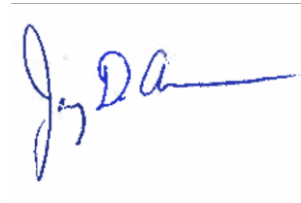


To Whom It May Concern:

This is to certify that on April 30th, 2011, Jessica Dickinson Goodman submitted an Honors Thesis entitled "Historical Understandings of Derivative Works and Modern Copyright Policy" to the Philosophy Department. This thesis has been judged to be acceptable for purposes of fulfilling the requirements to graduate with College Honors.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Aronson", enclosed within a thin black rectangular border.

Dr Jay Aronson
Thesis Advisor

Dr. Richard Scheines
Head, Department of Philosophy

Dr. John Lehoczky
Dean, College of Humanities and Social Sciences

Historical Understandings of Derivative Works and Modern Copyright Policy
Jessica Dickinson Goodman
Ethics, History and Public Policy
Candidate, H&SS Senior Honors Thesis

30 April 2011

“Many people, other than the authors, contribute to the making of a book, from the first person who had the bright idea of alphabetic writing through the inventor of movable type to the lumberjacks who felled the trees that were pulped for its printing. It is not customary to acknowledge the trees themselves, though their commitment is total.”

—Forsyth and Rada, Machine Learning

Acknowledgments

This thesis came from a fight I could not win with my friend Lillian Leath DeRitter about the competing needs and rights of published authors and fanfiction writers. She and my friend Anthea Carns have both provided invaluable feedback and support during my research. Matthew Holmes, volunteer editor and fiancé, has gently kept me on track for this entire project. My advisor, Jay Aronson, has been my constant sounding-board and supporter throughout this process and nothing I have written here would have existed without him. Last but never least, my readers on FeelingElephants (including those not directly related to me) have provided me with invaluable feedback, criticism, and support.

Thank you all.

“As [American poet Ruth Stone] was growing up in rural Virginia, she would be out, working in the fields and she would feel and hear a poem coming at her from over the landscape. It was like a thunderous train of air and it would come barreling down at her over the landscape. And when she felt it coming...cause it would shake the earth under her feet, she knew she had only one thing to do at that point. That was to, in her words, run like hell to the house as she would be chased by this poem.

The whole deal was that she had to get to a piece of paper fast enough so that when it thundered through her, she could collect it and grab it on the page. Other times she wouldn't be fast enough, so she would be running and running, and she wouldn't get to the house, and the poem would barrel through her and she would miss it, and it would continue on across the landscape looking for 'another poet'.”

-- Elizabeth Gilbert

Abstract

The Fair Use Doctrine allows unauthorized uses of copyrighted works by scholars, reporters and parodists but does little to protect creative critics or non-commercial transformative works. The Fair Use Doctrine is valuable because it provides cover for criticism, derivation, and creativity using copyrighted works without requiring permission. It also acknowledges the derivative nature of much creation. To better protect derivative works and their authors, fair use must be modified in two ways. First, creative criticisms of non-technical works should receive stronger protection. Second, non-commercial derivative works should be presumptively fair use. These modifications will be a start towards protecting a large and vibrant community producing both creatively critical and entertaining derivative works borrowing from the settings, characters, and concerns of earlier authors.

The current Fair Use policy in the United States chills the speech of hundreds of thousands of writers, does not do enough to help established authors, and does not effectively “promote the progress of Science and useful Arts”.¹ The following historical analysis and policy argument is supported by readings from three works of historical derivative literature, Homer’s *Iliad*, Publius Vergil’s *Aeneid*, and Shakespeare’s *Troilus and Cressida*.

Why Modify Fair Use?

Copyright reform is an enduring public policy challenge, with powerful corporate and political forces aligned to resist any change to the status quo advocated for by a diverse array of artists, writers, activists scholars, and lawyers. Record labels, the movie industry, established authors and their publishing houses, all believe they benefit from longer, stronger copyright. The Electronic Frontier Foundation, Creative Commons, and less established creators advocating reform have much to gain from a more flexible borrowing culture and a richer public domain.

¹ "The Constitution of the United States," Article 1, Section 8, Clause 8.

Lawrence Lessig, a giant in the intellectual property policy reform movement, often complains that “Fair Use is the right to hire a lawyer.”² Though designed to encourage criticism and creativity by making unauthorized uses of copyrighted material legal in some circumstances, the Fair Use Doctrine's very flexibility leaves many eligible works dangerously vulnerable. This is chilling for the non-commercial creators who have made up the vast majority of copyright holders since the Copyright Act of 1976 scrapped the requirement to register a copyright.

Today, every five-year-old's scribble has protection under copyright law, sometimes for a century or more.³ From mommy bloggers to garage guitarists to casual photographers, creating a derivative work without seeking formal permission from the original producer is not just following in the footsteps of Homer, Vergil and Shakespeare. It is also an invitation for a ruinously expensive copyright infringement lawsuit. While derivative creators can, of course, attempt to purchase the license of their source material, this process is both opaque and astronomically expensive in terms of money, time, and loss of creative control.

A book published in the first decade of the new millennium bears copyright protection for five times longer than it would have three centuries ago, when the first copyright law, the Statute of Anne, was made passed in England.⁴ Since 1998, any fixed expression in the United States has copyright protection for seventy years after the death of the author, ninety-five if the work was created for hire, or one-hundred and twenty years, which ever expires first.⁵

Copyright covers also more expression today than any other time in history, hindering the ability to creative critics to use fiction to make political arguments. Current Fair Use policy chills

2 Lohmann, Fred von. “This Land Isn't Your Land.” (Last visited 10 April 2011).
<https://www.eff.org/deeplinks/2004/07/land-isnt-your-land>

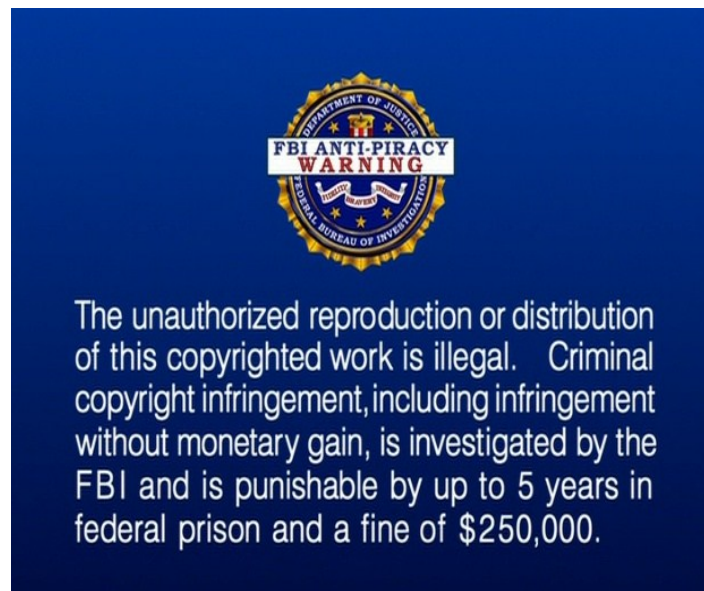
3 U.S. Copyright Office. “Copyright Law of the United States.” (Last visited 10 April 2011).
<http://www.copyright.gov/title17/>

4 This is assuming the book's copyright was not renewed after the first 14 years of protection. However, even with renewal, 70 years is slightly more than twice the 28 years of protection it could have received in 18th century England. Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Caravan: NY, 2008.
<http://www.thepublicdomain.org/download/> Pp 29-30.

5 U.S. Copyright Office. “Copyright Law of the United States.” (Last visited 10 April 2011).
<http://www.copyright.gov/title17/>

the speech of bestselling authors⁶ and dabbling fans alike.⁷ The modifications to Fair Use described in this thesis are a small way to shield authors, established or emerging, from chilling copyright infringement lawsuits.

Modern authors not only have longer copyright protection; legal enforcement of their copyright is stronger than ever before. The Federal Bureau of Investigation's anti-piracy seal is a memorable and pervasive example of this:



The appropriate length of copyright has been covered in exhaustive depth by innumerable academics and policy experts and is outside of the scope of this paper. Here I will address the narrow issue the Fair Use Doctrine's expansion to include creative criticisms of creative works and its presumptive protection of non-commercial works. The expansion of protection for non-commercial creators would affect the rights of every American who will ever write a single word without being paid for it.

6 Gaiman, Neil. "Fair Use and other things." (Last visit 10 April 2011).
<http://journal.neilgaiman.com/2008/04/fair-use-and-other-things.html>

7 "Jacob and Bella—Love the Way You Lie" (Last visit 10 April 2011).
http://www.youtube.com/watch?v=l5PpA7Y1rC0&feature=player_embedded

What follows is a brief history of 2700 years of intellectual property policy, with a closer look at the last 103 years of regulation in the United States, followed by my policy argument.

During the history, I will make two major arguments:

1. Many great creative works are derivative.
2. Modern fair use excludes potentially great creative works.

Followed by my policy argument:

3. Non-commercial works should be presumptively fair use and fair use should protect creative criticism of creative works.

“He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.”—Thomas Jefferson

2700 Years of Intellectual Property Policy in 2700 words

Homer

Late in the eighth B.C.E., a person or a group of people we call Homer composed the *Iliad* and the *Odyssey*.⁸ Greek poetry in the seventh century has evidence that major poets including Tyrtaeus, Callinus, Alcman and Archilochus were all familiar with Homer's work.⁹ They borrowed his lines and reference his portrayals of famous scenes in their own works.¹⁰ Riffing off of other creators' works appears to have been standard practice for seventh century Hellens: archeologists found a vase from before 700 B.C.E. which seems to refer to the cup of Nestor, a

8 Fagles, Robert (translator). *The Odyssey*. Penguin Classics, NY: 1996. Pp 3.

9 Ibid, Pp 5

10 Ibid.

character from the *Iliad*.¹¹ If modern copyright law existed and was enforced when the *Iliad* was composed, the creators of that vase would be in violation of Homer's copyright unless they paid licensing fees, and perhaps modified their creation to suit his tastes.¹² Thankfully, both Homer and the unknown creator of that vase died more than 2000 years before the first copyright statute was made law.

The vision of the author as the sole font of a story underpins much of modern copyright policy and would have been bizarre in seventh century Athens.¹³ Though it is impossible to know how or by whom the *Iliad* and the *Odyssey* were created,¹⁴ some scholars argue that the Homeric epics were an accretion of generations of the work of oral storytellers.¹⁵ If their composition was like any of the modern oral traditions, they would have been modified to fit audience's expectations and sung under the assumption that their audiences knew parts of the story.¹⁶

Homer's stories served a vital political purpose in Hellenic society. Of Homeric epics in the 5th century, classics scholar Robert Fagels says:

They maintained their hold on the tongues and imaginations of the Greeks [...] by the fact that they presented the Greek people, in memorable form, with the images of their gods and the ethical, political and practical wisdom of their cultural tradition.¹⁷

The Homeric epics are fine examples of how fiction is used to make political arguments, both by its creators and by its consumers. These three characteristic's of Homer's writing—existence within a storytelling community, performance to audiences who are familiar with a body of work, and political undertones—characterize some online creative communities today whose

¹¹ Ibid.

¹² A similar modern case can be found in Disney's lawsuits against owners of children's daycare centers. "Daycare Center Murals." (Last visited 10 April 2011) <http://www.snopes.com/disney/wdco/daycare.asp>

¹³ Woodmansee, Martha and Peter Jaszi. "The Construction of authorship: textual appropriation in law and literature." 1994. (Last visited 10 April 2011). http://books.google.com/books?id=dpRKltgJYYwC&pg=PA301&lpg=PA301&dq=citation+martha+woodmansee&source=bl&ots=jomCoovkVn&sig=Kn2RilBvX3kHmGuwBq4XdTeXtzM&hl=en&ei=aiaiTcqOBcrXgQfPoqTaBQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false

¹⁴ Ibid, Pp 6-7.

¹⁵ Ibid, Pp 20-22.

¹⁶ Ibid, Pp 19.

¹⁷ Ibid, Pp 12.

existence is imperiled by modern copyright law.

Vergil

Publius Vergilius Maro died in 19 B.C.E., seven centuries after Homer's *Iliad* wove its way into Hellenic culture, with his epic poem depicting life of the mythical founder of Rome still unfinished.¹⁸ That Vergil modeled his *Aeneid* on Homer's epics seems undisputed.¹⁹ Vergil's epic poem not only shared a settings²⁰ and characters²¹ with Homer's works, they shared purposes:

Virgil chose to write about the only Roman hero who meshes with the *Iliad* and the fall of Troy: he chose to imitate and adapt the works of Homer in a Latin form [ibid] [...] To show that civil war was futile and wicked, and that all Italy should be felt as one place, which is had recently become, and which Julius Caesar's and Augustus's policy favored, was certainly central to his aims.²²

The *Aeneid* is a nationalist declaration linking Hellenic heroes to the founders of Rome and a vision of a unified Italy. Like all of the great and derivative works discussed here, Vergil's work was not a simple copy or even a cultural translation of the Homeric epics. Using the settings and characters and concerns of Homer's stories, Vergil takes a bit player and grows Aeneas to serve his own purposes.

Because the *Aeneid* is a written poem rather than an orally-composed one, there is an important note of transformativeness in its creation story. Within modern copyright law there is more leeway for derivative works which are “transformative”: an example might be using an old copy of *The New York Times*'s Real Estate section to make a paper-mache model of a refugee camp.²³ No matter how much the editors of *The New York Times* dislike the art, the unauthorized use of their copyrighted work is allowed under the Fair Use Doctrine. Like the paper-mache

18 Vergil is also known as Virgil, and his *Aeneid* is also known as the *Aeneas*. Latin to English transliteration is troubling.

19 Bono, Barbara J. *Literary Transvaluation: From Vergilian Epic to Shakespearean Tragicomedy*. University of California Press, Berkeley, CA: 1984. Pp 2.

Bernard, John D. *Vergil at 2000: Commemorative Essays on the Poet and His Influence*. AMS Press, NY: 1986. Pp 85.

Gransden, K. W. *Virgil's Iliad: An Essay on Epic Narrative*. Cambridge University Press, London: 1984. Pp 1.

20 Camps, W. A. *An Introduction to Virgil's Aeneid*. Oxford University Press, Oxford: 1969. Pp 75.

21 Ibid, 75 -83.

22 Levi, Peter. *Virgil: His Life and Times*. St. Martin's Press, NY: 1998. Pp 223.

23 Nolo Press. “B. Measuring Fair Use: The Four Factors.” (Last visited 13 April 2011). http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html

artist, Vergil transformed Homer's epic poems in two major ways:

1. He took advantage of the technology available to him, papyrus, and wrote his epic poem rather than orally composing it.
2. He reshaped the epic narrative, swinging his focus away from the warring, conquering Hellens and towards the fleeing Aeneas and his family.

Because there was no copyright law in force at Vergil's time, whether Homer would have approved of Vergil's appropriation of his characters, settings and concerns to glorify a state which was in Vergil's time subjugating Hellens had no bearing on Vergil's work. Homer had no opportunity to censor Vergil, and Vergil no requirement to restrict his political fiction to appease his source.²⁴

Vergil's use of the Homeric epics, particularly his appropriation of the setting, characters, and concerns of the *Iliad* and *Odyssey*, are a tribute to the importance of the blind bard's words to the ancient Mediterranean, an influence that would only spread. In the next section we will find that Shakespeare shared Vergil's comfort with borrowing.

Shakespeare

Jumping forward fifteen centuries, we reach Elizabethan London, a teeming hotbed of literary innovation and political drama. In *The Norton Shakespeare's* "General Introduction: The Dream of the Master Text," Stephen Greenblatt argues:

[T]here is no evidence that Shakespeare had an interest in asserting authorial rights over his scripts, or that he or any other working English playwright had public 'standing,' legal or otherwise, from which to do so [...] There is no indication whatever that he could, for example, veto changes in his scripts or block interpolated scenes or withdraw a play from production if a particular interpretation, addition, or revision did not please him.²⁵

As the title of the section implies, there is no historical evidence that Shakespeare intended his plays to be final, or to produce a master text; the plays are "creatively, inexhaustible

24 A similar case might be the law suits by the estate of *Gone with the Wind* author Margaret Mitchell against the parody *The Wind Done Gone* author Alice Randall. "Gone with the Wind copyright fight." <http://news.bbc.co.uk/2/hi/entertainment/1284888.stm> Because Shakespeare's work was not parody but simply riffing off of the other authors' works, he would have had even less protection than Ms Randall. This distinction is not relevant to the point that he would have been open for lawsuits, just as she was.

25 Greenblatt, Stephen. "General Introduction: the Dream of the Master Text." *The Norton Shakespeare*. W.W. Norton and Co, NY: 1997. Pp 67.

unfinished.”²⁶ This enduringly malleable state is like the *Odyssey*’s while it was being orally composed. It also eats into the idea that Shakespeare’s writings were fixed expressions; modern copyright theory distinguishes from uncopyrightable ideas and copyrightable expressions. To be protected by copyright today, a work must be fixed, like a printed poem, not ephemeral, like drawing in chalk.

Like Vergil and Homer before him, Shakespeare found inspiration in the Trojan War. His *Troilus and Cressida* tells the story of two young lovers victimized by conflict. Like Vergil, Shakespeare borrows two minor characters from the *Iliad* and grows their parts into an entire play. According to Shakespeare scholar Anthony B. Dawson,²⁷ Shakespeare’s main sources for *Troilus and Cressida* were Chaucer’s *Troilus and Criseyde*, the George Chapman translation of the *Iliad*, and William Caxton’s *Recuyell of the Historyes of Troye*. Published in 1474, the Caxton was the first English-language book ever printed; this shows just how deeply derivation is knitted into the Western cannon.²⁸

Both Caxton and Chaucer were derivative as well. As Dawson delicately states: “Chaucer, Caxton, Lydgate, and Henryson all based their works on earlier texts, so that each was participating in a long process of passing along a literary tradition.”²⁹ It should be noted that this derivativeness is not restricted to *Troilus and Cressida*, but can be found in many of his great plays, including *Anthony and Cleopatra*,³⁰ *King Lear*,³¹ and *Hamlet*.³² From the beginning of published English literature and for the greats of the cannon, derivation has been part of creation.

This freedom to derive also came with a price for both Shakespeare and generations of his scholars. Though most who read Shakespeare in high school receive his works as if they are

26 Ibid.

27 Dawson, Anthony B (Editor). *Troilus and Cressida*. Cambridge University Press, UK: 2003.

28 Presson, Robert K. *Shakespeare’s Troilus and Cressida & The Legends of Troy*. Regents of the University of Wisconsin, WI: 1953.

29 Ibid, pp 253.

30 Quint, David (Editor). *William Shakespeare’s Anthony and Cleopatra*. Yale University, 2008. pp 195 – 226.

31 Munro, John (Editor). *The London Shakespeare*. Volume VI. Simon and Schouster, NY 1958.

32 Gollancz, Israel (Sir). *The sources of Hamlet: with Essay on the Legend*, Oxford University Press, London: 1926.

fixed, many of his plays have competing versions. In a time without copyright protection, Shakespeare had no legal recourse if a rival play-house performed his *Julius Caesar* or *Pericles* because he had no copyright. The copies that we read and see performed today are often unofficial versions, parts of them recreated from the memories of actors or unfinished versions of the plays.³³

The protections for creators which copyright provides are important. However, they are not why creators create. Many advocates of stronger intellectual property policy argue today that storytellers will stop weaving, writers stop writing, actors stop acting without stronger copyright. However, 2500 years of literary creation with no intellectual property policy in place exposes this as a lie.³⁴

200 Years of Change: 1709 - 1909

Statute of Anne and the Rise of Property Talk

Less than 100 years after Shakespeare's death, the English parliament passed the Statute of Anne, what is widely considered the first copyright law.³⁵ They passed it at the insistence of the printers' guilds who were interested in earning more money from the work of authors and controlling how other printing houses used the works under their care.³⁶ Copyright lasted for fourteen years, renewable for fourteen more years. The printers used what copyright scholar Siva Vaidhyathan calls "property talk" to describe their ownership of books' copyright.³⁷

Property talk is using the language of physical property to describe intellectual property. By placing stories in the same category of legal regulation as yarn, they ignore the key differences which distinguish the two:

33 Ibid, pp 70.

34 Green, Heather. "Commentary: Are The Copyright Wars Chilling Innovation?" (Last visited 10 April 2011). http://www.businessweek.com/magazine/content/04_41/b3903473.htm

35 Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Caravan: NY, 2008. (Last visited 10 April 2011). <http://www.thepublicdomain.org/download/> Pp 29-30.

36 Ibid, Pp 30.

37 Vaidhyathan, Siva. *Copyrights and Copywrongs*. New York University Press, NY: 2001. Pp 11-15.

1. Physical property is, to use terms of economics, rival and excludable.³⁸
2. Intellectual property is non-rival and non-excludable.³⁹

Take the case of a ball of yarn. If I give a ball of yarn as a gift to one person, I no longer have it.

If I do not want other people to have it, I can prevent them from taking it. A song is different. If I sing a song to someone, and they learn it and sing it with me we now have two copies of the song where there was only one before without incurring any additional cost. If I perform the song, I have no way of preventing my audience from taking it home with them in their minds.

These intrinsic differences require different approaches. In 1740 in London, the case of *Gyles V. Wilcox* introduced the concept of “Fair Abridgment,” which would later evolve into the Fair Use doctrine.⁴⁰ Essentially, fair use is legal unauthorized use of a copyrighted work. It exists to encourage learning and criticism in the public interest. It acknowledges that most authors are building upon the shoulders of giants. The doctrine of Fair Use could never be applied to physical property because physical property is excludable. Attempts at unauthorized use of physical property is more commonly referred to as theft, since only one person can possess it. Property talk ignores these differences.

A little more than a century after the Statute of Anne was passed in Britain, American founding father Thomas Jefferson would object violently to this kind of property talk in an 1813 letter to his friend, Isaac McPherson. This letter has become a guiding star for many in the copyright reform movement.⁴¹ I will quote it at length, as his criticism will form a historical legal foundation for my policy argument.⁴² Though he uses the metaphor of fire for intellectual property the argument is the same:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself

38 Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Caravan: NY, 2008. Pp 3.

39 Ibid.

40 *Gyles v. Wilcox* (Atkyn's Reports), London (1741) http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1741%22

41 Barlow, John Perry. “The Economy of Ideas.” (Last visited 10 April 2010). <http://www.wired.com/wired/archive/2.03/economy.ideas.html>

42 Vaidhyathan, Siva. *Copyrights and Copywrongs*. New York University Press, NY: 2001. Pp 28 – 34.

into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body. Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.⁴³

Thomas Jefferson knew how vital it would be to creativity and innovation to ensure that the focus of intellectual property law in the United States was not on creators's pocketbooks or even their feelings, but on the needs of society and cultural production. Therefore, when the Constitution defined the purpose of intellectual property, did so in a way quite different from the purpose of normal property. Physical property, like land or yarn, can be owned totally and no one other than the owner has any rights to it. Intellectual property is leased by a creator from the public domain only as long as is necessary to "promote the Progress of Science and useful Arts."⁴⁴

This focus on the needs of society did not last. In 1909 the United States Congress passed a law extended copyright from forty-two to fifty-six years. This law not only marked the beginning of a century of copyright extensions which would systematically choke off the flow of new works into the public domain. It could be seen as the first major victory of what authorship scholar Martha Woodmansee⁴⁵ would call the "romantic conception of the author."⁴⁶

43 Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Caravan: NY, 2008. Pp 20.

44 "The Constitution of the United States," Article 1, Section 8, Clause 8.

45 Ibid, Pp 36.

Today

In 1976 copyright terms would be extended again by the U.S Congress, and once more in 1998. Lawrence Lessig⁴⁷ and James Boyle⁴⁸ both trace the political calculations and theoretical flaws of these extensions in far greater depth than is possible here. Copyright today is the life of the author plus seventy years, or plus ninety-five years if the expression was created for hire, or one-hundred and twenty years, whichever expires first.⁴⁹ In all but the most unfortunate cases where a very young copyright holder dies tragically, these terms are double or triple the 1909 length.

Intellectual property policy in the twenty-first century looks nothing like intellectual property policy at any other time in western history. It is longer, more enforceable, and more encompassing. Before the Copyright Act of 1976, an author had to act before a work could be copyrighted. Afterwards, any fixed expression was protected for seventy years after their eventual death up to one-hundred and twenty years.⁵⁰

The strength of established authors to award themselves more and longer rights has throttled the public domain. I have access to a public domain today which is functionally the same a size as it was when my grandmother was born. Established copyright holders use both property talk and the romantic conception of the author to bolster their cases. Below is a summary of changes in U.S. copyright terms in the past two and a quarter centuries:

Please note the jump in extension time after the passage of the 1909 bill by the U.S. Congress, then the massive length increase in 1978 (when the 1976 law was implemented) and another

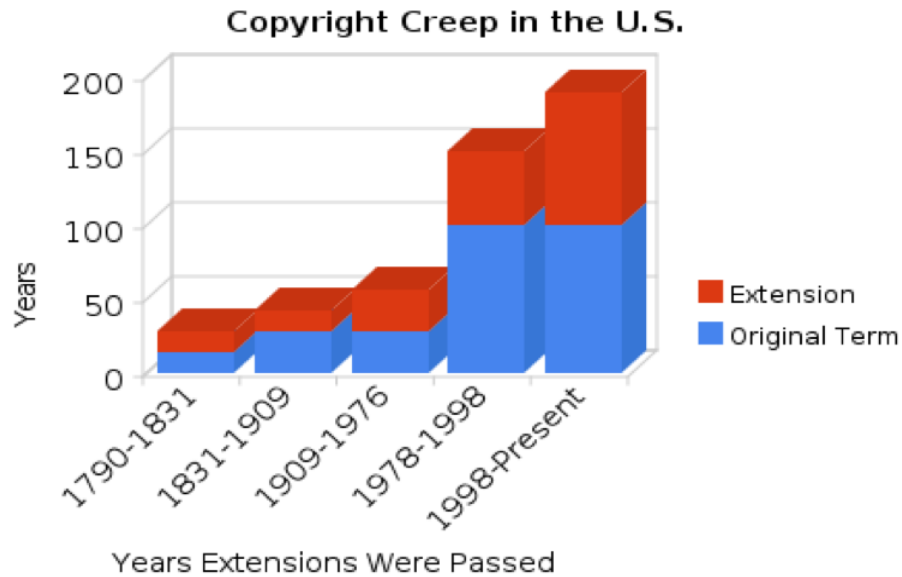
46 Woodmansee, Martha and Peter Jaszi. "The Construction of authorship: textual appropriation in law and literature." 1994. (Last visited 10 April 2011). http://books.google.com/books?id=dpRKltgJYYwC&pg=PA301&lpg=PA301&dq=citation+martha+woodmansee&source=bl&ots=jomCoovkVn&sig=Kn2RilBvX3kHmGuwBq4XdTeXtzM&hl=en&ei=aiiiTcqOBcrXgQfPoqTaBQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false

47 Lessig, Lawrence. *Free Culture*. (Last visited 10 April 2011). <http://www.free-culture.cc/>

48 Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Caravan: NY, 2008. (Last visited 10 April 2011). <http://www.thepublicdomain.org/>

49 Hirtle, Peter B. "Copyright Term and the Public Domain in the United States." (Last visited 10 April 2011). <http://copyright.cornell.edu/resources/publicdomain.cfm>

50 Ibid.



large increase in 1998. This chart does not show the increasing monetary penalties, the heightened expenses of copyright lawsuits, or the new and aggressive forms of enforcement which have characterized the last quarter century. Though extensions in copyright term do not necessarily change what is and is not protected by fair use, they are indicative of an increasingly closed culture.

Networked Fan Culture and What it Means for Copyright Holders

With this history of intellectual property policy in mind, the need for a policy shift should be clear. Though these next sections in support of my policy proposal focus how the fair use doctrine affects on fans and their online communities, they are certainly not the only stakeholders. Fans are not the only producers of creative derivative works, but because they are generally non-commercial, communal, and disdained, they are a useful focus.

Fan cultures have existed for longer than there has been an Internet. In the 1950s, fanfiction spread through fanzines, amateur fan curated magazines dedicated to beloved fictional worlds but it became more widespread in the last quarter century.⁵¹ Some authors trace fandom

⁵¹ Hiskey, Michelle. "Lilburn fanzine publisher helped sci-fi flourish." (Last visited 10 April 2011). <http://www.accessatlanta.com/atlanta-events/lilburn-fanzine-publisher-helped-601199.html>

back to Mary Wollstonecraft Shelley,⁵² but fan communities fulfill the same need to honor the works of great creators which Vergil and Shakespeare felt. Fanfiction, stories written using the characters, settings, and concerns from the worlds of other authors, has existed in name for less than a century. However, the creative derivation which characterizes fanfiction is as old as literature.

Using the definition above, Vergil's *Aeneid* and Shakespeare's *Troilus and Cressida* are both fanfiction. Both works use the settings, characters, and concerns of other authors' works to create sometimes critical, sometimes political, sometimes entertaining pieces. They also share many characteristics with non-commercial and creatively critical works which suffer from a lack of legal protection today. Like Homer's *Iliad*, much of fanfiction is written within a community of creation, relies on the audience's familiarity with past works, and has political undertones. If Vergil, Shakespeare and the vase maker who lived just after Homer's time were all living and writing today, and Homer were of a litigious mindset, they would all be subject to copyright infringement lawsuits for their unauthorized use of his epics.

In a world where fair use protected creative criticisms and non-commercial works more effectively, perhaps Vergil, Shakespeare and Homer would not be at each other's throats in court. In the following section, I will dive more deeply into the issue of fair use, point out two of its flaws, and then propose a remedy.

“Borrowing is ubiquitous, inevitable, and, most importantly, good. Contrary to romantic notion that true genius inheres in creating something completely new, genius is often better described as opening up new meanings on well-trodden themes.”
—Chris Springman

Background: Fair Use

At its core, all copyright law in the United States is designed to “promote the Progress of Science

52 Wilson, Frances. “How J.K. created a monster.” 15 July 2007. (Last visited 10 April 2011).
<http://www.telegraph.co.uk/culture/3666577/How-J-K-created-a-monster.html>

and useful Arts.”⁵³ The Fair Use Doctrine is a way of acknowledging the differences between physical and intellectual property and encouraging useful creation. It is also designed to be nebulous so that it can be invoked in future cases authors did not envision.⁵⁴ Its current frustratingly vague construction places creative criticism and non-commercial derivative works on decidedly shaky ground.

First, the legal definition of fair use. The Fair Use statute:

[S]ets out four factors to be considered in determining whether or not a particular use is fair:

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work⁵⁵

Whether a work is fair use or not can only be determined by a court; thus Lessig's famous remark about lawyers. With this in mind, consider the clearly fair use case of a professor selecting a reading on modern-day slavery for her human rights class. She is nearly certainly protected by fair use if she photocopies a few pages of *Human Trafficking: Twenty-sixth Report of Session 2005-06: Oral and Written Evidence*.⁵⁶ Her use is non-commercial and educational, the copyrighted work is scholarly and technical, she is using a small portion of the work, and her use of the work will have no foreseeable effect on the market for the complete report. Fair use provides educators with a bedrock security. Professors can quote, cite, photocopy, scan, and summarize copyrighted works without fear of cease-and-desist letters. Other fair uses which are generally safe are journalistic quoting, parody, and documentaries.⁵⁷

53 O'Connor, Justice Sandra Day, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340, 349(1991)

54 Ibid.

55 U.S. Copyright Office. "Copyright: Fair Use." (Last visit 10 April 2011).

<http://www.copyright.gov/fls/fl102.html>

56 House of Lords, House of Commons. *Human Trafficking: Twenty-sixth Report of Session 2005-06 Volume II – Oral and Written Evidence*.

<http://books.google.com/books?id=DFdaUnT1f7IC&lpg=PP1&dq=human%20trafficking&pg=PP1#v=onepage&q&f=false>

57 U.S. Copyright Office. "Copyright: Fair Use." (Last visit 10 April 2011).

The policy change I proposed has to do with how the “nature of the copyrighted work” is defined. Currently, works are more likely to be protected by fair use if they derive from or transform a scholarly or technical.⁵⁸ Works which transform or derive from fiction are specifically highlighted as weak candidates for fair use protection.⁵⁹

Creative works such as novels, films, and TV shows receive stronger copyright protection because they are perceived by policy makers to be more original. Authorship scholar Martha Woodmansee makes the persuasive argument that the view of originality which has shaped modern copyright law is based on a flawed romantic conception of the author.⁶⁰ She argues that authors draw from the works of other authors and it is only recently that writers have begun to conceive of themselves as purely original. That is, the romantic conception of the author is a modern development.

All authors do not feel this way. Many fiction authors acknowledge the derivative nature of their own creations. For example, fantasy author Neil Gaiman, who has won the Newbery Award and the Hugo Award-winning and has had several books appear in the New York Times Bestseller list, argues that “Genre fiction, as [the famous British fantasy author Sir] Terry Pratchett has pointed out, is a stew. You take stuff out of the pot, you put stuff back. The stew bubbles on.”⁶¹ Shortly, Gaiman will provide us with a clear case for providing better fair use protection of creative criticism, but for now it is important to note that this image of authors as cooks is decidedly unromantic. Reevaluating the differences in fair use's stance towards derivative works using this non-romantic conception of the author leads to the first of my two

<http://www.copyright.gov/fls/fl102.html>

58 Purdue University Copyright Office. “Copyright Exceptions: Fair Use.” (Last visited 10 April 2011).

http://www.lib.purdue.edu/uco/CopyrightBasics/fair_use.html

59 Ibid.

60 Woodmansee, Martha and Peter Jaszi. “The Construction of authorship: textual appropriation in law and literature.” 1994. (Last visited 10 April 2011).

http://books.google.com/books?id=dpRKltgJYYwC&pg=PA301&lpg=PA301&dq=citation+martha+woodmansee&source=bl&ots=jomCoovkVn&sig=Kn2RilBvX3kHmGuwBq4XdTeXtzM&hl=en&ei=aiaiTcqOBcrXgQfPoqTaBQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false

61 Gaiman, Neil. “Fair Use and other things.” (Last visit 10 April 2011).

<http://journal.neilgaiman.com/2008/04/fair-use-and-other-things.html>

arguments: creative criticisms, where an author uses fiction to critique another work of fiction, should receive stronger fair use protection.

What follows is a brief description of two occasionally overlapping forms of creation which receive too little protection by the Fair Use doctrine under our current intellectual property policies. The first are creative criticisms which are derivative works often excluded from clear fair use protection. The second is non-commercial derivative works, which make up the vast majority of derivative works and receive precious little protection.

“People think that stories are shaped by people. In fact, it’s the other way around.

Stories exist independently of their players. If you know that, the knowledge is power.

Stories, great flapping ribbons of shaped space-time, have been blowing and uncoiling around the universe since the beginning of time. And they have evolved. The weakest have died and the strongest have survived and they have grown fat on the retelling . . . stories, twisting and flowing through the darkness.”

--Terry Pratchett, Witches Abroad

Creative Criticism

If the professor with the human rights class imagined above wanted to help her students understand the effects of slavery more viscerally, she might assign them to read *Uncle Tom's Cabin*. *Uncle Tom's Cabin* is creative criticism because it uses fiction to make a political point. Harriet Beecher Stowe's anti-slavery novel is often credited with setting the stage for the United States civil war and the end to legal slavery⁶². *Uncle Tom's Cabin* did not need the protection of fair use because it does not explicitly draw on a previous fictional work. However, for creative criticisms of creative works, fair use provides little protection.

Works like Gaiman's deconstruction of C.S. Lewis's *The Chronicles of Narnia* series, *The*

⁶² Downs, Robert Bingham. *Molders of the modern mind: 111 books that shaped Western civilization*. Barnes & Noble, 1961. Pp 262.

Problem of Susan, do need its protection, and they do not receive it.⁶³ *The Problem of Susan* criticizes C.S. Lewis's choice to exile the character Susan from *Narnia* after she shows an interest in the adult female signifiers of nylon-stockings and lipstick.⁶⁴ Lewis makes clear that God, represented by the great lion Aslan in the story, prefers asexual children to normally maturing teenagers. This criticism was not new, but its expression through fiction was powerful in the hands of a craftsman like Gaiman.⁶⁵ Whether this kind of creative criticism is protected under fair use is painfully unclear; indeed, this led Gaiman's publisher to hold off on publishing the work for several years, for fear of retribution from the C.S. Lewis estate.⁶⁶ The author briefly describes this episode in an interview with *The Onion*'s non-satirical A.V. Club:

AVC: Your short story "The Problem Of Susan," about C.S. Lewis' Narnian character, has finally been published, though for years you said it could never see print because of the copyright issues. Did that turn out to be a problem in the end?

NG: Nobody's sued me. Some of it was trying to figure out how to craft the story so that C.S. Lewis' estate lawyer would say "I probably couldn't get an injunction against this. This is borderline, but you could probably get away with it." And I think that I probably did. I hope. It's a problem story. Every now and then, someone comes up to me and says "That was an enormously wonderful story," and other people get really offended by it. One woman described it as "blasphemous," which I loved, that a potshot at a fictional lion from a series of children's books could be seriously described as blasphemous. It's just one of those moments where you look at a children's book and there's a thing that sticks in your head and irritates you. I was amused to see an interview with J.K. Rowling in *Time* where she started going off about the problem of Susan again. It's the thing that sort of Philip Pullman hates about the books, though he hates the books and I love them. But that's the thing he focuses on most of all. So I was trying to write a story that would address that issue, and also the wider issue of how people relate to children's books and death. It is an intensely problematic story, and I don't actually know if it's any good.

AVC: It's a difficult story to interpret, because the original characters had such defined symbolic values, and it's hard to tell whether you're creating your own symbolism, or subverting C.S. Lewis'.

NG: And also the fact that when you start getting into it, is what part of the text actually

63 Gaiman, Neil. "Fair Use and other things." (Last visit 10 April 2011).
<http://journal.neilgaiman.com/2008/04/fair-use-and-other-things.html>

64 Martin, Paul. "Much Ado About Susan." (Last visited 10 April 2011).
<http://www.narniafans.com/archives/tag/neil-gaiman>

65 Gaiman, Neil. "Fair Use and other things." (Last visit 10 April 2011).
<http://journal.neilgaiman.com/2008/04/fair-use-and-other-things.html>

66 Ibid.

belongs to which of the characters in it.⁶⁷ Though Gaiman's short story was commercially produced, there are hundreds of thousands of authors online who use the same creatively critical techniques to criticize our culture and its stories for no hope of profit. However, though their works are even more likely to be fair use than Gaiman's because they are non-commercial, they are much more vulnerable because they have no agent, publisher, or law firm ready to defend them from copyright infringement lawsuits.⁶⁸ Gaiman is among the privileged class of fanfiction authors who are published, but even his work was censored for a time by a lack of clear fair use protection. However, a small change to Fair Use policy could provide more protection to both him and those less fortunate.

“What actually urges [the scientific investigator] on is not some brummagem idea of Service, but a boundless, almost pathological thirst to penetrate the unknown, to uncover the secret, to find out what has not been found out before. His prototype is not the liberator releasing slaves, the good Samaritan lifting up the fallen, but a dog sniffing tremendously at an infinite series of rat-holes.”
--H.L. Mencken

Non-Commercial Derivative Works

Non-commercial derivative works are any works which draw on those which came before them and whose creators do not make a profit.⁶⁹ For the purposes of this paper, I will focus on fanfiction as a representative subset of non-commercial derivative works. Fanfiction has no agreed-upon definition. Fanworks, an umbrella term which includes written fanfiction as well as fan videos, and fanart, can be defined as derivative works exploring the world of an original work and grows from a fan-community, fandom, that is centered on that original work. The previous examples of fanfiction have all been commercial to solidify the point that creative

⁶⁷ “Not Prince Hamlet, nor was meant to be - Neil Gaiman grows garrulous on the cutting-room floor.” (Last visited 28 April 2011). <http://rollick.livejournal.com/423627.html>

⁶⁸ Chilling Effects Clearing House. “FanFic.” (Last visited 10 April 2011). <http://www.chillingeffects.org/fanfic/>

⁶⁹ Thank you to Mimi Calter, Assistant University Librarian & Chief of Staff for the Stanford University Libraries for pointing out in her review of my argument that commerciality is a complex issue. Is an author who makes enough money from selling ads on her sites to pay for bandwidth a non-commercial producer? Taking a cue from the seventh Amendment of the United States constitution, I propose using an arbitrary number. If an author does not make more than \$20 from their derivative work then it is considered non-commercial.

derivation is both a part of the Western cannon and can be written well. However, in terms of volume, the vast majority of fanfiction is non-commercial.

For those not familiar with online fan culture it is important to note three things that will be explained in more detail below:

1. There are hundreds of thousands of people who write fanfiction;
2. Fanfiction writers live under constant threat of lawsuits for copyright infringement;
3. Some established authors casually and caustically deride fanfiction and its writers (their fans).

The numbers and demographics of fanfiction writers are as difficult to determine as those of any other group which primarily exists online. However, it is possible to approximate the number by examining groups we can quantify. Like in Homer's time, much fanfiction is created in a crowd. While open comments sections and lively dialogs are hallmarks of fan communities, many fan authors form special relationships with fan authors they admire who then edit their works. These volunteer editors are called "Betas," as in, they see the second by not final version of a story. On one popular fanfiction site alone, <http://fanfiction.net>, Bestas number in the tens of thousands.⁷⁰ Other fanfiction websites are dedicated to only one fan community and have large user bases. For example, "A Teaspoon and an Open Mind," (<http://www.whofic.com>) dedicated to fanfiction within the Doctor Who television series, has 3,438 registered authors.⁷¹ Another fan website called "The Leaky Caldron" (<http://www.the-leaky-cauldron.org>) caters to fans of J.K. Rowling's Harry Potter series, boasts over 75,000 registered users.⁷² Each and every one of these writers lives under constant threat of costly copyright infringement lawsuits because fair use does not clearly protect them.

"Please Don't Sue Me: I'm Poor" and similar disclaimers are commonly found in the headers of fanfictions online.⁷³ Fanfiction authors' fears of cease-and-desist letters and ruinously

70 "Beta Readers." (Last visited 10 April 2011). <http://www.fanfiction.net/betareaders/>

71 "A Teaspoon and an Open Mind." (Last visited 10 April 2011). <http://www.whofic.com/>

72 "The Leaky Caldron." (Last visited 10 April 2011). <http://www.the-leaky-cauldron.org/myleaky>

73 Dickinson Goodman, Jessica. "The Piteousness of Disclaimers." (Last visited 10 April 2011). <http://feelingelephants.wordpress.com/2010/08/31/the-piteousness-of-disclaimers/>

expensive law suits are not unfounded. Chilling Effects Clearing House, a project of the Electronic Frontier Foundation which collects predatory cease-and-desist letters, has examples of these kinds of take-down notices.⁷⁴ In Appendix A is an image of a take-down letter sent by J.K. Rowling's attorneys to a person running an adult-oriented Harry Potter fan site. There is not enough space in this paper to cover the issue of whether the relatively high frequency of erotic plot lines and homosexual pairings within fanfiction are subversive political attacks on sex negativity and heteronormativity in our culture, though it deserves the attention.

Fanfiction writers not only have to contend with threats of legal retributions: they are also publicly mocked by some of the very creators who they promote. Below are three examples of some authors' ugly attitudes to their fans, ranging from disapproving to disdainful. Though fanfiction serves as free advertisement for many authors and it may be protected by fair use even without the policy changes below it is seen by some established writers as the playground of immature dreamers and poor writers. Take note of the pervasive property talk and evidence of the romantic conception of the author in the quotes below.

From Diana Gabaldon, author of the popular children's fantasy series *Outlander* series:

OK, my position on fan-fic is pretty clear: I think it's immoral, I_know_ it's illegal, and it makes me want to barf whenever I've inadvertently encountered some of it involving my characters.⁷⁵

From Anne Rice, author of popular adult horror novel *Interview with a Vampire*, and one of the most popular authors revolted by fanfiction:

I do not allow fanfiction. The characters are copyrighted. It upsets me terribly to even think about fanfiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.⁷⁶

⁷⁴ "NoticeID 669." <http://chillingeffects.org/N/669>

"NoticeID 534." <http://chillingeffects.org/N/534>

"NoticeID 522." <http://chillingeffects.org/N/522>

"NoticeID 1067." <http://chillingeffects.org/N/1067>

⁷⁵ Because of an uproar from her fans, Ms Gabaldon removed the post I quote above from her blog. Here is a partial archive: "Fan-Fiction and Moral Conundrums." (Last visited 10 April 2011). http://www.goodreads.com/author_blog_posts/417316-fan-fiction-and-moral-conundrums

⁷⁶ "Anne Rice Readers Interactions: Anne's Messages to Fans: IMPORTANT MESSAGE FROM ANNE ON 'fanfiction'" <http://www.annerice.com/ReaderInteraction-MessagesToFans.html>

Jasper Fforde, fantasy author of *Shades of Grey* is slightly more nuanced:

My thoughts on fanfiction are pretty much this: That it seems strange to want to copy or ‘augment’ someone else’s work when you could expend just as much energy and have a lot more fun making up your own. I feel, and I think with good reason, very proprietorial about Thursday and all her escapades; clearly I can’t stop you writing and playing what you want in private, and am very flattered that you wish to do so. But anything published in any form whatsoever – and that specifically includes the internet – I cannot encourage, nor approve of.⁷⁷

Large, threatened, and publicly chided and derided, fanfiction authors continue to produce interesting takes on popular culture. Whether challenging heteronormativity by pairing Kirk and Spock romantically or imagining a feminist cross-over between the *Twilight* series and Buffy the Vampire Slayer, fanfiction provides consumers with a way to actively shape their culture, and to even make important political or social statements in the process. Non-commercial derivative works should be presumptively fair use to protect writers who may become our era’s Vergils and Shakespeares, or just astute social critics.

Policy Proposal

To remove the shackles that current copyright policy places on the ankles of our modern potential Vergils and Shakespeares, fair use must be modified in two ways. First, fair use should protect creative criticism of creative works like *The Problem of Susan*. Second, non-commercial works must be presumptively fair use to protect those hundreds of thousands of fanfiction writers and other creators of non-commercial derivative works.

Again, here are the current four factors for determining whether a work is fair use:

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work⁷⁸

As mentioned above, the second factor is weighted to provide less fair use protection to creative

77 Fforde, Jasper. “Frequently Asked Questions.” (Last visited 10 April 2011).
<http://www.jasperfforde.com/faq.html>

78 U.S. Copyright Office. “Copyright: Fair Use.” (Last visited 10 April 2011).
<http://www.copyright.gov/fls/fl102.html>

derivative works, like *The Problem of Susan*, and more to technical works, like an academic paper. Changing that weighting would provide stronger protection for fanfiction writers and creative critics, removing the constant threat of reprisals from established authors who disagree with their critics and fans.

Second, modifying fair use so that non-commercial derivative works are presumptively protected by it provides protection to hundreds of thousands of authors without stopping copyright holders from aggressively attacking those who are truly violating their copyright. These minor adjustments to intellectual property policy provide breathing room for creators to criticize without fear of expensive copyright suits designed to chill their speech.

They are not enough. Until copyright terms are shortened to a more limited period, until creators find ways to make money from the internet and stop fearing it so much and until intellectual property policy makers in the United States truly come to terms with the practical effects of a networked world, our intellectual property policy will be painfully out of step with the realities of modern creative production. That pain is felt by established creators who will not make the money they expected to from their work and emerging creators who are denied the same freedom to borrow upon which their predecessors relied.

Conclusion

Emerging creators today live in the most restrictive intellectual property culture in American history. The freedom to derive, to be creative within the worlds of authors who came before, has been curtailed to the point where even established authors change their stories to avoid the lawsuits of men long dead. This is unacceptable if we wish to have a creative and innovative culture.

Though the intellectual property policies protecting, and harming, creators have changed significantly—beginning 302 years ago with the Statute of Anne, making a significant shift with the U.S. Congress's 1909 law and finally lurching into truly damaging territory with the 1998

extension—this creative process has not changed. The greats of the Western canon did not shy away from borrowing, nor did they have to. Creators, regardless of whether they are paid or not, criticizing a newspaper or a novel, deserve the same freedom.

From Anne Rice to Neil Gaiman, authors create in much the same ways as Shakespeare and Vergil did. The job of intellectual property policy makers in the U.S. is to ensure that that creative process continues to fulfill the constitutional mandate to “promote the progress of Science and useful Arts.”⁷⁹ The two modifications to fair use policy will move this country closer to that goal.

These small changes will do significant good to emerging creators, and if they are followed by much broader copyright change, we will again see a world where Vergil and Shakespeare and Gaiman can create without fear.

⁷⁹ "The Constitution of the United States," Article 1, Section 8, Clause 8.

Appendix A

[REDACTED]
ACT
Australia

BY EMAIL to [REDACTED]

Dear Sir

Harry Potter adult fan fiction

We are a firm of solicitors (attorneys) in London. We have been consulted by our client, Christopher Little Literary Agency, on behalf of Ms J K Rowling, and by our client Warner Bros, in connection with the Harry Potter adult fan fiction and illustrations made available by you at URL <http://www.psa.shadow-wrapped.net> (see enclosed screenshot).

As you are aware, Ms Rowling is the author of the Harry Potter books. Ms Rowling therefore owns the copyright in the Harry Potter books. The sexually explicit content of the fan fiction and illustrations available at www.psa.shadow-wrapped.net, which are plainly based on characters and other elements of the fictional world created by Ms Rowling in the Harry Potter books, are a matter of serious concern to our client. In addition, our client Warner Bros, which owns the film and merchandising rights to the children's series of Harry Potter books, is concerned to protect the integrity of its Harry Potter properties. For the avoidance of doubt, our clients make no complaint about innocent fan fiction written by genuine Harry Potter fans.

There is plainly a very real risk that impressionable children, who of course comprise the principal readership of the Harry Potter books, will be directed (e.g. by a search engine result) to your sexually explicit website, which you will appreciate most people would consider wholly inappropriate for minors. Plainly the warnings to the effect that children under 18 should not access your website do not in fact prevent minors from doing so. Indeed, such warnings may well serve simply to entice teenagers to your site.

You have chosen to publish the material in question on the worldwide web where it may be seen by anyone with access to the internet. If you choose to publish to the world at large, then in our view you should conduct yourself accordingly. It is no answer to suggest that the fault lies with the children, or their parents, if they visit your website, whether they do so inadvertently or otherwise. We see no reason why online publishers should consider themselves relieved of the responsibilities and legal obligations accepted by publishers in every other medium, and the Courts of both England and Australia take the same view.

In the circumstances, our clients therefore request you to remove all such material and cease making it available to the general public on the internet or by any other means. Would you please let us have your confirmation that you will do so by no later than 18:00 GMT on Wednesday, 29 January 2003.

Yours faithfully
[REDACTED]

**THEODORE
GODDARD**
[REDACTED]
London EC1A 4EJ

Telephone: [REDACTED]
Facsimile: [REDACTED]
DX: 47 London
E-mail: [REDACTED]
Website: www.theodregoddard.com

Our Ref: 568/935/12552.130

22 January 2003

VALD758911.1 LONDON, BRUSSELS AND ASSOCIATES WORLDWIDE
London Office: PARIS Klein-Goddard Associates, JERSEY T.G. Jersey.
A note to our users: No person is permitted to publish or disseminate this document. Theodore Goddard is regulated by the Law Society.

Bibliography

"The Constitution of the United States," Article 1, Section 8, Clause 8.

Barlow, John Perry. "The Economy of Ideas."
<http://www.wired.com/wired/archive/2.03/economy.ideas.html>

Bernard, John D. *Vergil at 2000: Commemorative Essays on the Poet and His Influence*. AMS Press, NY: 1986.

Bono, Barbara J. *Literary Transvaluation: From Vergilian Epic to Shakespearean Tragicomedy*. University of California Press, Berkeley, CA: 1984.

Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Caravan, NY: 2008.
<http://www.thepublicdomain.org/>

Camps, W. A. *An Introduction to Virgil's Aeneid*. Oxford University Press, Oxford: 1969.

Chilling Effects Clearing House. "FanFic." <http://www.chillingeffects.org/fanfic>

Dawson, Anthony B (Editor). *Troilus and Cressida*. Cambridge University Press, MA: 2003.

Dickinson Goodman, Jessica. "The Piteousness of Disclaimers."
<http://feelingelephants.wordpress.com/2010/08/31/the-piteousness-of-disclaimers/>

Downs, Robert Bingham. *Molders of the modern mind: 111 books that shaped Western civilization*. Barnes & Noble, NY: 1961.

Fagles, Robert (translator). *The Odyssey*. Penguin Classics, NY: 1996.

Fforde, Jasper. "Frequently Asked Questions." <http://www.jasperfforde.com/faq.html>

Gaiman, Neil. "Fair Use and other things." <http://journal.neilgaiman.com/2008/04/fair-use-and-other-things.html>

Gollancz, Israel (Sir). *The sources of Hamlet: with Essay on the Legend*. Oxford University Press, London: 1926.

Gransden, K.W. *Virgil's Iliad: An Essay on Epic Narrative*. Cambridge University Press, London: 1984.

Green, Heather. "Commentary: Are The Copyright Wars Chilling Innovation?"
http://www.businessweek.com/magazine/content/04_41/b3903473.htm

Greenblatt, Stephen. "General Introduction: the Dream of the Master Text." *The Norton Shakespeare*. W.W. Norton and Co, NY: 1997.

Gyles v. Wilcox (Atkyn's Reports), London (1741) <http://www.copyrighthistory.org/cgi->

bin/kleioc/0010/exec/ausgabe/%22uk_1741%22

Hirtle, Peter B. "Copyright Term and the Public Domain in the United States."
<http://copyright.cornell.edu/resources/publicdomain.cfm>

Hiskey, Michelle. "Lilburn fanzine publisher helped sci-fi flourish."
<http://www.accessatlanta.com/atlanta-events/lilburn-fanzine-publisher-helped-601199.html>

House of Lords, House of Commons. *Human Trafficking: Twenty-sixth Report of Session 2005-06 Volume II – Oral and Written Evidence*.
<http://books.google.com/books?id=DFdaUnT1f7IC&lpg=PP1&dq=human%20trafficking&pg=P1#v=onepage&q&f=false>

Keillor, Garrison. "Wednesday, Mar. 16 2011"
<http://writersalmanac.publicradio.org/index.php?date=2011/03/16>

Lessig, Lawrence. *Free Culture*. <http://www.free-culture.cc/>

Levi, Peter. *Virgil: His Life and Times*. St. Martin's Press, NY: 1998.

Lohmann, Fred von. "This Land Isn't Your Land." <https://www.eff.org/deeplinks/2004/07/land-isnt-your-land>

Martin, Paul. "Much Ado About Susan." <http://www.narniafans.com/archives/tag/neil-gaiman>

Munro, John (Editor). *The London Shakespeare*. Volume VI. Simon and Schouster, NY: 1958.

Nolo Press. "B. Measuring Fair Use: The Four Factors."
http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html

O'Connor, Justice Sandra Day, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340, 349: 1991.

Presson, Robert K. *Shakespeare's Troilus and Cressida & The Legends of Troy*. Regents of the University of Wisconsin, WI: 1953.

Purdue University Copyright Office. "Copyright Exceptions: Fair Use."
http://www.lib.purdue.edu/uco/CopyrightBasics/fair_use.html

Quint, David (Editor). *William Shakespeare's Anthony and Cleopatra*. Yale University, 2008.

U.S. Copyright Office. "Copyright Law of the United States." <http://www.copyright.gov/title17/>

Vaidhyanathan, Siva. *Copyrights and Copywrongs*. New York University Press, NY: 2001.

Wilson, Frances. "How J.K. created a monster." 15 July 2007.
<http://www.telegraph.co.uk/culture/3666577/How-J-K-created-a-monster.html>

Woodmansee, Martha and Peter Jaszi. "The Construction of authorship: textual appropriation in law and literature." 1994.

http://books.google.com/books?id=dpRKltgJYYwC&pg=PA301&lpg=PA301&dq=citation+marta+woodmansee&source=bl&ots=jomCoovkVn&sig=Kn2RilBvX3kHmGuwBq4XdTeXtzM&hl=en&ei=aiiiTcqOBcrXgQfPoqTaBQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false

“A Teaspoon and an Open Mind.” <http://www.whofic.com>

“Anne Rice Readers Interactions: Anne's Messages to Fans: IMPORTANT MESSAGE FROM ANNE ON 'fanfiction'” <http://www.annerice.com/ReaderInteraction-MessagesToFans.html>

“Beta Readers.” <http://www.fanfiction.net/betareaders>

“Daycare Center Murals.” <http://www.snopes.com/disney/wdco/daycare.asp>

“Fan-Fiction and Moral Conundrums.” http://www.goodreads.com/author_blog_posts/417316-fan-fiction-and-moral-conundrums

“Jacob and Bella—Love the Way You Lie”
http://www.youtube.com/watch?v=l5PpA7Y1rC0&feature=player_embedded

“Letter to Helen Keller from Mark Twain.” <http://www.afb.org/braillebug/hktwain.asp>

“Not Prince Hamlet, nor was meant to be - Neil Gaiman grows garrulous on the cutting-room floor.” <http://rollick.livejournal.com/423627.html>

“The Leaky Caldron.” <http://www.the-leaky-cauldron.org>