization was launched in 2001 to develop a set of licenses applied to works granting ex ante permission for certain uses.[223] The organization reports that as of 2015, 1.1 billion works have been licensed with a Creative Commons license.[224]

It's likely impossible to ever fully measure the value of derivative works licensing of entertainment works, but hopefully the above discussion has provided some sense of its scope. Licensing has produced a vibrant and robust marketplace for remix in whatever form it may take. And the marketplace has proven itself capable of responding to shifts in the licensing landscape, particularly the growth of amateur creativity. Next, this Article will take a look at some of the benefits that the current legal framework provides.

IV. BENEFITS

Former Register of Copyrights David Ladd remarked nearly thirty years ago that "[t]he glory of copyright is that it sustains not only independent, idiosyncratic, and iconoclastic authors, but also fosters daring, innovative, and risk-taking publishers. . . . [C]opyright supports a system, a milieu, a cultural marketplace which is important in and of itself."[225] As the above survey demonstrates, this includes support for economically significant and culturally vibrant marketplace for remixes and other derivative works. A number of features are beneficial to copyright owners, copyright users, and the public in general.

The remix critique focuses almost solely on the right of copyright owners to *exclude* others. Overlooked is the way copyright, like other forms of property, fosters *inclusion*. In *The Right to Include*, Daniel B. Kelly takes a long overdue look at this point, asserting that "the ability of owners to 'include' others in their property is a central attribute of ownership and fundamental to any system of private property."[226] Kelly says, this inclusion,

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222 Lawrence Lessig, *CC in Review: Lawrence Lessig on How it All Began*, CREATIVE COMMONS (Oct. 12, 2005), https://creativecommons.org/weblog/entry/5668.

223 *What is Creative Commons?*, CREATIVE COMMONS, https://creativecommons.org/about/ (last visited May 13, 2016); *History: Founding*, CREATIVE COMMONS, https://creativecommons.org/about/history/ (last visited May 13, 2016).

224 CREATIVE COMMONS, STATE OF THE COMMONS (2015), https://stateof.creativecommons.org/2015/sotc2015.pdf.

225 David Ladd, *The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture*, 30 J. COPYRIGHT SOC'Y U.S.A. 421, 428-29 (1983).

226 Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 859 (2014); *see also* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373 (1954) ("Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit

which can, for example occur formally through contract, "is critical for coordinating economic activities and organizing social relationships."[227] Kelly explains that incentives to include others "might be socially suboptimal" without the ability to contract or license.[228] And while contractual inclusion incurs certain costs, "contracts provide more certainty and deter many kinds of opportunism."[229]

In other words, "[i]nclusion is critical because human beings depend upon each other, not only to survive but also to flourish," but at the same time, inclusion opens the door to exploitation.[230] Law professor Jay Rubin provides an example of this point in the context of reality television programming, saying "[w]ithout a reliable system of enforcement, acquirers of program ideas have no other choice, from an economic standpoint, but to act opportunistically, reducing incentives for innovation and reducing economic efficiency."[231] Rubin also points out some firms may choose formal inclusion mechanisms primarily for their social dimension, noting that it may be preferable to license rather than "risk harming long-term relationships" or getting distracted by disputes.[232] Property thus incentivizes good faith and fair dealing.

Of course, when it comes to intellectual property, it is physically (near) impossible to exclude others from the use of an expressive work once it is published because the intangible nature of a work makes it nonexcludable.[233] This may mean that instead, methods of exclusion are exercised before publication, through, for example, secrecy, scarcity mechanisms, or through private industry agreements, as seen in U.S. bookseller agreements to exclusively reprint British books prior to international copyright relations.[234] The result would likely be suboptimal sharing.

Kelly discusses specifically the use of formal inclusion mechanisms like contracts, which provide a number of benefits over informal inclusion.

> Contracts allow parties to include others with more certainty. Because both parties know they can rely on legally enforceable remedies to vindicate their rights, they have less concern about opportunism and conflicts over use. Moreover, unlike informal inclusion, which is freely revocable, contractual inclusion provides more certainty to nonowners. Thus, an

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others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.").

227 Kelly, *supra* note 226, at 859.

228 *Id.*

229 *Id.* at 860.

230 *Id.* at 871.

231 Jay Rubin, Note, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 667 (2006).

232 *Id.* at 664.

233 Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 637 (2007).

234 *See* Stan J. Liebowitz, *A Critique of Copyright Criticisms*, 22 GEO. MASON L. REV. 943, 957 (2015).

> owner's promise not to enforce the right to exclude may encourage socially beneficial reliance. In addition, because an owner will have less incentive to exclude, contracts may deter various types of strategic behavior—one of the primary objectives of contract law.[235]

Kelly observes five specific benefits of inclusion—sharing, exchange, financing, risk-spreading, and specialization—each of which will be discussed in turn with examples of how they are realized when it comes to licensed remixes.

The first of these, *sharing*, "enables donative transfers without requiring the transfer of ownership (e.g., waiving IP rights over a life-saving drug or creating a trust to support a surviving spouse)."[236] It "entails a gratuitous transfer," which Kelly notes is "ubiquitous across cultures."[237] Kelly also notes that it may "emerge out of necessity."[238] Sharing may explain some franchise owners' acceptance of otherwise infringing fan fiction. Other artists may share as a means of engaging with their fans and audiences; for example, in 2012, musician Trent Reznor made "stems"—separate tracks that would later be combined to produce a final music recording—of several songs from his score to *The Girl with the Dragon Tattoo* available for download to be remixed.[239] However, the sharing was limited to personal use—"[c]ommercial exploitation [was] not permitted,"[240] a restriction enabled by his exclusive rights.

Exchange "facilitates mutually beneficial agreements regarding the use or possession of property without complete alienation (e.g., licensing software)."[241] Kelly writes that exchange differs from sharing because it "entails a transfer with consideration."[242] He further explains that "[e]xchange is fundamental to a market economy because, through voluntary agreements, resources move from low-value to high-value users."[243]

Cooperation and collaboration are integral to society and markets, and they often lead to benefits. Here, in contrast to the downsides of having to work with licensors that the remix critique focuses on, the upsides can be observed. For example, the following recounts how the creators of *The*

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235 Kelly, *supra* note 226, at 887 (footnotes omitted); *accord* Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59 (describing negative features of informal property rights governed by social norms).

236 Kelly, *supra* note 226, at 877.

237 *Id.* at 871, 873.

238 *Id.* at 871.

239 Carrie Battan, *Trent Reznor Shares Stems of Songs from* Dragon Tattoo, PITCHFORK (Jan. 27, 2012), http://pitchfork.com/news/45255-trent-reznor-shares-stems-of-songs-from-dragon-tattoo/.

240 Jacqueline Rosokoff, *Stems from "The Girl with the Dragon Tattoo" Soundtrack*, TUNE CORE (Jan. 26, 2012), http://www.tunecore.com/blog/2012/01/the-girl-with-the-dragon-tattoo-stems-2.html.

241 Kelly, *supra* note 226, at 877.

242 *Id.* at 873.

243 *Id.* (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 39 (8th ed. 2001)).

Lego Movie, including producer Dan Lin, collaborated with The Lego Group on the movie:

> At one point, Lin and his directors flew to Billund to participate in a "boost session," where the filmmakers tossed out concepts from the screenplay—such as a steampunk pirate ship—and then Lego's designers competed to build the best possible version. "A lot of that made it into the film," says Wilfert.
>
> "They were very influential on story, script, every major casting decision, every director decision," says Lin. "It's a hybrid movie made out of [computer graphics] and real bricks. They co-built the movie."[244]

Similarly, noted-music-attorney Dina LaPolt told the following story:

> In 1986, legendary hip hop group Run-D.M.C. recorded a version of Aerosmith's hit song "Walk This Way" for a genre-bending smash hit. While it may have been appropriate for Run-D.M.C. to request a compulsory "mechanical" license to create their version, instead, by involving Steven and guitarist Joe Perry directly in the recording process, they created one of the most famous derivative works of our modern times. By getting both Run-D.M.C. and Steven and Joe on the same recording, and in the same music video—in which Steven literally breaks down a wall separating the two groups—Run-D.M.C.'s "Walk This Way" figuratively broke down the wall separating hip hop from mainstream genres such as rock. The song reached number four on the Billboard Hot 100 chart and is often credited for helping to bring hip hop into the mainstream and establishing the "rap rock" crossover genre.[245]

The modern day media franchise relies heavily on copyright and other legal mechanisms to coordinate production among numerous entities. As Derek Johnson points out, "Franchising occurs where creative resources are exchanged across contexts of production, where sequels, spin-offs, and tie-ins ask multiple production communities to work in successive or parallel relation to one another."[246] Without the ability to coordinate in such a fashion, it is difficult to see such franchises like *Star Wars* or the *Marvel Cinematic Universe* achieving such success as they have, and, as explained more below, such coordination ensures a level of shepherding over a particular set of creative elements that allows their value to be protected and maximized.

Financing "allows a party to obtain access to property without purchasing it (e.g., leasing rather than buying a car)."[247] Kelly notes financing is instrumental in a market economy, and "[l]icenses are instrumental in

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244 Felix Gillette, *Lego Goes to Hollywood: How Lego Finally Trusted Warner Bros. to Bring Its Minifigs to the Big Screen*, BLOOMBERG (Feb. 6, 2014, 4:35 PM), http://www.bloomberg.com/bw/articles/2014-02-05/lego-movie-toy-brands-minifigs-entrusted-to-warner-bros-filmmakers (alteration in original).

245 LaPolt Comment, *supra* note 114, at 6 (footnote omitted).

246 DEREK JOHNSON, MEDIA FRANCHISING: CREATIVE LICENSE AND COLLABORATION IN THE CULTURE INDUSTRIES 109 (2013).

247 Kelly, *supra* note 226, at 877-78.

financing various types of intellectual property rights, including rights in motion pictures."[248] In fact, given the high cost of producing and promoting films, many films would be impossible to produce without the ability to finance through licensing.[249] But the ability to finance through licensing brings benefits beyond money. Jill Wilfert, Vice President for Global Licensing and Entertainment at the Lego Group says, "Licenses bring us relevance, stories, and characters . . . . We can do that on our own. But kids are fickle today, especially in our business. They want what's new."[250] This is similar to the motivation for those consumers who choose to lease a car, in that it minimizes the costs needed in order to continually have a late-model car.[251]

Risk-spreading "allows nonowners, as well as owners, to share risks (e.g., renting an apartment for what could be a short-term move)."[252] Inclusion enables risk-spreading by allowing "certain risk-averse parties to use, possess, and enjoy property while bearing less risk."[253] The copyright industries are historically risk-heavy, so the ability to spread risk is imperative to fulfilling copyright's purpose. Perhaps the primary reason for remaking or reusing elements from existing works is to take advantage of the built-in audience for such works. All new works face competition for attention, so it is advantageous to incorporate recognizable elements.[254] Like other property rights, the derivative works right enables the maximization of the value of works[255] because "[e]xclusive rights are justified if it seems practically certain that broad exclusion incentivizes owners to produce valuable resources from property *and share those products with* others."[256] Perhaps no other company does this better these days than Disney, which has launched successful franchises out of animated films like *The Lion King*, *Beauty and the Beast*, and, most recently, *Frozen*. "'They know how to leverage a property in more ways than just about any other company,' says Jessica Reif Cohen, a media analyst at Bank of America Merrill Lynch who has covered Disney for over two decades."[257] On the other hand, the inability to protect, for example, television formats, say Kent Raygor and Edwin Komen, "produces a

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248 *Id.* at 875.

249 *See* EDWARD JAY EPSTEIN, THE HOLLYWOOD ECONOMIST RELEASE 2.0: THE HIDDEN FINANCIAL REALITY BEHIND THE MOVIES 85-87 (2012).

250 Gillette, *supra* note 244 (internal quotation marks omitted).

251 *See* Cathy Pareto, *New Wheels: Lease or Buy?*, INVESTOPEDIA (Apr. 19, 2005), http://www.investopedia.com/articles/pf/05/042105.asp.

252 Kelly, *supra* note 226, at 878.

253 *Id.* at 876.

254 GREENSPAN ET AL., *supra* note 10, at 108.

255 *See generally* Newman, *supra* note 43.

256 Eric R. Claeys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON L. REV. 825, 841 (2015).

257 Michal Lev-Ram, *Frozen: Do You Wanna Build an Empire?*, FORTUNE (Dec. 22, 2014), http://fortune.com/2014/12/22/do-you-wanna-build-an-empire/.

disincentive to create any new formats, to the benefit of no one, including the public who merely seeks to be entertained and enlightened."[258]

Professor Jane C. Ginsburg has argued that allowing copyright owners to take advantage of works like this through the derivative works right promotes the underlying goals of copyright.[259] The potential for exploiting derivative works may increase the incentive to produce the initial work: "[f]or example, hardcover sales of a book may not generate enough revenues to recoup its advance, but subsidiary rights (including magazine serial and film rights) may prove the real source of income."[260]

"Finally, *specialization* allows parties to maximize their joint gains by performing distinct roles or functions (e.g., having one party manage a trust for a fee while another party enjoys the income from the trust)."[261] Says Kelly, "An owner's inclusion of a nonowner may benefit both parties because each party is able to utilize her own strengths and capabilities."[262] The ability to specialize is fundamental to any market economy; Adam Smith begins *Wealth of Nations* discussing division of labor, saying it has caused "[t]he greatest improvement in the productive powers of labour."[263] In her article on cumulative research, Professor Suzanne Scotchmer notes that specialization is beneficial because "creativity is largely serendipitous."[264] Not every firm will see the same opportunities for new works.[265]

Scotchmer asserts that "firms other than the first innovator should participate in development of second generation products. Since the first innovator might not have expertise in all applications, more second generation products are likely to arise if more researchers have incentive to consider them."[266] This applies just as well to the creative industries and copyright law.

In addition to the benefits described by Kelly, licensing of derivative works provides benefits specific to the creative industries. First, it allows owners to shepherd their characters and stories over time, which benefits

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258 KENT R. RAYGOR & EDWIN KOMEN, MEDIA LAW RESOURCE CTR., INC., LIMITATIONS ON COPYRIGHT PROTECTION FOR FORMAT IDEAS IN REALITY TELEVISION PROGRAMMING 119-20 (2009), http://www.sheppardmullin.com/media/article/806_Reality Format Paper.pdf.

259 *See* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1899 (1990).

260 *Id.* at 1911.

261 Kelly, *supra* note 226, at 878.

262 *Id.* at 876.

263 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 7 (Edwin Cannan ed., Univ. Chi. Press 1976) (1776).

264 Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 32 (1991).

265 *Id.*

266 *Id.* at 31-32.

both creators and audiences.[267] And second, it protects the artistic integrity of works, a critical part of the incentive provided through copyright.

A. *Shepherding*

It takes considerable craft and investment to create something that will sustain interest from year to year and generation to generation. Supporters of looser derivative works rights often justify their claims by arguing that certain characters and stories are part of a shared culture.[268] Forgotten is the fact that they've only become part of our culture and recognizable through individual time, expense, and risk-taking. Hampering the ability to shepherd creations may likely result in less of these types of works becoming part of our culture (there are very few "open source fictional" worlds—where ex ante permission for derivative works is granted, and none which approach in popularity to traditional franchises).[269]

The importance of shepherding creativity is reflected by the time and effort companies and franchise owners invest in their upkeep. For example, Lucasfilm, in charge of the *Star Wars* universe, employs a "continuity database administrator" solely to maintain and administer the continuity of the universe, which includes "not just the six live-action movies but also cartoons, TV specials, scores of videogames and reference books, and hundreds of novels and comics."[270] The administrator's work is pervasive; "[W]hen Lucas Licensing inks a deal with a toy company or a T-shirt designer, it vets those ancillary products to ensure they conform to the spirit and letter of the continuity that has come before and will continue afterward."[271] The work is also important. "Careful nurture of the Star Wars canon—thousands of years of story time, running through all the bits and pieces of merchandise—has kept the franchise popular for decades."[272]

But Lucas only began paying such close attention to continuity after experiencing the problems with ignoring it. The first *Star Wars* tie-in novel, for example, featured a romance between Luke Skywalker and Princess Leia, who were revealed in a later film to be siblings.[273] Others featured

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267 *E.g.*, David Newhoff, *Talking to William Hammerstein—Part I*, ILLUSION OF MORE (Dec. 27, 2013), http://illusionofmore.com/talking-william-hammerstein-part/.

268 *See, e.g.*, Patrick McKay, Note, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U. L. REV. 117, 118-19 (2011).

269 *See* Johnny B. Truant, *The Engine World Commandments (For Writers in the* Dream Engine*'s Open-Source Fiction World)*, STERLING & STONE (Oct. 16, 2014), http://sterlingandstone.net/open-source-fiction-world-commandments/.

270 Baker, *supra* note 169.

271 *Id.*

272 *Id.*

273 *Id.*

"questionable characters like Jaxxon, a furry green creature with big floppy ears who wisecracked like Bugs Bunny."[274] It wasn't until 1991, when the novel *Heir to the Empire*, written by *Hugo* Award-winning writer Timothy Zahn, was published that Lucas sat up.[275] Despite appearing five years after the final *Star Wars* film, the book spent nineteen weeks on the *New York Times* best-seller list.[276] As Wired Magazine's Chris Baker explained:

> Without movies at the core, though, Lucas Licensing couldn't afford to be lackadaisical—no more Jaxxons, no more incestuous flirtations. "We set parameters," Roffman says. "It had to be an important extension of the continuity, and it had to have an internal integrity with the events portrayed in the films." Closely tending the canon was paying off with fans. Essentially, all the new comic books, novels, and games were prequels and sequels of one another. If you wanted to know the whole story, you had to buy them all. Neither Lucasfilm nor its licensees will divulge just how much money Lucasfilm gets for each item; suffice it to say the percentage is substantial.[277]

Kelly writes, "Because a nonowner may have a shorter time horizon than an owner with respect to the property, the nonowner may discount the future utility of the property."[278] A 2004 New York Times article notes that "[n]o changes, like costume alterations or additions of superpowers, can be done without Marvel's approval. Spider-Man, for instance, is not permitted to kill anyone. 'These characters are our lifeblood,' Mr. Lipson said. 'We can't let a studio ruin a character for us.'"[279] And too many derivatives of a particular work may "wear out," or satiate, consumers, devaluing the derivate works market for that work.[280]

The compulsory license for "cover" songs provides a counterfactual that supports the above point. Since 1909, the Copyright Act has provided a compulsory license for making phonorecords of a nondramatic musical work once a phonorecord of that musical work has been "distributed to the

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274 *Id.*

275 *Id.*

276 Baker, *supra* note 169.

277 *Id.*

278 Kelly, *supra* note 226, at 881. This is an ancient observation that can be traced at least as far back as Thomas Aquinas. *See* 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, q. 66, art. 3 (Fathers of the English Dominican Province trans., 1912) (1485) ("First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community, as happens where there is a great number of servants.").

279 Melanie Warner, *How a Meek Comic Book Company Became a Hollywood Superpower*, N.Y. TIMES (July 19, 2004), http://www.nytimes.com/2004/07/19/business/media-how-a-meek-comic-book-company-became-a-hollywood-superpower.html?_r=0; *see also* Goldberger, *supra* note 17, at 355 ("Characters, just like real celebrities, have images that need protection.").

280 Sood & Drèze, *supra* note 171, at 353; *see also* William LaRue, *Part 2: The History*, COLLECTING SIMPSONS!, https://web.archive.org/web/20080615041449/http://members.aol.com/bartfan/history.htm (last updated Dec. 22, 2001) (discussing how "tremendous overproduction" of Simpsons merchandise led to swift decline in sales).

public in the United States under the authority of the copyright owner."[281] That is, a performer can record and distribute her own version of a song that has already been recorded and distributed, without permission of the copyright owner of the song, so long as she complies with the statutory terms of the compulsory license—similar to compulsory licenses proposed by some proponents of the remix critique.

No doubt, there have been benefits to the compulsory license for mechanical reproductions. But there are also drawbacks, particularly as digital technology has reduced the cost of both recording and distributing music. The result is a flood of "knock-off" versions of songs on digital platforms. Huffington Post reported in 2013, "There are about 600 versions of Adele's Oscar-winning song 'Skyfall' on the Spotify subscription music service. Not one of them features Adele."[282] This unfairly diverts revenue from the performer being mimicked whose popularity the knock-off version is free riding off of.[283] It frustrates consumers, who may not realize they are not listening to the version they want to listen to, or who have to wade through dozens or even hundreds of versions to find the original. And finally, it hurts the digital services themselves if consumers get so frustrated they simply leave.[284]

It's true too that many readers, viewers, and fans appreciate the results of a licensing system. This is self-evident through the popularity and success of adaptations, sequels, and franchises. "Canon"—"the material accepted as officially part of the story in an individual universe" is important to many fans.[285] This necessitates an "official" or "authorized" voice for a particular universe. And many licensors and licensees likewise consider this important. For example, the producers of *The Lego Movie* screened the movie as it was in the process of being made to Lego brand managers. Here they found that "[k]issing was a point of contention":

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281 17 U.S.C. § 115(a)(1) (2012).

282 Ryan Nakashima, *Cover Songs on Spotify: Homage or Irksome Marketing Ploy?*, HUFFINGTON POST (July 30, 2013), http://www.huffingtonpost.com/2013/05/30/cover-songs-homage-or-irk_n_3362235.html.

283 *Id.* (noting that some actors will even "copy cover art and use other deceptive practices" to trick users into listening to their version).

284 *Id.* ("Thousands of cover songs crowd digital music services such as Spotify and Rhapsody and listeners are getting annoyed. The phenomenon threatens the growth of these services—which have millions of paying subscribers—and could hold back the tepid recovery of a music industry still reeling from the decline of the CD.").

285 *Canon (Fiction)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Canon_(fiction) (last modified Apr. 15, 2016).

> The Lego brand managers were less amused. "They warned us that parents don't like it when minifigs kiss," says Lin. "We tested the movie several times. They were right. Parents didn't like it."[286]

However, they were also surprised that other things were acceptable.

> The Lego overseers made concessions, too. "I was like, 'Could we take out some of these butt jokes?'" says Wilfert. "They felt really strongly that it was adding to the humor and gestalt of the movie. We did a lot of screening, and moms were fine with it, so we left them in there."[287]

Similarly, tie-in authors speak of a "duty to be as true to the material" as possible.[288] Author Jeff Mariotte expands on this:

> That tiny thing that seems unimportant to you (oh, Prentiss uses her thumb to remotely unlock her vehicle, not her forefinger . . .) will seem like a major mistake, should you get it wrong, to some reader who will hurl your beautifully crafted novel across the room in disgust, and then tell all her friends (and the readers of her blog and Facebook page) how insipid your work is.[289]

B. *Artistic integrity*

Given the nature of creative works, there may be other negative effects if a weaker approach to copyright is embraced. One, it undermines the control an author has over her work, a principle at the core of copyright. The D.C. Circuit Court of Appeals observed shortly after the 1976 Copyright Act went into law,

> Closely related to the author's right to remain silent is the author's right to limit the subsequent use of his work to protect his artistic reputation. This interest has been recognized by Congress in the new Copyright Act. The commentator concludes:
>
> > The 1976 Copyright Act may be interpreted to afford authors a limited right of artistic reputation in their works. By granting authors rights against the unauthorized use of their works, including failure to reproduce the work as the author created it, the Act allows an author to secure her reputation in a literary or artistic work.[290]

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286 Gillette, *supra* note 244.

287 *Id.*

288 Jeff Mariotte, *Jack-of-All-Trades*, *in* TIED IN, *supra* note 147, at 11, 17.

289 *Id.*

290 Schnapper v. Foley, 667 F.2d 102, 114-15 n.5 (D.C. Cir. 1981) (citation omitted) (quoting Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1515 (1979)).

The Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*[291] said that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'"[292] Copyright serves this "First Amendment value."[293] The Ninth Circuit has recently remarked, "A copyright holder has the right to refuse to license its work and should not be penalized for exercising that right."[294]

The right to control one's work is paramount to many creators. This is evident by the high importance many put on creative approval in their contractual arrangements.[295] History produces many examples of hard-fought protections. Film and television directors, for example, consider themselves as integral to the creation of the work in which they are involved.[296] In 1964, the Committee on Creative Rights, an eighteen-member group within the Directors Guild of America, published "A Bill of Creative Rights."[297] The document proposed a number of demands from directors that were considered important to maintaining their creative vision, the most important of which was the right to create a Director's Cut of a work.[298] The document was agreed to after several months of intense negotiations between directors and producers.[299]

Creative control issues are so important to playwrights that the first two items in the Dramatists Guild of America "bill of rights" address them. They read:

> 1. ARTISTIC INTEGRITY.
>
> No one (e.g., directors, actors, dramaturgs) can make changes, alterations, and/or omissions to your script—including the text, title, and stage directions—without your consent. This is called "script approval."

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291 471 U.S. 539 (1985).

292 *Id.* at 559 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

293 *Id.* at 560.

294 Oracle Corp. v. SAP AG, 765 F.3d 1081, 1087 (9th Cir. 2014); *accord* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.").

295 SECOND GREEN PAPER ROUNDTABLE, *supra* note 121, at 33 (remarks by Walter McDonough) ("But we don't have continental style, mor[al] rights in the United States, but there's something to be said for some artists that want to preserve the integrity of their works. And you can go to the Biz Markie case, where I had a similar experience with Billy Joel and Ice Cube, of all people, where some artists just do not want the integrity of their works to be changed.").

296 *See* Elana Harris, The Right to Final Cut Approval: The Struggle for Creative Control Between the Director and the Studio in Feature Filmmaking 4 (Fall 2013) (unpublished seminar paper, ITT Chicago-Kent College of Law), http://www.kentlaw.edu/perritt/courses/seminar/E Harris Final Seminar Paper.pdf; Lyndon Stambler, *Director's Cut*, DGA Q. (Spring 2011), http://www.dga.org/Craft/DGAQ/All-Articles/1101-Spring-2011/Feature-Creative-Rights.aspx.

297 Stambler, *supra* note 296.

298 *Id.*

299 *Id.*

> 2. APPROVAL OF PRODUCTION ELEMENTS.
>
> You have the right to approve the cast, director, and designers (and, for a musical, the choreographer, orchestrator, arranger, and musical director, as well), including their replacements. This is called "artistic approval."[300]

The same can be seen in the music world. Music attorney Dina LaPolt has written that artists should be able to deny uses they disagree with, such as when a song is "mashed-up, remixed, or sampled" to imply endorsement of an objectionable cause or ideology.[301] LaPolt shares concerns over weakening this creative control:

> A compulsory license for derivative works amplifies these concerns tenfold. For example, Melissa Etheridge is a known lesbian and animal rights activist. A compulsory license would allow someone to remix or sample her music into a new work filled with homophobic epithets, and she could not say "no". In the same way, a compulsory license would allow someone to remix or sample music by Ted Nugent, noted gun ownership advocate, for a song promoting stricter gun control without Nugent's permission. One could imagine countless instances of compulsory licensing working to an artist's detriment—think of a white supremacist using black artists' music in a way that promotes the supremacist's hateful views. These examples illustrate the potentially perverse results of a compulsory license. It is not hard to see that a compulsory license for derivative works could easily be abused in a way that negatively impacts creators.[302]

The 2014 Causeway Films horror film *The Babadook* featured a creepy children's pop-up book as a key plot element. The producers decided to make and sell a real world version of the book after many requests from fans. Creative control over this unusual tie-in project was critical to the creators. As *The Babadook* writer Jennifer Kent explained,

> I'm a real purist, and I hate the idea of Babadook Happy Meals or whatever. I didn't want to capitalize on the film that way, because it's not that kind of film. But the book is a work of art . . . It was always in the back of our minds: we could produce that. We made sure, in the contract before we started filming, that we were in charge of [the book rights]. And it's worked out really well because now we can do what we want with them.[303]

The importance of control can be observed even on the "open source" Internet with works created outside traditional creative avenues. "Slender Man" is a fictional supernatural character—thin, tall, no face, and wearing a suit—which has been the subject of numerous remixes, images, and other

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300 *Bill of Rights*, DRAMATISTS GUILD OF AM., http://www.dramatistsguild.com/billofrights/ (last visited May 13, 2016).

301 LaPolt Comment, *supra* note 114, at 3.

302 *Id.*

303 Scott Meslow, *Mister Babadook: An Oral History of 2014's Most Terrifying Movie Prop*, THE WEEK (Dec. 5, 2014), http://theweek.com/article/index/273127/mister-babadook-an-oral-history-of-2014s-most-terrifying-movie-prop (alteration in original).

types of content by numerous Internet users.[304] It has been called "the internet's monster" and resembles folklore in some respects.[305] However, the character has a creator: Eric Knudsen, who introduced it through a number of images posted on a 2009 Something Awful forum.[306] Knudsen has referred to himself as more of an "administrator" or "manager" of the character rather than the "creator" and has not prevented the numerous works created by others since then.[307] However, Knudsen has registered his copyright in the character[308] and has expressed an interest in maintaining control over any potential commercial projects. Said Knudsen, "If there's going to be a commercial exploitation of the character, I just don't want to see something that's going to be lame."[309]

C. *Response to Common Criticisms from Literature*

But could copyright's critics be right? Could weakening of the derivative works right or narrowing of copyright's boundaries be more beneficial to creators and society? It might be said that those who argue in favor of looser rules favoring derivative creativity are engaged in a nirvana fallacy, finding discrepancies between the real world (or how they perceive the real world to operate) and an ideal "free culture."[310] That said, it is beyond the scope of this Article to offer any claims about the ideal scope of a derivative works right. Nor is it possible to respond to all critiques—indeed, it is not the position of this Article that all of the points made as part of the remix critique lack merit. But there are a number of points raised by critics of the current copyright landscape worth responding to. The underappreciated factual and theoretical benefits of that landscape, often overlooked in the remix critique, are also worth noting.

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304 *See* Alex Goldman & PJ Vogt, *Managing a Monster*, ON THE MEDIA (Jan. 30, 2014), http://www.onthemedia.org/story/managing-monster/; *see also* Caitlin Dewey, *The Complete, Terrifying History of 'Slender Man,' the Internet Meme that Compelled Two 12-Year-Olds to Stab Their Friend*, WASH. POST (June 3, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/.

305 Goldman & Vogt, *supra* note 304.

306 *Id.*

307 *Id.*

308 *Id.*; Slender Man, U.S. Copyright Reg. No. V3628D950 (Apr. 16, 2013).

309 Goldman & Vogt, *supra* note 304 (audio recording of interview—quote begins at 7:02).

310 *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) ("In practice, those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient.").

1. Remixes Do Not Require Copying Protected Expression

Chief among these is the assertion that cumulative creativity happens only (or most often) through copying of a material amount of expression.[311] As stated earlier, this assertion is at the core of the remix critique—copyright, it is said, "doesn't acknowledge" that "everything is a remix."[312] It is not only academics who have made this claim. In *Klinger v. Conan Doyle Estate, Ltd.*,[313] Seventh Circuit Judge Posner said,

> More important, extending copyright protection is a two-edged sword from the standpoint of inducing creativity, as it would reduce the incentive of subsequent authors to create derivative works (such as new versions of popular fictional characters like Holmes and Watson) by shrinking the public domain. For the longer the copyright term is, the less public domain material there will be and so the greater will be the cost of authorship, because authors will have to obtain licenses from copyright holders for more material—as illustrated by the estate's demand in this case for a license fee from Pegasus.
>
> *Most copyrighted works include some, and often a great deal of, public domain material—words, phrases, data, entire sentences, quoted material, and so forth*. The smaller the public domain, the more work is involved in the creation of a new work. The defendant's proposed rule would also encourage authors to continue to write stories involving old characters in an effort to prolong copyright protection, rather than encouraging them to create stories with entirely new characters. The effect would be to discourage creativity.[314]

But if "everything is a remix," and copyright serves as a barrier to copying, how is it that we see a wealth of new works being created every day without infringement and without licensing? It may be the case that works are underproduced because the derivative works right is too broad. On the other hand, there is clearly a great deal of creation occurring under the current framework, and a good deal of noninfringing appropriation occurs due to the idea/expression distinction. This doctrine mediates between the need for a commons of ideas that all authors can draw upon without needing permission and the exclusive rights that facilitate the commerciali-

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311 *See, e.g.*, Bambauer, *supra* note 93, at 353 ("A common response to complaints about these legal trends, and to the need for 'starter material' for new works, is to direct potential creators to unprotected expression—resources in the public domain. However, recent changes to copyright law halted the flow of works out of protection and into the commons. For example, the CTEA provided twenty years of additional protection for works with expiring copyrights (including, famously, Disney's Mickey Mouse cartoon *Steamboat Willie*), thwarting creators about to gain new building blocks. Normally, copyright's limited duration operates like a conveyor belt, constantly bringing works into the public domain where artists can build upon them." (footnotes omitted)); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 149 ("A healthy system of copyright must consider the inputs that authors require to function as authors and can't content itself simply with invoking platitudes about the separability of idea and expression . . . ."); Voegtli, *supra* note 49, at 1243 ("[D]erivative rights may actually reduce the production of expressive works because they inhibit creation of appropriative works by raising their production cost.").

312 *See supra* note 44 and accompanying text.

313 755 F.3d 496 (7th Cir.), *cert. denied*, 135 S. Ct. 458 (2014).

314 *Id.* at 501 (emphasis added).

zation of expressive works.[315] The fact that all works are built on existing works while the vast majority of works do not infringe on other works proves the centrality and effectiveness of the idea/expression distinction.

As the First Circuit has put it, "[I]n most contexts, there is no need to 'build' upon other people's expression, for the ideas conveyed by that expression can be conveyed by someone else without copying the first author's expression."[316] For example, when writer Kevin Williamson wanted to make a horror film like the ones he had grown up watching, he didn't remake or make a sequel to films like *Halloween* or *Friday the 13th*, he wrote what would eventually become *Scream*.[317] Some of the influences are deliberately obvious, but at the same time, it is highly unlikely a court would ever find actionable copying from those influences. And one need only witness the flood of copycats when there is a successful work—TV sitcoms featuring a group of attractive young people in the city after *Friends*,[318] teen supernatural romance books after *Twilight*[319]—to see that the idea/expression distinction allows non-infringing inspiration and remix.[320]

Perhaps it is the case that the operation of the idea/expression distinction is so fundamental to copyright that it becomes easy to overlook. As Professor Jessica Litman observes, "The concept that portions of works protected by copyright are owned by no one and are available for any member of the public to use is such a fundamental one that it receives atten-

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315 Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 453 (2005) ("Copyright protects expression, not ideas. Many economists have seen *It's a Wonderful Life*, the Jimmy Stewart movie classic, and have read *The Choice*, Russell Roberts' treatment of free trade. Although Roberts uses the plot device of a man who must return to earth to earn his angel's wings, his book does not infringe the movie's copyright. Though clearly an important creative element of the movie, the plot device is not protected by copyright. . . . Artists do indeed draw on old themes, and they are allowed to do so. On the other hand, they are not allowed to incorporate details of copyrighted works. So the economists are correct in that copyright does raise artists' costs—copyright forces artists to do some work themselves. However, since only specific expressions are protected, extensive parts of the culture are not, as it is sometimes claimed, walled off from creative re-use.").

316 Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 818 (1st Cir. 1995), *aff'd by an equally divided court*, 516 U.S. 233 (1996) (per curiam).

317 *See* Haleigh Foutch, *Kevin Williamson on 'Scream' 20 Years Later, The Power of Nostalgia, and Remembering Wes Craven*, COLLIDER (Jan. 29, 2016), http://collider.com/scream-kevin-williamson-vampire-diaries-interview/.

318 *E.g.*, *Coupling* (BBC 2000-04); *Happy Endings* (ABC 2011-13); *How I Met Your Mother* (CBS 2005-14); *Two Guys, a Girl and a Pizza Place* (ABC 1998-2001).

319 *E.g.*, JOSEPHINE ANGELINI, STARCROSSED (2012); LEIGH FALLON, CARRIER OF THE MARK (2011); AMY PLUM, DIE FOR ME (2012).

320 *See* Liebowitz & Margolis, *supra* note 315, at 453 ("Television addicts will also note the flock of shows that followed the *Friends* format or the current proliferation of *Survivor*-type shows. Artists do indeed draw on old themes, and they are allowed to do so.").

tion only when something seems to have gone awry."[321] And perhaps because the line between idea and expression, as Landes and Posner observe, is hazy,[322] it invites dismissal. Nevertheless, the vast majority of works both build upon existing works yet do not infringe upon existing works, due primarily to the idea/expression distinction.[323] A few examples of its operation best illustrate how it functions.

Star Trek is a popular science fiction franchise created by Gene Roddenberry and currently owned by CBS Television Studios.[324] The franchise, which has since spawned multiple television series and films,[325] began in 1966 with *Star Trek* on NBC.[326] The television series takes place several centuries in the future and is centered on the crew of the starship *Enterprise*, tasked with a mission of interstellar exploration.

Roddenberry began developing the series in 1964. In that year—as recounted in Roddenberry's authorized biography—he wrote a telling letter to then production-assistant Herb Solow that suggests some of the influence of the film *Forbidden Planet* (1956):

> You may recall we saw MGM's *Forbidden Planet* . . . some weeks ago. I think it would be interesting . . . to take another very hard look at the spaceship, its configurations, controls, instrumentations, etc. while we are still sketching and planning our own. . . . [W]ould it be ethical to get a print of the film and have our people make stills from some of the appropriate frames? This latter would be most helpful. Please understand, we have no intention of copying either interior or exterior of that ship. But a detailed look at it again would do much to stimulate our thinking . . . .[327]

Later in development, Roddenberry specifically mentioned *Gulliver's Travels*, expressing his hope that, like *Gulliver's Travels*, *Star Trek* would be a "meaningful drama and something of substance," perhaps alluding to the allegorical storytelling style he would come to adopt.[328]

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321 Litman, *supra* note 36, at 977.

322 Landes & Posner, *supra* note 40, at 349.

323 *See* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 5 (1997) ("The fair use doctrine . . . and the idea/expression dichotomy . . . relieve most of the tension that exclusive rights for first authors may cause when confronted with the creative demands of second authors.").

324 *Star Trek Corporate History*, MEMORY ALPHA, http://en.memory-alpha.org/wiki/Star_Trek_corporate_history (last visited May 13, 2016).

325 *E.g.*, *Star Trek: The Next Generation* (CBS television broadcast 1987-94).

326 Later referred to as *Star Trek: The Original Series*. *Star Trek* (NBC television broadcast 1966-69).

327 DAVID ALEXANDER, STAR TREK CREATOR: THE AUTHORIZED BIOGRAPHY OF GENE RODDENBERRY 219 (1995); *accord* Ryan Lambie, *The Influence of Forbidden Planet on Star Trek and Star Wars*, DEN OF GEEK (Jan. 14, 2016) http://www.denofgeek.com/us/movies/forbidden-planet/251991/the-influence-of-forbidden-planet-on-star-trek-and-star-wars.

328 ALEXANDER, *supra* note 327, at 239. Others have noted substantial similarities between the two works. *E.g.*, RICHARD KELLER SIMON, TRASH CULTURE: POPULAR CULTURE AND THE GREAT TRADITION 139-52 (1999).

In *The Making of Star Trek*, Roddenberry notes some of the other ideas that influenced his concept—expressly mentioning them in his pitch.[329] The series is described as a "'Wagon Train' concept," referring to the popular network Western television show that ran from 1957-65. The captain of the Enterprise was described as "[a] space-age Captain Horatio Hornblower," an allusion to the protagonist of a series of novels by author C. S. Forester.[330] Roddenberry would compare the captain to historical figures such as "Drake, Cook, Bougainville, and Scott."[331] The setting was compared to "Gunsmoke's Dodge City [and] Kildare's Blair General Hospital."[332] Roddenberry also sketches out a few ideas for episodes. Here again specific sources of inspiration are evident. Roddenberry suggests one story based on the society from "the novel, '1984.'"[333] Another episode is proposed as a take on Mark Twain's novel, "A Connecticut Yankee in King Arthur's Court."[334]

The point here is that Roddenberry created *Star Trek* by copying from these—and undoubtedly other—sources. Yet it would be a difficult argument to make saying such copying is actionable under copyright law. Roddenberry, like all creators, copied, rearranged, and combined ideas from multiple sources. He didn't, however, need to copy material expression from any existing works.

Setting aside any conceptual difficulties at the margins,[335] the most important takeaway for the idea expression distinction is that, on a day-to-day basis, it *works*.[336] It mediates between protection of creative works and recognition that any creative work necessarily borrows from other creative works. It allows remedies against misappropriation while allowing creative appropriation. It gives industry lawyers and courts a rough guide for distinguishing between property and the public domain. The result is billions of dollars in economic activity creating and disseminating creative works with a trivial amount of litigation involving idea/expression issues.

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329 STEPHEN E. WHITFIELD & GENE RODDENBERRY, THE MAKING OF STAR TREK 21-28, 36 (1968).

330 *Id.* at 28.

331 *Id.*

332 *Id.* at 25.

333 Gene Roddenberry, Star Trek 13 (Mar. 11, 1964) (unpublished manuscript), http://leethomson.myzen.co.uk/Star_Trek/1_Original_Series/Star_Trek_Pitch.pdf.

334 *Id.* at 14.

335 *See, e.g.*, Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 552-53 (1990) ("[T]he traditional distinction between idea and expression is misguided and irrelevant. No 'expressionless idea' exists and, at least in any meaningful writing, it makes no sense to speak of an 'idealess expression.' Despite the manner in which cases are framed, the scheme of differentiating idea from expression does not aid courts in their task of determining what is the protectable expression and whether this expression has been infringed.").

336 *See* Warner Bros., Inc. v. Am. Broad. Co., 720 F.2d 231, 240 (2d Cir. 1983) ("Though imprecise, [the idea-expression dichotomy] remains a useful analytic tool for separating infringing from noninfringing works.").

And the idea/expression distinction is self-balancing. Copyright owners rely on copying ideas, so they are likely to not be as aggressive in fixing where the line between idea and expression lies. This is especially true for entertainment companies with large copyright portfolios; since they are on both sides as creators and copiers, their litigation and licensing strategy will mediate between allowable and actionable copying.

Restraints on copying expression may in fact be beneficial to downstream creators. In *Creating Around Copyright*, Professor Joseph P. Fishman writes that, as cognitive psychology, management studies, and art history has all shown, creativity requires restraints.[337] Certain types of constraints, including those inherent in copyright law, may be generative.[338]

> Without a derivative work right, we may get more homogenization. That's costly if the name of the game is creativity. The wider the range of undiscovered appropriate solutions to a problem, the more audiences may miss out when problem solvers become locked in to a single solution. And if audiences value a multiplicity of solutions separately from the content of those solutions, the cost of that lock-in is exacerbated. The expressive arts, where appropriateness is often extremely ill-defined and where audiences desire new works even though there's nothing wrong with the old ones, check both of those boxes. To the extent that the derivative work right encourages create-around effort, it furthers—not frustrates—copyright's goal of "stimulat[ing] artistic creativity for the general public good." Thus, although the current derivative works system constrains more broadly than a hypothetical blocking copyrights system, it may also constrain more wisely.[339]

Fishman cites the example of George Lucas developing *Star Wars* after being unable to get a license for a remake of *Flash Gordon*.[340] Film critic Devin Faraci has also written about this example, saying,

> Lucas says that King Features wanted 80% of the profits, and that they wanted Fellini to direct. Francis Ford Coppola, Lucas' best bud at the time, thinks that they just didn't take the movie brat seriously. Whatever the case, George Lucas was unable to make a Flash Gordon film, and so he instead filtered what he loved about Flash Gordon through other influences, including Joseph Campbell and 2001 and came up with a brand new concept that forever changed our pop culture. Could his Flash Gordon have been as seismically important? Perhaps, but it's the synthesis of other influences that makes Star Wars special.[341]

Benjamin Goldberger cites the example of the Lara Croft character from the *Tomb Raider* as a case where "concern for other's intellectual property rights may encourage artists to break new ground, as they attempt to ensure that their creations are sufficiently different from what came be-

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337 Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1334 (2015).

338 *Id.* at 1395-97.

339 *Id.* at 1395-96 (alteration in original) (footnotes omitted) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

340 *Id.* at 1336.

341 Devin Faraci, *How Copyright Law Gave Us Star Wars*, BIRTH. MOVIES. DEATH. (Dec. 29, 2013), http://birthmoviesdeath.com/2013/12/29/how-copyright-law-gave-us-star-wars.

fore so as to avoid litigation."[342] The original character bore a strong resemblance to *Indiana Jones*, a dashing archaeologist played by Harrison Ford in a series of films. The creators ended up changing the character to a female, and *Tomb Raider* went on to become a highly successful franchise, which included two films with Angelina Jolie as Lara Croft.[343]

Other authors have demonstrated ways to "create around" any need to license. One example involves best-selling novel *50 Shades of Grey*, by E.L. James.[344] James originally wrote the story as *Twilight* fan fiction.[345] However, before publishing, James rewrote it as an original, stand-alone novel, removing all references to *Twilight* characters and story elements.[346] The story was later adapted into a blockbuster film.[347]

There are, in fact, entire firms dedicated to "drafting" behind established larger properties—producing noninfringing works which are nevertheless closely associated enough with existing works to take advantage of their audiences. The Asylum is one of the most successful studios producing "mockbusters," films that "piggyback[] on the name-brand recognition of a major-studio release."[348] The studio produces such films as *Atlantic Rim*, which has the same basic plot as *Pacific Rim*, a "$180 million sci-fi thriller directed by Guillermo del Toro and starring Idris Elba," but is made for $500,000 and stars "ex-Baywatcher" David Chokachi and Naughty by Nature rapper Treach.[349] The success of these copycat films is almost entirely dependent on the major studio version,[350] and they occasionally invite legal action from the major studios,[351] but this is how copyright works:

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342 Goldberger, *supra* note 17, at 390.

343 *Tomb Raider*, IMDB, http://www.imdb.com/title/tt0146316/ (last visited May 13, 2016).

344 Mike Fleming, Jr., *Mike Fleming's Q&A With 'Fifty Shades Of Grey' Agent Valerie Hoskins, Broker of 2012's Biggest Book Rights Film Deal*, DEADLINE HOLLYWOOD (Mar. 26, 2012), http://deadline.com/2012/03/mike-flemings-qa-with-fifty-shades-of-grey-agent-valerie-hoskins-broker-of-2012s-biggest-book-rights-film-deal-249309/.

345 *Id.*

346 Jason Boog, *The Lost History of Fifty Shades of Grey*, GALLEYCAT (Nov. 21, 2012), http://www.mediabistro.com/galleycat/fifty-shades-of-grey-wayback-machine_b49124.

347 *See* Brooks Barnes & Michael Cieply, *In a Shift, 'Shades' Dominates Box Office*, N.Y. TIMES (Feb. 15, 2015), http://www.nytimes.com/2015/02/16/movies/fifty-shades-of-grey-leads-weekend-box-office-stirring-reflection-on-sex-films.html?_r=0.

348 David Katz, *From Asylum, the People Who Brought You (a Movie Kinda Sorta Like) Pacific Rim*, GQ (July 11, 2013), http://www.gq.com/story/sharknado-atlantic-rim-pacific-rim-asylum-movie-spoof.

349 *Id.*

350 The Asylum began producing mockbusters after it realized its biggest sale with a version of War of the Worlds that coincided with a Steven Spielberg adaptation starring Tom Cruise. *Id.* "When it was finished, Blockbuster bought 100,000 copies of the film, the studio's biggest sale yet. The store had noticed that when a major-studio picture came out, people rented similar films, even if they were off-brand B movies." *Id.*

351 Though more often than not the concerns involve trademark rather than copyright. *Id.* "The major studios (and their trademark-protection lawyers) tolerated mockbusters until last year, when

"Yeah, these are knockoffs of someone else's ideas, but The Asylum's scripts are always original—its writers don't get to read the real movie's script beforehand."[352]

Though most films do not hew as closely to existing films as Asylum's, the same principles underlie their creation. As one court observed,

> The commentators cited by Plaintiff may well be correct that Defendants—wittingly or unwittingly—took some inspiration from Plaintiff, or even copied elements of his works in making their film. But many Hollywood movies take their inspiration from other movies or works—or go even further—without running afoul of the Copyright Act.[353]

This brief discussion shows the breadth of remix possible under the idea/expression dichotomy.

In some cases, it should be mentioned, the creation of derivative works that improve on original works, by, for example, commenting on or critiquing them within the confines of a new work, may be encouraged by not requiring licensing. This type of commenting improves the original by creating "new insights and understandings" about the original work.[354] For example, Alice Randall's book *The Wind Done Gone* makes "substantial use" of protected elements, including "numerous characters, settings, and plot twists" from Margaret Mitchell's 1936 novel *Gone With the Wind*.[355] However, it does so in order to "rebut and destroy the perspective, judgments, and mythology of [*Gone With the Wind*]. Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."[356] *The Wind Done Gone* thus does not just provide the reader with its own story, but with an improved understanding of an existing work. It is undeniable that such improvements are socially and culturally beneficial, and the doctrine of fair use privileges the use of otherwise actionable copying when it is necessary for such purposes of criticism and

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Universal sued The Asylum over its *Battleship* knockoff. The two parties settled out of court after The Asylum agreed to change the movie's title from *American Battleship* to *American Warships*. . . . This past December, Warner Bros. piled on, taking The Asylum to court for its 2012 mockbuster *Age of the Hobbits*." *Id*.

352 *Id.*

353 Dean v. Cameron, 53 F. Supp. 3d 641, 650 (S.D.N.Y. 2014).

354 *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) ("If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.").

355 Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259, 1267 (11th Cir. 2001).

356 *Id.* at 1270.

commentary.[357] However, this does not necessarily entail expansion of existing copyright limitations.

2. The "Shared Culture" Argument Overreaches

The second argument raised through the remix critique worth addressing says that weaker copyright rules are needed to allow noncommercial uses of popular characters and stories so that individuals can participate in popular culture. As part of the commenting period for the IPTF Green Paper, the Organization for Transformative Works submitted an eighty-page comment on the legal framework for remixes that largely embraced this viewpoint.[358] The Organization writes,

> New technologies allow people with limited financial resources to talk back to mass culture in language that audiences are ready to hear, both because they are familiar with the referents in a remix and because the quality of a remix can now be sufficient to keep it from being dismissed out of hand as ludicrously amateurish or unwatchable.[359]

The most comprehensive response to this critique comes from Professor Thomas W. Joo, in his article *Remix Without Romance*.[360] Joo observes that the same rules that allow individuals to appropriate from larger copyright owners would "also allow dominant institutions to appropriate from the underdog."[361] This would additionally allow dominant institutions to "drown out" independent voices.[362] Finally, remixing popular characters can tend to reinforce their popularity and the influence of dominant cultural messages, which undermines the egalitarian goals of proponents of this argument.[363]

Joo is not the only one to recognize this. Says copyfighter Cory Doctorow, "We copyfighters have a problem: Remix culture (mostly western, technologically dominant) has the power to irresponsibly exploit and ap-

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357 *But see* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) ("[A]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent. This is so even where—as here—the allegedly infringing work makes few physical changes to the original or fails to comment on the original."); Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (reversing district court's imposition of a "requirement that, to qualify for a fair use defense, a secondary use must 'comment on, relate to the historical context of, or critically refer back to the original works'").

358 Organization for Transformative Works, Comment Letter on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy (Nov. 13, 2013), http://www.uspto.gov/ip/global/copyrights/comments/Organization_for_Transformative_Works_Comments.pdf.

359 *Id.* at 30.

360 *See* Thomas W. Joo, *Remix Without Romance*, 44 CONN. L. REV. 415 (2011).

361 *Id.* at 415.

362 *Id.*

363 *Id.*

propriate traditional culture (mostly poor, technologically unempowered)."[364] This echoes earlier claims by Professors Anupam Chander and Madhavi Sunder about the romanticization of the public domain that is central to the remix critique.[365] They argue that the public domain may be exploited asymmetrically just as easily as intellectual property:

> Focused more on form than function, the increasingly binary rhetoric of "intellectual property versus the public domain" deafens us to new claims by individuals who seek to restructure social and economic relations through property-like rights. The current habit of critiquing each and every new claim for property rights as an encroachment on the public domain carries some risks, as it may: (1) legitimate the current distribution of intellectual property rights, (2) mask how current constructions of the public domain disadvantage and subordinate indigenous and other disempowered groups globally, and (3) impair efforts by disempowered groups to claim themselves as subjects of property—that is, as autonomous individuals with constitutive personhood interests in property—rather than as mere objects, or someone else's property.[366]

And it is not just traditional knowledge and culture that is protected from appropriation by copyright; original, user-generated content is also shielded. In October 2011, Warner Bros. optioned a "pitch" that originated from comments made on Reddit.[367] With weaker or no rights to make the adaptation, the original writer (who was also hired to write the screenplay, though it was later rewritten)[368] would be easily cut out of the picture.

3. The Popularity of User-Generated Content May Be Overstated

Another assumption that seems to underlie copyright's remix critique is a perceived rise of so-called "user-generated content."[369] Lessig has written extensively about how the lower costs of producing and distributing

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364 Cory Doctorow, *Kickstarting a "Fair Trade" Remix Project*, BOINGBOING (Oct. 2, 2012, 9:30 AM), http://boingboing.net/2012/10/02/kickstarting-a-fair-trade.html.

365 Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1332 (2004).

366 *Id.* at 1355.

367 Jeff Sneider, *WB Redrafting Reddit-Borne Time-Travel Pic*, VARIETY (Jan. 14, 2013), http://www.variety.com/2013/film/news/wb-redrafting-reddit-borne-time-travel-pic-1118064641.

368 *See id.*

369 *See* Guilda Rostama, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WIPO MAG. (June 2015), http://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html ("Many commentators today are talking about the 'age of the remix', a practice enabled by widespread access to sophisticated computer technology whereby existing works are rearranged, combined or remixed to create a new work."); *see also* Bambauer, *supra* note 93, at 352 (asserting that there are an "increasing number of producers of transformative works"); Harper, Note, *supra* note 82, at 406 (discussing "the rising popularity of mashups and the unlikelihood that they are a passing fad"); Krueger-Wyman, Note, *supra* note 99, at 125 ("[M]ashup has become mainstream. . . ."); Long, Comment, *supra* note 99, at 317 ("Over the past several years, the Internet has exploded with the growth of user-generated information.").

digital content has increased remix: "The ways and reach of speech are now greater. More people can use a wider set of tools to express ideas and emotions differently."[370] The question of whether there has been a rise in this type of activity and its current scope is an empirical one—and one that I am unaware of having been tested.

"DIY" creativity is not uniquely an Internet phenomenon. There are certainly examples of amateur and informal creative communities before the Internet: amateur "zines," for example, have been published since the late nineteenth century.[371] And it may be the case that any rise in popularity in user-generated content may be a temporary phenomenon and one that does not displace professional media.[372] Perhaps much user-generated content is actually aspiring professional content rather than a distinct category, what formerly might be considered demo tapes and spec scripts seen only by A&R (artists and repertoire) reps and literary agents rather than the general public. Netflix, which licenses professional content, has a larger share of broadband traffic than user-generated content platform YouTube.[373] More relevant, Netflix is directing more resources to even more costly content—its recent original series *Marco Polo* cost $90 million for ten episodes, making it one of the most expensive television shows ever produced.[374] And YouTube itself has invested in creating original content in recent years.[375] As one journalist concluded, "The fundamental recipe for

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370 LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 83 (2008).

371 *Zine and Amateur Press Collections at the University of Iowa, The World of Zines*, UNIV. IOWA LIBR., http://www.lib.uiowa.edu/sc/resources/ZineResources/ (last visited May 13, 2016) ("The term 'zine' (derived from the word 'fanzine') refers generally to a small, informal, non-professionally produced publication.").

372 *See, e.g.*, Michael Wolff, *Michael Wolff: 8 Hollywood Predictions for 2015*, HOLLYWOOD REP. (Dec. 18, 2014), http://www.hollywoodreporter.com/news/michael-wolff-8-hollywood-predictions-759110 (predicting that "'premium content,' that is, the stuff made by professionals, will be as much the sought-after digital media model as user-generated content (a much-derided form in 2015) used to be" and that Facebook and Google will focus more on premium content buying and licensing than on "[y]our friends' irritating children").

373 Todd Spangler, *Netflix Remains King of Bandwidth Usage, While YouTube Declines*, VARIETY (May 14, 2014), http://variety.com/2014/digital/news/netflix-youtube-bandwidth-usage-1201179643/.

374 Emily Steel, *How to Build an Empire, the Netflix Way*, N.Y. TIMES (Nov 29, 2014), http://www.nytimes.com/2014/11/30/business/media/how-to-build-an-empire-the-netflix-way-.html.

375 *See, e.g.*, Amir Efrati, *YouTube to Double Down on Its 'Channel' Experiment*, WALL ST. J. (July 31, 2012), http://www.wsj.com/article_email/SB10000872396390444840104577549632241258356-lMyQjAxMTAyMDMwMDAzODA3Wj.html; Georg Szalai, *YouTube to Invest in New Content from Top Creators*, HOLLYWOOD REP. (Sept. 19, 2014), http://www.hollywoodreporter.com/news/youtube-invest-new-content-top-734285. It's also worth noting that, independent of YouTube's investment in its own content, the overwhelming majority of top 100 most-watched videos on the site are professionally created music videos. *See Most Viewed Videos of All Time*, YOUTUBE, https://www.youtube.com/playlist?list=PLirAqAtl_h2r5g8xGajEwdXd3x1sZh8hC (last visited May 13, 2016); *see also* Davey Alba, *Inside the Company That's Made Viral Videos Big Business*, WIRED (Aug.

media success, in other words, is the same as it used to be: a premium product that people pay attention to and pay money for."[376]

Some scholars have made additional claims, as when Professor Daniel Gervais describes "the transition from a professional one-to-many entertainment infrastructure to a many-to-many—and in large measure amateur—environment in which financial incentives are often not a significant motivation for creation."[377] Again, whether financial incentives are or are not significant motivation to these creators is empirical; however, a few points must be made in response.

First, though it may be the case that many amateur creators do not have financial incentives, they may still prefer to maintain some control over their work. Over the past couple years, several social network platforms have found themselves the subject of user outrage after new terms of service were announced that were perceived to allow unwanted commercialization and other uses of users' noncommercial and personal content.[378] In late 2014, for example, a plan by Yahoo to begin selling prints of images uploaded to photo site Flickr was met with anger by users.[379] This was despite the fact that the move was limited to photos licensed under Creative Commons licenses that explicitly allowed commercial uses.[380] More recently, software code repository SourceForge was the target of user anger after it was found to be taking control of inactive open-source projects and commercializing them through the use of "bundleware."[381] Said the developer of

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4, 2015), http://www.wired.com/2015/08/jukin-media (explaining how online video has shifted from a primarily grassroots phenomenon to a regularized commercial endeavor).

376 Michael Wolff, *How Television Won the Internet*, N.Y. TIMES (June 29, 2015), http://www.nytimes.com/2015/06/29/opinion/how-television-won-the-internet.html.

377 Daniel Gervais, *The Derivative Right, or Why Copyright Protects Foxes Better Than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 787 (2013).

378 *See, e.g.,* Richard Harrington, *Facebook Changes Terms of Service—Photographers Be Wary!*, PHOTOFOCUS (Sept. 9, 2013), http://photofocus.com/2013/09/09/facebook-changes-terms-of-service-photogs-be-wary/ ("The new Facebook Terms of Use have been modified to allow the company to sell virtually anything that is uploaded to the service, including all your photos, your identity and your data." (citing American Society of Media Photographers)); Heather Kelly, *Why Your Face Might Appear in Google Ads, and How to Stop It*, CNN (Oct. 11, 2013), http://www.cnn.com/2013/10/11/tech/social-media/google-plus-ads-profiles/; Craig Timberg, *Instagram Outrage Reveals a Powerful But Unaware Web Community*, WASH. POST. (Dec. 21, 2012), http://www.washingtonpost.com/business/technology/instagram-outrage-reveals-a-powerful-but-unaware-web-community/2012/12/21/b387e828-4b7a-11e2-b709-667035ff9029_story.html (commenting on Instragram's public relations decision to reverse its Terms of Use that would have permitted it to license images to third-parties).

379 Douglas MacMillan, *Fight Over Flickr's Use of Photos—Yahoo Starts Selling Canvas Prints from Free Pictures Uploaded to the Internet Sharing Site*, WALL ST. J. (Nov. 25, 2014), http://www.wsj.com/articles/fight-over-flickrs-use-of-photos-1416875564.

380 *Id.*

381 Sean Gallagher, *SourceForge Locked in Projects of Fleeing Users, Cashed in on Malvertising (Updated)*, ARS TECHNICA (June 1, 2015), http://arstechnica.com/information-technology/2015/06/sourceforge-locked-in-projects-of-fleeing-users-cashed-in-on-malvertising/.

one affected project, "This was done without our knowledge and permission, and we would never have permitted it."[382] Regardless of how in the clear Yahoo or SourceForge were legally, the user response evidences that the motivations underlying copyright remain, even for creators without explicit commercial intentions. As discussed earlier, control over one's expression is often as important, if not more important, to creators as compensation.

Second, while many of the types of acts described here may be noncommercial, many of the platforms where these works are shared online are commercial. Companies like YouTube, Tumblr, and Soundcloud, for example, assuredly *do* care about financial incentives, and it is legitimate to question to what extent they should be able to profit off works that may infringe.

V. IMPLICATIONS

Remixes—whether adaptations, sequels, mashups, or any of their other diverse forms—are flourishing through licensing, while the idea/expression distinction ensures that authors are able to take robust inspiration from, and build upon, existing works within copyright law without permission. These two points have been greatly underappreciated in the academic literature. Their recognition, placing the type of remix most academics talk about in the proper context, has a number of policy and legal implications.

First and foremost, courts and policymakers should "do no harm"—one does not begin remodeling a room without knowing which walls are load-bearing. They should recognize the crucial role the derivative works right plays in enabling an economically significant and culturally relevant marketplace for remixes. They should also preserve copyright's commercialization function and the incentives to cooperate in the marketplace. Formal inclusion mechanisms like licensing are essential to this function. Whether it is the USPTO considering the "legal framework for remixes"[383] or the legislature reviewing the law as a whole, policymakers looking at the current landscape of copyright law should carefully consider whether, and to what extent, there are any problems. If there are problems, policymakers should ensure any solutions do not threaten to undermine the flourishing licensing marketplace. They should also be concerned about adding new layers of complexity or administrative procedures for what may amount to much ado about nothing. Instead, the discussion could benefit from a reinvigoration of commerciality. Markets are dynamic, and if there is indeed a shift toward more informal creativity and looser licensing practices, industries will adapt; government intervention risks creating distortions.

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382 *Id.*

383 *See supra* Section II.C.

Policymakers and courts should strive to ensure that regular, commercial use remains within the licensing framework. For example, while amateur, ad hoc remixing might not always be amenable to licensing, either because of transaction costs or free speech concerns, the commercial platforms where such remixes are disseminated do engage in the type of regular commercial exploitation of copyrighted works that is amenable to licensing. Many, like YouTube, earn revenue through advertising, while others, like Soundcloud, offer paid subscriptions. Under licensing agreements, the platforms benefit—their users see less anxiety about uploading works, and platforms can distinguish themselves in the competitive marketplace through what properties are licensed. And licensors benefit by establishing positive relationships with platforms and their fans. As explained above, several sites relying on user-generated content have entered into licensing agreements with media companies to allow such derivative works.[384] This is exactly the type of behavior property encourages—incentivizing cooperation and building long-term, stable relationships between firms.

One area where commerciality has taken a hit is fair use. Section 107 of the Copyright Act, where fair use is codified, provides that among the factors courts shall consider when determining whether a particular use is fair is "the purpose and character of the use, *including whether such use is of a commercial nature* or is for nonprofit educational purposes."[385] The language regarding the commercial nature was added late in the legislative process of the 1976 Copyright Act; the 1976 House Report explains,

> The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.[386]

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384 Other types of informal mechanisms may be used to provide more certainty for creators of fair use such as the Principles for User-Generated Content Services, created in 2007 by a consortium of media and entertainment companies and online service providers. *See* Press Release, Principles for User Generated Content Services, Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), http://www.ugcprinciples.com/press_release.html.

385 17 U.S.C. § 107(1) (2012) (emphasis added).

386 H.R. REP. NO. 94-1476, at 66 (1976). The language did not appear in S. 22, which was reported by the Senate Judiciary Committee on November 20, 1975. *See* S. REP. NO. 94-473 (1975). It was added during markup by the House Judiciary Committee in the summer of 1976 and first appeared in the bill reported September 3, 1976. H.R. REP. NO. 94-1476, at 66; *see also* WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE (2000), http://digital-law-online.info/patry/patry8.html.

At the time, commercial uses were considered presumptively unfair.[387] In *Harper & Row v. Nation Enterprises*, the Supreme Court explained:

> The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.[388]

But the Supreme Court shifted its views within a decade in *Campbell v. Acuff-Rose Music, Inc.*,[389] where it reviewed a Second Circuit decision that held, in part, that the commercial nature of the use at issue created a presumption against fair use.[390] The Court said that *Sony* did not create a per se rule;[391] courts should approach the fair use inquiry broadly, keeping in mind that "the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character."[392] It explained:

> If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "[n]o man but a blockhead ever wrote, except for money."[393]

The result of this shift was that commerciality became less significant to fair use analysis.[394] The trend has continued; more recent years have seen

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387 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.").

388 471 U.S. 539, 562 (1985) (citation omitted) (quoting *id.*).

389 510 U.S. 569 (1994).

390 *Id.* at 572.

391 *Id.* at 585.

392 *Id.* at 584.

393 *Id*. (alteration in original) (citations omitted) (quoting *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting); 3 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 19 (George Birkbeck Hill ed., Clarendon Press 1934) (1791)).

394 Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 602 (2008) ("[A] finding that the defendant's use was for a commercial purpose (which was made in 64.4% of the opinions) did not significantly influence the outcome of the fair use test in favor of an overall finding of no fair use.").

"a sharp decline in the weight that courts say they are giving to whether a use is commercial."[395]

The lowest point of this decline may very well be the Southern District Court of New York's 2014 decision in *Fox News Network, LLC v. TVEyes, Inc.*[396] TVEyes is a media-monitoring service that "records the content of more than 1,400 television and radio stations, twenty-four hours a day, seven days a week" and creates a searchable database of that content, which it provides to its paying subscribers.[397] According to the court, "TVEyes is a for-profit company with revenue of more than $8 million in 2013. Subscribers pay a monthly fee of $500, much more than the cost of watching cable television."[398] It was sued by Fox News Network for copying its copyrighted programming without authorization.

TVEyes asserted a fair use defense and moved for summary judgment, which the court partially granted.[399] It said, "The issue of fair use is affected by the issue of profits. Clearly, TVEyes is a for-profit company, and enjoys revenue and income from the service it provides. However, the consideration of profits is just one factor, among many others."[400] It then recited the language on commerciality from *Campbell* while concluding, without any further analysis, that "the first factor weighs in favor of TVEyes' fair use defense."[401] That is, after noting that "consideration of profits" is a factor, it failed to actually consider profits as a factor.[402] This is a misstep if copyright is indeed concerned with the commercial exploitation of works.[403]

Section 107 also directs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work."[404] Here, too, courts have shifted away from the traditional fair use jurisprudence. In *Harper & Row*, the Court said, "This last factor is undoubtedly the single most important element of fair use."[405] Again, it was *Campbell* that marked the beginning of the shift by saying that "[a]ll [factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[406] Professor Barton Beebe notes that this had a modest effect on lower courts,

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395 Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 742 (2011).

396 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

397 *Id.* at 383.

398 *Id.* at 385.

399 *Id.* at 383.

400 *Id.* at 393.

401 *Id.* at 394.

402 *Fox News Network*, 43 F. Supp. 3d at 393.

403 The case is currently on appeal to the Second Circuit. Fox News Network, LLC v. TVEyes, Inc., No. 15-3886 (2d Cir. filed Dec. 3, 2015).

404 17 U.S.C. § 107(4) (2012).

405 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

406 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

with fewer placing emphasis on the fourth factor after the decision.[407] Professor Neil Netanel confirms that the importance of the fourth factor has declined, replaced by an emphasis on the first factor.[408]

The recent Eleventh Circuit decision in *Cambridge University Press v. Patton*[409] demonstrates the extent to which the fourth factor has been whittled away.[410] In its analysis of the fourth factor, the court said:

> Put simply, absent evidence to the contrary, if a copyright holder has not made a license available to use a particular work in a particular manner, the inference is that the author or publisher did not think that there would be enough such use to bother making a license available. In such a case, there is little damage to the publisher's market when someone makes use of the work in that way without obtaining a license, and hence the fourth factor should generally weigh in favor of fair use. This is true of Plaintiffs' works for which no license for a digital excerpt was available.[411]

This interpretation effectively reads the word "potential" out of the fourth factor. This vitiation, combined with the reduced significance courts place on the fourth factor, threaten the ability of copyright owners to license new uses, remixes, and adaptations precisely at a time when tremendous experimentation is occurring as technology advances and consumer behavior is in flux. The reduction in focus on the commercial nature of uses and emphasis on potential market for, or value of, the copyrighted work is at odds with copyright's core commercialization policy.

CONCLUSION

In an 1845 copyright case, Justice Story observed:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a

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407 Beebe, *supra* note 394, at 617.

408 Netanel, *supra* note 395, at 745 ("In sum, in contrast to the *Harper & Row* regime in which the fourth factor was undoubtedly the most important, today it is largely the first factor, particularly whether the use is held to be transformative, that drives fair use analysis.").

409 769 F.3d 1232 (11th Cir. 2014).

410 *See id.* at 1275-76.

411 *Id.* at 1277. To its credit the court does aver in a footnote: "Of course, it need not *always* be true that a publisher's decision not to make a work available for digital permissions conclusively establishes that the publisher envisioned little or no demand, and that the value of the permissions market is zero." *Id.* at 1277 n.32.

> combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.[412]

The idea that "everything is a remix" has long been recognized and inherent to copyright law. The derivative works right aspires to preserve the benefits of copyright protection while enabling an optimal level of inclusion with other parties to remix works, while the idea/expression dichotomy mediates between infringement and inspiration. Thus, contrary to proponents of the remix critique, an economically significant and culturally relevant marketplace of remixes exists under current copyright law. A "permissions culture" is not some dystopian place, and, in fact, it provides a number of societal benefits.

Recognizing this is important and, beyond the implications this has for policymakers and courts, it is a recognition that will hopefully inform public discourse about copyright. Authorship is a vital public interest, and debate over the best way to encourage it is cheapened when it is reduced to bromides like "copyright stifles creativity."

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412 Emerson v. Davies, 8 F. Cas. 615, 619 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).