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THE COPYMARK CREEP: HOW THE NORMATIVE STANDARDS OF FAN COMMUNITIES CAN RESCUE COPYRIGHT

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ABSTRACT

Copyrighted works are increasingly perceived by society as serving a purpose traditionally considered to be held by trademarks. Copyrighted works act as valuable brands within a consumer marketplace, protected as corporate assets and defined to protect commercial interests. This Article argues that the growing overlap between copyright and trademark has resulted in a "copymark creep," evident in the judicial decisions that have confronted the issues.

This overlap has tipped the balance away from copyright's purported constitutional goal. Copyright is understood to benefit the public by providing a public domain and protecting certain free speech rights, whereas the trademarking of copyright chips away at both of those benefits. The lack of bright line rules in the copyright arena only adds to the uncertainty and leads to the stifling of more speech, at further detriment to the public.

This Article proposes that the solution to this problem can be found on the Internet through fan communities. Fan communities employ bright line rules to create a system that is clearer than that found in the judicial precedents, rather than the anything goes anarchy they are frequently perceived as. These communities have instinctively turned toward trademark protections in the copyright context, relying on disclaimers to dispel confusion and on a lack of commercialism to shelter them from infringement attacks. This

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importation of benchmarks more strongly associated with trademark law both acknowledges the overall copymark creep and finds a way to preserve copyright's goals in the face of the creep, resulting in a flourishing creative community. Finally, fan communities use these benchmarks to set bright line rules for themselves that encourage speech that might otherwise be hesitant in the face of legal uncertainty.

If we are going to continually expand copyright law, we should at least be careful to check it with those doctrines we use to keep trademark from swallowing the cultural dialogue. Such an impulse is the only one that makes sense to preserve the effectiveness of copyright as a method of encouraging creativity. Otherwise, we run the risk of using copyright as merely a backstop to trademark law and lose sight of its different overall goal: to encourage creativity, not commercial gain.

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INTRODUCTION

Copyright is a statutory scheme authorized by the Constitution to promote progress by providing ownership in certain creative works.[1] The brief, simple directive set forth by the Intellectual Property Clause of the Constitution has led to a morass of overlapping statutes that seek to strike a continually elusive balance between the rights of the creator, to prevent others from using a creative work, and the rights of the public, to engage with that creative work.[2] At its heart, copyright seeks to regulate the creative marketplace by giving some

1. U.S. CONST. art. I, § 8, cl. 8.
2. *See id.*

limited benefit to the few copyright holders to ultimately benefit of the public at large.

Trademark law is a statutory scheme used to aid effective and efficient consumer purchasing decisions. One of the many ornaments dangling off the justifying branch of the Constitution's Commerce Clause, trademark law protects valuable symbols to clarify the clamor of the competitive economy. At its heart, trademark seeks to regulate the commercial marketplace by giving some limited benefit to the few trademark holders to ultimately benefit the public at large.

In the abstract, having one system to deal with goods and services and another system to deal with creative endeavors makes conceptual sense. In practice, however, copyright and trademark have spilled into each other to such an extent that attempts to disentangle the two legal schemes have only led to muddled judicial decisions and imprecision. The growing overlap between copyright and trademark law leaves the public with little guidance as to how to enjoy the benefits supposedly provided to them under both systems, tipping the balance too much toward the rights holders.[3]

The Internet is frequently blamed for the confused state of the copyright system. However, it is copyright holders who have caused much of the blurring between copyright and trademark, by increasingly treating their copyrighted works more like trademarks and seeking an expansion of their copyright monopolies through trademark law concepts.[4] In the face of the resulting confusion this "copymark" idea has left in the legal system, the folk wisdom of fan communities on the Internet actually stands as a beacon of clarity. Far from threatening the copyright system, the bright line rules that fan communities have frequently adopted should be embraced for re-establishing the intended balance of copyright and trademark.

3. *See infra* Part I.
4. *See infra* Part I.D.

I. THE INTERACTION OF COPYRIGHT AND TRADEMARK LAW

A. The Traditional Justifications for Two Separate Systems

In the beginning, there were two systems under two different Constitutional clauses dealing with two different things in two different ways: trademark and copyright.[5] Historically, the difference between these two seemed so clear-cut as to be obvious.

1. The Trademark Law Regime

Traditionally, trademark was a doctrine used to protect consumer brands.[6] Its Congressional authority is rooted in the Commerce Clause.[7] Trademark was meant to assist corporations in marketing themselves and to aid consumers in making efficient buying decisions.[8] Trademark law is all about the marketplace and selling goods in fair and profitable ways.[9]

The Lanham Act that governs trademark law "was intended . . . 'to protect persons engaged in . . . commerce against unfair competition.'"[10] It was "*not* designed to protect originality or creativity"[11] and "should not be stretched to cover matters that are typically of no consequence to purchasers."[12] Rather, its purpose is to "reduce[] the customer's costs of shopping and making purchasing decisions" and ensure that the right company "will reap the financial, reputation-related rewards associated with a desirable product."[13]

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5. U.S. CONST. art. I, § 8, cl. 8.

6. *See* Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1488–89 (2004).

7. *Id.* at 1488.

8. *Id.* at 1488–89 ("[F]ederal trademark law seeks to protect consumers by allowing product- and producer-differentiation that reduces the risk of consumer confusion and lowers search costs.").

9. *See id.* at 1488–89, 1494–1500.

10. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 28 (2003) (quoting 15 U.S.C. § 1127 (1999)); *see also* Michael Todd Helfand, Note, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 637 (1992) ("[T]rademarks benefit not only their owners, but consumers who rely on identification of the sponsoring or producing business entity.").

11. *Dastar*, 539 U.S. at 37.

12. *Id.* at 33; *see also* Meyer v. Rodex Sales & Servs., LLC, No. CV 05-176-S-MHW, 2006 WL 3355004, at *9 (D. Idaho Nov. 16, 2006).

13. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995).

Therefore, trademark law is largely unconcerned with what happens to the good once it is sold.[14]

2. The Copyright Law Regime

Copyright, on the other hand, was considered to be totally different. After all, if it was not, there would have been no need for the Lanham Act in the first place.[15] Copyright law is a tense balance between the rights of the creator and the rights of the public to engage with creative works.[16] As opposed to the commercial emphasis of trademark law, copyright law is concerned with creativity.[17] Rooted in the Intellectual Property Clause of the Constitution,[18] copyright law was intended to encourage creative works for the good of society at large, establishing an incentive structure.[19] This incentive structure would "motivate the creative activity of authors and inventors"[20] to ensure the "optimal level" of

14. *See* Bretford Mfg., Inc. v. Smith Sys. Mfg. Corp., 419 F.3d 576, 581 (7th Cir. 2005).

15. *See* Andrea Pacelli, *Who Owns the Key to the Vault? Hold-up, Lock-out, and Other Copyright Strategies*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1229, 1261–62 (2008).

16. Moffat, *supra* note 6, at 1476–77 ("Congress has passed numerous statutes creating copyright . . . rights, in each case attempting to achieve a balance between the rights granted to the creators and inventors and the benefits to the public, and in each case attempting to provide a sufficient incentive for the production of new works."); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing,* Porgy and Bess*, and Unfair Use*, 37 RUTGERS L.J. 277, 342 (2006); Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 316 (1996); Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1399–1400 (2013); Douglas Campbell Rennie, *This Book is a Movie: The Faithful Adaptation as a Benchmark for Analyzing the Substantial Similarity of Works in Different Media*, 93 OR. L. REV. 49, 54 (2014); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 394 (2000); Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 938 (2007).

17. *See Dastar*, 539 U.S. at 37.

18. *See* Moffat, *supra* note 6, at 1488.

19. Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 280 (2005) ("[T]he goal of copyright is public enrichment, based on providing incentives for artists to create new works . . . ."); Arewa, *supra* note 16, at 343; Patrick R. Goold, *Why the U.K. Adaptation Right is Superior to the U.S. Derivative Work Right*, 92 NEB. L. REV. 843, 888 (2014); Kathryn M. Foley, Note, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 924 (2009); Allison Hollows, Comment, *Who Owns the Athlete?: The Application of the Transformative Use Test in the Right of Publicity Context*, 45 SETON HALL L. REV. 285, 301 (2015); Moffat, *supra* note 6, at 1475, 1476–77.

20. *Sony*, 464 U.S. at 429.

"production of valuable, remunerative, and socially beneficial new works."[21] "What we want . . . is to assist authors in earning just enough profit to, first, enhance the creative environment enough to stimulate them to create works in the first place, and, second, encourage them to make their works available to us."[22] This is why copyright encourages the growth of a public domain of freely available works.[23] In fact, "[t]he ultimate purpose of . . . copyrights in the United States is to enlarge the public domain of creative works by authors and inventors, thereby promoting 'the progress of science and useful arts.'"[24]

The Copyright Act originally concerned books, maps, and charts[25]; it later expanded to music, movies, and television shows.[26] The Act, however, never seemed to be primarily about selling goods so much as that was just a side effect to the primary benefit of encouraging the creation of such works.

3. The Differences in Practice

"Congress enacted the copyright and trademark statutes to protect different types of intellectual property and redress different types of harm."[27] The temptation to conflate the two may always have been

21. Moffat, *supra* note 6, at 1479; *see also* Goold, *supra* note 19, at 888 ("[W]ithout copyright protection, it is arguable that the number of works created would decrease to a sub-optimal level."); Lavigne, *supra* note 16, at 316 ("Copyright is essentially a provision of monopolistic protection for authors as an incentive for them to produce creative works for the public good."); Edward C. Walterscheid, *The Remarkable—and Irrational—Disparity Between the Patent Term and the Copyright Term*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 233, 241 (2001).

22. Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 434 (1994).

23. Moffat, *supra* note 6, at 1481; *see also Sony*, 464 U.S. at 429; Foley, *supra* note 19, at 924.

24. Walterscheid, *supra* note 21, at 239; *see also, e.g.*, Litman, *supra* note 22, at 433.

25. Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 6 (2013).

26. *See* 17 U.S.C. § 102(a) (2012).

27. Zuffa, LLC v. Justin.tv, Inc., 838 F. Supp. 2d 1102, 1104 (D. Nev. 2012); *accord* EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos Inc., 228 F.3d 56, 63–64 (2d Cir. 2000); Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 781 (2d Cir. 1994); Bach v. Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1110, 1117 (W.D. Wash. 2007) ("Trademark and copyright law have fundamentally different purposes."); Lee B. Burgunder, *The Scoop on Betty Boop: A Proposal to Limit Overreaching Trademarks*, 32 LOY. L.A. ENT. L. REV. 257, 269 (2012); Foley, *supra* note 19, at 953 ("[T]he nature of the rights conferred by copyright and trademark are substantially different . . . ."); Liu, *supra* note 16, at 1428; Pacelli, *supra* note 15, at 1260; J.C. Sander, *The End of Arbitrary Findings of Secondary*

there, as they both deal with word, sound, and image based methods of creativity. Additionally, trademark law is expansive in its breadth, allowing anything to be considered a trademark as long as it is capable of carrying meaning[28]: an incredibly broad definition that dovetails nicely with copyright's protection of expression, and also something that carries meaning.

However, the different justifications and resulting bodies of law seemed initially to make it easy to distinguish between the two.[29] For one thing, while trademarks require commercial use to be protected,[30] copyright operates to protect even private diary entries designed never to be marketed at all.[31] Indeed, copyright law sometimes operates to protect the owner's right to withdraw entirely from the marketplace.[32] Despite their surface similarity, copyright and trademark have sometimes been in tension with each other.[33]

B. The Growing Overlap Between Copyright and Trademark

While initially the two realms of copyright and trademark seemed clearly separate, the realm of copyright has begun to look much more like the realm of trademark.

1. The Length of Protection

Where once copyright was limited in a manner similar to patent laws, copyright terms have expanded outward so far that, to the

Meaning: A Call for the Expansion of Trademark Status of Literary Characters, 17 INTELL. PROP. L. BULL. 1, 21 (2012) ("This coexistence of trademark and copyright laws should not be that big of a problem, as they each deal with protecting different things.").

28. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162 (1995).

29. Moffat, *supra* note 6, at 1475 ("Historically, patent, copyright, and trademark law protected very different types of works; the three areas of law occupied three separate realms and there was little or no overlap between them."); *see also* Frederick Warne & Co. v. Book Sales, Inc., 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979) ("[T]he nature of the property right conferred by copyright is significantly different from that of trademark . . . .").

30. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 16:1 (4th ed. 1996).

31. *See* New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 593 (2d Cir. 1989).

32. *See, e.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir. 1987).

33. *See, e.g.*, Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008).

average person, the term may as well be infinite.[34] Copyright terms are defined by life, which practically guarantees that no one, other than the original creator, can culturally engage with the works being produced during our lifetimes, and that are arguably most relevant to us, because we will be dead by the time they enter the public domain.[35] This lengthy term looks far more like the indefinite term of trademark than it does the extremely short term for patents.

2. Corporate Ownership

Most copyrights today are owned by corporations, not creators.[36] Indeed, the prevalence of the work-for-hire doctrine,[37] permitting corporations to directly be considered "authors" for purposes of copyright law,[38] illustrates to what extent copyright is understood to be a corporate asset. The concept of treating corporations as authors for copyright purposes is foreign under the copyright structure of most other countries.[39] Corporate ownership of copyright, therefore, is not intuitive to copyright. Rather, it appears to be a reaction to the growing use of copyright in a trademark sense by corporations in the marketplace.[40]

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34. Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1499 (2002); Joshua Saval, Comment, *Copyrights, Trademarks, and Terminations: How Limiting Comic Book Characters in the Film Industry Reflects on Future Intellectual Property Issues for Character Law*, 9 FIU L. REV. 405, 431 (2014). Indeed, commentators have noted that copyright has been expanded twice for the benefit of the same group of copyright holders, giving the impression to them that the benefit could be infinitely expandable. *See* Lavigne, *supra* note 16, at 350–51.

35. *See* Liu, *supra* note 16, at 1426 ("The extremely long term of copyright protection already means that the concrete benefits of the public domain are relatively diffuse. Most individuals are vaguely aware of a public domain, but think of these works in relatively remote terms (e.g., Shakespeare, classical music, etc.).").

36. *See* Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 280 (2002) (noting the debate over how much the system "benefits corporations at the expense of authors"); Arewa, *supra* note 16, at 318.

37. *See, e.g.*, RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 4:3, Westlaw (database updated Sept. 2015); Judith A. Silver, Note, *A Bad Dream: In Search of a Legal Framework for Copyright Infringement Claims Involving Digital Imagery in Motion Pictures*, 35 IDEA 407, 411–12 (1995).

38. 17 U.S.C. § 201(b) (2012).

39. *See* Martin, *supra* note 36, at 282–83.

40. *See id.* at 280.

3. Copyright as Brands

A consequence of corporate ownership is that a copyright is frequently a corporate asset used for selling in the marketplace, much like a trademark.[41] While the ability to license copyright no doubt inspires some creativity, a copyright is more generally understood, by public and copyright holders alike, as a branding tool.[42] The American Marketing Association explains that "[a] brand is a '[n]ame, term, design, symbol, or any other feature that identifies one seller's good or service as distinct from those of other sellers.'"[43] While this sounds similar to the definition of a trademark,[44] many copyright holders use the term brand when referring to their copyrighted properties.[45]

For example, a recent controversy erupted over a violent fan film based on the Power Rangers characters.[46] The maker of the film argued that it was fair use, but the Power Rangers copyright holders were concerned about the video, not because it was infringing copyright necessarily, but because it might negatively impact their "brand": "[Y]ou can't take a brand like this and reboot it so dark and gritty. This is still a kids' brand."[47] The Power Ranger copyright holders were planning to produce a movie and were clearly concerned that the arguably fair use video would harm them; not because it was substantially similar to their very different copyrighted products, but because it might tarnish what they were doing[48]—a trademark law concept.[49]

In the same vein, many "news agencies use trademarks at the beginning or end of an article to distinguish and reinforce their

41. *See, e.g.*, Pacelli, *supra* note 15, at 1255–56.
42. *See id.* at 1249.
43. *Dictionary*, AM. MARKETING ASS'N., https://www.ama.org/resources/Pages/Dictionary.aspx?dLetter=B (last visited Nov. 9, 2015).
44. *See* 15 U.S.C. § 1127 (2012).
45. *See, e.g.*, B. Alan Orange, *'Power Rangers' Fan Film Returns After Copyright Dispute*, MOVIEWEB (Feb. 28, 2015), http://www.movieweb.com/power-rangers-movie-fan-film-banned-online.
46. *See id.*
47. *Id.* (quoting Jason David Frank, a former Power Ranger).
48. *See id.*
49. *See* 15 U.S.C. § 1125 (2012).

brand."[50] The "brand," of course, that they are seeking to protect here is in fact their news articles—traditionally the subject of copyright.[51] But their desire to use the commercial doctrines of trademark law to attempt to protect their copyright is understandable: "Journalistic content might not be a 'good' or product in the traditional sense, but it is most certainly a commercialized product. Garnering goodwill with the public thus is of supreme importance."[52]

Explicitly reflecting the brand understanding of copyrighted works, copyright holders have frequently begun to trademark titles of movies, titles of books, works of art, and even the names of characters.[53] In this way, copyright law has come to seem more consumer goodwill driven (like trademark) than expression driven (like traditionally copyright).[54] Copyright holders propose the same idea in multiple iterations, "rebooting" franchises frequently, in a way that relies heavily on consumer recognition of the brand in question.[55]

4. The Lack of Unified Treatment within Copyright Statutes

The jumbled state of the copyright statutory scheme, with its inconsistent view on what is and is not a copyright, has added to the confusion. The legal definition of "copyright" has been challenged by increasingly regulatory statutes, like the Digital Millennium

50. Matthew Novaria, Note, *Piracy of Online News: A "Moral Rights" Approach to Protecting a Journalist's Right of Attribution and Right of Integrity*, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 295, 313 (2014).

51. *See, e.g.*, Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 541–42 (S.D.N.Y. 2013).

52. Novaria, *supra* note 50, at 313.

53. *See* Eriq Gardner, *'Twilight' Producer Facing Possible Trial this Month for Interfering on Parody*, HOLLYWOOD REP. (NOV. 13, 2014, 3:08 PM), http://www.hollywoodreporter.com/thr-esq/twilight-producer-facing-trial-month-748852. Indeed, some people have started trademarking statements they have used to answer questions, signalling just how valuable merchandising has become. *See* Darren Rovell, *Lynch Seeks "I'm Just Here" Trademark*, ESPN.COM (Feb. 23, 2015), http://espn.go.com/nfl/story/_/id/12371993/marshawn-lynch-seattle-seahawks-files-trademark-super-bowl-media-day-quote.

54. *See* Gardner, *supra* note 53; Rovell, *supra* note 53.

55. *See* Foley, *supra* note 19, at 937; Goold, *supra* note 19, at 883–84; Courtney Enlow, *Eff It, Let's Just Reboot Everything: 10 More Shows We Should Drag Out of the Grave*, PAJIBA (Apr. 8, 2015), http://www.pajiba.com/miscellaneous/eff-it-just-reboot-everything-10-more-shows-we-should-drag-out-of-the-grave.php.

Copyright Act (the "DMCA")[56] that define what can and cannot be copyrighted based on narrow, specific situations, at times apparently using the newness of developing technologies to overturn accepted jurisprudence on what is protectable and what is permissible.[57] As such, although copyright's delineated bundle of rights does not include a "right of attribution,"[58] commentators have suggested that the DMCA confers a "de facto" one.[59] Other commentators have noted that the DMCA can operate to limit use of works in the public domain, which would have been free to use under traditional copyright law.[60] Other proposed statutes, like the You Own Devices Act,[61] have been regarded as trying to prevent "copyright mind tricks" from being employed.[62]

C. The Creation of the Concept of "Copymark"

Given the ways in which copyright has come to seem more like it is protecting something similar to trademark, copyright holders have tried to use trademark law to add protection to their copyrighted works.[63] Copyright holders are understandably attempting to broaden their copyright monopoly, so they treat trademark law as an

56. *See generally* 17 U.S.C. §§ 101–22 (2012). Indeed, although the statute has "copyright" in its title, commentators have noted that it has been used "as a competitive weapon for purposes that had essentially nothing to do with [copyright objectives], but more to do with the prevention of competition." Arewa, *supra* note 16, at 292.

57. *See* Edward Lee, *Warming up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1466 (2008).

58. Michael Landau & Donna K. Lewis, *Issues and Best Practices in Connection with Educational Resources and Other Materials in the "Cloud"*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 627, 664–65 (2014).

59. Novaria, *supra* note 50, at 314–15.

60. *See* Liu, *supra* note 16, at 1454.

61. H.R. 862, 114th Cong. (2015).

62. Jeff Roberts, *"YODA law" would ensure devices can be resold free of copyright*, GIGAOM (Feb. 11, 2015, 10:42 AM PST), https://gigaom.com/2015/02/11/yoda-law-would-ensure-devices-can-be-resold-free-of-copyright/.

63. *See, e.g.*, EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos Inc., 228 F.3d 56, 63 (2d Cir. 2000); Comedy III Prods., Inc. v. New Line Cinema, 200 F.3d 593, 595 (9th Cir. 2000); Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc., 191 F.2d 594, 603 (2d Cir. 1951); Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282, 1290 (S.D.N.Y. 1988); Helfand, *supra* note 10, at 623, 641; Alex Kozinski, *Mickey & Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465, 467–68 (1994); Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 773 (2013).

expansive doctrine that might compensate them for damage that might not otherwise be recognized by copyright law.[64] In this way, copyright holders have come to encourage a way of thinking about copyright that is a blend between copyright and trademark: a "copymark" idea.

1. The Copymark Creep

Copyright holders have attempted to expand their copyright monopoly by borrowing from trademark law concepts.[65] Where copyright law leaves gaps that cause copyright holders to feel exposed, they turn to trademark law for extra protection.[66] In this way, trademark law has been used in the name of expanding the copyright monopoly.[67] This is especially alluring in cases where a copyright has expired,[68] but is by no means limited to such situations.[69] Similarly, in application to situations it was not originally intended for, the scope of trademark protection itself has greatly expanded beyond its original intentions.[70]

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64. *See* Universal City Studios, Inc. v. Kamar Indus., Inc., No. H-82-2377, 1982 U.S. Dist. LEXIS 15942, at *10 (S.D. Tex. Sept. 20, 1982) (finding two lines of dialogue copyrighted based not on copyright standards like originality and creativity but rather on consumer understanding that the lines were "readily recognizable to the lay observer as key lines of dialogue"); Gershwin v. Whole Thing Co., No. CV 80-569, 1980 U.S. Dist. LEXIS 16465, at *9 (C.D. Cal. Mar. 10, 1980) (discussing the trademark harm of goodwill in the context of copyright infringement); Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 334 (2005) (raising the possibility "that judges protect characters and plots based on some intuitive sense that reusing them amounts to misappropriation" rather than relying on strictures of copyright law in their decisions); Sander, *supra* note 27, at 2.

65. Sander, *supra* note 27, at 1–2.

66. *See, e.g.*, Saval, *supra* note 34, at 422–23.

67. *See* Moffat, *supra* note 6, at 1496 ("[T]rademark law now protects a wide variety of 'product identifiers' in circumstances hardly imaginable a hundred years ago."); Helfand, *supra* note 10, at 652 ("Unchecked, it expands the scope of exclusive rights of copyright . . . ."). In some circumstances, the copyright holder only has a trademark argument to make based on the copyright protection it received, meaning that "the monopoly granted during the copyright term served only to facilitate the copyright owner's development of . . . trademark protection, and the public receives nothing in exchange for the grant of a copyright monopoly." Foley, *supra* note 19, at 957; Frederick Warne & Co. v. Book Sales Inc., 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979); Pacelli, *supra* note 15, at 1259, 1263–64.

68. *See Comedy III*, 200 F.3d at 595.

69. *See* EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos Inc., 228 F.3d 56, 63 (2d Cir. 2000); Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc., 191 F.2d 594, 603 (2d Cir. 1951); Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282, 1290 (S.D.N.Y. 1988).

70. *See* Moffat, *supra* note 6, at 1494; Litman, *supra* note 22, at 430; Liu, *supra* note 16, at 1428. Indeed, the attempt to "hybridize" intellectual property regimes goes both ways, as trademark holders

Influenced by the ways in which copyright and trademark were beginning to blur, courts began discussing them in overlapping terms.[71] For instance, in a Ninth Circuit case involving Mickey Mouse, the court used a traditional trademark test in deciding the copyright cause of action.[72] The Second Circuit has similarly conflated copyright and trademark, discussing trademark likelihood of confusion in the context of its copyright substantial similarity analysis.[73] Some of the leading cases have therefore blurred the copyright and trademark lines.[74]

The interplay of characters acting as both trademarks and as copyrighted entities is one of the areas where copymark creep is most visible. In an early case involving copyrighted comic strips, a court refused to view the comic strips as functioning like trademarks: "In the case of these silly pictures nobody cares who is the producer—least of all, children who are the chief readers—; the 'strips' sell because they amuse and please, and they amuse and please because they are what they are, not because they come from 'Detective.'"[75] These copyrighted comic strips, the court found, were successful because of their creativity, not because they indicated a single source in the way that a trademark might.[76]

Copyright holders continued to raise the issue, however, probably because they were treating their copyrighted materials as trademarks.[77] So, Columbia Broadcasting System (CBS) asserted both copyright and trademark protection in not only the characters, but also in a variety of other features of the Amos 'n' Andy radio shows, including some dialogue.[78] The court made no ruling on

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will also seek to backstop their trademark protection with copyright protection. *See, e.g.*, Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc., 264 F.3d 622, 632–33 (6th Cir. 2001).

71. Said, *supra* note 63, at 773 ("[B]ecause courts have not historically paid enough attention to the differences between [copyright and trademark law], the case law has evolved in a doctrinally haphazard fashion."); Foley, *supra* note 19, at 945 (referring to a "less coherent line of cases that often commingled trademark and copyright principles").

72. *See* Helfand, *supra* note 10, at 646.

73. *See id.* at 650.

74. *See* sources cited *supra* note 64.

75. Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc., 191 F.2d 594, 603 (2d Cir. 1951).

76. *Id.*

77. Silverman v. CBS Inc., 870 F.2d 40, 45 (2d Cir. 1989).

78. *Id.*

whether or not CBS owned valid marks, however, because it found that, even if it had, it had abandoned them.[79] The court acknowledged being influenced in its trademark ruling by the fact that the case also had copyright implications, noting that "[i]n the area of artistic speech, . . . enforcement of trademark rights carries a risk of inhibiting free expression."[80] Other courts, however, became more comfortable with the conflation of copyright and trademark law.[81]

This is clearly seen in the case of Mickey Mouse,[82] possibly the most famous copyrighted work to have also gained trademark protection. Cases dealing with Mickey Mouse jumble trademark, trade dress, and copyright language all together, with little regard to the differences between them.[83] A court referred to a defendant as "exploit[ing], without authorization, established trademarks . . . without any copyright license and mimick[ing] plaintiff's well-established trade dress."[84] Throughout the opinion the court continued to switch between intellectual property regimes, referring to "trademark rights," "copyright designation[s]," "licensee[s]," and even just "Disney's rights," with little attempt made to differentiate which intellectual property right was actually being violated by any given conduct.[85] In fact, in one impressive paragraph, the court strung together three consecutive sentences referring to three different types of intellectual property as if they were one and the same:

> Disney's copyrights in Mickey Mouse and Minnie Mouse will be enforced as to exact copies and variations of

79. *Id.*

80. *Id.* at 48 (citing L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28–29 (1st Cir. 1987).

81. *See, e.g.*, DC Comics Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110 (N.D. Ga. 1984). *Compare* Warner Bros. v. Am. Broad. Cos., 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982) (finding that the Superman character deserved copyright protection based on "forty years of development in various media," which sounds more like a testament to trademark use and public recognition), *with* Detective Comics, Inc. v. Bruns Publ'ns, Inc., 111 F.2d 432, 434 (2d Cir. 1940) (finding that the plaintiff was "not entitled to a monopoly of the mere character of a 'Superman' who is a blessing to mankind").

82. Walt Disney Co. v. Powell, 698 F. Supp. 10 (D.D.C. 1988).

83. *Id.* at 11–12.

84. *Id.* at 11.

85. *Id.* at 12.

> Mickey and Minnie. These variations are classic examples of trade dress violations, for Mickey and Minnie have acquired not only a secondary meaning, but a meaning of great value, favorable in all respects, and well-entrenched worldwide. Powell's free ride on the ingenuity, skillful promotion, and resulting public acceptance which Disney has rightfully gained from these charming mouse characters must come to an end.[86]

Plaintiffs sometimes bring both trademark and copyright causes of action, which causes the mingling of judicial reasoning.[87] In other cases, however, the plaintiffs have imported trademark law principles into copyright law arguments, without bringing a trademark cause of action.[88] Some courts have been willing to nebulously expand copyright past anything the author has created, referring vaguely to "lives in the public imagination that extend far beyond the reach of the individual works."[89] One court explicitly gave up trying to determine "the precise application of the copyright . . . to each of [the] examples."[90] Other courts are drawn to the idea of simply calling everything "intellectual property rights"[91] or even "proprietary interests"[92] without sorting through the different analyses. This confusion has happened because these decisions, while ostensibly concerning copyright, are really about protecting some undefined combination of copyright and trademark that could be called "copymark." Some courts also explicitly conflated substantial similarity, a copyright doctrine, with likelihood of confusion, a

86. *Id.*

87. *See, e.g.*, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31–32 (2003).

88. *See, e.g.*, Perfect 10, Inc. v. Megaupload Ltd., No. 11cv0191-IEG (BLM), 2011 WL 3203117, at *7 (S.D. Cal. July 27, 2011) (noting that the defendant characterized the plaintiff's claims as "copyright claims disguised as trademark claims"). Parties have, of course, acknowledged this tactic in arguments in front of courts. *Id.*

89. DC Comics Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110, 118 (N.D. Ga. 1984).

90. *Walt Disney*, 698 F. Supp. at 13.

91. Lyons P'ship v. Morris Costumes, Inc., 243 F.3d 789, 794 (4th Cir. 2001).

92. *Id.* at 795.

trademark doctrine, and provided little explanation as to why those two separate doctrines suddenly mean the same thing.[93]

This copymark creep extends to the ways in which courts treat copyright defenses. Courts have also been willing to use harm "akin to that of dilution in trademark law" to find against copyright fair use analyses.[94] Other courts have gone "through the motions of evaluating the statutory fair use factors, yet focused almost entirely on the economic value and goodwill . . . , erroneously importing trademark principles into the copyright fair use analysis."[95]

2. Dastar

The Supreme Court's leading case on the "copymark creep" issue, *Dastar Corporation v. Twentieth Century Fox Film Corp.*, acknowledged the collision of trademark and copyright law concepts.[96] However, the *Dastar* holding left many questions in its wake which has only increased the muddle of how copyright holders view trademark law as a weapon in their arsenal.

Dastar involved the television series *Crusade in Europe*, which was first broadcast in 1949 and which Fox owned the copyright to.[97] Due to Fox's failure to comply with the formality requirements written into the copyright statute at the time, the copyright in *Crusade in Europe* lapsed, which left the series in the public domain.[98] Dastar purchased a copy of the public domain television series, edited it, and began selling it as part of a series called *World War II Campaigns in Europe*.[99]

Fox was less than pleased with this development, but Fox had a problem: it no longer owned the copyright in *Crusades in Europe*. Therefore, Fox could not allege that Dastar's use of the television

93. *See* Warner Bros. v. Am. Broad. Cos., 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982).
94. *DC Comics*, 598 F. Supp. at 118.
95. Foley, *supra* note 19, at 954.
96. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).
97. *Id.* at 26.
98. *Id.*
99. *Id.* at 26–27.

series was infringing in any way.[100] Fox then turned to trademark law.[101]

Section 43(a) of the Lanham Act, which governs trademark law, contains a cause of action for "reverse passing off."[102] Reverse passing off is a cause of action "against a person who use[s] in commerce[,] either 'a false designation of origin, or any false description or representation' in connection with 'any goods or services.'"[103] Passing off is placing another's trademark onto your own goods, whereas reverse passing off is placing your trademark onto another's goods.[104] The disagreement in *Dastar* was not over mislabeling the goods; it was, in copyright terms, over a failure to attribute.[105]

The standard for recovery on a reverse passing off claim is the trademark linchpin: whether the public is confused.[106] In essence, Fox's claim was that Dastar's use of Fox's formerly copyrighted television series confused people as to who had created the series.[107] As a Lanham Act claim, this is unmistakably a trademark cause of action.[108] However, under copyright law, Fox's television series was no longer protected at all.[109]

The district court was convinced by Fox's reverse passing off argument and awarded Dastar's profits to Fox.[110] The court even doubled the award to make sure that Dastar was not tempted to "infring[e]" again in the future.[111] The problem, of course, was that

100. *Id.* at 26.
101. *Id.* at 27.
102. 15 U.S.C. § 1125(a)(1) (2012).
103. *Dastar*, 539 U.S. at 29 (quoting Lanham Act, Pub. L. No. 79-489, 60 Stat. 427, 441 (1946) (codified as amended at 15 U.S.C. § 1125(a)(1))).
104. MCCARTHY, *supra* note 30, § 25:4.
105. *Dastar*, 539 U.S. at 37.
106. MCCARTHY *supra* note 30, § 25:6.
107. *Dastar*, 539 U.S. at 31 ("[T]he gravamen of respondents' claim is that, in marketing and selling Campaigns as its own product without acknowledging its nearly wholesale reliance on the Crusade television series, Dastar has made a 'false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of his or her goods.'").
108. *Id.* at 32.
109. *Id.* at 31.
110. *Id.* at 28.
111. *Id.*

Dastar had not infringed anything at all. *Crusade in Europe* was in the public domain. By definition, formerly copyrighted works currently in the public domain cannot be infringed.[112] Fox *had* to turn to trademark law because copyright law was of no assistance. If Fox wanted to expand its copyright monopoly, it had to do it by importing trademark law concepts.

The Court of Appeals for the Ninth Circuit affirmed the district court, finding that Dastar had performed a "bodily appropriation" of the television series that constituted reverse passing off and justified awarding damages to Fox.[113]

The Supreme Court, however, disagreed, starting its analysis with the fact that Dastar "took a creative work in the public domain."[114] But the Supreme Court then veered away from its discussion of the public domain nature of the copyrighted work and whether it could be lassoed into trademark law, choosing instead to focus on the definition of the word "origin" in the reverse passing off statute.[115] If Fox could be considered the origin of Dastar's product, even though Dastar had been working with a public domain work, the Court thought it could still be liable for reverse passing off.[116]

Ultimately, the Court decided against Fox on the reverse passing off issue.[117] The Court did not explicitly cordon off copyright from trademark, but rather relied on a precise definition of the word "goods."[118] The good at issue in *Dastar* was not any copyrighted work, whether that work might be *Crusade in Europe* or *World War II Campaigns in Europe*.[119] Rather, the good at issue was the physical videotape that *World War II Campaigns in Europe* was contained on.[120] The videotape at issue originated from Dastar; there was no confusion about that, and Fox did not dispute that it had not created

112. *Id.* at 31–33.
113. *Dastar*, 539 U.S. at 28.
114. *Id.* at 31.
115. *Id.* at 31–32.
116. *Id.* at 31.
117. *Id.* at 38.
118. *Id.* at 31–32.
119. *Dastar*, 539 U.S. at 31–32.
120. *Id.* at 32.

the physical videotape.[121] For the Court, that was where the Lanham Act's governance ended.[122]

3. "Copymark Creep" post-Dastar

a. Dastar's Shortcomings

Dastar is a curious decision,[123] especially notable for its very narrow reading of a statute that had formerly been called "a remedial provision [that] should be broadly construed."[124] For one, it seems to draw a distinction between copyright law and trademark law[125] that is not quite correct. In the Court's view, copyright law appears to exist to protect nebulous, intangible things.[126] But copyright law does not protect anything until it is "fixed in [a] tangible medium of expression."[127] The concept of something that is protected by copyright that is separable from its embodiment in a physical good is confusing. Even more problematic, though, copyright emphatically does not protect "ideas."[128] The *Dastar* Court noted that an attempt to

121. *Id.* at 38.

122. *Id.*

123. *See, e.g.*, Richard H. Chused, *The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age*, 17 TUL. J. TECH. & INTELL. PROP. 163, 209 n.150 (2014) ("The result in *Dastar* seems wrong to me . . . ."); Liu, *supra* note 16, at 1431 ("The Court's opinion is interesting and somewhat odd in a number of ways.").

124. Geisel v. Poynter Prods. Inc., 283 F. Supp. 261, 267 (S.D.N.Y. 1968).

125. *See* Liu, *supra* note 16, at 1431–32.

126. *See Dastar*, 539 U.S. at 33.

127. 17 U.S.C. § 102 (2012).

128. *See* Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990) ("Copyright law protects an author's expression; facts and ideas within a work are not protected."); Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc., 191 F.2d 594, 600 (2d Cir. 1951) ("[A] copyright never extends to the 'idea' of the 'work' . . . ."); Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc., 58 F.3d 27, 32 (2d Cir. 1995); Conan Props., Inc. v. Mattel, Inc., 712 F. Supp. 353, 358 (S.D.N.Y. 1989) ("One of the first rudiments of intellectual property is that no one may copyright an idea."); Warner Bros. v. Am. Broad. Cos., 530 F. Supp. 1187, 1190 (S.D.N.Y. 1982); Burgunder, *supra* note 27, at 272 ("[C]opyrights cover expressions, but not ideas . . . ."); Cameron Hutchison, *Insights from Psychology for Copyright's Originality Doctrine*, 52 IDEA 101, 109 (2012) ("Copyright subsists in the expression of a work and not the ideas or facts which underlie it."); Martin, *supra* note 36, at 268, 270 ("[C]opyright . . . accords no protection for ideas. . . . [I]t provides absolutely no protection for ideas."); John M. Olin, *"Recoding" and the Derivative Works Entitlement: Addressing the First Amendment Challenge*, 119 HARV. L. REV. 1488, 1491 (2006); Rennie, *supra* note 16, at 54 ("[C]opyright protection does not protect ideas."); Saval, *supra* note 34, at 410 ("[C]opyright protection does not extend to an idea."); Said, *supra* note 63, at 782. *But see* DC Comics, Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110, 118 (N.D. Ga. 1984) (praising a "creative effort" that "fashion[ed] . . . ideas"); King Features Syndicate v. Fleischer, 299 F. 533, 535 (2d

protect the "originat[or of] ideas"[129] is not permitted under the Lanham Act, but this leaves open the implication that it might be protected under the Copyright Act, which is simply not true.[130] Other courts have noted this implication and carried forth the confusion. [131]

Additionally, stating that the Lanham Act is referring to the physical goods is imprecise because not all marks protected by the Lanham Act refer to physical goods.[132] Many of the commercial uses that the Lanham Act is seeking to protect from confusion never involve physical goods in any way, shape, or form.[133]

Dastar increased the muddled relationship between trademark law and copyright law. *Dastar* did not say that a work in the public domain cannot gain extra protection through trademark law.[134] Nevertheless, some courts and parties read *Dastar* in exactly that way.[135] This impulse is understandable; courts prior to *Dastar*

Cir. 1924) (discussing the infringement of a "copyrighted idea"); Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843 (2010).

129. *Dastar*, 539 U.S. at 32.

130. *See* 17 U.S.C. § 102(a) (2012).

131. *See, e.g.*, Radolf v. Univ. of Conn., 364 F. Supp. 2d 204, 222 (D. Conn. 2005) ("[C]opyright and patent laws sufficiently cover inventions, discoveries, ideas and concepts . . . . Because Dr. Radolf's claim centers around his contention that he was the 'author' or originator of the ideas and concepts that underlie the DOD Grant, his Lanham Act claim necessarily fails in light of *Dastar*." (internal citations omitted)); Monilisa Collection, Inc. v. Clarke Prods., Inc., No. 6:11-CV-360-ORL-31GJK, 2011 WL 2893630, at *2 (M.D. Fla. July 20, 2011) ("[T]he 'origin of goods' language in the Act refers to the production of the tangible goods offered for sale, and not to the authorship of any idea, concept, or communication embodied in those goods."); McArdle v. Mattel Inc., 456 F. Supp. 2d 769, 783 (E.D. Tex. 2006); Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc., 299 F. Supp. 2d 565, 572 (E.D. Va. 2004).

132. *See, e.g.*, Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102-JST (ANx), 2013 WL 3936394, at *7 (C.D. Cal. July 30, 2013); Bob Creeden & Assocs., Ltd. v. Infosoft, Inc., 326 F. Supp. 2d 876, 879 (N.D. Ill. 2004); Smith v. New Line Cinema, No. 03 Civ. 5274 (DC), 2004 WL 2049232, at *4 (S.D.N.Y. Sept. 13, 2004); Do it Best Corp. v. Passport Software, Inc., No. 01 C 7674, 2004 WL 1660814, at *17 (N.D. Ill. July 23, 2004).

133. *See, e.g.*, *Do it Best Corp.*, 2004 WL 1660814, at *4.

134. Mary LaFrance, *A Material World: Using Trademark Law to Override Copyright's First Sale Rule for Imported Copies*, 21 MICH. TELECOMM. & TECH. L. REV. 43, 71 (2014); Landau & Lewis, *supra* note 58, at 664.

135. *See, e.g.*, Defined Space, Inc. v. Lakeshore E., LLC, 797 F. Supp. 2d 896, 901 (N.D. Ill. 2011) ("This case does not involve works in the public domain, . . . such as the Supreme Court faced in *Dastar*."); Williams v. UMG Recordings, Inc., 281 F. Supp. 2d 1177, 1184–85 (C.D. Cal. 2003); Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc., No. 11 C 5177, 2012 WL 414803, at *4 (N.D. Ill. Feb. 8, 2012); Novaria, *supra* 50, at 313–14 ("[W]hen interpreted broadly, *Dastar* probably affects all uncopyrighted works and content—not merely expired copyrights.").

focused on copyrighted status when debating the interaction between trademark and copyright law.[136] However, it is not what *Dastar* held, resisting such a bright line rule. Nor did the *Dastar* court limit the Lanham Act to cases involving trademarks, which would also provide a bright line rule.[137] Rather, *Dastar* held that the Lanham Act does not protect against confusion as to the origin of "ideas"[138]—which is protected by neither trademark nor copyright.[139]

Dastar noted that expanding reverse passing off to include the originator of "intellectual content" would cause trademark law to conflate with copyright law.[140] The Court noted that it has "been 'careful to caution against misuse or over-extension' of trademark and related protections into areas traditionally occupied by patent or copyright."[141] Additionally, it acknowledged that allowing a reverse passing off claim for the copyrighted work at issue "would create a species of mutant copyright law."[142] At the same time, the holding has left itself vulnerable to continued confusion as to exactly where the line between copyright and trademark is drawn to prevent this "mutant copyright law."[143]

For instance, the Court did not discuss whether the rationale that prohibits the reverse passing off claims from applying in *Dastar* would also extend to passing off claims.[144] As the similar names imply, passing off and reverse passing off belong to the same general family of claims.[145] As discussed, passing off is selling goods with

136. *See, e.g.*, Comedy III Prods., Inc. v. New Line Cinema, 200 F.3d 593, 595 (9th Cir. 2000); Lacour v. Time Warner Inc., No. 99 C 7105, 2000 WL 688946, at *4 (N.D. Ill. May 24, 2000).

137. *See* Romero v. Buhimschi, 396 F. App'x. 224, 231 (6th Cir. 2010); Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 399 (5th Cir. 2008); Empresa Cubana del Tabaco v. Culbro Corp., 399 F.3d 462, 478 (2d Cir. 2005); Zyla v. Wadsworth, 360 F.3d 243, 251 (1st Cir. 2004). *But see* Bretford Mfg., Inc. v. Smith Sys. Mfg. Corp., 419 F.3d 576, 580 (7th Cir. 2005) (finding that *Dastar* requires a trademark harm given the Court's focus on the goods' origins).

138. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37 (2003) (concluding that the reverse passing off cause of action did not apply "to the author of any idea, concept, or communication embodied in those goods") (citing 17 U.S.C.§ 202).

139. *Id.*

140. *Id.* at 33.

141. *Id.* at 34 (quoting TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29 (2001)).

142. *Id.*

143. *Dastar*, 539 U.S. at 34.

144. *See id.*

145. *See* 1-1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 1.01(B)(1)(e),

another's trademark on them; reverse passing off is selling someone else's goods with your trademark on them.[146] Commentators have disagreed about whether *Dastar* also affects passing off claims because of this interrelationship and *Dastar*'s silence on passing off.[147]

In many well-known passing off cases decided prior to *Dastar*, courts have endorsed the idea of confusion of authorship of a creative good sounding claim in trademark law.[148] For example, in addition to copyright infringement, in *Gilliam v. American Broadcasting Companies*, Monty Python was entitled to bring a claim under the Lanham Act based on American Broadcasting Company (ABC) "passing off" work as Monty Python's own work.[149] Courts rely on *Gilliam* in the continued survival of the false designation of "sponsorship" claims if a work has been altered,[150] but it is difficult to see how the rationale behind *Gilliam* differs from the rationale behind the reverse passing off claim in *Dastar*: confusion about who made a creative good. Commentators have noted that reading *Dastar* as overturning *Gilliam* would provoke an "earthquake" in the law,[151] but the *Dastar* reasoning could be interpreted to provoke just that sort of earthquake.[152]

LEXIS (2015).

146. *Id.*

147. *Id.* § 1.01(D)(2); *see also* Aagard v. Palomar Builders, Inc., 344 F. Supp. 2d 1211, 1216 (E.D. Cal. 2004).

148. *See* Frederick Warne & Co. v. Book Sales Inc., 481 F. Supp. 1191, 1197 (S.D.N.Y. 1979); LaFrance, *supra* note 134, at 72.

149. Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24–25 (2d Cir. 1976); *see also* Jaeger v. Am. Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971).

150. Museum Boutique Intercont'l, Ltd. v. Picasso, 880 F. Supp. 153, 164 (S.D.N.Y. 1995).

151. *See* David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 43 (2004).

152. *See* Rebecca Tushnet, Dastar *and design patent*, REBECCA TUSHNET'S 43(B)LOG (Sept. 12, 2014, 11:43 AM), http://tushnet.blogspot.com/2014/09/dastar-and-design-patent.html; *see also Register of Copyrights: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet & Intell. Prop. of the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters) ("[T]he longstanding understanding prior to *Dastar* [was] that section 43(a) is an important means for protecting the moral rights of attribution and integrity.").

i. The Problem with the Focus on the Physical Goods

The *Dastar* court noted in dicta that reverse passing off would have succeeded as a claim if Dastar had bought some of the videotapes "and merely repackaged them as its own."[153] The *Dastar* court was referring to the purchase of the physical videotapes themselves because the Court went on to state that what really happened here was a *copying* of the copyrighted work on that physical videotape, followed by "arguably minor" modifications.[154] This apparently placed the focus on the physical good that was the videotape, not the show contained upon it.

However, some courts interpreted *Dastar*'s language as a reference to a copyright infringement idea of failing to transform.[155] The district court in *Defined Space v. Lakeshore East*, for instance, declined to dismiss a Lanham Act claim because the defendant fit into *Dastar*'s dicta exception when it "took the plaintiff's photos and repackaged them as their own without revision."[156] The district court agreed that *Dastar*'s dicta was "directly on point."[157] *Dastar*'s dicta exception was not about the amount of revision; however, it was about the *physical good itself*.[158]

The modern world's goods are increasingly *not* tangible, which makes the *Dastar* decision difficult for courts to apply. The separation of physical tangible goods and the intellectual property wrapped up in those goods is not as straightforward as the *Dastar* decision implied.[159] For instance, the Central District of California was faced with the question of whether the plaintiff would be

153. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003).

154. *Id.*; *see also* Aagard v. Palomar Builders, Inc., 344 F. Supp. 2d 1211, 1218 (E.D. Cal. 2004) (acknowledging that the Lanham Act still applies to "tangible products").

155. Defined Space, Inc. v. Lakeshore E., LLC, 797 F. Supp. 2d 896, 900 (N.D. Ill. 2011).

156. *Id.* (quoting Cable v. Agence France Presse, 728 F. Supp. 2d 977, 981 (N.D. Ill. 2010)).

157. *Id.* at 901.

158. *See* San Jose Options, Inc. v. Ho Chung Yeh, No. CV 14-00500-KAW, 2014 WL 1868738, at *5 (N.D. Cal. May 7, 2014); Deckers Outdoor Corp. v. J.C. Penney Co., 45 F. Supp. 3d 1181, 1185 (C.D. Cal. 2014). The *Defined Space* court itself notes that other courts have disagreed with its reading of *Dastar*. *See Defined Space*, 797 F. Supp. 2d at 901 n.2 (citing Agence France Presse v. Morel, 769 F. Supp. 2d 295, 308 (S.D.N.Y. 2011)).

159. *See, e.g.*, Monsanto Co. v. Syngenta Seeds, Inc., 443 F. Supp. 2d 648, 652 (D. Del. 2006) (debating whether the product at issue was a physical seed or the genetic traits of that physical seed).

considered the "author" of digital images, foreclosing a Lanham Act claim, or the "printer / publisher" and thus the originator of the images, permitting a Lanham Act claim.[160] The Southern District of New York found a "motion picture" to be a physical good, while the screenplay the motion picture was based on was not a physical good.[161]

Computer software is the most visible category of this problem because computer software is almost never physical. Therefore, when courts try to decide whether *Dastar* forecloses a Lanham Act claim with regard to computer software, they seem to focus, like the *Defined Space* court, on the degree to which the program was changed. A Lanham Act claim was allowed where the competitor did little more than change the coding for the opening "splash screens" of the program.[162] However, where the computer program was further altered so that the Lanham Act allegations involved where the program had been "derived" from, the court dismissed the Lanham Act claims as foreclosed by *Dastar*.[163]

The instinct to examine the extent of the "plagiarism" is understandable because courts are naturally more comfortable with condemning more verbatim copying.[164] However, it is attempting to create an artificial distinction. The dichotomy between physical goods and the intellectual basis of the goods does not work for a product, like computer software, that is never a physical good. Courts instead equate an unchanged computer program with a physical good.[165] If that is the case, however, then why is an unchanged poem not considered physical good, too?[166] Even more damning, the

160. Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102-JST (ANx), 2013 WL 3936394, at *7 (C.D. Cal. July 30, 2013).

161. Smith v. New Line Cinema, No. 03 CIV. 5274 (DC), 2004 WL 2049232, at *4 (S.D.N.Y. Sept. 13, 2004).

162. Do It Best Corp. v. Passport Software, Inc., No. 01 C 7674, 2004 WL 1660814, at *17 (N.D. Ill. July 23, 2004).

163. Bob Creeden & Assocs., Ltd. v. Infosoft, Inc., 326 F. Supp. 2d 876, 879 (N.D. Ill. 2004).

164. Courts have used the word "plagiarist" interchangeably with "infringer." *See, e.g.*, Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc., 191 F.2d 594, 603 (2d Cir. 1951).

165. *See Do It Best*, 2004 WL 1660814, at *17.

166. *See* Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc., No. 11 C 5177, 2012 WL 414803, at *4 (N.D. Ill. Feb. 8, 2012).

Dastar court explicitly found that plagiarism was not a cause of action in the first place.[167] In fact, it was this resistance to plagiarism as a cause of action that required the plaintiffs in *Dastar* turn to trademark law instead. Without a right of attribution recognized in copyright law, the plaintiffs' recourse had to be to trademark law.

In light of *Dastar*'s preoccupation with physical goods, some courts have distinguished the Lanham Act's prohibition of false authorship claims on *goods* from false authorship claims on *services*, the latter of which these courts conclude are permitted.[168] For instance, the Court of Appeals for the Seventh Circuit in *Gensler v. Strabala* overturned a lower court's dismissal of Lanham Act claims based on the *Dastar* precedent.[169] In that case, Gensler asserted that Strabala falsely claimed to be the architect who designed several buildings.[170] Copyright law protects architecture,[171] and arguably architecture is embodied in the goods of the building, much as the copyrighted creativity behind *Crusade in Europe* was embodied in the goods of the videotapes.[172] However, the *Gensler* court disregarded the existence of the buildings and viewed the issue as being one of architectural *services*, whose origins were misrepresented.[173] This altered the entire analysis and permitted the Lanham Act cause of action.[174] A similar case in Puerto Rico permitted a Lanham Act claim on false allegations of architectural design without discussing *Dastar*.[175] However, other courts have disagreed that *Dastar* requires any distinction between goods and services at all.[176]

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167. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 36 (2003).

168. *See id.* at 31–32.

169. Gensler v. Strabala, 764 F.3d 735, 737 (7th Cir. 2014).

170. *Id.* at 736–37.

171. 17 U.S.C. § 102(a)(8) (2012).

172. *See also* EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos Inc., 228 F.3d 56, 63 (2d Cir. 2000) (noting that "the musical composition *is* the product" in the same way that buildings are the product in architecture).

173. *Gensler*, 764 F.3d at 737.

174. The *Gensler* court concluded that no copyright claim would have been possible, so a Lanham Act claim was the only cause of action left to the plaintiff. *See id.*

175. *See* Landrau v. Solis Betancourt, 554 F. Supp. 2d 102, 109 (D.P.R. 2007).

176. *See* Sidem, S.A. v. Aquatech Int'l Corp., No. 10-81, 2010 WL 2573882, at *8 (W.D. Pa. June 23, 2010).

ii. The Language Problem

In addition, *Dastar* dealt entirely with a cause of action under § 43(a)(1)(A),[177] focusing on the "origin" language.[178] However, courts have attempted to *carry Dastar*'s reasoning over to causes of action under § 43(a)(1)(B), a section of the statute dealing with the "nature, characteristics, [and] quality" of the goods, rather than with the origin.[179] In order to remain consistent with the *Dastar* holding, courts determine that the authorship of the good is not part of its nature.[180] While this makes some logical sense with the *Dastar* decision,[181] it does so at the expense of common sense; there are few authors who would agree that authorship is unrelated to the nature of their goods. In fact, other courts in dicta have listed things like "original . . . artist" of a karaoke recording as being related to the nature, characteristics and quality of the good,[182] and the relationship of the original artist to a karaoke recording is, at its heart, one of authorship.[183] Courts prior to the *Dastar* decision seemed to agree with the idea that the clarity regarding authorship of the "good" was important.[184] Indeed, courts even found that a lack of clarity would cause irreparable harm.[185]

The jurisprudence in the wake of *Dastar* is therefore characterized by a great deal of technical hair splitting. One district found that

177. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003).

178. Likewise, *Dastar* leaves open the question of how copyright infringement interacts with a dilution cause of action. *See* Perfect 10, Inc. v. Megaupload Ltd., No. 11cv0191-IEG (BLM), 2011 WL 3203117, at *8 (S.D. Cal. July 27, 2011).

179. 15 U.S.C. § 1125(a)(1)(B) (2012).

180. *See* Baden Sports, Inc. v. Molten U.S.A., Inc., 556 F.3d 1300, 1307 (Fed. Cir. 2009); M. Arthur Gensler, Jr. & Assocs., Inc. v. Strabala, No. 11 C 3945, 2012 WL 600679, at *3 (N.D. Ill. Feb. 21, 2012); Smartix Int'l Corp. v. MasterCard Int'l LLC, No. 06 CV 5174(GBD), 2008 WL 4444554, at *6 (S.D.N.Y. Sept. 30, 2008); Thomas Publ'g Co. v. Tech. Evaluation Ctrs., Inc., No. 06 Civ. 14212(RMB), 2007 WL 2193964, at *3 (S.D.N.Y. July 27, 2007); Antidote Int'l Films, Inc. v. Bloomsbury Publ'g, PLC, 467 F. Supp. 2d 394, 400 (S.D.N.Y. 2006).

181. *See Baden*, 556 F.3d at 1308 ("To find otherwise . . . is contrary to the Ninth Circuit's interpretation of *Dastar*.").

182. Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008).

183. *See id.*

184. *See, e.g.*, Rich v. RCA Corp., 390 F. Supp. 530, 531 (S.D.N.Y. 1975) (finding that using a current photograph of a singer when the singer had recorded the songs years earlier was sufficient to deceive people regarding the goods and support a Lanham Act cause of action).

185. *See id.*

improper use of the words "proprietary" or "exclusive" was preempted by the Copyright Act, but not improper use of the word "innovative,"[186] while on appeal the Court of Appeals for the Federal Circuit found the dispute nothing more than "an attempt to avoid the holding in *Dastar* . . . ."[187] In a different case, the Eastern District of Pennsylvania concluded that an allegation that defendant's product had originally been created by plaintiff were barred by *Dastar*, but an allegation that defendant stole plaintiff's product was not barred by *Dastar*.[188]

Meanwhile, faced with a brochure that was largely plagiarized, a district court in Colorado found one Lanham Act cause of action precluded by *Dastar*, but allowed another to go forward because the unactionable misrepresentation of whose brochure it was might create confusion that the plagiarized party had approved the brochure.[189] Thus, the false designation of origin claim was thrown out as a result of *Dastar*'s preoccupation with origin.[190] But the false designation of sponsorship or approval claim, based on the same activities with the brochure, survived.[191]

b. Sherlock Holmes and the Case of the Copymark Creep

One of the most notable recent copyright cases involved the copyright status of the famous detective Sherlock Holmes.[192] This case illustrates the fact that the *Dastar* decision did little to directly address the root of the copymark issue.

Sherlock Holmes has long been a copyrighted work with a confusing status.[193] The character of Holmes appears in fifty-six

186. *Baden*, 556 F.3d at 1306–07.
187. *Id.* at 1307.
188. *See* ZS Assocs., Inc. v. Synygy, Inc., No. 10-4274, 2011 WL 2038513, at *11 (E.D. Pa. May 23, 2011).
189. *See* MDM Grp. Assocs., Inc. v. ResortQuest Int'l, Inc., No. 06-cv-01518-PSF-KLM, 2007 WL 2909408, at *7 (D. Colo. Oct. 1, 2007).
190. *Id.* at *8.
191. *Id.* at *7; *see also* Auscape Int'l v. Nat'l Geographic Soc'y, 409 F. Supp. 2d 235, 251 (S.D.N.Y. 2004).
192. Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 497 (7th Cir. 2014).
193. *E.g.*, Lavigne, *supra* note 16, at 342–43.

stories and four novels published between 1887 and 1927.[194] The final ten stories remain under copyright, while the rest of the stories, and all of the novels, are in the public domain.[195]

Leslie Klinger was editing an anthology called *A Study in Sherlock: Stories Inspired by the Sherlock Holmes Canon*.[196] The stories contained in the anthology were "inspired by" the Sherlock Holmes stories and usually contained Holmes and his partner Dr. Watson as characters.[197] When the Conan Doyle Estate, holders of the copyright on the ten final stories, learned of the anthology, they contacted Klinger's publisher and requested that he obtain a copyright license.[198] Klinger's publishing company paid the licensing fee and the anthology was published.[199]

A few years later, Klinger decided to edit a second anthology of Sherlock-Holmes-inspired stories.[200] This time Klinger's publishing company balked at paying the Conan Doyle Estate's requested licensing fee and left payment of the fee to Klinger.[201] Klinger, however, refused to pay the fee, asserting that he was allowed to use material from all the public domain Sherlock Holmes stories, so that the Conan Doyle Estate could demand a licensing fee only if he was using material from the ten stories still under copyright.[202]

The Conan Doyle Estate, at this point, confronted the crux of the issue: Traditional copyright law did not provide them with the level of protection they needed. Traditional copyright law protected the original elements of creative expression in the final ten stories, but traditional copyright law did not protect anything in the first forty-six stories and the four novels. Unfortunately for the Conan Doyle Estate, the characters of Sherlock Holmes and Dr. Watson appeared

194. *Klinger*, 755 F.3d at 497.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Klinger*, 755 F.3d at 497.
201. *Id.* at 498.
202. *Id.*

in all of the public domain materials, which seemed to leave them open for anyone to use.

Therefore, in order to prevent Klinger and others from using the characters of Sherlock Holmes and Dr. Watson, the Conan Doyle Estate needed something more than traditional copyright. The estate argued that the characters were not fully complete until the final story was complete, so that anyone trying to use those characters would inevitably have to use original creative expression that was still copyrighted.[203] The issue in the case centered on when a character falls into the public domain; the first time it appears, or the last time it appears.[204] However, the debate was really about copymark.

It is by no means an inevitable conclusion that a character such as Sherlock Holmes is entitled to copyright protection in the first place.[205] "Copyright is relatively difficult to obtain for literary characters . . . ."[206] Only distinct characters that are not stereotypes or stock characters can be copyrighted.[207] A character that is not sufficiently delineated exists only as an "idea" that cannot be copyrighted.[208] "[T]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[209] To decide otherwise would grant "a monopoly in a particular type of person."[210]

A character's specific name and appearance is copyrightable and the copying thereof can be copyright infringement.[211] Klinger

203. *Id.*

204. *See id.*

205. *See* Foley, *supra* note 19, at 938 ("[E]valuating whether a fictional character is a proper subject for copyright protection is an unavoidable threshold issue in the copyright infringement analysis.").

206. Abramowicz, *supra* note 64, at 364.

207. *See, e.g.*, Detective Comics, Inc. v. Bruns Publ'ns, 111 F.2d 432, 433–34 (2d Cir. 1940); Burroughs v. Metro-Goldwyn-Mayer, Inc., 519 F. Supp. 388, 391 (S.D.N.Y. 1981).

208. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

209. *Id.*

210. Abramowicz, *supra* note 64, at 364–65.

211. *See* Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014) (construing Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004)). Interestingly, courts have implied that written characters sometimes may not become sufficiently distinctive until they are combined with a visual cue. *See Gaiman*, 360 F.3d at 660–61. The famous deerstalker cap and pipe that characterize most people's visions of Sherlock Holmes are not found in the stories. *See, e.g.*, *Sherlock Holmes: A Hero for His Time—and Ours*, DISCOVERING ARTHUR CONAN DOYLE, sherlockholmes.stanford.edu/biography_elusive.html (last visited Nov. 13, 2015). Nor did Holmes ever deliver the line "Elementary, my dear

wished, presumably, to use the name and description of Sherlock Holmes in the stories, but if the stories were merely "inspired" by the Sherlock Holmes canon, did not have a character named Sherlock Holmes, and merely contained a character who was a brilliant detective, the copyright infringement case is not nearly so clear-cut.

The Court of Appeals for the Seventh Circuit therefore properly treated the Conan Doyle Estate as making "arguments for enlarged copyright protection."[212] The court acknowledged that the original elements of the final ten stories still enjoy copyright protection, but the Conan Doyle Estate could not thereby rope in the rest of the stories that had entered the public domain.[213]

The Conan Doyle Estate argued that refusing to give an author protection in a character dating from the character being "perfect[ed]" in the final work would destroy "incentive to improve the character in future work . . . ."[214] "If he loses copyright on the original character . . . he'll be competing with copiers."[215] This argument is bewildering as a matter of copyright law, because the copyright term lasts for the life of the author plus seventy years.[216] No author should lose copyright in an actual copyrightable character while he or she is alive, and therefore, no author should be competing with copiers. As the court acknowledged, in the particular circumstances of this case, Conan Doyle had been dead over eighty years.[217] This is typical; only once an author has been dead many decades do you have a discussion about public domain materials.[218] At any rate, the refusal of the law to protect vague and indistinctly drawn characters already disincentivizes authors to take their time perfecting characters.

Watson" in the stories. *See id.*

212. *Klinger*, 755 F.3d at 498; *see also* Helfand, *supra* note 10, at 652 (noting the same danger in allowing the importation of trademark law tests to expand copyright protection "to protect against the use of characters that are less and less similar").

213. *Klinger*, 755 F.3d at 501.

214. *Id.*

215. *Id.*

216. 17 U.S.C. § 302(a) (2012).

217. *Klinger*, 755 F.3d at 501.

218. Corporate authors, of course, cannot "die" in the way humans can, so they enjoy their own term of copyright protection. 17 U.S.C. § 302(c) (2012).

The Conan Doyle Estate's arguments boiled down to matters of trademark law, although they were not framed that way; the Conan Doyle Estate wished to use Sherlock Holmes as a trademark. They wished to control the source from which he emanates for as long as they desired.[219]

The Seventh Circuit indirectly acknowledged this in the final paragraphs of the opinion, noting that what the Conan Doyle Estate really sought was trademark dilution protection. The estate wanted the Sherlock Holmes character only used in a manner it approved, out of fear that otherwise deterred consumers would diminish the value of its property.[220] But, the court pointed out, "[t]here is no comparable doctrine of copyright law . . . ."[221]

Thus, the Sherlock Holmes case stands as a copymark case; one in which the copyright holder seeks to expand its monopoly through trademark law. However, it is also not a *Dastar* case, illustrating the major shortcoming of *Dastar*; the copymark problem is much more pervasive than a reverse passing off case on a public domain copyrighted work. Therefore, to the extent to which *Dastar* can even be understood as sensible precedent, it fails to address the heart of the copymark issue.

D. The Danger of the Copymark Creep

As noted, copyright is a careful balance between the monopoly rights of the copyright holders to exclude the uses of others, and the rights of the public.[222] The public benefit from the copyright balance manifests itself in two ways. First, the public's access to the growing public domain; and second, the public's right to exercise their First

219. The idea of an author trying to enjoy rights that might not explicitly belong to him has been endorsed not only by the conflation of intellectual property concepts that has been discussed thus far, but also by precedent providing authors with copyright in characters through implication in the absence of any express language otherwise. *See* Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 102 F. Supp. 141, 145 (S.D. Cal. 1951).

220. *See Klinger*, 755 F.3d at 503.

221. *Id. But see* DC Comics Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110, 118–19 (N.D. Ga. 1984) (explicitly looking at trademark dilution harm in the context of evaluating a fair use defense to copyright infringement).

222. *See* Moffat *supra* note 6 at 1476–77.

Amendment free speech rights by engaging with copyright-protected works.[223]

1. The Danger to the Public Domain

Commentators have noted that copyright owners can treat their goods more like trademarked goods in order to win the expanded protection of trademark law.[224] Such activity can be "an anticompetitive measure."[225] It is an effort to capture what they perceive as the more favorable trademark protection for their work.[226] Copyright protection might restrict the original expression and some circle of substantially similar works, whereas trademark law permits the copyrighted creation to be scattered throughout merchandising.[227] In this way, the copyrighted item itself becomes a trademark.[228] This overtly lays the basis for continued protection once the copyright term expires.[229] Indeed, the very ubiquity of this practice has swayed some courts to protect characters based not on law, but on the "public expectation that merchandise displaying elements of a fictional character is at least sponsored by the owner of the character."[230]

The trademark protection period has no set expiration date, unlike copyright law.[231] The "potentially perpetual" protection period

223. *See id.* at 1481.

224. *See* LaFrance, *supra* note 134, at 73.

225. *Id.* at 75; *see also* Arewa, *supra* note 16, at 292 (discussing anticompetitive use of the DMCA).

226. *See* LaFrance, *supra* note 134, at 73.

227. *See, e.g.*, Helfand, *supra* note 10, at 626–27; Liu, *supra* note 16, at 1428; Foley, *supra* note 19, at 937, 948; Pacelli, *supra* note 15, at 1250–51, 1264.

228. *See* Liu, *supra* note 16, at 1434.

229. *See* Parchomovsky & Siegelman, *supra* note 34, at 1498.

230. Foley, *supra* note 19, at 949.

231. *See, e.g.*, Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 AKRON L. REV. 649, 678 (2006); Foley, *supra* note 19, at 939 ("Trademark protection . . . may . . . persist in perpetuity."); Helfand, *supra* note 10, at 657; Liu, *supra* note 16, at 1427 ("Unlike copyright law, trademark law places no temporal limit on the length of protection."); Moffat, *supra* note 6, at 1494 ("[T]he term of trademark protection has always been indefinite, with protection lasting as long as the mark is used (unless the mark becomes generic) . . . ."); Parchomovsky & Siegelman, *supra* note 34, at 1459 ("[T]rademark protection is, in principle, infinite in duration."); Laurie Richter, *Reproductive Freedom: Striking a Fair Balance Between Copyright and Other Intellectual Property Protection in Cartoon Characters*, 21 ST. THOMAS L. REV. 441, 467 (2009) ("[T]rademark rights do not expire as long as the mark qualifies for protection; therefore it is in the owner's best interest to attempt to obtain trademark rights in conjunction with their copyright."); Sander, *supra* note 27, at 22 ("[T]rademarks . . . can last for an unlimited amount of

reflects the different purpose of trademark law.[232] Because trademark law is about protecting the consuming public from confusion rather than incentivizing further creativity, "there is no reason why trademarks should ever pass into the public domain by the mere passage of time."[233] Trademark law focuses on the smooth operation of commerce and has little interest in promoting expanded use of its subjects. Copyright law, on the other hand, has the opposite goal.[234] It seeks to "enrich[] . . . the public domain."[235] This is its constitutionally stated purpose,[236] and constitutionally a copyright cannot be perpetual, but must only last "for limited [t]imes."[237] That makes trademark a more attractive protective mechanism as a copyright holder.[238] In fact, copyright holders have even used these trademark ideas to justify further expansion of the copyright term limit itself.[239]

Because trademark law is not worried about ensuring that works enter the public domain, there is no mechanism under the Lanham Act to shepherd trademarks toward the public domain.[240] Therefore, using trademark law to cover works more traditionally covered under copyright permits a strangulation of the public domain.[241]

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time."); Saval, *supra* note 34, at 420 ("[T]he duration of a trademark is potentially perpetual . . . ."). *But see* Pacelli, *supra* note 15, at 1263 (arguing that copyright protection could be considered stronger if Congress continues to expand the term, because, unlike trademark, copyright protection cannot be lost through inactivity).

232. Helfand, *supra* note 10, at 637.

233. *Id.* at 657 (quoting Boston Prof'l Hockey Assoc. v. Dallas Cap. & Emblem Mfg., Inc., 510 F.2d 1004, 1011 (5th Cir. 1975)).

234. *Id.*

235. Moffat, *supra* note 6, at 1482; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Foley, *supra* note 19, at 924.

236. Walterscheid, *supra* note 21, at 239 ("The ultimate purpose of . . . copyrights in the United States is to enlarge the public domain of creative works by authors and inventors, thereby promoting 'the progress of science and useful arts.'") (quoting U.S. CONST. art. I, § 8, cl. 8); Litman, *supra* note 22, at 433.

237. Moffat, *supra* note 6, at 1481 (quoting U.S. CONST. art. I, § 8, cl. 8); Lavigne, *supra* note 16, at 357; Walterscheid, *supra* note 21, at 241, 245.

238. Copyright holders have, at times, explicitly stated a belief that "copyright should last as long as possible." Litman, *supra* note 22, at 431.

239. *See, e.g.*, Buccafusco & Heald, *supra* note 25, at 16–17.

240. *See* 15 U.S.C. § 1127 (2012).

241. *See* Litman, *supra* note 22, at 435; Saval, *supra* note 34, at 446; Liu, *supra* note 16, at 1398.

Disney is one of the foremost practitioners of using both copyright and trademark protection; although, Disney is by no means alone.[242] Commentators have noted that Disney is in favor of copyright extensions in order to protect "Steamboat Willie," which is on the cusp of falling into the public domain.[243] As others have pointed out, surely the many changes that Disney has instituted between "Steamboat Willie" and the current iteration of Mickey Mouse are copyrightable and would protect the current version of Mickey Mouse.[244] But Disney wants to keep Mickey Mouse out of the fray altogether.[245] If Steamboat Willie falls into the public domain, Disney is aware that an argument exists that some iteration of Mickey Mouse is in the public domain[246]—regardless of the occurrence of the last copyrighted use of Mickey Mouse.[247] Therefore, Disney seeks to supplement its copyright protection by relying on Mickey Mouse as a trademark.

The arguments of the Conan Doyle Estate illustrate the way in which copyright holders want to achieve trademark protection: If they are continuing to license uses of Sherlock Holmes, then what is to stop them from continuing to expand the copyright term based on the last time their copyrighted character was used?[248] Put that way,

242. *See, e.g.*, Abramowicz, *supra* note 64, at 369; Buccafusco & Heald, *supra* note 25, at 7–8; Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909*, 2 VA. SPORTS & ENT. L.J. 254, 255 (2003); Richter, *supra* note 231, at 451, 460–61; Sander, *supra* note 27, at 23; Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES (Mar. 28, 1998), http://www.nytimes.com/1998/03/28/arts/immortal-words-immortal-royalties-even-mickey-mouse-joins-the-fray.html?pagewanted=all.

243. *See, e.g.*, sources cited *supra* note 242.

244. *See* Hedenkamp, *supra* note 242, at 266, 278; William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 491 (2003); Liu, *supra* note 16, at 1441–42; Martin, *supra* note 36, at 318.

245. *See generally* Hedenkamp, *supra* note 242.

246. Some commentators have suggested that, despite Disney's best efforts otherwise, Mickey Mouse is already in the public domain. *See, e.g.*, *id.* at 255.

247. *See* Richter, *supra* note 231, at 471–72.

248. The appellate court noted that the Conan Doyle Estate's argument raised "[t]he spectre of perpetual, or at least nearly perpetual, copyright . . . ." Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014); *see also* Klinger v. Conan Doyle Estate, Ltd., 988 F. Supp. 2d 879, 890 (N.D. Ill. 2013) ("The effect of adopting Conan Doyle's position would be to extend impermissibly the copyright of certain character elements of Holmes and Watson beyond their statutory period . . . ."); Liu, *supra* note 16, at 1452 (predicting that "parties may attempt to lay claim to works ostensibly in the public domain by making small changes to a public domain work in an effort to retain or extend the copyright and using the resultant uncertainty to limit free use"); Foley, *supra* note 19, at 935.

the protection they sought for Sherlock Holmes begins to look not like copyright, but more like how we understand Mickey Mouse to function these days[249]: as a trademark that continues to receive protection as long as it is being used. Mickey Mouse is a well-known trademark; Sherlock Holmes, however, traditionally has not been considered one, but the copyright holder wishes that it were.

2. The Danger to the First Amendment

Not only does the use of trademark law in copyright analyses endanger the public domain, it also increases the limitations on those uses that would have been permitted under the copyright law regime of non-public-domain works. Traditionally copyright law talked very little about its First Amendment implications in the silencing of speech, relying instead on the fair use defense and the idea/expression dichotomy.[250] But these protections can only properly protect in the copyright world, and they are powerless against trademark law concepts.

Trademark's "likelihood of confusion" standard presents an attractive emotional appeal for copyright holders to fall back on where copyright law might otherwise fail because of a lack of substantial similarity between the works.[251] Copyright holders are drawn to the idea that confusion, in and of itself, is a harm for which they should be compensated.[252] The copyright infringement standard, however, is substantial similarity, not confusion.[253]

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249. Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004); Burgunder, *supra* note 27, at 258, 290; Landes & Posner, *supra* note 244, at 491; Liu, *supra* note 16, at 1424, 1428; Martin, *supra* note 36, at 317 ("Disney was not, in fact, ever at risk of losing all of its rights to Mickey Mouse, which is a trademarked character."); Moffat, *supra* note 6, at 1496; Pacelli, *supra* note 15, at 1250–51; Saval, *supra* note 34, at 441.

250. Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after* Campbell v. Acuff-Rose Music, 12 DUKE L. & TECH. REV. 92, 95 (2014); Hollows, *supra* note 19, at 301–02; Martin, *supra* note 36, at 270, 302. Commentators have noted that these doctrines perform this task only semi-effectively. *See* Liu, *supra* note 16, at 1418.

251. *See* Lyons P'ship v. Morris Costumes, Inc., 243 F.3d 789, 804 (4th Cir. 2001).

252. S*ee, e.g.*, Orange, *supra* note 45 (noting that copyright holders treat the elimination of confusion as fixing the copyright infringement problem).

253. *Lyons*, 243 F.3d at 801.

The "substantial similarity" test, like many of the most important tests in copyright, is a difficult one to articulate.[254] It is "necessarily imprecise,"[255] "one of the most uncertain questions in copyright and 'one which is the least susceptible of helpful generalizations.'"[256] "It is . . . impossible to articulate a definitive demarcation that measures when the similarity between works involves copying of protected expression; decisions must inevitably be ad hoc."[257] As a result, copyright infringement actions are haunted by complicated and divisive tests involving debates over where to draw the lines between expression and ideas, and whether this song sounds too much like that song.[258]

In comparison, confusion seems like an impossibly simple thing to measure and quantify. Indeed, it is tempting enough that appellate courts have used evidence of confusion to overturn trial courts' rulings on substantial similarity.[259]

In trademark law, most causes of action rest on a multi-factor likelihood of confusion test.[260] In the absence of consumer confusion, trademark harm does not occur. [261] "In the absence of a likelihood of consumer confusion, a finding of trademark infringement is an unwarranted limitation on creativity and expression, for the trademark owner's rights have not been infringed."[262] Confusion is thus the hallmark of trademark law.[263]

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254. *Id.* at 801, ("The notion of [substantial] similarity can be a slippery one . . . ."); Hutchison, *supra* note 128, at 112; Rennie, *supra* note 16, at 67.

255. Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990).

256. Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 472 (1986).

257. *Shaw*, 919 F.2d at 1356 (citing Sid & Marty Television Prods. Inc., v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

258. *See* Lee, *supra* note 57, at 1480 ("The basic test of substantial similarity for infringement—which is vital for the public to evaluate whether its conduct is permissible—is, unfortunately, 'largely subjective, thus permitting the finder of fact to give effect to its intuitive judgment of the perceived equities in a case.'") (quoting Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1005 (1990)).

259. *Lyons*, 243 F.3d at 802; *see also* Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 246 (2d Cir. 1983) (referring to the finding of substantial similarity and likelihood of confusion as if they are the same test and the same cause of action).

260. *Lyons*, 243 F.3d at 804.

261. *See* Perfect 10, Inc. v. Megaupload Ltd., No. 11cv0191-IEG (BLM), 2011 WL 3203117, at *8 (S.D. Cal. July 27, 2011) (criticizing trademark allegations for failing to ever use the word "confusion").

262. Foley, *supra* note 19, at 946–47.

263. *Lyons*, 243 F.3d at 804; GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 (9th Cir.

While confusion undeniably plays a role in copyright law due to the danger of misrepresentation inherent in any copyright infringement,[264] confusion is not the hallmark of copyright law in the way that it is in trademark law.[265] The substantial similarity test does not necessarily hinge on confusion to the extent that trademark law does. Unlike trademark infringement, copyright infringement can exist even if no one is confused.[266]

Copyright holders turn to trademark law to avoid the morass of debate over substantial similarity. A copyright holder can never be sure how a substantial similarity analysis might turn out, but a measure of consumer confusion is an irresistibly easy thing to set out. It seems to the copyright holder like a way to sneak a bright line rule into an arena of the law that is notoriously resistant to such rules. Also, it has the added bonus of sounding like something the law should concern itself with on a basic fairness level.

The likelihood of confusion standard is even more appealing given how much it has grown in recent years.[267] Recourse to likelihood of confusion means that a copyright holder need only prove that some percentage of consumers (in trademark law, the percentage can be as low as ten percent)[268] was confused at some point in time, however briefly, even if that confusion was later dispelled.[269]

The danger in allowing the importation of such a standard, however, is that it diminishes the protective power of traditional copyright measures that promote the proliferation of expressive uses

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2000) ("The likelihood of confusion is the central element of trademark infringement . . . ."); Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112, 115 (2d Cir. 1984); Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 917 (9th Cir. 1980); Meyer v. Rodex Sales & Servs., LLC, No. CV 05-176-S-MHW, 2006 WL 3355004, at *9 (D. Idaho Nov. 16, 2006) ("A key purpose of the Lanham Act is avoidance of confusing the public."); Helfand, *supra* note 10, at 636 ("Proof of consumer confusion is the most crucial element of a trademark infringement cause of action."); Kozinski, *supra* note 63, at 468 ("[A]t the core of trademark law is the issue of confusion."); Sander, *supra* note 27, at 21; Saval, *supra* note 34, at 420 ("Proof of consumer confusion is the crucial element of a trademark infringement cause of action . . . .").

264. *See* Lacour v. Time Warner Inc., No. 99 C 7105, 2000 WL 688946, at *8 (N.D. Ill. May 24, 2000).

265. *See, e.g.*, Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 781 (2d Cir. 1994).

266. Shaw v. Lindheim, 919 F.2d 1353, 1364–65 (9th Cir. 1990).

267. *See* Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 774 (8th Cir. 1994).

268. *Id.* at 775.

269. Liu, *supra* note 16, at 1429.

in support of the public's First Amendment free speech rights.[270] For instance, under copyright law, a fair use defense might protect a parody.[271] However, consumer confusion might conceivably still exist and act to work against the application of fair use, finding trademark infringement where copyright infringement would not have existed.[272]

If copyright holders cannot prove confusion, they still have the concept of tarnishment or blurring to turn to.[273] These ideas—that particular conduct is damaging one's reputation or strength in the marketplace[274]—are trademark concepts found in the dilution cause of action, that copyright holders seek to use to gain more control in how their copyrighted works can be used by others.[275] There are many First Amendment implications in the protection provided, especially by tarnishment law, because it provides a rights holder with the ability to silence a speaker who it finds offensive.[276] Using this law, copyright holders can chip away at the amount of protection provided to parody.[277]

270. *See* Sander, *supra* note 27, at 1; Foley, *supra* note 19, at 953.

271. See 15 U.S.C. § 1125(c)(3) (2012).

272. *See* Helfand, *supra* note 10, at 653 (noting that "one might defend against a copyright infringement action by asserting a fair use parody and yet not be able to disprove consumer confusion"); Saval, *supra* note 34, at 423 (discussing that copyright holders can "use trademark law to circumvent what copyright law may allow under fair use"); Foley, *supra* note 19, at 954; Sander, *supra* note 27, at 21.

273. Foley, *supra* note 19, at 951 ("[D]ilution provides broad protection in the *absence* of a likelihood of consumer confusion . . . .").

274. Liu, *supra* note 16, at 1438.

275. *See* Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014); Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282, 1291 (S.D.N.Y. 1988); Frederick Warne & Co. v. Book Sales Inc., 481 F. Supp. 1191, 1199 n.5 (S.D.N.Y. 1979); Helfand, *supra* note 10, at 627; Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 35–36 (2006); Liu, *supra* note 16, at 1438; Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 936 (2007).

276. *See* Gardner, *supra* note 53.

277. *See* DC Comics Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110, 118–19 (N.D. Ga. 1984); Gardner, *supra* note 53.

II. TURNING TO FAN COMMUNITY PRACTICES TO BALANCE COPYMARK CREEP

Fan communities define themselves by reference to a copyrighted work whose rights belong to other entities.[278] As such, they inevitably confront copyright issues regularly as a fact of their very existence.

While all fan communities do not speak with one voice, a number of recurring characteristics and attitudes have coalesced into a recognizable set of unwritten rules.[279] These rules attempt to provide some protection of the rights of the creator of the original copyrighted work while simultaneously encouraging a flourishing creative atmosphere among the fan creators engaging with the work. In short, these rules seek the traditional copyright balance.[280]

Fan communities have developed largely independent of formal legal advice and detailed statutory knowledge because these communities have normally been located only at the fringe of mainstream creative culture.[281] These communities did not set out to rewrite copyright law.[282] Rather, the balance they struck developed organically and intuitively from their understanding of how the law works.[283] They were worried about what would be "fair," not necessarily what was legal. In their actions, they instinctively recognized the copymark creep and sought to limit its effects.[284]

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278. *See, e.g.*, a blackpanther, *What Fanfic is and isn't*, OBSERVATION DECK (Dec. 2, 2013, 8:24 AM), http://observationdeck.kinja.com/what-fanfic-is-and-isnt-509492028 (defining "fandom" as a group of people who "spend their free time interacting with the canon source in ways that aren't standard, i.e. more than just watching, reading or playing something deciding 'hey, I kinda like that' [sic]. It's fanfic writers, fanartists, cosplayers, readers of fanfiction, people who hang around the forums discussing all the details and so on.").

279. *Id.*

280. *Id.*

281. Henry Jenkins, *Citizen Fan: An Interview with Filmmaker Emmanuelle Wielezynski-Debats (Part Two)*, CONFESSIONS OF AN ACA-FAN THE OFFICIAL WEBLOG OF HENRY JENKINS (Oct. 6, 2014), http://henryjenkins.org/2014/10/citizen-fan-an-interview-with-filmmaker-emmanuelle-wielezynski-debats-part-two.html (quoting Emmanuelle Wielezynski-Debats as referring to fandom as "folk culture").

282. *See* Lee, *supra* note 57, at 1473.

283. *Id.* at 1461.

284. *Id.*

The rules established by fan communities betray an attraction to bright line rules; in the vacuum left behind by copyright precedent, those most affected by copyright have found their own way. And, given the trademark character of most copyright discussions, it is unsurprising that fan communities have unconsciously drawn these bright line rules from trademark law—not copyright.[285] In this way, fan communities have used trademark law concepts to offset the damage done by these same concepts to the public domain and free speech balance of copyright.

A. Fan Community Understanding of Trademark Law

There does not seem to be a conscious understanding of trademark law concepts as opposed to copyright law concepts because fan communities are composed primarily of laypeople as opposed to lawyers. However, the practices of fan communities can be readily understood in a trademark law context—more so than a copyright law context.

1. Embracing Trademark's Likelihood of Confusion Standard

Much as copyright holders appear to like trademark's confusion standard, fan communities have followed; if there is no confusion as to who is responsible for which part of a piece of creativity, fan communities support that piece of creativity.[286]

Fan creators frequently place disclaimers in front of their works, emphasizing what they have "borrowed" from other people and what is their own work.[287] This permits them to define ownership ("I own this, but J.K. Rowling owns that") while continuing to use that which

285. *See* wtfzurtopic, Comment to *Was Fanfic any Fifferent in the Olden Days*, TUMBLR.COM (Jan.25, 2015), http://nonasuch.tumblr.com/post/109152651195/was-fanfic-any-different-in-the-olden-days.

286. *See* jennlynnfs, FANFICTION, https://www.fanfiction.net/u/873760/jennlynnfs (last visited Nov. 14, 2015).

287. *See* Lee, *supra* note 57, at 1534; wtfzurtopic, *supra* note 285; *see also* Orange, *supra* note 45 (reporting that the parties decided the solution to alleged copyright infringement was a disclaimer); Natasha Simonova, *Fan fiction and the Author in the Early 17th Century: The Case of Sidney's* Arcadia, TRANSFORMATIVE WORKS & CULTURES (2012), http://journal.transformativeworks.org/index.php/twc/article/view/399/314.

they acknowledge does not belong to them. The thinking seems to be that the disclaimer dispels any confusion that might exist.[288] But, as has been discussed, confusion is a trademark law concept; it has little effect on a copyright infringement analysis.[289] In fact, the concept of disclaimers is more prevalent in trademark law.[290]

Fans also encourage using proper "sourcing," providing original links or otherwise crediting the original in some way.[291] Fan communities recognize the value of the very attribution right dismissed by the Supreme Court in *Dastar*, betraying how much they view copyright through a trademark lens.[292]

This desire to make sure that consumers are informed about what type of creativity they are getting shows up in other fan practices, too, like the mania for "trigger warnings" and "tagging," to give people a clear view of what is coming in a fanwork.[293]

The rules that fan communities have established set forth when fan creators have gone too far, and generally that runs along the trademark law "passing off" fault.[294] Taking someone's work, either wholesale or as unmistakable inspiration, without providing proper credit, is frowned upon by fan communities.[295] Notably, such a practice would lead to consumer confusion as to where the work in question originated (hence why it is prohibited by trademark law).

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288. *See* Orange, *supra* note 45 ("They put these disclaimers on so kids . . . don't confuse . . . .").

289. *See* Lee, *supra* note 57, at 1534.

290. *See* Home Box Office, Inc. v. Showtime/The Movie Channel, Inc., 832 F.2d 1311, 1315 (2d Cir. 1987).

291. *See, e.g.*, jennlynnfs, *supra* note 286; Kambria Rain, FANFICTION, https://www.fanfiction.net/u/1688000/Kambria-Rain (last visited Nov. 14, 2015); George deValier, FANFICTION, https://www.fanfiction.net/u/2348750/George-deValier (last visited Nov. 14, 2015); *Blanket Permission to Podfic*, FANLORE, http://fanlore.org/wiki/Blanket_Permission_to_Podfic (last visited Nov. 14, 2015); REDDIT, http://www.reddit.com/r/fandomnatural/wiki/index (last visited Nov. 14, 2015); room_317, *Chapter 1*, LIVEJOURNAL (Apr. 28, 2012, 10:01 PM), http://room-317.livejournal.com/.

292. *See, e.g.*, jennlynnfs, *supra* note 286; Kambria Rain, *supra* note 291. *See also* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 36 (2003) (likening passing off as applied in a copyright context to plagiarism).

293. *See* wtfzurtopic, *supra* note 285.

294. *See Dastar*, 539 U.S. at 36 (likening passing off as applied in a copyright context to plagiarism).

295. *See, e.g.*, Kambria Rain, *supra* note 291.

2. Trademark's Commercial—as Opposed to Creative—Marketplace

Fan communities also traditionally drew a clear distinctive line between "for profit" works and "free" works. Many works of fanfiction will include a statement that the writer is not making money off of the work.[296] It is unclear if this is meant to insulate the writer from being sued for money that does not exist, or if there is an understanding that it is only "wrong" if you are making money off of the original content creator.[297]

At any rate, trademark law, rooted in the Commerce Clause, must focus on the commercial aspects of the conduct in question.[298] While commercial implications may play a role in copyright, they are not the prerequisite fan communities frequently treat them as. Giving something away for free does not insulate you from copyright infringement charges,[299] as many fans mistakenly believe.[300]Copyright holders understandably fixate less on the commercial emphasis of trademark law as opposed to copyright law, mostly because, to them, all copyright law violations have a financial aspect.[301] This is a consequence of the overall "copymark creep"—the tendency of copyrighted works to function more like trademarks in a commercial marketplace. It is only natural that fan communities instinctively seize upon traditional trademark defenses in response, asserting their lack of commercialism to protect them.

Nevertheless, it is true that the monetization of some fanworks has begun to occur;[302] although in many instances it remains a hotly contested issue.[303] For example, some people sell costume replicas to

296. *See* wtfzurtopic, *supra* note 285.

297. *See, e.g.*, Debora J. Halbert, *The Labor of Creativity: Women's Work, Quilting, and the Uncommodified Life*, TRANSFORMATIVE WORKS & CULTURES 4.21 (2009), http://journal.transformativeworks.org/index.php/twc/article/view/41/118.

298. *See* MCCARTHY *supra* note 30, § 6:2.

299. *See, e.g.*, Stephanie Losi, *RIAA Sues Hundreds in 'First Wave' of War*, TECH NEWS WORLD (Sept. 8, 2003, 3:30 PM PT), www.technewsworld.com/story/31525.html.

300. *See* Halbert, *supra* note 297, at 4.21.

301. *See* Foley, *supra* note 19, at 925.

302. *See* Falco276, *Publishing Fanfictions for Profit?*, FANFICTION (Dec. 5, 2013), https://www.fanfiction.net/topic/2872/101834311/Publishing-Fanfictions-for-Profit.

303. *Id.*

"cosplayers" so they can dress like their favorite characters.[304] There has been a movement to auction off custom-made pieces of fanworks for various charities.[305] The monetization seems especially central to fanartists, who will accept commissions and also sell their works as prints and other products.[306] The rise of Kickstarter has also made the monetization of fanworks easier, both for pieces of fanart[307] and for further transformative uses, like fanmade "movie" versions of popular pieces of fanfiction.[308] As fan activities become more commercialized, the communities seem to be relying on the lack of confusion with the original content creator to protect them.[309]

B. Fan Community Encouragement of Creative Activity

In the balance between the rights of the creator and the rights of the public to engage with creative works, fan communities have used trademark law to strengthen the public side of that balance.[310] Fan communities, attempting to narrow the copyright monopoly as much as possible, treat trademark law as a limiting doctrine.[311]

The bright line rules established by fan communities provide for greater clarity and predictability, thereby lowering transaction costs.[312] This has resulted in a general free-for-all of posting in which anyone can upload anything, confident that, by the standards of the fan communities, their work will be accepted on its own merits as

304. *See* Search results for "Cosplay Costume," ETSY, https://www.etsy.com/market/cosplay_costume (last visited Nov. 14, 2015).

305. *See, e.g.*, *A Fandom Auction to Help Haiti Recover*, LIVEJOURNAL, http://help-haiti.livejournal.com/ (last visited Nov. 14, 2015).

306. Some of this monetization is even taking place in partnership with the copyright holder. *See, e.g.*, Alan Wexelblat, *Makers, Fan Art, Making It Pay*, COPYFIGHT (Aug. 25, 2014), https://www.primaryopinion.com/articles/makers-fan-art-making-it-pay .

307. *See, e.g.*, Benjamin Henson, *Destiny Custom Fan-Art T-Shirts*, KICKSTARTER, https://www.kickstarter.com/projects/benjaminhenson/destiny-custom-fan-art-t-shirts (last visited Nov. 14, 2015).

308. *See* Naomi Javor, *A Finger Slip: Web Series*, KICKSTARTER, https://www.kickstarter.com/projects/1879289266/a-finger-slip-web-series (last visited Nov. 14, 2015).

309. *See* Artemis J. Potter, Comment to *Publishing Fanfictions for Profit?*, FANFICTION (Dec. 5, 2013), https://www.fanfiction.net/topic/2872/101834311/Publishing-Fanfictions-for-Profit.

310. Liu, *supra* note 16, at 1428.

311. *Id.*

312. *See* Lee, *supra* note 57, at 1485–86.

long as they comply with the delineated standards.[313] Therefore, the fan community's emphasis on commercialism provides a bright line rule of predictability, leading people to feel assured of their safety in asserting what they wish to say. This baseline encourages a freer (and more free-for-all) creative dialogue.[314]

Likewise, the emphasis on consumer confusion also provides greater clarity to the fan creator (it also does to the copyright holder).[315] As long as the fan creator is careful to provide proper credit, then the fan creator feels secure in his or her acceptance in the fan community.[316]

This environment leads to an ongoing tumble of transformative uses of the works of others.[317] Permission is often sought before such uses are made[318]—striking given the fact that most fan creators do not seek permission before engaging in their initial acts of creation.[319] However, permission also appears to be freely given, given the profusion of ongoing uses that exist.[320] It is clear that fans believe creativity to be a dialogue.[321] They ask permission frequently because, comfortable in the delineated rules of their community, they are confident that permission will be freely given and will be withheld only occasionally. When permission becomes costly to seek and uncertain to achieve, as it does in the more commercial "copymark" world, it acts as a stumbling block that discourages creativity.[322]

The overall effect of the fan community emphasis on trademark law in traditionally copyright dictated regimes is an advancement of the fan community goals: encouragement of creative collaboration between the creator and the consumer. Fan communities have used

313. *See, e.g.*, jennlynnfs, *supra* note 286; George deValier, *supra* note 291.
314. *See* Lee, *supra* note 57, at 1546.
315. Liu, *supra* note 16, at 1428.
316. *See, e.g.*, jennlynnfs, *supra* note 286; George deValier, *supra* note 291; *Blanket Permission*, *supra* note 291; REDDIT, http://www.reddit.com/r/fandomnatural/wiki/index (last visited Nov. 14, 2015).
317. *Blanket Permission*, *supra* note 291.
318. *See, e.g.*, jennlynnfs, *supra* note 286; George deValier, *supra* note 291.
319. *See* Lee, *supra* note 57, at 1462.
320. *Blanket Permission*, *supra* note 291.
321. *Id.*
322. *See* Liu, *supra* note 16, at 1418; Lee, *supra* note 57, at 1532.

their bright line rules influenced by trademark law to achieve the sort of flourishing creativity that is copyright's ultimate purpose.

III. USING THE INTERNET TO SAVE COPYRIGHT

The domain of copyright—books, movies, art, television—is part of the larger culture. It is inevitable that social norms cropup around these shared creative experiences, especially considering the muddle of legal and statutory norms around them.

In a world where copyright holders appear drawn to a "copymark" idea, the folk wisdom of fan communities should not be dismissed. Copyright is a "carefully crafted bargain."[323] "In theory, when an author obtains the protections of copyright law, society gets something in exchange, including the increased production, disclosure, and dissemination of creative works, the right to make fair use of the copyrighted works, and the right to independently create identical or substantially similar works."[324] This is an extremely delicate balance,[325] and the importation of trademark law concepts into copyright law tips it; meaning that "the public may be deprived of some of these bargained-for benefits."[326] Copyright holders understandably support this shifting of balance, because they benefit.[327] However, when that bargain is shifted too far and the public fails to benefit from copyright, then copyright protection itself becomes "unjustified."[328] In fact, if trademark law is imported too

323. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150–51 (1989), *quoted in* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33 (2003); *see also* Moffat, *supra* note 6, at 1475 (referring to "the copyright bargain" and warning against "disrupting" it); Burgunder, *supra* note 27, at 287; Foley, *supra* note 19, at 924.

324. Moffat, *supra* note 6, at 1516.

325. Lavigne, *supra* note 16, at 316.

326. Moffat, *supra* note 6, at 1516; *see also* Litman, *supra* note 22, at 433 ("We give out exclusive rights in return for, among other things, the dedication of the work to the public after a limited period of time has expired.").

327. Richter, *supra* note 231, at 472 ("The union of trademark, copyright, patent and other intellectual property protections tends to benefit corporation and owners because creators reap all the benefits . . . .").

328. Foley, *supra* note 19, at 925.

heavily into copyright law, it can be said that "the public receives nothing in exchange."[329]

This problem is illustrated by looking at the character of Santa Claus. Commentators have noted that it is difficult to pinpoint an "author" of the Santa Claus character; "[t]he name Santa Claus has been traced back as far as 1773, while settlers brought the Duge legend of Sinter Klaas to New York in the seventeenth century."[330] Therefore, these commentators say, there is no need to worry much about how long individual drawings of Santa Claus might be protected by copyright, because no one would ever be able to own the idea of Santa Claus.[331]

This only works, though, if Santa Claus drawings stay copyrighted instead of importing trademark law concepts. Given the state of the law today, it is not a difficult leap to imagine that Thomas Nast, whose nineteenth-century drawings of Santa Claus established much of the modern vision of him we all possess today,[332] might try to claim an expanded protection using trademark law instead of copyright. It might be laughable to imagine Santa Claus being owned by copyright,[333] but it is disturbingly plausible to imagine Santa Claus being owned under a "copymark" idea.

The attitude of fan communities can be understood as an attempt to recalibrate the balance. Permitting the bargain to remain upset without correction skews the ability of copyright to achieve its creativity-encouraging goals.[334] Fan communities, representing the "public" side of the copyright bargain, have instinctively found ways to tip the scales back to a more even distribution.[335] Therefore, there is normative value to be gleaned in their reliance on the bright line rules of trademark.

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329. *Id.* at 957.
330. Martin, *supra* note 36, at 269.
331. *Id.*
332. *Id.*
333. *Id.* at 268–69.
334. Moffat, *supra* note 6, at 1474.
335. Richter, *supra* note 231, at 472 ("[T]he union [of trademark, copyright, patent, and other intellectual property protections] should protect individuals and those who wish to parody and fairly use the [works] . . . .").

What fan communities are doing is reacting to developments: in the law, in the real world, and by copyright holders.[336] These reactions might be subconscious or instinctive, rather than deliberate, but they should be valued for exactly that reason.[337] Fan communities should not be accused of distorting copyright law in a vacuum.[338] Rather, this distortion should be seen as a correction of other distortions.[339] Without the fan communities' organic bright line rules, the delicate balance of copyright would shift too far in favor of the copyright holders and too far away from the promotion of progress.[340]

When copyright law looked more traditional rather than an iteration of trademark law, the defenses built into the statute may have made sense. However, as copyright law has continued to expand to resemble a hybrid of copyright law and trademark law, the traditional copyright defenses have begun to make less sense. Moreover, the resistance to bright line rules that initially seemed to encourage more speech has resulted in the opposite.

The fair use defense—copyright law's primary free speech protection—is messy and unpredictable.[341] Indeed, some courts have referred to it as "seem[ing] arbitrary."[342] It "leav[es] little guidance for users of copyrighted works on whether a particular use is fair."[343] Its reliance on the injunction as a remedy—especially the preliminary injunction[344]—results in extensive stifling of speech.[345] Many speakers will simply choose not to take the "gamble" of engaging in

336. *See generally* Jamar, *supra* note 128; Lee, *supra* note 57.
337. *See generally* Jamar, *supra* note 128; Lee, *supra* note 57.
338. *See* Lee, *supra* note 57, at 1483.
339. *See generally* Jamar, *supra* note 128; Lee, *supra* note 57.
340. Jamar, *supra* note 128, at 870.
341. Hill v. Whalen & Martell, Inc., 220 F. 359, 360 (S.D.N.Y. 1914) ("It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden."); Gardner, *supra* note 53; Goold, *supra* note 19, at 893; Lewis, *supra* note 19, at 268; Thomas Plotkin & Tarae Howell, *"Fair is Foul and Foul is Fair:" Have Insurers Loosened the Chokepoint of Copyright and Permitted Fair Use's Breathing Space in Documentary Films?*, 15 CONN. INS. L.J. 407, 408, 434 (2009); Richter, *supra* note 231, at 473 ("The fair use exception to the Copyright Act is vague as there is no clear standard to determine whether a use should be deemed fair or unfair.").
342. Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 102 F. Supp. 141, 148 (S.D. Cal. 1951).
343. Lee, *supra* note 57, at 1480.
344. NIMMER & NIMMER, *supra* note 145, § 14.06(A)(1)(b) (2015).
345. *See id.* § 14.06(C)(1)(c) (2015).

speech that might be found infringing based on vague and nebulous standards.[346] And those that do choose to speak may not have a chance to do so before a judge orders them to stop through an injunction.[347]

The power imbalance between many copyright holders and many members of fan communities also illustrates the necessity of bright line rules.[348] Many fan community members have little understanding of how the law works, so they have little understanding of how it can operate to protect them.[349] For instance, a Tumblr post explaining that the DMCA can operate to protect artists whose work is stolen was greeted with delighted surprise by Tumblr users who evidently did not know about the possibility.[350] But it also led to further confusion, as Tumblr users portrayed a misunderstanding of what to do with this information: The Tumblr DMCA page is used to address copyright infringement involving other websites, not "re-posters," but there appeared to be confusion on this front.[351]

This situation is exacerbated where precedent is unclear and legal status is uncertain, because copyright holders often exploit this uncertainty to assert more than they are entitled to, hoping for acquiescence on the part of the would-be speaker. The *Klinger* case detailed earlier in this Article makes clear that Klinger thought he had the right to use the public domain aspects of the Sherlock Holmes characters.[352] However, when confronted by the Conan Doyle Estate, the publishing company capitulated and paid instead of

346. Richter, *supra* note 231, at 452; *see also* Bunker & Calvert, *supra* note 250, at 126; Lee, *supra* note 57, at 1480 (characterizing the fair use defense as "act[ing] almost as a trap"); Monika Isia Jasiewicz, Note, *"A Dangerous Undertaking": The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 YALE J.L. & HUMAN. 143, 170 (2014) ("Commentators have argued . . . that the doctrine's lack of clarity will necessarily result in chilling effects.").

347. NIMMER & NIMMER, *supra* note 145,§ 14.06(A)(1)(a) (2015).

348. Jamar, *supra* note 128, at 856–57 ("[U]ser-creators need to rely upon the vagaries of fair use or the abstractions of the idea/expression dichotomy concept. A better, brighter line should be developed . . . .").

349. *See, e.g.*, jolly-godflies, *If Your Art Gets Stolen*, TUMBLR, http://smargo64.tumblr.com/post/109659843015/if-your-art-gets-stolen (last visited Nov. 14, 2015).

350. *Id.* (linking to *DMCA Copyright Notifications*, TUMBLR, http://www.tumblr.com/dmca (last visited Nov. 14, 2015)).

351. *Id.*

352. Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 497 (7th Cir. 2014).

fighting,[353] which perpetuated further years of confusion on the copyrighted status of Holmes and led to years of work that was in the public domain being treated as if it was not.[354] The resulting limit to the public domain is a societal cost that copyright does not support.[355]

Even if one is confident that one's speech will not be infringing based on fair use, the lack of clear standards makes the probability that a copyright holder will still complain about such a use high. For instance, a one-man show entitled "My Princess Bride" received a cease-and-desist letter apparently alleging copyright infringement of the movie *The Princess Bride*, the book *The Princess Bride*, or both.[356] This situation was distressing to the originators of the "My Princess Bride" show because they had done "some research to ensure they weren't infringing on copyright, and they were . . . 'comfortable and confident it was fair use . . . .'"[357] Nevertheless, in the face of the cease and desist letter, the show's creators canceled it, in part based on "caution and prudence," even though they continued to believe the show was permissible under fair use, but also because many venues refused to mount the show with its cloud of copyright infringement allegations.[358]

Given the unpredictability of fair use cases, it would be difficult to deter such actions by copyright holders based on sanctions. If there is a good faith basis to believe in the action—and the lack of clear-cut rules makes such a basis likely—then the conduct is acceptable.[359] The fair use defense is usually available in situations where its expense is prohibitive:

353. *Id.*; *see also* Jasiewicz, *supra* note 346, at 170 ("The trend toward settlement . . . seems to indicate that many artists are not willing to take the risk of litigation when there is so much uncertainty inherent in the law."); Elina Lae, *Mashups—A Protected Form of Appropriation Art or a Blatant Copyright Infringement?*, 12 VA. SPORTS & ENT. L.J. 31, 43 (2012); E. Kenly Ames, Note, *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1484 (1993).

354. *Klinger*, 755 F.3d at 497–98.

355. Lavigne, *supra* note 16, at 325, 359.

356. Stephanie Merry, *Inconceivable: 'My Princess Bride' Halted After Threat of Lawsuit*, THE WASHINGTON POST: GOING OUT GUIDE (Dec. 6, 2013), http://www.washingtonpost.com/blogs/going-out-guide/wp/2013/12/06/inconceivable-my-princess-bride-halted-after-threat-of-lawsuit.

357. *Id.*

358. *Id.*

359. *See* FED. R. CIV. P. 11.

> [T]he fair use defense is available only after the defendant begins to defend himself in court, after he, as a possibly innocent infringer, is pressured to spend money on a lawyer. This of course makes the fair use exception virtually untenable to well-intentioned individuals who happen to not be wealthy.[360]

As a result, the current state of the law incentivizes copyright holders to attack all uses of their works, with little downside and tremendous upside, exploiting both the power imbalance and the convenient lack of bright line rules.[361]

Dismissing these issues as the inevitable consequences of copyright law may have made sense in a world where copyright looks more like traditional copyright. But in a world where the copyright holders want copyright to look more like trademark, the fan community importation of trademark law concepts to check this expansion seems necessary.

If copyright holders wish to expand their monopoly in a way similar to trademark, then the limitations that have developed in trademark law to check trademark monopolies should likewise be imported.[362] Importing such limitations will recalibrate the copyright balance from its current lopsided state. If copyright's built-in limitations have ceased to be effective because of the rise of the hybrid "copymark" idea,[363] then further limitations must be found, and turning to trademark law makes sense. For instance, the trademark law practice of disclaimers should be allowed to protect fan communities' copyrighted activities[364]—just as fan communities

360. Richter, *supra* note 231, at 469; *see also* Goold, *supra* note 19, at 893.

361. *See* Arewa, *supra* note 16, at 293; Jamar, *supra* note 128, at 844–45; *see also* Gardner, *supra* note 53; Techdirt, *Getty Threatens the Wrong IP Law Firm in Its Copyright Trolling Efforts*, ABOVE THE LAW (Aug. 22, 2014, 10:26 AM), http://abovethelaw.com/2014/08/getty-threatens-the-wrong-ip-law-firm-in-its-copyright-trolling-efforts.

362. Saval, *supra* note 34, at 423 (noting that trademark law does contain doctrines that operate similar to copyright law's fair use doctrines in protecting "unflattering" free speech); Liu, *supra* note 16, at 1430, 1439.

363. Litman, *supra* note 22, at 434, 435 ("The system incorporates limitations because its purpose is to benefit *all of us* in a variety of creativity-enhancing ways.").

364. Liu, *supra* note 16, at 1433.

hope that they do, and just as some copyright holders themselves have encouraged.[365] The fan community emphasis on non-commercialism fits nicely into the "non-commercial" exemptions built into trademark law.[366]

It makes sense that the fan communities rely on bright line rules about commercialism and consumer confusion. As discussed, the result of the resistance to bright line rules in traditional copyright analyses can actually lead to a discouragement of speech.[367] There are no legal precedents concerning traditional fan activities, which provides fan communities with even less guidance than other speakers.[368] The fan community introduction of greater predictability through its reliance on trademark law concepts leads to the encouragement of more speech, as the fan community experience has proven.[369]

This increased clarity also permits fewer latent aesthetic judgments of the artistic merit of the work in question. Judges in trademark cases are rarely called upon to determine whether the trademark in question is a good one that ought to be allowed to exist, as they regularly are called upon to do in copyright cases with regard to creative works.[370]

Fan community norms do not endorse a radical "free commons" idea where no one has ownership and no one will be able to make money. Fan communities have a concept of both ownership and monetization, respect both concepts, and have even begun to engage in both.

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365. Lee, *supra* note 57, at 1532.

366. Liu, *supra* note 16, at 1439.

367. Lee, *supra* note 57, at 1510 ("[T]here is no easy way to draw the line between what is permissible copying and what is not. This line may be even harder to draw in the noncommercial context . . . ."); Liu, *supra* note 16, at 1418; Richter, *supra* note 231, at 477.

368. *See* Lee, *supra* note 57, at 1531.

369. *See generally* Jamar, *supra* note 128.

370. *See, e.g.*, Arewa, *supra* note 16, at 312. Consumer surveys, which dominate trademark cases, do the work for the judge in trademark cases, permitting the public itself to have a say in where trademark law protection lies. By contrast, consumer surveys play almost no role in copyright cases. Robert H. Thornburg, *Trademark Surveys: Development of Computer-Based Survey Methods*, 4 J. MARSHALL REV. INTELL. PROP. L. 91, 91 (2004).

For instance, people who offer downloads of other people's works seldom charge for it.[371] When fans do monetize their works, they seem to believe that they have added something of value to the work that permits them to charge for it—and the people who buy seem to agree. Maybe it is time to recognize that value explicitly, rather than devaluing it the way current copyright law does. An acknowledgement of the creep of trademark into copyright and the rise of the hybrid "copymark" idea would be the first step to legitimizing wider, more diverse forms of creativity.

CONCLUSION

Copyright holders, in recognition of the overall trajectory of their creative industries and how copyrights are being used, have succumbed to the temptation to import trademark law ideas into the copyright law context. Courts have also yielded to this temptation, leading to an overall blurring of the line between copyright and trademark that looks more similar to "copymark." Where courts have tried to clarify copyright and trademark again, they have tended to only further muddy the waters between them.

Copyright law seeks to balance the rights of the creator against the rights of the public to engage with the creative work. Trademark law, however, merely seeks to protect the marketplace. The importation of trademark ideals into copyright runs the risk of stifling free speech and strangling the public domain, tipping the copyright balance. The judicial resistance to bright line rules in the copyright arena has only resulted in aiding this lopsided balance.

To the extent that we still believe the copyright balance is one we wish to maintain, the solution need not reinvent the wheel. Rather, we can look to fan communities for the ways in which they have sought to check the expanding copyright monopoly and protect the balance. Fan community practices promote the traditional goals of copyright, encouraging a flourishing creative community. Their use

371. *See, e.g.*, *Jury Orders Student to Pay $675,000 for Illegally Downloading Music*, ABC NEWS, http://abcnews.go.com/Business/story?id=8226751 (last visited Nov. 14, 2015).

of trademark defenses to do this, in a world where copyright has begun to look more like trademark, should be supported. After all, if speech would not be considered harmful in a trademark law context, surely it should not be stifled in a copyright law context. The promotion of creative progress at least requires that. In this way, the Internet can save copyright.