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**SLASH/ING GENDER AND INTELLECTUAL PROPERTY:
A VIEW FROM FAN FICTION**

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I. Introduction

Today, it is no secret that the regime of copyright law, once an often-overlooked footnote to our legal system of property, now occupies a central position in modern debates surrounding the relationship between freedom of expression, language, and ownership. Curiously, while contemporary scholarship on copyright now embraces a wide range of political and economic approaches, it has often failed to consider how intellectual property (hereinafter, IP), as it is owned, constituted, created, and enforced, both benefits and disadvantages segments of the population in divergent ways. This absence is both vexing and fascinating. While issues of distributive justice have permeated almost every other area of legal scholarship, the literature on intellectual property has traditionally reflected a striking lack of attention to these considerations. This tendency becomes even more noticeable as we see a growing number of debates that continue to permeate the architecture of IP, providing a silent subtext that forces us to confront which narratives receive protective license and which narratives receive legal prohibition. At the same time, IP law is uniquely poised to govern the most intimate aspects of the representations

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of human life, including the depiction and commodification of racial, sexual, ethnic, and political identities. Indeed, far from being a value-neutral regime, the history of IP law reveals an astonishing number of incidences where the law has been used—often with great success—to silence transgressive depictions of sexuality, sexual identity, and gender expression.

Within the realm of trademark and copyright law, for example, courts have routinely protected the rights of IP owners to enjoin expressive uses of their works under the argument that sexualized depictions “tarnish” the wholesomeness of the original.¹ More specifically, recent cases demonstrate an increasing interest in prohibiting suggestions of homosexuality in appropriated works.² For instance, DC Comics sent cease-and-desist letters to a New York art gallery and web site over a series of paintings showing “Batman and Robin” in homoerotic poses.³ Similarly, legal threats were levied against the maker of *Ernest and Bertram*, a film which depicted the two Sesame Street characters, “Ernie and Bert,” in a same-sex relationship,⁴ as well as against the makers of greeting cards featuring John Wayne and Clark Gable with gay themes;⁵ Mattel protested a film’s depiction of Barbie engaging in a sexual relationship with a

¹ See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

² See *MGM-Pathe Commc’ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991).

³ See *Gallery Told to Drop ‘Gay’ Batman*, BBC NEWS (Aug. 19, 2005), <http://news.bbc.co.uk/1/hi/entertainment/arts/4167032.stm>.

⁴ See *Sesame Street Legal: Furore Over Bert and Ernie Gay Flick*, GUARDIAN UNLIMITED (Apr. 10, 2002), <http://www.theguardian.com/film/2002/apr/10/news>.

⁵ See Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 931 (1999) [hereinafter Hughes, *Recoding*] (discussing the greeting cards cases).

female servant.⁶ A similar issue even reached the Supreme Court in a case that held that the United States Olympic Committee (USOC) could enjoin the use of the term the “Gay Olympics.”⁷

As these events demonstrate, queering mainstream works, while endlessly entertaining, can also be construed as a brazen act of civil disobedience against the frameworks of intellectual property.⁸ While depictions of sex and sexuality have always been fraught with cultural controversy, these incidents demonstrate how such incidences of “semiotic disobedience” increasingly personify an underlying tension between our legal regimes of IP and free speech, and reveal how issues of distributive justice are invisibly intertwined within the interstices of commodified representations. While constitutional speech frameworks tend to treat expression as part of an ongoing contribution to layers of democratic dialogue, IP frameworks tend to honor expression as an excludable, privately owned resource. Even though fair use defenses are meant to mediate the boundaries between property and speech, their inherent lack of predictability sometimes contributes to the ongoing instability within the field at large. Often, as the above examples show, the resolution of these conflicts results in the exclusion of certain types of recoding over others.

In sum, there is much more to be said about the relationship between intellectual

⁶ See *Lesbian Row Over Barbie*, THE FREE LIBRARY (Mar. 14, 2002), <http://www.thefreelibrary.com/Lesbian+row+over+Barbie.-a083751895>.

⁷ See *S.F. Arts and Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 530, 535, 541, 546 (1987).

⁸ See generally Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489 (2006) [hereinafter Katyal, *Semiotic Disobedience*].

property—as a governing body of law—and its distributive implications for the particular identities that it governs. As these examples suggest, intellectual property law plays significant roles in regulating the marketplace of speech. Depending upon our vantage point, the law can either empower or disable creativity, and have a powerful impact on who actually receives access to and protection within the marketplace of cultural products. Further, propertizing expression benefits some authors and artists, often within the mainstream, sometimes at the cost of chilling other types of artistic expression and commentary, often from “outsider” groups like women, people of color, and sexual minorities.⁹ Ignoring this result matters. If we construe a marketplace of copyrighted cultural products as akin to, or at least reflective of, the rich diversity of the marketplace of ideas itself, then the denial of the privileges of authorship to some suggests that we are missing an important and illuminating facet of the relationships between production, representation, and consumption within copyright law. Consequently, we must consider how the inability to access these markets can yield a lasting impression, one that relates to and fosters a greater and more permanent exclusion from the marketplace of speech itself.

Consider one of the most glaring pieces of evidence in this respect. It is perhaps no secret to academics and lawyers that women are disproportionately underrepresented in governing the ownership, production, and management of copyrighted content in the United States. One recent study conducted by the Annenberg Center noted that among the top media companies in telecommunications, publishing, printing, entertainment, and advertising, women were grossly

⁹ See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1991) [hereinafter Coombe, *Objects of Property*].

underrepresented.¹⁰ The study noted that on average women make up no more than fifteen percent of top executives, even less of board directors, and that no company has a majority of women in top executive positions or on its board. The absence of women from the top positions governing the management and production of IP is not simply structural—one could credibly argue that it inextricably affects every aspect of the content industries, particularly strategies for content production and creation of IP.

Yet, the creation of cyberspace seems to have changed some of these dynamics. More specifically, the nature of cyberspace can teach us a host of lessons regarding the relationship between gender, sexuality, and intellectual property that real space cannot. Years ago, when the Internet was first beginning to permeate our ways of thinking and communicating, legal scholars proclaimed that cyberspace was a new, borderless entity—capable, in the words of John Perry Barlow, of transcending human concepts of space, identity, property, time, and governance.¹¹ While many of Barlow’s utopian predictions have failed to sustain themselves in the wake of increasing surveillance and private and public control, the Internet has today unleashed an enormous array of opportunities for individuals to participate in the creation and circulation of content. That invitation has extended itself to individuals from *all* walks of life—male, female, straight, gay, and those that challenge the boundaries of identity.

¹⁰ See Erika Falk & Erin Grizard, THE GLASS CEILING PERSISTS: THE 3RD ANNUAL APPC REPORT ON WOMEN LEADERS IN COMMUNICATION COMPANIES, 4 (2003), available at http://www.annenbergpublicpolicycenter.org/downloads/information_and_society/20031222_glass_ceiling/20031222_glass-ceiling_report.pdf.

¹¹ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, in CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS 27, 27-30 (Peter Ludlow ed., 2001).

In particular, the freedom of cyberspace has significance for “outsider” groups, specifically women and minorities. In stark contrast to the disproportionality that we see in real space with respect to gender equity, in cyberspace, we see an almost breathtaking array of equity in participation. Some studies claim that women have far outpaced men when it comes to using the Internet.¹² In making these observations, I do not mean to underestimate the comparable impact of race, class, location, and education (among other factors) on access to technology. However, women’s access to technology offers potential promises in terms of closing the gender gap in the production and management of IP. By creating spaces for the “outsider,” cyberspace enables the creation of a world of informal markets and amateur communities that create cultural resources, illustrating how women’s access to technology can radically change the future of the production of IP.

This Chapter excavates the relationship between the formal and the informal marketplaces of copyrighted commodities and expression. The interactions between the two markets, I argue, highlights a deeper set of constraints and possibilities with respect to equalizing the marketplace of speech, particularly the production, dissemination, and circulation of content by women. Here, instead of serving as fixed, excludable elements of owned property as in real space, copyrighted cultural products in cyberspace become performative, cultural texts—infrastructural resources—that are ripe for commentary, recoding, transgression, and

¹² See Eric Chabrow, *More American Women than Men Go Online*, INFO. WEEK, (Apr. 7, 2005), <http://business.highbeam.com/137376/article-1G1-131264024/more-american-women-than-men-go-online-study-emarketer>; Fred Harteis, *Business Series - It's A Women's Web*, FRED HARTEIS NEWS ARTICLES (Jun. 5, 2005), http://team_fred_harteis.typepad.com/my_weblog/2005/06/business_series_1.html.

appropriation. By creating spaces for reworkings of cultural texts, we allow them to transcend their fixed, stable form and instead to become properties that are performative in nature, ripe for audience participation and contribution. To show how this world is possible, I draw on performance theory to demonstrate the need for copyright's active reengagement with its "outsider" audience. While most conventional scholarship casts the audience as a largely passive body of recipients, performance theory has helped us to radically rethink these assumptions and has offered scholars a host of insights regarding the multiple and intersecting ways in which audiences respond to performances, often creating rich and varied interpretations of a preexisting work, with fan fiction being a single example. Along these lines, I argue that copyright must view its commodities not as fixed, stable texts, but rather as a set of starting points, of ongoing performances that can be recoded and reanalyzed by an active audience. In other words, copyright law needs to equalize the authorial monopoly of the creator in favor of a more dialogic and dynamic relationship between producers and consumers in the process.

In this Chapter, I specifically focus on one key example of the difference between property and performance by exploring a particular type of fan fiction known as "slash" fan fiction, which demonstrates how copyright both protects and prohibits divergent kinds of expression. "Slash" fan fiction, in particular, demonstrates how female audience participation can drastically alter the performance and interpretation of a given text.¹³ Women have long been the dominant force behind fan fiction; like many types of creative work performed by women, their contributions are usually circulated among informal, decentralized, and largely

¹³ See, e.g., Lakshmi Chaudhry, *Hey Spock, Lookin' Good*, WIRED NEWS (Sept. 9, 2005), <http://www.wired.com/news/culture/0,1284,38484,00.html>.

unrecognized communities outside of the mainstream.¹⁴ Yet slash takes the trope of the engaged audience to a new level. Slash involves fictional, homoerotic pairings between male characters in mainstream television programs and films, usually science fiction.¹⁵ As I show, slash empowers the virtual community to actively rework traditional narratives between men, demonstrating how queering mainstream characters can actually deconstruct and then transcend traditional gender norms and stereotypes. Unlike the commodified world of the content industries, which are largely dominated by men, slash represents a striking example of how female consumers can radically rework and recode existing texts. By doing so, they produce new works that add to the marketplace of ideas to create an alternative cultural and political economy that surrounds a copyrighted work, and actually “slash” the strictures of gender stereotyping in the process.

Although slash has been explored at length in the literature analyzing fandom, it has received almost no attention in the literature surrounding the relationship between technology, gender, and IP.¹⁶ Yet, slash demonstrates how equal access to technology can yield richer and

¹⁴ See Camille Bacon-Smith, *Spock Among the Women*, N.Y. TIMES (Nov. 16, 1986), <http://www.nytimes.com/1986/11/16/books/spock-among-the-women.html?pagewanted=all> (discussing how women, rather than men, are far more likely to engage in amateur production of content in science fiction venues).

¹⁵ See Anne Kustritz, *Slashing the Romance Narrative*, 26 J. AM. CULTURE 371, 372 (2003) (providing examples of slash fiction pairings). See also Sarah Kendzior, *Who Owns Fandom?*, SALON (Dec. 13, 2003), <http://archive.salon.com/tech/feature/2000/12/13/fandom/print.html>.

¹⁶ But see Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 373-74 (1992) [hereinafter Coombe, *Author/izing the Celebrity*].

more complicated textual narratives than the content industries offer. Slash demonstrates an increasing tendency towards product differentiation that creates two parallel markets in the production of content: one in real space that reflects some degree of gender inequity within the marketplace of products, and another in cyberspace that reflects significant gender participation within the marketplace of expression. The former is a commodity-based market driven by profit; the other an idea-based market that is driven largely by the desire to “recode” and “rework” appropriations from the first.

While copyright law could play an extremely dynamic role in mediating these two markets, it often operates to silence, rather than advance, such oppositional recordings. Although some scholars have argued that fan fiction falls within fair use exceptions, many copyright holders have vociferously disagreed, and periodically institute random cease-and-desist campaigns against fan fiction sites, particularly ones that offer slash narratives. But their legal campaigns often generate a host of online protests, and have, so far, done little to stem the general growth of fan fiction in cyberspace. Indeed, I would argue that incidences of private enforcement only tend to divide, rather than chill, the marketplaces of speech. This results in the creation of two parallel political and cultural economies in copyrighted content: one honored by the protection of law, and another, privately ordered system that flourishes in the wake of continued tolerance through the use of disclaimers and other informal means of protection. Finally, rather than mediating these two parallel markets, copyright law actually perpetuates the division between them.

II. Property, Performativity and Copyright law

Over the past several years, humanities scholarship has focused extensively on performance theory to explain many aspects of identity and social organization across time and space. Today, a large number of projects focusing on social inequalities have actively inculcated performance theory, particularly a substantial number of projects dealing with race, gender, and sexual orientation. Its rich body of insight has helped explore how social norms and codes operate to govern outward expression—indeed, everything within human behavior—including dress, speech, articulation, and other mannerisms. By exploring the power of performance on our everyday lives, its body of work has also offered academics a host of insights regarding the varied responses of the audience to these performances.

Generally, when we think of a “performance,” we tend to conjure up an image of a scripted set of statements, actions, and activities that are fully anticipated, planned, and enacted down to every last detail, including stage, costume, antics, language, with an audience in rapt attention. We imagine a “performance” to be something separate from everyday life and behavior. We tend to think of actors, stepping outside of their everyday roles as individual beings, and adopting particular identities that are assertively divorced from their own. The beauty of the stage is premised on this artful separation between art and life; it offers us a world of escape and freedom in fantasy. The actors are endowed with the ability to transform their identities by adopting an on-stage presence and the audience is asked to become a partner complicit in the formation of a fantasy. The actor is employed, partly to facilitate this separation, and the theatre becomes the site at which real life becomes transgressed; fiction transgresses fact,

and fantasy becomes the result.

Scholarship on performance theory actively distances itself from the idea of a clear delineation between the performances of life and the performances of art and instead, argues that everyday life and activities both capture and enable elements that bear a stark resemblance to theatrical rendition and expression.¹⁷ Further, the audience, as well as the speaker, receives and constructs through the lens of their own experiences and expectations. As Michael De Certeau has written, “[E]very reading modifies its object.’ . . . The reader takes neither the position of the author nor an author’s position. He invents in the text something different . . . he combines their fragments and creates something unknown.”¹⁸ This process of creating one’s own interpretation can be called “textual poaching.”¹⁹ Quite unlike the perception of a passive audience, performance theory suggests that individual viewers play an enormously powerful role in the construction of a text and its social meaning. The audience has the following choices to make: (1) adopt either the proffered or dominant ‘codes’ offered by the speaker, (2) adopt a negotiated stance where the reader might modify the code in a way that reflects their own experiences and interests, or (3) create an oppositional reading that enables the reader to reject and oppose the dominant meaning offered.²⁰ The choice is up to the interpreter, but it heralds an

¹⁷ See Erving Goffman, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

¹⁸ Michel de Certeau, *THE PRACTICE OF EVERYDAY LIFE* 169 (Steven Rendall trans., 1984) (quoting Michel Charles, *RHETORIQUE DE LA LECTURE* 83 (1977)).

¹⁹ See Henry Jenkins, *TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE* 24-27 (1992); Kris Larsen, *In Defense of Slash*, U.N.C.L.E. FAN FICTION IN PRINT, <http://www.manfromuncle.org/krisl.htm> (last visited Dec. 26, 2013).

²⁰ See Stuart Hall, *Encoding/decoding*, in *CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES*,

important, supplementary dimension to the development and protection of IP: The audience plays just as powerful a role in the construction of authorship as the original creator.

Here, law gives rise to a potential area of divergence between *property* and *performance*, which is uniquely mirrored by the preexisting tensions between IP (which honors exclusion), and expression (which honors inclusion within the marketplace of ideas). The dynamic of copyright regimes operates as a silent translator of the performance by helping the audience to guide its reception. In turn, the audience's reception also modifies the text, giving rise to a process of dialogue that paves the way for audience appropriation and creation. Indeed, despite its operational tendency to honor the romantic author, the original architecture of copyright law is somewhat delicately poised between the themes of property and performance. The property theme, which has taken on greater emphasis in modern times, suggests a sort of fixed, unitary, thing-like character that remains largely static, stable, and resistant to modern change.²¹ However, the performance theme is still indelibly powerful, which suggests that fair use provisions that allow commentary, criticism, news reporting, and the like also allow for copyrighted texts to become fluid, indeterminate, and multi-dimensional pieces that permit interactions between the performer and the audience.

To be sure, there is strong precedent to support some kinds of audience participation within copyright, even when the ideas expressed involve depictions that we may find

1972-79 128-38 (Stuart Hall et al. eds., 1980); Daniel Chandler, *Semiotics for Beginners: Encoding/Decoding*, <http://www.aber.ac.uk/media/Documents/S4B/semiotic.html> (last visited Dec. 26, 2013).

²¹ See generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 530-34 (2001) (addressing the growing tendency to consider culture as a “thing”).

uncomfortable or unwholesome. Indeed, the laws of intellectual property premise their very existence on carving out a protective space for such commentaries to exist in order to ensure that IP retains a non-exclusive, non-sovereign character that comports with basic First Amendment values. Copyright and trademark law, for example, contain implicit defenses for some kinds of parodic commentary but not others, drawing a firm line between parody and satire. The desire to rework and renegotiate meaning, however, is a power that belongs squarely with the audience, rather than the original speaker. In many cases, these expressions take the form of parody, satire, or pastiche—all of which aim to offer subversive readings and interpretations of the same script. The idea of a parody is to use some elements from a prior author's work in order to reinterpret and subvert the intended meaning by offering a commentary on the original.²² Parody allows for the creation of properties that suggest the non-exclusivity of behavior. But it also offers us a vision of non-exclusivity in property as well. Rather than the creator controlling the meaning and representation of a given text, parody suggests the existence of alternative readings and enables properties to become nonexclusive, non-sovereign entities. The audience actively participates in remaking the original performance, imbuing it with a new, particularly expressive quality. Through the law's protection of parody, property becomes a dialogue, instead of a one-way transmission of meaning.

III. Female Appropriation of Popular Culture: The Story of Slash

As I have suggested, performance theory suggests a sort of rivalrous relationship between

²² See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

the performer and the audience. The two are interdependent, but are also deeply conflicted with the possibilities of internal rebellion. Therefore, rebellion and resistance takes the form of unmaking and unraveling a given text to emulate or challenge the very notion of the ideal, by reworking performances and encoding them with specific and new understandings and expression. Thankfully, today such imaginings are not merely in the abstract; today, performance in another “world” is possible through cyberspace, enabling persons to remain anonymous, adopt alternative personae, and create multiple works, texts, visuals, and so on. As Professor Sherry Turkle has written, “[w]hen we step through the screen into virtual communities, we reconstruct our identities on the other side of the looking glass.”²³

Fan fiction is an integral part of this development, but it depends on the law’s protection of underlying interests for its flourishing and protection. Law becomes implicated in every stage of this process, from protecting privacy to protecting expression. Indeed, fan fiction depends integrally on a peculiar paradox within cyberspace: the existence of “personal privacy in a public forum.”²⁴ While much of Turkle’s exploration is limited to role-playing games, her conclusions can be profitably reframed to cover many aspects of identity and personhood in cyberspace. “When each player can create many characters and participate in many games,” Turkle explains, “the self is not only decentered but multiplied without limit.”²⁵

Such diversity of possibilities extends to multiple areas of creation in cyberspace—the

²³ Sherry Turkle, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 177 (1995).

²⁴ See Sharon Cumberland, *Private Uses of Cyberspace: Women, Desire, and Fan Culture*, MIT COMM. F. (2000), available at <http://web.mit.edu/comm-forum/papers/cumberland.html>.

²⁵ Turkle, *supra* note 23, at 183.

creation of the self, along with the possibility of (re)creating other texts. Dan Hunter and Greg Lastowka have written that cyberspace allows for the creation of an “amateur-to-amateur community,” where individuals from all walks of life participate in the creation and circulation of content with no desire to own the content or profit financially from it.²⁶ Here we see vast examples of audience interactivity in fan fiction, which involve stories that are written about particular characters from popular television shows, movies, and other cultural texts. In some ways, fan fiction reverses the classic distinctions that are often drawn in cultural media between producer and creator, affecting gendered assignments in the process.²⁷

Professor Henry Jenkins has suggested that fan fiction heralds a return to earlier modes of communal storytelling, in which great sagas would pass through oral tradition and narrative. He argues that “[f]an fiction is a way of the culture repairing the damage done in a system where contemporary myths are owned by corporations instead of owned by the folk.”²⁸ Initially, in the 1980s, fan fiction was often widely inaccessible because it was only circulated through “fanzines,” which tended to be produced on a very limited scale.²⁹ While zines (self-produced magazines) had been traditionally non-profit entities in real space, they were often rather low-budget and rarely numbered more than demand required.³⁰ However, on a very basic level, the

²⁶ See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 955-56 (2004).

²⁷ See generally Coombe, *Author/izing the Celebrity*, *supra* note 16, at 384-86.

²⁸ Amy Harmon, *In TV's Dull Summer Days, Plots Take Wing on the Net*, N.Y. TIMES, Aug. 18, 1997, at A1 (quoting Jenkins).

²⁹ See Celandine Brandybuck, *Slash Fanfiction: A Personal Essay*, FANFIC SYMPOSIUM (2004), <http://www.trickster.org/symposium/symp158.html>.

³⁰ See Kustritz, *supra* note 15, at 372.

advent of the Internet opened up a wide array of publishing opportunities for people from all walks of life. Given the much lower costs of printing and publicity, it became possible for authors of fan fiction narratives to reach a wide readership for their work and to create huge communities across cyberspace as a result.

While the world of fan fiction is both diverse and expanding, and has been studied at some length both inside and outside of the legal academy, it represents an important culmination of the theories we explored above regarding the power of the audience in receiving and reworking performances. Like the audience's power to recode and reinterpret meaning, fan fiction enables individuals to engage in widespread and active appropriation of given texts, plots, characters and to build alternative communities and marketplaces of expression. Fan fiction, therefore, is not an extreme departure from societal norms, but a compromise between the original text and the reworking done by fans.³¹ Jenkins offers a litany of examples of audience appropriation in his work *Textual Poachers*, ranging from collectives that actively reread, gossip, and discuss given texts to those that engage in full-on rewriting of scripts and plots.³² Some fan fiction writers may attempt to "recontextualize" a program by adding scenes that help to clarify omissions in plots and explain a character's motivations.³³ They may also seek to write texts that expand the timeline of the series, develop secondary or villainous characters who are underexplored in the central series, blend two or more series to create a new product, or to eroticize relationships between characters.³⁴

³¹ See Jenkins, *supra* note 19, at 219.

³² See *id.* at 155.

³³ See *id.* at 162.

³⁴ See *id.* at 165-77.

This Chapter focuses more specifically on this last category of fan fiction, which comprises a particular type of fan fiction known as “slash” that focuses mainly on developing homoerotic relationships between two, usually male, characters in a television show or motion picture.³⁵ Slash receives its name from the typological character that occurs between male pairings (e.g. m/m), originating with a number of fan-written stories in the 1970s that centered on developing a relationship between Kirk and Spock in the television program “Star Trek.”³⁶ As Jenkins has elegantly explained,

When I try to explain slash to non-fans, I often reference that moment in *Star Trek: The Wrath of Khan* where Spock is dying and Kirk stands there, a wall of glass separating the two longtime buddies. Both of them are reaching out towards each other, their hands pressed hard against the glass, trying to establish physical contact. They both have so much they want to say and so little time to say it. Spock calls Kirk his friend, the fullest expression of their feelings anywhere in the series. Almost everyone who watches that scene feels the passion the two men share, the hunger for something more than what they are allowed. And, I tell my nonfan listeners, slash is what happens when you take away the glass. The glass, for me, is often more social than physical; the glass represents those aspects of

³⁵ See *id.* at 188-89. For more information, see *THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA* (Lisa Lewis ed., 1992); Shoshanna Green et al., “Normal Female Interest in Men Bonking”: *Selections from the Terra Nostra Underground and Strange Bedfellows*, in *THEORIZING FANDOM 9* (Cheryl Harris & Alison Alexander eds., 1998).

³⁶ See Kustritz, *supra* note 15, at 371-72.

traditional masculinity which prevent emotional expressiveness or physical intimacy between men, which block the possibility of true male friendship.³⁷

Although it was initially met with opposition in the fan community,³⁸ media theorist Constance Penley has described the “slash phenomenon as one of the most radical and intriguing female appropriations of a popular culture product that [she] had ever seen,” and notes that it demonstrates “how women, and people, resist, negotiate, and adapt to their own desires this overwhelming media environment that we all inhabit.”³⁹ By taking traditional male heroes and reworking their characters and performances, slash writers are able to dissect, appropriate, and then deconstruct the various elements of male dominance. For example, in stark opposition to the typical dominant male/passive female theme one often sees in popular culture texts, slash depicts two equals involved in a romantic relationship and negates the uneven power balance afforded to women and men by simply removing “gender as a governing and determining force in the love relationship.”⁴⁰ In most cases, women rewrite archetypal hero figures who traditionally tend to propagate women’s social marginalization and create narratives that undermine, rather than reinforce this patriarchy, by depicting men as softer, more complicated and emotional human beings.⁴¹

³⁷ Green et al., *supra* note 35, at 19-20 (quoting Henry Jenkins, *Confessions of a Male Slash Fan*, 1 STRANGE BEDFELLOWS (May 1993)).

³⁸ See Jenkins, *supra* note 19, at 187-88.

³⁹ Constance Penley, *Feminism, Psychoanalysis, and the Study of Popular Culture*, in CULTURAL STUDIES 484 (Lawrence Grossberg et al. eds., 1992).

⁴⁰ Kylie Lee, *Confronting ‘Enterprise’ Slash Fan Fiction*, 44 EXTRAPOLATION 78 (1995).

⁴¹ See Kustritz, *supra* note 15, at 383.

Slash also initiates a powerful dialogue between the producers of an item of IP and between its female consumers. By empowering women to undertake their own processes of recreation and building communities within fandom and, in some instances, initiating a dialogue with the show's producers and writers themselves, slash initiates a collaborative exchange between the (usually male) creators and producers of a given series and their (usually female) slash participants. As Jenkins observes, "[f]andom originates, at least in part, as a response to the relative powerlessness of the consumer in relation to powerful institutions of cultural production and circulation."⁴² Even though network executives and producers often generate "official" merchandise for fan groups to celebrate and protect a given narrative, slash perpetuates the growth of a parallel industry that celebrates the freedom of imagination, rather than the control of a commodity.

Although there are a host of diverse reasons why women would choose to create homoerotic relationships between men, slash, on a general level, highlights the increasingly participatory culture of cyberspace and the audience's inherent challenge to the author's control over the creation of meaning and subtext. It enables the "amateur" man or woman to appropriate and recreate scripts from the entertainment industry, exploring new character dimensions and elements. As one author explains, "[w]e're taking the passive medium of television and making it active, making it interactive, transforming it from something one simply sits and watches to something one engages in."⁴³

⁴² Jenkins, *supra* note 19, at 278.

⁴³ Kass, *Why I Write Slash*, THE FANFIC SYMPOSIUM, (1999), <http://www.trickster.org/symposium/symp15.htm>.

In other words, by creating a fictional, 'equal' world that transgresses gender, it enables women from all walks of life to *slash gender itself*. Its work completely reinvents traditional notions of masculinity and femininity because many of its themes explore the possibility of living outside of these circumscribed boundaries by blending fragments of both into new, unconventional pairings.⁴⁴ Put another way, by recoding narratives in virtual space, slash allows readers to experience a world of imaginative possibility that transcends the political limitations of the current world in real space on another level. Cyberspace allows female authors to build marketplaces of speech in which they are active participants in creation.

Certainly, the world of fandom, like most marketplaces of speech, is not perfect, nor does it purport to be. But the representations offered through slash provide a critical vantage point from which to critique, analyze, and reinterpret the cultural products that are offered within the marketplace. And here is where the role of gender becomes so powerful. Slash allows women, often left out of the marketplaces of content production, to rewrite narratives in imaginative and complicated ways and experiment with, abandon, or recreate notions about gender itself in the process.⁴⁵ As Jenkins has written, slash is deeply connected to the various ways in which women, throughout time, have continually remade and reworked the narratives that they are often forced to watch. "The school girl required to read a boy's book, the teenager dragged to see her date's favorite slasher film, the housewife forced to watch her husband's cop show rather

⁴⁴ See Jenkins, *supra* note 19, at 193.

⁴⁵ See Noy Thrupkaew, *Fan/tastic Voyage: A Journey Into the Wild Wild World of Slash Fiction*, BITCH MAGAZINE (Spring 2003), http://www.bitchmagazine.com/archives/04_03slash/slash.shtml.

than her soap, nevertheless, may find ways to remake those narratives, at least imaginatively.”⁴⁶

IV. The Governing Power of Law

Given the complex role that law plays in regulating and therefore subsidizing certain speech over others, it is important to consider how the law governs these commentaries. At a most basic level, the law is implicated in every stage of creation, everything from the place and mode of creation to the form and content that it takes. Despite the creative impulse that inspires these types of appropriation, the laws of IP and personal property provide remarkably thin or negligible areas of protection for such oppositional readings to occur. In this sense, such works highlight the intangible possibilities of expression, but they also signify how particular kinds of expression can be owned and accorded a particularly powerful sovereignty that permits an owner to exclude others from utilizing them.

As it is currently fashioned, IP law can act in powerful ways to constrain, protect, or enable these kinds of commentary. Each dimension of slash, and the way that intellectual property owners have responded to its proliferation in cyberspace, demonstrates how law implicitly subsidizes certain types of speech and penalizes others. In previous work, I have argued that copyright and trademark law perpetuate a dance of opposition, where the law tends to protect only appropriative works that either assimilate or oppose their originally intended

⁴⁶ Jenkins, *supra* note 19, at 114.

meaning.⁴⁷ Works that negotiate meanings fall within a separate category of speech and tend to be afforded almost no protection within the spheres of both copyright and trademark because they produce works that are not fully transformative of the original.

These types of expression, inasmuch as they occupy a significant body of contemporary art, also occupy a vulnerable space within the artistic and literary market, precisely because of their fragile, potentially illegal, legal status. Because of this uncertain legal status, copyright owners utilize a variety of private modes of control demonstrated by random and selective enforcement campaigns against certain groups of fan fiction. However, there is a peculiar irony in confronting the proliferation of fan fiction in cyberspace. The more private copyright owners attempt to control these types of expression, the more they risk alienating the most dedicated segments of their fan base. Fan writers tend to be interested in creating alternative texts, but still maintaining loyalty to the original character. As Rosemary Coombe writes, “[f]ans respect the original texts and regularly police each other for abuses of interpretative license, but they also see themselves as the legitimate guardians of these materials, which have too often been manhandled by the producers and their licensees for easy profits.”⁴⁸

Accordingly, producers and publishers have chosen to undertake an approach that at once demonstrates lukewarm tolerance coupled with random, selected incidences of control. This campaign of selective enforcement both reifies and solidifies fan fiction’s vulnerability and leads to the creation of the two following parallel political economies surrounding cultural products:

⁴⁷ See generally, Katyal, *Semiotic Disobedience*, *supra* note 8.

⁴⁸ Coombe, *Author/izing the Celebrity*, *supra* note 16, at 388.

one that represents the commodification of the icon within the mainstream and another that represents its subversion within the parallel universes of cyberspace.

Despite the creative power of audience interpretation, it is often believed that fan fiction occupies a murky and underexplored area of copyright law, where informal norms tend to govern, rather than actual black-letter legal formulations. In sum, the grey area that fan fiction occupies in copyright is part of a larger tale of how intellectual propretization affects different groups. Copyright law's requirements of originality, tangibility, and fixation tend to minimize the contributions of non-market, amateur participants and often penalize them in the process. Recall that copyright law is designed to protect only expression, rather than the idea behind the expression. This is a foundational cornerstone of copyright law, but it has often given rise to a host of confusion, particularly where the protection of literary characters is concerned.

Since the fan fiction writer uses the name, appearance, or personality of a particular character, some degree of copying is clear. At the same time, it becomes incumbent on a court to determine whether the defendant's work is substantially similar and amounts to infringement or whether other defenses weigh in favor of the appropriation. Here is where a host of confusion can result. In an early case, the Second Circuit found that a cartoon character, "Wonderman," infringed upon the copyright in "Superman," after examining the similarities between the two characters. However, as one writer points out, the court never made clear what aspect of Superman was actually infringed—his appearance, abilities and powers, or specific incidents

within the cartoon.⁴⁹ In another more recent case, an advertising agency was sued for copyright infringement based on a commercial advertisement that they developed to sell a new car, the Honda Del Sol.⁵⁰ The concept for the advertisement involved a villain who leaps from a high-tech helicopter onto the roof of the automobile, which is driven by a well-dressed male with a female passenger. Based on the similarities between the theme of the advertisement and the character of “James Bond,” the court found evidence of infringement.

On the other hand, clear evidence of differences between the two characters can be determinative in successfully defending claims of infringement.⁵¹ Similar conclusions were reached regarding the comparison between “Superman” and the protagonist on the television show, “The Greatest American Hero,” where the main character was depicted as a messy, underconfident, and often inept superhero, in stark contrast to the confident, classy, and skillful Superman.⁵² Other cases denying protection also may find that the character does not constitute the story being told; arguments in this context have extended to characters from the movie *The*

⁴⁹ See *Detective Comics, Inc., v. Bruins Publ'ns, Inc.*, 111 F.2d 432, 433-34 (2d Cir. 1940); Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 445-46 (1986).

⁵⁰ See *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1291-92 (C.D. Cal. 1995).

⁵¹ In a case involving the Pink Panther character, a court held that the copyright extended “not merely to the physical appearance of the animated figure, but also to the manner in which it moves, acts, and portrays a combination of human and feline characteristics.” However, the court declined to find that the defendant’s cat, an animated cougar used to sell Lincoln-Mercury cars, bore an actionable degree of similarity between the two cats largely due to the differences in appearance, manner, and movement. See *United Artists Corp., v. Ford Motor Co.*, 483 F. Supp. 89, 91 (S.D.N.Y. 1980); see also Kurtz, *supra* note 49, at 448.

⁵² See *Warner Bros., Inc. v. Am. Broad. Co.*, 654 F.2d 204, 209 (2d Cir. 1981).

*Exorcist*⁵³ and the television show “The A-Team.”⁵⁴

Despite these examples, there is still a significant degree of protection offered to fictional characters and, as a result, a large degree of vulnerability facing the legal status of fan fiction. Some copyright owners will continue to and have successfully argued in the past that a fan’s use of a fictional character is an unauthorized derivative work. The case for infringement becomes much clearer in fan fiction because the character’s names and visual styles are often appropriated to ensure a sense of authenticity between the fan fiction piece and the original work. Consider the case of *Anderson v. Stallone*, which involved Timothy Anderson, an individual who prepared a prospective script treatment for a planned *Rocky IV* sequel.⁵⁵ Despite preparing a preliminary outline for the sequel and circulating it to representatives from MGM Entertainment, a formal deal was never reached. When Anderson viewed Sylvester Stallone, the writer and star of the original *Rocky*, on national television discussing his plans for a sequel, he filed suit for copyright infringement after the sequel’s release on the grounds that Stallone and MGM had appropriated his treatment. In its opinion, the court found a high level of protection for the “Rocky” character on the basis of its high degree of delineation and character development.⁵⁶ However, the court found that it was Anderson who had created an unauthorized derivative work based on his wholesale appropriation of the characters. Perhaps most importantly, the court found that Anderson was not entitled to any degree of protection for the new, original work that he created in addition to the preexisting character and protected plot. The court concluded that the standards

⁵³ Warner Bros. v. Film Ventures Int’l, 403 F. Supp. 522, 525 (C.D. Cal. 1975).

⁵⁴ See *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1451-53 (9th Cir. 1988).

⁵⁵ *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989).

⁵⁶ See *id.* at *7.

of copyrightability could not be used to “arm an infringer,” thereby limiting the protection for derivative works.⁵⁷

As some commentators have noted, *Anderson* creates a substantial dilemma for individuals, like fan fiction writers or sequel authors, who may seek to draw upon preexisting copyrighted works in their own creative endeavors.⁵⁸ Such authors have little incentive to create or to circulate their work for commercial reasons because *Anderson* creates a substantial likelihood that an original copyright holder can use the material produced by a prospective scriptwriter without attribution, on the grounds that the work constitutes an unauthorized derivative work.⁵⁹ Not only can the original copyright holder “block” any improvements or changes to a protected work in a sequel or work of fan fiction by denying copyrightability, it also creates some risk that the holder may unjustly enrich herself of the new work without fear of legal retribution under copyright law.⁶⁰

These cases taken together suggest that fan fiction occupies a particularly vulnerable area within cyberspace. Since it draws upon the unauthorized use of copyrighted characters, it often runs the risk of igniting tensions between fans and content owners in the process. Given the powerful role of creativity in fan fiction, there is a powerful argument to be made on the basis of fair use considerations. Certainly, each of the following four factors analyzed in fair use cases

⁵⁷ *See id.* at *10-11.

⁵⁸ *See* Matthew A. Kaplan, Note, *Rosencrantz and Guildenstern are Dead, but are They Copyrightable?: Protection of Literary Characters with Respect to Secondary Works*, 30 RUTGERS L.J. 817, 830 (1999).

⁵⁹ *See id.* at 830-31.

⁶⁰ *See id.* at 831.

weigh strongly on its behalf: the purpose and character of the use (whether it is for profit or noncommercial reasons), the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work.⁶¹ Even though it has a large base of demand, fan fiction is usually a non-commercial enterprise and writers rarely attempt to profit from its creation and circulation.⁶²

I would argue that slash represents a subset of fan fiction that highlights a sort of paradox. At the same time that it may be seen as more vulnerable due to its “queering” of mainstream characters (and its erotic treatments of their relationships), it also establishes a stronger claim in favor of fair use on such grounds. As many of the cases I have mentioned demonstrate, there may be strong non-economic reasons why a copyright owner might choose to utilize copyright protections as a vehicle in silencing alternative narratives of characters that may be offensive to some.

Although many entertainment corporations usually tend to leave fan fiction alone, a few have attempted to shut down unauthorized uses of their characters on the Web.⁶³ At the same

⁶¹ See 17 U.S.C. § 107 (2005) (detailing the four factors courts are to consider in determining copyright fair use).

⁶² See Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What's all the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 451 (explaining that most fan fiction writers post their work on the Internet, allowing free access).

⁶³ See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 651 (1997); see also Nancy Basile, *Fox vs. 'The Simpsons' Fans*, ABOUT.COM, <http://animatedtv.about.com/od/foxnetwork/i/foxfans.htm> (last visited Dec. 23, 2013) (detailing Fox's threats against both Simpsons and Millennium fan sites); Nancy Basile, *The Great Fox Blackout: "The Simpsons" Fans Get*

time, such outright policing of copyrighted and trademarked characters masks the prominent role that appropriation has historically played in the construction of significant works. For example, despite this long tradition, IP law has been used to control such creations. In June of 1977, Paramount, which held the copyrights to *Star Trek*, sent a cease-and-desist letter to two women who had written and published a *Star Trek* fanzine.⁶⁴ Although Paramount eventually dropped the case after they realized that the zine was not a professional publication, it marked a watershed moment because it was the first time that IP law had been used as a tool to control the development of fan fiction.⁶⁵ Just four years later, the head of the Official Star Wars Fan Club sent a similar letter to the producers of an adult fanzine on Star Wars, arguing that its content violated an informal policy of the copyright holder to resist from governing fanzines as long as they were not pornographic in nature.⁶⁶ More recently, there has been a much greater degree of fan fiction surveillance by copyright holders, which can and has given rise to a higher incidence of policing.⁶⁷ However, more recently, *Star Trek*'s owner Paramount has taken a more lenient

Organized, ABOUT.COM, <http://animatedtv.about.com/od/foxnetwork/a/greatblackout.htm>; Lynn Burke, *Fox wants Buffy Fan Sites Slain*, WIRED NEWS, Mar. 2, 2000, <http://www.wired.com/techbiz/media/news/2000/03/34563> (explaining that Fox sent cease-and-desist orders to a number of unofficial websites dedicated to *Buffy the Vampire Slayer*).

⁶⁴ See McCardle, *supra* note 62, at 441.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ In the mid-1990s, Fox Television began issuing cease-and-desist letters against fan sites of the shows “Millennium” and “The Simpsons,” warning them of criminal and civil penalties if they contained infringing material. Fox asserted that it did not want to “shut down legitimate fan sites, but it wanted to retain the ‘creative integrity’ of its shows” and was concerned about turning characters into parodies and or tarnishing their image in pornographic narratives. Almost immediately, the letters generated a substantial chilling effect. Out of the forty-

view and has commented that it is familiar with several fanzines and finds them to be a “fair use” that they only hope to encourage.⁶⁸

Despite the expansion of copyright law into this uncharted area, editorializing arguments against recoding, particularly as they apply to slash, only serve to advance, rather than counteract, the economic and expressive arguments in favor of fair use. In an influential article, Professor Wendy Gordon postulated that fair use considerations should be applied in cases of “market failure,” that is to cases where parties fail to reach a market transaction.⁶⁹ As the Supreme Court itself recognized in *Campbell v. Acuff-Rose Music*, “there is no protectible derivative market for criticism,” since most copyright owners would opt against licensing their works for such purposes.⁷⁰ Given the potentially prohibitive presence of non-economic

three sites devoted to “The Simpsons,” who received such letters, twenty-seven shut down and seventeen agreed to remove copyrighted images from the site. Eventually Fox decided to halt its campaign against most sites, deciding that the existence of disclaimers and a legal notice on the fan sites would suffice and focused on the most egregious infringers instead. See Cecilia Ogbu, Note, *I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners*, 12 S. CAL. INTERDISC. L.J. 279, 303 (2003). For more on the privacy implications of piracy surveillance, see generally Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297 (2003).

⁶⁸ See Tushnet, *supra* note 63 at 673 (adding that Paramount ignores fan publications and only takes legal action against commercial products).

⁶⁹ See Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982). For related discussion in the context of parody, see Robert P. Merges, *Are you Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305 (1993).

⁷⁰ 510 U.S. 569, 592 (1994).

considerations, like a predisposition against criticism or debased commentary, it is unlikely that a copyright holder will be willing to enter into a market transaction with a parodist. As a result, fair use protections operate to ensure that the law supplies a solution that favors dissemination, even where the refusal to license is based on non-economic motives.⁷¹

At the same time, a copyright owner might argue that a work of fan fiction interferes with the market for the original work or any derivative markets that the original creator might plan to enter or license. In one case, *Castle Rock Entertainment v. Carol Publishing Group*, a court found that the publication of an unauthorized book of trivia based on the television show “Seinfeld” constituted an infringing derivative work because of the realistic possibility that the creator might choose to enter into the new market.⁷² Other cases involving similar fan books have reached the same conclusion.⁷³

Yet such cases often overlook a key distinction between market substitution and market complementarity, which is that the fan-related products are meant to enhance the demand for the original, rather than compete with it. Slash, in particular, does not operate as a market substitute precisely because of its transgressive nature and it is highly unlikely that any mainstream creator would choose to market their characters in same-sex relationships.⁷⁴ The presence of stronger claims of product differentiation, at the very least, suggests that it does not harm the market for

⁷¹ See *Merges*, *supra* note 69, at 310.

⁷² See 150 F.3d 132, 145 (2d Cir. 1998).

⁷³ See, e.g., *Paramount Pictures Corp. v. Carol Publ’g Group*, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998); *Twin Peaks Prods., Inc. v. Publ’n Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

⁷⁴ See Judith Gran, *Fan Fiction and Copyright*, <http://www.alternateuniverses.com/judygran/copyright.html>.

the original, but, if anything, may even enhance it.⁷⁵

Aside from these economic considerations, there are also strong expressive considerations that operate in favor of recognizing slash as a clearly protected area of fair use. Some evidence suggests that the trend towards silencing such narratives is shifting, a factor which creates significant degrees of uncertainty within the world of fan fiction.⁷⁶ A few courts, for example, actually espouse a greater degree of protection when the discussion centers on a critique of sexuality and gender norms. The Ninth Circuit also established powerful parameters for this right in the case of the song “Barbie Girl” that attempted to personify a speaking Barbie doll as a living, breathing character who only liked to party and have fun.⁷⁷ In that case, the court observed that a trademark comprises a limited property right that “cannot be used to allow trademark owners to eviscerate all discussion of their marks they may find annoying or offensive.”⁷⁸ Another recent case, also involving Barbie, this time in pictorial images that displayed the Barbie doll in a host of compromising positions, also reached similar conclusions with respect to copyright law.⁷⁹ Given that the purpose of the images was to critique gender roles and norms, the court held that there was little risk of market substitution. Because the use of the Barbie dolls did not convey any level of sponsorship, the court found that the pictures

⁷⁵ See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992) (finding a computer program allowing the alteration of character elements to be fair use because it enhanced the market for the original).

⁷⁶ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268-69 (11th Cir. 2001).

⁷⁷ See *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1125-26 (C.D. Cal. 1998) (holding the song was a parody and was protected speech under the First Amendment).

⁷⁸ *Id.* at 1141. See also *Mattel, Inc., v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003).

⁷⁹ See *Mattel*, 353 F.3d at 796.

constituted protected fair use. Central to its conclusion was a critical balancing test that required courts to apply trademark protections to artistic works “*only* where the public interest in avoiding consumer confusion *outweighs* the public interest in free expression.” Given the strong speech implications of the works, the court opted to allow their protection.⁸⁰

However, despite the powerful implications for fan fiction, one writer argues that the import of these cases may be limited since most fan fiction writers do not aim to criticize or satirize the original work, but merely add to it in new and different ways.⁸¹ This often means that copyright owners themselves may attempt to draw lines between what is allowed and what is prohibited. For example, according to Jenkins, Lucasfilm, while claiming to tolerate fan fiction, actively discourages the production of slash fan fiction in particular.⁸² It does so by apparently distinguishing between “parodies” (which it permits on its fan fiction site) and “dramatic expansions of the ‘Star Wars’ universe” (which it apparently prohibits).⁸³ Yet the lines are so blurred between parody and other forms of appropriative expression that the copyright owner may claim that something is prohibited, when in fact it may fall within fair use protections

⁸⁰ *See id.* at 812.

⁸¹ *See* McCardle, *supra* note 62, at 456 (adding that the *Suntrust* decision might aid only the few fan fiction writers whose purpose is to satirize the original work).

⁸² *See* *CNet Media Expert Talks to TFN*, THEFORCE.NET, (May 18, 2005), http://www.theforce.net/fanfiction/story/CNet_Media_Expert_talks_to_TFN_92570.asp [hereinafter THEFORCE.NET, *Editorial*].

⁸³ *See id.* (clarifying Lucasfilm’s restrictions, which include “you can only use these sounds we provide you, you can’t use copyrighted materials and appropriate or recontextualize it, you can do parodies, but you can’t do dramatic expansions of the ‘Star Wars’ universe”).

entirely.⁸⁴

Instead, given the uncertainty over the legal status of fan fiction, systems of private ordering govern in cyberspace—slash fan writers have extraordinarily well-developed systems of customs, rules, and expectations with respect to the writing of narratives and character development. In turn, copyright holders also tend to follow another set of rules that predictably, might overstate their realm of control over their characters. The market for characters has changed in recent years as well, leading to a much greater level of attention paid to the marketing and trademarking of characters as actual, tangible commodities.⁸⁵ Along these lines, copyright, trademark, and the right of publicity often blend together, raising a host of converging concerns against the tarnishment, appropriation, and dilution of a single character.

Thankfully, most copyright owners tend not to get involved with fan fiction unless a narrative involves graphic sexual content, in order to avoid “tarnishment” of the original image. However, slash fan fiction is considered to be especially transgressive because of its sexualization of mainstream characters and because its story lines often involve “recoding” these characters as gay, bisexual, or involved in a same-sex relationship with another character. In these instances, it is hard to separate out whether the objectionable content is considered to be problematic because of its graphic sexual content or because of the same-sex narrative that it offers. Whether the objection is due to a desire to “purify” characters from sexualized

⁸⁴ Tushnet, *Legal Fictions*, *supra* note 63, at 668. *See generally* Bruce Keller & Rebecca Tushnet, *Even More Parodic than The Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979 (2004).

⁸⁵ *See* Michael Todd Helfand, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional, Literary, and Pictorial Characters*, 44 STAN. L. REV. 623 (1992).

appropriations or to save them from a presumed “gay agenda,” the result is clear—a potential chilling of expressive, creative activity that squarely belongs within the audience’s control.

Most fan fiction web sites contain a detailed disclaimer that acknowledges that the fan fiction writer does not own the copyright to the characters used and that the author is receiving no financial benefit from the work.⁸⁶ Rebecca Tushnet has argued that disclaimers represent a powerful means for copyright holders to ensure the integrity of their creations, while allowing for creativity and discussion to flourish regarding such works.⁸⁷ They allow fans to show their allegiance to specific characters and texts and acknowledge that they are not writing the “canon,” but borrowing from it. She writes, “[c]opyright disclaimers are manifestations of democracy in action; articulating norms about justice in the shadow of formal law.”⁸⁸ However, a recent action by Lucasfilm suggests an interesting variance regarding the formal divide between the “canon” and fan fiction. It offered fans free pages on its starwars.com site to post their stories, songs, messages, and essays regarding the work.⁸⁹ Yet, the fine print stated that Lucasfilm retained the copyrights to anything placed on the sites—borrowed, original, appropriated, or transformed.⁹⁰

⁸⁶ See McCardle, *supra* note 62, at 451 (explaining that the purpose of fan fiction writing is to satisfy the author’s desires).

⁸⁷ See Tushnet, *Legal Fictions*, *supra* note 63, at 669 (adding that disclaimers enhance the market for official texts by producing interest in them).

⁸⁸ *Id.* at 683.

⁸⁹ See David Plotz, *Luke Skywalker is Gay? Fan Fiction is America’s Literature of Obsession*, SLATE (Apr. 14, 2000), <http://slate.msn.com/id/80225> (adding that Lucasfilm has suppressed Star Wars slash, but allows uncontroversial fan fiction).

⁹⁰ See *id.* (explaining that Lucasfilm feared a lawsuit by fans claiming Lucas stole his or her ideas).

The uncertainty over the status of fan fiction presents copyright scholars with an important lesson regarding the development of creativity in cyberspace. While the formal laws of copyright reveal a set of tools for the unapologetic chilling of appropriative expression in cyberspace, many copyright owners tend to engage in a much more dynamic dialogue with their consumers and permit fan fiction to exist so long as it ensures the purity and control of the original creator. At best, the result is the development of two parallel markets that are both non-rivalrous and build upon each other for creativity – one authorized by copyright law, and another tacitly tolerated by the copyright owner. The problem is that copyright law, as it is formally structured, enables a hierarchic division between the two that permits the latter to be silenced if the expression proves objectionable or problematic, and here is where slash is so vital, and vulnerable, as a result. Its recoding of largely heterosexual male characters by largely female authors represents a transgression that breaks down both barriers and expectations regarding the “proper” performance of gender and sexuality. And yet its vulnerability within the creative enterprises of cyberspace may mean that its rich narratives can be swiftly silenced as a result of the growing influence of copyright over cyberspace.

V. Conclusion

In this Chapter, I have introduced a necessary conversation between two previously discordant areas of law, intellectual property and gender, through exploring female appropriation of narratives within popular culture. As I have argued, slash fan fiction is but just one example

of how greater female audience interactivity can offer us a new world, handing us new lenses with which to view cultural commodities. The themes we have seen within the laws of intellectual property—passive consumers, authorial monopolies, and sovereign products—need no longer dominate our field of vision.

Indeed, just as artists have reminded us for centuries, and as slash writers remind us today, another world is certainly possible—it all depends on the power of the audience and the power of participation. If we are to build a world of gender equality in the production of media, then we must first ensure that the law of intellectual properties guarantee, rather than prohibit, a dynamic and rich degree of audience participation in the process.