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PLEASURE & PAIN IN INTELLECTUAL PROPERTY

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ABSTRACT

Intellectual property produces pleasure. IP laws incentivize investment in popular culture, helping to ensure the viability of entertainment industries and the steady production of our favorite shows, cherished brands, and beloved celebrities. Across IP-heavy industries, creators cite the joy of writing, composing, coding, and experimenting as a motivation for countless hours in the office, studio, or lab. Nonetheless, in a broad range of settings, and across several areas of IP, courts have responded with hostility to personal accounts of pleasure in IP disputes. When a defendant admits to

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using IP because they are fans of the plaintiff, or because they wanted to share their love of popular culture, or because it was simply a lot of fun, courts cite such admissions as reasons for ruling against them.

By contrast, when parties to IP disputes cite not to joy, pleasure, or fandom, but instead to anger, pain, and adversity, courts are far more receptive to such motivations for copying. When a defendant asserts that they copied aspects of the plaintiff's work or brand because they felt alienated by it, or because they wanted to ridicule it, or because they wanted to insult the rightsholder, courts have embraced such motives as supporting fair use and free speech defenses. While sanctioning painful narratives may help artists expose the biases embedded in much popular culture, the judicial privileging of pain also has facilitated disempowering, mocking, blatantly hateful, or intentionally harassing portrayals of vulnerable individuals and communities. Moreover, by privileging pain over pleasure, IP law has limited the ability of marginalized groups—especially women, people of color, and queer people—to share their joy publicly.

This Article shows that courts routinely undervalue pleasure and overvalue pain when resolving IP disputes. This “pleasure taboo” discourages honesty in litigation, disconnects IP doctrine from real-world creative practices, and skews IP's moral compass. Insults and derision emerge as archetypes of fair use and free speech, while fandom and joy become commodities for rightsholders to harvest and control.

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INTRODUCTION: “LOVE IS A WONDERFUL THING”¹

Intellectual property law should be a lot of fun. Prominent IP case law showcases a vibrant range of pop culture moments, including South Park,² Madonna’s “Vogue,”³ *Star Trek*/Dr. Seuss mashups,⁴ Andy Warhol’s portraits of Prince,⁵ Aqua’s “Barbie Girl,”⁶ and “Honey Badger Don’t Give a S---.”⁷ IP disputes also feature a broad range of recreational activities, including online shopping,⁸ yoga,⁹ sex,¹⁰ video games,¹¹ sports,¹² fan fiction,¹³ and accessorizing your pets.¹⁴ For nerdier audiences, IP law highlights cutting edge technologies, including online streaming,¹⁵ artificial intelligence,¹⁶ genetic engineering,¹⁷ mass digitization,¹⁸ and peer-to-peer file

1. MICHAEL BOLTON, *Love Is a Wonderful Thing*, on Time, Love & Tenderness (Columbia Recs. 1991). See generally *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000) (ruling on the litigation associated with Michael Bolton’s song “Love Is a Wonderful Thing”).

2. See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).

3. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

4. See *Dr. Seuss Enters., L.P. v. ComicMix, LLC*, 983 F.3d 443 (9th Cir. 2020).

5. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

6. See *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894 (9th Cir. 2002).

7. See *Gordon v. Drape Creative, Inc.*, 909 F.3d 257 (9th Cir. 2018).

8. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

9. See *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015).

10. See *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382 (6th Cir. 2010); *Ritchie v. Vast Resources, Inc.*, 563 F.3d 1334 (Fed. Cir. 2009); *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366 (S.D.N.Y. 1979), *aff’d*, 604 F.2d 200 (2d Cir. 1979).

11. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013).

12. See *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018); *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 489 (5th Cir. 2008).

13. See *Polychron v. Bezos*, No. 23-cv-02831, 2023 WL 6192743 (C.D. Cal. Aug. 14, 2023); *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 15-cv-09938, 2017 WL 83506 (C.D. Cal. Jan. 3, 2017).

14. See *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578 (2023); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

15. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

16. See Edward Helmore, *Microsoft Asks to Dismiss New York Times’s ‘Doomsday’ Copyright Lawsuit*, THE GUARDIAN (Mar. 7, 2024, at 09:28 ET), <https://www.theguardian.com/technology/2024/mar/06/microsoft-dismiss-ai-new-york-times-lawsuit> [<https://perma.cc/PR6P-6JJN>].

17. See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

18. See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

sharing.¹⁹ IP law aims to promote entertainment, art, and science, and it accordingly resolves disputes concerning some of the most joyful or engaging topics in our culture. Especially against the dense, heavy, and dispiriting tenor of much of American jurisprudence, IP's colorful cast of characters would seem to provide much-needed opportunities for lawyers, judges, and students to find pleasure within the law.

Nevertheless, pleasure remains at the periphery of IP law and policy. The primary justification for the provision of IP rights in the United States is decidedly economic; without exclusive rights in a creative work, invention, celebrity likeness, or trademark, the IP holder lacks sufficient economic incentives to invest in creative activities or develop high-quality brands and products.²⁰ IP rights are protected only to the extent that they shore up the rightsholder's financial stake in the use and dissemination of their creative pursuits. Noneconomic interests in IP—such as privacy, community, spirituality, and emotions—are frequently rejected as legitimate concerns of the IP system.²¹ Pleasure—the focus of this Article—is another one of IP's excluded values. Judges and lawyers rarely frame IP disputes in terms of the pleasurable experiences of authorship or the joyful experience of sharing popular culture with others.

Previous scholarship has critiqued the IP system—especially copyright law—for ignoring the role of pleasure and joy as important motivators for creative and innovative pursuits. Despite judicial recitations of phrases like, “[n]o man but a blockhead ever wrote, except for money,”²² research on actual creative processes reveals

19. See *Metro-Golden-Mayer Studios, Inc. v. Gorkster, Ltd.*, 545 U.S. 913 (2005).

20. See *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1583 (2023) (“[T]he producer of a quality product may derive significant value from its marks. They ensure that the producer itself—and not some ‘imitating competitor’—will reap the financial rewards associated with the product’s good reputation.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Chakrabarty*, 447 U.S. at 307 (“The patent laws promote this progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts.”); *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001) (“[T]he right of publicity is essentially an economic right.”).

21. See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc) (“In broad terms, ‘the protection of privacy is not a function of the copyright law.’”); Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 73-76 (2018).

22. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (alteration in original)

that money is only one trigger—and often not the primary trigger—for individuals and communities to devote time and resources to creativity and innovation.²³ Within a broad range of IP-heavy industries, creators cite the joy of writing, composing, coding, and experimenting as motivation for countless hours in the office, studio, or lab.²⁴ Several IP scholars have accordingly argued that pleasure—in creating, consuming, reusing, and sharing—can provide a powerful incentive to innovate.²⁵ Other scholars have argued that strictly economic accounts of IP leave little space for stories of human flourishing that emphasize pleasure, play, love, and joy among artists, devoted fans, and the consuming public.²⁶ Within existing scholarship, pleasure might be understood as *implicit* in the IP system: an unacknowledged motivation to create and an assumed reason why the market consumes IP-protected goods, often at supra-competitive prices.

Existing scholarship has not, however, asked what happens when pleasure becomes *explicit*, that is, when a party to an IP dispute *does* openly acknowledge the role of pleasure in their creative process.²⁷ If individuals are motivated by joy to engage in creative

(quoting 3 JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* 19 (G. Hill ed., 1934)).

23. See Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 104-05 (2017).

24. See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 35, 38-42 (2015).

25. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 526 (2009) (“[C]reativity routinely *feels good*.”); Julie E. Cohen, *Power/Play: Discussion of Configuring the Networked Self*, 6 JERUSALEM REV. LEGAL STUD. 137, 141 (2012) (“Play is what gives need, passion, or desire for an outlet and shapes its expressed form.... A regime of copyright law that prizes human creativity ought to care about the situated behaviors and circumstantial factors that are important in shaping both the form and the content of human creativity.”); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1765-66, 1772 (2012); Rosenblatt, *supra* note 23, at 129 (“Valuing economic incentives while ignoring emotional ones ... undervalues the multi-faceted nature of individual motivation and warps social concepts of who can be a creator.”).

26. See JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 70-73 (2012); MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 23-25 (2012); Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 346 (2017) (“Aesthetic play has intrinsic value—as a source of pleasure, of moral and political cultivation, of imaginative freedom and self-actualization.”); Tushnet, *supra* note 25, at 537 (“[C]reativity is a positive virtue, not just because of its results but because of how the process of making meaning contributes to human flourishing.”).

27. One possible exception is Jennifer E. Rothman, *Sex Exceptionalism in Intellectual*

pursuits, and those individuals are parties to litigation, then they will likely be forced to describe—often under oath—their creative process, the reasons they undertook it, and the feelings they had during it. For example, if a defendant is sued for producing fan fiction, or for making mashups of popular works, or for injecting humor into the depiction of a well-known celebrity or brand, then discussions of joyful creativity would likely find their way into a case’s factual record. As a result, judges in IP disputes are likely to be confronted with evidence of the pleasure infused into creation, consumption, and reuse of IP. How, then, do judges respond to personal accounts of pleasure within IP disputes?

In short, with hostility. Most commonly, when a defendant admits to using a plaintiff’s IP—especially copyrighted works, trademarks, or publicity rights—because they are fans of the plaintiff, or because they wanted to share their love of popular culture with others, or because it was simply a lot of fun, courts cite such admissions as reasons for ruling against them. For example, the prominent visual artist Richard Prince was sued for copyright infringement for creating large-scale replicas of a variety of different Instagram posts in his “New Portraits” series;²⁸ when asked during his deposition why he undertook this project, he said that his goals were “to ‘have fun,’ ‘make art,’ and to ‘make people feel good.’”²⁹ In rejecting Prince’s fair use defense, the district judge repeatedly referenced Prince’s “fun” as undermining his contention that he had made a “transformative” use of plaintiffs’ works.³⁰ Numerous other defendants have been unsuccessful in asserting fair use defenses to copyright infringement, or analogous free speech defenses to trademark and publicity rights claims, when they have acknowledged the joy of their creative process, their love and fandom for the plaintiff’s work, or their desire to cater to the joy, pleasure, or fandom of their customers.³¹

Property, 23 STAN. L. & POL’Y REV. 119, 120 (2012). Rothman’s focus, though, is on exceptional treatment of sexual subject matter more broadly, as opposed to sexual *pleasure* specifically. As this Article explains, courts appear hostile to sexual expression when its stance is joyful and loving but are more receptive to sexual expression that is dark and critical, for example, showcasing sexual harassment as opposed to facilitating the sexual pleasure of consumers. See *infra* Part II.C.

28. *Graham v. Prince*, No. 15-cv-10160, 2023 WL 3383029 (S.D.N.Y. May 11, 2023).

29. *Id.* at *3.

30. *Id.* at *11, *13.

31. See *infra* Part II.

When pleasure bubbles to the surface of IP litigation, it constricts the rights of parties who made the mistake of admitting to a good time.

By contrast, when parties to IP disputes cite not to joy, pleasure, or fandom, but instead to anger, pain, and adversity, courts are far more receptive to such motivations for creativity and copying. When a party asserts that they copied aspects of the rightholder's work or brand because they felt alienated by it,³² or they wanted to ridicule it,³³ or because they wanted to knock it "off its perch,"³⁴ courts have embraced such motives as supporting fair use and free speech defenses.³⁵ While painful—as opposed to pleasurable—motives may seem necessary to expose the racism and sexism embedded in popular works like *Gone with the Wind*,³⁶ such asserted motives have also facilitated mocking, blatantly hateful, or intentionally harassing portrayals of vulnerable individuals and communities.³⁷ For example, in a case involving the notoriously misogynistic gossip site TheDirty.com,³⁸ the disputed post was "meant to ridicule and mock

32. See First Amended Complaint and Demand for a Jury Trial ¶ 51, *Adjmi v. DLT Ent. Ltd.*, 97 F. Supp. 3d 512 (S.D.N.Y. 2015) (No. 14-cv-00568), 2014 WL 10298437.

33. See *Weinberg v. Dirty World, LLC*, No. 16-cv-09179, 2017 WL 5665023, at *7 (C.D. Cal. July 27, 2017) ("Rather, the entire post is meant to ridicule and mock Plaintiff's wife."); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 968-69 (C.D. Cal. 2007) ("The eighteen-second clip of the animated figure resembling the 'Charwoman,' mopping the floor next to 'blow-up dolls,' a rack of 'XXX' movies, and 'video booths' in a porn shop is clearly designed to 'imitate[] the characteristic style of an author or a work for comic effort or ridicule.'" (alteration in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994))).

34. *CCA & B, LLC v. F + W Media Inc.*, 819 F. Supp. 2d 1310, 1317 (N.D. Ga. 2011).

35. See *infra* Part II.A.3.

36. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268-71 (11th Cir. 2001); see also *infra* Part II.A.3.

37. See *Hannley v. Mann*, No. 21-cv-02043, 2023 WL 3407183, at *3, *5-6 (C.D. Cal. Mar. 8, 2023) (finding fair use of a photo captioned "I recently Came out. I love My Body but i hate my UGLY Face. I HATE it :("); *Roberts v. Bliss*, 229 F. Supp. 3d 240, 253 (S.D.N.Y. 2017) ("The ad replaces Roberts—the object of the harassing men's attention in the 10 Hours video—with the appetizers. They are now the subject of the men's desire.").

38. See Kate Knibbs, *Cleaning up the Dirty*, THE RINGER (Apr. 19, 2017, at 12:21 ET), <https://www.theringer.com/2017/04/19/tech/the-dirty-nik-richie-gossip-site-relaunch-4a086aa24536> [<https://perma.cc/J9WJ-WNEM>]; see also Laura Cannon, Comment, *Indecent Communications: Revenge Porn and Congressional Intent of § 230(c)*, 90 TUL. L. REV. 471, 479-86 (2015) (detailing litigation between the website and several women); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 NYU J. INTELL. PROP. & ENT. L. 422, 429-30 (2014) (discussing the website's history of "inviting" posts that invaded women's rights of privacy).

Plaintiff's wife, calling her 'ugly' and 'awkward looking,' insulting her for being an unknown model, and disdainfully commenting on her ears."³⁹ According to the court, "[s]uch a use is precisely what the Copyright Act envisions as a paradigmatic fair use."⁴⁰ When purportedly humorous and entertaining uses are infused with misogyny and sexual aggression, courts will frame these uses as critical speech protected by fair use and the First Amendment.⁴¹ By contrast, humorous and entertaining uses that *do not* inflict pain on a target are characterized as free-riding, lazy, and unfairly invading the plaintiff's legitimate markets.⁴² The First Amendment may make it necessary for IP laws to carve out space for critique and opposition, but this Article shows that IP has not carved out space for joy and loving attachments.

This Article accordingly shows that although economic interests remain paramount in IP disputes, courts are not absolutely hostile to noneconomic interests; they are just especially hostile to pleasure. The pleasure accompanying creativity is cited as evidence that a party (1) lacks a sufficiently weighty justification for seeking the court's protection—that is, pleasure is frivolous;⁴³ (2) lacks sufficient self-control to respect the legal interests of others—that is, pleasure is excessive;⁴⁴ or (3) is invading the core economic interests of

39. *Weinberg v. Dirty World, LLC*, No. 16-cv-09179, 2017 WL 5665023, at *7, *9 (C.D. Cal. July 27, 2017) ("[T]he entire Post uses the Video Image as part of a direct critique on Plaintiff's wife's appearance, her status as a model, her husband, and her relationship with her husband.")

40. *Id.* at *9 (first citing *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152-53 (9th Cir. 1986); then citing *Dhillon v. Does 1-10*, No. 13-cv-01465, 2014 WL 722592, at *5 (N.D. Cal. Feb. 25, 2014); then citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); and then citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003)).

41. *Infra* Part II.C.2.

42. *Infra* Part II.C.1.

43. See *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 448, 452-53 (9th Cir. 2020) (rejecting fair use argument by a "Trekkie" who stated they wanted to create a "funny" book); see also COHEN, *supra* note 26, at 70-74 (arguing that play is less romantic than "meaning making" or contesting cultural hegemony); Beebe, *supra* note 26, at 340 (noting that the nation's founders may have been hostile toward "books of mere amusement"); Alexis Lothian, *A Different Kind of Love Song: Vidding Fandom's Undercommons*, 54 CINEMA J. 138, 143 (2015) ("To argue for the legal legitimacy of the creative work they do, vidders must show not only that what they do is not theft but also that it is about more than love.")

44. See *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008) ("Perhaps because Vander Ark is such a *Harry Potter* enthusiast, the Lexicon often lacks restraint in using Rowling's original expression for its inherent entertainment and aesthetic value.")

others—that is, pleasure is a commodity.⁴⁵ Implicit in each of these framings is that creative activity motivated by the subjective experience of pleasure, or the desire to share that experience of pleasure with others, does not fulfill IP law’s constitutional mandate to promote “[p]rogress.”⁴⁶ In other words, pleasure is not progressive.

The devaluation of pleasure within IP is problematic for several reasons. First, to the extent that IP laws remain committed to increasing incentives for investments in innovation and creativity, the hostility toward pleasure discounts a core human experience that is often integral to the creativity IP is supposed to promote.⁴⁷ The fun experienced by artists like Richard Prince may be dismissed as merely lighthearted or inconsequential, but “fun” bears many of the optimal qualities of creativity and innovation: playful experimentation, social connection, and a sense of flow.⁴⁸ Moreover, pleasure in creativity and popular culture can be the gateway toward developing one’s (gender, sexual, ethnic, religious, or professional) identity, signaling a sense of comfort and belonging in

45. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (“[W]e are concerned not with whether conventional celebrity images should be produced but with who produces them and, more pertinently, who appropriates the value from their production.... [I]f Saderup wishes to continue to depict The Three Stooges as he has done, he may do so only with the consent of the right-of-publicity holder.”); *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (“[I]n the entertainment industry fun *is* profit.”).

46. U.S. CONST. art. I, § 8, cl. 8; see Beebe, *supra* note 26, at 374 (“This market definition of aesthetic progress ignores what cannot be commodified and sold, such as one’s own engagement in aesthetic play.”); Rosenblatt, *supra* note 23, at 94 (“While the prevailing constitutional interpretation of ‘progress’ focuses exclusively on the production and advancement of material goods, many authors and inventors view ‘progress’ as having as much to do with community as with stuff.”).

47. See *infra* Part III.B; see also Beebe, *supra* note 26, at 392 (advocating for adding “the value of aesthetic production in itself” to the incentives equation); Margaret Chon, *Emotions and Intellectual Property Law*, 54 AKRON L. REV. 529, 540 (2021) (“[C]opyrighted content can elicit delight, joy, or even awe.... Happy engagement with inventions and trademark designs, by either the owners or putative infringers, can also further overall understanding and learning, which then furthers the goals of IP.”).

48. See CATHERINE PRICE, *THE POWER OF FUN: HOW TO FEEL ALIVE AGAIN* 32-34 (2021); COHEN, *supra* note 26, at 54 (“Play is ... the pathway by which transformative innovation and synthetic understanding emerge.”); Rosenblatt, *supra* note 23, at 120 (“Experiencing belonging in creative communities provides a sense of ownership and motivation in connection with one’s work, which improves the quality of that work.”); MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* 110 (1996) (describing the optimal experience of creativity as involving “*flow*,” an “almost automatic, effortless, yet highly focused state of consciousness”).

particular communities.⁴⁹ While personal development and community building may not be the economic incentives traditionally embraced by IP, they nonetheless have been shown to be key motivators for many creators—especially women, racial minorities, and queer people—whose agency and flourishing are underrepresented in popular culture.⁵⁰ Cutting off pleasure cuts off a signal that someone’s work is worth pursuing emotionally. If IP law is *punishing* pleasure, yet pleasure is an important incentive to create, then IP law may be perversely disincentivizing a significant amount of creative activity.⁵¹

Second, the disparate treatment of pleasurable and painful motives creates a strong incentive for litigants to lie about or significantly distort their motivations for undertaking their creative process.⁵² Parties in IP disputes are frequently accused of “post hoc rationalizations” for their creative activities, for example by desperately trying to unearth a parody, critique, or social commentary in a work where one was never intended.⁵³ When joy and pleasure are third-rail topics, however, creators (who, again, are likely enjoying their craft) are forced to narrate away from their actual motives in order to avoid liability. Despite the doctrinal dichotomy between oppositional and joyful attachments to popular culture, hate and love are often deeply interwoven motivators for creative works, especially fan works.⁵⁴ By downplaying pleasure, IP laws create little space for the hybrid motives that pervade creative communities and present a distorted picture of what spurs people to create.

Third, and relatedly, the downplaying of pleasure unjustly redistributes the benefits and privileges of IP away from important

49. Cf. SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 171 (2001) (exploring the connection between emotion and identity-formation).

50. See Fromer, *supra* note 25, at 1764-81; Rosenblatt, *supra* note 23, at 110-22.

51. See Fromer, *supra* note 25, at 1786-87 (observing that Bentham and Mill both viewed happiness and pleasure as part of the utilitarian welfare calculus); Beebe, *supra* note 26, at 384 (observing that the Supreme Court’s failure to “consider[] ... the pleasure and edification a second-generation author might derive from ... publish[ing] a transformative work”).

52. See *infra* Part III.A.

53. See, e.g., *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 453 (9th Cir. 2020).

54. See Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J.L. & POL’Y FOR INFO. SOC’Y 1, 8 (2010) (“Many fanworks don’t fit the prototypical fair use of biting, mocking criticism that targets aspects of the original in order to reject them.”).

forms of creative expression. If oppositional uses of creative works and brands are likely to be lawful, while joyful uses are not, then large-scale financial investments in creative activity (for example, recording contracts, distribution deals, and venture capital) will be funneled to those creators who can best spin their projects as critiquing or lampooning earlier works or brands. They will not be funneled into projects that pull from popular culture to lift up the audience and empower them via representations that are otherwise scarcely available in mainstream culture.⁵⁵ When pleasure, love, and joy are cast as suspect motivations for reusing IP, it becomes much harder to justify; for example, portrayals of empowered Black women finding joy despite a backdrop of institutional racism,⁵⁶ drag artists spreading messages of self-love through the music of pop divas;⁵⁷ teenage girls placing themselves at the center of their favorite movie franchise;⁵⁸ or a trans filmmaker sharing her gender journey through the lens of Gotham City.⁵⁹ For such uses to be recognized as fair use or free speech, the artists need to emphasize the pain, anger, and alienation that motivated their work and downplay the joy attending their creative process. Pleasure in popular culture remains subject to the veto of rightsholders.

The disparate treatment of pleasure and pain accordingly suggests a rather bleak normative vision for IP. To the extent audiences feel deep personal connections with creative works, brands, and celebrities, the cases examined in this article drive a sharp wedge between those connections that are rooted in joy or affection and those that are rooted in pain or anger.⁶⁰ To the extent that audiences love some aspect of a work, brand, or celebrity, IP laws treat

55. See MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE* 28 (1998) (“[The] ability of popular culture to produce pleasure and incite the human imagination to new levels of freedom exists as an ideal, all too often underrealized.”).

56. See *infra* Part II.A.3 (discussing Alice Randall’s *The Wind Done Gone*).

57. See Eden Sarid, *A Queer Analysis of Intellectual Property*, 2022 WIS. L. REV. 91, 96-114 (2022).

58. See Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women’s Voices on Fandom and Fair Use*, in *EGIRLS, ECITIZENS* 385, 391, 398-400 (Jane Bailey & Valerie Steeves eds., 2015).

59. See *infra* text accompanying notes 388-94 (discussing *The People’s Joker*).

60. See SUNDER, *supra* note 26, at 34-35 (observing that it is “paradoxical” that hostile works have greater freedom from copyright enforcement than those works that embrace and try to extend them in new directions (quoting HENRY JENKINS, *CONVERGENCE CULTURE* 198-99 (2006))).

such loving attachments as sufficiently provided for by IP licensing markets; if audiences see some gap in the current menu of offerings, they should step up and pay whatever fee rightsholders demand. Ultimately, this Article shows that the value of pleasure in IP lies almost entirely in its potential as a commodity; if someone loves *Star Trek*, or college football, or The Three Stooges, then they should be expected to pay monopolistic prices to incorporate these entities into their creative works.⁶¹

Pain, by contrast, transcends the marketplace. To the extent that audiences dislike or feel angry about some aspect of a work, brand, or celebrity, IP laws carve out spaces for them to freely express those feelings; this expression might call out racism or misogyny (that is, speak truth to power or “punch up”) but it might also take the form of racism or misogyny (that is, speak power to truth or “punch down”).⁶² IP laws protect your right to express the pain you have experienced in pop culture as well as your right to make others feel the pain you think they deserve. If, as several scholars assert, IP truly has the potential to promote human flourishing,⁶³ then IP laws need to explicitly embrace a much broader, less painful, emotional bandwidth than they currently do.

Ultimately, this Article shows that IP laws fail to appreciate just how much pleasure matters. The affective experience of pleasure—and the related emotions of love, joy, fun, and happiness—is often dismissed in law, culture, and politics as an unimportant policy consideration.⁶⁴ Pleasure, at best, is a reward for hard work and productivity—a treat at the end of the day to be purchased by those who have earned it.⁶⁵ At worst, pleasure is viewed as an addictive distraction from hard work and the various obligations that make us responsible citizens.⁶⁶ Nonetheless, a range of scholars have

61. See *infra* Part III.C.

62. See *infra* Part II.C.2.

63. See COHEN, *supra* note 26, at 224-29; SUNDER, *supra* note 26, at 24.

64. See, e.g., JAY WEXLER, WEED RULES 61 (2023) (“Joy is not a criterion we often hear people talk about in serious public policy circles.”).

65. BRONSKI, *supra* note 55, at 15 (“The promise of pleasure functions as currency for shaping socially appropriate behavior. If you behave correctly, dress nicely, and don’t challenge accepted authority, you will be compensated with pleasure.”); AHMED, *supra* note 49, at 163 (“Pleasure becomes an imperative only as an incentive and reward for good conduct, or as an ‘appropriate outlet’ for bodies that are busy being productive.”).

66. See BRONSKI, *supra* note 55, at 139 (“Right-wing strategists zeroed in on the image of

recognized pleasure as a foundational human capability with enormous political potential.⁶⁷ Pleasure builds connections with others and trains the mind and body to feel welcome and included in a particular domain.⁶⁸ Determining who has access to pleasure in popular culture accordingly determines who feels seen and included in mainstream society.⁶⁹ Pain, of course, also matters—it signals danger and injustice and can catalyze political action—but treating pain as a right and pleasure as a commodity hollows out the political potential of the cultural spaces IP regulates.

This Article identifies and pushes back against a pleasure taboo that has emerged at the intersection of IP and free speech. In elevating the value of pleasure in IP, however, it does not argue that all pleasurable uses of IP are categorically noninfringing. Pleasure-motivated activities *can* impact rightsholders in ways that might be actionably harmful. A large-scale unauthorized fan work, for example, might be shown to divert revenue away from an authorized sequel or cause confusion as to whether the work was authorized by the rightsholder. Moreover, pleasure experienced by one group of people can come at the expense of other people’s privacy, safety, or professional reputation. But rather than focus on these potential harms, courts often improperly use narratives of love, fun, and pleasure as shortcuts around the difficult balancing of the diverse interests present in IP disputes.⁷⁰ As this Article shows, the hazy line between love and hate is a poor proxy for the line between

homosexuals as wealthy pleasure seekers and made it the cornerstone of their attempt to galvanize animosity and resentment.”).

67. See ADRIENNE MAREE BROWN, PLEASURE ACTIVISM 13 (2019) (“Pleasure activism asserts that we all need and deserve pleasure and that our social structures must reflect this.”); BRONSKI, *supra* note 55, at 15 (“We have been taught to conceptualize pleasure as something with which we are rewarded in small doses, as something that is granted by an external source, not as an innate potential.”).

68. AHMED, *supra* note 49, at 164 (“Pleasures open bodies to worlds through an opening up of the body to others.”).

69. BRONSKI, *supra* note 55, at 24 (“The impulse for pleasure is closely tied to impulses for creativity and personal freedom.”).

70. In previous work, I have advocated an “interest-transparent” approach to fair use, which foregrounds the rightsholders’ motivations (for example, money, privacy, reputation), weighs those interests against the defendants’ justification for their use, and tailors any remedies to the nature of the interests at stake. Andrew Gilden, *Copyright’s Market Gibberish*, 94 WASH. L. REV. 1019, 1075-80 (2019). Such an approach would render it unnecessary to denigrate fandom and other loving attachments to deny fair use defenses in the face of reasonably likely harms.

infringement and free speech. Devaluing pleasure deters investment in unauthorized activities that might be framed as “fun,” to the detriment of creativity, community, and equality.

The remainder of this Article demonstrates the gap between love and hate in IP jurisprudence and highlights the pitfalls of downplaying and discounting the joy, pleasure, and affection that often inheres in the creative process. Part I provides a brief overview of relevant IP doctrines and situates emotional attachments within them. Part II closely analyzes over seventy cases where courts have addressed pleasure, pain, and related emotions as part of the parties’ creative processes. It shows a sharp divergence in courts’ approaches to pleasure and pain across a diverse body of copyright, trademark, and publicity rights case law. Part III shows the dangers of such divergence for IP and cultural policy. The Article concludes with thoughts on how to better interrogate love and hate when they emerge in IP disputes.

I. DOCTRINES OF PLEASURE

Most of the time, pleasure is only implicit within the dominant economic theory of IP. IP rights facilitate investment in entertainment industries and better ensure that creative professionals are compensated for the time and energy they devote to entertaining audiences.⁷¹ Without IP, the prevailing concern is that the market for film, television, music, and other forms of entertainment would be underserved due to the ease of copying creative works without compensation. IP law is generally agnostic to market preferences and whether audiences love, hate, or care at all about the creative output it incentivizes. Even though pleasure, pain, and related emotions undoubtedly drive many decisions in the IP system,⁷²

71. See *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1583 (2023) (“[T]he producer of a quality product may derive significant value from its marks. They ensure that the producer itself—and not some ‘imitating competitor’—will reap the financial rewards associated with the product’s good reputation.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

72. See Chon, *supra* note 47, at 531 (“[U]nderstanding how emotions undergird affect, attachment, attraction, repulsion, and attention for all areas of IP knowledge production is an essential first step to addressing our currently pervasive knowledge asymmetries, biases, and omissions.”).

including licensing,⁷³ litigation,⁷⁴ and registration,⁷⁵ courts routinely insist that IP rights ultimately are *not* designed to address the emotional aspects of copying someone's creative work, invention, name, likeness, or brand.⁷⁶

Emotions and the subjective views of audiences nonetheless do sometimes emerge explicitly, most often in connection with free speech and fair use limits on copyright, trademark, and publicity rights.⁷⁷ IP rights are typically limited when there are reasons to believe that strict enforcement of IP rights will skew public discourse in problematic ways, for example by suppressing critique or by imposing unreasonably high coordination and clearance costs on socially valuable expression.⁷⁸ The resulting speech-protective

73. See Raphaëlle Rérolle, *My Father's "Eviscerated" Work—Son of Hobbit Scribe J.R.R. Tolkien Finally Speaks Out*, WORLD CRUNCH (Dec. 5, 2012), <https://worldcrunch.com/culture-society/my-father39s-eviscerated-work-son-of-hobbit-scribe-jrr-tolkien-finally-speaks-out> [<https://perma.cc/2VK3-E9Y4>].

74. See Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. REV. 639, 656-76 (2017); Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433 (2016).

75. See *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 46 (D.C. Cir. 2005) ("In 1992, seven Native Americans petitioned for cancellation of the registrations, claiming that the marks had disparaged Native Americans at the times of registration.").

76. See *Garcia v. Google, Inc.*, 786 F.3d 733, 744 (9th Cir. 2015) ("The difficulty with Garcia's claim is that there is a mismatch between her substantive copyright claim and the dangers she hopes to remedy through an injunction."); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) ("Publicity rights, however, are meant to protect against the loss of financial gain, not mental anguish."). I have contested these economic framings of IP, both normatively and empirically. See Gilden, *supra* note 21, at 68, 72-79, 99.

77. Patent law, unlike other areas of IP, lacks a free-speech-related defense that would allow the alleged infringer to justify their actions based on a socially significant purpose. See Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1180-81 (2000). So long as a defendant practices every element of a patent claim, they are liable for infringement, even if they had a "good" reason and even if they were fully unaware of the existence of the patent. This is not to say that pleasure and joy are irrelevant to the world of invention, see SILBEY, *supra* note 24, at 35-39 (discussing the pleasure motives of scientists and engineers), just that patent law lacks the doctrinal hooks for such pleasure narratives to make their way into case law.

78. See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014) ("[Fair use's] goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors. (Many copyright owners would block all parodies, for example, and the administrative costs of finding and obtaining consent from copyright holders would frustrate many academic uses.)"; see also Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 30 J. COPYRIGHT SOC'Y U.S.A. 253, 271 (1983) (arguing that the fair use doctrine should be invoked

doctrines often look at the purposes behind creating or copying IP-protected subject matter, foregrounding the parties' creative perspectives and opening up their emotional interiors to judicial scrutiny. This Part shows the potential doctrinal relevance of powerful feelings in IP. The subsequent Part then shows the divergent treatment of love and pleasure versus hate and pain within litigated IP disputes.

A. Copyright

The most common potential setting for a discussion of emotion in IP is copyright law's fair use doctrine. The fair use doctrine is designed to buffer against the constitutional concerns of robust copyright protections, such as First Amendment impingements on journalism and artistic expression, and to provide space for uses of copyrighted works that would be unlikely to be licensed, such as in creative works that criticize or fairly compete with the copyright owner.⁷⁹

Several aspects of fair use law focus on the motivations behind a contested use.⁸⁰ Most prominently, the first of the four fair use factors looks at "the purpose and character of the use."⁸¹ If the defendant's purpose is distinct from the rightsholder's purpose, they can claim the mantle of a "transformative use" and likely avoid liability.⁸² For example, in *Campbell v. Acuff-Rose*, the Supreme Court found 2 Live Crew's song "Pretty Woman" to be a transformative parody of Roy Orbison's "Oh, Pretty Woman."⁸³ The song

when a defendant's use of the copyrighted work is "socially desirable").

79. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203-04 (2021) (finding Google's copying of parts of the Java API to be transformative when it enabled the creation of new products, the interoperability of software, and the recruitment of computer programmers to the Android platform); *Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003) (describing fair use as one of copyright law's "built-in First Amendment accommodations").

80. For example, Section 107 of the Copyright Act sets forth a list of exemplary fair uses such as "criticism, comment, news reporting, teaching ... scholarship, or research." 17 U.S.C. § 107. Some courts also have examined whether a use was in good or bad faith. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("Fair use presupposes 'good faith' and 'fair dealing.'" (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968))).

81. 17 U.S.C. § 107.

82. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).

83. See *id.* at 583.

was “a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.”⁸⁴ In its recent decision in *Warhol Foundation*, by contrast, the Supreme Court held that displaying an Andy Warhol silkscreen of Prince on the cover of Vanity Fair magazine was not a transformative use of Goldsmith’s photograph of Prince, which Warhol had used as a reference.⁸⁵ Because the *Warhol Foundation* defendants, unlike 2 Live Crew, were not targeting Prince for criticism, they had a much weaker justification for using a copyrighted photograph of him.⁸⁶

The fair use inquiry focuses on what a defendant reasonably⁸⁷ intended to convey when copying the plaintiff’s work and what, if anything, the defendant is reasonably perceived as saying *about* the plaintiff’s work itself. This inquiry ultimately pushes accused infringers to place themselves at a critical distance from the plaintiff’s work and by contrast pushes copyright owners to frame copyists as merely piggybacking on their work’s aesthetic appeal.

Where defendants’ uses are motivated by pleasure, love, and joy, there accordingly is an awkward fit with fair use. Such uses are not necessarily *critical* of the copyrighted work, but they are still often suppressed by rightsholders, such as with unauthorized fan fiction.⁸⁸ Pleasure-motivated reuses of copyrighted works may be highly creative, but they are often perceived as competing with the object of the defendant’s affection. As one district court post-*Warhol Foundation* explained, “criticism (and its close cousin, parody) do not ‘supersede the objects of, or supplant’ an original work in the same way that more flattering follow-on works might do.”⁸⁹ Without narratives of ridicule aimed at the copyrighted work, it becomes much harder for defendants to justify copying a work, even when they add significant amounts of new creative expression. Critique

84. *Id.*

85. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1280 (2023).

86. *Id.* at 1272, 1286-87.

87. I include the term “reasonably” here to clarify that the fair use inquiry is ultimately objective—it is not enough for the defendant to show that they subjectively intended to parody the copyrighted work; such parody must be reasonably perceived by audiences. *Id.* at 1282-83. Nonetheless, as shown throughout this Article, courts routinely discuss defendants’ subjective intents in using a copyrighted work.

88. *See infra* Part II.A.

89. *Larson v. Dorland*, 693 F. Supp. 3d 59, 80 (D. Mass. 2023).

is a winning narrative for the defendant; praise is a winning narrative for the plaintiff.

B. Rights of Publicity

Right-of-publicity laws generally prohibit the use of a person's name, voice, or likeness for purposes of trade or advertising without authorization.⁹⁰ Although publicity rights initially were justified as protecting individuals' privacy interests, they have increasingly been framed, in parallel to copyright law, in terms of providing economic incentives to invest in one's celebrity persona.⁹¹ Also, like copyright law, courts have recognized that a legal restriction on the use of celebrity imagery could easily clash with free speech principles, and they have developed First Amendment defenses to right-of-publicity claims.⁹²

As with the fair use defense, publicity rights' First Amendment defenses often prompt an inquiry into the motives behind the defendant's actions and the discursive relationship between a celebrity likeness and the defendant's expression.⁹³ Most prominently, the California Supreme Court has explicitly imported a "transformative use" analysis from copyright's fair use doctrine in order

90. See generally JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) (detailing the history of right-of-publicity laws).

91. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("[T]he protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.").

92. See *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) ("Celebrities ... are an important element of the shared communicative resources of our cultural domain."); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 ("[B]ecause celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression.... Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation." (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993))); see also Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 370-71 (2016) (summarizing the judicial approach to resolving the tension between the First Amendment right-of-publicity laws).

93. In addition to the transformative use test, which has become the most common First Amendment defense to publicity rights claims, others advocate for a "predominant use" test, which asks whether "the predominant purpose of the product is to make an expressive comment on or about a celebrity" or if it "predominantly exploits the commercial value of an individual's identity." *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

to determine whether the defendant was engaged in “parody or other distortions of the celebrity figure” or was merely engaged in “conventional depictions of the celebrity.”⁹⁴ In *Comedy III v. Saderup*, the court held that the defendant’s charcoal drawings of The Three Stooges were not transformative because they were “literal, conventional depictions of The Three Stooges” intended “to exploit their fame.”⁹⁵ In doing so, the court disagreed with the defendant’s argument “that it would be incongruous and unjust to protect parodies and other distortions of celebrity figures but not wholesome, reverential portraits of such celebrities.”⁹⁶

C. Trademark

There are several aspects of trademark law that might prompt a discussion of a party’s loving attachment—or aversion—to a trademarked good or service. The central issue within any trademark infringement lawsuit is whether the defendant’s use of the plaintiff’s mark is likely to cause confusion among consumers as to the source or sponsorship of the defendant’s commercial offering.⁹⁷ Trademark claims can trigger many of the same expressive interests as copyright and publicity rights, particularly when trademarks are parts of parodies, satire, and social commentary.

Several courts have addressed parody by applying their standard multifactor likelihood of confusion tests, but acknowledging at each step that consumers are unlikely “to think that the maker of a mocked product is itself doing the mocking.”⁹⁸ For example, when addressing defendants’ good or bad faith intent in using plaintiffs’

94. *Comedy III*, 21 P.3d at 808.

95. *Id.* at 811.

96. *Id.*

97. See *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1584 (2023) (“Confusion as to source is the bête noire of trademark law.”).

98. See *id.* at 1587; 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:153 (5th ed. 2025) (“The unpermitted use of another’s mark in an expressive parody is not an affirmative defense to a charge of trademark infringement.... Rather, ‘parody’ is a way of arguing that there will be no trademark infringement because there will be no likelihood of confusion.”). Accordingly, an attempted parody is not categorically immunized from a finding of likely consumer confusion. See *Vans, Inc. v. MSCHF Prod. Studio, Inc.*, 88 F.4th 125, 142 (2d Cir. 2023) (“But if a parodic use of protected marks and trade dress leaves confusion as to the source of a product, the parody has not ‘succeeded’ for purposes of the Lanham Act, and the infringement is unlawful.”).

trademark, courts have searched for evidence of whether defendants were genuinely motivated to say something critical or humorous about the trademark or were instead drawn to the trademark owner's popularity, fame, or goodwill.⁹⁹ When a defendant asserts that they were motivated by a desire to say something critical about the trademark, the likelihood of confusion analysis shifts considerably.¹⁰⁰

Courts also have developed a standalone defense that provides additional First Amendment safeguards for expressive uses of a trademark.¹⁰¹ The First Amendment protects the use of a trademark in an expressive work so long as the use has "artistic relevance" and does not "explicitly mislead[]" as to source or sponsorship.¹⁰² "The artistic relevance prong ensures that the defendant intended an artistic ... association with the plaintiff's mark, as opposed to one in

99. *Compare, e.g., Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225, 1232 (7th Cir. 1993) ("Throughout this case Stanard has asserted that he intended only to poke fun at Nike's corporate identity."), and *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 443 (S.D.N.Y. 2016) ("Louis Vuitton relies on the fact that MOB intentionally designed its totes to evoke Louis Vuitton's bags, as to which there is—and can be—no dispute. In the context of parody, however, [t]hat evidence ... does not show that defendant acted with the intent relevant in trademark cases—that is, an intent to capitalize on consumer deception or hitch a free ride on plaintiff's good will." (citation omitted) (quoting *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 419 (S.D.N.Y. 2002))), and *World Wrestling Fed'n Ent., Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 438 (W.D. Pa. 2003) ("[A]ll parodists of consumer products 'intend to select' the products' mark to make their comments."), with *Viacom Int'l Inc. v. Pixi Universal, LLC*, No. 21-cv-02612, 2022 WL 909865, at *6 (S.D. Tex. Mar. 25, 2022) ("[N]either the pop-up nor its name is used to comment, criticize, ridicule, or poke fun. To the contrary, its target is to replicate Viacom's intellectual property in such an authentic manner ... that would attract paying SpongeBob fans.").

100. See MCCARTHY, *supra* note 98, § 31:153 ("A non-infringing parody is merely amusing, not confusing.").

101. Some courts have addressed parodic or other expressive uses of a trademark within the framework of "nominative fair use," which permits the referential use of a plaintiff's trademark so long as (1) the use of the plaintiff's mark is necessary to describe their goods or services; (2) they use only as much of the mark as is necessary to describe the product; and (3) their conduct reflects the accurate relationship they have with the plaintiff. See, e.g., *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 (9th Cir. 2003) ("Forsythe's use of the Barbie trade dress is nominative. Forsythe used Mattel's Barbie figure and head in his works to conjure up associations of Mattel, while at the same time to identify his own work, which is a criticism and parody of Barbie.").

102. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); see also MCCARTHY, *supra* note 98, § 31:144.50 ("The Second Circuit's *Rogers* balancing test has been used by almost all courts."). The Supreme Court recently held that the *Rogers* test is inappropriate when the defendant used the plaintiff's mark as a source identifier (that is, as a trademark). *Jack Daniel's*, 143 S. Ct. 1578, 1589.

which the defendant intends to associate with the mark to exploit the mark's popularity and good will."¹⁰³ Under this test, courts have found, for example: (1) the use of BARBIE was artistically relevant to the band Aqua's critique of conventional beauty standards in its song "Barbie Girl";¹⁰⁴ (2) the use of a Los Angeles strip club's trademarks were artistically relevant to a seedy portrayal of Los Angeles in the *Grand Theft Auto* video games;¹⁰⁵ and (3) the mention of Louis Vuitton's mark was artistically relevant to making a character in *The Hangover: Part II* seem "snobbish" and "socially inept."¹⁰⁶

Trademark law also provides a cause of action for the dilution of famous marks.¹⁰⁷ A dilutive use of a mark undermines the distinctive source identifying function of a trademark by creating new associations between the mark and an unrelated, and potentially tarnishing, use.¹⁰⁸ Some examples might include using BUICK for a line of aspirin or MCDONALDS for a strip club. When dealing with an expressive use of a trademark in a dilution claim, courts typically adapt their multifactor dilution analysis to acknowledge the parodic or artistic intent, akin to what they do with infringement claims.¹⁰⁹ Additionally, the federal dilution statute expressly carves out from dilution liability "[a]ny fair use, including a nominative or descriptive fair use ... including use in connection with ...

103. *Louis Vuitton Mallatier, S.A. v. Warner Bros. Ent.*, 868 F. Supp. 2d 172, 178 (S.D.N.Y. 2012); *see also* *AM Gen. LLC v. Activision Blizzard, Inc.*, 450 F. Supp. 3d 467, 479 (S.D.N.Y. 2020) ("[A]n artistically relevant use will outweigh a moderate risk of confusion where the contested user offers a 'persuasive explanation' that the use was an 'integral element' of an artistic expression rather than a willful attempt to garnish the trademark owner's goodwill for profit.").

104. *See* *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) ("I'm a blond bimbo girl, in a fantasy world.").

105. *See* *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1096-97 (9th Cir. 2008).

106. *Louis Vuitton*, 868 F. Supp. 2d at 178.

107. *See* 15 U.S.C. § 1125(e).

108. *See id.* § 1125(c)(2)(B) ("'[D]ilution by blurring' is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."); *id.* § 1125(c)(2)(C) ("'[D]ilution by tarnishment' is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.").

109. *Louis Vuitton Malletier, S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 266-67 (4th Cir. 2007) ("[The Lanham Act] does not require a court to ignore the existence of a parody that is used as a trademark, and it does not preclude a court from considering parody as part of the circumstances to be considered for determining whether the plaintiff has made out a claim for dilution by blurring.").

identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner,” so long as the defendant is not using the mark in a source-identifying manner.¹¹⁰ As with an infringement claim, evidence about the defendant’s intent to parody, criticize, or comment on a famous mark owner can significantly shift the dilution analysis.

Even though copyright, trademark, and publicity rights formally vindicate the economic interests of rightsholders, there are numerous doctrinal spaces within IP where the interior lives of the parties become relevant. Through discovery, depositions, testimony, and creative lawyering, courts are ultimately presented with rich narratives of artistic expression, including a wide spectrum of critical reflections, enthusiastic fandoms, devoted research, and biting humor. As the following Part shows, however, not all such narratives are created equal in the eyes of IP.

II. IP’S PLEASURE TABOO

This Part examines four different factual contexts in which courts are regularly confronted with evidence of strong emotional attachments to IP-protected subject matter. In each context, courts almost universally rule against litigants whose actions are framed in terms of celebrating a cultural entity or sharing joyful feelings with respect to a creative work, brand, or celebrity. By contrast, when litigants’ motivations are framed as antagonistic, mocking, or otherwise critical of a work, brand, or celebrity, courts frequently dismiss IP claims against them. Ultimately, love is a losing strategy in IP litigation.

A. *Fans & Anti-Fans*

Perhaps unsurprisingly, emotional attachments to IP often emerge when the disputed activity occurs within some sphere of fandom that has emerged around sharing or discussing a creative work.¹¹¹ Although the term “fan” colloquially denotes someone who

110. 15 U.S.C. § 1125(c)(3)(A).

111. For background on fan communities and their intersection with IP law, see generally Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY.

is an “enthusiastic devotee” or “ardent admirer” of a particular author, TV series, or sports team,¹¹² the field of fan studies generally views fandom more broadly “as the regular, emotionally involved consumption of a given popular narrative or text.”¹¹³ In other words, the mark of fandom is not necessarily full-throated *admiration*, but instead ongoing *emotional investment*, involving a diverse mix of celebration, curiosity, excitement, desire, opposition, and alienation poured into shared cultural symbols. The first two Subparts show courts’ consistent hostility toward works that are motivated by the joy of fandom or that aim to spread joy among devoted fans. The third Subpart shows courts’ very different reaction to fan works that are motivated by pain, anger, or opposition.

1. *Fans as Authors: “Bette Davis, We Love You”*¹¹⁴

Fandom generates a tremendous range of follow-on creativity: The more that people engage with popular culture and connect their own personal experiences with those portrayed in mainstream media outlets, the more they become spurred to memorialize their own perspective on popular culture in the form of new writings, songs, videos, and images, incorporating well-known characters and stories. Fans create and share “fan works” for many reasons, including: to forge community around a shared cultural language, to empower themselves through storytelling, to speak back against cultural authorities, to develop their writing skills, to creatively play, and to gift their pleasurable experiences to others.¹¹⁵ Fans are not merely passive, uncritical consumers of mass media; they are

L.A. ENT. L.J. 651 (1997); Rosenblatt & Tushnet, *supra* note 58.

112. See *Fan*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fan> [<https://perma.cc/FRN4-7XXH>]; *Fan*, DICTIONARY.COM, <https://www.dictionary.com/browse/fan> [<https://perma.cc/U3GM-NHTD>].

113. Cornel Sandvoss, *The Death of the Reader? Literary Theory and the Study of Texts in Popular Culture*, in *THE FAN FICTION STUDIES READER* 63, 64 (Karen Hellekson & Kristina Busse eds., 2014).

114. MADONNA, *Vogue, on I’m Breathless: Music from and Inspired by the Film Dick Tracy* (Sire Recs. 1990). See generally *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016) (deciding on claims that Madonna’s “Vogue” included copyright infringing material).

115. See Tushnet, *supra* note 111, at 656-57; Rosenblatt, *supra* note 23, at 104-05; SUNDER, *supra* note 26, at 13-14; Sonia K. Katyal, *Slash/ing Gender and Intellectual Property: A View from Fan Fiction*, in *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* 315, 319-20 (Irene Calboli & Srividhya Ragavan eds., 2015).

often active, highly engaged participants in the creation of meaning surrounding cultural works.¹¹⁶ Although the vast majority of fan works are tolerated by IP owners, these works nonetheless explicitly incorporate copyrighted works and celebrity images in ways that have yielded threatened or actual legal action by the rightsholders in the underlying subject matter.¹¹⁷ The resulting lawsuits have forced IP laws to confront the diverse reasons why individuals and communities become invested in popular culture and to determine which of these investments ultimately fall under the authority of a rightsholder.

When defendants have openly acknowledged that they are themselves enthusiastic fans of a copyrighted work, courts have used these expressions of fandom to support a finding of infringement. In *Paramount Pictures v. Axanar Productions*, the copyright owners to the *Star Trek* franchise sued the company and individuals behind a high-quality, crowdsourced short film, *Prelude to Axanar*, which imagined a series of events leading up to a major battle in the original *Star Trek* series.¹¹⁸ According to the defendant's summary judgment brief, "Defendant, Alec Peters, a lifelong Star Trek fan, founded Axanar Productions along with a group of other Star Trek fans to celebrate their love of Star Trek."¹¹⁹ In finding that *Prelude to Axanar* was not a fair use, the court mentioned that Peters was a "long-time Star Trek fan" and observed that it had "difficulty discerning from the *Axanar* Works any criticism of the Star Trek Copyrighted Works. This is not surprising since Defendants set out

116. See generally HENRY JENKINS, FANS, BLOGGERS, AND GAMERS: EXPLORING PARTICIPATORY CULTURE (2006) (discussing the interaction between media and its consumers); ANTI-FANDOM: DISLIKE AND HATE IN THE DIGITAL AGE (Melissa A. Click ed., 2019) (chronicling the development of anti-fandom).

117. See Betsy Rosenblatt, *Fanmarks*, in RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF TRADEMARK LAW 248, 250-51 (Glynn S. Lunney, Jr. ed., 2023). See generally AARON SCHWABACH, FAN FICTION AND COPYRIGHT (2016) (examining copyright protection of fan-created works).

118. See No. 15-cv-09938, 2017 WL 83506, at *1 (C.D. Cal. Jan. 3, 2017).

119. Defendants Axanar Productions, Inc. and Alec Peters' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 3, *Axanar*, 2017 WL 83506 (No. 15-cv-09938), 2016 WL 7660571, at *5. Moreover, the brief quotes *Star Trek*-creator Gene Roddenberry, who "realized that there is no more profound way in which people could express what Star Trek has meant to them than by creating their own very personal Star Trek," as well as several *Star Trek* film directors who stood behind fans' active celebration of the franchise. *Id.* at 13-14, 2016 WL 7660571, at *7.

to create films that stay faithful to the *Star Trek* canon and appeal to *Star Trek* fans.”¹²⁰ In other words, because Peters was a devoted fan of *Star Trek*, cared about the canon, and wanted his film to resonate with other fans, it would have been “surprising” to the court if Peters had made the type of work that fair use protects. The defendants presented Peters’s love and deep knowledge of *Star Trek* to the court to emphasize that they were not just trying to leech off the commercial value of *Star Trek*; the court instead interpreted this love and knowledge as belying a blind faithfulness to the *Star Trek* canon that was incapable of producing something transformative.¹²¹

Star Trek fans have lost other epic battles. In *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, the Ninth Circuit held that a mashup of *Star Trek* and the Dr. Seuss classic, *Oh, the Places You’ll Go!*, was not a fair use of the Dr. Seuss book.¹²² The court pejoratively described the three authors of *Oh, the Places You’ll Boldly Go* as “Trekkie[s]” and dismissed the Trekkies’ arguments that they had made a transformative use of Dr. Seuss’s work.¹²³ Instead of critiquing Seuss’s work, they merely aimed “to create a ‘funny’ book” that “‘evokes’ rather than ‘ridicules’ [*Oh, the Places You’ll Go!*]”¹²⁴ The defendants had created their work “with love and affection” and not with the requisite desire to critique or ridicule the materials they were reimagining.¹²⁵ In *Paramount Pictures Corp. v. Carol Publishing Group, Inc.*, the court held that a book titled *The Joy of Trek: How to Enhance Your Relations with a Star Trek Fan* was not

120. *Axanar*, 2017 WL 83506, at *1, *8.

121. *See id.*

122. *See* 983 F.3d 443, 448 (9th Cir. 2020).

123. *Id.* at 448 (“If he were alive today, Dr. Seuss might have gone on to say that ‘mash-ups can happen to you.’”).

124. *Id.* at 452-53.

125. The defendant’s Kickstarter campaign contained the following statement:

While we firmly believe that our parody, created with love and affection, fully falls within the boundary of fair use, there may be some people who believe that this might be in violation of their intellectual property rights. And we may have to spend time and money proving it to people in black robes. And we may even lose that.

Dr. Seuss Enters., L.P. v. ComicMix LLC, 372 F. Supp. 3d 1101, 1109 (S.D. Cal. 2019), *aff’d in part, rev’d in part* 983 F.3d 443. Although the Ninth Circuit did not mention the defendant’s “love and affection” in its opinion, the court did quote the above passage for its mention of “people in black robes.” *See ComicMix*, 983 F.3d at 448.

a fair use.¹²⁶ Even though the book “does poke fun at Star Trek and its fans,” the court observed, “it would be nonsensical to think that a Trekker would author a book in which the main point is to mock Star Trek.”¹²⁷ Again, diehard fan status was perceived as incompatible with a critical purpose, and a desire to teach non-fans about “the joy of watching ‘Star Trek’” was insufficiently educational or transformative.¹²⁸

Similarly, the court in *Salinger v. Colting* cited the defendant’s long-term “intrigue[]” and “fascination” with author J.D. Salinger and *The Catcher in the Rye* as undercutting the defendant’s argument that his story about an elderly Holden Caulfield was transformative.¹²⁹ The court doubted the defendant’s professed desire to “expose Holden Caulfield’s disconnectedness, absurdity, and ridiculousness” and found that his plain purpose was “rather to satisfy Holden’s fans’ passion” for those very traits that had appeared in the original work.¹³⁰ Even though the defendant’s book emphasized Holden’s “tendency toward depressive alienation,” the court dismissed this theme as sufficiently critical or parodic, given that these elements of Holden’s personality were apparent in *The Catcher in the Rye*.¹³¹ The court was unable to find a transformative purpose in the author’s deep exploration of a famous character’s troubling characteristic that had long fascinated and intrigued him; it instead found that he was merely trying to satisfy a market full of hungry, passionate fans lusting for whatever bits and pieces of Holden they could throw money at.

126. 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998), *aff’d* 181 F.3d 83 (2d Cir. 1999) (unpublished table decision). According to the court, the defendant “was motivated, to a large extent, by a genuine desire to help others to understand the idiosyncrasies of the typical Trekker,” in part through summarizing the various series and movies to a non-Trekker audience. *Id.* at 335.

127. *Id.* at 335-36. The book’s authors declared, “I love Star Trek so much I actually wanted to promote Star Trek in a way to people who had not seen it before.” Brief for Defendants-Appellants at 6, *Carol Publ’g*, 181 F.3d 83 (No. 98-7918), 1998 WL 34176991, at *4.

128. *Id.* at 18, 1998 WL 34176991, at *9 (“As appears from what Mr. Ramer says in his book and in his testimony, he is a devoted fan of ‘Star Trek’ who wants to teach others about the joy of watching ‘Star Trek.’”); see *Carol Publ’g*, 11 F. Supp. 2d at 334-35.

129. 641 F. Supp. 2d 250, 260-61 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010) (“Like many people, I have long been fascinated by Salinger and his relationship to Holden Caulfield. I am intrigued by the fact that, after creating Holden and other characters, Salinger has not published a new work in nearly half a century and is almost never seen in public.”).

130. *Id.* at 260.

131. *Id.* at 259.

In dismissing fair use arguments by fan-authors, courts repeatedly allude to some aspect of fandom that is somehow excessive, irrational, or uncontrollable.¹³² For example, the Second Circuit rejected an argument that a *Seinfeld* trivia book, the *Seinfeld Aptitude Test*, was a fair use, given that it was meant to “satisfy your between-episode cravings.”¹³³ The book *60 Years Later* presented the “many readers and critics” that “have apparently idolized Caulfield” with a cautionary tale about their idol’s “depressive alienation,” but the court reframed readers’ fascination and intrigue with Caulfield as fandom’s unsatisfied “passion.”¹³⁴ The Axanar defendants’ *Star Trek* fandom and faithfulness to canon caused them to stay “true to *Star Trek* canon down to excruciating details,”¹³⁵ resulting in an excess amount of copyrighted material in *Prelude to Axanar*.

Even more explicitly, the court in *Warner Bros. Entertainment Inc. v. RDR Books* held that even though the defendant’s *Harry Potter Lexicon* had been a useful reference guide for *Harry Potter* fans, students, and editors, it nonetheless used an amount of copyrighted expression “in excess of its otherwise legitimate purpose of creating a reference guide.”¹³⁶ The court remarked, “Perhaps because Vander Ark is such a *Harry Potter* enthusiast, the Lexicon often lacks restraint in using Rowling’s original expression for its inherent entertainment and aesthetic value.”¹³⁷ According to the court, the frequent verbatim copying of the *Harry Potter* text “demonstrates Vander Ark’s lack of restraint due to an enthusiastic admiration of Rowling’s artistic expression, or perhaps haste and laziness[.]”¹³⁸ Taken together, these decisions send a message that

132. See Lothian, *supra* note 43, at 142 (showing media representation of fandom as going “too far” and “endangering the smooth running of productive operations”); Rebecca Tushnet, “I’m a Lawyer, Not an Ethnographer, Jim”: *Textual Poachers and Fair Use*, 2 J. FANDOM STUD. 21, 22 (2014) (“Fans still seem excessive, overinvested, not politely consuming but also not creating culturally valued artifacts. Though fans are people with passions and interests, they are too often treated as figures of fun rather than as ordinary or representative citizens.”).

133. *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 135-36 (2d Cir. 1998).

134. *Salinger*, 641 F. Supp. 2d at 259-60.

135. *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 15-cv-09938, 2017 WL 83506, at *5 (C.D. Cal. Jan. 3, 2017).

136. 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008).

137. *Id.*

138. *Id.* at 548.

enthusiastic fans cannot moderate or restrain their appetites for the copyrighted works they love.

Notably, this dim view of fans as authors is not limited to situations where the fan at issue is the defendant asserting fair use; courts have been similarly uncharitable where the fan at issue is the *plaintiff* claiming *infringement*. In *Polychron v. Bezos*, the plaintiff wrote a book called *The Fellowship of the King* based on J.R.R. Tolkien's *The Lord of the Rings* series, which he shared with Tolkien's grandson, the current administrator of the Tolkien estate.¹³⁹ The plaintiff alleged that Amazon subsequently changed the focus of its *Rings of Power* television series in ways that closely tracked his *The Fellowship of the King* story.¹⁴⁰ The court dismissed the plaintiff's lawsuit, holding that his story was "an unauthorized derivative work [ineligible for] copyright protection."¹⁴¹ In doing so, it quoted extensively from the plaintiff's letters to the Tolkien estate explaining his years-long *The Lord of the Rings* fandom.¹⁴² When he discovered the Tolkien books, he became "enchanted," "devoured the worlds of JRR Tolkien," "re-read those book until the spines gave out," and would "lie in bed for hours every night imagining I was in Middle-earth on the Road with the hobbits."¹⁴³ When he started writing, he "had no plan nor any real knowledge" of what he was embarking on; he "only knew that [he] loved this world."¹⁴⁴ He told Simon Tolkien that he "wrote [these stories] for your grandfather, to honor his legacy, and for the fans, like myself, who have spent years yearning; waiting our whole lives for these stories."¹⁴⁵

Unfortunately for the plaintiff, his forthright discussion of his loving attachment to the Tolkien works also served as an admission to the court that he had intentionally, and carefully, copied from the

139. No. 23-cv-02831, 2023 WL 6192743, at *1, *4-5 (C.D. Cal. Aug. 14, 2023).

140. *Id.* at *5.

141. *Id.* at *8. In doing so, the court relied heavily on *Anderson v. Stallone*, No. 87-0592, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989), which dismissed a lawsuit against the producers of the film *Rocky IV*, who allegedly copied parts of the plaintiff's movie proposal, because that proposal was in itself an unauthorized derivative of the earlier *Rocky* movies. *Polychron*, 2023 WL 6192743, at *7-8 (citing *Anderson*, 1989 WL 206431 at *1, *8, *11).

142. See *Polychron*, 2023 WL 6192743, at *2-5.

143. *Id.* at *2.

144. *Id.* at *5.

145. *Id.*

Tolkien canon.¹⁴⁶ Despite the plaintiff's countless hours of work, and strong desire to celebrate the Tolkien legacy with other fans, copyright law placed stewardship of Tolkien's legacy squarely and exclusively in the hands of his grandson.¹⁴⁷ Other decisions similarly limit copyright protections for authors whose work emerges from engaged fandom.¹⁴⁸

2. Fans as Audience: "Whatever You Desire, I'll Supply Ya"¹⁴⁹

In addition to framing fans as excessive in their actions and insatiable in their desires, IP owners appear to be the only people legally authorized to satisfy fans' cravings for content they love. Copyright law has repeatedly prohibited the publication of resources designed to both entertain and educate readers about devoted fandom. In addition to *The Joy of Trek* and *Seinfeld Aptitude Test* discussed above,¹⁵⁰ courts have rejected fair use arguments for an "aesthetically pleasing" *Godzilla* compendium book¹⁵¹ as well as a

146. *Id.* at *7 ("Here, Plaintiff has admitted that the characters were taken directly from *the Lord of the Rings* in his correspondence with Simon Tolkien and the Tolkien Estate. He has also admitted that his series is intended to be a sequel to *The Lord of the Rings*, so every plot point flows from the ending of *the Lord of the Rings* series.").

147. See Gildea, *supra* note 74, at 670-71 (discussing the Tolkien estate's strict policing of its copyright interests). The Tolkien Trust subsequently sued Polychron for copyright infringement and obtained a permanent injunction against him. See *Tolkien Tr. v. Polychron*, No. 23-cv-04300, 2023 WL 9471264, at *12 (C.D. Cal. Dec. 14, 2023).

148. See *Anderson v. Stallone*, No. 87-0592, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989) (dismissing copyright infringement lawsuit by fan of the *Rocky* movies whose screenplay was allegedly used, without authorization, by the producers of *Rocky IV*); *Gracen v. Bradford Exch.*, 698 F.2d 300, 301, 305 (7th Cir. 1983) (denying copyright protection to a painting of Dorothy from *The Wizard of Oz* which had been commissioned with instructions that "your interpretation must evoke all the warm feeling the people have for the film"); *Cramer v. Netflix, Inc.*, No. 22-cv-00131, 2023 WL 6130030, at *1, *5 (W.D. Pa. Sep. 18, 2023) (dismissing lawsuit against Netflix for its use of a tattoo of Joe Exotic that the plaintiff had tattooed on her husband's thigh and observing that "Plaintiff's stated purpose for choosing Joe Exotic to create her artwork was because of Joe Exotic's notoriety, global recognition, fame, and number of fanatical viewers.").

149. *DESTINY'S CHILD, Cater 2 U, on Destiny Fulfilled* (Sony Univ. Music 2005). See generally *Allen v. Destiny's Child*, No. 06-cv-06606, 2009 WL 2178676 (N.D. Ill. July 21, 2009) (ruling on copyright infringement claims against Destiny's Child's "Cater 2 U").

150. See *supra* notes 126-28, 133 and accompanying text.

151. *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1217 (C.D. Cal. 1998). According to the court, the defendant's unauthorized compendium book "s[ought] to capitalize on the *Godzilla* marketing blitz," and even though it contained numerous biographies, analyses, and commentary, the court noted that it included pictures "th[at] are merely

large-print book “aimed exclusively at a child (or infantile adult) audience” titled *For the Love of Beanie Babies*, which contained both full-page photographs and commentary relevant to collectors.¹⁵² Experiences of joy (for example, of *Star Trek*), pleasure (for example, in aesthetics), and love (for example, of Beanie Babies) appear to remove companion texts from the umbrellas of commentary, criticism, and education.¹⁵³ The Seventh Circuit notably distinguished *For the Love of Beanie Babies* from *Beanie Babies Collector’s Guide*, which had small print and was “clearly oriented toward adult purchasers.”¹⁵⁴ Catering to children or “infantile adult[s]” who “love” the copyrighted work was improper, whereas catering to adults who instead deliberately “collect” the copyrighted works was complementary and transformative.¹⁵⁵ In stripping the joy and humor out of one of their Beanie Babies books, the defendant was able to avoid liability.¹⁵⁶

This seemingly exclusive right to cater to loving fandom is not limited to copyright law. In publicity rights decisions, the line between unlawful appropriations and transformative uses often hinges upon whether the defendant is seeking to tap into the market for those who uncritically enjoy the celebrity and their offerings. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court held that the defendant’s t-shirts violated the plaintiffs’ publicity rights because of “the defendant’s overall goal of creating literal, conventional depictions of the Three Stooges so as to exploit their fame.”¹⁵⁷ The “economic value of Saderup’s work

aesthetically pleasing to the reader.” *Id.* at 1214, 1217.

152. *Ty, Inc. v. Publ’ns. Int’l*, 292 F.3d 512, 519 (7th Cir. 2002); *see also* *Twin Peaks Prods., Inc. v. Publ’ns. Int’l*, 996 F.2d 1366, 1378 (2d Cir. 1993) (holding that a book containing summaries of the show *Twin Peaks* was not fair use).

153. *See also* *DC Comics v. Towle*, 802 F.3d 1012, 1017, 1026-27 (9th Cir. 2015) (observing that infringing full-size Batmobile replicas were designed to “attract the attention of the Batman fans” and to appeal to “avid car collectors’ who ‘know the entire history of the Batmobile” (quoting Appellant’s Opening Brief at 20, *Towle*, 802 F.3d 1012 (2015) (13-55484))).

154. *Ty*, 292 F.3d at 519.

155. *Id.* at 518-21.

156. *See id.* at 523-24.

157. 21 P.3d 797, 811 (Cal. 2001). Other cases have provided artists more leeway to use celebrity likenesses as part of an arguably more educational purpose. *See* *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (“A piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events. It would

derives primarily from the fame of the celebrities,” and, to the extent that the public wants to spend money on portrayals of celebrities they are drawn to, this economic value belongs to rights-holders.¹⁵⁸ Subsequent decisions similarly prohibit conventional, flattering depictions designed to appeal to a celebrity’s “fan base,”¹⁵⁹ instead carving out First Amendment space for those artistic depictions that are by comparison critical, unflattering, or otherwise distortive.¹⁶⁰

Trademark law similarly views an intent to evoke positive feelings and joyful fandom as supporting a finding of likely confusion. For example, in *Board of Supervisors of Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, the Fifth Circuit held that the defendant’s use of university color schemes on t-shirts was likely to cause confusion, even though the t-shirts did not display the universities’ names, contained humorous messages related to college sports teams and rivals, and were meant to be distinguishable from the more conservative officially-licensed products.¹⁶¹ Ultimately, “Smack used the color schemes, logos, and designs with the specific intent to rely upon their drawing power in enticing fans of the Universities to purchase its shirts.”¹⁶² It did not matter whether the consumers *cared* that the t-shirts were officially sponsored, so long as the trademark color schemes were used by the public to “show ‘allegiance to or identification with the teams.’”¹⁶³ Similarly, when a defendant’s offerings have sought to “pay tribute”

be ironic indeed if the presence of the image of the victorious athlete would deny the work First Amendment protection.”).

158. *Comedy III*, 21 P.3d at 811.

159. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 168 (3d Cir. 2013) (observing that the producer of the *NCAA Football* videogame “seeks to capitalize on the respective fan bases for the various teams and players” and might appeal to fans of rival teams seeking “some cathartic readjustment of history”); *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Ct. App. 2011) (“Activision’s use of life-like depictions of No Doubt performing songs is motivated by the commercial interest in using the band’s fame to market *Band Hero*, because it encourages the band’s sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt.”).

160. See, e.g., *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (half-human, half-worm depictions of the plaintiffs); *infra* Part III.D.

161. See 550 F.3d 465, 472-73, 480 (5th Cir. 2008).

162. *Id.* at 474.

163. *Id.* at 484-85 (quoting *Bos. Pro. Hockey Ass’n v. Dall. Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1011 (5th Cir. 1975)).

to a beloved celebrity, like Elvis Presley,¹⁶⁴ or to evoke strong feelings of “nostalgia” for a beloved television show, like *SpongeBob SquarePants*, courts have rejected parody arguments and found a likelihood of confusion as to source or sponsorship.¹⁶⁵ In finding that a pop-up restaurant, The Rusty Krab, infringed *SpongeBob* trademarks in the KRUSTY KRAB, the court noted that its advertising touted “AN UNFORGETTABLE NOSTALGIC EXPERIENCE” and that “[t]he most important thing” to the owner “[was] for people to have fun [t]here.”¹⁶⁶ According to the court, this showed an intent “to appropriate the goodwill of Viacom’s intellectual property for the exclusive profit of Defendants.”¹⁶⁷

Ultimately, IP laws value conventional forms of fandom—positive feelings and joyful attachment to popular culture—primarily as a source of revenue that belongs exclusively to rightsholders. Even if third parties dedicate substantial time, skill, knowledge, imagination, and humor in the creation of new artwork, goods, or services, they have nonetheless crossed a legal boundary by providing fans additional sources of joy and pleasure without a rightsholder’s permission.¹⁶⁸ And, as discussed above, to the extent that creators

164. *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 196 (5th Cir. 1998) (“[A]dvertising scheme [for the Velvet Elvis restaurant] would leave the ordinary customer with the distinct impression that the bar’s purpose was to pay tribute to Elvis Presley or to promote the sale of EPE related products and services.”); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981) (“The defendant has made no showing, nor attempted to show, that the production is intended to or acts as a parody, burlesque, satire, or criticism of Elvis Presley. As a matter of fact, the show is billed as ‘A TRIBUTE TO ELVIS PRESLEY.’”).

165. *Viacom Int’l Inc. v. Pixi Universal, LLC*, No. 21-cv-02612, 2022 WL 909865, at *3 (S.D. Tex. Mar. 25, 2022) (observing that the Rusty Krab pop-up restaurant was designed “to recreate something that was so nostalgic” and that the designer “really wanted to give it a feel of people actually being in Bikini Bottom”).

166. *Id.* at *4. *Compare id.* (finding that defendant’s advertisements that evoked feelings of “fun” infringed on plaintiff’s trademark) *with* *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1279 (11th Cir. 2012) (“Moore’s paintings, prints, and calendars very clearly are embodiments of artistic expression, and are entitled to full First Amendment protection. The extent of his use of the University’s trademarks is their mere inclusion (their necessary inclusion) in the body of the image which Moore creates to memorialize and enhance a particular play or event in the University’s football history.”).

167. *Viacom*, 2022 WL 909865, at *6.

168. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 167 (3d Cir. 2013) (“[T]he balancing test in right of publicity cases does not look to whether a particular work *loses* First Amendment protection. Rather, the balancing inquiry looks to see whether the interests protected by the right of publicity are sufficient to *surmount* the already-existing First Amendment protections.”).

identify themselves as fans, they appear in case law pathologized as artistically lazy, excessive in their appetites, or blinded by devotion.¹⁶⁹ It may well be that fan-produced works materially harm rightsholders or reasonably undermine their creative incentives, but such an empirical question does not require skeptical, or outright hostile, narratives about fandom. Particularly given the inherent uncertainty surrounding fair use, the repeated judicial linkage of fandom with values antithetical to IP policy (for example, freeriding, laziness, and unoriginality) makes fan works legally risky. If someone wants to create artwork based on well-known cultural figures or build a business that caters to fan communities, the cases surveyed above indicate the peril in that person acknowledging the joy triggered by consuming, creating, and sharing the fruits of their labor. A different artistic or rhetorical strategy is needed to fall within the permissive boundaries of IP.

3. *Critical Reworkings & Anti-Fandom: “Haters Gonna Hate”*¹⁷⁰

Unlike uses of IP that are designed to celebrate popular culture, or bring joyful experiences to a particular fan base, uses of IP that are designed to criticize, mock, or poke fun at popular culture have been repeatedly insulated from liability. Such oppositional perspectives on IP have been framed as core political speech, valued as important artistic expression, and situated as outside rightsholders’ sphere of economic control.

Perhaps the clearest contrast to the celebratory, infringing fan works discussed above are darker, critical reworkings of well-known cultural works. The best-known example of such a work in IP litigation is *The Wind Done Gone*, Alice Randall’s retelling of *Gone with the Wind* from the perspective of its Black characters, “a specific criticism of and rejoinder to the depiction of slavery and the

169. See Joli Jensen, *Fandom as Pathology: The Consequences of Characterization*, in *THE ADORING AUDIENCE* 9, 9 (Lisa A. Lewis ed., 1992) (“[F]andom is seen as excessive, bordering on deranged, behavior.”).

170. TAYLOR SWIFT, *Shake it Off*, on 1989 (Big Machine Recs. 2014). See generally *Crash Proof Ret., LLC v. Price*, 533 F. Supp. 3d 227, 229 (E.D. Pa. 2021) (ruling on copyright litigation concerning Taylor Swift’s “Shake It Off”).

relationships between blacks and whites” in the original novel.¹⁷¹ In finding Randall’s work to be a transformative parody, the Eleventh Circuit observed that it was “principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of [*Gone with the Wind*]. Randall’s literary goal is to explode the romantic, idealized portrait of the antebellum South.”¹⁷² The Eleventh Circuit’s word choices—“critical,” “destroy,” and “explode”¹⁷³—position Randall as the polar opposite of the faithful fans found to have infringed *Star Trek*, *Harry Potter*, *The Catcher in the Rye*, and *The Lord of the Rings*. As a result, Randall has been described as an “anti-fan”: someone highly knowledgeable and strongly attached to a cultural entity, not because they *love* it, but because they *hate* it.¹⁷⁴

In contrast to the Eleventh Circuit’s presentation of *The Wind Done Gone* as a critical intervention seeking to “explode” *Gone with the Wind*, the district court in the case had presented *The Wind Done Gone* as an entertaining sequel aimed at the *Gone with the Wind* fan base.¹⁷⁵ In an analysis echoing those of infringing “sequels” like *60 Years Later* and *The Fellowship of the King*, the district court emphasized that *The Wind Done Gone* “provides a fresh and unwritten perspective from the same characters in the same scenes” and that “black Americans will derive emotional satisfaction, vindication and fun” from this “exuberant act of literary revenge.”¹⁷⁶ The court further noted the comedic effect of certain reworked scenes.¹⁷⁷ Although acknowledging Randall’s “partially parodic purpose,” the court nonetheless frames Randall as seeking

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

172. *Id.* at 1270.

173. *Id.*

174. See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1870 (2009) (“Alice Randall, the author of the parody at issue in *Suntrust*, is better described as an antifan of *Gone with the Wind*.”). The concept of an anti-fan is generally traced back to Jonathan Gray, *New Audiences, New Textualities: Anti-Fans and Non-Fans*, 6 INT’L J. CULTURAL STUDS. 64 (2003). See generally Jonathan Gray, *How Do I Dislike Thee? Let Me Count the Ways*, in ANTI-FANDOM 25 (Melissa A. Click ed., 2019) (taxonomizing forms of anti-fandom).

175. See *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 1375 (N.D. Ga. 2001) (“[T]he author takes Cynara on new adventures with the older works’ characters, all of which seems to fit well within the definition of a sequel.”), *rev’d*, 268 F.3d. 1257.

176. *Id.* at 1374.

177. See *id.*

to satisfy the “strong appetite”¹⁷⁸ of *Gone with the Wind* fans: “When the reader of *Gone [w]ith the Wind* turns over the last page, he may well wonder what becomes of Ms. Mitchell’s beloved characters and their romantic, but tragic, world. Ms. Randall has offered her vision of how to answer those unanswered questions.”¹⁷⁹

Moreover, in contrast to the Eleventh Circuit’s presentation of Alice Randall as a critical anti-fan of *Gone with the Wind*, the district court presented Randall as a more conventional fan. It quoted the following passage from an interview with Randall:

When I was twelve, I read *Gone [w]ith the Wind* (GWTW) and *fell in love* with the novel. This was a troubled love from the beginning. I had to overlook racist stereotyping and Klan white-washing to appreciate the ambitious, resilient, hard-working, hard-loving character who is Scarlett. Like so many others, I managed to do it. Then one day, rereading the book, enormous questions arose for me: Where are the mulattos on Tara? Where is Scarlett’s half-sister? Almost immediately I knew I had to tell her story, tell the story that hadn’t been told. Tell it because the silence injured me.¹⁸⁰

Although this passage acknowledges Randall’s discomfort with the racism permeating *Gone with the Wind*, it simultaneously embeds Randall’s injuries within a capsule of *love* for the copyrighted work. The district court was accordingly able to present Randall as a fan of *Gone with the Wind* unable to stop herself from writing an unauthorized sequel. On appeal, the Eleventh Circuit removed any mention of Randall’s fandom or loving attachments from its opinion, and it even expressed skepticism that fans of *Gone with the Wind* would have any interest in *The Wind Done Gone*.¹⁸¹ In order to craft

178. *Id.* at 1373 n.11 (quoting testimony of book editor that “[t]here is a strong appetite in the book reading public to know more about characters that have already captured the public’s imagination and, consequently, a strong desire on the part of publisher’s [sic] to fill that appetite.”).

179. *Id.* at 1384.

180. *Id.* at 1365 n.4 (emphasis added).

181. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (“[Plaintiff] has failed to show, at least at this early juncture in the case, how the publication of *TWDG*, a work that may have little to no appeal to the fans of *GWTW* who comprise the logical market for its authorized derivative works, will cause it irreparable injury.”); *see also id.* at 1281 n.5 (Marcus, J., concurring) (quoting statement from literary agent that “[i]t is

a compelling narrative that would satisfy the demands of fair use, the Eleventh Circuit extracted love, fun, and comedy from its discussion of Randall's critique,¹⁸² even though Randall herself demonstrated that love and critique are not always so oppositional.¹⁸³

Numerous other litigants have avoided liability when they have framed themselves as the critical, oppositional anti-fans of well-known works. For example, in *Adjmi v. DLT Entertainment Ltd.*, the court held that an off-Broadway play, *3C*, was a "highly transformative parody" of the television series *Three's Company* that turned it "into a nightmarish version of itself, using the familiar *Three's Company* construct as a vehicle to criticize and comment on the original's light-hearted, sometimes superficial, treatment of certain topics and phenomena" such as queer sexuality, drugs, and women's beauty standards.¹⁸⁴ The play was "often difficult to follow and unrelentingly vulgar."¹⁸⁵ In his pleadings, the playwright described his experience watching television as a gay teenager as "baffling and alienating" and explained that he wanted to "deconstruct the sunny, silly sitcom vision of *Three's Company* and contrast it with the reality of life in the 1970s for many people."¹⁸⁶ In a similar case involving a "dark" play, a playwright made a fair use of the copyrighted Grinch and Cindy characters by placing them in the context of "profanity, bestiality, teen-age pregnancy, familial estrangement, ostracization and scandal, poverty, drug and alcohol abuse, the eating of a family pet, domestic violence and murder."¹⁸⁷

In contrast to the posture of loving fascination that doomed the prospects of other litigants, a posture of alienation, ridicule, or even

easier to imagine a buyer of *The Wind Done Gone* wanting to read *Gone [w]ith the Wind* to find a reference point, than it is to imagine a reader who loved *Gone [w]ith the Wind* wanting to read a book such as *The Wind Done Gone* that parodies and puts it in a critical light.").

182. In a footnote, the Eleventh Circuit acknowledged, but found "questionable," Houghton Mifflin's argument that *The Wind Done Gone* was "an example of 'African-American humor.'" *Id.* at 1269 n.23.

183. Rebecca Tushnet has closely examined Alice Randall's hybrid expressions of love and hate to reveal copyright law's difficulty addressing the complex mix of emotional attachments that often motivate fan fiction. See Tushnet, *supra* note 54, at 9.

184. 97 F. Supp. 3d 512, 515, 531-32 (S.D.N.Y. 2015).

185. *Id.* at 532.

186. See First Amended Complaint and Demand for a Jury Trial, *supra* note 32, ¶¶ 27-28.

187. Complaint ¶ 50, *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497 (S.D.N.Y. 2017) (No. 16-cv-09974), 2016 WL 7496476, *aff'd*, 729 F. App'x 131 (2d Cir. 2018); see *Lombardo*, 279 F. Supp. 3d at 503, 515.

violence toward pop culture has served as a winning IP litigation strategy.¹⁸⁸ For example, in *Lyons Partnership v. Giannoulas*, the Fifth Circuit upheld the dismissal of copyright and trademark claims against the creator of a giant chicken sports mascot who would “slap, tackle, trample, and generally assault” a look-alike of Barney, the iconic purple dinosaur.¹⁸⁹ The defendant asserted that Barney was “a symbol of what is wrong with society” and that “some perceive Barney as a ‘potbellied,’ ‘sloppily fat’ dinosaur who ‘giggle[s] compulsively in a tone of unequaled feeble-mindedness’ and ‘jiggles his lumpish body like an overripe eggplant.’”¹⁹⁰ The court agreed that “he was engaged in a sophisticated critique of society’s acceptance of this ubiquitous and insipid creature” and emphasized that “the Chicken’s actions toward Barney seem to have always been antagonistic.”¹⁹¹ A deep hatred for Barney resonated with the federal bench and proved to be a winning litigation strategy.

The posture of the anti-fan seeking to mock or ridicule also has proven successful where the object is an actual human being.¹⁹² For example, in *Winter v. DC Comics*, the California Supreme Court held that DC Comics had made a transformative use of the

188. See *CCA & B, LLC v. F + W Media Inc.*, 819 F. Supp. 2d 1310, 1317, 1330 (N.D. Ga. 2011) (denying preliminary injunction against *Elf on the Shelf* parody in which “Defendant’s book attacks and undermines *Elf On’s* [sic] ‘wholesome and healthy’ image” and is “intended to ‘knock a holiday favorite off its perch.’” (quoting Plaintiff’s Brief in Support of Its Motion for Temporary Restraining Order and Preliminary Injunction at 6, *CCA & B*, 819 F. Supp. 2d 1310 (No. 11-cv-02056), 2011 WL 3958384, at *2-3)).

189. 179 F.3d 384, 385-86 (5th Cir. 1999).

190. *Id.* at 386 (quoting Alison Rose, *Pacifier*, NEW YORKER, May 3, 1993, at 37).

191. *Id.* at 387-88.

192. See *Easter Unlimited, Inc. v. Rozier*, No. 18-cv-06637, 2021 WL 4409729, at *14 (E.D.N.Y. Sep. 27, 2021) (“Defendant’s use of a mask widely associated with a film’s (fictional) serial killer provides a means of satirizing and ridiculing the perception of ruthless, high-scoring athletes in the NBA, as well as underscoring the humor in the Scary Terry moniker.”). The *Easter Unlimited* decision is a bit unusual in that the defendant, a professional basketball player, used the plaintiff’s *Scream* mask to poke fun at his *own* reputation for being a “killer” on the court by using an element of a movie that “was very important to him growing up, where its mix of violence and humor provided solace and escapism in a childhood surrounded by violence.” *Id.* at *2, *12-13 (quoting Memorandum of Law in Support of Terry Rozier’s Motion for Summary Judgment at 3-4, *Easter Unlimited*, 2021 WL 4409729 (No. 18-cv-06637), 2020 WL 7121935, at *4). Defendant was a fan of the *Scream* movie, but he used that movie in order to engage in a humorous critique. In the author’s view, given the court’s heavy reliance on the “new meaning, expression, and messaging” of attaching the *Scream* mask to a basketball player, see *id.* at *12, it is unlikely that this decision would come out the same following the Supreme Court’s decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (2023). See *supra* notes 85-89 and accompanying text.

likenesses of musicians Johnny and Edgar Winter where they had been turned into “villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground.”¹⁹³ The musicians alleged that they were portrayed as “vile, depraved, stupid, cowardly, subhuman individuals who engage in wanton acts of violence, murder and bestiality for pleasure and who should be killed.”¹⁹⁴ According to the court, DC Comics was protected by the First Amendment because the musicians were “merely part of the raw materials from which the comic books were synthesized.”¹⁹⁵ Defendants have similarly avoided liability when Shaquille O’Neal was turned into a “half-human and half cactus” character¹⁹⁶ and when professional wrestlers were “dogified” with “big floppy ears” and a “big silly tail.”¹⁹⁷ These representations might be reframed as harmless humor that “poke[s] fun” at a celebrity,¹⁹⁸ but note the role that such humor plays in these cases. Whereas humor in the fan-works

193. 69 P.3d 473, 476 (Cal. 2003).

194. *Id.*

195. *Id.* at 479-80. The lower court, by contrast, allowed the musicians’ claim to move forward in light of evidence that DC Comics was using their names in promotions: “[I]f you want to discover ... exactly how rockers Johnny and Edgar Winter sort of turn up in *Riders of the Worm and Such*, you’ll just have to wait.” Winter v. DC Comics, 121 Cal. Rptr. 2d 431, 442 (Cal. Ct. App. 2002), *rev’d*, 69 P.3d 473 (Cal. 2003).

196. Mine O’Mine, Inc. v. Calmese, No. 10-cv-00043, 2011 WL 2728390, at *9 (D. Nev. July 12, 2011), *aff’d*, 489 F. App’x 175 (9th Cir. 2012) (dismissing publicity rights claim with respect to Shaqtus character but finding trademark liability for use of Shaqtus mark).

197. World Wrestling Fed’n Ent., Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413, 418, 427 (W.D. Pa. 2003) (“The WBDF merchandise can certainly be perceived as commenting, through mockery or derision, on ‘... the larger-than-life, intimidating, self-serious fierce and violent images and persona of WWF professional wrestling.’”).

198. See Lombardo v. Dr. Seuss Enters., L.P., 279 F. Supp. 3d 497, 508 (S.D.N.Y. 2017) (“The Play’s version of Who-Ville likewise pokes fun of *Grinch*’s utopic depiction of Who-Ville.... Who-Ville is now a place where young women are impregnated by green beasts, families struggle to put food on the table, paparazzi run rabid, and citizens get high on ‘Who Hash’ to escape problems of daily life.”), *aff’d*, 729 F. App’x 131 (2d Cir. 2018); CCA & B, LLC v. F + W Media Inc., 819 F. Supp. 2d 1310, 1329 (N.D. Ga. 2011) (“Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.” (quoting L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir. 1987)); World Wrestling Fed’n Ent., 280 F. Supp. 2d at 418 (“The Big Dog graphics ridicule, poke fun at, and mock these self-serious icons by characterizing them as dogs.”); Lyons P’ship v. Giannoulas, 179 F.3d 384, 388 (5th Cir. 1999) (“[I]n the context in which Giannoulas intended to insert a reference to the Barney character, the humor came from the incongruous nature of such an appearance, not from an attempt to benefit from Barney’s goodwill.”).

and fan-audience cases discussed above was framed as a strategy for diverting consumers toward another entertaining product,¹⁹⁹ the humor that emerges in the anti-fandom cases is framed as critical, mocking, and even violent.

Mocking humor and hostile fandom underlay Jimmy Kimmel's success in staving off a lawsuit by former Congressman George Santos.²⁰⁰ Kimmel and his production staff created fake Cameo user accounts, pretended to be fans of Santos, and purchased fourteen video messages in which Santos conveyed absurd messages, including congratulating someone for eating six pounds of ground beef in thirty minutes, congratulating a legally blind woman for getting her driver's license, and congratulating someone for coming out as a furry.²⁰¹ Kimmel aired these videos in a segment called "Will Santos Say It?," prompting a lawsuit for copyright infringement and for breach of the Cameo terms and conditions, which prohibited the use of false identities.²⁰² The district court held that Kimmel's actions were fair use, contrasting Santos's purpose to "convey[] his feelings of hope, strength, perseverance, encouragement, and positivity" with Kimmel's efforts at "political commentary and criticism."²⁰³ The court found it irrelevant that Kimmel's actions might have been "deceptive and unkind" or quite possibly in bad faith.²⁰⁴ It did not matter that, as alleged in the Amended Complaint, "Defendants openly admitted to deceiving the Plaintiff under the guise of fandom, soliciting personalized videos only to then broadcast these on national television and across social media channels for commercial gain."²⁰⁵

In setting forth courts' divergent treatment of loving versus hostile relationships to the subjects of IP, the point is not necessarily to suggest that courts erred in protecting critical reworkings

199. See, e.g., *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 11 F. Supp. 2d 329, 335 (S.D.N.Y. 1998) (acknowledging that *Joy of Trek* was poking fun at *Star Trek*), *aff'd*, 181 F.3d 83 (2d Cir. 1999).

200. See *Santos v. Kimmel*, 745 F. Supp. 3d 153, 160, 164 (S.D.N.Y. 2024), *argued*, No. 24-2196 (2d Cir. Mar. 24, 2025).

201. See *id.* at 160-61.

202. *Id.* at 160-62, 168.

203. *Id.* at 164.

204. *Id.* at 165.

205. Amended Complaint ¶ 1, *Santos*, 745 F. Supp. 3d 153 (No. 24-cv-01210), 2024 WL 3718211.

from liability. There are compelling constitutional, moral, and economic reasons for making sure that IP owners cannot suppress viewpoints that they object to. If an iconic film, powerful brand, or major celebrity conveys problematic messages about race, gender, sexuality, religion, ability, or class, then our legal system's free speech commitments demand that courts prevent rightsholders from vetoing individuals actively speaking back against them.²⁰⁶

But in protecting voices of dissent and framing opposition as the core of fair use, courts are also sidelining and degrading voices of affirmation. Fans develop a diverse, complex set of emotional attachments to popular culture, spurring highly creative activity that can be deeply empowering at both the individual and community level. This empowerment may surface as joy, anger, nostalgia, resentment, or some combination of each. IP laws nonetheless drive a wedge through experiences of fandom, insisting that any humor and pleasure that fans express be at the expense of those they dislike. Humor should not need to center a reviled politician or a trauma-inducing television show to be perceived as valuable speech.

B. Appropriation Art

Another context in which the pleasures and pains of the creative process bubble up in litigation is visual art, in particular the use of pop culture images by “appropriation” artists like Jeff Koons and Richard Prince. Unlike disputes involving fan works, where there will always be some need to make some direct references to the object of fandom, there is often no pressing need for an artist to incorporate any particular image, brand, or individual into appropriation art. Nonetheless, there is a long, storied tradition of creative borrowing that both informs the work of repeat litigants like Koons and Prince and ultimately triggers lawsuits by owners of the “raw material” of their incredibly expensive work.²⁰⁷ Appropriation artists have had very mixed results in IP litigation, and the Supreme Court's recent decision in *Warhol Foundation* has cast even further

206. See *infra* Conclusion.

207. See Gildea, *supra* note 92, at 355-56; Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 270 (1997) (“The principal copyright difficulty posed by art is that art sometimes uses (and in the case of appropriation art, *always* uses), as its raw material, images—‘works’—already in existence.”).

doubt on the legality of artistic appropriations.²⁰⁸ Nonetheless, disputes surrounding appropriation art provide additional insight into what types of motivations and mindsets are seen as consistent with fair use and free speech defenses.

*1. Fun, Fascination, and Friendship: “Thank God, I Found You”*²⁰⁹

As with fans, visual artists have generally fared poorly where they have openly acknowledged the joys of appropriation. In *Graham v. Prince*, Richard Prince was sued by the owners of copyrighted images that had been incorporated into his controversial *New Portraits* series, which involved largescale screenshots of Instagram posts, to which he would add his own (often idiosyncratic) comments.²¹⁰ Prince explained that in selecting which posts to use, he would “determine which comments had interesting language” in order to create “a serious and an amusing commentary on social media and art.”²¹¹ When asked whether he had a particular message he wanted to convey, “Prince stated that he wanted to ‘have fun,’ ‘make art,’ and to ‘make people feel good.’”²¹² He also stated that he had selected a post that included a photograph of musician Kim Gordon because he had “been friends with Kim Gordon for many years.”²¹³ He added the comment “Kool Thang You Make My Heart Sang You Make Everythang Groovy,” which was an “inside joke” between himself and Gordon.²¹⁴ In assessing Prince’s fair use defense, the court emphasized that his reasons for appropriation were far from “clear,” quoting his previous statements that “his purpose was simply to ‘make art’ and ‘have fun.’”²¹⁵ The joy of sifting

208. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1287 (2023).

209. MARIAH CAREY, *Thank God I Found You, on Rainbow* (Columbia Recs. 1999). See generally *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004) (ruling on litigation involving copyright claims related to Mariah Carey’s “Thank God I Found You”).

210. No. 15-cv-10160, 2023 WL 3383029, at *1-2 (S.D.N.Y. May 11, 2023).

211. *Id.*

212. *Id.* at *3 (quoting Declaration of Caitlin Fitzpatrick: Exhibit 38: Videotaped Deposition of Richard Prince at 143, *Graham*, 2023 WL 3383029 (No. 15-cv-10160)).

213. *Id.* at *5.

214. *Id.*

215. *Id.* at *13.

through pop culture phenomena, and turning that experience into visual art, did not support a finding of fair use.²¹⁶

Although the *Graham* court did not prominently mention Prince's friendship with Kim Gordon in its fair use analysis, other courts have discussed artists' efforts to positively represent the celebrities featured in their work. For example, in *Morris v. Young*, the defendant used a photograph of the Sex Pistols in order to "amplif[y] the Sex Pistols [sic] punk-rock counter-culture image," and, accordingly, the "grittiness' he applied to 'Sex Pistols' was intended to mirror the grittiness of the band members themselves."²¹⁷ In denying the defendant's fair use defense, the court observed that defendant's work was not "created for any reason other than to emphasize the characteristics with which the band was already associated."²¹⁸ In another case involving a photograph of Sex Pistols frontman Sid Vicious, the defendant argued that he was attempting to "transform the image of Sid Vicious with colors to reflect the positive attributes of Sid Vicious" in order to "make him look carefree and fun."²¹⁹ According to the court, this was not a "sufficient justification for using the Photograph."²²⁰ A similar argument with respect to (the musician) Prince was unavailing in the Supreme Court's *Warhol Foundation* decision; the Court rejected the district court's conclusion that Warhol's works were transformative because they "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure."²²¹ The Second Circuit had similarly rejected this approach to assessing transformative uses, noting that "a whole generation

216. *Id.* at *20; *see also* *Rogers v. Koons*, 960 F.2d 301, 305, 310 (2d Cir. 1992) (denying fair use to Jeff Koons's appropriation of a photograph he purchased in a "very commercial, tourist-like card shop"); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 372, 385 (S.D.N.Y. 1993) (denying fair use to Jeff Koons's use of the Garfield comic strip's Odie character, which was among the "popular images and ideas" Koons purchased during the course of his travels).

217. 925 F. Supp. 2d 1078, 1082 (C.D. Cal. 2013) (first alteration in original) (quoting Declaration of Russell Young in Support of Defendant's Opposition to Plaintiff's Motion for Summary Adjudication ¶¶ 13-14, *Young*, 925 F. Supp. 2d 1078 (No. CV 12-00687)).

218. *Id.* at 1086, 1088.

219. Reply in Support of Defendants' Motion for Summary Judgment at 5, *Morris v. Guetta*, 2013 WL 440127 (C.D. Cal. Feb. 4, 2013) (No. 12-cv-0684), 2012 WL 6899873, at *3.

220. *Guetta*, 2013 WL 440127, at *9.

221. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1281-82, 1284-85 (2023) (quoting *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019)).

of Prince’s fans might have trouble seeing the [source photo] as depicting anything other than the iconic songwriter and performer whose musical works they enjoy and admire.”²²² It did not matter that Prince might be adored by fans for a diverse range of reasons; mirroring the perspective of an adoring fan was not the type of use protected by the fair use doctrine.

2. *Detached Indifference: “Don’t Want None of Your Time”*²²³

Although few reported appropriation art decisions frame the defendants’ motives in terms of hate or critical opposition,²²⁴ a few visual artists have successfully invoked the fair use defense where they have detached themselves—both critically and emotionally—from their source material. Once again, Richard Prince provides the clearest example. In *Cariou v. Prince*, the Second Circuit held that Prince had made a fair use of the plaintiff’s photographs of Rastafarians by incorporating modified versions of them in his *Canal Zone* series.²²⁵ In contrast to the *Graham* litigation, where Prince described the “fun” of combing through Instagram posts featuring his “friend[,]”²²⁶ in *Cariou*, Prince distanced himself from his source material; Prince had testified, “[I do not] have any really [sic] interest in what [the plaintiff’s] original intent is because ... what I do is I completely try to change it into something that’s completely different.”²²⁷ The Second Circuit ultimately framed Prince’s relationship to the source material as Prince merely using “raw material ... in the creation of new information, new aesthetics, new insights and understandings.”²²⁸ Even though Prince elsewhere has recounted a

222. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42 (2d Cir. 2021), *aff’d*, *Warhol Found.*, 143 S. Ct. 1258 (2023).

223. TLC, *No Scrubs*, on FanMail (Laface & Arista Recs. 1999). See *Buchanan v. Sony Music Ent.*, No. 18-cv-03028, 2020 WL 2735592 (D.D.C. May 26, 2020) (ruling on copyright claims related to TLC’s “No Scrubs”).

224. One possible example is *Mattel Inc. v. Walking Mountain Productions*, in which a visual artist incorporated Barbie dolls into a series of works in order to critique the gendered beauty standards associated with Barbie. 353 F.3d 792, 796 (9th Cir. 2003). For further discussion on the *Walking Mountain* case, see *supra* note 101.

225. 714 F.3d 694, 698-99, 706-08 (2d Cir. 2013).

226. *Graham v. Prince*, No. 15-cv-10160, 2023 WL 3383029, at *1, *3, *5 (S.D.N.Y. May 11, 2023).

227. *Cariou*, 714 F.3d at 706-07.

228. *Id.* at 706 (quoting *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142

far more intimate emotional connection with his source material,²²⁹ the Second Circuit nonetheless framed his successful fair use defense in the relatively cold and detached language of “raw materials.”

As I have discussed at length elsewhere, in cases like *Cariou*, the demands of fair use push artists to “downplay their personal connection to the imagery they employ.”²³⁰ Artistic appropriation is highly complex along multiple axes—for example, the reasons for appropriating and the ethics of appropriating without consent—but copyright nudges artists away from discussing what drew them toward a particular image, especially if what emerges might be framed as inspiration, or fascination, or celebration.²³¹ Instead, copyright law rewards artists who embrace a position of detachment and disinterest in the objects of their appropriation;²³² for the transformative user, source images are not fundamentally different than the cans of paint sitting in the artist’s studio.²³³ Such detachment and disinterest, however, are often closely connected with ethically questionable artistic practices, such as when famous artists fail to consult, credit, or pay lesser-known or minority artists.²³⁴

(2d Cir. 1998)).

229. See Memorandum of Law in Support of Defendant’s Joint Motion for Summary Judgment at 17-18, *Cariou*, 784 F. Supp. 2d 337 (No. 08-cv-11327), 2010 WL 3054515, at *10 (recounting Prince’s initial reaction to encountering Cariou’s photographs in a bookstore: “It’s that notion of when worlds collide” (quoting Affidavit of Hollis Gonerka Bart in Reply to Plaintiff’s Opposition to Defendants’ Joint Motion for Summary Judgment: Exhibit C: Video-taped Deposition of Richard Prince, *supra* note 212, at 263)); see also Richard Prince, *Interview with Peter Halley*, in *APPROPRIATION* 83, 84-85 (David Evans ed., 2009) (describing the “alien” feelings that Prince experienced when looking through advertisements he appropriated).

230. Gildea, *supra* note 92, at 392.

231. *Id.* at 393 (“This emerging body of law thus funnels diverse and complex creative processes into a narrative framework that forces artists to adopt, at the very least during litigation, the relatively cold and detached logic of raw materials.”).

232. *Id.* at 391.

233. Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 *DEPAUL J. ART TECH. & INTELL. PROP. L. J.* 1, 17-18 (2013) (observing that Richard Prince’s lawyers referred to Cariou’s photographs as “akin to the paint Prince had applied to some of the images or the canvases to which he had squeezed them”).

234. See Xiyin Tang, *Art After Warhol*, 71 *UCLA L. REV.* 870, 912-14 (2024); Gildea, *supra* note 92, at 393; ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 194-99 (1998) (discussing the erasure of African American and Native American peoples “through appropriations of their alleged alterity”). For a fuller academic discussion of appropriation art and the ethical issues surrounding it, see generally CUTTING ACROSS MEDIA: APPROPRIATION ART: INTERVENTIONIST COLLAGE, AND

There is growing awareness that artists should care about the people behind their “raw materials,” but IP law signals that perhaps they should care a little less.

C. *Sexual Pleasure & Pain*

IP laws are, perhaps surprisingly, increasingly enmeshed in contemporary sexuality.²³⁵ Sexual expression, even if obscene, is fully protected by copyright law,²³⁶ and adult entertainment businesses are regularly protected by trademark and patent laws.²³⁷ Many important IP decisions about online piracy have involved adult entertainment businesses seeking to enforce their rights against internet companies or their users.²³⁸ Moreover, with the rise of image-based abuses, such as nonconsensual dissemination of intimate images (also known as “revenge porn”) or pornographic deepfakes, copyright and publicity rights laws have been relatively effective tools for victims to limit the spread of unwanted sexual content.²³⁹ Accordingly, IP has emerged as a means of both facilitating sexual pleasure and combatting sexual harms, raising questions about how courts should incorporate the risks and rewards of sexuality into IP’s more conventional concerns with economic incentives, free speech, and fair competition.²⁴⁰ Although courts sometimes do appear to “exceptionalize” sexual expression in

COPYRIGHT LAW (Kembrew McLeod & Rudolf Kuenzli eds., 2011); THE ETHICS OF CULTURAL APPROPRIATION (James O. Young & Conrad G. Brunk eds., 2009); JAMES O. YOUNG, CULTURAL APPROPRIATION AND THE ARTS (2008).

235. See Gilden, *supra* note 21, at 81-93.

236. See Ann Bartow, *Copyright Law & Pornography*, 91 OR. L. REV. 1 (2012).

237. See, e.g., Andrew Gilden & Sarah R. Wasserman Rajec, *Pleasure Patents*, 63 B.C. L. REV. 571 (2022); cf. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 803-07 (9th Cir. 2002) (holding that a former Playboy model’s repeated use in the website wallpaper might have infringed Playboy’s trademark).

238. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (finding the creation of thumbnail images for Google Image Search to be fair use); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 794-808 (9th Cir. 2007) (upholding dismissal of infringement claims against payment processors of infringing websites); *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1025-29 (9th Cir. 2004) (restricting defendants’ ability to use trademarked terms to generate banner ads).

239. See Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 B.C. L. REV. 801 (2023); Cathay Y. N. Smith, *Weaponizing Copyright*, 35 HARV. J.L. & TECH. 193, 223-26 (2021).

240. See Gilden, *supra* note 21, at 81-87; Levendowski, *supra* note 38, at 437-39.

their IP analyses,²⁴¹ their treatment of pleasure and pain in the context of gender and sexuality nonetheless mirrors the divergent treatment of love and hate in other areas of IP.²⁴² Sexual pleasure is suspect, while sexual pain, violence, or aggression can be ingredients for a successful litigation strategy.²⁴³

*1. Sexual Gratification & Titillation: “Feels So Good
Being Bad”*²⁴⁴

Several courts have rejected fair use and free speech arguments where the defendants used IP-protected subject matter in sexually entertaining, and arguably sex-positive, ways.²⁴⁵ In *MCA, Inc. v. Wilson*, the Second Circuit rejected the defendants’ argument that their song, “Cunnilingus Champion of Company C,” was a fair use of the song “Boogie Woogie Bugle Boy” because they used it to help portray cunnilingus as “joyous.”²⁴⁶ The song was featured in an erotic show called “Let My People Come,” “whose ‘main concern [was] not fornication but fellatio and cunnilingus.’”²⁴⁷ In *Walt Disney Productions v. Air Pirates*, the Ninth Circuit found an underground comic book infringing where it reimagined several Disney characters “as active members of a free thinking, promiscuous, drug ingesting counterculture.”²⁴⁸ In *Walt Disney Productions v. Mature Pictures Corp.*, the district court found a pornographic film infringing for using the “Mickey Mouse March” as background music for a scene in which a female protagonist “appears to simultaneously gratify the sexual drive” of three men wearing nothing but “Mouseketeer”

241. Rothman, *supra* note 27, at 120.

242. *See supra* Part II.B.

243. *See infra* Parts II.C.1-2.

244. RIHANNA, *S&M, on Loud* (Def Jam Recs. 2010). *See generally* LaChapelle v. Fenty, 812 F. Supp. 2d 434 (S.D.N.Y. 2011) (ruling on copyright claims concerning Rihanna’s “S&M”).

245. Although the cases cited in this paragraph are largely from the 1970s and 80s, they have not been overruled and are not in tension with any newer bodies of case law addressing sexualized uses of IP. *See infra* notes 246-51.

246. 677 F.2d 180, 183-84 (2d Cir. 1981); *see also* *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 453 n.18 (S.D.N.Y. 1976), *aff’d*, 677 F.2d 180 (“Clearly, when Champion was written, it was not intended to make any statement about Bugle Boy, but rather was meant to project the message that sex is good, clean and wholesome.”).

247. *Wilson*, 677 F.2d at 181.

248. 581 F.2d 751, 753 (9th Cir. 1978).

hats.²⁴⁹ And in *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, the film *Debbie Does Dallas* infringed plaintiff's trademarks when its protagonist wore a Dallas Cowboys Cheerleader uniform during a variety of sex acts.²⁵⁰ The district court in *Dallas Cowboys* had emphasized that the only purpose in including the uniform—or, for that matter, any narrative and dialogue—was “to try to add to the titillation force of the sex acts.”²⁵¹ While the works found infringing in these cases are unlikely groundbreaking works of sexual empowerment, these cases are nonetheless notable for the low esteem they hold for uses of IP aimed at sexual joy, gratification, titillation, and promiscuity.

Trademark dilution provides another area that rather explicitly places a low value on sexual pleasure. Under the “tarnishment” strand of trademark dilution, it is unlawful to use a famous trademark in a way that displaces its positive associations in the minds of consumers and harms the mark owner's reputation.²⁵² Numerous courts have found that the use of a mark in connection with a sex-related businesses would likely tarnish a famous mark.²⁵³ Such uses include: a webcam site with the domain *barbiesplaypen.com*;²⁵⁴ a sex toy website with the domain name *adultsrus.com*;²⁵⁵ and a porn website operated by someone with the nickname King VelVeeda.²⁵⁶ The Sixth Circuit has even held that there is a *presumption* that use

249. 389 F. Supp. 1397, 1397-98 (S.D.N.Y. 1975).

250. 604 F.2d 200, 202-03 (2d Cir. 1979).

251. *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 370 (S.D.N.Y. 1979), *aff'd*, 604 F.2d 200 (2d Cir. 1979).

252. 15 U.S.C. § 1125(c)(2)(C).

253. See *Williams-Sonoma, Inc. v. Friendfinder, Inc.*, No. 06-cv-06572, 2007 WL 4973848, at *7 (N.D. Cal. Dec. 6, 2007) (finding defendants' use of POTTERY BARN mark on their sexually oriented websites tarnishing); *Polo Ralph Lauren L.P. v. Schuman*, No. 97-cv-01855, 1998 WL 110059, at *2 (S.D. Tex. 1998) (finding POLO was tarnished by POLO CLUB adult entertainment business); *Hasbro, Inc. v. Internet Ent. Grp.*, No. 96-cv-00130, 1996 WL 84853, at *1 (W.D. Wash. 1996) (finding CANDY LAND tarnished by *candyland.com*, a sexually explicit website); *Cnty. Fed. Sav. & Loan Ass'n v. Orondorff*, 678 F.2d 1034, 1035 n.4, 1037 (11th Cir. 1982) (finding use of bank's COOKIE JAR mark on topless bar across the street from main branch of the bank tarnished bank's trademark).

254. *Mattel, Inc. v. Internet Dimensions Inc.*, No. 99-cv-10066, 2000 WL 973745, at *5 (S.D.N.Y. 2000).

255. *Toys “R” Us, Inc. v. Akkaoui*, No. 96-cv-03381, 1996 WL 772709, at *3, 4 (N.D. Cal. 1996) (finding TOYS “R” US tarnished by sex toy website, “adultsrus.com”).

256. *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942, 956 (N.D. Ill. 2002) (enjoining use of KING VELVEEDA on adult website).

of a mark to sell “sex-related products” is likely to tarnish the famous mark if the accused mark creates an “association” with the famous mark.²⁵⁷

IP accordingly takes a rather dim view of sexual entertainment and sexual commerce. When a film producer uses a copyrighted work to entertain and sexually arouse their audience, they likely cannot establish fair use in the absence of some direct criticism of the underlying work.²⁵⁸ Where a business uses a trademark to help sell products that will entertain and sexually arouse their customers, they may be presumptively tarnishing the reputation of the trademark owner—a presumption applied to no other type of business.

Perhaps the most explicit discussion of the relationship (or lack thereof) between sexual pleasure and creative expression comes from one of the few cases discussing IP protection for sex toys.²⁵⁹ In *ConWest Resources Inc. v. Playtime Novelties, Inc.*, the court held that the plaintiff’s “erotic fantasy sculptures”—reproductions of male genitalia created from castings of the male penis—were unlikely to be copyrightable.²⁶⁰ Copyright law protects utilitarian, “useful articles” only to the extent that their artistic features can be identified separately from their utilitarian features.²⁶¹ The plaintiff argued that their sculptures “were intended to stimulate in the

257. *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 388-89 (6th Cir. 2010) (“Thus, any new mark with a lewd or offensive-to-some sexual association raises a strong inference of tarnishment.”); see also 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:89 (5th ed. 2024) (discussing the presumption of tarnishment for sex-related uses).

258. See *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 322 (S.D.N.Y. 2002) (“Defendant asserts that she is at least in part attempting to comment on what she perceives as the sexual nature of Barbie through her use of customized Barbie figurines in sadomasochistic costume and/or storylines.”). Other cases finding sexualized parodies to be fair uses include *Pillsbury Co. v. Milky Way Prod., Inc.*, No. C 78-679A, 1981 WL 1402, at *6, *8 (N.D. Ga. Dec. 24, 1981) (finding that an image of “Poppin’ Fresh” and “Poppie Fresh” having sex was “intended to make an editorial comment on the values epitomized by these trade characters”) and *Lucasfilm Ltd. v. Media Market Group*, 182 F. Supp. 2d 897 (N.D. Cal. 2002) (denying preliminary injunction against a pornographic parody of *Star Wars*).

259. See also *Ritchie v. Vast Res., Inc.*, 563 F.3d 1334 (Fed. Cir. 2009) (finding plaintiff’s sexual devices to be obvious and unpatentable).

260. No. 06-cv-05304, 2006 WL 3346226, at *5 (N.D. Cal. Nov. 17, 2006).

261. See *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 417-18 (2017) (finding that the chevrons and stripes on cheerleading uniform designs were conceptually separable from the design of the utilitarian cheerleading outfit itself).

mind of the beholder an appreciation of the inherent beauty and power of male sexuality” and were accordingly designed as “tributes to certain models” for both use and display.²⁶² Nonetheless, the court reasoned that “it is clear that the objects have a utilitarian purpose,” namely, “they can be, and generally are, used for sexual gratification.”²⁶³ Moreover, according to the court,

It is difficult to imagine how the sculptures’ aesthetic features can be conceptually separated from their function: given that the function is to arouse, design features that are intended to stimulate in the mind of the beholder the concept of sexuality are not truly independent from the utilitarian purpose of the object.²⁶⁴

In other words, because the utilitarian purpose of a sex toy is to provide sexual gratification, any design that makes the purchaser *think* about sexual pleasure is also utilitarian and outside the bounds of creative authorship protected by copyright.

A wide range of incredibly popular creative works (romance novels, adult films, *Bridgerton*) are designed to stimulate the minds of audiences and activate their sexual fantasies,²⁶⁵ but IP law refuses to acknowledge these motives as artistic, let alone transformative. Creatively using IP to trigger sexual pleasure is only viewed as sufficiently weighty where it can be reframed as the byproduct of some supposedly loftier goal, such as mocking the rightsholder²⁶⁶ or reporting on something newsworthy in a sexual image. For example, the First Circuit found that a magazine made a fair use of nude photos of Miss Puerto Rico Universe when “the

262. *ConWest*, 2006 WL 3346226, at *5.

263. *Id.*

264. *Id.*

265. See Sonia Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER, SOC. POL’Y & LAW 461, 484-86 (2006); see also Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 425-26 (2016) (distinguishing between sexual fantasy and harmful sexual conduct).

266. See, e.g., *Lucasfilm Ltd. v. Media Mkt. Grp.*, 182 F. Supp. 2d 897, 901-02 (N.D. Cal. 2002) (denying preliminary injunction against a pornographic parody of *Star Wars*). Although the *Lucasfilm* decision is short and includes few details on the parody film, reviewers have shared that *Star Ballz* was an anime production that included a scene in which Jar Jar Binks fellates George Lucas. Felix Vasquez, *Star Ballz*, CINEMA CRAZED (May 4, 2016), <https://www.cinema-crazed.com/blog/2016/05/04/star-ballz-2001/> [<https://perma.cc/8743-5KB8>].

pictures were shown not just to titillate, but also to inform.”²⁶⁷ Again, titillation and enticement are suspect; information is not. As shown below, titillating and enticing one group of people can of course produce serious harms toward other groups,²⁶⁸ but the dividing line between infringing and noninfringing uses is *not* drawn between joyful or empowering titillation on one hand and hateful and degrading titillation on the other.²⁶⁹ Instead, it is drawn between uses that “just” titillate and uses that add something else to the mix.²⁷⁰ And often that extra ingredient is a healthy sprinkle of hatred.²⁷¹

2. *Sexual Harassment, Homophobia, and Misogyny: “I Know You Want It”*²⁷²

In contrast to the hostility courts have shown toward sexually arousing uses of IP, courts have been far more receptive to *insulting* uses of IP that deploy misogynistic, objectifying, or homophobic language. For example, in *Hannley v. Mann*, the defendants copied photos from the plaintiff’s social media pages to create a fake fan page—pauledalatisgay.com—that included captions such as “I love my body but I hate my ugly face.”²⁷³ In finding fair use, the court noted that “the fair use inquiry does not ask whether the criticism or parody of the copyrighted work is just or accurate, or mean-spirited.”²⁷⁴ Similarly, in *Weinberg v. Dirty World, LLC*, the defendants made a fair use of a photo of the plaintiff’s wife that had

267. *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000) (“Puerto Ricans were generally concerned about the qualifications of Giraud for Miss Puerto Rico Universe, as is demonstrated by the several television shows discussing the photographs.... Appellee reprinted the pictures not just to entice the buying public.”).

268. *See id.*

269. *See id.*

270. *See id.*

271. *See infra* Part II.C.2.

272. ROBIN THICKE, *Blurred Lines*, on *Blurred Lines* (Star Trak Ent. 2012). *See Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (ruling on copyright claims related to Robin Thicke’s “Blurred Lines”).

273. No. 21-cv-02043, 2023 WL 3407183, at *4 (C.D. Cal. Mar. 8, 2023).

274. *Id.* at *5; *see also Burnett v. Twentieth Cent. Fox Film Corp.*, 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007) (“Criticism of figures as universally recognized as Carol Burnett ... may come in the form of ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” (quoting *Hustler Mag. v. Falwell*, 485 U.S. 46, 51 (1988))).

been posted on TheDirty.com, an interactive message board “reveal[ing] many posts containing unsavory and disparaging comments towards women.”²⁷⁵ In finding a critical, transformative use, the court observed:

[T]he entire post is meant to ridicule and mock Plaintiff’s wife, calling her “ugly” and “awkward looking,” insulting her for being an unknown model, and disdainfully commenting on her ears. Further, the Post is followed by user comments that include the language “she is so UGLY ewwwwwwwwwww and she is a model? maybe model for that dude’s farm haha[.]” Viewed within the context as a Website as a whole, the Court finds that the central purpose of the Post was to criticize and disparage women like Plaintiff’s wife.²⁷⁶

The defendants had criticized Plaintiff’s wife’s appearance, her status as a model, and her relationship with her husband, and “[s]uch a use is precisely what the Copyright Act envisions as a paradigmatic fair use.”²⁷⁷

Along these lines, sexual harassment emerges in IP jurisprudence as ... funny? For example, in *Roberts v. Bliss* an actress was hired to participate in a video highlighting street harassment of women; the chain restaurant TGI Friday’s then superimposed life-sized images of its appetizers over the actress.²⁷⁸ “The ads’ [sic] message: ‘Nobody likes a catcaller.... But who can blame someone for #Appcalling?’”²⁷⁹ Although the actress was “humiliat[ed]” by the ad and argued that it “belittled women and the very cause which [p]laintiff was promoting,” the court found that by replacing women with appetizers as

275. No. 16-cv-09179, 2017 WL 5665023, at *3 (C.D. Cal. July 27, 2017).

276. *Id.* at *7 (citations omitted).

277. *Id.* at *9; *see also* Katz v. Google Inc., 802 F.3d 1178, 1182-83 (11th Cir. 2015) (“[Defendant’s] use of the Photo was transformative because, in the context of the blog post’s surrounding commentary, [defendant] used [plaintiff’s] purportedly ‘ugly’ and ‘compromising’ appearance to ridicule and satirize his character.”); Yang v. Young Turks, Inc., No. 18-cv-07502, 2019 WL 13252522, at *1, *3 (C.D. Cal. May 8, 2019) (finding fair use of photo originally used in an article titled “Why I Don’t Date Hot Women Anymore” where the defendant criticized the photo “for showing a man of ‘average looks’ and a woman who looks ‘a little crazy’”); Yang v. Mic Network, Inc., 405 F. Supp. 3d 537, 544 (S.D.N.Y. 2019) (finding fair use of the same photograph “to place [the subject of the photo] in a harshly negative light”).

278. 229 F. Supp. 3d 240, 243 (S.D.N.Y. 2017).

279. *Id.*

“the subject of the men’s desire” the defendants had engaged in a protected parody.²⁸⁰

These dynamics are not limited to relatively obscure district court opinions; misogynistic, arguably demeaning language appears in prominent fair use and parody decisions.²⁸¹ In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court’s landmark decision on parodic fair uses, the parody at issue—2 Live Crew’s reworking of “Oh, Pretty Woman”—consisted of a series of derogatory catcalls aimed at said pretty woman, including: “Big hairy woman you need to shave that stuff,” “Bald headed woman you got a teeny weeny afro,” and “Two timin’ woman you’s out with my boy last night.”²⁸² Use of IP to sexually arouse or to entertain with adult humor tends to be infringing, but using IP to either sexually harass—or joke about sexual harassment—is fair use. As pithily phrased by Rebecca Tushnet, “[i]n cases of parody, the original text asked for it.”²⁸³

Cumulatively, IP sends troubling messages about the sexual discourse that needs to be insulated from overzealous rightsholders. On one hand, the mere republication of a sexually explicit image would likely infringe copyright (and potentially publicity rights), and the mere repackaging of an image, brand, or celebrity in a sexual context would likely be infringing or tarnishing.²⁸⁴ For those scholars (such as this author) who have supported using IP as a means of combatting image-based abuses online, these outcomes may be welcome.²⁸⁵ On the other hand, by *adding even more* harassing and hurtful language to an image, would-be abusers can

280. *Id.* at 243, 253 (first alteration in original) (quoting Amended Complaint for Damages for Breach of Contract, Quantum Meruit and Violations of the Lanham Act and the Right of Publicity ¶¶ 6, 32, *Bliss*, 229 F. Supp. 3d 240 (No. 15-cv-10167), 2016 WL 8117607).

281. *See* *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003) (finding fair use of a series of photos that “portray a nude Barbie in danger of being attacked by vintage household appliances”); *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) (“You can brush my hair, undress me everywhere/Imagination, life is your creation” and “I’m a blond bimbo girl, in a fantasy world/Dress me up, make it tight, I’m your dolly.”); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 322 (S.D.N.Y. 2002) (finding fair use where “a recostumed and apparently physically altered Barbie doll, was the protagonist in a tale of sexual slavery and torture, the victim of which was another reconfigured Barbie”).

282. 510 U.S. 569, 595-96 (1994).

283. Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER, SOC. POL’Y & LAW 273, 276 (2007).

284. *See supra* Part II.C.1.

285. *See* Gilden, *supra* note 21, at 100-04.

more likely avoid liability.²⁸⁶ This is not a merely hypothetical concern: the website TheDirty.com has been repeatedly called out by sexual privacy advocates as a catalyst for online harassment of women.²⁸⁷ Nonetheless, IP laws carve out space from infringement liability precisely because defendants are directly harassing the people pictured in copyrighted images and are using violent rhetoric to demonstrate transformative critique.²⁸⁸ They produce what media scholar Emma A. Jane describes as “e-bile.”²⁸⁹ When the caption underneath the image says, “She’s so sexy,” then it will be more difficult to avoid infringement.²⁹⁰ But when the caption says, “She’s so UGLY,” the fair use doctrine may save the day.²⁹¹

Consider, again, *Santos v. Kimmel*, where the court held that Jimmy Kimmel’s fraudulent procurement and broadcast of George Santos’s embarrassing Cameo videos were fair use.²⁹² Although Santos’s past misconduct may render him a uniquely unsympathetic victim,²⁹³ the court nonetheless sets dangerous precedent in deeming Kimmel’s actions fair and transformative. If Santos were not a former congressman, but were a drag artist on Cameo, a model on OnlyFans, or a queer person on Grindr, then the deception, breach of trust, and public ridicule on display at *Jimmy Kimmel Live* would look less like “criticism or commentary” and more like catfishing, revenge porn, and a serious invasion of privacy.²⁹⁴

286. See Rothman, *supra* note 27, at 165 (“Using a cute reference to breasts in a product marketed to women ... is vulgar, but objectifying women’s breasts and using them to sell hamburgers to men is okay.”).

287. See Danielle Keats Citron, *The Continued (In)visibility of Cyber Gender Abuse*, 133 YALE L.J.F. 333, 356 (2023); Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 54 n.16; Levendowski, *supra* note 38, at 429-30.

288. Cf. Betsy Rosenblatt, *Considering the Role of Fairness in Copyright Fair Use*, 61 HOUS. L. REV. 261, 269 (2023) (“Fair uses frequently dismember works.”).

289. Emma A. Jane, “*Your a Ugly, Whorish Slut*”: Understanding E-Bile, 14 FEMINIST MEDIA STUD. 531, 531-32 (2012).

290. See *Weinberg v. Dirty World, LLC*, No. 16-cv-09179, 2017 WL 5665023, at *9 (C.D. Cal. July 27, 2017).

291. See *id.* (“Rather than using the photo to ... glorify Plaintiff and his wife’s lifestyle ... the entire Post uses the Video Image as part of a direct critique on Plaintiff’s wife’s appearance.”).

292. 745 F. Supp. 3d 153, 164 (S.D.N.Y. 2024).

293. See *id.* at 160.

294. See Ari Ezra Waldman, *Law, Privacy, and Online Dating: “Revenge Porn” in Gay Online Communities*, 44 LAW & SOC. INQUIRY 987, 987-88 (2019); CARRIE GOLDBERG, NOBODY’S VICTIM: FIGHTING PSYCHOS, STALKERS, PERVS, AND TROLLS 139-144 (2019).

Moreover, it may be tempting to overlook Santos's identity as a gay Latino Republican—an easy object of ridicule for the entire political spectrum—or the sex-negativity of the jokes fed to him—for example, congratulating someone on coming out as a furry.²⁹⁵ Deception, ridicule, and “punching down” humor pervade Kimmel's dissemination of Santos's video, yet the court did not hesitate to dismiss the infringement claim, finding fair use as a matter of law.²⁹⁶

D. Love & Hate in the Marketplace

The division between pleasure and pain in IP does not just shape activity in relatively niche spaces like gallery art, fan fiction fora, and revenge porn sites; it also shapes everyday goods and services that are available for purchase online and in retail stores. Where businesses offer for sale items that reference a well-known brand, and do so for the purposes of fun and amusement, courts have repeatedly found such references to infringe trademark and publicity rights. For example, in *Estate of Fuller v. Maxfield & Oberton Holdings, LLC*, the defendant manufactured magnetic desk toys called “Buckyballs,” which were “inspired and named after famous architectural engineer and inventor, R. Buckminster Fuller.”²⁹⁷ An instruction book for Buckyballs explained “Buckyballs were named for Buckminster Fuller ... [h]e was smart. He was crazy. He was fun. Remind you of anything?”²⁹⁸ The court rejected the defendants' argument that they had made a transformative use of Fuller's name and identity, allowing his estate's publicity rights and false endorsement claims to proceed.²⁹⁹ Similarly, in *Volkswagen AG v. Dorling Kindersley Publishing, Inc.*, the court rejected a publisher's argument that it had lawfully used Volkswagen's trademarks in a children's book, *Fun Cars*, that featured images of the NEW BEETLE.³⁰⁰ In rejecting the publisher's *Rogers* defense, the court agreed that “use of the NEW BEETLE design in *Fun Cars* is

295. See *Kimmel*, 745 F. Supp. 3d at 161.

296. See *id.* at 161, 164.

297. 906 F. Supp. 2d 997, 1002 (N.D. Cal. 2012) (quoting Complaint ¶ 13, *Fuller*, 906 F. Supp. 2d 997 (No. 12-cv-02570)).

298. *Id.* (alteration in original) (quoting Complaint, *supra* note 297, ¶ 18).

299. *Id.* at 1007.

300. 614 F. Supp. 2d 793, 810-11 (E.D. Mich. 2009).

relevant to the book's underlying 'fun' theme," but was unconvinced that the use of the NEW BEETLE trade design was not "explicitly mislead[ing]" as to the relationship between the parties.³⁰¹ Echoing the analysis of sports merchandise and other merchandise aimed at "fans,"³⁰² where a reference to IP is meant to further enhance the "fun" consumers experience, such an aim signals to courts that the defendants are treading too far into rightsholders' domains.

By contrast, where defendants seek to *poke* fun at a well-known brand or to communicate, more explicitly, that the brand "sucks,"³⁰³ courts are much less likely to find a likelihood of consumer confusion and more likely to find First Amendment-protected activity. Rather than celebrate the fun associated with a rightsholder, like the VW Beetle or an eccentric inventor, prevailing defendants undermine or mock the typically positive associations with brands like Louis Vuitton,³⁰⁴ L.L. Bean,³⁰⁵ or Nike.³⁰⁶ Moreover, where a brand already has some negative associations, such as SPAM, defendants have avoided trademark liability by piling on additional jokes at the brand owner's expense.³⁰⁷ In *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, the Second Circuit observed, "Although SPAM is in fact made from pork shoulder and ham meat, and the name itself supposedly is a portmanteau word for spiced ham,

301. *Id.*

302. *See supra* Part II.A.2.

303. *See* *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("We find that Mishkoff's use of Taubman's mark in the domain name 'taubmansucks.com' is purely an exhibition of Free Speech, and the Lanham Act is not invoked."); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1163-64 (C.D. Cal. 1998) (finding "Bally sucks" website to be noninfringing).

304. *See* *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 261 (4th Cir. 2007) ("The furry little 'Chewy Vuiton' imitation, as something to be *chewed by a dog*, pokes fun at the elegance and expensiveness of a LOUIS VUITTON handbag, which must *not* be chewed by a dog.").

305. *See* *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987) ("Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.").

306. *See* *Nike, Inc. v. Just Did It Enters.*, 6 F.3d 1225, 1232 (7th Cir. 1993) ("Throughout this case Stanard has asserted that he intended only to poke fun at Nike's corporate identity. He intended to use his own name to play a witty prank upon the perception of the viewer.").

307. *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 501 (2d Cir. 1996) ("Although the name 'Spa'am' is mentioned only once in the entire movie, Henson hopes to poke a little fun at Hormel's famous luncheon meat by associating its processed, gelatinous block with a humorously wild beast.").

countless jokes have played off the public's unfounded suspicion that SPAM is a product of less than savory ingredients."³⁰⁸ Once again, it is not the defendant's humor that successfully removes a likelihood of confusion; it is the use of humor at the trademark owner's expense.³⁰⁹ According to several courts, "[n]o one likes to be the butt of a joke, not even a trademark."³¹⁰ And as a result, brands are often the butt of the joke, both figuratively and literally.³¹¹ Although some courts have insisted that trademark laws are not intended to "deprive the commercial world of all humor and levity,"³¹² the humor preserved by trademark law tends to laugh quite pointedly *at*, not with, the rightsholder.³¹³

III. DANGERS OF THE PLEASURE TABOO

The previous sections showed a sharp distinction in how IP doctrine treats uses of IP designed to convey joy, pleasure, or appreciation compared to uses designed to convey dislike, critique, and opposition. To a certain extent, this distinction has an intuitive appeal. It would be an egregious abuse of the IP system to allow rightsholders to prohibit expression that is critical of them. From a free speech perspective, everyone should be able to criticize significant cultural entities and speak truth to power;³¹⁴ from an

308. *Id.*

309. See Roger L. Zissu, *Funny Is Fair: The Case for According Increased Value to Humor in Copyright Fair Use Analysis*, 55 J. COPYRIGHT SOC'Y USA 393, 394 (2008) (observing that humor weighs in favor of fair use only when accompanied by parody or satire).

310. *Nike, Inc.*, 6 F.3d at 1231 (quoting 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:88 (2d ed. 1984)); *MPS Ent., LLC v. Abercrombie & Fitch Stores, Inc.*, No. 11-cv-24110, 2013 WL 3288039, at *10 (S.D. Fla. June 28, 2013) (quoting *Jordache Enters. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1486 (10th Cir. 1987)); *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 421 (S.D.N.Y. 2002) (quoting 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:155) (4th ed. 1996)).

311. *Jordache Enters.*, 828 F.2d at 1488 (finding noninfringing defendant's "Lardashe" jeans); *Anheuser-Busch, Inc. v. VIP Prods., LLC*, 666 F. Supp. 2d 974, 985 (E.D. Mo. 2008) (finding noninfringing defendant's "Buttwiper" dog toys).

312. *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 322 (4th Cir. 1992).

313. See *Jack Daniel's Prods., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1591-92 (2023) ("Yet to succeed, the parody must also create contrasts, so that its message of ridicule or pointed humor comes clear. And once that is done (*if* that is done), a parody is not often likely to create confusion. Self-deprecation is one thing; self-mockery far less ordinary.").

314. See Fiona Macmillan, "Speaking Truth to Power": *Copyright and the Control of Speech*, in COPYRIGHT & FUNDAMENTAL RIGHTS IN THE DIGITAL AGE: A COMPARATIVE ANALYSIS IN

economic perspective, we cannot expect licensing markets to fairly and efficiently produce critical speech.³¹⁵ But in carving out space for critical speech, IP laws have, perhaps unwittingly, significantly undervalued joyous speech and treated pleasure as taboo. Speech that emphasizes joy or pleasure is regularly viewed with skepticism and channeled into the licensing markets controlled by IP rights-holders. If someone loves what the rightsholder has put out into the world, then the creativity generated by such love becomes a legally suspect intrusion into the rightsholder's derivative markets, brand expansions, and merchandising rights. Rarely does it matter that the joyful defendant has provided new material and perspectives or that, in many cases, the economic harm to the rightsholder is highly speculative.³¹⁶ This Part highlights several serious problems with siloing love from hate in IP doctrine, and it shows the dangers in undervaluing positive attachments while overvaluing negative attachments.

A. Misrepresentation & Exclusion

The cumulative effect of imposing liability on fan works, joyful visual art, sex-positive expression, and fun branding while insulating anti-fandom, detachment, sexual aggression, and critical branding is a rather clear litigation strategy for those accused of IP infringement. If a defendant and their lawyer can conjure a plausible story of critique or opposition to the rightsholder and their work, they will be in a much stronger position to establish fair use or otherwise-protected speech.³¹⁷ Even if the defendant seems

SEARCH OF A COMMON CONSTITUTIONAL GROUND 6, 8, 14 (Oreste Pollicino, Giovanni Maria Riccio & Marco Bassini eds., 2020).

315. See Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 307-08 (1993); Gordon, *supra* note 78, at 294-95; see also SUNDER, *supra* note 26, at 35 (noting that law privileges parody not because of its normative benefits, but because licensing is difficult).

316. See Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 644 (2015); David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 389 (2014).

317. See Lothian, *supra* note 43, at 143 (“To argue for the legal legitimacy of the creative work they do, vidders must show not only that what they do is not theft but also that it is about more than love.”); Zissu, *supra* note 309, at 394 (observing that courts only protect humorous uses by making “unconvincing, sometimes tortured findings that a good joke or funny spoof could reasonably be perceived as in part intended to ridicule the copied work”).

unquestionably motivated by fandom, love, or pleasure surrounding the IP at issue, IP doctrine channels litigants away from pleasure narratives and toward narratives of anger, criticism, and trauma. The result is a body of jurisprudence that often misrepresents the social activities it governs and skews public discourse in disempowering ways.

This channeling function can be seen in the many cases where defendants put forth highly strained arguments about how their work is critical or parodic. For example, in trying to present a *Seinfeld* trivia book as a transformative use, the defendants argued, “*The [Seinfeld Aptitude Test]* is a quintessential example of a critical text of the TV environment expos[ing] all of the show’s nothingness to articulate its true motive forces and its social and moral dimensions.”³¹⁸ Similarly, in trying to present a *The Cat in the Hat/OJ Simpson* mashup as transformative, the defendants argued that the mashup “comment[s] on the mix of frivolousness and moral gravity that characterized the culture’s reaction to the events surrounding the Brown/Goldman murders” and “parody the mix of whimsy and moral dilemma created by Seuss works.”³¹⁹ Another unsuccessful Dr. Seuss mashup “refracts the banal narcissism” of his works “through a *Star Trek* lens, advocating not conquest but communion.”³²⁰ The pornographic Mouseketeer scene discussed above³²¹ allegedly “emphasize[d] the transition of such teenagers from childhood to manhood.”³²² These and other strained narratives of critique have been routinely rejected as “post-hoc rationalizations”³²³ for infringement and dismissed as “pure shtick.”³²⁴

Given the hostile treatment toward joy and fandom, defendants should not be blamed for taking a swing at a critical narrative; nevertheless, the result of such failed attempts is additional case

318. *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d. Cir. 1998) (second alteration in original).

319. Defendants/Appellants Penguin Books USA, Inc. and Dove Audio, Inc. Opening Brief at 3, *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.* 109 F.3d 1394 (9th Cir. 1997) (No. 96-55619), 1996 WL 33417472, at *5.

320. Defendant-Appellees Answering Brief [Redacted], at 32, *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348), 2019 WL 5149913, at *16.

321. See *supra* text accompanying note 249.

322. *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975).

323. See *Castle Rock*, 150 F.3d at 142; *ComicMix*, 983 F.3d at 453.

324. See, e.g., *Penguin Books*, 109 F.3d at 1403.

law expressing skepticism toward joyous uses of IP and linking fun with deceptive behavior. Creative works that involve a significant amount of creative labor, substantial new material, a healthy dose of humor, and minimal market harm to the rightsholders ultimately emerge in the IP canon as examples of deception, laziness, greed, and freeriding. Instead, they might be seen as casualties of IP's pleasure taboo and the narrow range of creative narratives embraced by courts.

In addition to encouraging litigants to deceptively reframe their joy as critique, the pleasure taboo encourages parties who *are* critiquing the rightsholder to omit the joy, pleasure, or fandom that accompanies that critique. Recall that in *Suntrust* the district court pointed to the humorous elements of *The Wind Done Gone* when finding infringement; the Eleventh Circuit opinion by contrast provided no clue that the book might have been enjoyable to write or read.³²⁵ And in *Santos v. Kimmel*, even though the Cameo videos were procured for use in a comedy show, the court's decision makes no mention of comedy, humor, or entertainment; a funny bit on *Jimmy Kimmel Live* was framed entirely as political commentary.³²⁶

As discussed by scholars of fan fiction, fandom is often a hybrid of loving attachments, hurtful alienation, and a strong compulsion to speak up;³²⁷ this emotional hybridity may be particularly salient among women, BIPOC, and queer people craving better representation in the works they love.³²⁸ But when fan works make their way into IP litigation, case law strongly encourages fans to set aside their mixed feelings and firmly embrace their anti-fandom. The results are decisions that discuss what parties *hated* about cultural entities like *Gone with the Wind*, *Three's Company*, Barbie, or Nike

325. See *supra* notes 171-83 and accompanying text.

326. See *Santos v. Kimmel*, 745 F. Supp. 3d 153, 164 (S.D.N.Y. 2024); see also *supra* notes 200-05.

327. See Tushnet, *supra* note 54, at 2; Rosenblatt, *supra* note 23, at 115-16; SUNDER, *supra* note 26, at 71 (observing that enjoyment and entertainment are closely interwoven with experimentation and innovation).

328. See Sarid, *supra* note 57, at 93 (“[Q]ueer creativity often engages directly with mainstream works (which are often under copyright), transforming, rewriting, and queering mainstream culture.”); JONATHAN GRAY, *DISLIKE-MINDED* 45 (2021) (“We might, therefore, expect to see heightened levels of engaged dislike amid marginalized individuals and communities, precisely because they are required more regularly to do the hard work of grinning and bearing it.”).

but say little about what parties *loved* about them enough to expend so much time and energy on them.³²⁹

The difference between framing someone's work as sharp criticism of the source material as opposed to a complex celebration is not merely semantic. By publicly engaging with well-known aspects of popular culture, authors are at least implicitly claiming that their perspectives are worthy of the general public's attention. To the extent that IP laws insist that these perspectives be framed in terms of pain, anger, and alienation, and not in terms of pleasure, joy, and agency, it becomes much more difficult for those on the margins of popular culture to realistically present themselves as anything other than marginal. When members of marginalized groups—especially women, racial minorities, and LGBTQ+ people—experience and share moments of pleasure, they are publicly signaling that they can truly belong in whatever setting they find themselves.³³⁰ Pleasure presupposes at least a moment in time when a person is comfortable enough to laugh and smile, notwithstanding their outsider social status.³³¹ Pleasure can be an effective strategy of transformative justice because it flips the scripts of racism, misogyny, and homophobia, which send the message that not everyone is capable or deserving of the full spectrum of human emotions.³³² Pain, on the other hand, signals that someone is *not* comfortable and does not have access to joy and laughter because of something they have experienced. As explained by Sara Ahmed, when individuals “do not experience pleasure from proximity to objects that are already attributed as being good,” they can feel intensely alienated.³³³

Although it's crucial for everyone to have an outlet to express their pain, narratives of pain are nonetheless entirely consistent

329. See SUNDER, *supra* note 26, at 112.

330. See AHMED, *supra* note 49, at 148, 152.

331. *Id.*; see also Nico H. Frijda, *On the Nature and Function of Pleasure*, in PLEASURES OF THE BRAIN 102 (Morten Kringelbach & Kent C. Berridge eds., 2010) (“The feeling of pleasure, for all its ineffability, reflects the absence of need to change. It is a pointer to stability and actual acceptance.”).

332. AUDRE LORDE, THE EROTIC AS POWER 7 (1978) (“The sharing of joy ... forms a bridge between the sharers which can be the basis for understanding much of what is not shared between them, and lessens the threat of their difference.”).

333. Sara Ahmed, *Happy Objects*, in THE AFFECT THEORY READER 37 (Melissa Gregg & Gregory J. Seidworth eds., 2010); AHMED, *supra* note 49, at 27 (“So pain can be felt as something ‘not me’ within ‘me’: *it is the impression of the ‘not’ that is at stake.*”).

with the scripts of racism, misogyny, and homophobia; painful narratives claim precisely the outsider, alienated status that the dominant culture has carved out for them. To the extent that IP laws condition free speech on codified narratives of pain—on what Wendy Brown calls “wounded attachments”—they blunt the political potential of freely engaging with our popular culture.³³⁴

B. Distorted Incentives

By encouraging specious narratives of critique and downplaying narratives of love and joy, the pleasure taboo drives a further wedge between the theory and practice of creativity in IP law. The animating theory of IP rights in the United States is that some degree of market exclusivity is needed to incentivize an optimal amount of creative activity; without the revenue streams protected by IP, it would be too difficult to recoup the costs of investment in, say, a film franchise, a new pharmaceutical, a high-quality brand, or an influential social media profile.³³⁵

Several scholars have pushed back against this economic vision of creativity, showing empirically that creativity is spurred by much more than money.³³⁶ As observed by Rebecca Tushnet, “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.”³³⁷ Whether in the domain of creative writing, or computer programming, or visual art, creators create out of a desire to feel a sense of community, to better understand themselves, to create change in the world, or, often, because creativity can be fun.³³⁸ Based on extensive interviews with a diverse range of

334. WENDY BROWN, *STATES OF INJURY* 73-75 (1995) (arguing that political claims that rely on “entrenching, restating, dramatizing, and inscribing its pain ... can hold out no future ... that triumphs over this pain”); see also AHMED, *supra* note 49, at 150 (“Assimilation involves a desire to approximate an ideal that one has already failed.”).

335. See *supra* notes 314-15 and accompanying text.

336. See Buccafusco & Fagundes, *supra* note 74, at 2449-50 (“[M]arket-based incentives often play a limited role in people’s descriptions of why they create.”).

337. Tushnet, *supra* note 25, at 526.

338. See SILBEY, *supra* note 24, ch. 1; Tushnet, *supra* note 25, at 528 (observing that literature “creates a sense of an infinite horizon of play” through which authors hope to pass onto readers “the pleasure that we ourselves have taken in the stuff we love” (quoting MICHAEL CHABON, *MAPS AND LEGENDS: READING AND WRITING ALONG THE BORDERLANDS* 56-57 (2008))).

creators, Jessica Silbey has observed that “[an] individual’s pursuit of pleasure” is one of the key conditions for initiating creative endeavors.³³⁹ People invest in creative activities because it can keep them “balanced and happy,” and innovation occurs most where “pleasure is encouraged.”³⁴⁰

Despite courts’ dismissive approach to parties having fun with IP, “fun” bears many of the hallmarks of the creativity IP laws claim to value. Rather than a mere signal of immaturity or frivolity, fun is a much richer emotional experience than typically understood.³⁴¹ As explained by Catherine Price, fun is the confluence of playfulness, flow, and social connection.³⁴² Play has been closely linked with experimentation and innovation.³⁴³ Flow—“an almost automatic, effortless, yet highly focused state of consciousness”—is a well-documented characteristic of creativity.³⁴⁴ And social connection has been identified as both an important incentive for creativity and a marker of thriving citizenship.³⁴⁵ Dismissing fun thus dismisses human experiences that are—or should be—at the core of IP policy.

339. SILBEY, *supra* note 24, at 28.

340. *Id.* at 39, 53; *see also* Patrick Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. 721, 729 (2024) (“Since creative works are a potential source of pleasure, copyright protection increases pleasure by incentivizing the creation of works that would not be created without it.”); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947 (2006) (“[I]ntrinsic motivations can include the desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author.”); TERESA M. AMABLE, CREATIVITY IN CONTEXT 103, 115 (1996) (defining intrinsic motivations for creativity as “any motivation that arises from the individual’s positive reaction to qualities of the task itself”).

341. PRICE, *supra* note 48, at 17.

342. *Id.* at 32.

343. *See* COHEN, *supra* note 26, at 54 (“Play is both the keystone of individual moral and intellectual development and a mode of world making, the pathway by which transformative innovation and synthetic understanding emerge.”); SILBEY, *supra* note 24, at 45 (“Whatever the legal rules, making room for play and experimentation was regularly described as a precursor to the act of creation or discovery.”).

344. CSIKSZENTMIHALYI, *supra* note 48, at 110; *see also, e.g.*, SILBEY, *supra* note 24, at 35 (citing CSIKSZENTMIHALYI, *supra* note 48).

345. *See* Rosenblatt, *supra* note 23, at 98; SILBEY, *supra* note 24, at 269 (“Their talents or gifts propel them to work diligently to refine their craft in service of three progress goals: to express themselves as creators or innovators, to form community (establish relationships), and to enrich it (build and challenge capabilities).”); SUNDER, *supra* note 26, at 24 (“Intellectual property laws bear considerably on the ability of humankind to flourish, affecting everything from the developing world’s access to food, textbooks, and essential medicines, to the ability of citizens everywhere to democratically participate in political and cultural discourse.”); ANJALI VATS, *THE COLOR OF CREATORSHIP* 28 (2020).

IP's jurisprudential pleasure taboo further illustrates the disconnect between the dominant story of economic incentives and actual creative motivations. Creators are encouraged to downplay their fandom and the fun they experienced in reworking the opposing party's IP, sidelining an important creative incentive from the balancing of interests inherent in doctrines like fair use and likelihood of confusion. Instead of balancing, say, the potential impact of incomplete control over companion book derivative markets against the potential impact of preventing fans from creating new texts about works they love,³⁴⁶ courts instead balance the potential loss of a derivative market against a highly questionable "critical text" that is more logically understood as freeriding on the success of the original. Finding works like *Seinfeld Aptitude Test*, *The Joy of Trek*, *The Fellowship of the King*, and *Prelude to Axanar* to be infringing does not simply boost the economic incentives of rightsholders; it also suppresses the affective incentives of audiences to dive deeply into the cultural worlds they love.³⁴⁷ It may be that the highly commercial nature of certain joyful works harms rightsholders in ways that eclipse the benefits to fan communities, but these benefits nonetheless are missing from the fair use and free speech equations. Rightsholders can "joyride"³⁴⁸ off fan works when it suits them and shut these works down when it does not.

Ultimately, there is little rhetorical space within IP jurisprudence to extoll the virtues of fandom, pleasure, and loving attachments—either for the accused infringers themselves or as a matter of IP policy. Litigants are incentivized to downplay these positive attachments, and when they do not downplay them, they are presented in case law as evidence of excess, frivolity, or greed. To be fair, the cases discussed above do recognize that broad IP rights can negatively impact downstream creativity, even creativity that is motivated primarily by strong feelings; however, the concern is only that IP law will unduly constrain criticism, opposition, and insults

346. See Fagundes, *supra* note 316, at 384-85.

347. See Goold & Simon, *supra* note 340, at 763 ("As a source of meaningful human activity, engaging in such creative practices produces a high degree of intellectual pleasure. And because our theory accounts for both pleasurable product as well as consumption, it must account for the highly pleasurable nature of the activity involved both in creating and enjoying fan fiction.").

348. I thank Camilla Hrdy for this framing.

and not that it will unduly constrain their more joyous counterparts.³⁴⁹

C. Commodified Pleasure

But why? Why would judges take such a dim view of fandom, love, and pleasure in a field that is so dedicated to supporting the industries behind much of popular culture? One plausible, and important, explanation is that they are part of a legal system with a long-standing discomfort towards human pleasure.³⁵⁰ Pleasure, whether in sex, drugs, or rock n' roll, is often presented within law as excessive, irrational, socially wasteful, or impossible to calculate; as a result, lawyers and judges in other legal contexts often attempt to reframe pleasure as something less taboo or more important.³⁵¹ Some of this dodging and reframing of pleasure does appear to be happening in the cases surveyed above.³⁵²

However, judges appear to be doing something else notable with regards to joy and pleasure in IP disputes. To the extent pleasure is not significantly downplayed or reframed as critique, pleasure appears to be conflated with the economic interests of the rightsholder: “[I]n the entertainment industry fun *is* profit.”³⁵³ To the extent that a boundary exists between the markets that a rightsholder should

349. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) (“[T]he public benefit in allowing artistic creativity and social criticism to flourish is great.... It is not in the public’s interest to allow Mattel complete control over the kinds of artistic works that use Barbie as a reference for criticism and comment.”).

350. See Gildea & Rajec, *supra* note 237, at 618-21; Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 328 (2008); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 205-08 (2001); Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 159 (2014).

351. See Andrew Gildea & Sarah R. Wasserman Rajec, *Patenting the Taboo: Sex, Drugs, and Abortion*, 27 YALE J.L. & TECH. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5035245 [<https://perma.cc/854W-2XXH>]; Andrew Gildea, *Reliable Consultants, Inc. v. Earle (USA): Reimagining the Sex Toy Cases*, in *QUEERJUDGMENTS* (Nuno Ferreira, Maria Federica Moscati & Senthoran Raj eds., 2024).

352. Cf. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583, 1587 (2010) (“[P]ositive and negative feelings are thought to be invisible, inaccessible, and unmeasurable.”); Martha C. Nussbaum, *Who Is the Happy Warrior? Philosophy Poses Questions to Psychology*, 37 J. LEGAL STUDS. S81, S96 (2008). (“[P]leasure is simply not normatively reliable.”).

353. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

foreseeably control and those that should remain beyond their reach, this boundary often exists at the thresholds of love and hate, celebration and opposition, and pleasure and pain.³⁵⁴ To the extent that audiences enjoy what is happening in their streaming multiverse of whatever, their positive vibes provide precisely the value that rightsholders are given the exclusive rights to extract.³⁵⁵ If audiences “crav[e]”³⁵⁶ or have “passion[s]”³⁵⁷ for some aspect of popular culture, it is ultimately rightsholders who decide whether and how such hunger will be sated.³⁵⁸ To the extent that pleasure is recognized as valuable within IP jurisprudence, it is not because of the intrinsic benefits it provides to individuals and communities; it is because of the commodity value it provides to joyriding rightsholders.

This commodification of pleasure within IP is troubling. To the extent that courts are claiming to narrowly focus only on the economic interests in IP-related pleasure, they are engaged in, what I have called elsewhere, “market gibberish.”³⁵⁹ Many of the lawsuits above are not motivated by the rightsholder’s genuine concern for lost revenues or triggered by the defendant’s hidden desire to make a lot of money at the rightsholder’s expense;³⁶⁰ these disputes are instead about a diverse range of affective investments, related to privacy, moral revulsion, family legacy, social hierarchy, and identity development.³⁶¹ Courts and litigants may try to repackage

354. Lothian, *supra* note 43, at 143 (“On the one hand, fan production is defensible to copyright holders inasmuch as it performs free labor for a brand; on the other hand, fan laborers become lawbreakers if they share and create too freely.”).

355. See Tushnet, *supra* note 25, at 542 (“It is the audience’s desire that make media properties valuable.”); Lothian, *supra* note 43, at 141 (“Fannish investment is the reproductive labor that keeps media companies going.”).

356. Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998).

357. Salinger v. Colting, 641 F. Supp. 2d 250, 260 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

358. See Buccafusco & Fagundes, *supra* note 74, at 2468-69 (recounting J.K. Rowling’s statement that if anyone deserves to make money from *Harry Potter*, it’s her).

359. Gilden, *supra* note 70, at 1019.

360. See, e.g., Mattel Inc. v. Walking Mountain Prods., 353 F. 3d 792 (9th Cir. 2003); Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894 (9th Cir. 2002); Núñez v. Caribbean Int’l News Corp., 235 F.3d 18 (1st Cir. 2000); Salinger, 641 F. Supp. 2d 250; Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002); Mattel, Inc. v. Internet Dimensions Inc., No. 99-cv-10066, 2000 WL 973745 (S.D.N.Y. 2000); see also *supra* Part II.A.I.

361. See Gilden, *supra* note 21, at 68; Buccafusco & Fagundes, *supra* note 74, at 2452; Margaret Chon, *Copyright’s Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364, 366 (2016)

emotions as economic commodities, but the end result is a body of law whose outcomes are at odds with its own internal policy justifications as well as with broader notions of fairness and justice.

To the extent that the scope of IP rights are presented as coterminous with the pleasure generated by the underlying work, symbol, or identity, they leave little space for play, experimentation, community formation, and identity-building free from the veto power of cultural authorities.³⁶² To a certain extent, IP rights will inevitably divert the surplus value of joy and pleasure to the rights-holder—the market value of, say, a feature film, will ultimately hinge upon how many people liked it.³⁶³ But doing so underappreciates that many of these uses go far beyond the types of paid consumption at least arguably necessary to sustain professional creativity and the supply of mass cultural works.³⁶⁴

Moreover, the commodification of fun underappreciates just how significant audiences' noneconomic interests in "fun" can be. For example, Martha Nussbaum lists as one of her ten basic human capabilities, "[b]eing able to laugh, to play, to enjoy recreational activities."³⁶⁵ According to Sara Ahmed, "[p]leasure involves not only the capacity to enter into, or inhabit with ease, social space, but also functions as a form of entitlement and belonging."³⁶⁶ Several IP scholars have emphasized how deeply connected such notions of joyful play are with ensuring that everyone has ample access to cultural resources and freedom to actively experiment with them.³⁶⁷

("If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present.")

362. See Duane Rudolph, *We Have the Right to Play*, 26 U. PA. J.L. & SOC. CHANGE 369, 374-75 (arguing that play and "fun" are "core facet[s] of our democratic commitment to liberty").

363. It should be noted, however, that the market for dislike, that is, "hatewatching," is likely underappreciated. See generally GRAY, *supra* note 328 (discussing the prevalence of "involuntary consumption").

364. See Fromer, *supra* note 25, at 2760; Goold & Simon, *supra* note 340, at 729; Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1546 (2013) ("[C]reative second comers are frequently willing to invest a considerable amount of time and energy in producing their own original derivative uses that may exploit a market niche that does not harm the markets in which the authors of the underlying works are operating or have reasonable expectations of operating in the future.")

365. MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 34 (2011).

366. AHMED, *supra* note 49, at 164-65.

367. See SUNDER, *supra* note 26, at 24 ("Intellectual property laws bear considerably on the

Christopher Yoo connects the “pleasures of production of transformative works” with both self-actualization and membership in a community.³⁶⁸ Julie E. Cohen has observed, “many processes of cultural participation occur not via consumption or communication in the abstract, but rather by literally inserting the self into the work, and those processes can be celebratory as well as critical.”³⁶⁹ Far from presenting joy and play as core aspects of human flourishing, IP jurisprudence presents them as luxury goods: You can hate and harass cultural entities for free, but you will have to pay extra to love and celebrate them.

In treating pleasure as a commodity, as an experience that must be paid for or earned, IP laws ultimately feed into existing biases within popular culture. Where pleasure is a luxury good, or is abstracted into consumers’ general market preferences, it will be most readily available to those with the ability to pay for it. When socioeconomic power dictates cultural representation, popular culture will continue to center the experiences of straight, white, cisgender men, and the priorities of the entertainment industries will continue to reflect the perspectives of those with money and power.³⁷⁰ IP’s free speech doctrines further bolster existing power relations by subsidizing expression that critiques, ridicules, and punches down at those who stand in opposition to the white, cis, hetero male gaze.³⁷¹ IP laws thankfully do carve out space for

ability of humankind to flourish.”); Tushnet, *supra* note 25, at 537 (“[C]reativity is a positive virtue, not just because of its results but because of how the process of making meaning contributes to human flourishing.”).

368. Christopher S. Yoo, *Self-Actualization and the Need to Create as a Limit on Copyright*, in *CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS* 12, 28 (Shyamkrishna Balganes, Ng-Loy Wee Loon & Haochen Sun eds., 2021) (quoting Mizuko Ito, *The Rewards of Non-Commercial Production: Distinctions and Status in the Anime Music Video Scene*, *FIRST MONDAY*, May 3, 2010, at 4, www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2968/2528).

369. COHEN, *supra* note 26, at 86.

370. See GRAY, *supra* note 328, at 50 (“Our white patriarchal society regularly requires people of color, women, and queer subjects to perform the emotional labor of enduring offensive commentary and suffering it quietly, not speaking up and disrupting others’ enjoyment.”)

371. See John Tehranian, *The Subject Strikes Back: Intellectual Property Law, Visual Pleasure, and Resistance in the Arts*, 71 *AM. U. L. REV.* 1367, 1396 (2022) (“In the shadow of the male gaze, a woman in front of the camera exists solely for visual pleasure—a passive erotic object only significant for how she ‘plays to and signifies male desire.’” (quoting Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 833, 837-38 (Leo Braudy & Marshall Cohen eds., 5th ed. 1999))).

marginalized communities to call out racism, sexism, transphobia, and homophobia, and to speak of the ways that they have been negatively impacted by mainstream culture.³⁷² Nonetheless, marginalized pleasures remain underserved by the IP system, both in the entertainment industries incentivized by IP rights and in the carveouts for free speech. Empowered, joyful representations of marginalized people remain relatively under-represented in mainstream culture, and IP laws make it even more difficult for marginalized people to reappropriate pop culture icons in ways that showcase their capacities for pleasure and love.³⁷³ Drag, fan fiction, and queer art, for example, remain subject to the veto of rightsholders, unless they convincingly foreground the pain and anger of subordination.

D. First Amendment Tensions

The main takeaway from the cases examined in this Article is that courts discourage discussions of pleasure, incentivize the creation of especially hostile works, and subject joyous creativity to the veto of rightsholders. Despite the fun pop culture pervading its case law, the emotional tenor of IP law suddenly seems quite bleak: Love bites; hate wins. Notwithstanding judicial efforts to shunt moral considerations from IP law, there is a growing awareness that IP laws inevitably impact human relationships, mediate access to vital resources, and shape social hierarchies.³⁷⁴ To the extent that IP diverges in its treatment of loving attachments and joyful expression, on one hand, and antagonism and disdainful speech, on the other, it is difficult to argue that IP is helping to make the world a kinder, fairer, or more connected place.

IP's pleasure taboo is particularly troubling when set against other areas of free speech law.³⁷⁵ The First Amendment protects speech expressing both support and opposition for a particular

372. See *supra* notes 32-34 and accompanying text.

373. See GRAY, *supra* note 328, at 82 (“[M]arginalized viewers have less media directed toward them and their desires, hopes, fears, and interests, forcing them to repurpose, refashion, and redirect those texts through the act of consumption.”).

374. See SUNDER, *supra* note 26, at 24; VATS, *supra* note 345, at 2-3; JESSICA SILBEY, *AGAINST PROGRESS* 89 (2022).

375. See Mark A. Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases*, 2023 SUP. CT. REV. 85, 91 (2024).

individual or cause.³⁷⁶ Indeed, it seems strange to even pose the question of whether speech that says nice things about someone should be given less protection than hateful speech; the challenge in the First Amendment context usually centers on whether regulated speech is sufficiently harmful to merit legal intervention,³⁷⁷ not on whether the speech in question is positive or negative in tone. Indeed, even in the context of trademark law, the Supreme Court in *Matal v. Tam* recently struck down a portion of the Lanham Act that prohibited the registration of disparaging marks.³⁷⁸ The disparaging marks clause was unconstitutional viewpoint discrimination because it disallowed registration of marks that disparaged persons, groups, or institutions but allowed registration of marks that celebrated those same institutions.³⁷⁹ It was, in the words of the Court, “a happy-talk clause.”³⁸⁰ Driving wedges between “happy” and mean talk in IP violates the First Amendment, yet such wedges ultimately pervade IP doctrine to the *detriment* of happy talk.

Moreover, although it is undoubtedly true that offensive, critical speech enjoys protection under the First Amendment,³⁸¹ there is growing awareness that speech intended to harass or threaten does not enjoy absolute immunity from liability. Most analogously to the circumstances in this Article, several courts have upheld laws that prohibit the nonconsensual dissemination of intimate images, colloquially referred to as “revenge porn” laws.³⁸² For example, in *People v. Austin*, the Supreme Court of Illinois upheld the conviction of a woman who sent nude pictures of her ex-boyfriend’s neighbor to his friends and family in order to explain why the

376. See *Citizens United v. FEC*, 558 U.S. 310, 372 (2010); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995).

377. See *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (assessing whether the Stolen Valor Act could criminalize false statements about receiving military honors); *Snyder v. Phelps*, 562 U.S. 443, 447 (2011) (assessing whether members of the Westboro Baptist Church could be held liable for holding homophobic signs outside a funeral service).

378. See 582 U.S. 218, 223 (2017).

379. *Id.* at 243.

380. *Id.* at 246.

381. See, e.g., *Snyder*, 562 U.S. at 460-61 (2011) (reversing liability for intentional infliction of emotional distress for picketing with homophobic signs outside a funeral); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (reversing liability for intentional infliction of emotional distress based on sexual parody of Reverend Jerry Falwell).

382. See Gilden, *supra* note 239, at 828-29.

relationship ended.³⁸³ The Illinois statute was upheld against a First Amendment challenge given that “the nonconsensual dissemination of private sexual images causes unique and significant harm to victims.”³⁸⁴ *Austin* and other recent decisions reflect a move away from an absolutist vision of the First Amendment that unduly disregards the many harms of image-based abuses and sexual privacy violations.³⁸⁵ In holding out uses of IP designed to mock, insult, or harass someone as paradigmatic fair use, IP jurisprudence appears especially out of sync with a more nuanced understanding of how free speech, privacy, celebration, and critique might ethically coexist.

CONCLUSION: A MORE CRITICAL APPROACH TO LOVE & HATE

This Article has demonstrated a persistent divergence, across diverse factual and doctrinal settings, in IP law’s treatment of love and hate. While it might be tempting to remedy this treatment with statutory amendments or specific doctrinal changes, the problems outlined above appear much more rhetorical than doctrinal; that is, they stem from the ways that narratives around fandom, art, sex, and commerce implicitly shape judicial reasoning. For example, the fair use statute explicitly mentions “criticism” and “comment[ary]” as prototypical fair uses,³⁸⁶ and the federal dilution statute exempts “parodying, criticizing, or commenting” from liability.³⁸⁷ In application, however, commentary and criticism largely collapse into each other, leaving little space for commentary on popular culture that celebrates in diverse ways what a character, series, celebrity, or brand has meant for an individual or community.

Take, for example, the independent film *The People’s Joker*, a darkly comedic coming-of-age story about a trans woman, Joker the

383. 155 N.E.3d 439, 449, 474 (Ill. 2019).

384. *Id.* at 461. *See also* State v. Casillas, 952 N.W.2d 629, 642 (Minn. 2020) (upholding Minnesota statute under strict First Amendment scrutiny given the “broad and direct threat to its citizens’ health and safety” posed by nonconsensual dissemination of private sexual images); State v. Katz, 179 N.E.3d 431, 451 (Ind. 2022) (“[W]e have no trouble concluding the impingement created by the statute is vastly out-weighted by the public health, welfare, and safety served.”).

385. *See* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 127-35 (2019).

386. 17 U.S.C. § 107.

387. 15 U.S.C. § 1125(c)(3)(A)(ii).

Harlequin, who tries to make it as a comedian in a Gotham City.³⁸⁸ The film was nearly pulled from the Toronto Film Festival after Warner Bros. sent the filmmaker a “concern[ed]” letter.³⁸⁹ Although the film eventually received a limited theatrical run without further interference from Warner Bros.,³⁹⁰ its status under copyright law is highly uncertain. On one hand, the film is a dark, queer reimagination of the Batman universe that was labeled as a “parody.”³⁹¹ On the other hand, the filmmaker has stated, “I really love the Joel Schumacher Batmans,” and observed that “Joker has always been a really queer character to me.”³⁹² The resulting film accordingly engages in a lot of commentary about what a major cultural entity means to a queer filmmaker, but it does not necessarily criticize the Batman universe for, say, being implicitly transphobic.³⁹³ Had Warner Bros’ concerns blossomed into litigation, these narratives of fandom could map quite directly onto similar narratives about *Star Trek*, *The Catcher in the Rye*, and *The Lord of the Rings*,³⁹⁴ notwithstanding the extensive commentary and creative transformations present in the film.³⁹⁵

IP’s pleasure taboo, while pervasive, ultimately does not seem intentional. It instead emerges from analytical frameworks that set forth rather broad property-like protections around works, symbols, names, and likenesses and then carve out free speech limitations where imposing liability seems most dangerous. That danger is particularly acute where IP is used to squelch criticism by those seeking to say something negative about powerful cultural

388. Angela Wattercutter, *The Best Queer Batman Parody You Almost Never Saw*, WIRED (Apr. 5, 2024, at 7:00 ET), <https://www.wired.com/story/vera-drew-the-peoples-joker-interview/> [<https://perma.cc/E5VR-RYGD>].

389. Eric Grode, *The People’s Joker’ and the Perils of Playing with a Studio’s Copyright*, NYTIMES (Apr. 4, 2024), <https://www.nytimes.com/2024/04/01/movies/peoples-joker-warner-bros.html> [<https://perma.cc/H4YY-65E7>].

390. *Id.*

391. Wattercutter, *supra* note 388.

392. Grode, *supra* note 389.

393. See Aimée Wolfson, *Reconciling Fair Use and the Derivative Work Right: Did Warhol Say “Kenough?”* 47 COLUM. J.L. & ARTS 323, 326 (2024) (“It’s worth reminding ourselves that comment or criticism is not reserved only for finding fault or criticizing. It can also encompass a positive, celebratory analysis or review of a work, or an effort to connect it to the culture in which it exists.”). Grode, *supra* note 389; Wattercutter, *supra* note 388.

394. See *supra* Part II.A.1.

395. See *supra* notes 386-89 and accompanying text.

entities—in other words, when audiences are “punching up” or “talking back” to mainstream representation. But in anchoring fair use and free speech in opposition and critique, IP jurisprudence has overly entrenched the *good* of disdain, making joy and celebration speech seem unduly *bad* in comparison. Moreover, in valorizing critique, IP jurisprudence has failed to distinguish between punching up at those in power and punching down as an exercise of subordination.³⁹⁶ Love and hate, and the rhetoric associated with each, have become shorthand proxies for whether uses of IP are sufficiently weighty to justify a carveout from liability.

Ultimately, to whittle away at the pleasure taboo, lawyers will need to refocus courts’ attentions away from the question about whether a use is critical (that is, oppositional) or flattering and towards questions about the real-world impact of the disputed activity. Statements about love, pleasure, and fandom are highly imperfect proxies for whether a use is reasonably likely to undermine the rightsholders’ expected revenue streams (or whatever economic or emotional interests motivated an assertion of rights). Moreover, pleasure motives can be entirely compatible with free speech and the norms of progress meant to be advanced by IP laws.³⁹⁷ Conversely, statements of hate and opposition may be decent proxies for whether the defendant’s offerings are intended to compete with the rightsholder’s, but many IP disputes are decidedly NOT about economic returns.³⁹⁸ In such nontraditional IP disputes, hate and opposition might be strong evidence that the defendant is intruding upon legitimate privacy expectations or

396. See Emma A. Jane, *Hating 3.0: Should Anti-Fans Be Renewed for Another Season*, in ANTI-FANDOM: DISLIKE & HATE IN THE DIGITAL AGE 42, 45 (Melissa A. Click ed., 2019) (“The idea that anti-fans are speaking a sort of personal truth to hegemonic power might help explain why anti-fan discourse has, for the most part, not been a candidate for rigorous ethical interrogation, even when the discourse has been extremely negative and hateful.”).

397. Lemley & Tushnet, *supra* 375, at 91 (“[T]here are many different ways to transform a work besides making fun of it ... ‘a narrow succinctly articulable message is not a condition of constitutional protection.’”) (quoting *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995)); Henry Jenkins, *Fan Fiction as Critical Commentary*, POP JUNCTIONS (Sep. 27, 2006), https://henryjenkins.org/blog/2006/09/fan_fiction_as_critical_commen.html [<https://perma.cc/UX2H-M9RK>] (“[F]an fiction ... involves criticism as in interpretation and commentary if not necessar[ily] criticism as in negative statements.”); Joshua N. Mitchell, Note, *Promoting Progress with Fair Use*, 60 DUKE L.J. 1639, 1641 (2011).

398. See Buccafusco & Fagundes, *supra* note 74, at 2434-35.

otherwise engaged in a campaign of harassment.³⁹⁹ Moreover, hate and opposition are sometimes *at odds* with free speech. When analyzing critical speech aimed at putative victims outside of IP, courts increasingly focus on the type of harm that was intended and/or occurred; they do not focus on whether the defendant thought the person portrayed was hot or not.

Ultimately, the remedy for IP's pleasure taboo might be a more "behaviorally realistic"⁴⁰⁰ approach to IP disputes that embraces greater transparency about (1) what everyone's motives were in undertaking the creative activities at issue, (2) the demonstrable impacts of the challenged use—both harmful and beneficial, and (3) how this dispute fits into the IP system's professed commitments to promoting vibrant creative activity, fair competition, fair compensation, and free speech.⁴⁰¹ Across several speech-protective doctrines, courts are already balancing multiple factors in light of the policy justifications for IP laws. However, they are doing so through cramped rhetorical frameworks organized around market interests that are insufficiently connected to the diverse types of creative activities that IP can promote.

As observed by queer historian Michael Bronski, "The politics of popular culture is the politics of pleasure and personal freedom."⁴⁰² Where pleasure remains implicit, popular culture remains biased towards dominant groups and the perspectives that will entertain them. Lawyers, judges, lawmakers, and scholars accordingly need to embrace pleasure as an *explicit* goal of the IP system. Fair use and free speech doctrines, although meant to encourage outside perspectives on mainstream art, celebrities, and brands, can be weaponized too easily against those who already tend to be harassed and ridiculed.⁴⁰³ Angry critiques of power are absolutely crucial, but there also need to be discursive spaces where access to pleasure is more fairly distributed.

399. See Gilden, *supra* note 70, at 1071-83.

400. Buccafusco & Fagundes, *supra* note 74, at 2483.

401. See Gilden, *supra* note 70, at 1019, 1071 (setting forth an "interest-transparent" framework for evaluating harms and benefits in copyright law).

402. BRONSKI, *supra* note 55, at 36.

403. See *supra* notes 32-41 and accompanying text.