

ECONOMIES OF DESIRE: FAIR USE AND MARKETPLACE ASSUMPTIONS

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ABSTRACT

At the moment that “incentives” for creation meet “preferences” for the same, the economic account of copyright loses its explanatory power. This piece explores the ways in which the desire to create can be excessive, beyond rationality, and free from the need for economic incentive. Psychological and sociological concepts can do more to explain creative impulses than classical economics. As a result, a copyright law that treats creative activity as a product of economic incentives can miss the mark and harm what it aims to promote. The idea of abundance—even overabundance—in creativity can help define the proper scope of copyright law, especially in fair use. I explore these ideas by examining how creators think about what they do. As it turns out, commercially and critically successful creators resemble creators who avoid the general marketplace and create unauthorized derivative works (fanworks). The role of love, desire, and other passions in creation has lessons for the proper aims of copyright, the meaning of fair use, and conceptions of exploitation in markets.

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INTRODUCTION

As the Supreme Court has explained, “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”¹ But if that economic philosophy is only partially correct as an empirical matter, the implications for copyright are substantial. Copyright’s incentive model largely bypasses a persuasive account of creativity that emphasizes a desire for creation, grounded in artists’ own experiences of creation.

At the moment that “incentives” for creation meet “preferences” for the same, the economic account of copyright loses its explanatory power. This piece explores the ways in which the desire to create can be excessive, beyond rationality, and free from the need for economic incentive. Psychological and sociological concepts can do more to explain creative impulses than classical economics. As a result, a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote. The idea of abundance—even overabundance—in creativity can help define the proper scope of copyright law, especially in fair use. I explore these ideas by examining how creators think about what they do. As it turns out, commercially and critically successful creators resemble creators who avoid the general marketplace and create unauthorized derivative works (fanworks) when they talk about why and how they create.² Their similarities in motivation and inspiration help explain why exclusive rights must be carefully limited if we are to achieve the creativity to which a free and vibrant society aspires.

Several notes of caution are in order: First, though my discussion here focuses on creators’ own accounts of their creative processes, I am not arguing that creative impulses exist in isolation from social structures, any more than creators themselves do. Rather, the individual reports of how creativity is experienced as unpredictable,

1. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

2. See *infra* Part IIA-B.

tyrannical, obsessive, and joyful are consistent with the thesis that creativity arises from unplanned and stochastic encounters with the world around us.³ One reason that economic narratives are so limited is that they cannot tell us how preferences to create are shaped, nourished, or crushed by the social structures that inevitably frame all human interaction.

Second, I am not arguing that extrinsic incentives are irrelevant or disrespectable, whether they are monetary or nonmonetary (reputation is probably the most common nonmonetary extrinsic motivation dissected in the literature on copyright and creativity).⁴ Incentives do matter, especially for intermediaries—a topic to which I will return—and even if they didn't, the availability of rewards, some of which are generated by copyright, would still affect the extent to which some creators could afford to satisfy their preferences to create. What I aim to do is draw attention to the lived experience of many creators, which is (and always has been) richer and messier than the language of incentive can accommodate. Desire, love, pleasure: these are concepts we need to theorize creatively, even if the law has difficulty accommodating them. Once we recognize that copyright's abstract incentive story bears little relationship to the reality of much creative practice, we can better appreciate what copyright can, and cannot, do for authors.

Part I briefly canvasses the standard economic incentive-based story of copyright and a few of its discontents. Part II offers some thicker accounts of creative experience, focusing on creativity as a need that, like love, often strengthens as it becomes more familiar. Desire, not calculation, drives much creative practice. Part III looks at a few implications for copyright doctrine, including fair use, where questions of passionate response to existing works often get addressed.

3. See generally Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (arguing that creativity emerges from a cultural landscape of encounters not reducible either to economic or rights-based theories of the genesis of creative work).

4. See *infra* note 18.

I. THE OFFICIAL STORY: “NO MAN BUT A BLOCKHEAD EVER WROTE,
EXCEPT FOR MONEY”⁵

Justices of the Supreme Court, like most lawyers, are formally committed to copyright’s incentive story, which is elegant and simple: “copyright law serves public ends by providing individuals with an incentive to pursue private ones.”⁶ Prominent academic accounts of copyright law likewise accept and elaborate on incentive theory to explain why authors create.⁷ At its extreme, incentive theory posits that maximum incentives require maximum control:

The fundamental premise of our copyright law is that the best way to encourage the creation of valuable works is to let authors capture the market value of those works. This means that even if we don’t want to give the Dr. Seusses of the world power to enjoin uses that offend them, we do want to protect their ability to share in *all* the profits that their work gives rise to.⁸

There are a number of problems with this account even on its own terms. One of the biggest is that rights don’t mean payment. There is little hard evidence about the relationship between copyright and creativity. What empirical evidence exists does not engender

5. JAMES BOSWELL, 3 BOSWELL’S LIFE OF JOHNSON 19 (G. Hill ed., 1934), *quoted in* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

6. Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

7. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 331-32 (1989); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997).

8. Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 524 (1999) (emphasis added). Shyamkrishna Balganeshe summarizes this line of reasoning:

[Copyright’s] purpose lies solely in encouraging creativity [T]he incentive provided by copyright’s promise of exclusivity is also thought to correlate directly with the overall production of creative expression.... The linear conception thus implies that there exists “no good reason” *within the very idea of incentives* (the model’s only frame of reference) for “why copyrights should not cover everything and last forever.”

Shyamkrishna Balganeshe, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1579 (2009) (quoting Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002)).

confidence that increases in copyright protection spur creativity.⁹ A significant factor in this failure of incentive is that, regardless of the strength of protection, it is the likelihood of success in the market—a highly unpredictable variable, and one that law can do little if anything to affect—that is key to whether new authors reap rewards from creating works.¹⁰

Separately, Mark Lemley and Brett Frischmann, among others, have compellingly criticized the extreme control-everything version of copyright theory. Positive externalities or “spillovers” and free riding are a pervasive, beneficial, and necessary part of markets of all sorts, including intellectual property markets.¹¹

I will not restate these objections here. My aim is to show how easily, using the language of economics, monetary incentives come to be labeled both necessary and sufficient for creativity. For example, reacting to the explosion of uncompensated, uncontrolled creativity on the Internet, Robert Merges proposes to protect that creativity by adding property rights.¹² In this account, people are acting against their best interests, failing to notice that the proper incentive structure is not in place. The current level of

9. See, e.g., Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty* 4 (Case Research Paper Series in Legal Studies, Working Paper No. 09-20, 2009), available at <http://ssrn.com/abstract=1410824> (“[S]tatistically, there is no uniform or fully predictable relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general.... [T]he data suggest[] that these relationships may be essentially random.... So while increasing copyright protection may increase the rewards available to authors, it does little to change their incentives overall.”).

10. See Jessica Litman, *The Copyright Revision Act of 2026*, 13 MARQ. INTELL. PROP. L. REV. 249, 252 (2009) (“In the real copyright system, though, writers, artists, musicians, and filmmakers face daunting obstacles in searching for opportunities to write, paint, play, or film anything the public will see.... Even when creators succeed in publishing a book, cutting an album, placing an article, or selling a screenplay, ... they typically earn only a small share of the proceeds of the copyright in their work.”); Ku et al., *supra* note 9, at 33-34.

11. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

12. Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1880, 1882 (2009) (proposing “awarding some form of intellectual property (‘IP’) to large groups of dispersed creators” because “[t]his form of effort is not well-accounted for in our legal system” and “labor ought to be rewarded with a property right”). Though one could read this as a rights-based account, Merges makes clear that his framework is economic. See *id.* at 1184 (“Individual control of economic assets as a general organizing principle makes as much sense when those assets are digital as when they are industrial or agricultural.... As far as we can tell, for the most part individual ownership and control are as important now as ever.”).

nonpropertized creativity is simply an anomaly, one that would be better served by being brought within copyright's control.¹³

Other economically-minded copyright reform proposals partake of the same monetary-incentive-based assumptions. Judge Alex Kozinski, an influential judicial voice on intellectual property matters, and Christopher Newman have proposed to minimize injunctions in copyright cases by (1) eliminating the fair use doctrine in cases of unauthorized derivative works, but (2) instead of granting injunctions, requiring parodists and other fair users to share the profits attributable to the use of the original's copyrighted elements.¹⁴ They argue that there should be no difference in the treatment of unauthorized commercial and noncommercial works.¹⁵ Yet their solution requires, as a baseline assumption, that profits will routinely be available. If many unauthorized derivative works are noncommercial and there is no money to pay the copyright owner, those works will be suppressed.¹⁶

13. *Id.*

14. See Kozinski & Newman, *supra* note 8, at 525-26. As Jonathan Fox notes, Kozinski and Newman, in perhaps their most triumphant assertion of law-and-economics reasoning over reality, worry that fair use law "does not maximize utility since it fails to give authors and publishers any incentive to produce the kinds of famous works that inspire parody." Jonathan M. Fox, *The Fair Use Commercial Parody Defense and How To Improve It*, 46 INTEL. PROP. L. REV. 619, 638 (2006) (citing Kozinski & Newman, *supra* note 8, at 525); see also Kozinski & Newman, *supra* note 8, at 525 ("[P]eople do write with the goal of being parodied, indirectly—because they write with the goal of becoming the kind of success that attracts parody. The value of those parodies, therefore, ought to be reflected somehow in the original author's compensation.... By rewarding [publishers] for publishing writers whose works are popular enough to spawn parody, we give them the means to find and support other potentially valuable writers as well."). Given that authors and publishers routinely think more of their productions than the rest of the world does, this reasoning is not incentive-based so much as it relies on what Mark Lemley criticizes as a naïve theory of "if value, then right." Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 533 n.49 (2003).

15. Kozinski & Newman, *supra* note 8, at 528 (discussing noncommercially motivated publishers, though only in the context of ideologically motivated participants in a commercial marketplace; arguing that there should be no difference between commercial and noncommercial works in assessing infringement).

16. See *id.* at 525 (injunctions should only be granted when damages would be "inadequate"); *id.* at 526 (proposing to award a proportion of fair users' profits, or damages to the copyright owner's profits); *id.* at 527 (proposing no award unless there are profits or damages, which means that "commercial publishers" would only infringe when it was efficient). In fact, the presumptions and burdens of proof they propose would put noncommercial creators—unlikely to be represented by counsel—at significant risk:

If you want to make pornographic cartoons starring Mickey Mouse, you'd better be sure you can convince a court that this constitutes critical evaluation of

What about individual variations in creativity? No matter how much money J.K. Rowling makes, very few people have the ability to write the next *Harry Potter* series. The conventional theory treats capacities and motivations to create as exogenous variables—tastes, or preferences, which affect individual responsiveness to copyright’s incentives, but are otherwise not amenable to analysis.¹⁷

Even prominent proponents of limiting copyright have focused more on ways in which nonmonetary incentives can replace money than on creators’ perspectives on the sources of inspiration and spurs to creativity.¹⁸ As Tom Bell suggests, economically minded theorists interested in nonmonetary incentives have remained largely uninterested in thicker accounts of creative motivation: “We need not specify what motivates ... authors [who share their works for free or for nominal prices] We need only observe that ... non-monetary incentives sometimes suffice to inspire authorship.”¹⁹ Copyright restrictionists have given most attention to the ways in which monetary incentives can compete with and crowd out certain important nonmonetary incentives.²⁰ But incentives are

Disney’s work. If not, you’ll be liable for any damages Disney can prove, and subject to injunction if it looks like you can’t pay up.

Id. at 529.

17. Note, *Designing the Public Domain*, 122 HARV. L. REV. 1489, 1498 (2009) (“Most economic analyses of information production and regulation account for intrinsic motivation by assuming that it is ‘an exogenously given constant’ and may thus be disregarded.” (quoting Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVEYS 589, 591 (2001))). For a good summary of the way in which conventional economic theory sets preferences aside as exogenous, see Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 325-27 (2008).

18. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 189 (2008) (“Assume a random distribution of incentive structures in different people ... [I]t just does not matter why they do it. In lots of cases, they *will* do it. One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and a fourth because he has to solve a particular problem anyway for his own job and loses nothing by making his hack available for all. Each person has their own reserve price, the point at which they say, ‘Now I will turn off *Survivor* and go and create something.’”); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 42, 58 (2007) [hereinafter Lastowka, *Digital Attribution*] (arguing that copyright law should be reconfigured to support reputation-based incentives as well as monetary incentives).

19. Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841, 851 (2008).

20. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 92-96 (2006) (discussing the effects of different incentives and summarizing evidence of crowding out); John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 214-15 (2008) (“[A]mateur creators

still dominant, with occasional nods to preferences, which are still treated as inherent and static properties of authors.²¹

Anne Barron has recently called attention to the bizarre consequences of treating creative motivation as exogenous in copyright specifically.²² In economic theory, the meaning of the resulting works is irrelevant:

[T]he writer who churns out formulaic potboilers for no other reason than to pay her rent is indistinguishable—*qua* economic actor—from the journalist who seeks through her works to enrich political debate, the scholar who advances a theory in the hope of convincing others of its explanatory power, or the poet who endeavours through words to transfigure others' imaginative horizons.²³

The scientist might have been a journalist, if only her internal utility calculus and/or the relative rewards from the two fields differed enough. But the actors in this story are unrecognizable as people.²⁴ Creativity, as lived, is more than a response to incentives, working from fixed and random preferences. Copyright law has good reasons to shy away from judging artistic merit (though eschewing

do not have commercial interest as their primary motivating force, and so propertization of their work is irrelevant to their production of innovative material. But more than this, propertization may be inconsistent with their continued creativity and so may not just be irrelevant but actively inimical to the development of this modality of production.”)

21. Another variant comes from Greg Lastowka, who argues that the desire for fame is a primary incentive for creativity. See Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1177 & n.25 (2005). Lastowka also credits the pure enjoyment of creative production as a key motivation, but perhaps because he is focused on policy levers that seem unlikely to affect that enjoyment, he does not spend much time analyzing it. See Lastowka, *Digital Attribution*, *supra* note 18, at 58 n.95. Creativity is thus figured as the purchase of a lottery ticket, with the hope of a payoff in fortune or fame. Like the monetary-incentives account, the fame-seeking story has difficulty explaining why classical composers don't all switch over to rap or country music, and why poets are not clamoring to join the casts of reality shows.

22. Anne Barron, *Copyright Infringement, 'Free-Riding' and the Lifeworld*, (London Sch. of Econ. & Pol. Sci, Law, Soc'y & Econ., Working Paper No. 17, 2008), available at <http://ssrn.com/abstract=1280893>.

23. *Id.* at 8.

24. The copyright literature is starting to recognize this point, at least for creators who are not participating in the money economy. See, e.g., Quiggin & Hunter, *supra* note 20, at 220 (“Amateur content producers are emphatically not just utility maximizers who will start making widgets if the return on investment for widgets is better than the return on investment for producing content.”).

aesthetic theory is often an impossible project),²⁵ but copyright's formal indifference to content has mistakenly been coupled with indifference to process: to the reasons creators produce new works and the methods they use. This is where incentive theory breaks down. The next section explores how creators think and talk about their own creativity in ways that contrast sharply with the incentive story.

II. AUTHORS ON AUTHORSHIP: THE ECSTASY OF INFLUENCE

A. Beyond Preferences: Compulsion, Love, and Other Narratives of Creativity

Many standard experiences of creativity simply do not fit into the incentive model, whether the incentives are measured in money or in reputation. Incentives require audiences—if no one is reading, neither payment nor credit will be forthcoming—and yet much creativity exists without any external audience.²⁶ As professors used to too-silent classrooms, academics may forget that, in the absence of sanctions at least, it is usually much harder to get people to *stop* talking than to get them to start.

Margaret Atwood, the well-known Canadian novelist, begins a volume on writing with various quotations, including one from Mavis Gallant that emphasizes the irrationality of creativity:

I still do not know what impels anyone sound of mind to leave dry land and spend a lifetime describing people who do not exist. If it is child's play, an extension of make believe ... how to account for the overriding wish to do that, just that, only that, and consider it as rational an occupation as riding a bicycle over the Alps?²⁷

25. See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

26. One could call internal satisfaction a type of incentive, but unless one has an account of how external forces might change the magnitude of that internal motivation, incentive would collapse into preference. The point of incentive theory is that it offers levers by which to affect behavior, given preferences.

27. MAVIS GALLANT, *THE SELECTED STORIES OF MAVIS GALLANT*, at x (1996), *quoted in* MARGARET ATWOOD, *NEGOTIATING WITH THE DEAD: A WRITER ON WRITING*, at xiii (2002).

Atwood then collects a series of over seventy answers to the question of why writers write.²⁸ Only two include “[t]o make money”;²⁹ the others, while more varied, regularly invoke notions of compulsion, overflowing desire, and other excesses:

Because I knew I had to keep writing or else I would die.... To please myself.... To thumb my nose at Death.... Because to create is human. Because to create is Godlike.... To attract the love of a beautiful woman.... To thwart my parents. To spin a fascinating tale. To amuse and please the reader. To amuse and please myself.... Graphomania. Compulsive loghorrhea. Because I was driven to it by some force outside my control. Because I was possessed. Because an angel dictated to me. Because I fell into the embrace of the Muse. Because I got pregnant by the Muse and needed to give birth to a book.... To act out antisocial behavior for which I would have been punished in real life.... Because the story took hold of me and wouldn't let me go.... To

28. MARGARET ATWOOD, *NEGOTIATING WITH THE DEAD: A WRITER ON WRITING*, at xx-xxii (2002). Atwood is no enemy of the profit (or sustenance) motive; she devotes a chapter to the complicated and necessary relationship between art and commerce, recognizing that writers need to sustain themselves somehow, and that means participating in economic life one way or another, whether it is marrying wealth, attracting a patron, or earning advances. *See id.* at 61-90.

29. *Id.* at xx. Writing “original” fiction is generally a risky way to make money, since most writers are commercially unsuccessful. Regardless, it is still common for writers to *want* to sell their work along with getting their revenge. Even when direct commercialization is entirely out of reach for a type of creative practice, creators regularly have varying motives. Writing about the practice of creating freely shared “mods” for videogames, Braxton Soderman summarizes:

Many of the articles about game mods also contemplate the reasons why modders produce their works: for the fun of it, for reputation and ego boosts, for experience that might allow them to find employment within the gaming industry, for the connections and community that such productions offer, or for a form of artistic expression and sense of “owning” their work Although clearly some modders are motivated by extrinsic rewards ... it is often pointed out that many modders are motivated by deeper, intrinsic motivations. For example, Neil Rodrigues, a project manager for the company that created [the free online game] *The Silver Lining*, explains that volunteer workers find motivation in personal, internal sources: “[S]ince you’re not getting paid to work, you must have an internal passion to enjoy what you do.”

Braxton Soderman, *Intrinsic Motivation: f1Ow, Video Games, and Participatory Culture*, 2 *TRANSFORMATIVE WORKS AND CULTURES* (2009), <http://journal.transformativeworks.org/index.php/twc/article/view/97/87>.

cope with my depression.... To make a name that would survive death.... To give back something of what has been given to me.³⁰

Some of these reasons are pleasant, some are unpleasant, even destructive. They are not the products of conscious choice or rational weighing of utilities. "The blood jet is poetry," Sylvia Plath wrote, "[t]here is no stopping it."³¹ Days later, she killed herself.³² As for Atwood's account of her own genesis as a writer, it has the feel of a lightning strike:

It simply happened, suddenly, in 1956, while I was crossing the football field on the way home from school. I wrote a poem in my head and then I wrote it down, and after that writing was the only thing I wanted to do. I didn't know that this poem of mine wasn't at all good, and if I had known, I probably wouldn't have cared. It wasn't the result but the experience that had hooked me: it was the electricity.³³

Novelist Anne Lamott's realization came in elementary school when her writing was published as part of a school competition: "I understood immediately the thrill of seeing oneself in print. It provides some sort of primal verification: you are in print; therefore you exist."³⁴ Later, Lamott addresses the question "why do people write?" directly:

Interviewers ask famous writers why they write, and it was ... the poet John Ashbery who answered, "Because I want to." Flannery O'Connor answered, "Because I'm good at it," and when the occasional interviewer asks me, I quote them both. Then I add that other than writing, I am completely unemployable. But really, secretly, when I'm not being smart-alecky, it's because I want to and I'm good at it.³⁵

30. ATWOOD, *supra* note 28, at xx-xxii.

31. Sylvia Plath, *Kindness*, in *ARIEL* 78 (1965); see also LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 146 (1983) ("[T]he artist often feels compelled, feels the *desire*, to make the work and offer it to an audience.").

32. Kate Kellaway, *The Poet Who Died So Well: The Real Sylvia Plath*, *THE OBSERVER*, Mar. 19, 2000, at 21.

33. ATWOOD, *supra* note 28, at 14.

34. ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE*, at xiv (1994).

35. *Id.* at xxviii.

Many people contribute to open source projects and other online endeavors for the same reason: to make a mark,³⁶ whether or not that mark is acknowledged by others. Margaret Atwood's experience of disturbing the universe came as self-recognition, before she had even shared her poem with anyone else.

For Lamott and the writers she knows, writing is often difficult, and certainly not a good way of earning a living, though very few aspiring writers want to hear just how bad a way it is.³⁷ According to Lamott, writing a felt truth "is a little like milking a cow: the milk is so rich and delicious, and the cow is so glad you did it."³⁸ Contrary to the Lockean vision of difficult labor, which people only do to avoid starving, engaging in creative labor is not a task in need of external incentives. Using another telling comparison, Stephen King claims that "[t]he writer who is serious and committed is incapable of sizing up story material the way an investor might size up stock offerings, picking out the ones which seem likely to provide a good return."³⁹ And yet, when it works well, writing is so rewarding that all the sacrifices are worth it (and these economic terms are not accidental, even though creators are not referring to incentives).

Jorge Luis Borges, in his short story *Borges and I*, appeals not to divinity or compulsion but to doubleness: Borges the writer is not Borges the person; the person tried to escape the writer once, but no longer.⁴⁰ Borges's playful approach demonstrates yet another version of the nonrationality of creation. Borges the author may have

36. CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 132 (2008) (stating that people contribute to Wikipedia and other noncommercial projects for "a chance to exercise some unused mental capacities" and out of "vanity—the 'Kilroy was here' pleasure of changing something in the world, just to see my imprint on it. Making a mark on the world is a common human desire").

37. LAMOTT, *supra* note 34, at xxx.

38. *Id.* at xxxi; *see also id.* at 202-03 ("You are going to have to give and give and give, or there's no reason for you to be writing.... [Y]ou are going to have to go on giving, and the giving is going to have to be its own reward."); *id.* at 216 ("Even though so much of my writing time is stressful and disheartening, I carry a secret sense of accomplishment around with me.... But you pay through the nose for this.").

39. STEPHEN KING, *ON WRITING: A MEMOIR OF THE CRAFT* 159 (2000).

40. Jorge Luis Borges, *Borges and I*, in *LABYRINTHS* (James E. Irby trans., 1964), available at <http://www.amherstlecture.org/perry2007/Borges%20and%20I.pdf> ("I recognize myself less in his books than in many others or in the laborious strumming of a guitar. Years ago I tried to free myself from him and went from the mythologies of the suburbs to the games with time and infinity, but those games belong to Borges now and I shall have to imagine other things. Thus my life is a flight and I lose everything and everything belongs to oblivion, or to him.").

preferences, but they are not the preferences of Borges the person, and so to maximize the utility of one is not necessarily to maximize the utility of the other.

Roberta Kwall, who argues for enhanced moral rights for creators (as against the claims of publishers and of audiences), documents that many creators experience creativity as inspiration.⁴¹ It feels as if the source of the work is at least in part external, guided but not controlled by the artist's hand.⁴² Whereas Kwall emphasizes the extent to which creation narratives parallel the Creation narrative—the author is an instrument of God, and the resulting work is at least partly owed to God—I will speak more of compulsion and nonrational calculation. Kwall's narratives are consistent with my account, however; creators routinely do not think of themselves as controlling their own output.⁴³ Creativity is often experienced as an autonomic function, like making antibodies. People create as a function of their humanity; people who can't think of themselves as creators are damaged.⁴⁴

Or more positively: creativity routinely *feels good*. It brings the creator pleasure, and, if she's lucky, brings others pleasure as well. When we talk about pleasure (and agony) instead of utility, we get closer to the lived experience of creativity,⁴⁵ and are in a better position to understand exactly how resistant or compliant creative practices are likely to be in response to the constraints and poss-

41. Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1995-98 (2006).

42. *Id.* at 1947.

43. *See id.* at 1961 (discussing Madeline L'Engle's account of how artists are subjected to their works); *id.* at 1965-68 (quoting and citing numerous authors, from philosophers to composers to painters to poets to novelists, on the futility of trying to control the creative process and the way in which a work seems to be produced by forces outside the author's control).

44. "If somebody doesn't create something, however small it may be, he gets sick. An awful lot of people feel that they're treading water—that if they vanished in smoke, it wouldn't mean anything at all in this world. And that's a despairing and destructive feeling. It'll kill you." Arthur Miller, *What I've Learned*, ESQUIRE, July 2003, at 110 (interviewed by John H. Richardson), quoted in Martin Skladany, *Alienation by Copyright: Abolishing Copyright to Spur Individual Creativity*, 55 J. COPYRIGHT SOC'Y U.S.A. 361, 362 (2008).

45. This experience goes from high culture to low, from famous authors to unsung artists. *See* MICHAEL CHABON, MAPS AND LEGENDS: READING AND WRITING ALONG THE BORDERLANDS 14 (2008); Deborah Halbert, Intellectual Property in the World of Quilting (unpublished manuscript, on file with author) (discussing quilters' motivations, which focus on the pleasures of making something creative and of sharing that work with others).

ibilities of copyright law. One thing that jumps out from artists' own stories is the importance of process as well as result. The law assesses creative output—works—for originality and other features. There are good reasons for the law to take the work as the proper object of scrutiny. But these artistic self-reports are also, and often overwhelmingly, about creation the *verb* rather than creation the *noun*. Inspiration and motivation are dynamic. A copyright law directed only at static products will make mistakes about how to foster progress.

B. The Women Who Love Too Much: Leaving the Market Behind

Once we see creativity as more than a response to an external incentive, we can assess copyright's effects on individual creators as they respond to the world they see, which is already saturated with copyrighted works. This Section investigates fanworks—works created outside the major content industries by aficionados of a source text: the further adventures of Sherlock Holmes, or Han Solo, or Wonder Woman. If you have ever imagined what happened after *Return of the Jedi*, or wondered what would have happened if Superman was a supervillain facing off against Batman, you have begun to construct a fanwork. Fanworks can be essays, stories, art, videos, songs, or any other form of art. With limited exceptions, they circulate outside the money economy, shared freely with other fans. In much of media fandom, fanworks are mainly produced by women, contributing to their status as outsider art.⁴⁶

Fanworks exist because creativity arises out of a sense of play. Play can be serious and intense, or relaxed, but mainly play is unpredictable.⁴⁷ Play is about possibilities, not all of which can be realized in any one text. Audiences then respond to one author's creativity with their own, as Michael Chabon explains:

All enduring popular literature has this open-ended quality, and extends this invitation to the reader to continue, on his or her

46. Gender and Fan Studies (Round Five, Part One): Geoffrey Long and Catherine Tosenberger (July 1, 2007), http://www.convergenceculture.org/weblog/2007/07/gender_and_fan_studies_round_f.php.

47. See Cohen, *supra* note 3, at 1190-92 (arguing that the unpredictability inherent in creative play is a reason to limit copyright's scope, to avoid suppressing new creations).

own, with the adventure.... [I]t creates a sense of an infinite horizon of play, an endless game board; it spawns, without trying, a thousand sequels, diagrams, and Web sites.... Through parody and pastiche, allusion and homage, retelling and reimagining the stories that were told before us and that we have come of age loving—amateurs—we proceed, seeking out the blank places in the map that our favorite writers, in their greatness and negligence, have left for us, hoping to pass on to our own readers—should we be lucky enough to find any—some of the pleasure that we ourselves have taken in the stuff we love: to get in on the game. All novels are sequels; influence is bliss.⁴⁸

But in the modern era, sequels are derivative works, and derivative works are supposedly, by default, in the control of the copyright owner.⁴⁹ Chabon obviously means something different by “sequel” than the Copyright Act,⁵⁰ but the fact that there is no bright line between something that is a derivative work and something that is not points to a major breakdown between creative practice and copyright theory. Creativity serves its humanizing functions without regard to whether the author is making what would currently be deemed a derivative work.

As a result, copyright theorists have been quite interested in fanworks as evidence of creative practices that exist without, and even in contradiction to, copyright’s official incentive story. Doctrinally, the position that fanworks do not infringe copyright owners’ rights is usually framed as a claim of fair use. Even outside of fan studies, copyright low-protectionists regularly point to fan fiction—and its most studied subset, slash, which involves romantic and/or sexual relationships between two characters of the same sex⁵¹—as a classic fair use.⁵² Fan fiction typically has many features that favor a

48. CHABON, *supra* note 45, at 56-57.

49. *See, e.g.,* *MicroStar v. Formgen Inc.* 154 F.3d 1107, 1112 (9th Cir. 1998) (“A copyright owner holds the right to create sequels.”).

50. For definition of a “derivative work” see 17 U.S.C. § 101 (2006).

51. Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461, 505-06 (2006). Some uses limit “slash” to male/male relationships, preferring “femslash” to specifically designate female/female relationships.

52. *E.g.,* Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007); Katyal, *supra* note 51, at 505-06; Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1547-48, 1555 (2007) (using fan fiction as a key

finding of fair use. Fan fiction is usually noncommercial (though there are physical zines sold for money, even occasionally for profit), usually transformative (though there are works that do not add much to the original in the eyes of anyone except the fan creator), and usually not the type of work that competes with the copyright owner's markets (though there are works that could be licensed tie-ins). But fan fiction, especially slash, persists as a marquee fair use for deeper reasons.

Slash works as a metonym for transformative fair use because it is about nonrivalrous pleasures.⁵³ As Francesca Coppa has said in conversation, slash allows artists to answer the question “[d]o I want to be him or do I want to have him?” with, “[b]oth, of course.”⁵⁴ Fans like Captain Kirk and Mr. Spock, so they put them together. In fanworks, the two of them can find each other for the first time an infinite number of times, in an infinite number of ways: they can meet as children; they can fall in love slowly over the course of the first five-year mission; they can have a torrid affair that ends badly; they can have a torrid affair that never ends.

Imagination is a renewable resource. Fan creators, realizing this, reject the economy of scarcity and excludability that animates mainstream copyright discourse:

[W]e have the ability to keep changing our characters and giving them new life over and over. We can kill and resurrect them as often as we like.... We can give them an infinite, always changing life rather than the single life of their original creation. We

example of free speech threatened by expansive copyright rights).

53. Sonia Katyal argues that slash, by queering characters whose sexualities in canon are default heterosexual, subverts notions of the authenticity or singularity of any given text in the same way that it subverts notions of fixed sexual identity. See Katyal, *supra* note 51, at 492-93. Her argument is consistent with mine, but I am more interested in the way that slash focuses on *pleasure*—the pleasure of the characters, the pleasure of the authors, the pleasure of the readers. It is pleasure as well as felt necessity that drives the challenges to dominant sexuality that Katyal sees in slash.

54. My argument is about slash as metonym, not slash as unique. Any given person can have the same reaction to specific characters and situations regardless of sexuality. Slash is an exemplar of the category “fair use,” but that doesn’t make slash any *better*, even as fair use, than nonslash, any more than a robin is a *better* bird than an ostrich. The robin is just more easily recognized as a category member. See *generally* GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

have given ourselves license to do whatever we want and it's very liberating.⁵⁵

Fan writers get to have their stories and then wipe the slate clean and start over again, perhaps influenced, but not bound, by previous stories: they have their cake and eat it too. In the fannish economy, that's what cake is for.⁵⁶ Real cake is unfortunately rivalrous, but characters, stories, and plots aren't.

In particular, characters, unlike real people, are unkillable. Good characters inspire sequels, authorized and not, and become "exhilarating monsters, free (it seems at first) from ordinary moral considerations, free even from the laws of nature and common sense."⁵⁷ Characters like Tamburlaine and Falstaff (not to mention Hannibal Lecter) respect no boundaries: "There seems no reason why [they] should ever stop."⁵⁸ This is part of the nature of being a character instead of a person: "At the level of performance, all deaths are as fake as [Falstaff's]."⁵⁹ Hamlet dies, and the next night he bounds onto the stage again, mourning his father. If theater seems like special pleading, consider other resurrections: Sherlock Holmes returns to life after he dies, so does Spock (now for a second time as the original *Star Trek* series is remade with new actors);⁶⁰

55. Shoshanna Green et al., "Normal Female Interest in Men Bonking": Selections from the Terra Nostra Underground and Strange Bedfellows, in THEORIZING FANDOM 9, 35 (Cheryl Harris & Alison Alexander eds., 1998) (quoting K. Bannister, May 1993).

56. Again, I've borrowed Coppa's excellent words. See also HYDE, *supra* note 31, at 21 ("In the world of gift, as in [a fairy tale on the theme of charity to a stranger being rewarded], you not only can have your cake and eat it too, you can't have your cake *unless* you eat it.").

57. Alexander Leggatt, *Killing the Hero: Tamburlaine and Falstaff*, in PART TWO: REFLECTIONS ON THE SEQUEL 53, 55 (Paul Budra & Betty A. Schellenberg eds., 1998).

58. *Id.*

59. *Id.* at 56.

60. In fact, the recent *Star Trek* feature film might be thought to star the *third* set of actors to portray the classic characters, since a major fan film production has also offered live-action versions of Kirk, Spock, and the rest of the crew. See *Star Trek: Phase II*, <http://www.startreknewvoyages.com/> (last visited Oct. 26, 2009). This fan production features, among other things, performances by Walter Koenig (the original Pavel Chekov), George Takei (Hikaru Sulu), Denise Crosby (*Star Trek: The Next Generation's* Tasha Yar), and Majel Barrett Rodenberry (several key *Star Trek* and *Next Generation* roles, and creator Gene Rodenberry's widow), and scripts by *Star Trek* writers D.C. Fontana and David Gerrold (whose writing credits include the classic *Star Trek* episode *The Trouble with Tribbles*). *Id.* at http://www.startreknewvoyages.com/cast_crew.html (last visited Oct. 26, 2009). In other words, these people so loved *Star Trek* that they did not stop making it when they could no longer get paid; when they had a chance to work with other people who loved the show as

James Bond survives multiple decades, multiple actors, and multiple shifts in societal mores, all of which could have proved more deadly than any supervillain. David Brewer explained how multiplication of copies and performances made clear that no one appearance of a character necessarily competed with or altered another:

Falstaff was no more (or less) present in any [single performance or copy of Shakespeare's play,] but by virtue of those hundreds of performances and tens of thousands of printed copies—not to mention his additional iteration in texts like *Shakespeare's Jubilee*—he could seem exempt from the ordinary laws of physics As such, he could be envisioned as ultimately inexhaustible: one cannot wear out a “sprite” capable of appearing in thousands of places at the same time any more than one can deplete an “immortal spirit” by conjuring it up yet another time.

If characters were unconstrained by “mortal law,” then they could also be regarded as perpetually available through what Simon Stern has usefully termed an “economy of abundance.”⁶¹

Fanworks take this infinite extensibility to its logical conclusion. Each person can write her own version of the story, and thus there are no contradictions in the stories, only variations.⁶²

But why? Why would fans spend so much time, energy, and even money on endeavors that cannot bring monetary return, and often invite scorn from outsiders? Working with the basic assumption that

much as they did, they volunteered their creative talents.

61. DAVID A. BREWER, *THE AFTERLIFE OF CHARACTER, 1726-1825*, at 11 (2005). Brewer considers the economy of abundance a useful fantasy, juxtaposed to the “equally far-fetched” economy of scarcity posited by booksellers. *Id.* The utility of these fantasies, however, varies for different tasks; the present problem is that law sees the economy of scarcity everywhere. *See id.* at 203 (“One of the principal goals of this study has been to show how our current ways of thinking about characters as participants in an economy of scarcity have not always been as dominant or as seemingly self-evident as they are today. The corollary which emerges from this inquiry, of course, is that these ways of thinking need not (and, to my mind, should not) continue indefinitely. I thus find it heartening to see the glimmerings of a genuine if perhaps necessarily limited alternative to the economy of scarcity, one in which certain characters, at least, can operate in something approximating the economy of abundance.”).

62. *See id.* at 18 (noting class and educational implications of popular reinterpretations in producing “an equitable distribution of cultural capital,” part and parcel of an economy of abundance).

commercialization is impossible, fan authors are free to ignore copyright's incentive story and create for all the other reasons that people create. As Clive Young writes about fan filmmakers,

[For many people, making a fan film is] a stepping stone to reawakening their creativity, opening up the door to a whole side of themselves that may not have seen the light of day in some time. Kids are encouraged to be creative—then they grow up a bit and society recommends that they cut it out, fall in line, get it together, act their age, and make some money. Ironically, the money part is what causes many people to start making fan films—because without disposable income, how would they buy the equipment?⁶³

The money is flowing the wrong way: people pay to play.

Fan authors' explanations for why they do what they do look a lot like the explanations given by authors who participate in the commercial sector. To take a particularly notable example, one commercially successful fantasy author, Steven Brust, wrote an unauthorized novel starring characters from the TV series/movie *Firefly/Serenity*.⁶⁴ He wrote *My Own Kind of Freedom*, and released it under a Creative Commons license, because—in his own words—he “couldn't help [him]self.”⁶⁵ Brust's experience is just one example of what Wendy Gordon argues is a common phenomenon: because creators begin with what they know, and because what they know in modern times often comes from private, copyrighted sources, creators may feel that they have no choice but to respond to existing

63. CLIVE YOUNG, *HOMEMADE HOLLYWOOD: FANS BEHIND THE CAMERA* 261 (2008).

64. STEVEN BRUST, *MY OWN KIND OF FREEDOM: A FIREFLY NOVEL* (2007), available at <http://dreamcafe.com/firefly.html>.

65. Webmaster, Steven Brust Unofficial “Firefly” Novel—Serenitystuff.com Review (May 29, 2006), http://www.whedon.info/article.php3?id_article=15938.

works.⁶⁶ Their minds have been colonized, and only reworking can free them.

The history of one large slash fandom illustrates these creative dynamics: the sense of compulsion and the overwhelming passion that fan authors experience echo the accounts of the “pro” creators canvassed in the previous section, even though fan authors are excluded from the mainstream market. *Legacy*, a five-volume self-published zine reviewing the history of Kirk/Spock slash since *Star Trek* first aired in the 1960s, contains a number of first-person accounts of what it was like to discover, read, and write slash.⁶⁷ Excessiveness and plenitude are repeated themes, contrasting with the economic model of incentives predicated on scarcity.

Killa, for example, describes “complete distraction,” stories “burning up my brain,” being “desperately in love with my story,” having “no perspective,” and feeling “like falling in love at fifteen. Dizzy, heady, totally insane.”⁶⁸ Addiction metaphors, with their implication of the erasure of a cost-benefit analysis, also play a role. “‘Forget whiskey,’ says Greywolf, ‘forget sex, cocaine and chocolate; writing is the best fucking drug in the universe!’”⁶⁹ Professional and fan fiction writer Elizabeth Bear makes a similar comparison between sex and creation:

66. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1569 (1993) (“Some poems, some ideas, some works of art, become ‘part of me’ in such a way that *if I cannot use them, I feel I am cut off from part of myself*. I would prefer never to have been exposed to them rather than to experience that sort of alienation.”) (citation omitted). Gordon quotes J.S.G. Boggs:

Creative people are prisoners. That is to say that they get “captivated,” and the only way out is to beat a path away from the point of captivity. If my attention is “captured,” it is impossible to simply get away. The bars are not physical. They are produced by the intellectual, the emotional, or, more usually, a combination of the two. But, they are as functional as any jail cell you will ever construct in the material world.

J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L. REV. 889, 889 (1993), *quoted in* Gordon, *supra* at 1570; *see also* KING, *supra* note 39, at 159 (arguing that writers do not control their own material).

67. See *Legacy: Celebrating the 30th Anniversary of Kirk/Spock Fiction*, <http://liquidfic.net/legacyflyer.html> (last visited Oct. 22, 2009).

68. Lyrastar, *The Source of The Mississippi: What Was First?*, in 1 LEGACY 144, 145-46 (2007).

69. Lyrastar, *Online K/S Fiction*, in 1 LEGACY 148 (2007) [hereinafter Lyrastar, *Online K/S Fiction*].

We are pattern-finding and story-telling animals. It's what we do. We take the real world and turn it into narratives and symbols so our brains can manipulate them more easily. And once we have those narrative symbols, if they suit our needs, we don't stop manipulating them just because somebody says, "well, you shouldn't do that because it's nasty." Any more than, you know, the vast majority of people ever stopped wanking because somebody told them it would make them go blind.⁷⁰

Here is an extended description of the process by which a reader became a writer, following a typical trajectory:

I read online K/S [Kirk/Spock slash] insatiably. It almost didn't matter to me at first if the story were poorly written or if it were exquisitely crafted: I was so enraptured, so captivated by the wild, glorious terrain of my new world that I couldn't look upon any of it with dispassionate eyes. I devoured everything K/S that I could find on the Internet. When I wasn't reading K/S, I was thinking about it. I thought about it when I drove to work. I thought about it when I grocery shopped. I thought about it when I was elated, when I was bored, when I was peevish and when I was serene.

Most of all, I thought about it in bed at night.

In the dark, I'd mentally replay my favorite scenes from the K/S writers' stories. I'd often embellish them to better suit my own fantasies, and occasionally I'd squish parts of two different stories together to create something different. I'd conjure up bits of dialogue I'd read and work the words around in my head. If the writer's words didn't quite ring true, then I'd rearrange them until they were more convincing, more real in terms of what I thought I knew about the characters.

One night when I was giving up several hours of sleep to do all this, it suddenly occurred to me that the scene I was envisioning and the words I were hearing were not from anyone else's story. They were mine—all mine. And ... they weren't half bad.⁷¹

70. Elizabeth Bear, Column: Bears Examining #4, <http://subterraneanpress.com/index.php/magazine/summer-2007/column-bears-examining-4-by-elizabeth-bear> (last visited Oct. 26, 2009).

71. *Jesmihir: The Journey of One Author to K/S*, in 3 LEGACY 48, 49-50 (2007).

The intensity of this experience is standard for many creators. Like fan authors, computer programmers use the language of addiction when explaining why they participate in open source projects. Chris Hanson, a Principal Research Scientist at MIT and a maintainer in the Debian Linux community, stated: “Creation is unbelievably addictive. And programming, at least for skilled programmers, is highly creative. So good programmers are compelled to program to feed the addiction.”⁷²

The Internet made these features of creativity more salient and visible, converting the flexibility and extensibility of stories into a flexibility of text. When the physical inputs to creativity are so cheap as to nearly be free, the underlying noneconomic motivations can push the resulting works in new directions:

“Beside the Wells” was also the first K/S story online to play with some of the fluidity of electronic publishing, the ability to make changes to the online work. A few months after posting the story, says [the author], she thought of a clever ending she liked, though perhaps not so much as the first. But what the heck? It wasn’t like there would be a stack of zines to waste and reprint. She posted it to the newsgroup as a “Version 2[.]” Now readers have both: one story, two endings.⁷³

And because fanworks in their inception are based on the original, the ability to have more and more without erasing the original structures the entire enterprise. One popular fan story form is known as “Five Things That Never Happened.” A “Five Things” story is fanwork that sets forth five alternate realities, each usually incompatible with one another.⁷⁴ In the first, Kal-El (Superman) may be raised by the government instead of Jonathan and Martha Kent; in the second, Superman may be a villain; in the third, Superman may marry Lana Lang; in the fourth, he may be in love with Lex Luthor; and in the fifth, he may survive the end of the world and seek out a new planet to protect. The fanwork corpus as a whole contains multiple incompatible possible stories, and in a

72. ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 124 (2005), available at <http://web.mit.edu/evhippel/www/democ1.htm>.

73. Lyrastar, *Online K/S Fiction*, *supra* note 69, at 147-48.

74. See, e.g., Five Things That Never Happened, http://community.livejournal.com/5_nevers (last visited Oct. 22, 2009).

“Five Things” story one single author explicitly engages with that multiplicity and celebrates it.

Fanworks foreground their embeddedness in a web of other, related works: a story is not a single economic entity, neatly divisible from the rest of the world’s creative output, but is inextricably intertwined with other stories. As one fan wrote, “[T]he thing about ‘transformative’ work, whether it overshadows or not the original? Does it really matter? The important thing is that we’ll be able to see both, compare, have *more*.”⁷⁵ As fans recognize, this logic is incompatible with the incentive-based, ownership-focused theories underlying current copyright law, which attempts to occupy the field of creativity. In transformative work “[t]here’s no subtraction, only multiplication. Copyright law, as it stands now, doesn’t seek to add, subtract or multiply. Only DIVIDE.”⁷⁶

Neither cultural disrespect nor fear of aggressive copyright enforcement has deterred fans from creating fanworks. The language of preference comes closer than the incentive story to explaining this otherwise puzzling persistence, except that satisfying the preference changes the intensity of the preference. The desire to speak is a self-renewing, self-reinforcing desire that gets bigger the more it gives.⁷⁷ No wonder the dismal science can’t find it.⁷⁸

75. Posting of not_sally to <http://sockkpuppett.livejournal.com/472559.html> (Dec. 13, 2007, 10:26 UTC).

76. Posting of Sockkpuppett to <http://sockkpuppett.livejournal.com/472559.html> (Dec. 13, 2007, 10:32 UTC). As this discussion indicates, fan experiences of creativity are also incompatible with control-based theories of copyright positing that authors’ personalities are harmed by unauthorized uses. Here, however, I wish to focus on the contrast with the economic theory dominant in U.S. law.

77. See HYDE, *supra* note 31, at 22 (“Gift exchange and erotic life are connected in this regard. The gift is an emanation of Eros ... libido is not lost when it is given away.”); *id.* at 23 (“[P]eople who live in voluntary poverty or who are not capital-intensive do have more ready access to erotic forms of exchange that are neither exhausting nor exhaustible and whose use assures their plenty.”); *id.* at 146 (“So long as the gift is not withheld, the creative spirit will remain a stranger to the economics of scarcity.... [T]he gift is not used up in use. To have painted a painting does not empty the vessel out of which the paintings come. On the contrary, it is the talent which is not in use that is lost or atrophies, and to bestow one of our creations is the surest way to invoke the next.”).

78. See *id.* at 155 (“The hegemony of the market can undermine the possibility of gift exchange ... and the plenitude of the imagination can be lost to the scarcity of logic.”).

III. LAW UNLIKE LOVE: SOME IMPLICATIONS

Julie Cohen has pointed out that the incentive model, in which copyright is a vital driver of creativity, “justifies drawing firm distinctions between authors, on the one hand, and consumers, imitators, and improvers on the other.”⁷⁹ Once that move has succeeded, broad rights to control copying, public distribution, and derivative works follow as night follows day.⁸⁰ When we recognize the failure of the incentive account, we can more realistically assess what copyright has to offer.⁸¹ Copyright law, even in its own economic terms, plays a minor role, and not necessarily a positive one.⁸² I will sketch out three ways in which thick descriptions of creativity should matter to copyright: first, in its basic normative foundations; second, in its assessment of fair use claims; and third, in its calibration of the balance between individual creators and institutions.

A. What We Talk About When We Talk About Creativity

I will begin with the broadest normative claim: creativity is a positive virtue, not just because of its results but because of how the process of making meaning contributes to human flourishing. To date, copyright doctrine has largely treated the inherent good of

79. Cohen, *supra* note 3, at 1192-93.

80. *See id.* at 1193.

81. *See id.* (“Decentering creativity ... tends to suggest a much more modest conception of the role that copyright plays in stimulating creative processes and practices. Copyright fulfills some important economic functions ... and therefore plays an important role in organizing cultural production, but it is hardly ever the direct cause of a representational shift in creative practice, nor does it appear to play a direct role in motivating much that is normal science. Scholars who ask how deploying copyright might stimulate creativity (as opposed to production) are asking the wrong question. Neither creative inspiration nor the creative outputs that follow from it are so easily engineered.”); Quiggin & Hunter, *supra* note 20, at 241 (“To the extent that innovation and productive growth arise from activities that are pursued primarily on the basis [of] non-economic motives, the link between incentives and outcomes is weakened. This in turn undermines the rationale for policies aimed at sharpening incentives and ensuring that everyone engaged in the production of goods and services is exposed to the incentives generated by a competitive market.”).

82. Indeed, we should be more concerned about the jobs the creators would be doing instead of writing, drawing, etc., given that most artists pay for their creation time out of the opportunity cost.

creativity as a pure resource. Incentives may be endangered by improperly configured copyright law, but preferences to create are not. From that perspective, the idea that creativity is a powerful, upwelling force might be thought to counter the chilling effect decried by critics of expansionist copyright. One important website that collects cease and desist letters and promotes broad views of fair use is actually called Chilling Effects, suggesting the rhetorical appeal of the idea that ordinary speakers are being suppressed.⁸³ As with any lever of power, copyright enables the strong to do as they will and ensures that the weak do as they must. Yet if the desire to create is so strong, do we really need to worry about suppressing it?

The easy response is to note that not everyone has the same tolerance for risk, and we should be concerned about the speakers who will silence their voices, even if they still have the same ideas, the same creativity. This is certainly true, but it is not the full story. Edward Lee has recently argued that the practical tolerance of most large-scale copyright owners for most user-generated content, at least the remix variety, creates a “warming” effect: after watching others create mashup videos, even risk-averse people join in online.⁸⁴ I think this is probably right, because local norms are often more powerful in influencing behavior than vague and usually misguided theories about what copyright law provides.⁸⁵ And yet Lee’s theory is consciously value-neutral. He takes no position on whether user-generated content *ought* to be so free as it is in practice, and suggests that copyright owners might intervene to change the norms without any suggestion that such acts would be morally wrongful.⁸⁶

The accounts of creativity I have offered provide a foundation for a different argument. Creativity, including remix creativity, is part of a good life.⁸⁷ It should be valued for itself, not tolerated.

83. Chilling Effects Clearinghouse, <http://www.chillingeffects.org/> (last visited Oct. 22, 2009).

84. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1544-45 (2008).

85. *Id.* at 1545.

86. *See id.* at 1537-38.

87. *See* Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008) (stating that fair use is part of the conditions that determine “the contours of the private and public domains of human expression and, in so doing, directly impact our capability for human

Creativity should be a favorite of the law even if we do not need to worry about incentives or disincentives (chilling effects). Incentive stories, because they do not explain creativity, can mislead us about the value we want to protect. Under the First Amendment, we protect religious conviction not only, and not even primarily, because we worry about the chilling effects of religious persecution. Devout believers have been willing to go to jail and even die for their causes; they're hard to chill. We protect religious faith because it's so important, and a core wrong of suppression is its disrespect of the believer.⁸⁸ Likewise, respect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy. Instead of monetary rewards or even artistic control of how works are transmitted to others as our highest value, we should aim for policies that maximize participation—even when that changes the mix of economic winners and losers. Economic reward and control rights are likely to be part of the proper balance, but only part.

B. My Own Kind of Freedom

On a more doctrinal level, respecting creativity as a human force should lead us to think differently about fair use, among other things, by encouraging us to take account of noncommercial motivations even in contexts that current doctrine sees as commercial. Joanna Russ, the feminist science fiction writer, suggested that the “what if” of slash fanfiction was “what if I were free?”⁸⁹ What would

flourishing”).

88. Seana Shiffrin writes about the harm of insincere speech; insincere silence may be less damaging, but that doesn't make it healthy for speech. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 860-62 (2005) (recognizing the importance and value of sincere speech for First Amendment purposes).

89. EROTIC UNIVERSE, SEXUALITY AND FANTASTIC LITERATURE 253 (Donald Palumbo ed., 1986). See also a fan quoted in HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 256 (2006):

What I love about fandom is the freedom we have allowed ourselves to create and recreate our characters over and over again. Fanfic rarely sits still. It's like a living, evolving thing, taking on its own life, one story building on another, each writer's reality bouncing off another's and maybe even melding together to form a whole new creation.... I find that fandom can be extremely creative because we have the ability to keep changing our characters and giving them new life over and over. We can kill and resurrect them as often as we like. We

I read, what would I write, what relationships would I have with the external world and with other people? Asking “what if I were free” is very different from the claim-staking of the rhetoric of open-source software, which focuses on the idea that open-source software is “free as in free speech, not as in free beer.”⁹⁰ That common phrase has always struck me as hiding within it many unexamined and problematic assumptions about what free *is* with respect to speech and how it relates to a commercial marketplace.⁹¹ What free *is* with respect to women’s voices, of course, has been fiercely debated at least since John Stuart Mill (and his wife) wrote *The Subjection of Women*.⁹² Slash and other fanworks come from a background of constraint, where acting as if we were free to write our own versions is a different kind of act than using our already-extant freedom to create open-source software instead of proprietary code. Women as writers have rarely had the luxury of exclusive control to give away.

One aspect of that unfreedom has been an inability to participate in the money economy on the same terms as men.⁹³ Fanworks represent an alternative outlet for creative energies. What seems like a contradiction—though a Freudian might say that contradictions regularly have an underlying logic—is that the works on which fanworks are based are products of a mass market, incentive-based economy.⁹⁴ Nor would formal attempts to create a market for

can change their personalities and how they react to situations. We can take a character and make him charming and sweet or cold-blooded and cruel. We can give them an infinite, always-changing life rather than the single life of their original creation. We have given ourselves license to do whatever we want and it’s very liberating

90. See GNU Project, The Free Software Definition, <http://www.gnu.org/philosophy/free-sw.html> (last visited Oct. 22, 2009) (“Free software is a matter of liberty, not price. To understand the concept, you should think of free as in free speech, not as in free beer.”). Both free beer and free speech, of course, have their dangers. See Edward De Grazia, *The Haymarket Bomb*, 18 LAW & LIT. 283, 284 (2006) (“The next day’s *New York Times* belittled the incident: it was just ‘a collision’ between policemen and ‘a mob’ of 7,000 or 8,000 anarchist workmen and tramps—‘maddened with free beer and free speech.’”).

91. One practitioner has suggested that “free puppy” would be another useful comparison, due to later potential costs of maintaining open-source software. Lori E. Lesser, *A Hard Look at the Tough Issues in Open Source Licenses*, 846 PLI/pat 7, 17 (2005).

92. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869).

93. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1466 (2005).

94. See Posting of Cupidsbow to Live Journal, *Valuing the Work in Fanwork*, <http://cupidsbow.livejournal.com/266405.html> (Dec. 15, 2007, 22:42 UTC):

[Non-fans] see all this effort, all the work that goes into fanwork, and they are

fanworks be a positive change—asserting copyright claims in the original expression in fanworks would do little if anything to change the material relations between fanwork creators and mass media owners.⁹⁵ Noncommercial creative responses to commodified, mass media products are ways of reclaiming them for art, and of recognizing the elements in them that surpass market exchange.⁹⁶

Not unrelatedly, fanworks regularly engage with sexuality of all kinds. A group of mostly-female creators writes, draws, and makes video for an audience that is also mostly female, and they are often turning each other on. This would be dangerous even without the copyright issues. In fact, the routine presence of sexually explicit conduct and homosexuality in fanworks has often been a key part of fair use defenses of fanworks. I, and others, have argued that

so immersed in the invisible reality of capitalist thinking, that they honestly can't conceptualise that people might genuinely not give a shit about selling that work for money...

[W]hat I think makes the chasm even harder to bridge is that from the outside, fandom looks like it *is* all about consuming—because, in part, that's exactly what it is. Consumption is this great paradox that fans wrap their heads around without too many problems—we have a gift economy, yes, but it is built around buying primary texts, tie-in merchandise, franchised goods and services. For the most part we don't even blink at negotiating these two ideologies; I mean, we live with multiple realities in our fanfiction every day, so believing a dozen contradictory things before eating our Star Wars Special Edition Cornflakes is what we're trained for...

To the non-fandom side, however, it makes no sense at all. It looks like hypocrisy, I suspect, rather than living in a multiple-choice culture. Capitalism talks a good talk about supply and demand, but is too focused on the next big hit to really mean it: you can have any colour as long as it's black.

This is why I've come around to the idea that valuing something without a monetary price-tag is one of the most subversive everyday acts now possible in capitalist culture.

95. To the extent that their contributions in characters and storylines can be separated out, fanwork creators already automatically have copyright in their works. It just has no practical effect: very little money would be available to fan authors even if monetization wouldn't destroy much of what fans value in their communities, and other kinds of control are rarely an issue for fanworks.

96. See HYDE, *supra* note 31, at 158-59 (“The more we allow [commercial] art to define and control our gifts, the less gifted we will become, as individuals and as a society. The true commerce of art is a gift exchange, and where that commerce can proceed on its own terms we shall be heirs to the fruits of gift exchange: in this case, to a creative spirit whose fertility is not exhausted in use, to the sense of plenitude which is the mark of all erotic exchange, to a storehouse of works that can serve as agents of transformation, and to a sense of an inhabitable world.... But none of these fruits will come to us where we have converted our arts to pure commercial enterprises.”).

fanworks are fair use because of market failure: copyright owners won't license homoerotic or sexually explicit versions of their works.⁹⁷

The market failure argument, however, is vulnerable to empirical disproof.⁹⁸ As Julie Levin Russo has argued, even critical and “slashy” fan creations can be absorbed by a commercial media system that is rapidly learning how to profit from user-generated content. Thus, an official advertisement for the *Lord of the Rings* movies presented the films as the epic love story of Frodo and his boon companion, Sam.⁹⁹ But, Russo continues, “queer” fan productions have a form as well as a content: fans’ reliance on “subtext” “implies an open, plural, and dehierarchized model of textuality wherein diffuse and collective creative labor isn’t easily contained by top-down intention and authority.”¹⁰⁰

Moreover, *desire* is central to economic life: we have to want things to work for them and to trade the products of our labor for them. But because desire is so hard to contain, stories about desire—whether they’re stories about fans’ desires for their texts, or stories by fans about characters’ desires for each other—are likely to be “particularly unruly.”¹⁰¹ It is the audience’s desires that make media properties valuable, what Russo calls their “libidinal labor.”¹⁰² This inherently tugs against claims of central or authorial ownership, since the audience’s investment seems, in Lockean terms, to co-create the value of the intellectual property.¹⁰³ Furthermore, the

97. See, e.g., Chander & Sunder, *supra* note 52, at 621-23; Katyal, *supra* note 51, at 508; Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 301-03 (2007).

98. On promiscuous licensing by copyright owners, see Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 995-97.

99. Online Video: Lord of the Rings—Secret Lovers, <http://www.tbs.com/broadband/videoplayer/0,,70636,00.html> (last visited Oct. 22, 2009).

100. Gender and Fan Culture (Round Eighteen, Part Two): Julie Levin Russo and Hector Postigo, Confessions of an Aca-Fan: The Official Weblog of Henry Jenkins, http://www.henryjenkins.org/2007/10/gender_and_fan_culture_round_e_5.html (last visited Oct. 22, 2009).

101. *Id.*

102. *Id.*

103. Cf. Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 125-30 (1996) (making similar claims with respect to trademark value); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1735 (1996).

account of creativity as play, as unpredictable and outside authors' control, illuminates the ways in which a licensing regime will stifle creative practices even if economic theory only shows a shift of consumer surplus from licensee to licensor.¹⁰⁴

Because slash, and fan fiction generally, are fundamentally based on the plenitude of imagination, they will be fair use even when (may the day swiftly come) mainstream copyright owners accept gay and bisexual characters on the same terms as straight ones and even when (as is happening right now) copyright owners offer licenses to all comers as long as those licenses can be withdrawn at will.

Lydia Loren has recently argued that creators' intrinsic motives should be used to calibrate the scope of copyright protection for the works they create. Among other things, she argues that, when works would be created without an economic incentive, the scope for fair use of those works should be greater.¹⁰⁵ My argument looks at a different side of the equation: when copyright's incentive story breaks down and people create works that they do not intend to circulate in the money economy, then claims that such works make fair uses of existing works should be assessed differently, because fair use's economic model fails.

C. The Space Between Us: Intermediaries and Market Logic

Infringement claims, of course, are regularly asserted not only against individuals but against institutions: publishers, websites, software providers. Along with the practical reasons for targeting institutions—their deep pockets, their abilities to act as choke points—scaling up gives the incentive story more ways to avoid talking about creativity.

The standard economic move in discussions of intrinsic motivations for creativity is to punt to intermediaries/distributors, who are

104. See Cohen, *supra* note 3, at 1193-94 (“[A] growing body of anecdotal evidence suggests that copyright’s ‘permission culture’ does exert a substantial constraining influence on creative practice. Similarly, research in the psychology of creativity suggests that attempts to impose a rigid structure on the creative process quickly become counterproductive, and that the success of the creative process hinges in part on the ability to avoid externally imposed distractions.”) (footnotes omitted).

105. Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation To Shape Copyright Protection*, 69 LA. L. REV. 1, 38-39 (2008).

supposed to act like perfectly rational actors even if those crazy artists are unreachable through incentives.¹⁰⁶ So the claims about individual motivation made in the previous section can be brushed aside if all fair use analysis focuses on YouTube and Viacom. This is a mistake, as I have argued elsewhere.¹⁰⁷ The motivations of the people uploading their videos to YouTube, and not YouTube's more market-disciplined decisions, should guide fair use analysis.

But the distinction between individual creators' motivations and those of the institutions that support and live off of them has broader implications for the structure of copyright and the extent to which we should regard the current regime as just. Given the pervasive passion of creators to create, intermediaries, rather than operating in a classic perfectly competitive market, are essentially in the position of a proposer in the ultimatum game.

The ultimatum game involves two parties, one of whom can propose a division of some benefit, usually an amount of money, and one of whom can accept or decline (the responder).¹⁰⁸ If the responder accepts the offer, the proposed division occurs, but if the responder rejects the offer, no one gets anything. As a result, a purely rational responder who understood that the game was not part of any repeated transaction would accept any offer above zero, but most people do not behave that way in practice. They are offended by offers that are too small. Most responders reject offers that are substantially lower than half, and not being fools themselves, most proposers propose splits that give the responder a substantial amount.¹⁰⁹ However, when participants believe that the proposer holds the role of proposer for some specific reason, instead of chance, then proposers offer lower amounts and responders accept lower amounts, apparently because they conclude that the proposer

106. For a clear summary of this standard argument, see Quiggin & Hunter, *supra* note 20, at 244-45.

107. See Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497 (2008).

108. See generally Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

109. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1135 (2000) ("[T]he modal (that is, most common) proposal is for a 50-50 split, and the mean proposal has been for a 63-37 split.").

is, as a matter of justice, entitled to a larger share.¹¹⁰ Because creators desperately want to create, intermediaries can offer a lower price, and creators will accept a lower price, than they would if incentives mattered more.

This creates distributional concerns, and not just for nonmarket works. Themes of labor exploitation turn up both in discussions of the mature copyright industries—music,¹¹¹ television,¹¹² publishing¹¹³—and also in discussions of user-generated content.¹¹⁴ The incentive model, while it has no idea why people create, is also happily indifferent to questions of justice once people have started producing: people who don't need incentives wouldn't participate if they didn't get sufficient psychic benefits from producing. But failure to interrogate tastes should disturb us when it has significant distributional consequences. How were those tastes for creating without recompense formed? What are the alternatives? Consider, as a possible analogy, women's assumed natural proclivity for housekeeping and childrearing. We haven't been thought to need monetary incentives, because we do it for free, even as economic structures and social conditions made alternatives hard to find.¹¹⁵ The helplessness creators often feel in the face of their muses is echoed in helplessness in the face of their limited bargaining power. But policy can affect bargaining power, probably much more readily than it can help creators handle their muses. Legislative intervention, as with the termination of transfer provisions that allow authors to recapture rights in certain works,¹¹⁶ provides some rebalancing. Copyright law, and general cultural policy, could do more to direct material rewards to authors if we truly believe that

110. *See id.*

111. *See, e.g.,* K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 *CHAP. L. REV.* 521, 534-35 (2008).

112. *See* David Carr, *Who Won the Writers Strike?*, *N.Y. TIMES*, Feb. 12, 2008, <http://www.nytimes.com/2008/02/12/arts/television/12strike.html>.

113. *See, e.g.,* Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 *CASE W. RES. L. REV.* 605, 605-06 (2003).

114. *See, e.g.,* Nicholas Carr, *Sharecropping the Long Tail*, *ROUGH TYPE*, Dec. 19, 2006, http://www.roughtype.com/archives/2006/12/sharecropping_t.php; Posting of Cupidsbow to Live Journal, *How Fanfiction Makes Us Poor*, <http://cupidsbow.livejournal.com/239587.html> (Apr. 26, 2007, 10:43).

115. *See generally* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L. J.* 1073 (1994).

116. *See* 17 U.S.C. § 203 (2006).

monetary incentives will spur creativity. In addressing the effects of widely distributed nonmarket production, we need to keep a close eye on which entities are benefiting materially from all these new works, and ask whether there are better ways to allocate those rewards. Assimilation of all creative work to the market is not the solution to exploitative relations, but neither is blind utopianism.

CONCLUSION

Creativity is messy in ways that copyright law and theory have often ignored to their detriment. Creators speak of compulsion, joy, and other emotions and impulses that have little to do with monetary incentives. Fanworks, distilling all the reasons for creating that copyright's incentive theory ignores, foreground desire: desire for particular characters, desire for certain storylines, desire for reciprocal gift relationships between authors and audiences. Desire is of course vital to economic life: we have to want stuff to work for it. Desire, however, breaks through barriers, and stories about desire tend to make *homo economicus* uncomfortable. Fanworks, as creative endeavors existing outside the money economy, are fundamentally based on the inexhaustibility of the imagination. Yet the creative desires fanworks express and satisfy are not alien to other, marketized creative works. Indeed, creators' passions are strikingly similar across the boundary between "original"/authorized and unauthorized derivative works. That similarity has lessons for copyright's incentivizing ambitions, as well as for a broader cultural policy that strives to allow people to express themselves creatively.