

# EVERYTHING I NEEDED TO KNOW: EMPIRICAL INVESTIGATIONS OF COPYRIGHT NORMS IN FANDOM

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By 2007, user-generated content (UGC) platforms like YouTube had reached a level of critical popularity that ushered in obligatory legal hand-wringing. Concerns over the continued popularity of file-sharing and other wholesale copying, even in the wake of Napster’s demise, led to battles over whether the underlying problem was the emerging technology or copyright law itself.<sup>2</sup> However, one possible casualty in the midst of this “copyright crisis” was the growing amount of UGC that was *not* clearly infringing—either original content or derivative works that might fall under fair use.<sup>3</sup> This characteristic, that UGC reflect “a certain amount of creative effort,” was in fact central to its definition as provided by the global economic organization OECD.<sup>4</sup> However, moving beyond original content, there is no longer a bright line between legal derivative works and infringing material.

One component of this crisis was the difficulty that large copyright holders were having in making this distinction; a group of them even created a set of “principles” for UGC that were intended to “foster innovation,” “encourage creativity,” and “thwart infringement”.<sup>5</sup> The principles nodded to “accommodating fair use,” though provided little guidance with respect to how this might be accomplished.<sup>6</sup>

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<sup>2</sup> John Palfrey, Opinion, *The Digital Copyright Crisis*, THE BOSTON GLOBE, September 7, 2004.

<sup>3</sup> LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

<sup>4</sup> Casey Fiesler, Note, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 741 (2008) (citing ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PARTICIPATIVE WEB: USER-CENTERED CONTENT 4 (2007)).

<sup>5</sup> *Id.* (citing USER GENERATED CONTENT PRINCIPLES, <http://ugcprinciples.com/> (last visited Feb. 16, 2008)).

<sup>6</sup> *Id.*

At the time, I found myself perplexed that this was all being presented as if it were some *new* construct, as if the tension between “fostering creativity” and respecting the rights of copyright owners was a brand new problem that emerged fully formed in the wake of new technology. Not only copyright owners and lawyers, but also many others who praised remix as if it were something new, seemed oblivious to the fact that there was a huge community of creators who had been grappling with these exact same questions since long before YouTube—or the internet itself—was so much as a glimmer in a technologist’s eye.<sup>7</sup> After all, by 2007, I had been participating in fan fiction communities for a decade.

Fan fiction is fiction that “rewrites and transforms other stories”<sup>8</sup>—new stories about the continuing adventures of Luke Skywalker, the off-screen romances of Harry Potter—but there are factors that differentiate it from *Star Trek* tie-in novels or from Disney versions of fairy tales. Fan fiction also exists outside the traditional marketplace and is based on an “identifiable segment of popular culture.”<sup>9</sup> In her book *The Fanfiction Reader: Folk Tales for the Digital Age*, Francesca Coppa also defines fan fiction as being written *within* the fan creation community.<sup>10</sup> The *community* aspect of writing and sharing fan fiction (taking place in “fandom”) is critical, and as I will discuss in this essay, becomes hugely important in the context of copyright.

Fan fiction is also only one type of *fanwork*, which also includes fan art (e.g., a painting of Captain Picard) or fanvids (videos that edit together clips from television shows

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<sup>7</sup> Francesca Coppa & Rebecca Tushnet, *How to Suppress Women’s Remix*, 26 CAMERA OBSCURA 131–39 (2011).

<sup>8</sup> FRANCESCA COPPA, *THE FANFICTION READER: FOLK TALES FOR THE DIGITAL AGE* 4 (2017).

<sup>9</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997).

<sup>10</sup> COPPA, *supra* note 8.

and movies, set to music). Fanvids are a particularly striking example in the context of the increased interest in YouTube, and in particular in remix videos, in the mid-2000s.<sup>11</sup> Though better and easier-to-use editing tools and quick and easy distribution made remix videos an important form of UGC that took off quickly, fans had already been creating fanvids for decades by that point.<sup>12</sup> In fact, some were still distributing fanvids on VHS cassettes by the time YouTube came into being.<sup>13</sup>

Given this context, my observations of the hand-wringing over UGC and what many seemed to think was a new category of derivative works had me puzzled. One thought I had was: fans have been creating works just like this for decades, and everything seems to be fine. Is there something that we could learn from this.

## **I. EVERYTHING (I THOUGHT) I NEEDED TO KNOW: LEGAL SCHOLARSHIP**

In 2007 I was a law student, and the next year I published a Note in the *Vanderbilt Journal of Technology & Entertainment Law* titled “Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content.”<sup>14</sup> My question of “what can we learn from this?” turned into a theory—that the strong social norms surrounding copyright in fandom policed behavior and therefore kept it “safe” from copyright holders. In the Note, I concluded that “Fan fiction and copyright have peacefully

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<sup>11</sup> JEAN BURGESS ET AL., *YOUTUBE: ONLINE VIDEO AND PARTICIPATORY CULTURE* (2d ed. 2018).

<sup>12</sup> Coppa & Tushnet, *supra* note 7, at 131 (“It now seems incredible that vidders managed to create and share video for almost thirty years without streaming technology.”).

<sup>13</sup> Coppa & Tushnet, *supra* note 7.

<sup>14</sup> Fiesler, *supra* note 4, at 762.

co-existed for decades, and there is no reason why other types of derivative works cannot continue to do the same.”<sup>15</sup>

The Note traces the history of fanworks and the communities they have created, with an eye towards understanding community norms around copyright through illustrative examples of norm policing. As I wrote then, “Fandoms are extremely close-knit communities, and members protect themselves by operating under a specific set of self-regulating guidelines—their own social norms.”<sup>16</sup> The paper gives examples of fan fiction writers being shamed or ostracized for breaking these norms—for example, by commercializing their work, or by plagiarizing.<sup>17</sup> It also tells the story of Fanlib, the ill-fated attempt of outsiders to capitalize on the popularity of fanworks by trying to create a YouTube-style UGC platform for fan fiction.<sup>18</sup> One of the reasons it failed was that this existing community reacted badly to the attempt to commercialize their work—even if they had the blessing of copyright holders, it went against the very nature of what fan fiction is.<sup>19</sup> As legal scholar Elizabeth Rosenblatt points out, shaming is particularly powerful in intellectual property’s liminal spaces, in the shadow of formal law.<sup>20</sup>

The Note spends little time on a fair use analysis of fan fiction (which many others have done well both before and after this paper was published)<sup>21</sup> but instead focuses on

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<sup>15</sup> Fiesler, *supra* note 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> ANNE JAMISON, *FIC: WHY FANFICTION IS TAKING OVER THE WORLD* 304 (2013); Fiesler, *supra* note 4.

<sup>19</sup> Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 *CINEMA J.* 113 (2009); Fiesler, *supra* note 4.

<sup>20</sup> Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 *DEPAUL L. REV.* 1 (2013).

<sup>21</sup> Mynda Rae Krato, *Fictitious Flattery: Fair Use, Fanfiction, and the Business of Imitation*, 8 *AM. U. INTELL. PROP. BRIEF* 91 (2016); Pamela Kalinowski, *The Fairest of Them All: The Creative Interests of Female*

how the legal uncertainty was performed and negotiated within this community. I used examples of norm policing to make this case, citing countless LiveJournal posts and comment threads as evidence of real fans' behavior and opinions.<sup>22</sup> I also speculated. The paper includes statements like “the possibility that [fanvids] could be removed from public viewing without warning is likely to have a chilling effect on this sort of creative effort”<sup>23</sup> and “it is likely that the reason that there are not more cases like [a writer who was shamed for selling her fan fiction] is not merely fear of traditional copyright enforcement actions, but also fear of social sanctions in the fan fiction community.”<sup>24</sup>

I concluded that the new communities forming around UGC—as well as the copyright owners panicking over them—could learn from the longstanding social norms of fandom.<sup>25</sup> I argued that the norms about non-commercialism and attribution reflected respect for copyright owners, and that the community was extremely good at policing the exact same kind of behavior that copyright holder wanted to prevent. I suggested that if copyright holders were having trouble distinguishing between what kinds of UGC should be permissible, maybe they could simply allow the creators to do it for them. Why

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*Fan Fiction Writers and the Fair Use Doctrine*, 20 WM. & MARY J. WOMEN & L. 655 (2013); Christina Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421 (2006); Tushnet, *supra* note 9.

<sup>22</sup> Fiesler, *supra* note 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 732, 747.

<sup>25</sup> *Id.* Other legal scholars have since made related arguments for the value of social norms in informing copyright policy. See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009); Jacqueline D. Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1 (2010).

shouldn't new forms of UGC peacefully co-exist with copyright as fanworks had for decades?<sup>26</sup>

Following the publication of this paper, I took the unusual step of obtaining a Ph.D. in order to answer that question.

## **II. KNOWING MORE THROUGH ASKING MORE: EMPIRICAL INVESTIGATIONS**

Prior to law school, I studied psychology and then human-computer interaction (HCI), where I conducted research in order to answer questions about the world. As much as I enjoyed legal scholarship, and, in particular, writing the paper described above, I still found myself uneasy with the level of speculation. Phrases like “it is likely that” were frustrating, because there were ways to find out. *Did* fear of social sanctions govern behavior more than fear of copyright enforcement? One way to know is to ask.

The law review note was well received; it was awarded a Burton Award for Legal Writing and has a decent citation count a decade later. It has also had an impact on the community it discussed: it is often included on fan studies bibliographies,<sup>27</sup> and a quote from the paper has been reblogged nearly 13,000 times on Tumblr.<sup>28</sup> However, I still kept coming back to “it is likely that” when I thought about it.

To be fair, I did not enter into a Ph.D. program immediately after law school because I wanted to answer those exact questions. My motivation was more general: I wanted to help bridge law and technology and human

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<sup>26</sup> Fiesler, *supra* note 4, at 761.

<sup>27</sup> *Legal Analysis*, FANLORE, [https://fanlore.org/wiki/Legal\\_Analysis](https://fanlore.org/wiki/Legal_Analysis) (last visited June 12, 2018).

<sup>28</sup> *Fanhackers*, TUMBLR, <http://fanhackers.tumblr.com/post/57738624058/the-idea-of-fan-cultures-or-fandoms>. (last visited Oct. 5, 2018).

behavior. I saw in legal scholarship a lot of speculation about how technology and law impact people, and from my time studying HCI, I saw little engagement in that field with how the law might mediate people’s relationships with technology. I wrote a personal statement to this effect, and was accepted into a Ph.D. program in Human-Centered Computing (HCC) at Georgia Tech. This is a broad field that draws from computer science, psychology, sociology, communication, and design, though my specialized area was social computing—concerning how people interact with each other, mediated by technology.

Though my research went in some other directions as well, I spent about five years conducting a series of research studies about how fan creators make decisions about what they can and cannot do in a legally gray area, how it impacts the ways they use technology and how they interact with each other, and what these things suggest for how we might design technologies and policies.<sup>29</sup>

Over the course of this research, I found that many of the ideas of the original law review note were completely validated, and that one was completely wrong.

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<sup>29</sup> Casey Fiesler, *Chapter 6: Copyright Norms, Formation, and Enforcement*, in *THE ROLE OF COPYRIGHT LAW IN ONLINE CREATIVE COMMUNITIES: LAW, NORMS, AND POLICY 107* (2015) (Ph.D. dissertation, Georgia Institute of Technology), <https://caseyfiesler.com/dissertation/>. This research was funded by a grant from the Computer & Information Science & Engineering (“CISE”) directorate of the National Science Foundation, titled “Copyright and Online Communities: An Empirical Study of Social Norms and User Conceptions” with my PhD advisor Amy Bruckman as the Principal Investigator. *Award Abstract #1216347*, NATIONAL SCIENCE FOUNDATION, [https://www.nsf.gov/awardsearch/showAward?AWD\\_ID=1216347](https://www.nsf.gov/awardsearch/showAward?AWD_ID=1216347) (last visited Oct. 5, 2018).



**A. Copyright (Mis)conceptions and Chilling  
Effects**

**1. Understandings of Fair Use**

My first research project was an exploratory interview study of participants who identified as remixers or fan creators. These interviews were semi-structured and intentionally open-ended,<sup>30</sup> in order to probe understandings and interpretations of copyright law surrounding their creative work.<sup>31</sup> When conducting the interviews, I never used the term “fair use” until the very end (when I asked if they were familiar with it, if they had not brought it up themselves). However, in analyzing the data,<sup>32</sup> fair use became a clear framework for organizing our findings—how their understandings of what is allowed and not allowed tracked (or didn’t track) to the U.S. fair use doctrine. Interestingly, both understandings and misconceptions were extremely consistent across our participants.

The resulting paper based on this study organizes findings by each of the fair use factors, going through how well our participants’ understandings fit to them.<sup>33</sup> Some matched very well—participants even using words like “transformative” to describe what made certain works okay legally, or talking explicitly about market harm in terms of “whether you’re hurting anybody.” However, there were also common misconceptions, the two most prevalent being: (1) that commerciality is the sole deciding factor (if you sell it, it’s not okay; if you don’t, it is), and (2) that attribution is an explicit factor. These may seem familiar, because norms

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<sup>30</sup> IRVING SEIDMAN, INTERVIEWING AS QUALITATIVE RESEARCH (1998).

<sup>31</sup> Casey Fiesler & Amy S. Bruckman, *Remixers’ Understandings of Fair Use Online*, in PROCEEDINGS OF THE ACM CONFERENCE ON COMPUTER-SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING (2014).

<sup>32</sup> Virginia Braun & Victoria Clarke, *Using Thematic Analysis in Psychology*, 3 QUALITATIVE RES. PSYCHOLOGY 77 (2006).

<sup>33</sup> Fiesler & Bruckman, *supra* note 31.

around commerciality and attribution were the dominant ones identified in the law review note from examples of policing.<sup>34</sup>

Another finding of this work was that decisions were rarely based interpretations of the actual law. There were nuanced ethical judgments around things like distinguishing between commerciality and “profiting,” and the potential for “market good” (arguing that fanworks not only don’t hurt the copyright holder, but actively help their sales). We also identified that one of the reasons decisions could be difficult was they might require reconciling differences in interpretations of the law, ethical judgments, and community norms.

In this work, I also started to see clear evidence of chilling effects—one of the “it is likely that’s” of the law review note. My favorite participant quote came from this study:

For vidding [creating fan videos], I [post to] my personal journal just because of the hassles of the copyright violations associated with viding . . . because YouTube and sites like that have all those things where they can take down your video. Once YouTube took down one of my vids because of copyright violations. Just because I know that I’m not violating the law doesn’t mean that they know that... I really wish I could share with more people.<sup>35</sup>

In addition to validating some of the intuitions I had about social norms, this study solidified two things: (1) there are misconceptions about copyright and fair use in particular; and (2) unease about the law is causing chilling effects—like the fanvidder above who chose not to make her work as public as she might have, for fear of copyright enforcement. Francesca Coppa and Rebecca Tushnet’s

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<sup>34</sup> Fiesler, *supra* note 4.

<sup>35</sup> Fiesler & Bruckman, *supra* note 31.

paper “How to Suppress Women’s Remix” points towards similar copyright-related fears as contributing to the erasure of fans (and in particular, women) from the history of remix.<sup>36</sup>

## 2. Copyright Misinformation

In order to explore the problem of misconceptions further, the next study was a content analysis of public conversations about copyright in forums for online creative communities like DeviantArt and YouTube.<sup>37</sup> Almost every discussion about copyright was rooted in the problems it caused—for example, dealing with the consequences of being accused of infringement, or simply not understanding the rules. One YouTuber, after receiving a DMCA takedown, asked if they could go to jail. Others asked questions about gray areas of copyright law, expecting bright line rules. We concluded that most of the challenges presented by copyright law could be explained by a lack of knowledge about legal or policy rules, including breakdowns in expectations for how the platform itself handled copyright.

This data also revealed a contributing factor to copyright misconceptions—bad or misleading information. For example, in response to a question about the permissibility of a remix video, one commenter responded that there is “no such thing as fair use . . . it’s called stealing.”<sup>38</sup> Many other threads revealed flat-out incorrect statements about the law. Though this kind of trace data could not tell us how these situations turned out or how it might have impacted those participating in the threads, a

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<sup>36</sup> Coppa & Tushnet, *supra* note 7.

<sup>37</sup> Casey Fiesler, Jessica Feuston & Amy S. Bruckman, *Understanding Copyright Law in Online Creative Communities*, in PROCEEDINGS OF THE 18TH ACM CONFERENCE ON COMPUTER-SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 116 (2015).

<sup>38</sup> *Id.*

simple “thanks!” in response to bad information implies that it may have been taken at face value.

This data also showed specific instances of chilling effects, and highlighted the problem of *conflicting* rules, such as platform policy or even social norms providing a different answer than actual law. Though much of the time, platform policy was also completely opaque.

### 3. The Problem with Policy

Given this problem of misinformation, where *should* content creators go to find out what they can and cannot do? An obvious answer might be the rules of that particular platform; what does YouTube’s Terms of Service (TOS) tell you? However, even reading it might not provide a clear answer. As of June 2013, when the research described here was conducted, YouTube’s TOS was almost 4,000 words and written at a reading level of a college senior.<sup>39</sup>

Within HCI, there has been a fair amount of research concerning the usability of privacy policies and TOS, highlighting their complexity and difficult reading levels,<sup>40</sup> inconsistency across platforms,<sup>41</sup> how infrequently they are read,<sup>42</sup> and that even legal experts have variance in

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<sup>39</sup> Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, in PROCEEDINGS OF THE 19TH ACM CONFERENCE ON COMPUTER-SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1450 (2016).

<sup>40</sup> Carlos Jensen & Colin Potts, *Privacy Policies as Decision-Making Tools: An Evaluation of Online Privacy Notices*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 471 (2004).

<sup>41</sup> Jessica A. Pater et al., *Characterizations of Online Harassment: Comparing Policies Across Social Media Platforms*, in PROCEEDINGS OF THE ACM CONFERENCE ON SUPPORTING GROUP WORK 369 (2016).

<sup>42</sup> Nathaniel Good et al., *Noticing Notice: A Large-Scale Experiment on the Timing of Software License Agreements*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 607 (2007); Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing*

interpreting them.<sup>43</sup> Building on this work, we analyzed the copyright licenses in the TOS of thirty UGC sites. For the TOS themselves, we found similar levels of incomprehensibility; a number of sites had policies that climbed past 5,000 words, and nearly all of them were written at a college reading level (with two that required Ph.D.'s). With respect to the licenses, they were highly inconsistent across sites, suggesting that, for example, if someone understands what rights Instagram might have in their content, this will not tell them anything about Flickr's license.

We also conducted a survey of people who use these platforms, asking them what rights they thought the platforms had in their content, and what rights they *should* have. The troubling finding from this study was that the same terms that people were most uncomfortable with (right to transfer, right to modify, and irrevocable licenses) were also those that were the most surprising—that is, most people thought they *weren't* in place when they actually were.

Though this study focused on copyright licenses that govern how platforms can make use of UGC from its users as opposed to how those users can make use of others' content in their UGC, it highlighted the fact that platform policies are unlikely to provide much guidance for content creators trying to make decisions about copyright. Of course, it could be worse—what if official policies, even if understandable, intentionally chilled remix?

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*a Law and Economics Approach to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014).

<sup>43</sup> Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding*, 30 BERKELEY TECH. L.J. 39 (2015).

#### 4. That’s How the Law Works

In 2011, YouTube unveiled its “Copyright School” video,<sup>44</sup> which users receiving copyright-related strikes on their account would be required to watch. As one commentator pointed out, though this format may seem like “mandatory traffic school after you get a ticket,” it is actually more like “mandatory traffic school after someone calls the police station and says they saw you run a red light.”<sup>45</sup>

Given the problems I just discussed related to the general uselessness of platform policies, the idea of an easy-to-understand video (this one featuring friendly woodland creatures) to explain copyright policy seems like a good one. The cartoon’s description of what copyright is and why it is important is just fine—until the topic of remix arises.

In the video, when the protagonist (Lumpy) wonders about remix, a voiceover informs him that remix might require permission from the copyright owner, unless the new work is a fair use. The voiceover then proceeds to rattle off text from the fair use statute as it appears on the screen and *literally crushes* Lumpy—ending with the suggestion that Lumpy “consult a qualified copyright attorney.”<sup>46</sup>

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<sup>44</sup> YouTube Spotlight, *YouTube Copyright School*, YOUTUBE (Mar. 24, 2011), <https://www.youtube.com/watch?v=InzDjH1-9Ns>.

<sup>45</sup> Jodie Griffin, *My First Day at (YouTube Copyright) School*, PUBLIC KNOWLEDGE (Apr. 15, 2011), <https://www.publicknowledge.org/news-blog/blogs/my-first-day-youtube-copyright-school>.

<sup>46</sup> YouTube Spotlight, *supra* note 44, at 3:01.



**Figure 1.** A screengrab from YouTube’s Copyright School video.

The video goes on to explain the DMCA counter-notice process, highlighting that submitting false information will result in account termination, and that “if you misuse the process, you could end up in court.”<sup>47</sup> As a gavel appears out of thin air to hit Lumpy on the head, the voiceover announces: “You would get in a lot of trouble. That’s how the law works.”<sup>48</sup>

From making fair use sound like an impenetrable concept that will never be understood, to suggesting that amateur content creators hire lawyers, to emphasizing legal consequences—all of these things appear to be designed to discourage remix. If a remixer were not already worried about copyright law, they may be after watching this video.

This video as a representation of YouTube’s policy makes it no surprise that the fan creators and remixer I spoke to over the course of my research considered YouTube to be the scariest place to post content. The fanvidder quoted above, who no longer shares her work on YouTube, is representative of many more who are experiencing chilling

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<sup>47</sup> *Id.* at 3:35.

<sup>48</sup> *Id.* at 3:41.

effects not only because of their confusion about the law but because of the possible consequences of a wrong decision. Therefore, the policies and practices (such as the lack of fair use consideration in their automated takedowns)<sup>49</sup> of YouTube, coupled with the existing, longstanding norms around secrecy in fandom,<sup>50</sup> has led to many fanvidders in particular using complex strategies to mitigate perceived risks.<sup>51</sup> However it is also important to note that some of these strategies include education to learn more about their rights, as well as advocacy.<sup>52</sup> My work has also shown that remixers who understand more about copyright law are more confident in their rights and less likely to have their expression chilled.<sup>53</sup>

One conclusion of my research was that chilling effects interact strongly with information problems and formal policies, both of which could be improved by the platforms themselves. I made a set of concrete recommendations for platforms drawn from these findings: (1) providing plain language explanations of copyright policies; (2) monitoring user concerns and questions about copyright; (3) providing dedicated spaces for legal conversations and questions; (4) considering existing social norms in the creation of policies; and (5) scaffolding copyright knowledge in the design of content uploading tools.<sup>54</sup> In other words, in a world in which copyright law is slow (and difficult) to change, we might find helpful solutions at the level of technology and community.

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<sup>49</sup> Leron Solomon, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237 (2015).

<sup>50</sup> Coppa & Tushnet, *supra* note 7.

<sup>51</sup> Katharina Freund, “Fair use is legal use”: *Copyright negotiations and strategies in the fan-vidding community*, 18 NEW MEDIA & SOC’Y. 1347 (Oct. 27, 2014).

<sup>52</sup> *Id.*

<sup>53</sup> Fiesler & Bruckman, *supra* note 31.

<sup>54</sup> Fiesler, Feuston, & Bruckman, *supra* note 37.



**B. Social Norms and Enforcement**

Though the importance of social norms was a theme through this research, a second interview study was focused entirely on understanding (1) what the social norms for copyright are in fan creation communities, and (2) how those norms are enforced.<sup>55</sup> In large part, my findings tracked to intuitions I had first expressed in the law review note, though with more nuance.

The first major theme is the norm of attribution—giving credit where credit is due. Though this concept is also important in other UGC communities,<sup>56</sup> it is critical in fandom, which functions as a gift economy and where “payment in credit” is the norm.<sup>57</sup> This norm largely focuses on the cardinal sin of plagiarism, as well as the importance of crediting other fan creators for inspiration, though the common practice of using disclaimers (“these characters are owned by X”) also comes in part from a place of wanting attribution to be clear. There were related norms around permission—in particular, that despite this rule having no grounding in law (fair use is fair use), it was proper etiquette to ask permission of another fan creator before building upon their work.<sup>58</sup>

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<sup>55</sup> Fiesler, *supra* note 29.

<sup>56</sup> Nicholas Diakopoulos et al., *The Evolution of Authorship in a Remix Society*, in HT ‘07: PROCEEDINGS OF THE EIGHTEENTH CONFERENCE ON HYPERTEXT AND HYPERMEDIA 133 (2007); Andrés Monroy-Hernández et al., *Computers Can’t Give Credit: How Automatic Attribution Falls Short in an Online Remixing Community*, in CHI ‘11: PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 3421 (2011); June Ahn et al., *Youth Identities as Remixers in an Online Community of Storytellers: Attitudes, Strategies, and Values*, 49 PROC. AM. SOC’Y. INFO. SCI. & TECH. 1 (2012).

<sup>57</sup> Hellekson, *supra* note 19; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, LAW & CONTEMP. PROBS. (2007).

<sup>58</sup> Fiesler, *supra* note 29; Fiesler, Feuston, & Bruckman, *supra* note 37.

The norm against commerciality is perhaps the strongest in fandom, as I wrote in the 2008 note. It comes in part from wanting to ensure that fanworks are most likely fair use, but also from the strong “gift culture” of fandom.<sup>59</sup> For example, *Fifty Shades of Gray*, which started out as *Twilight* fan fiction, was not in danger of being labeled copyright infringement (since it most likely took nothing copyrightable from the original), but the fact that the author commercialized work that was originally part of this gift culture was still frowned upon.<sup>60</sup>

Interestingly, some of the exact same examples of norm policing that I found online and used to support my arguments in the 2008 note also appeared in my interviews. These examples of fan fiction writers being publicly shamed for breaking norms around plagiarism or commercialization have an air of legend to them now. I also heard stories that reflect the practices of newer platforms—for example, use of the “art theft” tag on Tumblr to shame users who repost fan art without attribution.

What became abundantly clear from these interviews was that another one of my “likely that’s” from 2008 was also accurate: fear of social sanctions *is* a stronger deterrent than fear of copyright law in these communities. With the exception of fanvidding in particular (mostly because of YouTube’s quick-to-trigger takedowns), fan creators describe their decision-making process far more in terms of community norms, which in many ways track to the law, but not entirely.<sup>61</sup> Their power comes from social pressure, but in some ways the policing isn’t even *needed*—fan creators follow these norms because they reflect the values of their community.

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<sup>59</sup> Hellekson, *supra* note 19.

<sup>60</sup> Bethan Jones, *Fifty Shades of Exploitation: Fan Labor and Fifty Shades of Grey*, 15 TRANSFORMATIVE WORKS & CULTURES (2014).

<sup>61</sup> Fiesler & Bruckman, *supra* note 31.

In Elinor Ostrom's discussion of how social norms evolve in response to collective action problems, she posits that norms often have more staying power than cooperation enforced by externally imposed rules,<sup>62</sup> which also mirrors Robert Ellickson's argument that social norms are most efficient at filling in gaps where law is absent.<sup>63</sup> However, unlike intellectual property's "negative spaces" where relevant laws are entirely absent,<sup>64</sup> fanworks and other remix exist within the purview of fair use. Therefore, the situation is not (as in Ellickson's cattle farmers) that social norms fill in the gaps when law is absent,<sup>65</sup> but instead that they clarify rules for gray areas where law is confusing. In other words, fan creators operate in a space in which there are externally imposed legal rules that are poorly defined and inconsistently applied. In Ostrom's view, this could lead to both difficulty in norm formation and an increase in deviant behavior.<sup>66</sup> However, my work shows that within fan creation communities, this does not seem to be the case. Instead, there exists a specific set of social norms related to copyright that are effectively enforced by the community. Supported by the fact that group membership can be important for norm formation,<sup>67</sup> my research suggests that the effective formation and enforcement of norms is in large part due to the strong ties and sense of community identity within fandom.

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<sup>62</sup> Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137 (2000).

<sup>63</sup> Robert C Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L.R. 623 (1986).

<sup>64</sup> Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011).

<sup>65</sup> Ellickson, *supra* note 63.

<sup>66</sup> Ostrom, *supra* note 62.

<sup>67</sup> Michael A. Hogg & Scott A. Reid, *Social Identity, Self-Categorization, and the Communication of Group Norms*, 16 COMM. THEORY 7 (2006).

This brings me to the fundamental flaw in my argument in 2008. I concluded there was no reason why communities around other forms of UGC could not form their own norms and co-exist in relative peace with copyright law as fandom had for so long.<sup>68</sup> However, there *is* a reason. By talking to people in addition to looking at their online interactions, I was able to get at *why* these norms exist and how they actually function in the community.

Fandom operates the way it does in part because it is a longstanding, close-knit community. Norms have had a long time to form, and they also weather technological changes and migrate across platforms.<sup>69</sup> It is also cohesive in part because of decades of valuing secrecy; even though “geek culture” is becoming more mainstream, including the type of fandom participation that is more about curation than transformation, fan creators for the most part are interested in sharing with each other more than with the outside world. Less visibility means less risk, but it also means that the community stays close-knit enough to maintain its values.

Though I still agree with my original suggestion that copyright holders could learn a lot from fandom—from its norms and how they make decisions about what types of reuse are acceptable—I am less optimistic that other communities could replicate their particularly successful culture of self-policing for this reason.

### III. TEN YEARS LATER

In reflecting on the potential prescience of my 2008 note, the first thing that comes to mind is that the UGC-fueled copyright “crisis” has not led to the downfall of the

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<sup>68</sup> Fiesler, *supra* note 4.

<sup>69</sup> Casey Fiesler, Shannon Morrison & Amy S. Bruckman, *An Archive of Their Own: A Case Study of Feminist HCI and Values in Design*, in PROCEEDINGS OF THE 2016 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2574 (2016).

media industry. While YouTube in particular continues to have a problem with creating an environment that can both protect copyright holders and respect transformative creativity (and will likely continue to do so, as use continues to climb)<sup>70</sup>, noncommercial fanworks do not seem to be under increased scrutiny. In fact, a major win for fanvidders in particular is the DMCA § 1201 exemption for non-commercial remix videos, which though still reliant on a fair use judgment, represented a huge step forward in terms of legal advocacy for transformative works.<sup>71</sup>

The giant leap forward that occurred shortly after my note was published was the emergence of the Organization for Transformative Works (OTW), a non-profit devoted in part to advocating for the legal rights of fan creators. OTW participated in that 2009 DMCA exemption proceeding, and the legal committee (of which I am a member) frequently writes amicus briefs and other policy documents in addition to creating educational materials and engaging with fans who have questions about copyright.<sup>72</sup>

OTW also formed in conjunction with other projects: an open access journal on transformative works and cultures,<sup>73</sup> a wiki (Fanlore) dedicated to preserving fan history,<sup>74</sup> and a fan fiction archive that was developed and is run entirely by fans. The last, Archive of Our Own (AO3), was a massive undertaking that has been incredibly

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<sup>70</sup> Monica Anderson & Jinjing Jiang, *Teens, Social Media & Technology 2018*, PEW RESEARCH CENTER (May 31, 2018), <http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/>.

<sup>71</sup> 17 U.S.C. § 1201 (2012); Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889 (2010).

<sup>72</sup> *Legal Advocacy*, ORGANIZATION FOR TRANSFORMATIVE WORKS, <http://www.transformativeworks.org/legal/> (last visited Oct. 5, 2018).

<sup>73</sup> TRANSFORMATIVE WORKS AND CULTURES, <http://journal.transformativeworks.org/index.php/twc> (last visited Oct. 5, 2018).

<sup>74</sup> FANLORE, <http://fanlore.org> (last visited Oct. 5, 2018).

successful, currently with over 1.5 million users and millions of individual works.<sup>75</sup>

Following my dissertation work, I conducted an interview study of developers, staffers, and users of AO3.<sup>76</sup> I found that one of the major success factors of the platform is that the developers made a conscious effort to bake the existing norms of the community *into* both its design and policies.<sup>77</sup> For example, there are design features that account for attribution norms, even nudging towards a “it’s okay to remix remixes” value.<sup>78</sup> Their TOS is also far more readable than most UGC platforms,<sup>79</sup> and their mission statement makes this clear statement: “We believe that fanworks are transformative and that transformative works are legitimate.”<sup>80</sup>

Much of the research I described earlier focused on the information deficit in creative communities when it comes to copyright. This kind of transparency is a step in the right direction—not only having more clear policies like the one on AO3, but having a clear statement of values. Aufderheide and Jaszi argue in the book *Reclaiming Fair Use* that because judges often consult patterns of use in surrounding communities of practice when making fair use determinations, it would be in the best interest of communities to articulate their own understandings, which has worked well in communities such as documentary film makers.<sup>81</sup>

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<sup>75</sup> ARCHIVE OF OUR OWN, <http://archiveofourown.org> (last visited Oct. 5, 2018).

<sup>76</sup> Fiesler, Morrison, & Bruckman, *supra* note 69.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Fiesler, Lampe, & Bruckman, *supra* note 39.

<sup>80</sup> *About the OTW*, ARCHIVE OF OUR OWN, <https://archiveofourown.org/about> (last visited Oct. 5, 2018).

<sup>81</sup> PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

The idea for AO3 was for the community to build something “of their own,” that they had control over, to avoid reliance on existing platforms that might be unfriendly to their practices or exploitation by new platforms like Fanlib. Through AO3 and OTW, fan creators have both found their own space to maintain the close-knit community they value, and an advocacy voice for making certain they are not forgotten.

#### IV. CONCLUSION

The novelty in reflecting on my note 10 years later is in part from the absurdity of spending six years in a PhD program to study the same topic empirically. It is interesting to see how much held up, as well as that fundamental flaw in my reasoning at the time. The subsequent history of fan communities in the light of the emergence of OTW and increased legal advocacy also lends a sense of “look how far we’ve come.”

I also think that the piece’s position as a launch pad for empirical inquiry is an interesting case study of how we can bridge legal scholarship and other disciplines. I can imagine many great law review articles that might raise questions that could be explored by sociologists, psychologists, or computer scientists. Though in recent years there has been an uptick in empirical work in intellectual property scholarship,<sup>82</sup> there is still so much more that could be done through collaboration. Whereas I do not necessarily hope that this essay will encourage anyone to get a PhD in order to validate claims in a law review article, I *do* hope that it might inspire reflection about what else we might “need to know.”

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<sup>82</sup> For an example of qualitative research (interviews) similar to those conducted in my work, see JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2014).

