The Role of Copyright in Online Creative Communities: Law, Norms, and Policy

danah boyd — It's Complicated

STACY HORN — CYBERVILLE

Baym — TUNE IN, LOG ON

LIFE ON THE SCREEN — SHERRY TURKLE

RHEINGOLD — THE VIRTUAL COMMUNITY

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COMMUNITY BUILDING ON THE WEB

RECLAIMING FAIR USE — Patricia Aufderheide and Peter Jaszi

REMIX — LAWRENCE LESSIG

WIRED SHUT — GILLESPIE

COHEN LOREN GERVAIS O'ROURKE — COPYRIGHT IN A GLOBAL INFORMATION ECONOMY

A Dissertation by Casey Fiesler

www.caseyfiesler.com

THE ROLE OF COPYRIGHT IN ONLINE CREATIVE COMMUNITIES: LAW, NORMS, AND POLICY

A Dissertation
Presented to
The Academic Faculty

by

Casey Fiesler

In Partial Fulfillment
of the Requirements for the Degree
PhD in Human-Centered Computing in the
School of Interactive Computing

Georgia Institute of Technology
August 2015

THE ROLE OF COPYRIGHT IN ONLINE CREATIVE

COMMUNITIES: LAW, NORMS, AND POLICY

Approved by:

Dr. Amy Bruckman, Advisor
School of Interactive Computing
Georgia Institute of Technology

Dr. Annie Antón
School of Interactive Computing
Georgia Institute of Technology

Dr. Eric Gilbert
School of Interactive Computing
Georgia Institute of Technology

Dr. Cliff Lampe
School of Information
University of Michigan

Rebecca Tushnet, J.D.
Georgetown University Law Center
Georgetown University

Date Approved: June 15, 2015

For the artists, creators, mixers, and poachers

ACKNOWLEDGEMENTS

This dissertation is the culmination of a long journey that could not have been possible without the support and encouragement of many people along the way. Though I cannot name everyone here, to all of my friends, family, colleagues, and mentors who have touched my life during the last decade, you have contributed and I am grateful.

First and foremost, this is a journey that began and ends at Georgia Tech, where I have spent eleven non-consecutive years of my life and have found every one of them rewarding. The students and faculty in the School of Interactive Computing have been a constant source of inspiration and support, particularly my ELC PhD comrades: Jill Dimond, Betsy DiSalvo, Michaelanne Dye, Joe Gonzales, Kurt Luther, and Sarita Yardi. Also, no one completes a dissertation alone, and I could not have done this without the research assistance of fellow students: Jessica Feuston, Shannon Morrison, Gabriel Perez, Bao Vu, and Titus Woo. My dissertation committee, Annie Antón, Eric Gilbert, Cliff Lampe, and Rebecca Tushnet, were invaluable sounding boards and mentors, and made my work stronger. I am also grateful for the generous financial support of a grant from the National Science Foundation. I feel deeply fortunate to have had the opportunity and flexibility to pursue research about which I am passionate.

I would also like to thank my research participants who took the time to speak passionately to me about the art that they love. Every fan creator and remixer that I have interacted with for many years served as an inspiration, and set me on this path in the first place. I am grateful as well to Rebecca and other members of the OTW Legal Committee for encouragement and legal sanity checks.

I cannot say enough about the impact that my advisor Amy Bruckman has had not only on my work but also on my life. Had she not seen something in me when I showed up at her door as a 21-year-old new MS student, my career path might have been very different. Her brilliant and patient mentorship allowed me to follow my passion, and she exemplifies everything I hope to be as an academic.

Finally, the deepest well of my gratitude goes to my father, Steve Fiesler. There are not enough words for the support he has given me throughout my (very *long*) years as a student. And though my mother could not see the culmination of all this hard work, I know how proud and happy she would be. Thank you all, so much.

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LIST OF ABBREVIATIONS

CSCW	Computer-Supported Cooperative Work
DMCA	Digital Millennium Copyright Act
EFF	Electronic Frontier Foundation
EULA	End-User License Agreement
HCC	Human-Centered Computing
HCI	Human-Computer Interaction
OTW	Organization for Transformative Works
TOS	Terms of Service

LIST OF LEGAL AUTHORITIES

STATUTES

Copyright Act of 1976	17 U.S.C. §§ 101-810
Digital Millennium Copyright Act	17 U.S.C. §§ 512, 1201–1205, 1301–1332[1]
Fair Use Clause	17 U.S.C. § 107

CASES

Authors Guild v. Google	770 F.Supp.2d 666 (S.D.N.Y. 2011)
Cambridge Univ. Press v. Patton	2nd Cir. 2014
Campbell v. Acuff-Rose	510 U.S. 569 (1994)
Capitol Records v. Vimeo	S.D.N.Y. 2013
Cariou v. Prince	714 F. 3d 694 (2d Cir. 2013)
Folsom v. Marsh	9. F. Cas. 342 (C.C.D. Mass. 1841)
Lenz v. Universal Music Corp.	572 F. Supp. 2d 1150 (N.D. Cal. 2008)
Perfect 10 v. Google	416 F. Supp. 2d 828 (C.D. Cal. 2006)
Sony v. Universal Studios	464 U.S. 417 (1984)
Suntrust v. Houghton Mifflin Co.	252 F. 3d 1165 (11th Cir. 2001)
Warner Bros. & Rowling v. RDR Books	575 F.Supp.2d 513 (S.D.N.Y 2008)
Williams & Wilkins Co. v. United States	487 F.2d 1345 (Ct. Cl. 1973)

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[1] The DMCA also added 28 U.S.C. § 4001 and amended 17 U.S.C. §§ 101, 104, 104A, 108, 112, 114, 117, 701.

SUMMARY

Many sources of rules govern our interactions with technology and our behavior online—law, ethical guidelines, community norms, website policies—and they do not always agree. This is particularly true in the context of content production because copyright law represents a collection of complex policies that often do not always account for the ways that people use and re-use digital media.

Can you write a story about Harry Potter? Can you sell his portrait on Etsy? Share it on Facebook? Is it permissible to use part of a song in a video you post on YouTube? How much of the song? Intellectual property, once mostly the domain of lawyers and corporations, is now relevant to anyone with an Internet connection and a "share" button. Within these legal gray areas, people make decisions every day about what is allowed, often negotiating multiple sources of rules. How do content creators make decisions about what they can and cannot do when faced with unclear rules, and how does the law (and perceptions of the law) impact technology use, creativity, and online interaction? In the course of this research, I have examined this complex relationship between law, site policy, norms, and technology, and extrapolated a set of design and policy recommendations for online community designers to help better support current practices among content creators.

In examining this space I have combined large-scale content analysis of public conversations about copyright with in-depth interviews in order to study the knowledge, attitudes, and norms about copyright among remixers. Findings focus on the challenges encountered by content creators, including evidence of chilling effects—when they

choose not to share or not to use certain technologies for fear of getting into trouble. I also conducted a study of copyright licenses in Terms of Service, examining the content and accessibility of copyright policies and how well users understand them. My work reveals that there is a pervasive usability problem related to law and policy information. Both copyright law and online policies are confusing, and misinformation rapidly proliferates in these communities without any signals of expertise. There is also evidence of strong social norms about content ownership that vary by community of creators. Community matters, and policy should not be one-size-fits-all.

This dissertation provides a better understanding of how content creators engage with copyright and how norms organically form within communities of creators. It is my hope that this knowledge will help online community designers decide how to best educate users and police their copyright decisions, while avoiding potential chilling effects.

CHAPTER 1

INTRODUCTION

We shouldn't have to be scared of doing our art.
– remixer[2]

You could get in a lot of trouble. That's how the law works.
– YouTube's Copyright School

In Lawrence Lessig's book *Code*, he explains the "pathetic dot" theory of regulation by asking what forces regulate someone's decision about whether or not to smoke (Lessig, 2006). One force is law: are you in an airport where it is illegal to smoke? Another is norms: will the people around you shame you for smoking? Another is markets: what is the cost of cigarettes? Finally, there is architecture: the characteristics of your cigarette, such as whether it is smokeless.
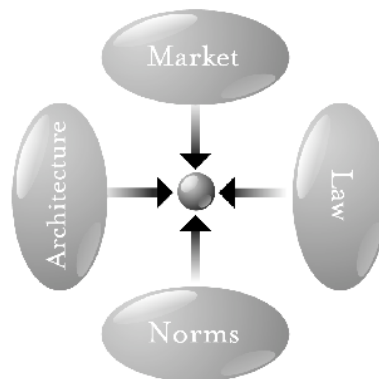
Figure 1 An illustration of the pathetic dot theory, from Lessig's *Code* (CC-BY-SA 2.5)

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[2] This quote comes from interview participant "Sharon," in Chapter 3.

What if the "pathetic dot" in this scenario rather than being a smoker was someone being creative online? What forces regulate decisions about how they can and cannot create and share their work? Architecture is a big part of the answer. Does the website itself support that kind of content? Is it usable? Does it have the ability to reach the audience you are trying to reach? Market forces are relevant as well. Do you have the resources to create? Does sharing cost anything? As for norms, the pertinent question is whether the community will approve of the content you are sharing. And finally, there is law: is the content itself legal, or are there any legal conditions or constraints to sharing?

In human-centered computing (HCC), we recognize that technology and the people using it operate in a world of complex forces such as these. We attempt to reconcile them by understanding the entire socio-technical system in effect when we design, such as by considering the cultural or political context of technology production and consumption or the ways in which technologies are socially constructed (Bijker & Meikle, 1996; Du Gay, Hall, Janes, Mackay, & Negus, 1997; Winner, 1986). However, most often the answer to "can I do this?" to a technologist is one of infrastructure rather than law. The role of law within socio-technical systems is important yet under-examined, and this is a starting point for the work described in this dissertation.

At the heart of my research lies an additional complexity to Lessig's pathetic dot theory, which is that these forces of regulation—law, norms, markets, and architecture—do not work in isolation. Consider our online content creator; she has created a remix video and wants to share it on YouTube. What factors influence her decision? There is the law, which has rules about how she is permitted to re-use copyrighted content. There is YouTube's copyright policy, which tracks somewhat but not entirely to the law.

YouTube's architecture is also important because of its automated content ID system,[3] a computational method of enforcing law and policy. There are market considerations as well, since taking down a video for copyright violations is ultimately the decision of the copyright owner, who could choose to monetize it instead.[4] Norms also come into play; how does the community feel about her video? Their attitudes about remix might be influenced by legal rules but could also diverge significantly. The dot here, or the user, is forced to make decisions within a complex system of rules that at times confuse and conflict. Because of this complexity, along with close ties to technology and an increasingly high level of engagement with the law by ordinary Internet users, this work looks to the specific domain of copyright to examine the role of law in socio-technical systems.

Traditionally, copyright was not an area of the law that held much relevance for the majority of people. However, the amount of agency that people have with technology has changed drastically, and so has the way that consumers interact with copyrighted material. Copyright is now relevant to anyone with an Internet connection and a "share" button. We have seen a significant cultural shift toward using previously existing content in new ways (Lessig, 2008). Consumers are not only producers but remixers—that is, not just creating from scratch but also making use of existing content. This is thanks to the digitization of nearly all media which makes manipulating it possible for anyone with

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[3] This is the system by which YouTube can automatically detect possible copyright infringements. Videos are scanned against a database of material submitted by copyright owners.
[4] Copyright owners have four options of actions to take if their copyrighted material is identified in a YouTube video: mute the audio, block the video from view, monetize the video by running ads, or track the video's viewership statistics. https://support.google.com/youtube/answer/2797370?hl=en

common computer software, and to the wide dissemination of amateur content made possible by the Internet. However, just because the law is more relevant to more people does not mean it is more easily understandable. Technological advances have only exacerbated the same confusions that have always existed in applications of copyright law.

Therefore, along with changes in behavior and creativity has come a change in the understanding and knowledge of applicable legal doctrines, and these understandings do not always track to the law as written. Though this is accounted for in part by ignorance or misunderstanding, it is also true that the law *as constructed* can become something else entirely. This is similar to the way that Janice Radway describes the construction of a text. A novel as read is constructed as a form of behavior in the context of a particular audience, bringing in their previously existing needs and interpretations (Radway, 1984). Similarly, when there is not an obvious or black-and-white meaning to a law, individuals and communities construct meaning based on their experiences. In situations in which the law is unclear or largely unenforced, these community constructions become social norms that may even carry more weight than written law (Ellickson, 1986; Ostrom, 2000). In these communities, the interplay between multiple sources of rules becomes complex.

A good example of this complexity is in online communities of content creation (like our hypothetical YouTube remixer), where creators struggle with the legally gray

area of how they are permitted to use pre-existing content. Fair use,[5] the legal doctrine that allows use of copyrighted content under certain conditions, is arguably one of the most confusing aspects of copyright law. It is also one of the most widely applicable due to the proliferation of online content creation, and it serves as an illustration of the divide between the law as written and the law as practiced. The concept of fair use has been the subject of legal and scholarly debate for over a hundred years. However, it is only in recent years that the concept has garnered substantial attention among the general public.

Is it legal to write an original story about Harry Potter? What about telling a new story using video clips from movies? What about an original drawing of the characters as you imagine them? Is it okay to use a segment of a song in your animation? Does it matter how long the segment is? If I remix commercial content, may I sell my creation? What is the boundary between creative reuse and piracy? While these questions were primarily of interest only to an elite group of corporate copyright owners and intellectual property attorneys, today they affect a large number of ordinary Internet users as well as the designers of online sites those users frequent. So how do non-lawyers make decisions about what they can and cannot do in the context of complex copyright matters?

In most online communities, copyright policies and explanations of applicable laws are hidden within rarely read Terms of Service agreements. Just as confusing if not more so than actual legal rules, online terms and conditions are notoriously long and incomprehensible (Jensen & Potts, 2004; Luger, Moran, & Rodden, 2013; Mcdonald & Cranor, 2008). Moreover, in the rare instances when sites make efforts to present

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[5] Chapter 2 includes a detailed explanation of fair use, and Chapter 3 includes more information about how the individual components function in practice.

copyright policies in understandable ways, it is common for these policies to downplay

fair use and favor the rights of copyright owners over remixers. For example, YouTube's

"Copyright School" is an animated explanation of user responsibilities, essentially a

guide for how not to get in trouble.[6] But what about user *rights*? The video presents any

content that is not 100% original as bad, and fair use as a scary, impenetrable concept,

suggesting that the viewer consult a lawyer (see Figure 2). It also notes that if you judge

incorrectly: "You would get in a lot of trouble. That's how the law works."

Mash-ups or re-uses of content may also require permission from the original copyright owner, depending on whether or not the use is a fair use. [Rapid quoted text of fair use statute] If you are uncertain as to whether a specific use qualifies as fair use **you should consult a qualified copyright attorney**…. If someone takes down your video as a mistake, or as a result of misidentification of the material to be removed, there is a counter-notification process for that. You can send YouTube a notice that there was an error. But be careful – if you misuse the process **you could end up in court.** And then **you would get in a lot of trouble. That's how the law works.**

Figure 2 Images and a quote from YouTube's "Copyright School" video

Rather than our hypothetical remixer caught in Lessig's forces of regulation,

consider a real example: Jonathan McIntosh, a "pop culture hacker" who has garnered

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[6] The "Copyright School" video has over 5 million views as of May 2015 (and unfortunately has comments disabled). http://www.youtube.com/watch?v=InzDjH1-9Ns

attention for several high-profile video remixes, including mashing up Donald Duck with

Glenn Beck[7] and remixing the Google Glass promotional video to include ads.[8] However,

McIntosh got his start with a clever feminist mash-up of *Buffy the Vampire Slayer* and

Twilight. Posted to YouTube in 2009,[9] the video has over 3.5 million views and was

featured in a number of media articles and nominated for a Webby award. It has been

used as a teaching tool in classrooms to explore issues of gender, remix, and even

copyright (Burwell, 2013). It also been used as an example of the value of remix in court

cases,[10] and McIntosh spoke about the video as an example of fair use during DMCA

exemption hearings before the Register of Copyrights, who mentions it specifically in the

2012 DMCA Rulemaking Recommendation (Pallante, 2012). It was also flagged on

YouTube for copyright infringement in 2012 (by Lionsgate, who own the rights to the

Twilight film). The road to having the video reinstated was an arduous one that included

two separate takedowns, assistance from a non-profit legal center (including a 1,000-

word legal argument for why the video was fair use of Lionsgate's material), and finally a

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[7] "Donald Duck Meets Glenn Beck in Right Wing Radio Duck"
https://www.youtube.com/watch?v=HfuwNU0jsk0

[8] "ADmented Reality – Google Glass Remixed with Google Ads"
https://www.youtube.com/watch?v=_mRF0rBXIeg

[9] "Buffy vs Edward: Twilight Remixed" https://www.youtube.com/watch?v=RZwM3GvaTRM

[10] Brief of Amici Curiae for Capitol Records v. Video (United States Court of Appeals for the 2nd Circuit) from the Electronic Frontier Foundation, Organization for Transformative Works, Center for Democracy and Technology, Public Knowledge, and New Media Rights, in support of defendants (July 30, 2014)

slew of media attention (Collins, 2014).[11] Only after the public backlash did Lionsgate retract the claim so that YouTube could reinstate the video, three months later.

In writing about this case, Collins notes that the story of McIntosh and Lionsgate "reveals a content owner at ease with dismissing fair use and denying permission unless it is permitted to have some economic stake" (Collins, 2014). In other words, there is a clear power imbalance, which is exacerbated by technological infrastructure; YouTube's content ID system, with the inability to differentiate between fair use and infringement, implies that every remixer is guilty until proven innocent. The bigger problem here is that for every rare creator like McIntosh who has a great deal of knowledge about fair use and the motivation to fight (and lawyer acquaintances to help him), how many others have allowed their work to be removed because they either trusted that this system is correct or because they were unwilling to risk (as YouTube's Copyright School emphasizes) getting into trouble? In the course of this research, I interviewed over 30 remixers, and not a single person I spoke to had ever fought a copyright claim made against them. This points to the existence of *chilling effects,* when someone chooses not to do something that they should be able to do, for fear of legal trouble.

We see tales of legal confusion and potential chilling effects across all different types of media and online communities. Dealing with these issues can be just as frustrating for online community designers and managers as it is for the users. Even if a remixer is fairly confident that they are on the right side of the law, these types of cases

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[11] McIntosh also detailed each step of this process on his blog. "Buffy vs Edward Remix Unfairly Removed by Lionsgate" (January 9, 2013) http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate

are rarely unambiguous. If judges have difficulty making decisions about what side of the fair use divide a particular case might fall on, then computer scientists and interaction designers are going to have even more difficulty. This is especially true for smaller companies without in-house lawyers.

Sometimes users have their own ways of dealing with these ambiguities. As creators negotiate multiple sources of rules, including the letter of the law, website policies, community norms, and ethical standards, it is unsurprising that copyright law is a frequent topic of conversation in their online communities. As Lessig notes, norms also play an important role in regulating behavior (Lessig, 2006), and in these legally gray areas, social norms can thrive (Ellickson, 1986). DeviantArt's forums are filled with artists pointing out copyright infringements and debating their own community norms for the line between copying and remixing. In the fan fiction community, where fans write stories based on the characters and worlds in existing content such as television shows or books, hugely detailed cases have been laid out against writers accused of plagiarism, or of commercializing their work (Busse & Farley, 2013; Fiesler, 2008).

In these situations, nuanced social norms regarding copyright often dictate users' actions as much as the law or any official community policy might (likely more, considering how few users tend to read Terms of Service). Because the law can be confusing (or even impenetrable), these norms that evolve do not necessarily track exactly to the law, but represent shared understandings and constructions, as well as ethical intuitions. The result is a complex example of the interplay between norms, law, and the technological and social architecture in which these creators are interacting.

1.1 Research Framing and Contributions

At one level, this dissertation is an examination of these complex interactions between sources of regulation and rules. From the perspective of an online content creator as Lessig's "pathetic dot," I have taken a deep dive into how law, norms, and technology interact. As a result, this dissertation provides insight both into the widespread activity of people being creative online as well as into broader questions of the role of law in socio-technical systems.

Therefore, in addition to offering insight into the specific domain of copyright, this dissertation has broader implications within the field of HCC. The socio-technical system of the Internet is shaped by both the law as written and the law as understood by software designers and end users. The professionals who contribute to shaping this space are strangely disconnected in their knowledge and methods. Legal scholars do not commonly use empirical approaches to understanding human behavior (Heise, 1999). Designers of social computing systems rarely have legal training. Policy makers often know little about software design. Where does this leave users?

It is true both that changes in technology can affect how people interpret the law and that changes in the law can affect how people use technology. A single piece of legislation—such as the Digital Millennium Copyright Act in criminalizing breaking DRM protection measures—can have a huge impact on the context in which ordinary users engage with technology. However, the role of law in socio-technical systems is not as frequently studied as other dimensions. Though this work focuses on a subset of the law (copyright) and a subset of technology users (online content creators), there are at its

heart larger research questions about the complex interaction between technology, norms, and law.

Within social computing, this work contributes to deeper understandings of both this specific type of user interaction and how social norms function in online communities. It also provides insight for online community designers thinking about copyright issues. Moreover, whereas "understanding users" has an obvious relevance for technology designers, it is important as well for *public policy* designers, and as the law continues to evolve with technological advancement, there is the possibility for working within constructed norms rather than against them.

To briefly position myself within this research, I am a copyright expert but also an advocate for amateur creators' rights. I have assisted in drafting DMCA exemption proposals and have worked with the legal committee of the Organization for Transformative Works and with Creative Commons. Though one of the complexities of this space is that of multiple stakeholders (government, corporations, professional artists, amateur artists, content consumers), the overarching perspective of this dissertation is essentially a user-centered one. My hope is that by focusing on the experiences of individual content creators, I can provide insight that will be valuable to lawmakers, copyright owners, and, most importantly, technology and online community designers.

1.2 Research Questions

This dissertation involves understanding users, how they engage with copyrighted content online, and how they interact with each other in environments of creative sharing. This has involved an examination of an entire system of law, norms, ethics, markets,

policies, and technology. Based in part on exploratory work described in Chapter 3, the research questions that I set about answering are:

- R1: In online creative spaces, what is the relationship between copyright law as written, policy as enacted by online communities, and social norms?

- R2: How does the law (and perceptions of the law) impact technology use, creativity, and online interactions?

- R3: How do content creators make decisions about what they can and can't do when faced with unclear rules?

- R4: What changes to policies or design/technical features of online communities might better support current practices among online content creators?

In order to answer these questions, I conducted four separate research studies, using each to iterate on the open questions from previous work. I used complementary qualitative and quantitative methods in order to examine the same problem from different vantage points. This research is bookended by in-depth interviews: first, a highly open-ended interview study to get a better understanding of the space and the interesting research paths, and finally, following large-scale analysis of trace data and surveys, interviews guided by the remaining open questions that could only be answered by direct engagement with creators.

Table 1 Overview of research in the course of this dissertation, as of June 2015

Study Method	Study Details	Publications	Dissertation Chapter
Exploratory interviews	In-depth interviews with 11 remixers about their understandings of fair use	(Fiesler & Bruckman, 2014b; Fiesler, 2013)	**3**: Remix Artists and Fair Use
Copyright forum analysis	Large-scale content analysis of public conversations about copyright in 8 different online communities	(Fiesler, Feuston, & Bruckman, 2014, 2015)	**4**: Copyright Problems in Online Communities
TOS content analysis	Analysis of the copyright licensing terms from 30 content creation websites	(Fiesler & Bruckman, 2014a)	**5**: Copyright Policies for Online Content Creation
TOS perceptions survey	Survey of 400+ Mechanical Turk users about their opinions and perceptions of the licensing terms for the websites they use	Under review	**5**: Copyright Policies for Online Content Creation
Final interviews	In-depth interviews with 20 online content creators, focusing on social and technology use	In process	**6**: Copyright Norms, Formation, and Enforcement

My analysis throughout this work focused on discerning norms, knowledge, and attitudes about copyright that existed in these online creative communities, as well as how they interact with the law as written and as enacted by community policies.

1.3 Overview of Dissertation

This document has five chapters, beginning with this chapter, the introduction. In Chapter 2, I discuss some of the applicable law to this research (including fair use and the Digital Millennium Copyright Act), and describe related work in the area of online communities, social norms, and policy. Chapters 3, 4, 5, and 6 detail the methods and results of the four research studies that make up this work. Chapter 3 describes an interview study of remixers, focusing on their understandings of fair use. Chapter 4 describes a larger-scale content analysis study of online creative communities, focusing on the problems creators face related to copyright. Chapter 5 describes a study of

copyright licensing terms for user-generated content sites, including analysis of the reality of those terms as well as survey work revealing users' knowledge and perceptions. Chapter 6 describes my final interview study, detailing the social norms about copyright that exist in a subset of remix communities, as well as how social norms are formed and enforced. Chapter 7 concludes with implications and recommendations for online community designers and maintainers.

CHAPTER 2

BACKGROUND AND RELATED WORK

At the heart of this work are the rules that people follow as they make decisions about copyright and re-use: law, site policy, and norms. This chapter will convey some background on each of these, as well as some notes on how they fit together. Finally, I will cover relevant past work specific to copyright and remix in online communities.

2.1 Law

In considering the impact of legal rules within a socio-technical system, it is necessary to have an understanding of what those rules are within the domain being explored. There are a number of areas of the law that touch online content creators—privacy, freedom of expression, or information security to name a few—but the most relevant for this work is intellectual property. Though concepts such as trademark and publicity rights come into play, for the most part my research has dealt with copyright. Additionally, though the online communities discussed are global spaces, for the most part I will be referring to U.S. law for the sake of simplicity, except where the law in other countries is specifically relevant. However, many of the core concepts discussed are largely universal due to the Berne Convention.[12]

Briefly, copyright is the legal concept that gives the creator of an original work—such as an essay, song, or painting—some exclusive rights over that work for a limited

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[12] The Berne Convention (created in 1886) is an international agreement that governs copyright, requiring signed countries to recognize the copyrights of authors in the other countries. It contains some universal provisions, such as a minimum copyright term and allowances for fair use. As of 2013, 167 states are parties to this agreement. The United States signed on in 1989.

time.[13] In the United States, there are six basic rights protected by copyright: (1) to *reproduce* (copy); (2) to prepare *derivative works*; (3) to *distribute* copies; (4) to *publicly perform* the work; (5) to *publicly display* the work; and (6) to *digitally transmit* the work (if a sound recording) (17 U.S.C. § 106). A copyright infringement is when anyone besides the copyright holder violates any of these rights.

2.1.1 Fair Use

Whereas questions of copyright online in contexts such as digital piracy are often quite black and white, the use of previously existing content in new creations is a more gray area. Most people are aware that there must be *some* mechanism in the law that allows for use of copyrighted content—otherwise we would not be able to quote from books in book reviews, or parody film and music on *Saturday Night Live*. Similar concepts exist all over the world, and in the United States, this legal doctrine is known as *fair use*. Behavior, knowledge, and norms surrounding use of previously existing material in communities of online content creation all have this law at their heart—often without the creators even realizing that it exists.

Fair use also happens to be one of the most confusing aspects of copyright law,[14] as well as one of the most widely applicable due to the proliferation of online content creation. Therefore, it serves as a good example of the differences between what the law

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[13] "Limited times" is specified in the U.S. Constitution, though the actual length of time has expanded over the years. Currently in the United States it is life of the author plus 70 years, or if the author is a corporation, 95 from publication or 120 years from creation (whichever is shorter). 17 U.S.C. § 302. For a list of the copyright terms of other countries, see http://en.wikipedia.org/wiki/List_of_countries'_copyright_length

[14] One hundred years after Justice Story referred to this problem of copyright as the "metaphysics" of law, the Supreme Court agreed that fair use remains the "most troublesome" aspect of all of copyright law (*Folsom v. Marsh; Campbell v. Acuff Rose*).

is, what people *think* it is, and what people actually *do*. The following discussion of fair

use focuses on tracing the confusions in the law with an eye toward the current context of

online content creation.

Fair use as a doctrine was not codified in U.S. law until the Copyright Act of

1976, but legal decisions applied the basic principles for 300 years prior to that. Fair use

is largely about balance, a "safety valve" to ensure that copyright law does not overpower

freedom of speech. In Pierre Leval's seminal writing on creating a standard for fair use,

he describes the basic principle as being that a use is fair when it stimulates the public's

wealth of knowledge without diminishing incentives for creativity (Leval, 1990).

Of course, it was not until the Copyright Act of 1976 that there was an attempt to define

the contours of the doctrine, borrowing from the 1841 decision *Folsom v. Marsh* in laying

out four factors that determine whether the use of a copyrighted work is a fair use:

> 1. the purpose and character of the use, including whether
> such use is of a commercial nature or is for nonprofit
> educational purposes;
>
> 2. the nature of the copyrighted work;
>
> 3. the amount and substantiality of the portion used in
> relation to the copyrighted work as a whole; and
>
> 4. the effect of the use upon the potential market for or
> value of the copyrighted work (17 U.S.C. § 107).

On its face, the act of codifying the doctrine seems to be one of clarification;

however, three decades later, there is just as much legal and scholarly debate surrounding

the question "what is fair use?" as there was before it made its way into statute.

Furthermore, when Congress dealt with fair use in the 1970s it was largely on a tertiary

level, not focused on the philosophical issues behind it but rather concerned with solving

a very specific problem—educational copying of copyrighted works, which at the time

was perhaps the most important relevant issue (Seltzer, 1978). Digital remixing, or even the Internet, was not so much as a glimmer on the horizon for lawmakers at the time. The educational context of the legislative history has unfortunately contributed to what appears to be a fundamental conceptual confusion about fair use jurisprudence. It has been used to justify two different things: "creative" fair uses and "quantitative" fair uses (Thatcher, 2006). A "creative" use is closer to the original conception of the doctrine, in allowing for someone to build upon the work of someone else in a "value-added" way such as criticism or commentary. A "quantitative" use is illuminated by the proliferation of photocopying, which came to bear in a 1975 Supreme Court case that allowed photocopying of scientific articles by government agencies as fair use (*Williams & Wilkins Co. v. United States*).

Both of these types of uses have obvious digital analogies. Again, the digitization of content lends itself to ease of manipulation—which makes possible "creative" fair uses far beyond those of quoting works in critical commentary and the like. And of course, digital copying allows for duplication with little overhead and no degradation of quality from the original, on a massive scale in relation to the "quantitative" uses of the 1970s. Therefore, the same confusions that have always existed in the application of fair use have only been exacerbated by technological advances.

Out of a number of efforts to lend some coherence to the doctrine, Pierre Leval's 1990 *Harvard Law Review* article is arguably the most influential. He recognized a "utilitarian message" in the underpinnings of copyright law, based upon the idea that creative intellectual activity is a necessary component of the well-being of society (Leval, 1990). His analysis led to a recognition of "transformativeness" as articulated by the first

factor of fair use as the most important consideration, a heuristic which is still largely followed by courts today.

However, transformativeness as a concept has proven just as ambiguous, and technology has highlighted a similar difference between transformative "use" and transformative "purpose."[15] Fair use has always been considered on a case-by-case basis by courts, and like the difference between "creative" and "quantitative" uses, there is something fundamentally problematic about the potential for using a rule meant to handle one set of facts for an entirely different type of situation.

As a result, interpretations of relevant rules for content creators can vary substantially. Not only in copyright, but for realms such as privacy as well, the law is often context-dependent, which can be frustrating for designers and researchers (Jackson, Gillespie, & Payette, 2014). Fair use was actually designed purposefully as a heuristic rather than a bright line rule. This flexibility is desirable in a legal context (particularly since the law can be slow to catch up to technology), but essentially impossible to model computationally (Aufderheide & Jaszi, 2011; Felten, 2003).

One of the reasons that this flexibility is desirable is that technology moves faster than law. Adding bright line rules may substantially help with de-mystifying the law, but could backfire in terms of making the law too inflexible to deal with new and fringe cases. Critics of fair use have argued that it is hopelessly compromised due to technologies such as encryption, that it is too connected to the status-quo of a broken copyright system, that it is too limited to be effective, or of course, that it is too unclear to

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[15] See especially *Campbell v. Acuff-Rose* (the transformative use of a copyrighted song in a parody) and *Perfect 10 v. Google* (the transformative purpose of thumbnails in a Google image search).

be helpful (Aufderheide & Jaszi, 2011). However, I believe like others that fair use is essential so long as it operates fairly and freely. As Aufderheide and Jaszi put it in *Reclaiming Fair Use*: "Fair use is like a muscle; unused, it atrophies, while exercise makes it grow. Its future is open; vigorous exercise will not break fair use" (Aufderheide & Jaszi, 2011). Therefore, this dissertation is framed towards dealing with the ambiguity of fair use *beyond* the policy level. Flexibility necessitates ambiguity, so what can we do about it? This is especially an issue in the communities I studied, since even though years of case precedent have clarified many areas of fair use, amateur creative content has been less frequently litigated. Therefore, some communities' uses cut through both the clear and unclear areas of the law.

It is a given, then, that the law as written is ambiguous. This is a problem that has only grown along with technology, and if lawmakers, judges, and legal scholars can have reasonable debates about what may or may not be a fair use, then it is not surprising that ordinary Internet users have trouble drawing these lines as well. Yet, "Am I allowed to do this?" is a question that many online content creators have to ask themselves in the context of using pieces of copyrighted works.

In organizing an analysis about common misconceptions about fair use, Chapter 3 will go into more detail about the individual factors and how they function in practice.

2.1.2 Technological Control: The DMCA

Though copyright owners have long been entitled to prohibit others from making copies of their works, they do not have rights to control how or whether people experience them. However, technology has changed this somewhat by giving copyright owners the ability to monitor and meter the consumption of their works in a way never

before envisioned (Litman, 2006). Therefore, not only has technology contributed to more ambiguity as to what is legal for a content user, but it has also allowed for content owners to maintain tighter control over how their work is used.

One close coupling of the law and technological control is the Digital Millennium Copyright Act (DMCA), a U.S. law that criminalizes the production and dissemination of technology that circumvents copyright control measures, as well as the act of copyright circumvention itself. Additionally, it created an exemption from direct and indirect liability for copyright infringement of intermediaries such as Internet service providers—or, as later applied, user-generated content sites such as YouTube. Since Congress passed the DMCA in 1998, legal scholars have examined the nuances and debated the merits of the law— for example, concerns about its impact on free speech (Benkler, 1999) the potential danger to innovation (Samuelson, 1998), the implications of tightly coupling technological fixes and the law (Gillespie, 2007), and the chilling effect on some types of creative works (Tushnet, 2010). In the field of computing as well, there was fear that the law would produce a chilling effect on science and research, especially with regard to encryption and security (Grove, 2003).

The anti-circumvention measures in the DMCA protect existing technical control by copyright holders, but the liability exemption for intermediaries has led to other types of technical control, in handling takedown notices. The DMCA provides that intermediaries must provide a mechanism for copyright owners to assert a claim, and if valid, the intermediary must "take down" the infringing material. Unsurprisingly, with sites like YouTube where there are billions of videos, this process has the potential for automation.

Accordingly, new technologies have contributed directly to interpretations of fair use by building in mechanisms for enforcement. On YouTube, one method has been automatic content filtering, which involves creating a digital ID of a copyrighted work and searching the site for that ID, thus allowing copyright owners to take down large amounts of potentially infringing works at a time. Though the procedure is an artifact of the DMCA rather than YouTube itself, automatic content filtering has made it far easier for copyright owners to make large, sweeping gestures to remove content – arguably resulting in YouTube users with legitimate fair use cases chilled into not fighting. This can be seen in part as prioritization of self-protection over the rights of creators (Collins, 2014).

Users do have some recourse; if they think that something is fair use, they can send a counter-notice to YouTube. Unlike the improper copyright flagging of *Buffy vs. Edward*, another well-publicized DMCA removal on YouTube actually made it to court. The 2006 case *Lenz v. Universal* came to be because of a video of a baby dancing to 30 seconds of poor quality radio play of a Prince song (Collins, 2014; Lessig, 2008). After the video was removed, Lenz sued under a little-used provision of the DMCA that requires a "good faith belief" by the owner in the copyright infringement. Universal lost the case, with the court finding that there is an onus on the copyright owner to consider whether a use is fair use before sending a takedown notice. However, considering the ambiguities in fair use as discussed here, this may not be a high bar to meet.

McIntosh (a copyright advocate) and Lenz (who sought the help of the Internet rights advocacy group EFF) took advantage of the counter-notification process, but most people likely do not. YouTube's presentation of this option makes it seem like a scary prospect,

noting that the user may be liable for damages if a mistake is made. Again, even the cartoony "copyright school" presents fair use as confusing and something that warrants a consultation with a lawyer. A technological solution for simplifying copyright owners finding uses of their content does not lessen any of the confusion about whether these are fair uses or not. Added to this is concern from some users over whether there might be consequences for how they *obtained* the copyrighted material (for example, ripping a DVD), and thus, we sometimes see a chilling effect for creators in their choices of where to share their content or even whether to create it in the first place (Tushnet, 2010).

2.2 Policy

The interaction between the DMCA and YouTube itself points to another important source of rules: website policy. Though sites like YouTube are bound by legal requirements such as those put forth by DMCA takedown procedures, they still make decisions about how they handle copyright matters. Just as a major problem described with respect to the law is ambiguity, a related problem with website policy is readability and access. Though information accessibility is a major theme within HCI, established tenants of good design tend to be glaringly absent from consideration in crafting terms and conditions on websites (Luger et al., 2013).

Though Terms of Service (TOS) are the most relevant to copyright, privacy policies and end-user license agreements (EULAs) are similar in presentation. They also cover similar but substantively different content. Privacy policies disclose the ways that a website or technology can gather, use, or disclose a user's data and information and

typically do not include copyright terms. Though some EULAs include copyright terms,[16] these contract the relationship between a user and a piece of software rather than a website. Though there is little existing research related specifically to TOS or copyright terms, privacy policies and to a lesser extent EULAs have received a fair amount of attention in the context of usability and accessibility.

This past work has shown a surprisingly high level of complexity within these different types of click-through conditions found on the web (Good et al., 2005; Jensen & Potts, 2004; Luger et al., 2013; Magi, 2010; Mcdonald & Cranor, 2008). Perhaps due to this complexity, users also seem to have been conditioned not to read them. One study showed less than 1% of consumers accessing EULAs, and those who did spent a median time of 29 seconds there, far less than the time required to read them (Bakos, Marotta-wurlger, & Trossen, 2009). In another, less than 2% of users reported reading EULAs thoroughly with about two thirds saying that they did not read them at all (Good, Grossklags, Mulligan, & Konstan, 2007). Yet another study showed that most users take less than 8 seconds to click through a consent dialog (Bohme & Kopsell, 2010).

High reading level scores suggest that users would not understand these policies even if they read them (Jensen & Potts, 2004). Reidenberg et al. asked comprehension questions about privacy policies to non-expert users, knowledgeable users, and privacy experts (Reidenberg et al., 2015). Discrepancies between non-expert users and experts

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[16] Though copyright related to user content is not relevant for most pieces of software, there is one domain in particular in which EULAs and intellectual property have received attention: online games and virtual worlds. Like user-generated content websites, users are able to contribute content to games like World of Warcraft and virtual worlds like Second Life, and EULAs govern ownership in that content (Grimes, 2006).

(and even among experts) led them to conclude that websites are not conveying privacy information in a way that a reasonable person could understand, possibly misleading the public. Similarly, Good et al. found a "strong disconnect" between actual EULA content and user expectations of EULA content. They suggested that it was the design of EULA and TOS that made them inaccessible to users—features like "too long," "small font," and "legal mumbo jumbo" (Good et al., 2005). In a later study they showed that if users slowed down and spent more time reading notices, they experienced less regret about their decision to agree to terms (Good et al., 2007).

Beyond the way they are presented, the content of terms and conditions can also be problematic. Researchers have examined privacy policies in detail to analyze their relationship to actual government regulations. Content analyses of the policies of library vendors, healthcare providers, and universities have shown that provisions are not always in line with regulations or expectations (Culnan & Carlin, 2006; Earp, Antón, Aiman-Smith, & Stufflebeam, 2005; Magi, 2010). One study of privacy information for mobile apps showed that some data uses surprised and discomforted users (Lin et al., 2012), and another that understanding privacy information can actually change users' decisions about website use (Tsai, Cranor, Egelman, & Acquisti, 2010).

Though work in HCI has focused on privacy policies and EULAs, many of the same ideas apply to all online terms and conditions. The overarching lesson is that copyright policies found in online creative communities may be even more difficult to understand the law itself and thus will only contribute to rather than help alleviated uncertainty. It is in the face of this uncertainty and ambiguity that best practices and social norms have emerged within communities of creators.

2.3 Norms

In both the physical and virtual world, personal interactions are in part governed by social norms, shared standards of behavior and inferences about how others behave (Cialdini & Goldstein, 2004). These are different than legal norms because they are enforced by members of a community (rather than external forces) and not always out of self interest (Elster, 1989). As an effective mechanism for social control, norms tend to be rooted in individual feelings of accountability (Erickson & Kellogg, 2000). Within a community, they often develop into a set of informal rules that are then policed by informal sanctions that community members impose on each other (Fehr & Fischbacher, 2004a; Lessig, 2006). Of course, the negotiation of these rules can be complex—as norms develop, they are in a constant state of flux as both the membership in the community and the tools for communication are prone to change (Kirman, Linehan, & Lawson, 2012).

HCC researchers often find social norms to be a factor in describing user behavior, particularly in online communities. Examples include how users choose what information to reveal on their social networking profiles (Gross & Acquisti, 2005); decisions about when and how mobile phones should be used (Palen, Salzman, & Youngs, 2000); how people participate on Wikipedia (Bryant, Forte, & Bruckman, 2005); or selective sharing behavior on Google+ (Kairam, Brzozowski, Huffaker, & Chi, 2012).

Norms also tend to have an interaction with the introduction of new technology. New norms might emerge around the use of that technology (M. K. Lee & Takayama, 2011), or the way that the technology is adopted might be influenced by existing norms (Orlikowski, 2000; Shklovski, Vertesi, Troshynski, & Dourish, 2009). This is true in

online communities as well. Sometimes norms evolve in communities of people that form in response to a new technology (e.g., YouTube), or sometimes pre-existing communities adopt some technology and make uses that support the norms they already have (such as fan fiction writers, who have migrated from Usenet to email groups to blogging communities). More infrequently, communities with existing norms build new technologies that support those norms.

Understanding the norms at play in a community is important in making design decisions for an online space. In the context of privacy, Barkhuus points out that though HCI researchers have investigated at length the way that users manage information sharing in the face of privacy concerns, this research does not tend to focus on the underlying contextually grounded reasoning for these concerns (or lack thereof) (Barkhuus, 2012). She makes an argument for better tools to study the concept of privacy, using Nissenbaum's theory of Contextual Integrity. By emphasizing the ubiquitous role of cultural, ethical, and moral norms in information flow, Contextual Inquiry explains how decisions about privacy are governed by these pre-existing norms and values (Nissenbaum, 2004). However, when new technologies fall into gray areas of these existing principles, there are no pre-defined understandings of privacy—resulting in designs that align poorly with social factors (Barkhuus, 2012). Barkhuus therefore suggests that designers should have a contextually grounded awareness of the appropriate situation and culture, which includes in part the way that norms change over time. This is a concept that extends beyond the notion of privacy and into any context in which norms and values are governing behavior.

As part of this context, it is also important for designers to have an idea of how norms in play in a community originated. For example, in danah boyd's discussion of the public outcry over Google's "real name" requirement after the Google+ launch, she pointed out that just because this norm was accepted on Facebook did not mean that it would translate to a new social network where it did not evolve organically (boyd, 2012). The norms on Facebook regarding real names originated in the "campus life" atmosphere of the early days of the site, where users felt secure and private, bolstered by a contrast with MySpace where pseudonyms were common. Whereas these existing social norms made real names part of the culture on Facebook, Google's attempt to force similar norms using corporate policies and technology was met with backlash.

Social norms related to copyright are also very complex. Former Creative Commons director Glenn Otis Brown put it well in a 2004 commentary: "To judge from most mainstream coverage of intellectual property disputes, and the big-media talking points that tend to frame the coverage, copyright is binary" (Brown, 2004). That is, the popular perception of copyright is that there are two levels—*property* and *piracy*. A person is either pro- or anti-copyright with little in between. However, Brown also pointed out that if you press people (in particular, "authors" such as a musician, a coder, or a teacher), you are likely to get more nuanced responses, that different values begin to emerge, ones that are "more meaningful and precise than simple copyright, piracy, or property."

Legal scholarship on the subject of social norms supports this idea as well, suggesting that people often have intricate intuitions about the law without actual knowledge to back it up—and that this phenomenon is particularly pronounced in

communities of online content creation such as fan creators. "Copynorms" are the

informal social rules that determine the social acceptability of copying works created by

others (M. F. Schultz, 2007); though digital piracy and peer-to-peer file-sharing (P2P) has

been a focal point in discussion of these norms, their existence is just as striking for

content creation as for sharing.

Traditionally these norms are based on part on complex ethical judgments. One

study found a significant disconnect between ethical judgment and behavioral intention

when dealing with questions of online piracy (McMahon & Cohen, 2008). Another found

that though participants had difficulty addressing theoretical questions due to a lack of

knowledge about intellectual property law, they expressed moral justifications for their

behavior (Warwick, 1994). A third study, specifically of adolescents and computer

piracy, showed that those who permit software copying and hacking do uphold some

ideas about privacy and property, but felt that their actions were neither unjust nor

harmful to others (B Friedman, 1997).

Therefore, even in the absence of knowledge of what the law actually says,

technology users often form their own heuristics about appropriate behavior, and one

source of these heuristics is social norms. In the case of piracy, these norms are often

considered unethical—"if many people do it then it isn't really wrong" (Nill,

Schibrowsky, & Peltier, 2008), in which case research has shown that there is a contagion

effect. An unethical decision does not depend solely on a cost-benefit analysis but rather

on social norms implied by the dishonesty of others (Gino, Ayal, & Ariely, 2009). With

respect to software piracy, the behavior is more likely to happen in social environment

that ignores or tolerates (or even subscribes to) pirating (Gupta, Gould, & Pola, 2004).

In fact, social norms related to the law tend to be strongest, and arguably the most important, in situations in which the actual law is unclear. In Ellickson's seminal study of economics and norms through the example of cattle ranchers settling trespass disputes, he pointed out that policies are often based on the assumption of perfect knowledge of legal rules—whereas in reality, legal knowledge is usually imperfect (Ellickson, 1986). In the context of this imperfect knowledge, people often resolve disputes by applying lower-level norms, and when these are inconsistent with formal legal rules, the norms prevail. We may see this as well in the context of copyright, particularly with respect to laws relevant to remix artists, where the law is very unclear. When people have imperfect knowledge of copyright law, social norms may fill in the gaps. Chapter 6 takes up this topic in detail, and contains further discussion of prior work around social norms as a framing mechanism for my analysis.

2.4 Power, Rules, and Conflict

Anthropological studies tell us that even without the rule of government and law, some order would exist, and legal intervention is often most effective when taking into account other sources of social order (Posner, 2002). Online communities typically carry with them two obvious sources of order—social norms, and terms of service or other policies. Applicable legal rules then provide yet another source. In this chapter I have discussed each of these sources of rules, but how do they work together to regulate behavior? And what happens if they conflict?

In her analysis of norms as they apply to the problem of collective action, Ostrom cites the frequent finding that when people with a common resource organize themselves to enforce their own rules, they manage resources better than when rules are externally imposed on them (Ostrom, 2000). She uses evolutionary theory to explain how five

design principles help these groups build cooperation over time. To summarize these principles, she puts forth that the collective action problem is solved when: (1) users design their own rules (2) that are enforced by chosen users accountable to them (3) using graduated sanctions (4) that define who has the right to withdraw and (5) assign costs proportionate to benefits. She also points out that, unlike physical (or by extension technical) constraints, rules have to be understood to be effective. Therefore, it is important as well to have simple, local mechanisms to resolve conflicts over rule interpretation (while noting that these do *not* have to be formal governmental devices). Moreover, she argues that public policy initiatives should *enhance* the formation of social norms rather than crowd them out, and that increasing the authority of individuals to devise their own rules allows norms to evolve that result in more cooperative behavior.

With respect to the name policy on Google+, boyd (2012) posed the question: "To what degree do designers want to hold power over their users versus empower them to develop social norms?" This same question might be asked about the law, given that in some cases the community enforcement of norms actually holds more weight than actual legal rules (Ellickson, 1986), which follows from Ostrom's theory as well. Perhaps a bigger question, then, is how these traditional sources of power—technical constraints, site policies, and law—can interact most effectively with organically derived norms.

In considering this complicated space, it is useful to draw from the framework of Activity Theory. This framework considers human practices as development processes with individual and social levels interlinked simultaneously, and is therefore useful for understanding people's relationships with technology (Kuutti, 1995). As a unit of analysis, an activity—such as "making decisions about copyright in an online

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community"—consists of a community of people with a shared goal, the object. A subject is directly involved in the activity, with tools (artifacts) and rules framing how it is accomplished and what norms are adhered to while engaging in it, and some division of labor explaining how work is divided among subjects (see Figure 3).

TOOLS

SUBJECT

OBJECT

RULES

COMMUNITY

DIVISION OF LABOR
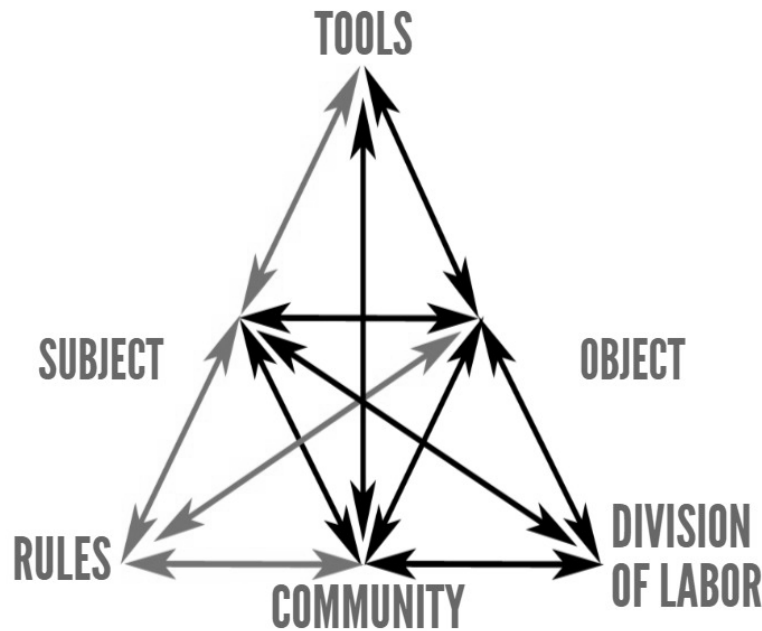
Figure 3 Illustration of the Activity Theory triangle

A key component of Activity Theory is that all of these components are related; people work together to use tools and set rules, and toward a goal, and the components mediate each other (Yardi & Bruckman, 2011). In considering the activity of making copyright decisions, much of the complexity comes from the fact that there are multiple sources of *rules*. An understanding of how each of these sources relate to *all* parts of the activity may therefore provide some insight into how they interconnect. For example, an activity system (for making a copyright decision) that had only the law as a source of rules would have a very different division of labor than a system that also incorporated social norms. In the first, the input of other members of the community would be largely

irrelevant, but not so in the second. I will return to a discussion of Activity Theory in Chapter 7.

It is perhaps inevitable that somewhere in these interactions between sources of rules there will be conflict. For example, norms may overlap laws, or they may be completely independent of them (Posner & Rasmusen, 1999). There are norms against stealing and lying, but also laws against them. However, we will see examples of important norms with respect to copyright that do not have legal equivalents, as well as laws that do not find their way into normative behavior. Similarly, copyright policies for websites at times go *farther* than the law in regulating behavior, or at other times are more lenient. This is a sort of legal pluralism, where multiple uncoordinated, overlapping bodies of law make competing claims of authority or impose conflicting demands (Tamanaha, 2008). This creates uncertainty for those who cannot be sure in advance which rules will be applied to their situation, as well as opportunities for cherry picking from coexisting legal authorities to advance a particular aim (Tamanaha, 2008).

Similar to the dangers of legal pluralism, there are other reasons to think that conflicting sources of rules cause problems. For example, a clash of social groups can lead to conflicting norms. McLaughlin and Vitak found that in social media spaces like Facebook, the intermingling of differing social groups can lead to context collapse and difficulty in determining which norms to follow (McLaughlin & Vitak, 2011). Similarly, Burnett points out that at the intersections of social groups, shared interests can actually lead to conflict rather than common ground due to divergent understandings of the relative values of those interests (Burnett, 2009). When people have to choose between conflicting norms, the choice becomes one of single conformity (and thus *not* conforming

to something) or compromise (and thus not conforming completely to any) (Stouffer, 1949).

Though many of these ideas about the interaction of multiple sources of rules are more broadly relevant, copyright provides an excellent context for examining the space since in communities of online content creation, rules are always relevant at both a user and legal level.

2.5 Copyright and Remix in Online Communities

A growing body of research in the field of creativity and technology emphasizes that creativity does not exist in a vacuum, and indeed, it is inevitably influenced by context, including the connection between artist and broader cultural and technological factors (Cook, Teasley, & Ackerman, 2009). In previous studies of remixers, there has been a necessary backdrop of copyright in discussions of issues such as distribution, sharing, or commercialization (Cheliotis, Nan, Yew, & Jianhui, 2014; Hoare, Benford, Jones, & Milic-Frayling, 2014). This is true both for creators of original content, such as digital musicians (Cook et al., 2009) or knitters (Humphreys, 2008), and for remixers, such as fan fiction authors (Busse & Farley, 2013; Hetcher, 2009; Jamison, 2013) or video mash-up artists (Aufderheide, Jaszi, & Brown, 2007; Diakopoulos, Luther, Medynskiy, & Essa, 2007). Sometimes the online spaces they frequent might have technical support for these kinds of norms, though very often not (Seneviratne & Monroy-hernández, 2010), which suggests that online community designers may not always be aware of them.

One example is the Scratch online community, made up of young people sharing user-generated content they create through programming, in which norms about reuse and attribution have evolved within their remix practices (Monroy-Hernández, Hill, Gonzalez-Rivero, & boyd, 2011). Researchers found that whereas there are both positive

and negative reactions to work being remixed within the community, the idea of attribution and credit was of near-universal importance. Even with (presumably) little knowledge of copyright law, norms emerged in the community about when remixing was okay based on whether appropriate credit was given to the creator. Remixing in this context will only become more important—Lange and Ito note that many of the activities in which youth are developing creative identities and competencies involve appropriation, such as music remixing and anime video creation (Lange & Ito, 2010). Hill and Monroy-Hernandez have also discussed ways to promote remixing and originality among their young Scratch users (Hill & Monroy-Hernandez, 2012), a goal that has been posited by other researchers as well (Cheliotis & Yew, 2009; Jenkins, 2006a; Lange & Ito, 2010).

In the interest of advocating remix within the combative copyright environment, Aufderheide and Jaszi studied different communities of creators to reveal practices and attitudes about using copyrighted material, and then published a book as a guide to fair use for online content creators (Aufderheide & Jaszi, 2011). In one of their studies, of college students who upload online video, nearly half of the participants said that they never incorporated copyrighted material in their work (Aufderheide et al., 2007). Some were simply confused about what is copyrighted, but for others, they purposefully did not incorporate material for fear of getting into trouble—possibly a chilling effect of the law. Though traditionally referring to when free expression is "chilled," this effect comes into play when any conduct is suppressed for fear of penalty.

Another major finding of Aufderheide's study was that participants did not understand even elementary facts about copyright; with respect to fair use, three fourths of participants believed that it permitted them use of copyrighted materials but none were

able to describe the doctrine accurately. Other studies have revealed similar misunderstandings of copyright law, such as among documentary filmmakers (Larsen & Nærland, 2010) and librarians (Graveline, 2010). Though there has not been much research on information *seeking* specifically related to intellectual property,[17] Humphries' study of Ravelry (an online community of knitters) examined copyright discussions in the site's online forum (Humphreys, 2008). The conclusion was that the community seemed to have very little consensus over what constituted legal or ethical behavior. As the author pointed out, if a simple request for information resulted in a thread with over 80 posts that culminates in a suggestion that the poster consult an attorney, there is likely a problem with both legal literacy and uncertainty. Humphries also suggested that these Q&A sessions result only in frustration rather than encouraging people to learn more.

In terms of decision-making despite confusion or misunderstandings, legal scholarship on the subject of social norms and content production has suggested that people may have intricate intuitions about the law without actual knowledge to back it up (Fiesler, 2008; Hetcher, 2009; Tushnet, 2008). This phenomenon is particularly pronounced in communities of online content creation such as fan creators.

2.5.1 Fandom

Fan culture is particularly interesting with respect to issues of copyright and appropriation. This subset of online content creators specializes in fanworks—art, writing, music, video, or other media based on media properties such as television shows, books, or videogames. The "fandom" community forms a set of subcultures focused on shared significant interests in these media. These practices date back to the days of

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[17] See Chapter 4 for additional discussion of social Q&A more broadly.

Sherlock Holmes and Jane Austen, but have flourished since the 1970s when fans congregated around science fiction television shows such as *Star Trek* (Coppa, 2006; Jamison, 2013).

Like the issue of fair use itself, copyright complications with fanworks do not begin and end with the Internet. Fan creators have been remixing works since long before digital technology was prevalent (Coppa, 2006; Jenkins, 1992, 2006a). However, as in many other contexts, changing technology has exacerbated already-existing tensions. Therefore, this community does not fit within the bounds of a particular online site. Instead migrating to some degree with changing technologies (Coppa, 2006), the group has established highly ingrained social norms that are not tied to a particular technology. Many discussions of fandom communities make mentions of Livejournal (a community blogging platform) extensively with respect to Internet fandom (Coppa, 2006; Jamison, 2013; Stein, 2006), but in recent years Livejournal appears to have fallen in popularity (as discussed by my interview participants in Chapter 6). A 2015 list of the "seven kingdoms of the Internet" for fans does not even include Livejournal, but does emphasize Tumblr, a migration verified by my interview participants (Maggs, 2015).

Researchers have examined how fandom communities make use of different technologies, such as Livejournal (Stein, 2006) or Twitter (Magee et al., 2013), as well as the norms that form. Communities of fan creators are notoriously tight-knit (Jenkins, 2006a), and Ito notes from her interviews with members of the anime music video community that standards for behavior and creativity derive from this closeness (Lange & Ito, 2010). They have specialized practices that rely on deep knowledge of the subject matter and the community, an environment that makes it easy for norms to proliferate.

Conflicts that have erupted over the years in fan communities reveal a number of strongly entrenched social norms related to copyright: norms about plagiarism, attribution, what constitutes commercialization, and "filing the serial numbers" off fan fiction (i.e., changing the names of characters and then publishing it) (Busse & Farley, 2013; Freund, 2014; Hellekson, 2009; Jamison, 2013). Remixers such as fan fiction writers represent a group struggling to understand and locate the law within these cultural norms (Roth & Flegel, 2013). Fans have also been struggling with legal issues for decades, much longer than most remix communities, but chilling effects became more common when these communities moved online (Coppa & Tushnet, 2011). However, in more recent years, content owners have also seemingly become more tolerant of fan activity. Lawyer and fan advocate Heidi Tandy wrote that whereas fans once felt they had to "cave and kowtow" to overreaching rightsholders, fans may feel safer now due to legal expansions of fair use and transformativeness (Tandy, 2015). However, adherence to new norms by rightsholders is inconsistent, and as I will discuss in the course of this dissertation, fan creators still function in a space of uncertainty.

Through this dissertation I will also make reference to specific fandom spaces. These include online communities and social networking sites that are broader—such as Livejournal and Tumblr—as well as fan creation websites such as fan fiction or fan art archives. One fan fiction archive I will refer to frequently is Archive of Our Own,[18] which is particularly notable because of its history. Discussed further in Chapter 6, the archive was created in response to attempts at external exploitation of fan communities

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[18] http://www.archiveofourown.org

and a decision that they needed a space of their own that would include up front

statements of the legality of the practice (Coppa, 2013). A non-profit devoted to

protecting the interests of fan creators (including their legal interests) was created as a

result of this discussion, the Organization for Transformative Works (OTW). [19] OTW's

major projects have been the creation of Archive of Our Own as well as a wiki devoted to

preserving fan history and an academic journal.

Chapter 6 delves into the specifics of the fan community's copyright norms in

more detail, but first, the next chapter begins with an exploration of the copyright

knowledge and attitudes of fan creators as a subset of remixers.

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[19] As noted in the introduction, I have worked with the OTW's legal committee since 2009.

CHAPTER 3

REMIX ARTISTS AND FAIR USE ONLINE

As an initial exploration into the complexity of copyright in online creative communities, I looked to the experiences of remixers, who deal most often with the legally gray area of fair use. Though the term "remix" originally applied to music, the concept has become much broader in recent years. As Lawrence Lessig describes in his book on the subject, remix is an act of read-write creativity—not just consuming content but using it to make something new (Lessig, 2008). By "remixer" I mean anyone who makes use of content created by someone else in new, creative ways. I wanted to better understand how remixers might think about copyright law and its relationship to their online creative activities. In the absence of bright line legal rules, how do they make decisions about what they can or can't do when it comes to creative appropriation?

Though I wanted to study "remixers," I did not want to focus on a specific online site or media type. My participants responded to an ad asking for "online content creators," and specifically those who create "remixes" and "fanworks" in a variety of media. Because all of my participants self-identified as being creators of fanworks, I considered this my population for this initial study—a subset of remixers.

3.1 Interview Methods

For this study, I interviewed eleven online content creators—two in-person interviews for local participants, and nine conducted by phone. My criteria for inclusion was that each participant dealt with issues of appropriation in their creative work. Participants were recruited through postings in online remix communities. I also attempted to use fliers on a college campus, but was unsuccessful in gaining any participants this way. Though I posted to websites that catered to fiction and music as well, the participants that contacted me came from communities that focused on art (DeviantArt) and video (a Livejournal fan video community), though also participated in a wider range of activities (see Table 2) and a large number of different online content creation websites.

Recruitment materials sought "online content creators," specifying a particular interest in those who created remix works or fanworks. Because I asked our participants to recommend others who might be interested in participating, word of mouth was also a recruitment tool; therefore, this result in part in a "snowball sample" of participants (Babbie, 2009). Five participants came to me directly from seeing recruitment materials, and six heard about the study from other participants. Though this technique does produce a more homogeneous sample, it also has the benefit of allowing the interviewer to explore shared meanings among the community being studied (Sinnreich, 2010). Additionally, though the sample size is only eleven participants, research has shown that data saturation can occur quickly in thematic analysis of qualitative interview data, and that most codes/themes can be present in as few as six interviews (Guest, Bunce, & Johnson, 2006).

Participants were 10 women and 1 man, ranging in age from 19 to 36. This gender breakdown is not unusual for the community of fan creators, which is traditionally predominantly female (Coppa & Tushnet, 2011; Jenkins, 2006b); though the Internet has shifted demographics of fan communities, this is largely with respect to age (younger) and nationality (more global) while maintaining the gender gap (Karpovich, 2006).[20] All participants lived in the U.S. and participated in primarily U.S.-based online communities. As detailed in Table 2, participants covered a range of different media types in their remixing activities, including fan art, fan video, and fan fiction and roleplaying (both types of writing), as well as music and graphics remix. I also captured non-remix content creation that might be relevant to the discussion (blogging, and original art and fiction); for example, some of the participants with blogs brought up copyright issues with respect to using images in their blog posts. Shaded areas represent content types that the participant reported creating on a regular basis. Names given here are pseudonyms chosen to match gender identification.

Table 2 Types of content creation by participant

	Fan Fiction	Fan Art	Fan Video	Fan Roleplaying	Music Remix	Graphics Remix	Original Fiction	Original Art	Blogging
Sharon	■			■					■
Jack		■				■		■	
Kelly	■			■					■
Natalie				■	■		■		
Martha			■		■	■			■
Felicity			■						■
Rachel	■			■					
Heather	■								■
Tabitha	■		■			■			■
Cassidy		■				■			■
Lara	■	■						■	■

[20] Chapter 6 contains a more detailed discussion of the implications of the gender gap in fan communities.

I conducted all of the interviews myself. They were semi-structured, and included questions about online activities, including types of content creation and sharing, as well as online communities participated in; scenarios related to copyright and content creation, asking for their judgments about how the law applied and how they thought it should apply; and knowledge about U.S. copyright law. The purpose of these questions was to tease out their attitudes about different aspects of the law, how they felt it applied to their work, and the ways in which different technologies as well as their knowledge of the law affect their online creative activities. The semi-structured interview protocol gave me the flexibility to dynamically adjust questioning based on the participants' responses. The idea behind this technique is to consider not just a behavior itself as stated, but the meaning behind it (Seidman, 1998).

After transcribing the interviews, I conducted a thematic analysis of the data. This method of identifying, analyzing, and reporting emergent patterns (or themes) within a set of data is a type of open qualitative coding that maintains some theoretical freedom (Braun & Clarke, 2006). My analysis relied in part on my own expertise in copyright. Though a number of themes emerged from my interviews, one concept that came up consistently was that of fair use. After having coded all of the data, I considered just the data that had been coded for fair use concepts, and examined it more closely.

Of my eleven participants, nine were familiar with the fair use doctrine by name even if they could not articulate it correctly, and the remaining two still had intuitions about an exception to copyright law—for example, one participant stated when asked about one activity, "No, I think it's okay, but I think you have to follow certain rules."

Judging from previous research, including studies of documentary filmmakers and remix video creators (Aufderheide & Jaszi, 2011; Larsen & Nærland, 2010), I expected to see misunderstandings of the law; however, a more surprising finding was just how similar the misconceptions were among the participants. Even across different types of creators—writers, visual artists, filmmakers—intuitions about what makes a use "fair" were by and large the same. What follows is a discussion of these common understandings (and misunderstandings) of fair use, as well as patterns of heuristics and judgments used in thinking about the law. Though social norms will be part of this discussion as they relate to the parts of fair use, I will return to these norms in much more detail in Chapter 6.

In order to emphasize the relationship between these understandings and the actual law, I organize findings based on the four fair use factors (introduced in the previous chapter).

3.2 Understandings of Fair Use

3.2.1 The Purpose and Character of the Use

> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes (17 U.S.C. § 107)

3.2.1.1 Noncommercial Use

Whether a use is commercial or noncommercial is only one part of the first factor weighed in fair use determinations. Generally, noncommercial use weighs more toward a finding of fair use. This factor is usually a point in favor of remixers who typically do not profit from their work. However, the definition of "noncommercial" is not clearly defined in case law (Tushnet, 2008).

Most participants (eight out of eleven) implied that this was the single most important factor in determining whether a use is fair. Four participants also expressed frustration that, like the doctrine itself, a judgment of commerciality is in a gray area. When pushed to define the boundaries of noncommercial use, they disagreed over where this line should be. Some thought that having ads on a website that displays remixed work was a deal breaker, whereas others stated that the remixer has to be explicitly selling something.

> *On my website, it has Amazon ads that help pay for the bandwidth or whatever for it. But I don't know that I would consider that as a profit-making enterprise that would be a big deal since I think I've made like 13 dollars in two years, which isn't enough to cover even the space.* – Martha

> *I don't think they should be making money from it. It's like a hobby, right? I mean, if you were making money, like if you were selling a DVD of your vids that had such and such song and clips from such and such show then the owners of that stuff should get some of the proceeds. If you profit from ads, same thing.* – Heather

In fact, many participants (five out of eleven) when discussing commercial use spoke in terms of "profiting." The issue was not whether any money exchanged hands at all, but whether the person making use of the copyrighted work was personally benefiting from the use. For example, charity auctions in fan communities are not uncommon. One participant, Lara, spoke of the "Help Haiti" initiative on Livejournal (a blogging community) in which fan fiction writers and artists offered their services (to write or draw to specifications) to the highest bidder, with the proceeds going to the Red Cross. She noted that the noncommercial norm within the community doesn't seem to apply to this situation because the artists are not personally profiting from the original works.

Another community norm that several participants articulated but had difficulty explaining is the significance of media with respect to noncommercial norms—specifically, the fact that within fan communities there is more tolerance for selling fan art than fan fiction. With the exception of charity auctions, there have been documented instances of fan fiction writers being ostracized for attempting to sell their work (see Chapter 6); however, the same does not seem to be true for art. One fan fiction writer, Tabitha, expressed envy that artists can sell their work at conventions, noting that "you could never get away with that" as a writer. Another participant, Lara, is an artist who regularly takes commissions to draw characters from books or movies such as *Harry Potter* or *Pirates of the Caribbean,* for as much as $50 a piece. She stated that she "sometimes feel[s] guilty" that she can make money from her art when writers can't.

Neither this artist, nor the others who brought up this inconsistency, could explain exactly why it exists. However, there seems to be a related norm of more tolerance for selling art from books over art from television shows, though some participants had a vague idea of publicity rights of actors factoring into this as well. Natalie and Lara did note that for books, it is more difficult to "prove" that the image is of a particular character—is that Harry Potter or just a boy with glasses? This could explain both why the noncommerciality norm within fandom seems to be less enforced for art, and why legal scrutiny (cease-and-desist letters, etc.) have more often been seen with fiction than with art. This issue of the normative differences in writing versus art is discussed in more detail in Chapter 6.

Despite the ambiguity regarding boundaries and differences in media, commercial use does play an important role within understandings of fair use: it is consistently judged

as being more legally important than it likely is. Since the landmark case *Campbell v. Acuff-Rose*, courts have recognized that commercial uses can still be fair.[21] However, it is also true that noncommercial uses are less frequently litigated, and since fair use is determined on a case-by-case basis, there is no bright line rule as to the weight of the factor (Hetcher, 2009). Though participants made statements like "I think that… would be okay, like legal, though because they're not making money" (Kelly), a more technically correct interpretation would be to pragmatically say that it (a noncommercial use of a copyrighted work) would be "okay" because it would be much less likely to be challenged in court.

In sum, the noncommercial part of the first prong of fair use is seen as an important factor. This in itself is not a misconception, but there is a misconception when it is seen as the sole deciding factor. However, perhaps more interestingly, this norm seems to be largely a moral judgment rather than a legal or market-based one. Judgments extend to the fairness of profiting from someone else's work. As one creator of fan videos, Martha, stated, "It's just tacky. Completely aside from fair use issues of commercial/non-commercial, you just don't do it because fandom's a gift economy."

3.2.1.2 Educational Use

Like commerciality, the potential educational purpose is considered part of the first "nature of the use" fair use prong. If a use is for nonprofit educational purposes, it is more likely to be judged a fair use.

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[21] Other well-known cases of commercial fair uses would be the novel *The Wind Done Gone* from *Suntrust v. Houghton Mifflin* (2001) and the commercial artwork remixes from *Cariou v. Prince* (2013).

The misconception concerning this part of the test is a simple and consistent one. When specifically asked about an educational use of content, nearly all of the participants (nine out of eleven) thought that there was a blanket exception for educational use of copyrighted material. The recognition of the concept does show some understanding of copyright exceptions; however, educational use is simply one part of the entire fair use test rather than a different exception altogether as most participants thought.

3.2.1.3 Transformativeness

Transformativeness—part of the "purpose and character of the use" stated in the first prong of the fair use test—covers how much a new work is "transformed" from the original, extending to the purpose and function of the new work. Two significant examples of this from case law are the 2 Live Crew "Pretty Woman" rap as defended in *Campbell v. Acuff Rose* and Google's use of thumbnail images in their search engine in *Perfect 10 v. Google*.[22] The more transformative a use is, the more likely it is to be judged fair use. Though currently considered to be a very important aspect of fair use analysis (Aufderheide & Jaszi, 2011), like fair use itself, the definition of what constitutes transformativeness has been ambiguous.

With the exception of often pulling out parody as an important copyright exception, participants by and large conflated transformativeness with the third fair use factor, amount and substantiality of the original work used—discussed more below.

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[22] The Supreme Court stated in *Campbell v. Acuff-Rose* that what "lies at the heart of fair use doctrine" is whether the work "merely supersede[s] the objects of the original creation, or instead adds something new, with further purpose or different character, altering the first with new expression, meaning, or message"; the transformative use in that case was parody. In *Perfect 10 v. Amazon*, the Ninth Circuit Court of Appeals found that a search engine providing "social benefit" as an "electronic reference tool" could actually be *more* transformative than a parody because it provides an entirely new function for the work.

3.2.2 The Nature of the Work

> 2. the nature of the copyrighted work (17 U.S.C. § 107)

The second fair use factor concerns the nature of the original copyrighted work—specifically whether it is fiction or nonfiction, or published or unpublished. If the original work is fiction or unpublished, this weighs slightly in favor of the new work being a fair use.

None of my participants had any concept of this factor, with the exception of the common misconception that some process is required to receive a copyright in something (such as registering). When pushed on this issue, several participants (Jack, Felicity, and Cassidy) reconsidered or expressed confusion—for example, stating that their work isn't copyrighted unless they have applied for it like a patent, but then also saying that their work posted online cannot be used without permission.

However, for these creators, this factor would be largely irrelevant. Fictional works are much more often the subject of fanworks than non-fiction. Non-publication is even more rare, since putting something on the Internet would constitute publication.

3.2.3 Amount and Substantiality

> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole 17 U.S.C. § 107).

The third factor of the test—amount and substantiality used—relates to how much of the original work is in the new work. The less of the original used, the more likely the new work is a fair use. Again, participants by and large conflated transformativeness with this factor. One might consider the underlying difference between the two to be quantitative versus qualitative—amount and substantiality is a largely objective measure of how much of the original remains, where as transformativeness looks more to the

spirit of the original in purpose or character. An example of a finding based on amount and substantiality would be the *Harry Potter Lexicon* case (*Warner Bros. v. RDR Books*), where the court found that on general principle reference books for fictional works can be fair use, but in the case of that particular reference book, it appropriated too much in terms of verbatim copying.

The general heuristic I saw from participants was that the more different from the original the new work is, the better—whether with respect to purpose or more tangible changes. One participant articulated this idea with respect to graphics, and the amount of transformation that can occur in creating user icons for blogs:

> *There really is an art to making a good icon, to choosing the right shot, to cropping it right, to tweaking the color in whatever way it has to happen, and obviously not everyone does that; there are icons that are less transformative just like there are vids that are less transformative.* – Martha

As with the gray area in determining whether a use is commercial, the majority of participants (seven out of eleven) were able to articulate vaguely that a remixed work needs to be different than the original in order to qualify for fair use. However, they differed on where this line should be (and many were not able to even guess where it might be). Of the fair use factors, this was the one for which participants had the most legally accurate idea of the balance that courts must find. Even without an idea of clear boundaries, they had consistent intuitions about the third fair use factor, particularly by virtue of believing that remixes are far more likely to be fair use than wholesale copying.

3.2.4 Market Harm

> 4. the effect of the use upon the potential market for or
> value of the copyrighted work (17 U.S.C. § 107)

The final fair use factor concerns the effect of the use upon the potential market for the original work. If a new work is interfering with a potential source of revenue for the original copyright owner, then it is less likely to be considered a fair use.

A number of themes involving market harm emerged from our interviews, reflecting in large part a utilitarian stance from my participants. For example, though they conceded that this concept likely does not have legal weight, four participants expressed that some people should be more entitled to copyright protection than others—i.e., the "little guy." They were less likely to obtain illegally and more likely to correctly attribute a source when that source is a smaller artist as opposed to a large corporation. When pressed, they admitted that this was a moral judgment rather than a legal one.

Another theme that emerged is that of the potential for remix to do a market *good* rather than harm. Though this is not a common component of this analysis in fair use, it is not unheard of; for example, in the initial dismissal of the Google Books case (*Authors Guild v. Google*), the judge stated that Google's indexing of books actually enhanced their sale to the benefit of copyright holders. The basic idea here is that if a work is included in a remix (such as a song, or clips from a television show), then that work reaches a larger audience, thus increasing exposure rather than discouraging sales. One participant put it thus:

What's better advertisement for a TV show than a [fan video]? Oh and I can't tell you the number of times I've bought a song because I heard it on a vid. I'm pretty sure that Regina Spektor owes a ton of sales to Lim [a popular creator of fan videos]. I mean not only are the fans not making money from this but they're putting money in the pockets of the owners. At least I think so. I don't think the law should mess with creative works that aren't hurting anybody. – Rachel

3.2.4.1 Piracy

Though for the most part we limited the discussion to remix and appropriation, when discussing issues of market harm, participants often went off on tangents related to piracy and illegal downloading, with the related heuristic being "it's okay if it doesn't hurt anyone." The main idea that came up was the "fairness" of being able to copy when the material is unavailable through legitimate means.

I don't download music from the Internet, I use iTunes or I'll get it from Amazon. Unless I can't. I am so annoyed that neither iTunes or Amazon has [recording artist] ACDC. There's no mp3s, you can't buy it. And I want Thunderstuck and I want it now! – Martha

With Doctor Who, I'm not going to wait a whole year to watch it just because I'm in the wrong country and with the Internet it's like a forced pop culture divide. My [Livejournal] friends list doesn't care who's in the UK and who's in the US and if I read it the day after [UK television show] Doctor Who airs I'm going to get spoiled at worst or at least not be able to participate in the conversation. – Cassidy

The participants that discussed this did, however, acknowledge that this was an ethical judgment and not a legal one. Additionally, those who do not pirate noted that they choose not to do so because of fear of viruses or legal ramifications rather than believing that it is wrong to do so in all cases. Those who do pirate also do not always abide by their own ethical heuristics—the same participant who spoke of her

unwillingness to download music unless absolutely necessary (Martha) has no qualms about pirating software "if it's too expensive." In fact, all participants who mentioned software seem to have fewer reservations about pirating it than other types of media, suggesting further utilitarian calculations relating to cost.

3.2.4.2 Attribution

Another issue that came up repeatedly with respect to the idea of "good" and "harm" is that of attribution. Attribution is the idea that if a work is used, its source should be properly credited. Though courts might consider this as part of an overarching sense of good faith, and it factors into moral rights in some cases, attribution is generally irrelevant to the fair use test.

However, the idea of "credit where credit is due" is an important norm within communities of fan creators in particular (discussed in more detail in Chapter 6). Fandom has even been described as an "attribution economy" (Tushnet, 2007). This idea extends beyond reuse and into sharing and copying as well. To a large degree, this is a "good faith" norm. Some participants said that though they don't necessarily credit every image they use in a blog post, for example, they would remove something without question if they were asked to do so.

We also saw some degree of *implicit* attribution at work in our participants' values and judgments about copyright law—the idea that attribution isn't necessary when the content source is obvious.

> *If you're writing a post about Sherlock Holmes, like a movie review, then yeah, put up a picture of the movie poster. No need to say where it's from, it's obvious. But if you have some picture you got from Flickr then you should give the photographer credit.* – Heather

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Another participant, Kelly, noted that for some types of content (such as music by indie recording artists), she will include links to purchase CDs or ask people to buy them, but that this isn't necessary for well-known works—that everyone knows she "didn't make up" Harry Potter, as well as where to buy the product if they want to do so.

Along with how well-known the source is, with respect to value judgments (as opposed to a consideration for what the law actually says), the importance of attribution seems to be related to how public the forum is—i.e., the bigger an audience the remixer has, the more important it is to correctly attribute sources. Again, to some participants this was a show of good faith, and is true of fan works also. Though most of the participants (seven out of eleven) cited a preference for disclaimers ("I don't own this"), they also thought that though they were not necessary, they were polite. In fact, disclaimers typically carry no legal weight when it comes to copyright infringement (Tushnet, 2008).

Though attribution is not a factor in fair use determinations, except perhaps relating to good faith, our participants consistently brought up the issue with respect to fair use or broader judgments of what is fair. This "hidden factor" represents a common misconception that correct attribution carries more legal weight than it actually does. However, it also represents a clear norm among original content creators to be properly credited; in early studies of the use of Creative Commons licenses, it was found that 97-98% of users were selecting attribution as a characteristic for their licenses, to the point where the organization made it a requirement of *all* licenses (Loren, 2007).

3.3 Conclusions and Open Questions

Of the themes that emerged from the analysis of interview data, the commonality of ideas related to fair use among participants was the most striking. The common thread

was that they all create and share fanworks online. This indicated to me that many of the heuristics described likely stem from the social norms of that larger community. What is also interesting, however, was that participants also represented a number of different media types: fiction, art, video, graphics, and music. Though their understandings of fair use were similar across these different types of creators, I also saw that treatment of different media types are not always the same when it comes to accepted norms—for example, the different standards for noncommerciality for art.

More generally, I saw these common legal misconceptions about fair use:

1. Perception of noncommerciality as a sole deciding factor of fair use

2. Blanket exception for educational use

3. Addition of attribution as an explicit fair use factor

In addition, though participants recognized that these did not translate to legal doctrine, I saw these ethical judgments related to fair use, sometimes tracking to norms within the fan community:

1. Distinction between "profiting" from someone else's work and commerciality

2. More consideration for the "little guy" with respect to market harm

3. Potential for "market good"

4. Implicit attribution

Moreover, participants' reported behavior did not always track to either legal understandings or ethical judgments, such as the decision to pirate software; or in some cases, reported behavior represented a failure to consider the implications at all.

With respect to fair use, or even more granular down to individual factors, I observed that the following five dimensions of copyright decisions can be completely

different: (1) what the law says; (2) what people think the law says; (3) what is ethical;

(4) what people think is ethical; and (5) what people actually do. Table 3 illustrates one

example of this from my data:

Table 3 Five dimensions of copyright decision-making

Dimension	Participant Scenario
What the law says	One part of a fair use judgment is whether a new use is noncommercial.
What they think the law says	It is always illegal to make money from fan fiction.
What they think is ethical	It is not right to profit from someone else's work.
Community norm	Fan fiction writers are heavily sanctioned by the community for selling their work.
What they actually do	There are fan fiction auctions where the proceeds go to charity are common.

Additionally, though I did not discuss with participants at length specific online

community policies, it was clear that these are another source of "law" that comes into

place. Some participants did express that they have more comfort in distributing their

work via some online communities than others. YouTube in particular seemed to have a

poor reputation when it comes to protecting creators' rights; three participants reported

not using the site due to the fear of being served DMCA takedown notices (though none

had a clear understanding of the Digital Millennium Copyright Act). For example:

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

Interestingly, those participants who said that they know more about the law were

more confident about their online activities. Some participants did seem to be the victims

of chilling effects of the law, particularly the DMCA, and those who were generally had the least knowledge.

However, I found generally that participants had more nuanced understandings of the law than we expected based on previous research—though they could not articulate fair use as written in law, they had some correct intuitions, and those that were not correct were often based on sound ethical judgments. Additionally, it was these ethical judgments that often inspired calls for change in the law. As one participant noted:

> *I wish they would just come out and say that fan fiction is legal and be done with it. It's not hurting anyone, and we shouldn't have to be scared of doing our art.* – Sharon

Though some of the patterns of knowledge and intuition among our participants did track correctly to the law, there was a general sense of confusion over the current state of legal doctrine when it came to their online activities. For some, it is simply something that they do not think about; for others, this uncertainty has some chilling effect on the ways that they choose to share their creative works online.

In moving forward from this first study, there were obvious next steps. The patterns from the small sample of fan creators suggested further threads of inquiry, particularly in terms of looking at different types of content creation communities, since it was unclear how much of the findings might be generalizable to other types of content creation or other groups of creators. Would there be different norms or ethical intuitions in a community of creators that does not skew so heavily female, such as music remix? Therefore, my next step was to pull back and take a broader look at what was happening in these communities.

The work described in this chapter can be found in (and should be cited as):

Fiesler, C., Feuston, J., and Bruckman, A. (2015) .Understanding Copyright Law in Online Creative Communities. In the *Proceedings of the 2015 ACM Conference on Computer Supported Cooperative Work and Social Computing (CSCW)*. Vancouver, BC, Canada.

CHAPTER 4

COPYRIGHT PROBLEMS IN ONLINE COMMUNITIES

The study detailed in Chapter 3 provided another example of how misunderstandings, misconceptions, and confusion about the law are commonplace among many different types of content creators and consumers (Aufderheide et al., 2007; Graveline, 2010; Humphreys, 2008; Larsen & Nærland, 2010; Marshall & Shipman, 2013). Particularly for online creators who work with appropriated material, there is confusion about fair use and other relevant law, providing the opportunity for community norms to fill in some gaps.

Of course, an additional source of confusion for amateur content creators showcasing their work online can be their own rights in their work. Whereas in most countries copyright vests at the time of creation and therefore automatically exists as soon as someone creates something original, it is a common misconception that making something available on the web puts it into the public domain,[23] or that registration is

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[23] Creative works in the public domain have no copyright and therefore are freely available for anyone to use. There are typically three ways this can happen: (1) the copyright has expired (e.g., the works of Jane Austen or Mozart); (2) the copyright has been forfeited (e.g., dedicating a work to the public domain with a license) or (3) copyright is inapplicable for that work (e.g., works from the U.S. government are excluded from copyright). Simply making something available for other people to consume does not forfeit any intellectual property rights or put it into the public domain.

required for having a copyright in a work.[24] Additionally, Terms of Service governing copyright terms for the websites used for sharing are often long and difficult to understand. Therefore, creators are sometimes unsure about their own rights, including how to deal with plagiarism and—going back to fair use—how other people can use parts of their work.

As these content creators make decisions every day about what is permissible and what is not, they must negotiate multiple sources of rules, including the letter of the law, website policies, community norms, and ethical standards. It is therefore unsurprising that copyright law is a frequent topic of conversation in the online communities where content creators gather.

Following the interview study described in Chapter 3, I wanted to look at the larger picture of what is happening related to copyright in these communities—to sample more broadly from different types of sites and different types of media creation. Therefore, in this next study I used these conversations about copyright as a starting point to understand the challenges that creators face in an uncertain legal environment. By analyzing public forum postings in online creative communities, I could look further into how the law is understood (and—most importantly—not understood), discussed, and engaged with, and its effects on creative activities and online interaction.

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[24] The standard of copyright applying at creation was established internationally by the Berne Convention in 1886. The United States did require registration of copyrighted works before joining this treaty in 1989. Though in the United States there are legal advantages to registration, such as statutory damages for infringement, since 1989 neither a mark nor registration is required for a work to be considered copyrighted.

4.1 Forum Analysis Methods

Based on the findings from the previous study, I identified four major media types associated with remix: art, music, video, and writing. In determining which communities to study, we used Alexa search engine rankings as a proxy for popularity, choosing search terms for each media type that specified remix or appropriation: "fan art" (art), "music remix" (music), and "fan fiction" (writing). For video, due to difficulty finding online communities in a search for "remix video," we chose to examine one site with a broader focus (keyword "video") and one with a narrower focus (keyword "machimina" as an example of a specific type of remix video).

For each of these keyword searches, I chose the top sites under the search results that: (a) were online communities; (b) featured user-generated content of the appropriate media type; (c) had active *public* forums with more than 100 posts; and (d) were primarily in English. I chose two sites for each media type (see Table 4).

Table 4 Website information and statistics

	Description	Approximate Total Public Posts	Approximate Posts Scraped	Posts in Data Set	Estimated Copyright Percentage
DeviantArt Art c. 2000 forum.deviantart.com	One of the largest social networks on the web, a popular space for artists both amateur and professional to showcase their work	15,800,000	49,464	50	3%
Fanart Central Art c. 2004 forums.fanart-central.net	An online art gallery that hosts primarily fandom-based art and fiction, but also allows original submissions	278,000	20,875	50	11%
Remix64 Music c. 2002 remix64.com/board	A Commodore 64 and Amiga music remix community, containing news and reviews as well as a place for users to upload their work	73,000	1,099	50	5%
OverClocked Remix Music c. 2003 ocremix.org/forums	A video game music community featuring fan-made remixes and information	636, 000	7,642	50	5%
YouTube Video c. 2005 productforums.google.com/ forum/#!forum/youtube	The largest user-generated content video site on the web; though it does not have a general forum for discussion, it does have a very large help forum in a Google Group	500 per day	17,546	50	13%
MMORPG Forum Video c. 1999 mmorpgforum.com	A site for discussion of massively multiplayer online roleplaying games; the largest sub-forums are dedicated to machinima, Warcraft movies and Warhammer movies	113,000	364	23	3%

HarryPotterFanFiction.com Writing c. 2009 harrypotterfanfiction.com/forum s	The oldest fan fiction site on the web dedicated to the *Harry Potter* novels, housing over 78,000 stories	70,000	1,211	16	2%
Twisting the Hellmouth Writing c. 2008 forum.tthfanfic.org	A fan fiction archive with over 15,000 stories based on the *Buffy the Vampire Slayer* and *Angel* television shows	54,000	1,590	50	7%

In the spring of 2013, Gabriel Perez, a graduate research assistant, scraped public forum posts (only those posts viewable to anyone on the web without creating an account or logging in) associated with these online communities. A "post" includes the initial post along with all the comments that follow. We collected the content as well as header information (title, author, date/time) for each post and corresponding comments. In narrowing down the data set of all forum posts to only conversations about copyright, we had to go beyond the obvious method of doing a keyword search for "copyright." Using only this keyword would leave out relevant conversations that did not include the word—perhaps systematically so, as some posters may not know enough about copyright to use that term. Using a sample of 200 posts from these online communities, I pulled out common related terms in order to create a comprehensive set of keywords to search for conversations about copyright. I used an inter-rater reliability measure to validate this manual judgment by having two additional coders judge a random sample of 10% of these posts, resulting in 100% agreement. Gabriel as well as Jessica Feuston, also a graduate research assistant, served as second coders. I also validated the sufficiency of the keywords by testing them on another sample of posts and then comparing the search results to another set of manually judged posts. Though there were a number of false positives, there were no false negatives. The final list of keywords used included: attorney, copyright, copy, copying, illegal, infringement, lawyer, legal, license, permission, plagiarism, plagiarist, rights, steal, stole, and trademark.

The scrape based on these keywords resulted in nearly 100,000 total posts across our eight different forums (see Table 4). Because there were false positives in this data (e.g., a post that might contain the word "legal" but discuss privacy rather than copyright), Jessica (whose judgment was validated using the inter-rater reliability measure noted above) used a random number generator to sample posts from this group, adding posts to the final data set only if they included some discussion of copyright. We collected a maximum of 50 posts from each site, though some had less than 50 as their total number of posts about copyright. Because some sites had a much smaller number of posts, keeping this number small allowed for a fairly stratified sample. In sum, I began with a set of millions of forum posts across eight different communities, narrowed this down to approximately 100,000 posts that might be about copyright, and then narrowed this to a tractable number of posts *only* about copyright based on a random sample. My final data set had a total of 339 forum posts.

In analyzing the resulting data set, I looked to grounded theory, a method for collecting and analyzing qualitative data in order to generate theories that are "grounded" in that data from the beginning (Charmaz, 2006). It provides a set of systematic guidelines for analysis while maintaining flexibility to fit the given set of data. This approach is particularly useful for sifting through large amounts of unstructured data, and makes its greatest contribution in areas where there has been little research (Lawrence & Tar, 2013). When using this method for extant texts such as Internet discussions, it is important to situate the texts in their contexts and incorporate that context into the generated theory (Charmaz, 2006). Grounded theory beginning with open coding is a

technique used often in online forum content analysis (Goggins, Mascaro, & Mascaro, 2012; Singh, Johri, & Kathuria, 2012).

Using this approach, I began with inductive, open coding in which data is coded for emergent phenomena (Strauss & Corbin, 1998). Jessica and I each coded subsets of the data independently, meeting periodically to discuss the codes and synthesizing them into a single set. Refining the codes was an iterative process until we had a total of 87 open codes that were grouped into 8 higher-level categories. I considered our codes finalized when the categories were "saturated"—that is, we found no new insights or new properties to these categories in the remainder of the data set (Charmaz, 2006). Using these finalized categories, we both coded the data again, including an overlap of 10% which I used to calculate inter-rater reliability with a percent agreement of 94% and Cohen's Kappa of .77 (Lombard, Snyder-Duch, & Bracken, 2002).

4.1.1 Data Set Limitations

Likely because the forums I studied are all English language and most of the sites based in the United States, most legal discussion focused on U.S. law. In this data set, only 5 posts out of 339 made any specific reference to the law of another country—for example, fair use equivalents in other countries such as Canada's fair dealing. Though many core copyright concepts discussed are largely universal due to the Berne Convention,[25] it is also true that international law complicates issues of copyright and that social norms about copyright can vary wildly from culture to culture.

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[25] The Berne Convention (created in 1886) is an international agreement that governs copyright, requiring signed countries to recognize the copyrights of authors in the other countries. It contains some universal

Since I did not have demographic information for the communities beyond the posting statistics noted in Table 4, I cannot make statements about the representativeness of these users for content creators generally. However, the findings here echo many of the themes that arose in the previous chapter, and will be further validated by interview data discussed in Chapter 6.

Additionally, the sites represent a range of different internal copyright policies and related technologies. For example, YouTube uses an automated content ID system to assist in removing copyrighted content and includes pages of copyright policy explanations, whereas Remix64 has no Terms of Service posted at all. Because these eight sites are quite different in terms of user base and copyright enforcement, the issues discussed in my results unless stated otherwise appeared for at least two of these sites in my dataset. I saw evidence that social norms and copyright literacy among users varies across sites; however, it was not within the scope of the current study to compare and contrast these sites.

4.2 Copyright Problems

Though my final data set consists of 339 randomly sampled posts, these were not the only copyright-related posts in the hundreds of thousands of forum posts available to us. Due to false positives, the initial results of my keyword search does not provide an accurate count of how many copyright-related posts there were on these sites. Therefore, in order to estimate the prevalence of this topic of conversation, I also took a random sample of 100 posts from each of the eight sites. I noted how many copyright-related

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provisions, such as a minimum copyright term and allowances for fair use. As of 2013, 167 states are parties to this agreement. The United States signed on in 1989.

posts there were in these samples, resulting in a basic estimate for the prevalence of copyright as a conversation topic on each site (see Table 4). Though these percentages might seem small, three percent of DeviantArt's 15 million posts, for example, is still hundreds of thousands of conversations.

None of the online communities discussed here have any focus on copyright issues or any features in the sites themselves to lead creators towards these discussions. It appears that the topic simply comes up organically, conversations taking place most commonly within "General" or "Off-Topic" sub-forums.

When categorizing each overall post by type, I found that by far the most common type of conversation occurring, (beyond even unrelated conversations that veered off-topic to copyright) were those in which someone was asking a question about copyright. In both DeviantArt and YouTube, the two largest sites, question-and-answer posts made up more than half of the copyright-related posts for those sites. The vast majority of these asked questions were answered by at least one person.

The iterative codes from our data set converged on topics such as legal concepts, ethical judgments, enforcement, and attitudes. However, one clear theme that emerged was the prevalence of *problems* related to copyright expressed by creators in these conversations. Most of the posts in this data set could be labeled as expressing some sort of problem. I identified five major types:

(1) avoiding trouble,

(2) dealing with consequences,

(3) fear of infringement,

(4) dealing with infringement, and

(5) incomplete information.

The final category is an overarching problem, and the others focus on either the point of view of creators who are appropriating work, or the point of view of creators who are concerned about protecting their own work. I use these five problem types as a framework for discussing this data.

4.2.1 Avoiding Trouble

A common problem directly expressed by these creators is worry over whether something they are doing might be infringing someone else's copyright. Many of the posts are essentially asking "Is this going to get me into trouble?" or "How can I avoid getting into trouble?" Out of all of the question-and-answer posts, these types of questions are the most prevalent. Many of these questions are quite nuanced, without simple yes-or-no answers.

For example, two questions with potentially complex answers come from Overclocked, a music remix site: "Is it legal to use extracted vocals in a remix of a commercial song?" and "Is it copyright infringement to use chiptune SFX on an album designed to generate revenue as a donation to a religious entity?"

The advice that the posters receive in return varies in quality, but interestingly, tends to veer towards stricter interpretations of copyright. It is more common to see "No you can't do that" than "Yes you can" or even "Yes you can if you follow these guidelines." Of course, not all copyright interpretations are strict; when we do see "Yes you can," it is often followed by "… because no one will notice."

> *[Site: MMORPG Forum] It's not like the RIAA goes
> around youtube and puts a big lawsuit on them for using
> their music. Do you REALLY think that every single movie
> maker has taken the time to buy the rights of the music they
> used? Get some common sense, imo.* [26]

However, particularly keeping in mind that the other community members answering the

questions are likely *not* copyright experts, the "better safe than sorry" flavor of advice

makes sense.

One of the responses to the religious donation question above was: "The best

thing you can do I would think is to phone and/or email the companies own the sounds."

This is not bad advice, and in fact "ask permission" is a common refrain. However, it is

also the case that an amateur remixer contacting a large copyright holder to ask for

permission to use something is unlikely to get a helpful result. Nearly every time

someone in one of these posts mentioned contacting a copyright holder, it went

something like this comment on a Remix64 post: "I tried to contact the legal owner of the

music but the Liverpool studio didn't take time to answer my question." Advice to ask for

permission was also the response to the following two questions from worried creators.

> *[DeviantArt] Let's say that I want to use a photo of a
> celebrity in a piece of digital artwork. The photo would not
> be the entire piece...just a small part of it. (The vast
> majority of the piece would be my own work.)
> Unfortunately, I realized (belatedly) that pictures of
> celebrities are generally copyrighted. I'm not planning to
> sell my work... just display it online. Is there any possible
> way to use celebrity pictures WITHOUT committing
> copyright infringement?*

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[26] The Recording Industry Association of America is the trade organization that represents record labels in
the United States, a large part of their mission being to protect the intellectual property of these labels.
They have brought a number of high-profile lawsuits for copyright infringements against individuals
engaged in file-sharing.

[YouTube] I made a remix for a song by artist Linkin park and have no intentions to sell or use the video for commercial purposes. how do I remove copyright flags???

In both of these examples, the original poster is asking about a remix activity that based on the descriptions here could very likely be fair use. In this data there are a number of cases of fair use not being discussed as an option. For example, one answer is: "You need a LICENSE in writing from the copyright owner or his agent spelling out in nauseating detail just what you can and cannot do with the audio. Nothing else matters." The original poster's response was to thank the respondent profusely for the advice, implying that they will likely follow it. However, as noted above, contacting copyright owners rarely has a positive result. One might speculate that given this advice the remixer might simply decide not to post their video after all. This is a solution to their problem of how to avoid infringing copyright, though arguably not the ideal one.

This category is also where I saw the most examples of what could be considered legal advice—such as asking a copyright holder for a license. Though we sometimes see an IANAL ("I am not a lawyer") disclaimer, more often we simply see advice provided with complete confidence but no credentials. In contrast, in every rare instance of *actual* expertise, I saw an "I am a lawyer, but" disclaimer stating that they are not providing actual legal advice (which is dangerous for lawyers to do outside of an attorney-client relationship). Sometimes posters will provide links to actual legal resources, though this is somewhat uncommon. Of course, we also see a lot of "you should consult a lawyer" as advice—which like the suggestion to ask permission is not *bad* advice, but impractical. Lawyers are expensive, perhaps a reason why these creators are asking advice from strangers on the Internet in the first place.

Many of the posters also note that they researched the issue first themselves and were confused by the law or unable to find satisfactory answers. This is one place where I saw a potential failure of site policies or copyright explanations, when posters note that they were unable to find the information that they need.

4.2.2 Dealing with Consequences

Also from the perspective of those creators who are appropriating content, a related problem to avoiding trouble is dealing with consequences after the fact. Many of the posts in our data set were creators asking for advice about what they should do (or simply complaining) after they have been accused or officially sanctioned for copyright violations—whether or not that accusation or sanction was legitimate.

> *[YouTube] So I posted a video and used some music, I then got an e-mail from youtube saying it was copyrighted by SME (who ever they are) and I wanted to know, will I go to jail or [lose] my channel?*[27]

> *[FanArt Central] I did not 'edit' the images to my desire, I DREW them, with my mouse. I am not trying to hide the fact that I used heavy references on this piece… If this is against the rules, I will be glad to remove it. If not, is there any way to proclaim that this is my work, and for people to stop accusing me?*

A lack of knowledge also contributes to this problem. Frequently the posters do not understand why they were sanctioned, either because of confusion about copyright law or confusion about site policies. Responses tend to cite these policies rather than the

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[27] Under the Digital Millennium Copyright Act, third-party content providers such as YouTube are required to take actions on copyright claims by removing the content accused of infringing. This "takedown notice" procedure notifies the person who uploaded the content, providing options for filing a "counter-claim" if the content is not infringing. The DMCA also makes it a criminal act to circumvent technological copyright protection measures. Because remixing often requires gathering source material, the DMCA often hits hardest at transformative uses by people who are attempting to conform with the law (Tushnet, 2011).

law, though the two are typically linked. In response to the YouTube question above, someone simply states "If you get three copyright strikes your account will be terminated" while another response briefly explains the Automated Content ID system that seeks out copyrighted content on YouTube (though no one assures the original poster that jail time is not a potential consequence for a YouTube copyright strike).

This problem is more frequent on YouTube than on the other sites studied, likely due to the Content ID system that automates taking down videos when there are copyright claims. Of course, this automation also means that there are false positives, when content is taken down erroneously (Sawyer, 2009). The cases of *Buffy vs Edward* and Lenz's dancing baby as discussed in Chapters 1 and 2 are only two examples of YouTube flagging or removing videos that are almost certainly fair use. Unfortunately, though fair use's flexibility makes it valuable as a legal doctrine, this same flexibility makes it a nightmare for computational models (Felten, 2003). In my interviews discussed in Chapter 3 I uncovered that fear of work being taken down can affect technology or site choice, and here we also see examples of creators deciding to stop using YouTube due to disagreement with their copyright policies.

> *[YouTube] These guys are making fools of themselves claiming they have rights to Handel, Bach, and Mozart. It's just an excuse to put advertising on the screen when the video runs. I signed up on Vimeo.*[28]
>
> *[YouTube] As long as this problem continues unsolved, and YT staff does not fix it, there's no point in being a partner (unless I can get full immunity)… a few seconds from some random WMG music was heard inside those*

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[28] Handel, Bach, and Mozart compositions would certainly be in the public domain—though sound recordings may not be.

files. This can be easily classified as a fair use in the copyright laws.

[YouTube] Iv'e looked all over Youtube. There is no place to report People Continually false copyrighting, and people who threaten to take channels down by False flagging. Am I supposed to sit here and watch my channel get taken down for lies? When you search through the report section, there is no option for these things. YOUTUBE, DO SOMETHING!

In this data set, references to legal consequences were scarce. Typically the worst consequence would be the removal of work or of a user account. However, outside official sanctions, accusations within the community, fueled by social norms, can have consequences as well. This is discussed in more detail from the opposing point of view in terms of dealing with cases of infringement. However, it is notable that in the current category, the posters do not tend to receive a lot of sympathy in response to their problems. There are few examples of other community members coming to their defense or noting that they may have been wrongly sanctioned. There appears to be a default assumption that site sanctions are typically correct.

4.2.3 Fear of Infringement

In the previous two categories, we see the point of view of mostly artists who are appropriating existing work, either in legitimate remixes or actual infringement, and the problems caused by unclear law or policy surrounding content reuse. In these next two categories we get the point of view of copyright holders—when artists are trying to protect their work from infringement.

Though there are examples of this problem across all studied sites, it appears to be most frequent among digital artists, especially on DeviantArt. This makes sense, as DeviantArt hosts a number of professional artists for whom protecting the monetary

value of their work is a real concern. Plagiarism is a much more common complaint than remixing, and there is a great deal of discussion about the role of credit and permission.

> *[DeviantArt] I would like to make it so that I can display my art work but not allow others to copy it. How do I do that?*

> *[Harry Potter Fan Fiction] I was thinking about posting my stories online and I'm wondering how safe it really is. Even if I put a copyright on it and say 'Everything you don't recognize is property of me' there is still a chance that someone will take it, right? Is there any way I can protect my work more? Thanks.*

Posters often express frustration that there isn't more that they can do to protect their work—for example, that the site moderators aren't doing enough or that the site's policies aren't effective, sometimes making suggestions for policy or workflow changes.

> *[DeviantArt] I've reported it to dA a few times over the last couple of months, but no action seems to be taken. One report even came back "invalid" (she stole the photo from the girls private Facebook for Christ's sake)*

> *[DeviantArt] I'd like to suggest if at all possible for DA staff to make it to where deviations that are submitted in must be manually approved or denied. The reason I say this is because there are people who have been treating DA like it's myspace, photobucket, facebook, etc in which completely goes against the copyright policy*

This demonstrates something of a reversal from remixers deciding not to use a particular site for fear of their work being flagged for infringement and removed. Instead, I saw creators deciding not to use a site because of fear their work will be infringed upon.

> *[DeviantArt] I just finished a play but nobody wants to look at it because they're busy. Of course I got it done really quickly, it's the FIRST DRAFT and I need you to look at it, mom! :< And I'm not posting it here for fear of Copyright Infringement*

We also see incomplete or incorrect information contributing to this problem, as many creators have some fundamental misunderstandings about the way that copyright works. The advice for "how can I protect my work?" can be as bad as some of the advice for "how can I avoid infringing?" For example, copyright registration is not necessary—copyright vests at the time of creation. A common misconception is that you have to *do* something to have rights in your work (such as register it with the Copyright Office).

> *[DeviantArt] there are several different ways to copyright. the "automatic" copyright actually only protects you to a certain extent. while other forms such as trademarking would further protect you through copyrighting names, figures, symbols, words, etc that are contained within an image. "all rights reserved" is another one.*

It is also worth noting that for creators who might be interested in more permissive uses of their work, there is little information available on the sites or in the forums about things like open licenses. In the very few instances in which Creative Commons[29] was mentioned, posters did not seem very knowledgeable about how it functions.

4.2.4 Dealing with Infringement

With respect to possible infringement that has already taken place, I did see some "someone stole my work, so what do I do now?" sorts of questions. However, the more common interactions here are calls for action or public shaming. Though there are occasional threats for legal action, mostly these posts include requests for other

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[29] Creative Commons licenses are a method for content creators to share their work more freely by communicating that it is "some rights reserved" rather than "all rights reserved" (Lessig, 2008). For example, a DeviantArt artist could put a Creative Commons Attribution No-Derivatives Non-Commercial license on their artwork, meaning that someone else could copy and use it, but they would have to credit the creator, could not modify the piece, and could not make any money from it.

community members to report someone for a Terms of Service violation, or simply

calling them out publicly. This is a form of community social norm policing.

> *[Overclocked] Why exactly does it say [username] and have a link to [username]'s (old?) webpage by it? Explain that to me and then I'll be happy to comment on your ALLEGED remix. Otherwise, nice try, genius. Don't let the door hit you on the way out, music thief.*

> *[Twisting the Hellmouth] it does smack of plagiarism, though at least he's up-front about saying he didn't write it. Not naming the real author is VERY bad, and I'm about to write a review saying so.*

Here I saw strong evidence of social norms against plagiarism within these

communities. These instances of public shaming can arguably be more effective than

official sanctions in these kinds of situations, particularly when the community members

are unclear on the law or do not have faith in the site itself to properly enforce it. Fan

communities in particular have been described as "hypervigilant" when it comes to

policing plagiarism, with one fan fiction community going so far as to maintain a list of

known plagiarizers (Busse & Farley, 2013). I discuss enforcement of norms in fan

creation communities in more detail in Chapter 6.

As far as the outcomes of these posts, sometimes they work exactly as intended:

> *[Remix64] well it's all sorted now. Got an apology from him, so the matter is resolved as far as I'm concerned. Happy for this thread to be deleted.*

Other times, they can backfire. This is also an example of a social norm—a norm about

what kinds of behavior needs policing and how to go about it.

> *[Twisting the Hellmouth] I've looked the forum over and you show an astonishing lack of common sense when it comes to "problems", especially when it involves moderators. There's nearly a half dozen occasions I've located on here where you could have easily contacted a site moderator and/or administrator regarding your*

> *perceived "problem", but have decided to air it publicly to*
> *try and stir up other members so you don't have to stick*
> *your neck out by yourself.*

Additionally, sometimes social norms or even community policies do not actually track to the law. Chapter 3 discussed evidence of this with respect to understandings of fair use among remixers. One striking example of this is the policy from the Twisting the Hellmouth fan fiction community about appropriation of elements in the work posted there. In an initial discussion of this topic, a writer asked if this was permissible, and another poster explained why they considered it unethical.

> ***[Twisting the Hellmouth]*** *I'd expect you (and we would*
> *double check) to obtain permission to do fanfic based off [a*
> *fanwork]. It'd be like you reading one of [username]'s fics*
> *and then deciding to make a "sequel" out of the blue. I*
> *wouldn't like it, no other author here would like it.*

This is actually a common norm within fanworks communities, when the same guidelines for re-use do not apply to other fanworks as they do for media properties. In other words, it's not okay to remix the remixes. Though fan creators recognize that this is not a legal or economic argument, the stance revolves around community norms and established etiquette (Busse & Farley, 2013). The original poster here noted the potential hypocrisy in this stance, but then stated an intention to follow the community norm.

> ***[Twisting the Hellmouth]*** *how does this differ from taking*
> *a story written by any established author? have we gained*
> *the permission of every writer and director of every single*
> *Book, TV show and Flim that the site covers? don't*
> *understand how someone who writes a story based on*
> *someone else?s work without getting permission from the*
> *original writer can complain about someone writing a story*
> *based on their work. It just smacks of double standards to*
> *me. But that is just my opinion and I'm more than happy to*
> *follow the general fanfic rule that it's taboo.*

In a later post in the forum, the site moderators came to the community for input

on an official policy on this exact issue, and put forth this policy:

> *[Twisting the Hellmouth] I came up with this as a
> potential solution for authors who want to write stories
> based on the stories of other authors. Quote 1. If you want
> to base your story on another author's work you must
> contact them and ask permission and attribute them if they
> give it. Ideally, this should be before you start writing so
> you don't waste your time if someone responds negatively.
> 2. If you do not get a response within two weeks, you can
> post the story but must still attribute their work. 3. The
> original author can ask to have your story removed from
> the site at any time, even if they have given their permission
> in the past. They have the right to change their mind.*

Interestingly, this policy also goes beyond the requirements of the law. Assuming

that fan fiction is fair use, then permission is not required. However, Twisting the

Hellmouth already has a policy in place that prohibits posting fan fiction that is based on

the property of copyright owners who have expressly stated that they do not want fan

fiction written about their work (for example, author Anne Rice saying that it "upsets

[her] terribly" and George R.R. Martin stating that he doesn't want people "making off

with" his characters (Busse & Farley, 2013)). This request does not actually hold any

legal weight in cases of fair use, but is instead an ethical norm. Unsurprisingly, there

were community members who felt that the policy of non-response indicating permission

was also too lenient, however.

> *[Twisting the Hellmouth] I do not know of any fanfiction
> archives that allow or even support authors playing in
> other authors' verses without their permission. I don't think
> that this site should become the first. I do not want authors
> on this site to feel that their hard work is not protected. I do
> not want authors to feel that their stories, their ideas, are
> up for grabs by whoever wants them.*

The excerpt above provides an example of a situation in which the law is less strict than a website policy (based on an ethical judgment rather than a legal one) which is less strict than a social norm. Similarly, Twisting the Hellmouth requires disclaimers ("I do not own the characters in this story"), which carry no legal weight, but follow social norms among fanworks creators regarding credit. Negotiating multiple sources of rules seems to be one cause of confusion in these spaces.

4.2.5 Incomplete Information

Though a lack of understanding of the law or site policies is an overarching problem throughout our other categories as well, there are many instances of information seeking behavior outside of discussions of specific cases. Sometimes these are simply expressions of confusion about copyright law in general. Perhaps they choose to post about it in these communities because they have seen other discussions of copyright. For example, this poster on Overclocked asked a very basic question about copyright law that did not directly relate to the content of the website:

> *[Overclocked] If downloading copyrighted music for free is illegal, then why can we listen to a music video on youtube or some amv of it. That's how I listen to music that I don't own.*

In these general discussions as well as in specific instances arising from the problems previous discussed, I saw both correct and incorrect explanations of the law in response. Some posters (though IANAL seems to apply) are actually very knowledgeable about the law and appear to seek out these discussions specifically to answer questions. One poster in the Remix64 music remix community appears in 35 out of 50 copyright-related posts, almost always answering questions.

Of course, the danger is that there is no simple way to tell the good from the bad when it comes to legal information and advice. For example, the following is an explanation of fair use provided by a poster, and though it contains some elements of truth, it is not quite right, since it suggests that only educational or news purposes constitute fair use.

> *[Twisting the Hellmouth] Actually under copyright law, the copyright owner doesn't have to prove a person made a profit OR caused damage. They just have to prove someone else used their copyright material in an illegal way. And almost any use is illegal. Unless that someone else is using the work as a reference in a non-fiction educational work or a news article, they will lose the law suit.*

In a more troubling example, this was a response to a post about a YouTube takedown in which the original poster stated that they thought their remix video was fair use.

> *[YouTube] There is really no such thing as fair use. If you use someone else property without permission it's still called stealing.*

When the original poster then cited the fair use provision in the Copyright Act, this was the response:

> *[YouTube] You might want to look into that law you posted the Copyright Act 1976 because since 1976 to 2010 it's been updated to take in this little thing called the internet. That's like me bring up a law from 1853 trying to defend my right to drive without pants.*[30]

Sometimes legal explanations aren't blatantly wrong, but just simplistic.

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[30] Even though the Copyright Act is decades old, it is still the law of the land. This is one reason that it is desirable for laws like fair use to be somewhat vague and flexible, because they can be interpreted in light of new technology (Aufderheide & Jaszi, 2011).

> *[YouTube] There's nothing particularly mind-boggling about copyright law: only the original owner has the "right", literally, to make "copies."*

At least occasionally, community members will point out that it might not be the best idea to trust strangers on the Internet with legal advice. In one exchange on DeviantArt, one poster argued "I'd tried looking up on the net, but I find it easier to get a straightforward answer from a person's personal point-of-view than to try to make sense of miles and miles to text," to which the response was, "Someone's point of view could be wrong, though."

Though these question-and-answer posts are the most common in this data set, there are also examples of higher-level discussions about copyright, often containing nuanced understandings of the issues involved even if not representing completely correct interpretations of the law.

> *[Twisting the Hellmouth] I imagine most people here have read about the book series "50 Shades of Grey", a recently published erotic novel trilogy that was originally posted as "Master of the Universe" – a Twilight fanfiction story posted on fanfiction.net. I thought it would be appropriate here to discuss the morality – perhaps even the legality – of fanfiction writers publishing their works with a few changes.*

Sometimes these discussions do not even relate to the content of the community—for example, a discussion about software piracy on a music remixing site—which suggests that for these types of content creators copyright is something that is of general interest to them even outside of the immediate challenges they face.

> *[Overclocked] I find that more and more people around me have no scruples with illegally downloading software. I would love, believe me, to own some of these programs, but I know that it is stealing. I feel you are no less a criminal for pirating programs than for shoplifting or pickpocketing.*

*Is it easier to justify because you won't ever see the guy
who's losing money, often thousands of dollars, because of
your whim? Someone want to explain your reasoning
behind doing this? You know you do it.*

A side effect of these discussions and information-seeking is that some
community members are doing legal research and learning things that they wouldn't
otherwise, due to their engagement with these communities and this type of content
creation.

> ***[Twisting the Hellmouth]*** *I write fan fiction of a limited
> sort (BtVS or Crossovers with BtVS) so I'm not exactly
> unbiased. When I first started writing it I did some basic
> research on the legal issues. My understanding is that there
> haven't been any actual court cases involving fan fiction (In
> the US anyway).*

> ***[Overclocked]*** *Let me just say I'm really enjoying this
> conversation. I went to school for music business and I like
> honing my knowledge with this kind of academic
> discussion, especially when the result of the exchange can
> potentially help someone!*

Therefore, these copyright discussions maintain a precarious position of both advancing
and contributing to knowledge, and potentially spreading misinformation.

4.2.5.1 Social Q&A

A final thought based on these findings is that one way to think about this issue of
incomplete information is as a social question-and-answer (Q&A) problem. After all, it is
not unusual for people to seek answers to their questions online, and from a number of
different sources. Research in this area has explored formal Q&A sites such as Quora and
Yahoo! Answers (Adamic, Zhang, Bakshy, Ackerman, & Arbor, 2008; Paul, Hong, &
Chi, 2011) where most of the interaction is between strangers, as well as the use of
personal social networks (Lampe et al., 2014; Morris, Teevan, & Panovich, 2010)(such as

Twitter and Facebook) for information-seeking. We know some reasons why someone might choose to ask a question on Facebook, for example, as opposed to seeking out a specific expert, such as personal context and trust (Morris et al., 2010). Choi et al. have proposed four models of Q&A sites: community, collaborative, expert-based, and social (Choi, Kitzie, & Shah, 2012). One might consider an online affinity space, in which people come together because of a shared interest or common activity (rather than simply Q&A) to be somewhere in between a social and community model.

In these spaces, when someone asks a question and the answer comes from a stranger, they know something about them—that they are likely also an artist, or a writer, or a knitter. They share a common experience, and common problems related to the question—in this case, the struggle to understand the boundaries of copyright law in the context of their creative work. Trust and context are still benefits, but information seekers also have to make decisions about authority and expertise—which we know from credibility research can be difficult to judge (Eastin, 2001; Paul et al., 2011). Additionally, the legal context makes the questions potentially high risk—could trusting a wrong answer lead to legal trouble? In this way, the environment is similar to health information seeking, where source credibility is an important factor in Q&A (Eastin, 2001). My findings suggest therefore that copyright Q&A has both some differences and similarities to other social Q&A work, and that this could be an area for further research.

4.3 Conclusions and Open Questions

Here I have described five emergent themes in this data as *problems* or *challenges* faced by creators in these online communities—but what are the consequences of these problems? Based on the data, I saw little evidence of legal consequences beyond those handled directly by the website (such as DMCA takedown notices). Though lawsuits

from content owners are not outside the realm of possibility, in practice they are more likely to go through the website itself to have content removed.

Therefore, setting aside that more unlikely consequence, there are four primary potential bad outcomes for content creators: (1) their work is removed from the site due to a policy violation or takedown notice; (2) their work is copied or distributed by someone else without their permission; (3) they decide not to upload their work to the site because of fear of getting into trouble or fear of someone else copying it; or (4) they violate a rule or norm and are shamed or ostracized by the community.

The secondary outcome of most of these, besides the distress of the creators themselves, is less creative work in these communities. Arguably this is a poor outcome for both websites and creators, as well as outside consumers. Fair use, in addition to being context-dependent, tends to be value-laden. Not every lawyer or judge will see remix as a valuable form of art (Tushnet, 2014b). However, "less creativity" (whether due to less creation or less visibility) also goes against the spirit of intellectual property in general, which as provided for in the Constitution exists to incentivize invention.

In legal terms, a *chilling effect* is when someone doesn't do something that they should be able to do because of a fear of legal consequences. Though traditionally examined in terms of the suppression of speech, this is something that can happen with creativity as well. As legal scholar Rebecca Tushnet points out, even though the law at its core values creativity, not everyone has the same tolerance to risk and so it is still susceptible to being suppressed by copyright expansionism (Tushnet, 2009). This data set showed specific instances of chilling effects within these communities (e.g., decisions not to upload work onto YouTube due to improper takedown notices), and we could

extrapolate to more (e.g., creators being told that their work would definitely be infringing if they don't get permission from the copyright holder). Of course, creativity is difficult to quantity, and it could be that creativity is not so often being *chilled* as *moved around*. However, choosing to share with a smaller audience does have a similar net result than choosing not to create at all.

Additionally, content creators not trusting in the site to protect their work from copyright infringement is a kind of reverse chilling effect that has the same outcome. Choosing to not use a technology for fear of copyright infringement is similar to evidence of technology non-use due to fear of privacy invasion (Lampe et al., 2013); both represent a lack of faith in the website to protect their interests.

Accepting these as problems that should be addressed, where do we begin in thinking about solutions? In my descriptions of the five copyright-related challenges observed in these communities, there are two major recurring *causes*. The first is a lack of information—misunderstanding, confusion, or ignorance of the law or site policy, and difficulty finding answers when sought. The second is some perceived failing of the site or technology itself—not providing needed information, policy or enforcement inadequacies, and imperfect or overreaching enforcement tools.

When it comes to the first problem of lack of information, there are multiple factors at work. Though simple lack of knowledge and lack of research can explain much of it, unclear law and unclear community policies are contributors as well. This lack of clarity is also exacerbated by the spread of misinformation in the very conversations that I studied. Though some of the community members are well informed about copyright law and do a service to their community by answering questions, there are also many

instances of incorrect information or simple bad advice. I could argue for better copyright education for people in general, but when misinformation and confusion is affecting user experience on these websites, then it becomes a usability problem appropriate for site designers to address.

From a design point of view, this is an incredibly complex space with intricate relationships between sources of rules, as discussed in Chapter 3. The discrepancy between law, site policy, and norms on Twisting the Hellmouth is a telling example of this kind of complexity. There we see a legal rule (fair use for transformative work) that is less strict than a site policy (seek permission when possible for re-use of fan fiction elements) that is less strict than a community norm (never re-use fan fiction elements without permission). Piling onto the problem of the law itself being gray, creators may also have to deal with multiple sources of rules that sometimes contradict each other.

Chapter 7 will take up the issue of specific design recommendations based on these ideas. However, first the next chapter focuses on one of these other sources of rules: website policy. Findings from this study made clear that policy is relevant to the way that creators think about copyright in these communities, so I wanted to better understand how these policies operate in practice.

The work described in this chapter can be found in (and should be cited as):

Fiesler, C., Lampe, C., and Bruckman, A. (2016). Reality and Perception of Copyright Terms for Online Content Creation. In *Proceedings of the 2016 ACM Conference on Computer Supported Cooperative Work and Social Computing (CSCW)*. San Francisco, CA.

CHAPTER 5

COPYRIGHT POLICIES FOR ONLINE CONTENT CREATION

In Chapters 3 and 4, examining the experiences of remixers with respect to copyright revealed multiple sources of rules that they negotiate in making decisions. Though the law as written is one of these, along with social norms (discussed more in the next chapter), another is the copyright policy of the website they are using. Though some user-generated content sites like YouTube and DeviantArt have policies related to appropriation, it is more common for websites to simply be silent on this issue. However, one copyright-related provision that nearly every user-generated content site does have is a copyright license, which provides for how the site can use *your* content.

After all, how much control do we really have over the content that we post online? We often consider this question in terms of privacy (e.g., (Hoadley, Xu, Lee, & Rosson, 2010; Squicciarini, Shehab, & Wede, 2010)). However, also hidden within websites' click-through terms and conditions are copyright licenses that provide important information about ownership of the content you create. For example, YouTube requires that users provide the website a *"worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube's (and its successors' and affiliates') business, including without limitation for promoting*

and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels."[31]

Though they may not exercise these rights, under a license like this a website *could* modify and license to others the content you provide. Until a change in October 2014,[32] LinkedIn's similar license further specified that it included giving over rights to "ideas, concepts, and techniques," and was also irrevocable, meaning that when a user clicked-to-agree they were locked in to those terms indefinitely. However, how many users will actually read this text? Moreover, even if they did, would they understand it?

Considering that reading only the privacy policy of every site visited would take the average Internet user over 200 hours per year, it is not surprising that many do not take the time to read often complicated terms and conditions (Jensen & Potts, 2004; Mcdonald & Cranor, 2008). Though the readability of online privacy terms specifically has been identified as a usability and accessibility problem (Jensen & Potts, 2004; Luger et al., 2013), intellectual property rights like those conveyed in the YouTube licensing clause are also increasingly relevant. Whereas privacy policies cover how a site can use user-provided information and data, intellectual property terms cover the ownership of the original content that users provide. Copyright vests at the time of creation, which means that we all own our blog posts, photographs, and maybe even tweets,[33] and we

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[31] https://www.youtube.com/static?template=terms (as of April 16, 2015)

[32] LinkedIn's copyright terms have changed significantly since the time of this study, and no longer claim so many rights in their license. https://www.linkedin.com/legal/user-agreement

[33] There is some question about whether tweets are copyrightable, and legal scholars generally agree that some are and some aren't, depending on factors like length, originality, and content (Haas, 2010; North, 2011). This same standard would apply to other types of content like social media status updates.

must give websites permission to display or use our work. These permissions are typically covered in the websites' TOS, but are these read any more frequently than privacy policies? Do people realize what rights in their original content they are granting or how their work can be used?

From the previous studies I know that remixers care about the user of their content online, but this is true for others as well. For example, Facebook users have described content ownership as one of their concerns about the site (Zhang, Choudhury, & Grudin, 2014), and react negatively to scenarios such as Facebook selling their content to another company, regardless of what they agreed to in Terms of Service (Marshall & Shipman, 2015). In 2009, an "online swell of suspicion" followed changes in Facebook's copyright license, leading a number of high-profile users to delete their accounts (Stelter, 2009). Similarly, in 2012, Instagram users pushed back over a provision in the photo-sharing site's TOS that allowed use of photographs "in connection with paid or sponsored content" (Lynley, 2012). In the summer of 2014, media attention around published research findings caused many people to realize that the TOS for websites like Facebook and OKCupid might allow the use of their data for research purposes (Robbins, 2014). The prevalence of ignorance over how content can be used is particularly problematic if terms vary wildly across websites. Moreover, we know from research about privacy terms that when information *is* presented to the user, it might misalign with expectations (Lin et al., 2012) or cause changes in user behavior (Tsai et al., 2010).

When it comes specifically to these licenses, I wondered: Do people read copyright terms, would they be able to understand them if they did, and does it matter? To answer these questions I looked to an even broader sample of user-generated content

and remix websites, conducting both an analysis of Terms of Service and a survey of user knowledge and attitudes.

5.1 Terms of Service Analysis

5.1.1 Methods

In creating a sample of sites to analyze, I used both remix communities and other user-generated content (UGC) and social networking sites to ensure that I covered a variety of different types of content creation. As in my previous study, I sampled sites along similar categories of media type: writing, music, art, and video. I used Alexa search engine rankings again to pull out the highest ranked five websites for each category that focused on user-contributed content. I also included the most popular social networking and user-generated content websites as provided by a website that also bases its algorithm on Alexa rankings,[34] so that I could get a broader picture of online content creation.

With 6 categories, this resulted in 30 websites in my final dataset (see Table 5). With the assistance of an undergraduate research assistant, Josephine Antwi, I retrieved the Terms of Service for each of these websites. In addition to analyzing the text of the TOS, I also gathered word count and reading level information. These documents were collected and analyzed for readability in June 2013, and I also checked the copyright licensing terms for any changes in July 2014 after the survey data was collected.

For this study, I focused on just copyright licensing terms—i.e., what rights the user grants in that work. The typical format of these terms is, "You grant this website an

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[34] http://www.ebizmba.com/articles/social-networking-websites, http://www.ebizmba.com/articles/web-2.0-websites

A, B, and C license to X, Y, and Z." The first author is a law school graduate and copyright expert, and determined which sections of the terms were relevant. The format of these licensing terms is extremely consistent, and identifying them in the text is an objective task. However, Josephine served as a second coder for the identification of the content of the licensing terms.

Table 5 Website TOS word count & Flesch-Kincaid grade level score, sorted from highest to lowest

Website	Media Type	Word Count	Flesh Kincaid Score
Sound Cloud	Music	7961	19.8
Warcraft Movies	Video	1837	19
Fanfiction.net	Writing	3661	18.3
Asianfanfics.com	Writing	5823	18
Craigslist	UGC	5006	17.6
Daily Motion	Video	3223	17.6
ccMixter	Music	2693	17.3
MySpace	Social	5486	16.9
YouTube	Video	3764	16.6
Club Create	Music	5811	16.3
Overclocked Remix	Music	1170	15.4
Twitter	Social	3486	15.3
Flickr	UGC	5763	15.2
Wikipedia	UGC	5773	15.2
Ebaum's World	Video	4659	15.1
LinkedIn	Social	7294	15
DeviantArt	Art	4031	14.7
IMDB	UGC	2613	14.2
Vidders.net	Video	1677	14.2
Fanart Central	Art	2591	13.2
Elfwood	Art	2300	13
Facebook	Social	4477	12.9
Pinterest	UGC	2219	12.5
Archive of Our Own	Writing	9142	12.1
Harrypotterfanfiction.net	Writing	985	11.9
Google+	Social	1691	11.5
Y-Gallery	Art	2368	10.6
Twisting the Hellmouth	Writing	3005	9
The Otaku	Art	1189	8.4
Remix 64	Music	N/A	N/A

Without knowing exactly what types of licenses would be present, I updated the coding scheme as we went through the set of documents and re-coded previous ones. In addition to coding for each license and right mentioned, we also coded for whether the site included plain language explanations of copyright terms. Some of the websites did not have any copyright terms. A comparison of independent coding achieved an 89% inter-rater reliability using Cohen's Kappa (Lombard et al., 2002).

5.1.2 Results

5.1.2.1 Readability

For each of the 30 TOS in our dataset, we determined word count and Flesch-Kincaid Grade Level Score using statistics automatically generated by Microsoft Word (see Table 5). This is a common readability measure that has been employed in similar studies for privacy policies (Culnan & Carlin, 2006; Graber, D'Alessandro, & Johnson-West, 2002; Jensen & Potts, 2004). Only one site on my list (Remix64, a music remix community) did not have any TOS.

The average Flesch-Kincaid Grade Level Score (representing a U.S. educational grade level) is a college sophomore reading level of 14.8, ranging from 8.4 to 19.8. This puts the readability of these documents roughly on par with those of privacy policies, which multiple studies have found to be in the 14-15 range (Graber et al., 2002; Jensen & Potts, 2004). The average scores for video sites (17.7) and for music sites (17.2) does skew higher than the other media types, which could possibly be accounted for by the additional legal complexities associated with sound. Just as reading privacy policies for all the websites one visits might take years, at an average adult reading speed of 250 words per minute, the TOS for these 30 sites would take almost 8 hours to read.

5.1.2.2 Copyright Terms

When a user submits content to one of these websites, they are typically licensing that work for use by the site—at the very least, the site must be permitted to display the work, or posting it there would be pointless. For every website except for one (Club Create, a music remix platform in which users remix provided samples live on the site), the site only licenses rather than requiring a transfer of copyright. Sixteen of the sites specifically state that the user retains copyright (or ownership) in the work.

Typically the license is stated in a string of legalese in the TOS, similar to the YouTube clause we quoted in the introduction. The majority of these sites include specific license and use rights provisions. Only one did not include a TOS, and another five did not have any information about copyright terms. These five were all fairly small websites.

It should be noted that the absence of a license does not mean that the site does not, for example, have the right to display a user's submitted content. An *implied* copyright license can be created by law in the absence of an official agreement. However, for this study we focused on the licenses as specifically stated—those that we *know* the user grants by agreeing to a TOS.

In this dataset, I saw the following types of licenses: revocable, irrevocable, assignable, limited, nonexclusive, paid, perpetual, royalty-free, sub-licensable, transferable, unrestricted, and worldwide. The most common are also the most unsurprising and necessary. Nonexclusive (19 instances) means that the user is free to use the same content however else they like, including licensing it to others. Royalty-free (16 instances) means that the website is not required to pay the user for their work. Worldwide (20 instances) means the license is effective all over the world.

License types are typically followed by an enumeration of specific uses the website can make of the work. For example, when posting on Craigslist the user is giving the website a license "to copy, perform, display, distribute, prepare derivative works from (including, without limitation, incorporating into other works) and otherwise use any content that you post." Based on the provisions in our data set, I developed the following codes to cover these different usage rights: transmit, translate, enforce, reproduce, perform, modify, adapt, transform, index, improve, edit, distribute, display, compile, backup, analyze, advertising/promotion, commentary, commercial use, in connection with site business, use by other parties, use of name/likeness, and unspecified use.

Again, the most common codes were also the least surprising. To reproduce (17 instances), distribute (18 instances), and display (20 instances) are technically necessary in order to have the work appear on the website. There are also a large number of sites that require being able to *change* submitted work—we saw 21 instances of requiring a modify, adapt, or transform use. At times this may only mean something like formatting, and at others, as in the case of Craigslist, the user gives the site the right to make and distribute derivative works.

Only five sites included plain language explanation of these copyright provisions. Pinterest's TOS includes: "More simply put, if you post your content on Pinterest, it still belongs to you but we can show it to people and others can re-pin it." Even this level of explanation is rare.

The number of codes (copyright provisions) did not fall into a pattern with respect to media type or popularity of the site. The site with the most number of codes (26), the small fan fiction website Asian Fan Fics, contains provisions for the site to essentially do

whatever they like with whatever is posted there without any notice or attribution to the creator.

5.2 User Perceptions Survey

5.2.1 Methods

Following my TOS analysis, I examined the relationship between the reality (what TOS actually say) and user expectations and opinions. Are the users of these websites aware of how their work can be used, and how do they feel about those uses? I hypothesized that very few would report having read the TOS. Based on my previous finding of difficult readability, I also predicted low accuracy in identifying terms. Additionally, I hypothesized, based on what I had already learned of social norms in creative communities that participants would feel differently about some terms over others (e.g., less favorable about terms involving commercialization and modification).

For the survey, I chose 11 of the most common terms, leaving out those that were too overlapping or non-specific. My final set of terms that I questioned users about were:

- **Non-exclusive license:** The user can also post/use this content elsewhere.
- **Worldwide license:** The license does not have any geographic restrictions as to where it is valid.
- **Royalty-free license:** The website does not have to pay the user royalties for their content.
- **Perpetual license:** The license does not expire.
- **Transferrable/sublicensable license:** The website is permitted to transfer this license or license the content to another party.
- **Irrevocable license:** The user cannot terminate the license once agreed to.
- **Right to modify or transform:** The website can modify the user's content (which could range from formatting changes to derivative works).
- **Right to create backups:** The website can make copies of the content for the purpose of backups.
- **Right to use commercially:** The website can make commercial use of the content, including selling or profiting from.
- **Right to use in advertising:** The website can use the content in advertisements.
- **Right to display:** The website can display the content (a necessary attribute to show the content on the site itself).

I asked about these license terms in plain language. For example, the question for non-exclusive license read: "If you publish content on [website], can you publish that content somewhere else?" I asked the participants to give me their intuition; therefore the only possible answers were "yes" and "no"—their *expectation* (or intuition) for the term. In addition to this factual answer, we asked their *opinion* of the term. Statements like "If you publish content on [website], you *should* be able to publish that content somewhere else" were followed by possible responses on a 5-point Likert scale, from "strongly agree" to "strongly disagree." Scales that use "agree/disagree" response categories have a tendency to create an acquiescence bias amongst respondents (Saris, Revilla, Krosnick, & Shaeffer, 2010), but for my purposes these scales were optimal for efficiently asking questions across a range of sites and dimensions. The survey also included demographic questions, and asked participants about copyright training and whether they had read the TOS of each website for which they answered questions.

The survey contained a list of the 30 sites listed in Table 5 and asked participants to check which sites they had used (denoting whether they had only read them or had shared content). To ensure that the survey would take comparable time for each participant, rather than asking about the TOS for every website they indicated, the survey provided a set of questions for each of three of the websites they indicated, chosen randomly. Though websites purposefully skewed towards creative communities that value appropriation, because participants answered questions based on the websites they use, my data set is also proportional to the popularity of the websites (see Table 6).

Table 6 How many participants reported having used and how many filled the surveys on each website, ordered by how represented they are in the survey data

Website	Media	Selected	Surveys
Facebook	Social	390	124
Wikipedia	UGC	378	120
Pinterest	UGC	336	111
Craigslist	UGC	373	106
MySpace	Social	315	97
YouTube	Video	391	96
LinkedIn	Social	284	76
IMDB	UGC	323	75
Twitter	Social	269	66
Google+	Social	282	63
Flickr	UGC	233	58
DeviantArt	Art	217	56
Daily Motion	Video	172	44
Ebaum's World	Video	164	33
Sound Cloud	Music	157	31
Fanfiction.net	Writing	88	20
Harrypotterfanfiction.	Writing	25	8
Warcraft Movies	Video	29	6
Archive of Our Own	Writing	26	4
Asianfanfics.com	Writing	20	4
Elfwood	Art	18	4
Overclocked Remix	Music	29	4
The Otaku	Art	27	4
ccMixter	Music	15	3
Remix 64	Music	15	3
Y-Gallery	Art	16	3
Fanart Central	Art	15	2
Twisting the	Writing	16	2
Club Create	Music	14	1
Vidders.net	Video	15	1

I pilot tested the survey on a group of 10 individuals recruited from my personal social network, including 2 attorneys (who corroborated my plain language explanations). After this pilot testing I tweaked the wording of some of the questions to avoid ambiguity. I then implemented the survey online (with the assistance of undergraduate research assistant Titus Woo) and recruited participants through Amazon's Mechanical Turk (Mturk) crowdsourcing service. This method offers greater scalability at a lower

cost and a wider demographic net than localized recruitment such as through a university. Participants on Mturk have performed comparably to laboratory subjects in traditional experiments (Paolacci, Chandler, & Ipeirotis, 2010), and the demographics of Mturk users are actually more demographically diverse than Internet samples (Buhrmester, Kwang, & Gosling, 2011).

One known limitation of Mturk is that participants are less likely to pay attention to experimental materials (Goodman, Cryder, & Cheema, 2013). However, this can be somewhat mitigated by the use of "attention checks" or screening questions to gauge attention. I included a simple, invisible attention check in our survey. The list of websites that participants could choose from included a 31st option: Mechanical Turk. Since anyone taking the survey was an Mturk user, if they did not check that box, they were told that they were not eligible to take the survey. Only 14 users were bumped from the survey in this way, suggesting that the majority of Mturk users were at least paying enough attention to read the list of sites and respond accurately about their use. Having shown from the pilot study that the survey generally took less than 5 minutes to complete, I paid Mturk participants 50 cents per survey, to ensure a rate of greater than $6/hour.

I deployed the survey as an Mturk task in May 2014, and 410 workers completed it. I limited participants to U.S. citizens, and all Mturk workers are 18 or older. Participants were 57% male, 75% white, and represented every U.S. state. The age range was 18-82 with a mean of 31. Regarding education, 39% had a college degree, and another 36% had attended at least some college. I also asked about the kind of creative work they post online. 61% had created some type of creative work in the media of

writing, music, video, or art. Only 9% of participants reported having had formal copyright education or training.

5.2.2 Findings

From the 410 participants, each of the 30 websites was reported as used by anywhere between 14 (Club Create) to 391 (YouTube) participants. However, each participant completed questions for only 3 (randomized) websites that they chose. Regardless, every one of the 30 websites studied had at least one participant surveyed for that site. There were a total of 1225 sets of questions answered. Table 6 shows these numbers per site.

For each one of these 1225 sets of questions, I asked the participant whether they had read the TOS for that particular website—11% said yes. Though this number is still low, I suspect it is also inflated due to self-reporting bias. Additionally, those who contributed to a site are slightly more likely to have read the TOS than lurkers (14% compared to 10%, $p < 0.05$).

5.2.2.1 Accuracy

One research question I set out to answer was how aligned participants' expectations for the terms of websites were with the reality of those terms. For each set of questions, I can calculate an accuracy score for how many of their answers matched the terms of that website.

An additional complexity is that not every term included in the survey was relevant for every website. This is because the *absence* of a term does not necessarily imply the negation of that term. For example, "royalty-free," one of the more common licenses, means that the website does not pay the user monetary royalties for their content. Facebook requires a royalty-free license, so when I asked participants "Does

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Facebook pay you for your content?" the correct answer was "no." In contrast, Google+ does *not* specify a royalty-free license. However, this does not mean that Google+ *does* pay users for their content. Though for some terms this negation may usually be true (for example, the absence of an irrevocable license suggests that it is revocable), I could not assume that this was the case. Therefore, *accuracy* here means how well a participant was able to correctly identify terms that did appear on a website. Accordingly, the six websites that did not include copyright terms do not have accuracy scores and were not included in these calculations.

Looking across every question as an individual data point (with an N of 6822 questions about terms that *existed* out of a total 12250 asked) participants had an accuracy of 69.3%. Aggregating the data by individual participant, the mean accuracy is 67% with a median of 70%, ranging from 0 to 100. By website, the mean is 66.1%, ranging from 45% (AsianFanFics) to 85% (Archive of Our Own).

I also analyzed the accuracy per licensing term, which provides much greater variance. Table 7 shows the accuracy on all questions asked about that term. The N is much lower for uncommon licensing terms, such as right to use in advertising, because this only reflects responses for websites on which these terms appeared.

The results in Table 7 show which copyright terms misalign with user expectations. With 93.4% accuracy, the right to display is an intuitive one. After all, none of these websites could show your work to others online if they did not have the right to display it. The high accuracy score shows that users have an intuition for common sense terms. However, other terms such as transferrable (can the website transfer your license to someone else?), irrevocable (can you take back the license once you grant it?), and

right to modify (can the site change your work?) are much less intuitive. A *low* accuracy

score indicates that users frequently indicated that a term was *not* there when it was.

Table 7 Accuracy by licensing term, as well as the number of sites with that term (i.e., how common the term is). N is the number of responses used to calculate accuracy.

Licensing Term	Sites	% Accurate	N
Display	20	93.4	954
Non-Exclusive	19	88.3	875
Royalty-Free	16	87.4	796
Worldwide	20	84.5	1026
Backup	3	78.2	124
Advertising	2	73.0	37
Perpetual	7	65.6	299
Commercialize	3	57.0	86
Irrevocable	7	46.6	755
Modify/Transform	21	42.2	1056
Transferrable	12	38.2	814

The variance here also explains why accuracy scores by website are potentially

not very meaningful. Because different websites include different licensing terms, some

may include terms that are more confusing than others. The lowest accuracy score comes

from AsianFanFics, which also has the highest number of licensing terms of any of the

sites. Therefore, it is difficult to speculate that this low accuracy is due to factors such as

the readability, when the TOS also contains more of the "confusing" terms than some

other websites. My data shows no significant correlation between accuracy and either

word count of TOS (Spearman R= 0.195) or Flesch-Kincaid score (-0.235). However,

this is not surprising considering the low number of respondents reporting having read

the TOS.

Interestingly, whether or not the participant reported having read the TOS also did

not appear to impact accuracy. Though mean accuracy for TOS readers (69%) was

somewhat higher than for non-TOS readers (65.5%), this difference did not rise to the

level of significance (p=0.09). I also measured no differences based on whether the participant reported copyright training (p=0.24) or whether they were a contributor or a lurker (p=0.16).

In sum, 69% accuracy suggests that perhaps Internet users do have decent intuition about many of the licensing terms that they agree to, but there is a great deal of variance by licensing term. Those with low accuracy that appear frequently, such as right to modify, present the biggest potential problem for users.

5.2.2.2 Expectations and Opinions

Participants indicated what they thought the reality *was* for each licensing term as well as what they thought it *should* be. Regardless of whether or not they were correct, this gives us a sense for user *expectations* and *opinions* about each licensing term. With a binary yes-or-no answer (0 for no and 1 for yes), the *expectation* score for each term tells me how what proportion of participants thought that licensing term existed. An *opinion* score comes from a Likert scale (with 1 being strongly disagree, and 5 strongly agree), indicating in aggregate how much participants thought it *should* exist for that website. There is a positive correlation between these scores (see Figure 1). The licensing terms users think the sites *have* generally match what they think they *should* have; this suggests that to some extent users trust the sites they use to have reasonable policies.
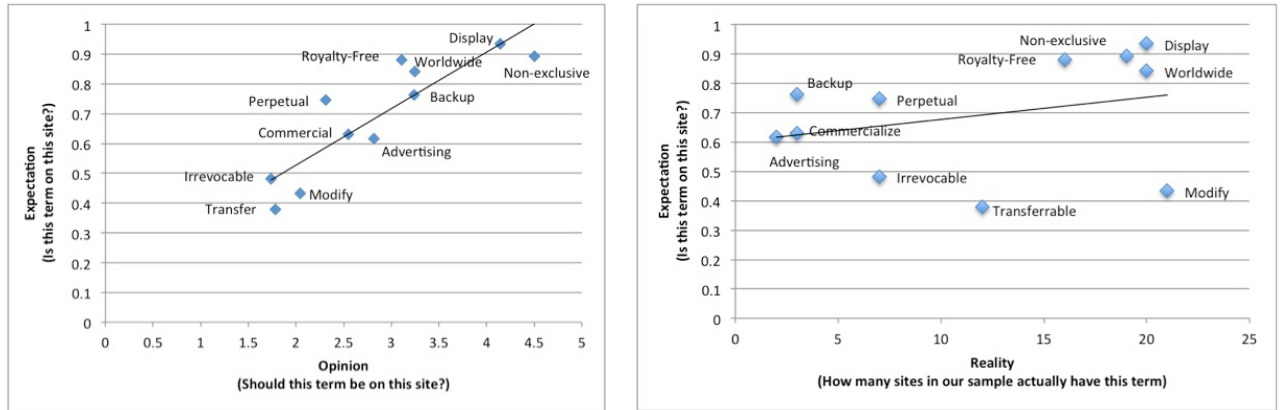
Figure 4 Left chart shows positive correlation between opinion and expectation scores – opinion on a 1 to 5 Likert scale and expectation on a 0 to 1 scale representing proportion of yes and no answers. Right chart shows correlation between expectation

However, expectation does not necessarily match the *reality* of sites' licenses; transfer and modify terms, for example, are very common. Using the number of sites in our sample that do have a certain term as a proxy for reality, the relationship between expectation (how often users expect a term to be present) and reality (how often a term *is* present) is by contrast not linear at all (see Figure 4). In other words, there are a number of terms that are often present that users would find surprising.

Interestingly, just as there were no differences between contributors and lurkers on accuracy, neither were there any significant differences on expectation or opinion measures when participants were split based on whether they had contributed content to the site or not. This holds true for the results discussed in the next section as well.

5.2.2.3 Differences in Website Types

My previous findings suggested that creators of different types of content (for example, art versus writing) may have different attitudes towards copyright. Therefore I expected to see differences in opinion based on the *type* of website participants were questioned about: music, writing, video, visual art, social media, and other user-generated content.

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For each of these types of websites, I compared responses for that type (see Table 5 for a list of websites) versus other responses, using t-tests to compare means. I looked at both expectation and opinion. I actually did not see striking differences, particularly given the granularity of Likert scores (and ours are aggregate rather than single-item measures), though there were some non-random patterns. It should be noted as well that my statistical tests were assuming unequal variances, since there were unequal sample sizes—for example, 426 social media responses to 799 non-social-media responses.

In writing communities, which are primarily fandom-based (e.g., fan fiction sites), I see somewhat less expectation for websites to have *modify* (24% for writing versus 44% overall, $p < 0.05$) and *commercial* terms (46% for writing versus 64% overall, $p < 0.05$). This tracks to social norms in these communities around remixing permissions and noncommercialization as discussed elsewhere in this dissertation. On music and video sites, there is a small but significant difference for royalty-free licenses; participants favor these licenses somewhat *less* (2.58 for music and 2.46 for video versus 3.22 overall, $p < 0.01$), suggesting that they might be more amenable to users being paid for their work. Though I cannot make strong claims about these small differences, it may be some reflection of differing values in these communities

In Marshall and Shipman's study of ownership values on Facebook, they suggested that the *personal* nature of Facebook content may be at the root of some of the discrepancy between perceived ownership rights and reality (Marshall & Shipman, 2015). In my data set, social media sites do stand apart from the other media types since they may contain more personal content than the other more creative communities. In comparing social media sites versus other types of sites, I see the same pattern for nearly

every licensing term: a slight favoring of the site having *less* control over their content. For example, a mean opinion score of 2.83 over 3.51 ($p < 0.001$) means that users were venturing towards "somewhat disagree" rather than "somewhat agree" as to whether social media sites should have a "worldwide" license in their content, suggesting that they might favor some geographic constraints in the content use.

Interestingly, looking at *expectation* data rather than opinion—what the users think the terms actually are—for some of the terms we actually see the exact opposite. On social media sites, 42% of users versus 36% for other users think that the site has the right to transfer or sublicense content to third parties ($p < 0.05$), 54% versus 45% think that the license the user grants is irrevocable ($p < 0.01$), and 92% versus 86% think that the site does not have to pay the user royalties ($p < 0.001$). This difference suggests that though users may think that social media sites actually have *more* control over their content than other types of sites, they want them to have less. Though these differences are quite small, the fact that they flip from opinion to expectation is worth noting.

Overall, while there are non-random differences between media types, the fact that the trend is still similar in terms of real numbers suggests that people have basic opinions about how any content should be used. However, these basic opinions are supplemented by at least some differences based on the website and type of content.

5.3 Conclusions

With this study, I sought to better understand whether and how copyright policies in Terms of Service might contribute further to user confusion about copyright. First, I extended prior work on privacy policies to copyright and Terms of Service, asking whether people read TOS and whether they would understand them even if they did. The answer is no. The 11% of my participants who reported reading was somewhat higher

than I expected based on prior work, but is still quite low and could well be self-reporting bias. Low readability and high word counts for TOS is on par with privacy policies, though I did find that people have good intuitions about some of the more common sense terms, such as right to display. However, low accuracy in predicting the existence of terms such as transferrable and modifiable are more problematic since these terms are common—and apparently users do not realize this.

Given these findings, one major point of reflection was: does it matter? Why is it important that we understand TOS? Why should we care enough that fixing this problem could be a design goal? I argue that it does matter, for two reasons. The first is that copyright licenses are far from one size fits all. Based on analysis of what terms exist on different websites, there is a great deal of variability. Beyond ubiquitous and common sense terms such as right to display, there are those that appear infrequently such as right to commercial use. Therefore, users cannot assume that the terms will be the same across different websites they use.

Moreover, there is evidence from this data that people do care. This follows previous work that has shown, for example, that information in privacy policies can affect purchasing behavior (Tsai et al., 2010) and that Facebook users report content ownership as one of their concerns about using the site (Zhang et al., 2014) while having strong opinions about that ownership (Marshall & Shipman, 2015). Though I did not ask survey participants directly about how licensing terms would affect their site use, there were strong differences in opinion about different terms. Clearly, copyright licenses are not one size fits all for users either.

Consider the three terms appearing as outliers in the right graph of Figure 4. Transferrable, modifiable, and irrevocable are the terms that appear most often appeared when not expected. The left graph also illustrates that they have the lowest opinion scores, suggesting they could be the ones participants care the most about. Distaste over transferrable and modifiable licenses suggests a desire for control over how content is used: for it not to be changed nor given to someone else. Not wanting irrevocable licenses suggests a desire for choice—ability to cut ties with a website at any given point.

The fact that opinions and expectations align suggests that people generally trust these websites to protect their interests when it comes to their content. Users don't *want* to grant transferrable, irrevocable licenses to modify work, but they also don't think that they are. This misalignment between expectations and reality is a significant usability problem. Many users *are* granting these rights without realizing, and they might be unhappy if they knew.

The question as to how this harms the user would be highly dependent on the intent of the website—but the truth is that these licensing terms give them the *option* to use content in these ways. At the time of my data collection, LinkedIn's license was in part assignable, sublicenseable, and irrevocable, and granted the right for them to create derivative works. Assignable and sublicensable (similar to transferrable) mean that they have your permission to give this license to some other party (for example, license your content for use on a different website). Creating derivative works could mean anything from changing the font size to producing a blockbuster film based on your blog post. And of course, irrevocable means that once you have granted these rights, you can't un-grant them. Even if LinkedIn had no intention of selling books filled with wisdom gleaned

from content posted by Mark Zuckerberg or Kim Kardashian, or featuring your profile on a new "world's worst resumes" webpage (and they probably didn't), users had given them the *option* of doing these things. The fact that they did so unknowingly is a usability problem.

Of course, with only about a tenth of users bothering to read the TOS, is this misalignment of expectation and reality the responsibility of the website? With the TOSs I analyzed having an average of 3851 words and requiring a college sophomore reading level, users may have long been trained out of even attempting to understand them. However, it is clear from these results that users *do* have opinions about how their content should be used—perhaps to the point where the licensing terms would affect their decision to use a site. Just as researchers have devised more readable modes of presentation for privacy policies (Kelley, Cesca, Bresee, & Cranor, 2010), websites where users contribute content should consider presenting their licensing terms in a readable way outside of the block of TOS legalese.

Additionally, the fact that there were some differences in opinions based on the media type of the website suggests that there could be differing norms and attitudes about copyright among different types of content creators. Interestingly, the website with the highest accuracy score of participants accurately predicting their licensing terms, Archive of Our Own, as noted in Chapter 2 was specifically designed with the social norms of a certain creative community in mind (Coppa, 2013; Lothian, 2010).

In sum, these findings verify that copyright terms are compounding the complexity of understanding relevant rules in online creative communities. Chapter 7 will discuss potential solutions to this problem, but in the next chapter I will return to a final

smaller-scale, qualitative study to answer remaining questions about how these

conditions interaction with social norms and technology use.

CHAPTER 6

COPYRIGHT NORMS, FORMATION, AND ENFORCEMENT

My exploratory interview study of remixers (described in Chapter 3) revealed that intuitions and attitudes about copyright are more often based on ethical heuristics and social norms than on the actual letter of the law. A large-scale content analysis of trace data (described in Chapter 4) verified further consistency of social norms in online communities of creators. Following this content analysis (as well as survey work described in Chapter 5), there remained open questions in this space that could be best answered by talking to people. Bolstered by what I learned in the previous three studies, this last study focuses on the identification, evolution, and enforcement of social norms and rules about copyright in online communities of remixers. In this chapter, I will discuss nuances of the most consistent norms in detail as well as how norms and rules form and are enforced by communities. My findings will reiterate the importance of social norms in regulating copyright-related behavior in these communities.

6.1 Interview Methods

In my first study described in Chapter 3, I interviewed eleven online content creators as part of an initial exploration into how these creators engage with copyright in online remix communities. In this final interview study, I set out to take a more purposeful sample of participants from different remix communities and to focus in on open questions from my previous work. From the forum and TOS studies described in Chapters 4 and 5, I had lists of the most popular online communities for the four major

media types I identified: art, music, video, and writing. With the help of research assistant Shannon Morrison, I recruited participants from these communities by posting messages in their online forums (with permission from community gatekeepers), as well as by posting recruitment materials to Tumblr under tags from the media types ("fan fiction," "music remix," etc.). I also allowed for some snowball sampling by asking participants to refer others to me, though most participants came to me independently.

There were a total of 20 interviews, which myself and Shannon conducted via Skype (12) and online instant message (8). When recruiting, I expressed a preference for voice interviews, but allowed IM for participants who felt more comfortable in that medium, given that research has shown that there is not a significant difference in information conveyed between the two mediums (Dimond, Fiesler, DiSalvo, Pelc, & Bruckman, 2012). Participants were compensated with a $6 Amazon gift card, for on average about an hour of their time. Participants ranged in age from 19 to 39, and included 8 men and 12 women. All live in the United States, with the exception of two: one in Germany (Sara) and one in Canada (Lily), though both reported that they tend to think about U.S. copyright law as being the most relevant to their online activities. The names used in my discussion are pseudonyms.

I recruited with an eye towards representing all four media types, though most participants regularly created more than one type of remix. Table 8 shows remix type by participant, noting what they reported to be their primary creative community. This cross-pollination of communities (or lack thereof, in one case) highlights a cultural divide among participants: music remixers versus everyone else. Following the previous studies described in Chapters 3 and 4, I suspected that this might be the case. Particularly for writing and art, the most common types of remix are also considered fanworks. Additionally, because fanvidders as a type of video remixer seem to have more of a sense of community identity than video remixers generally, they were easier to find and recruit.

Finally, the online communities where creators share content for writing, art, and video overlapped a great deal (see Table 8).

Table 8 Media creation type identified by each participant, along with current and previous websites where they share creative content. Darker grey indicates their primary creation activity/community. Names are pseudonyms.

Participant	Art	Music	Video	Writing	Current Sites	Past Sites
Lily			○	●	Fanfiction.net, AO3, Tumblr	Livejournal, YouTube
Christina	○		○	●	Livejournal, Tumblr, AO3, Vimeo	Fanfiction.net, YouTube
Karen				●	AO3, Fanfiction.net, YouTube, Tumblr	
Patricia				●	Tumblr, AO3	Livejournal
Maria			○	●	Dreamwidth, AO3	Livejournal, Fanfiction.net
Ellie				●	Tumblr, AO3	Fanfiction.net, DeviantArt
Harry				●	TTH, Fanfiction.net	
Andrea				●	AO3, Tumblr	Livejournal
Aaron				●	TTH	
Eve	●			○	Tumblr, AO3	Fanfiction.net, Livejournal
Carrie	●				Tumblr	DeviantArt
Felicia	●		○		Vimeo, Tumblr	YouTube
James	●				DeviantArt, Tumblr	
Sara			●	○	Livejournal	YouTube
Victoria			●	○	Dreamwidth, YouTube, Tumblr	Livejournal
Ben		●			OCR	
Kevin	○	●			OCR, DeviantArt, YouTube, Bandcamp, Soundcloud	MySpace
Drake		●			OCR, Soundcloud, Bandcamp	
Richard		●			OCR	
Jeremy		●			OCR, Soundcloud, YouTube, Tumblr	

Therefore, like the participants discussed in Chapter 3, 15 of the participants in this study would identify as part of fandom communities. The remaining 5 are all music remixers and were recruited from Overclocked Remix, a videogame music remix community. One of the music remixers, Kevin, also draws and shares fan art, but does

not identify strongly with that community. Prior to conducting these interviews, I predicted that the experiences, attitudes, and norms of music remixers might be different than the rest, and this turned out to be correct. As I will discuss in the next section, social norms among fan creators tend to be strong and consistent. As a result, my discussion will focus on my findings from those 15 participants, and I will discuss the music remixers separately at the end of this chapter. Table 8 grays out the music remixers who are not included in the main discussion.

This removal also skews the gender demographic of my sample to mostly female (12 women and 3 men), but as noted in Chapter 3 this is representative of fan creation communities (Coppa & Tushnet, 2011; Jenkins, 2006b; Tushnet, 2015). As Jenkins describes the phenomenon, "Media fan writing is an almost exclusively feminine response to mass media texts" (Jenkins, 2006b). This predominantly female gender balance is important to note, however, because gender may well play a role in attitudes towards intellectual property. For example, Halbert suggests that a feminist interpretation of intellectual property would value the circulation of texts over individual authorship (Halbert, 2006). Moreover, Tushnet argues that it is particularly important to include traditionally female forms of remix in discussions of copyright, which in policymaking have been largely based on male exemplars (Tushnet, 2015). Nancy Baym's early study of soap opera fans also suggested that gender may be a factor in the enforcement mechanisms for social norms in that community (Baym, 2000). The fact that the norms and attitudes among music remixers falls along gender lines as well is another reason to discuss them separately.

Interviews were semi-structured, and we asked participants about the type of creative content they share online, the communities and websites they use, and their knowledge, attitude, and experiences about copyright. Based on findings from my previous studies, I had already identified key copyright-related issues for each of the media types and was able to ask specifically about some of these. For example, we asked

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musicians about sampling and artists about tracing. We also focused some of the questioning on delving into social norms, asking for example if there were "unwritten rules" in these communities that people followed. The semi-structured interview protocol gave us the flexibility to adjust questioning based on responses (Seidman, 1998).

Following transcription of voice interviews, I conducted a thematic analysis of the data, identifying and analyzing emergent patterns and themes (Braun & Clarke, 2006). Shannon independently read the transcripts and developed a set of themes as well, and we came together and discussed the differences and similarities in our analysis. I then developed a final set of themes and re-coded the transcripts. The final analysis focused on identification, formation, and enforcement of social norms and other rules.

6.2 Norm Identification

In Chapter 3, I described common understandings (and misunderstandings) of fair use among fan creators. I noted that many legal interpretations did not track to the law as written, but were still consistent, suggesting instead adherence to another source of rules such as social norms or ethical heuristics. The two major legal misconceptions I identified were a perception of noncommerciality as the deciding factor of fair use and the addition of attribution as an explicit fair use factor. In forum postings about copyright, I continued to see issues of commerciality and attribution feature prominently. In this interview study, the strongest and most consistent social norms associated with copyright fell into those categories, along with two others: permission and secrecy. The social norms associated with these four concepts have shown up consistently throughout the entirety of my research, but it is also true that fan communities differ over time, between fandoms, and across technologies, and therefore can develop a diverse range of internal community rules (Busse & Farley, 2013). It is important therefore to remember that social norms represent not a single point but a range of permissible behavior (Stouffer, 1949). Additionally, my findings here come from the data from my interviews, but the existence of many of these norms are supported as well by the writings of other fan

studies scholars (Bacon-Smith, 2014; Busse & Farley, 2013; Busse, 2015; Chin, 2014; De Kosnik, 2015; Hellekson, 2009, 2015; Jamison, 2013; Stanfill, 2015; Tushnet, 2007).

6.2.1 Attribution

The idea of attribution, or giving credit where credit is due, is an important one. However, except as it relates to infringement or plagiarism, it is largely unregulated by the law since intellectual property in the United States does not include a moral right of attribution. As a result, nearly any community that involves creation adopts some process or rules for attributing creators' work properly (Fisk, 2006). Online remix communities are no exception, and tensions around ownership in these communities often focus on standards of attribution (Ahn et al., 2012; Luther, Diakopoulos, & Bruckman, 2010; Monroy-hernández et al., 2011).

Attribution and credit are particularly important in fan creation communities. Fandom is considered to be a "gift economy," meaning that as far as fans receive any kind of payment for their work, it is in the form of credit (Hellekson, 2009; Tushnet, 2007). In writing about one well-known case of the short-lived website FanLib breaking this norm,[35] Hellekson notes that "when the rules of exchange are broken, punishment is swift" (Hellekson, 2009). Breaking the rules of the gift economy can come in the form of commodification, discussed a bit later, or in failing to properly give credit to creators.

As previously noted, one of the most common misunderstandings of fair use that I identified was that it involves an attribution component—i.e., creators thinking that their work is more likely to be fair use of appropriated material if they properly credit the original creators of that material. This is an example of a norm so strongly entrenched that it is often mistaken for a legal rule. In the current study, interview participants spoke

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[35] FanLib, founded by media industry insiders with $3 million in funding, was an attempt at commodifying fan fiction through partnerships with media properties. As one fan noted in her reading of the venture, "It's perfectly clear—they get the bucks and we get the lawsuits" (Hellekson, 2009). Following intense backlash from the fan fiction community, the site closed down in 2008, about one year after launch.

of attribution in two different ways: credit to original source material, and credit to fan creators. Though obviously related, these values function differently in practice.

With respect to crediting source material, fan creators tend to fall into two camps: those who attach disclaimers and credit statements to their work, and those who feel that "implicit attribution" (also discussed in Chapter 3) is in effect. The latter attitude seems to be most prevalent, both based on my participants and their observations of the community. Even those creators who include disclaimers tend to do so for other reasons, such as there being a website policy requiring it or because they (incorrectly) believe that disclaimers hold legal weight. However, those who do make it a point to explicitly credit source material often do so out of a sense of loyalty to the copyright owner, as this fanvidder describes:

> *Basically, we all acknowledge that somebody else created the characters and that we're just borrowing them, and we're getting no monetary gain. When I do vids, I always mention the song, and the show, and I'm always like, "Get the music. Watch the show. It's great."* - Christina

Not providing explicit attribution to source material does not imply a lesser adherence to the norm of proper credit, however. Instead, creators feel that *implicit attribution* is in effect—that is, the source is obvious and does not need to be stated.

> *The fans, the other people who are going to be reading fan fiction, they know who the original creators are. They know that [television producer] Jack Kenny has the characters and they know who the actors are. So, I don't usually because I don't feel it's necessary.* - Ellie

> *I haven't seen anyone get chastised for not saying, "This belongs to Marvel," or whatever, because I think everyone already knows. We all love Marvel's works, but we all know it belongs to Marvel.* – Lily

By contrast, providing explicit credit to a *fan* creator when appropriating or sharing work is extremely important in these communities.

*If I am working off of someone's fan art, then I absolutely
attribute that person. So, like I do a lot of fan fictions based
on someone's Photoshop manips. If I'm not directly
attaching the fan fiction to the picture, I always, always,
always attribute the inspiration for fan works if it's another
fan. I think that's like one of those huge sort of social
norms on Tumblr, that you acknowledge other fan's
creative contributions to the community.* – Patricia

Closely tied to the norm of credit to creators is the strong norm *against*

plagiarism. The legal (and seemingly ethical/normative) difference between copyright

infringement and plagiarism is that plagiarism involves passing something off as your

own. This can be particularly complex within fanworks communities where there may be

unclear lines about how much of something need be changed before it constitutes a new

work. As Stanfill notes, transformation is haunted with the specter of stealing someone

else's work (Stanfill, 2015). However, the worst cases of plagiarism are obvious and

purposeful:

*In fan fiction, plagiarism is generally either taking
someone else's fan fiction and changing only the names
and then posting it as your own, or taking fan fiction and
copying from other original works that are not the source
material. In doing that, they are representing those words
as words that they have written when they're not. I know
that there have been authors who have gotten pushback for
doing what I've described.* – Ellie

This "pushback" is common in fan fiction communities, where the norm against

plagiarism is one of the most consistently enforced. Accusations are taken seriously, and

policed by the community. This includes, for example, a Livejournal community with a

mission to "report and pursue accusations of plagiarism," maintaining a list of known

plagiarizers (Busse & Farley, 2013). Several of my interview participants told the same

story about a fan fiction writer who was accused of plagiarism many years ago, a story

that is also recounted in Jamison's book (Jamison, 2013). It had an air of legend to it,

almost a cautionary tale of how fandom will turn on someone who breaks this particular

rule.

> *That incident was pretty legendary. Although, the issue*
> *wasn't so much that she stole fan fiction. The issue was that*
> *she plagiarized other people's fan fiction and then sold it.*
> *Yeah. I wasn't even around in those fandoms in those days,*
> *and God, even we heard about it.* – Patricia

> *I remember reading this insanely long blog post back in the*
> *day, detailing exactly everything that she'd supposedly*
> *plagiarized. It must have been so much work! And it still*
> *comes up to this day. Like, she's an actual author now, but*
> *you mention her around fangirls and they're still like, 'oh,*
> *that dirty plagiarist!'* – Victoria

This is one of the most strongly enforced norms in fan art communities as well,

and particularly on Tumblr, "reposting" work without attribution is considered a type of

plagiarism.

> *I've definitely seen a lot of people getting upset that*
> *somebody just took off their watermark [from fan art] and*
> *pretended that they had made it. Or if they had saved a*
> *copy and then reposted it, rather than like reblogging it*
> *from the original source, that's apparently a big problem.*
> - Christina

> *[On Tumblr] there are some expectations of behavior. Like*
> *you don't tag your hate and you don't repost people's*
> *artwork. Those are the basic ones.* – Patricia

> *No reposting artwork. If you're going to do that, then cite*
> *the source. I think Tumblr is really the first place where I*
> *started noticing that. Don't post art without a source, just*
> *because it's rude.* – Karen

Though these unspoken rules surrounding proper attribution are incredibly

consistent among fan creators, some participants acknowledged a potential inconsistency

of values with respect to amateur creators versus big copyright owners. This

inconsistency will come up with respect to other norms as well.

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You should definitely be asking for permission [from fan creators] and crediting them. If you were going to make art for the story, then you should credit them and whatnot. But then I feel like you don't have to do that if you're writing an Avenger story or something. You don't have to try and email Marvel and be like, "Oh, is it okay that I'm writing a story about the Avengers?" But I don't know if that's a double standard or if that's just the way it all is and that you don't need to. – Lily

6.2.2 Permission

Closely entwined with attribution are the norms surrounding permission. Rather than dealing with how to credit someone's work when used, the question is whether it is okay to use that work in the first place without first getting permission from the creator. As with attribution, this norm is consistent in its inconsistency: Ask for permission in appropriating fan-made content, but not when appropriating published material. Though this appears to be the predominant rule, there is some disagreement among members of the community over whether hypocrisy is at play here. I first encountered this argument as described in Chapter 4, in the discussion of Twisting the Hellmouth's fan fiction permission policies.

The complexity is this: Though everyone generally agrees that fanworks should not require explicit permission from a copyright owner,[36] there is disagreement about whether fan creators should respect a content owner's wishes for fans to *not* play in their worlds. A number of well-known authors—famously, Anne Rice and George R.R. Martin—have publicly stated that they do not like fan fiction, proclaiming it unethical,

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[36] Licensing on a large scale is generally accepted as impractical. Even if large copyright owners *were* willing to take the time and resources to make deals with amateur content creators , applying a cost to noncommercial creative activities would likely be prohibitive. (As a commercial example, Peter DiCola crunched numbers on how much it would cost to license the samples for Beastie Boys' early albums, and it was in the millions of dollars (McLeod & DiCola, 2011).) Attempts by copyright owners to create licensing schemes, such as Kindle Worlds, have not been highly successful (Tushnet, 2014a).

illegal, or both (Busse & Farley, 2013). Some fan fiction archives, including

FanFiction.net and Twisting the Hellmouth, have policies to block fan fiction based on

the works of a given list of authors who have this stance. Archive of Our Own, by

contrast, does not have this policy, maintaining the legality of all fan fiction as fair use,

which does not require permission. Fan creators are similarly split in their feelings about

this, though AO3's attitude appears to have the majority. Of my interview participants

who expressed an opinion on this subject, only two thought that fan creators should defer

to authors' wishes, and eight felt strongly otherwise, some noting that they thought the

community generally agreed with them. However, even those who disagree with the

policy are often inclined to follow it, for fear of legal consequences.

> *You cannot post any fiction with Anne Bishop, Anne Rice, Anne McCaffrey, Diane Gabaldon, and George R. Martin. The moderators will simply excise that whenever it pops up. People are actually really good about that on TTH. That's one thing I do like about the site is that people, they may not understand it, but they try to respect the source material, and the writers, and the creators. Without the creators, we wouldn't have raw material to work with.* – Harry (agreeing with the policy)

> *I do know that there have been on fan fiction, certain mostly book authors have either brought lawsuits or threatened legal action for people posting fan fiction about their works. So, I do know that FanFiction.Net does not allow the posting of certain works. I think they're shooting themselves in the foot in the long run. Ultimately, what they're doing is alienating the passionate parts of their fan base who might draw in more readers to their work. Fan fiction is really basically free advertising.* – Patricia (disagreeing with the policy)

> *The Anne Rice thing always comes up to me, because it strikes me as ridiculous that she doesn't allow someone to create fan works of hers. It strikes me as just very ridiculous, because art doesn't belong to the creator after it's released into the world. It belongs to the people who consume it. I find it ridiculous, but I do respect it. I respect it because they're the ones with big, fancy lawyers, and I'm not.* – Karen (disagreeing but following the policy)

Even on Twisting the Hellmouth, the policy is only to disallow fan fiction when there has been explicit *non*-permission—not a requirement to *get* permission from a copyright owner. The argument described in Chapter 4 was over whether there should be a similar policy for fan-made works—whether it was okay to write fan fiction based on someone else's fan fiction without explicit permission.

With respect to a rule about "remixing remixes" (for example, writing a sequel to a fan fiction), though some acknowledge the potential hypocrisy in this stance, the predominant norm in fan fiction communities is that permission is absolutely required. This distinction between "copying from those with more power and those with less" could be part of what Stanfill refers to as fandom's clear set of ethics around reuse (Stanfill, 2015). This also tracks to the "little guy" ethical heuristic I described in Chapter 3.

Busse describes this "unwritten norm" of fandom as a "prohibition against the borrowing of characters, settings, plot points, or narrative structures from other fan writers without permission—even though as fan fiction, the source of the inspiration engages in borrowing itself" (Busse & Farley, 2013). One heated debate around a fan fiction exchange was triggered by the moderators including the rule "we won't require you to ask their permission," a decision that the community rallied around as unacceptable. Of the 10 of my interview participants who expressed opinions on this matter, every one of them felt that the proper etiquette was to ask for permission.

> *It takes 5 seconds to ask someone, "Hey, I love your story. Can I play in this universe?" Like I realize there's a double-standard, because that's what we're doing to the original content producers, and we're not asking. The difference is that they got paid and we're all working for free. So, the social norm of fandom is that if you create a universe, or you create a character, I mean, it's really a part of you. For somebody else to take that character and run with it, or do something with it without permission is very, very frowned upon.* – Patricia

Most of the people that I've met in fandom or whatever,
they get super-pissed if you do it without their permission.
But everybody's super-nice if you just ask. – Christina

A nuance to this is that it is more acceptable to take one medium and translate it into another without permission—for example, creating a piece of artwork based on someone's fan fiction (as long as you credit them properly, as per the attribution norm). However, even for other media outside of writing, permission is necessary to appropriate *within* that medium—for example, emulating an art style or creating a fanvid with the same song.

> *I think almost universally, the understanding within*
> *communities is if you write something, if you do something*
> *in one medium and then somebody takes that idea and*
> *makes an art, or a video, or a fic (maybe it was a drawing*
> *and somebody wrote a fic for it) almost universally, that's*
> *considered very flattering and really, really awesome.*
> *– Patricia*

> *In fanvids I've also noticed that if you have an idea for a*
> *song but that song has been used before in the same*
> *fandom, then you either just dismiss the idea completely or*
> *you ask if that person is okay with you doing your own*
> *version of a video to that song. It's just etiquette I guess.*
> *– Sara*

> *I'd get pretty annoyed [if my art style was copied without*
> *permission]. I'd ask them to credit me, or to ask in the*
> *future, or to take it down. I've seen [community backlash] a*
> *number of times, because it's not cool. – Carrie*

The strength of this permission norm also goes back to the gift economy culture in these communities. One of my interview participants, in telling a story about a friend who felt her idea for a specific storyline had been stolen, pointed out how social capital in fandom drives the importance of attribution and permission:

> *Tumblr fandom very much runs on cultural capital. People*
> *who create works, who create gif sets or manips, or fan fic,*
> *they get basically a lot of social capital, because they're*
> *sort of creating the physical manifestation of what the*
> *fandom actually is. This wasn't necessarily an issue where*

she was pissed off that someone had stolen her idea. But
she was pissed off that someone else was getting more
social capital when she had done if first. – Patricia

6.2.3 Commerciality

Another consistent misunderstanding of fair use observed in my previous study
was the idea that it hinges on commerciality—i.e., if you aren't making money from a
remix, then it is always fair use. When it comes to fan fiction, this norm is consistent,
strong, and unambiguous; one of my interview participants articulated it as "thou shalt
not sell your fan fiction." Many expressed profit as being the bright line for when fan
fiction is ethical *and* legal, and when it's not.

> *I don't think it's ethical for anyone to sell their fan fiction. I*
> *mean, I've always understood part of fan fiction back when*
> *writing disclaimers was more common to say, "I'm not*
> *making any profit off of this," as a way to protect yourself.*
> *Well, if you start making profit, then you've crossed the*
> *line. –* Ellie

> *That's where the line is, I think, in terms of copyright*
> *infringement. By creating fanworks, you're accepting the*
> *fact that you're borrowing from someone else's creative*
> *work. To make money off of that just seems wrong. I think*
> *it's definitely unethical to try to make money off of,*
> *essentially, someone else's work.–* Sara

> *It's not ethical to sell it. It's not legal to sell it. No matter*
> *how much I may bitch and moan about the copyright, it's*
> *the law. It's not ethical to break the law when you know it's*
> *the law. –* Harry

This is also a heavily enforced norm in fan fiction communities. One of my
participants described "laptopgate," in which a fan fiction writer had asked for donations
to help her purchase a laptop to replace a stolen one. This would be an ambiguous
reading of "commercializing" at best, but was still criticized:

> *I guess people saw it as saying like, if you don't give me*
> *money then I won't keep writing! They crucified her for it,*
> *too. That's the number one rule. You don't make money*
> *from fic. It's weird but I guess they didn't see that as any*
> *different than throwing it up for sale on Amazon. –* Victoria

The norm against commercialization appears to have a large legal component, since many fan creators (incorrectly) believe that the noncommercial nature of their works is the sole factor that is protecting them from legal sanctions. Hellekson writes that "at the heart of the anticommercial requirement of fan works is fans' fear that they will be sued by producers of content for copyright violation" (Hellekson, 2009). It is true that noncommerciality makes a fair use argument much easier to make, and in fact, the organization behind AO3 states clearly that their mission is to protect the legal status of *noncommercial* transformative works. However, the norm against commerciality has at its source the gift culture of fandom as well. In writing about the fandom backlash against FanLib (which monetized fan fiction), Helleckson framed this as illustrating that "attempts to encroach on the meaning of the gift and to perform a new kind of (commerce-based) transaction with fan-created items will not be tolerated" (Hellekson, 2009). FanLib's creators "misread[] community as commodity" and thus failed to understand the existing norms of the community (Hellekson, 2009). Indeed, even when there *isn't* a legal issue with commercialization—for example, through Amazon's Kindle Worlds program[37]—selling fan fiction is still often frowned upon, in part because it does not support the "freedom and joy" of fan culture (Tushnet, 2014b).

> *There was relatively recently a thing going around Tumblr where on Amazon, a few fandoms were going to be having fan fiction published on Amazon and available to buy. I think it was like Vampire Diaries and a couple of other fandoms. I saw some people were really excited about it, and a lot of other people were really protesting it kind of in the same vein that I feel. It's not really fan fiction anymore if you're doing it for money like that. There were quite a few people against it.* – Lily

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[37] Kindle Worlds is a program set up by Amazon to monetize fan fiction by providing a licensing mechanism to share profits between Amazon, copyright owners of media properties such as television shows, and fan fiction writers. Rebecca Tushnet describes the program as "proof of concept that licensing is always available, and that all creativity should be monetized" (Tushnet, 2014a). She also analyzes the program as a "bad deal for creators" based on the licensing terms.

A variation on selling fan fiction is "filing off the serial numbers" before sale. This essentially means changing the names of the characters and any other identifying features. In the case of "alternate universe" stories—in which, for example, the characters aren't vampires but normal college students—these repurposed fanworks likely do not constitute copyright infringement regardless of commerciality. A famous example of this is the novel *Fifty Shades of Grey*, which began as *Twilight* fan fiction (Jamison, 2013; Jones, 2013). As a result of its popularity, the ethics of "pulling to publish" have been hotly debated in the fan fiction community in recent years, and a number of my interview participants mentioned this novel specifically. Some find the practice to be unethical, and others disagree so long as the new work bears little resemblance to the original.

> *[Not selling fan fiction] also applies to fanfic with the serial numbers filed off. If you don't make any effort to make the characters original, then you're not actually creating an original work.* – Andrea

> *You can take it from fan fiction to being not a fan fiction anymore. You would need to strip it of the things that make it part of that universe so that anyone who read it could understand it as a standalone work where you don't have anything in there that goes back to the original work or that comes from the original work, because those things all came from the original creator.* – Ellie

To some extent, the objection to publishing and selling *Fifty Shades of Grey* comes not from a legal standpoint, but from the *gift* part of the gift economy culture. The relevant norm is that once you gift something to the community, it is poor etiquette to then take it back again.

> *Once it becomes an actual "We're going to make money off of that," it's fairly dicey, even in the fandom community, just because it's like, "Should these people be making money off of things that they previously were providing for free?" Especially with Fifty Shades of Grey, that is a huge kafuffle with the Twilight community because that was really shady what happened there. The fact that this woman has made so much money off of it is just obscene. As a person in fandom, it leaves a very bad taste in your mouth,*

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> *aside from the fact that the whole story's abhorrence, the*
> *idea that these people could use their fandom clout, if you*
> *will, and then just kind of be like, "Peace out, guys!"*
> – Maria

Complicating matters as well is that legally, there is no clear-cut line as to what constitutes "commercial" use. For example, how much difference is there between selling something outright and putting it up on a website where you get a cut of ad revenue? With respect to fan fiction, there was one gray area with a clear ethical heuristic attached to it: it is okay for money to exchange hands, but the fan creator cannot *personally profit* from the transaction. Hellekson even notes that in fan commercial exchanges (such as sending money to a fan fiction archive to defray server costs or giving a "virtual gift" in a blogging community), money is presented as a token of enjoyment rather than as a payment and gifting is still the goal (Hellekson, 2009). She further notes that any attempts at "profit" should grow organically out of the fandom's community rather than being unilaterally imposed (Hellekson, 2015). Though the most common example of "commercial" activity not for personal profit is the charity auction.

> *There's such a long tradition of free fan fiction that it is*
> *considered in very poor taste, unless (here's the caveat) it*
> *was for charity. For the floods in Australia a few years*
> *ago, there was a charity auction. So, I offered to write fan*
> *fiction for people who donated to the relief efforts.*
> – Patricia

> *I know there have been charitable fundraisers where it's*
> *like, "I will write this fan fiction," or, "I'll do this fan art*
> *or this fan vid for a donation to a charity." I think that's*
> *still okay, because it's not the actual creator making*
> *money. It's going to a good cause. But once it becomes an*
> *actual, "We're going to make money off of that," it's fairly*
> *dicey.* – Maria

Though these norms and heuristics when it comes to fan fiction are still fairly straightforward, this is not the case for different mediums. One of my observations in the fair use study (discussed in Chapter 3) was that there seemed to be differing standards for fan fiction and fan art when it came to judgments of the legality of commercial use. Here

again, the norm is consistent in its inconsistency: It is okay to sell fan *art*, but not fan fiction. Of the 12 interview participants who expressed a strong opinion about whether it is okay to sell fanworks, all 12 said absolutely not for fan fiction, but 10 of these said that it *was* okay for fan art. Even without being prompted, many of these when expressing these opinions side-by-side commented on the inconsistency.

> *Artists taking a commission or people crafting things and selling them just always made sense to me whereas the notion of buying or selling fanfic is just wrong.* – Sara

> *I don't know why I've drawn the line down the middle, and writing is okay and art is not okay. It kind of sounds like a double standard when I say it out loud. That one's tougher because for starters, I'm looking at about ten fan art posters on my wall.* – Lily

> *I think there's a lot more selling of fan art than there is selling of fan fiction. People treat art differently than fan fic. They really do.* – Patricia

> *Selling fan art to me is a lot more complicated and iffy thing, at least ethically, for me than publishing fan fiction is. I can't tell you why, but it is.* – Eve

None of my participants could tell me precisely why this rule existed, but some had theories when they stopped to think about it. The two most consistent I've identified are: (1) there is some sense that art as a medium requires more work or creativity, and therefore is more worthy of monetary compensation; and (2) stories are closer to the original medium than art and therefore less transformative.

> *[Fan artists] put so much time and effort into creating their art, not that writers haven't. But I just feel like there is a different medium, so it has slightly different rules.* – Lily

> *I think in my opinion it may even still be like the intent thing. If you're telling a story, even if it's a different type of story, like romance out of the science fiction thing, it's still a story and still the original tells a story.* – Christina

*There are different ways that you can create a character
with the medium of drawing. I would say that it would be
harder legally to argue that someone has broken copyright
because who the character of the person that's being
drawn is, is sort of up to the artist's interpretation. I guess
that's why I don't have as many legal or ethical concerns,
even though really it's the same situation as publishing fan
fiction is.* – Eve

Others suggested that though they have no idea why, it has just always been this way.

*I've seen fan art sold at conventions forever. Like, that's
just a thing, a painting of Captain Picard or whatever.
Now, artists on Tumblr take commissions. And there's
tshirts with fan art sold on a hundred different websites.
But if you tried to do that with fan fiction? No way! It's
kind of not fair, actually.* – Victoria

Under the law, it is unlikely that one medium would be treated systematically differently than another when it comes to fanworks and fair use. One might think that the lack of lawsuits against fan artists might be some comfort to fan fiction writers, perhaps shifting a norm towards commerciality, but this does not seem to be the case. Rather, it highlights the strength of a norm that does not track entirely to the letter of the law.

6.2.4 Secrecy

The previous three norms discussed—attribution, permission, and commerciality—are all closely related in that at their core they come out of the gift economy culture of fandom. However, one final norm that came up with some consistency among my interview participants is that of maintaining some secrecy—not drawing too much attention to the community. Though this has to do with a number of different factors, one is a fear of inviting legal trouble. Freund notes in her discussion of copyright negotiation among fanvidders that some of the "culture of fear" about copyright in the community arose after they became more visible on Livejournal, and that many vidders are highly concerned with privacy, "locking" their posts and avoiding popular websites like YouTube (Freund, 2014). She also quoted a fanvidder as noting

that there was a sense of "You don't talk about Fight Club"[38] because of fears of copyright and exposure. Similarly, several of my interview participants expressed adherence to norms about not drawing too much attention to themselves—for example, not showing fanworks to the copyright owners.

> *That's kind of scaring me a little bit, the disappearing*
> *barrier between the fans and the people who are making*
> *the thing that we're fans of. Fans have to realize that they*
> *can't keep shoving things in the creator's faces or else they*
> *might take legal action. But at the same time, they*
> *shouldn't, because then nobody wins. I guess it's kind of*
> *hard to take legal action against a legion or different*
> *people, because that's a lot of people to try and sue. I guess*
> *it's a weird new world and we all have to learn to live*
> *within it and treat each other decently. - Karen*

This "keep it secret, keep it safe" mentality actually serves to strengthen the "insider" status of members of the fan community. As Goffman points out, shared experiences of marginalization can actually foster more a sense of community (Goffman, 1986). Though "geek culture" is generally becoming more mainstream, Busse writes that a spread in popularity also brings with it the danger of segregating remaining outsiders—excluding those who do not fit that more mainstream model (Busse, 2015). Fandom's "underground" status also gives them a degree of creative freedom that they might not have otherwise (Jenkins, 2006b).

Stigmatization can also affect the ways that community members seek information. Chatman's theory of information poverty, though largely focusing on poor information resources in small communities, also ascribes it to suspicion of information from outsiders (Chatman, 1996). Lingel and boyd's study of the body modification subculture suggests that marginalized communities experience tension between wanting

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[38] The vidder here "is referring to Chuck Palahniuk's 1996 novel *Fight Club* (and its associated 1999 film) in which two men organize underground fights. The first rule and second rule of this club is 'You don't talk about Fight Club'" (Freund, 2014).

to share information and wanting to keep it secret and safe (Lingel & boyd, 2013). Similar to fan creation activities, which traditionally experience some stigma even outside of legal matters, the threat of legal awareness reinforces a need for maintaining borders between insiders and outsiders. One fanvidder's testimony to the Library of Congress regarding copyright rulemaking argued that a copyright regime that threatens remix with sanctions can be particularly damaging to members of marginalized groups, already nervous about expressing themselves (Tushnet, 2015). Existing in a legal grey area presents a clear driver for secrecy, which then reinforces the social norms built up in the community rather than bringing in outside rules.

6.2.5 The Underlying Fannish Value System

In discussing the norm against remixing remixes, Busse argues that the underlying values at work are complex negotiations of online privacy and control, affective aesthetics, and the value of fan labor (Busse & Farley, 2013). This last one in particular is key to understanding attitudes surrounding ownership in these communities. Commerciality is clearly at odds with a gift economy. In the context of payment in credit, attribution becomes critical and plagiarism untenable. Permission norms reflect a respect for the value and care put into fan labor. Even the secrecy norm is rooted in part in a fear of being delegitimized at best or sued at worst.

As noted previously, this value system may arise in part because of the predominantly female nature of fan communities. Though fanworks (and fannish labors of love generally) are not limited to women (and in fact two of my interview participants were men), it is also the case that traditionally male-dominated fan activities are more likely to be commercial than traditionally female-dominated ones (Busse, 2015). Tushnet points out that transformativeness as a concept is key to forms of creativity associated with women, and argues that feminism should stand behind fair use (Tushnet, 2015). Busse further frames fan labor as a feminist concern, particularly since capitalism (and by

extension intellectual property, which was originally concerned with monetary incentivization) tends to devalue labors of love (Busse, 2015).

Just as Hellekson notes that any acceptable ways for fans to profit from fanwork must arise organically out of the community rather than being externally imposed (Hellekson, 2015), this is also the line between fan labor as a gift and exploitation. In examining the role of fans as grassroots organizers, promoters, and marketers for media properties, Chin points out that fans consider their contributions as service and gifts to fandom rather than as being exploited for free labor (Chin, 2014). However, this is only true when these decisions come from the community. This is why, though the complexities may seem similar, skirting the edge of the noncommercialism norm is more acceptable for fan charity auctions, fan artists taking commissions, or crafters on Etsy than it is for a website like FanLib. Therefore, the nuances of the value system are also dependent on individual circumstances of group membership.

The value system implied by the norms discussed here is tied to a long history, heavily rooted in commitment and loyalty to that community. These strong community bonds are critical to the formation and enforcement of norms, as discussed in the next section.

6.3 Norm Formation

Following the exploratory interview study described in Chapter 3, one research question moving forward was where social norms about copyright come from in these communities. How do they form, and how do they evolve? My trace data analysis of online forums in Chapter 4 strengthened identification of social norms by observing them in practice, and in crafting interview questions I hoped that asking participants directly would provide insight into how these norms came to be. However, what I learned instead was that for the most part participants simply didn't know. For example, when asking

why they thought the community felt differently about selling fan fiction versus selling

fan art, I received similar responses:

> *I don't know why I've drawn the line down the middle, and*
> *writing is okay and art is not okay.* – Lily

> *I don't know why it's seen as okay to have that kind of art*
> *decorate your house that you purchase and it is fan art. I*
> *don't know. I hadn't thought about that.* – Maria

> *Selling fan art to me is a lot more complicated and iffy*
> *thing, at least ethically, for me than publishing fan fiction*
> *is. I can't tell you why, but it is.* – Eve

> *I don't know why… I think it's something the community*
> *has decided.* – Sara

However, despite community members not necessarily being aware of this

process, there are some common themes related to the formation of norms in these

communities: emergent practice and observation, migration, and formalizing. Norms are

further reinforced by community enforcement, discussed in the next section.

6.3.1 Emergent Practice and Observation

We know from prior work on social norms and newcomer behavior in online

communities that behavior is largely socialized through observation. Newcomers learn to

interact in online communities by seeing how others conduct themselves and by applying

norms from other contexts (such as offline life) (Burke, Marlow, & Lento, 2009;

McLaughlin & Vitak, 2011). As a result, norms may emerge organically as newer

members of the community pick up on behaviors of other individuals (whether this

behavior is new or was brought with them from another context). In fandom communities

as well, learning how to properly engage with the community is a kind of initiation

(Hellekson, 2009), and it is common for older members of the community to act as

mentors and gatekeepers for newcomers (Bacon-Smith, 2014).

One of the clearest examples of adoption-through-observation is the widespread

use of disclaimers attached to fanworks. These disclaimers, often some variation on "I

don't own these characters," do not actually carry any legal weight (Tushnet, 2007).

However, this legal "tissue paper," as one participant (Harry) called it, became such a prevalent norm that in some online communities it has been formalized into site policy. The original spread of the practice, however, came from emulation of others in the community.

> *When I first started writing, I would emulate the kinds of things that other people would do and people would always put a disclaimer at the beginning of their stories to say, "Hey, I don't own this. It's not mine. It's the property of whomever." I picked up on that. I noticed it on all the stories I was reading and I would put it in mine when I had first started writing.* – Ellie

> *When I started doing it, it kind of seemed to be common practice. Everyone did it. So, I thought, "Okay, this is how you don't get in trouble, if you put this on there."* – Lily

> *I must admit though I'm not even sure if that thing is an actual legal thing, you know? But we had seen some of the "big" vidders in the big fandoms use this disclaimer so we used it too.* - Sara

Sara's comment highlights another component of this, which is the importance of the most visible members of the community. Because norms emerge from observed practices, early members of the community often have the most prominent role in shaping norms, as do leaders and those with the most social influence (Hogg & Reid, 2006). Participants also reported looking to early adopters for guidance on proper behavior.

> *You have what I would consider like the early adopters. So, the people who find the show in the first, or the second, or the third season, and they love it. Then they get excited about it. They're the ones that sort of form the fandom.* – Karen

Looking to other community members for guidance is particularly important for newcomers, who traditionally have a more difficult time learning established norms in a community. This is an even bigger problem when norms are ambiguous or when they evolve quickly, as in online communities and social networking sites (McLaughlin &

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Vitak, 2011). Therefore it is easy for norms to trap newcomers since they have not yet been exposed to the expectations of the community, which only become clear through the shared history of the group (Burnett & Bonnici, 2003).

> *It is kind of frustrating when you see people enter the community, or trying to enter the community, and clearly not aware that there is a community there and it already exists, and it has been going on for years before them. They're sort of acting like they're a special snowflake that has just discovered this amazing show. Meanwhile, we have a fandom manual and four years of history with each other and that sort of thing.* – Patricia

As Patricia adds in the quote below, one solution to this can be to spend time observing the interactions of the community, and indeed, some online communities explicitly encourage members to do this prior to group interaction (Burnett & Bonnici, 2003).

> *I lurked for about a year before I got a Tumblr. So, because of the people that I had sort of stalked and what I had experienced before I got one, I had sort of had expectations about the language, about how to use tags, about social norms of behavior that were and weren't allowed. Then when my friend entered this fandom she told me that she lurked for about six months and had found me and a couple of the others who had been very active for a long time. So, when she came in, she was able to sort of pick up what I would call the fandom's language.* - Patricia

As previously noted, fan communities tend to be close-knit (Jenkins, 2006a; Lange & Ito, 2010). This, along with degree of self-identification with the group, is an important factor contributing to the strength and speed of norm formation. The strongest social norms tend to be tied to self-identification within a community, forming most rapidly when new members immediately identify strongly with the group (Hogg & Reid, 2006). This is even true with respect to influencing or changing behavior. Kraut et al. found that when introducing new technology to a group, social influence for technology adoption is strongest in smaller, primary groups (Kraut, Rice, Cool, & Fish, 1998).

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Norms also tend to be stronger when the group's value or existence is under threat in some way (Hogg & Reid, 2006), and outside threats of IP enforcement may be particularly impactful since creative appropriation is this group's primary community-building activity (Rosenblatt, 2011). In other words, the more these creators associate being a fan with their identity, the easier norms about this important activity—content appropriation—will form.

Accordingly, a number of interview participants specifically mentioned learning about copyright (whether law or norms) from interactions with and observations of other fan creators.

> *You sort of pick up bits and pieces of [copyright] just by seeing other people interact with it. So, the rules aren't something that I can particularly articulate to you, but it's an innate knowledge that I just have sort of picked up. You know, they tell you read the terms and conditions. No one reads the terms and conditions. They tell you you should read the copyright policy. No one reads the copyright policy. But you sort of pick up bits and pieces of it just by seeing other people interact with it. – Eve*

> *I think Tumblr especially is the kind of community where there are people who will read into everything. Then they will share that kind of information [about copyright policy]. Fandoms are really aware of these things in general. So, it's not necessarily something you, in particular, have to be seeking out. At least in my experience, people will tell you. - Maria*

Moreover, once norms begin to propagate, an "everyone is doing it" mentality only serves to reinforce them. A number of participants attributed their understanding of what is legal and/or ethical when it comes to copyright practices as sort of following the herd—if they're not getting into trouble, then I won't either.

> *If you would go on Etsy and pick any fandom or character and type it in the search bar, you would get like a million results of people who have made craft posters, candles, pillows. You name it, there's something there. So, I feel like it can't be illegal because many people are doing it and there are whole sites devoted to it. – Lily*

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By the time I came to any of these social media sites, they were already being used so frequently. I'm not what you'd call an early adopter. So, I sort of figured if there was going to be a problem with copyright, I would have heard about it by now. I didn't, so I was like, "Oh, man! I'll just post my fic here!" – Patricia

6.3.2 Migration

Many fan communities have existed since long before the Internet (Coppa, 2006; Jenkins, 1992), and tied to an interest rather than a particular technology, have migrated along with technological advancements. Therefore, some of the highly ingrained norms in these communities formed not within the current instantiation—for example, a "Tumblr fandom" for a particular television show—but have evolved over the course of many years and many different spaces. A number of interview participants discussed the migration of their creative communities. One notable example is what one participant described as a "mass exodus" from Livejournal. Six interview participants noted Livejournal as a former major hub for fan creation activity, now replaced largely by Tumblr and to a lesser extent Dreamwidth, a Livejournal clone created in part to better support the needs of fan communities.

In Celia Pearce's ethnographic account of the immigration of players from a shutdown multiplayer online game to a new virtual world, she observed that the persistent community maintained characteristics and norms even in a new technological environment (Pearce, 2007). Similarly, intellectual property norms in fandom communities may have a long pre-Internet history and have simply been maintained by a persistent community identity despite changes in technology and membership.

I do know that fanfics have been around for a long time. I have a friend who was in a fandom for a show called Gunsmoke dozens of years ago. I've never seen the show but she told me how there wasn't this huge Internet thing back then, obviously, so they'd send fanfiction to each other by snail mail. Or they'd meet up once a year and put out a newsletter, for free, that had tons and tons of fanfiction in it. Maybe that was practiced a lot in fandoms, just this sharing thing. No charging money for it, and maybe that stuck with fanfic, so no one would try to sell their fics now.
– Sara

However, technological migration also serves to explain how norms change over time. Patricia's description of shifting norms on Tumblr track to the idea that community norms may start out very similar to a previous space after a migration, but then begin to diverge.

I've been on Tumblr for 3-4 years now I would say. The user culture has changed. I went onto Tumblr right before it sort of exploded, and took off, and got really popular. But the social norms and expectations of behavior, I think, were more rigid in the beginning. – Patricia

Things just seem kind of different now that most people have moved on from Livejournal. It's taken a while, but people definitely think differently about some things. Like, people get way more weird about attribution rules on Tumblr than they ever did on Livejournal. - Victoria

Differences in design and practices may contribute to this divergence. For example, the design emphasis on Tumblr towards sharing content has led to a unique set of norms dealing with definitions of plagiarism. Additionally, several interview participants mentioned the existence of Archive of Our Own, with its mission statement of protecting transformative works, as contributing to more of an awareness of intellectual property issues in the community.

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6.3.3 Formalizing

Social norms in these communities as I have been discussing them are largely *implicit* norms—that is, they emerge organically through the interactions of the group. By contrast, *explicit* norms are those that are codified in formal documents (Burnett & Bonnici, 2003). These can co-exist, with explicit norms supplemented by norms that are not formally articulated, and implicit norms can also become explicit through a process of formalizing them. For example, Usenet groups relied on FAQs to codify their norms and define boundaries of expected behavior, constructed by the community through group discussion (Burnett & Bonnici, 2003). Explicit norms formalized in this way still have their roots in the community itself.

Though none of my interview participants described formalizing processes quite like the creation of an FAQ, there were mentions of metadiscussions about copyright. Burnett and Bonnici describe metadiscussions as relating to norm formalization in that they are the primary mechanism for a community to discuss dynamics of their interaction and the acceptability of behavior (Burnett & Bonnici, 2003). As described in Chapter 4, the topic of copyright was common in remix discussion forums, and though the majority of content was Q&A, there were general discussions as well. The creation of Archive of Our Own was in large part due to one extended metadiscussion about the importance of fans having control over their own content and protecting themselves against legal challenge (Coppa, 2013). Sometimes these types of discussions extend into formalizing mechanisms such as the mission statement for Archive of Our Own stating that "we believe that fanworks are transformative and that transformative works are legitimate."[39] One interview participant also mentioned a "fandom manual" that she said served to

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[39] http://archiveofourown.org/about

introduce newcomers to their community. They included a suggestion for copyright

disclaimer language:

> *I actually had to look this up for [a television show]*
> *fandom, and now I don't remember what exactly we*
> *decided. I think using the same section of the US Copyright*
> *Code when it comes to fan works, which is 107, 108. It's*
> *basically the one that says, "If it's a transformative work*
> *intended for comment, criticism, something or something,*
> *and no profit is being made, it's fine."* - Patricia

Beyond formalizing that happens within the community itself, there is also an

interaction between social norms and the formal policies of the space the communities

inhabit. Website policies could be seen as a type of *institutional norm*. Institutional

norms are binding expectations from an institution about the range of appropriate

behavior for those subject to the institution (Merton, 1959). Some formal policies are

closer to the actual community—for example, on Twisting the Hellmouth where the site

is run by fans and they have community discussions about site policies. Other policies,

such as those on YouTube, are arguably far removed from users, who have negligible

input. However, the policies of a site can have an influence on norms as well, in the same

way that the actual letter of the law has some effect on how people think about

intellectual property. For example, policies might nudge norms through formal

moderation, where the attitudes of moderators can influence the community.

> *There was a really interesting discussion about moderator*
> *power. What it pretty much boiled down to is, look, these*
> *are the guys that are running the show. They're trying to*
> *keep all this as organized as possible. Though we do know*
> *that some of the moderators are prejudiced in different*
> *ways.* – Harry

Additionally, there may be interaction between enforcement through moderation and the

community, when community members report behavior to moderators. In one example, a

participant described going to the moderators because she felt that someone had broken

an unspoken rule about copying.

*I did go to the moderators. I was like, "Just as a head's up,
this person did this and I'm not super-happy with it. Also,
she didn't care. So, what can we do?" They were very cool
and they took care of it.* – Maria

This type of interaction is more common and more effective in the smaller, close-knit communities, however. The types of formalizing mechanisms that Burnett and Bonnici describe actually serve to strengthen community identity by the creation of a "we"—a formal description of the kind of person the group is meant for (Burnett & Bonnici, 2003). This could explain in part why, based on statements by my participants, agreement with and adherence to the rules of a website correlates with how close to the community that website is. For example, whereas participants spoke of agreeing with copyright policies of Archive of Our Own or Twisting the Hellmouth, the most common disagreements were with large user-generated content sites with a diverse user base, such as YouTube or Instagram.

*I did disagree with YouTube a number of times. In middle
school, we had a short course of lessons on copyright law
and fair use. I knew that what I was posting was within fair
use. But whatever company owned it was getting annoyed
anyway.* – Carrie

*Instagram had a thing with that where for a period of time
they were saying that under the new terms of services,
they'd be able to take your photos and do what they wanted
with them. People in fandom were very against that. When
made aware of it, it always makes me kind of wary.* – Maria

When creators feel far removed from website policies, or when they feel these policies go against established norms, these policies may not do as much to influence those community norms. However, they can still impact the way that they think about copyright. Seven of my participants mentioned disagreeing with YouTube's policies or having had work taken down for copyright violations. Yet all of them also assumed that if YouTube said so then their work must have been copyright infringement. Though it might not change their opinion about what was *right*, it did change what they thought was

legal. For example, Karen when asked about how she interpreted rules of content re-use, drew from YouTube policy:

> *I filmed a fireworks show when I was in Korea. They had it timed to music, and the video got flagged as using a song. I was like, "Well, I just recorded the show. I didn't put the song over it. They did. They're the ones who stole the song without asking if they could use it for this fireworks show." But that doesn't count, because even though I tried to write them and be like, "No, this is my video that I took. I did not plan the fireworks show." They were still like, "No, you can't. This is flagged media." So, it's really just anything that belongs to somebody else.* – Karen

This interaction between formal policy and assumptions about intellectual property can contribute to chilling effects, discussed in more detail later.

6.4 Norm Enforcement

Throughout the various studies in this research project, when creators spoke about following rules or how they made decisions about copyright, these judgments were more often ethical/normative than based on law or policy. Additionally, with one notable exception (works being removed from YouTube through DMCA takedown procedures), most of the enforcement mechanisms they discussed were largely community-based as well. Though as noted in the previous section norms are sometimes formalized into rules for a particular community, unofficial mechanisms often exert more normative pressure on community members than these more explicit norms (Burnett & Bonnici, 2003). Smith et al.'s study of conduct control on Usenet revealed that the majority of reprimanded transgressions were violations of the implicit norms of a particular newsgroup, such as failing to demonstrate knowledge of an FAQ or "undermining the communal spirit" of the group (Smith, McLaughlin, & Osborne, 2006). This is especially true in spaces where formal law is absent or unclear, and social norms have to fill in the

gaps in regulation (Ellickson, 1986). In this section, I will discuss how the previously

described norms are enforced in fan creation communities.

Informal enforcement mechanisms (those not prescribed by law or other formal

rules) generally fall into two categories: *personal enforcement*, or retaliation by a specific

victim, and *community enforcement*, where bad behavior triggers sanctions by other

members of a group (Kandori, 1992). Community enforcement is important because if

only the "second party" (the victim) of a violation imposed sanctions, only a limited

number of social norms could be enforced. Instead, sanctions by a third party (someone

who was not directly affected by is aware of the violation) enhances the scope of norms

in a given community (Fehr & Fischbacher, 2004b). For my interview participants, third

party enforcement of the social norms are an important part of community engagement

and the intellectual property landscape of fan creation. As on participant put it, this is to

be expected in any close-knit group, and is important to a group's success:

> *I just think that there are going to be social consequences*
> *to entering any group. I mean, it doesn't matter if it's*
> *fandom, if it's a sports team, it's a church group, it's a*
> *political activist group. When you enter into an established*
> *community, especially an identity-based community, there*
> *are always social norms and expectations of behavior. If*
> *you can't figure that out and look around, and be like,*
> *"Huh. Maybe I should pay attention," then there's always*
> *going to be social consequences. I don't think it's the job of*
> *the design of the website to enforce that, because that's just*
> *sort of a human universal. But, you are not actually*
> *special. You're entering a group that has existed before*
> *you. If you're going to be a dumb ass, you should get called*
> *out on it.* – Patricia

From my interviews there also emerged patterns of norm enforcement that mirror

Young's categories of mechanisms by which norms are held in place: (1) pure

coordination, shared expectations about the solution to a coordination problem; (3) threat

of social disapproval or punishment; and (3) internalization of norms of proper conduct (Young, 2008). With respect to the first, coordination situations are strategic social interactions where everyone is better off with the norm followed; with everyone sharing the same interest, there is no need for sanctions (or incentives) (Voss, 2001). Pure coordination is not as common for the types of norms outlined here, since there is typically *some* self-interested motivation for breaking a norm, such as making money from selling fan fiction, or gaining unearned praise from plagiarized work. However, it could explain in part why we don't see many public flagrant violations—such as highly visible attempts at commercial fan fiction. These tend to be noticed and stamped out by copyright owners quite quickly—for example, the case of an unauthorized *Star Wars* fan novel (Fiesler, 2008)—and thus the incentives are low. Victoria told me that she thought fan creators as a whole "know not to do really stupid things like try to sell your *Harry Potter* novel on Amazon without permission."

Therefore, most mechanisms for reinforcing norms are of the sanctioning or internalizing variety. Merton describes this as the difference between behavioral and attitudinal conformity—behavior resulting from the threat of sanctions versus adopting a value based on internalized belief (Merton, 1959). Though as Burnett points out, it can be difficult to draw a distinction between behavior and attitude in computer-mediated communication because attitudes are not directly observable (Burnett & Bonnici, 2003), interviews gave me the opportunity to find out which norms participants have internalized.

6.4.1 Threat of Sanctions

Though some sanctions may be more extreme than others, the use of sanctions is a way to negatively reinforce norms; they are punishments driven by negative emotions

and negative fairness judgments towards norm violators (Fehr & Fischbacher, 2004a).

My interview participants gave many examples of observing, giving, or receiving

sanctions having to do with copyright norms in fan creation communities. The most

severe are acts of public shaming, such as the Livejournal community that maintains a list

of known plagiarizers (Busse & Farley, 2013).

> *There were at one time pages on various fandom*
> *communities dissecting [a fan fiction writer's] work and*
> *putting it side-by-side with those of other original works*
> *that were in Harry Potter and showing all of the instances*
> *of plagiarism. I think they've since been taken down. But at*
> *one time, it was a big to-do.* - Ellie
>
> *I bitch slap people on Tumblr all the time. If I see you*
> *posting shit in the tags that isn't yours and you don't say*
> *where it comes from, I will publicly shame you. I will*
> *publicly emphasize that that is not acceptable in this*
> *community.* – Patricia
>
> *I feel like at least on Tumblr, there's definitely some*
> *shaming that goes on. People, they don't name names*
> *exactly, but they make these angry posts about somebody*
> *having done it [posted other people's fanvids without*
> *credit]. Then they're super-sarcastic and mean.* – Christina

This kind of shaming—publicly calling out community members for norm

violations—has long been a common and effective mechanism for social control. In

newsgroups where community sanctions are more effective than formal rules (Burnett &

Bonnici, 2003), researchers observed shaming behavior ranging from public reprimands

to "ruder" sanctions such as attaching a note describing the violating behavior to a

person's avatar (Pankoke-babatz & Jeffrey, 2002). Similarly, in the early days of MUDs,

one method of ritual shaming was "toading," where an administrator would alter the

offender's persona to into something shameful like a toad (Reid, 1999). In a study of an

early virtual community, Wall and Williams wrote that the only way to make anti-

normative behavior stop was to "make them feel small and ashamed" with this type of

public ridicule (Wall & Williams, 2007). A study of social pressure in voting behavior

showed that negative stimuli (shame) can be more effective in motivating prosocial

behavior than positive emotions (pride) (Panagopoulos, 2010). Even with respect to

criminal behavior, sanctions imposed by relatives, friends, or personal community are

thought to have more effect than those imposed by a remote legal authority (Braithwaite,

1989). Criminologist John Braithwaite posits that this is because sanctions are in large

part about shame, and people care more about their reputation with people they know

than with strangers of the criminal justice system (Braithwaite, 1989).

Shaming is also a particularly common enforcement mechanism in the context of

intellectual property. As legal scholar Elizabeth Rosenblatt writes, "In the shadow of

formal law, shame and shaming govern intellectual property's liminal spaces, where

protection is uncertain or inconsistent with the strictures of formal law... where copying

norms are created and internalized by the creative community and optimized to its needs,

rather than being imposed, top-down by Congress and courts" (Rosenblatt, 2013).

Discussions of IP's negative spaces (where relevant legal rules do not exist) such as

stand-up comedy (Oliar & Sprigman, 2008), jam bands (M. Schultz & Schultz, 2006),

and roller derby names (Fagundes, 2012) focus heavily on the role of social norms and

typically include references to public shaming. In my interviews I saw examples of

communities specifically stepping in to police behavior that they knew would not be

regulated in other ways:

People are more willing to share with celebrities, be it fan art or fan fiction. That kind of makes me uncomfortable a little bit. Because it just depends on what they're sharing. So, we're trying to police within the fandom. Like, "Okay, don't show this to whoever." – Karen

I see a lot of [harassment] go on without having anything done by the site it's being hosted on. FanFiction.Net and the like will remove something that say if you report a story as plagiarized, like if they took your fan fiction and changed the names to other character names, they'll pull that down. But unless a comment is downright threatening, they generally won't pull it down. That's where the community will kind of step up to right that wrong. – Ellie

I also saw evidence in interviews that threat of sanctions was effective at regulating behavior, from participants who spoke about the rules that they follow themselves.

I would always ask [permission to remix a fan fiction] anyway, just because I would rather maintain good relations within the community than take the risk of pissing somebody off. – Patricia

I had to learn that the hard way when I didn't adhere to etiquette and made a video to a song that had already been used. I wasn't aware it was used before but oh, the trouble that followed. The other vidder was in quite a snit, and loads of chats followed until we both agreed to disagree. But from then on whenever I had a song/video idea I always looked on YouTube if there already was another video to the same song and ship. It's just easier that way. – Sara

If the most severe type of sanction is public shaming, then the most severe instantiation of that is ostracization from the community. For example, in the roller derby world, using a name that has been adopted by another skater is "egregiously socially unacceptable" and would lead to ostracism (Fagundes, 2012). My interview participants also presented this as the worst case scenario of norm breaking.

> *When someone tries to plagiarize fan fic, generally they get*
> *called out. They get chastised. The community is made*
> *aware that someone is stealing someone else's intellectual*
> *property, and they are shunned.* – Patricia

Just as those with the most social influence have the greatest role in shaping norms (Hogg & Reid, 2006), they also have a significant role on the effectiveness of sanctions or attempts to shun or ostracize.

> *A lot of times if you get called out on a post, it's very easy*
> *for the rest of the community to see it, especially because*
> *the people who are oftentimes calling out stolen artwork*
> *are the big name fans in the fandom. So, they have a lot of*
> *followers, and a lot of people see what they post. If they*
> *call out somebody, it's very easy for the person who stole*
> *the artwork to be ostracized from the rest of the community.*
> - Eve

> *The fandom tried to run [accused plagiarizers] out, but*
> *they were also too popular with people who were not*
> *actively involved within the fandom policing efforts.*
> – Karen

Eve points out the importance of being called out by someone with enough visibility in the community, to increase the effectiveness of the shaming. Like norm formation, critical mass is important here. This could explain in part the "sic 'em" mentality described in Chapter 4, in which the reaction to a norm violation is not only to draw attention to it but to encourage the community to act in some way, even if it is just to pass the message on further. Perusing the "art theft" tag on Tumblr will at any given point show many examples of posters asking for reblogs of public shaming posts.

> *A lot of times people will reblog the stolen posts and will*
> *call them out and say, "This isn't yours. This is this*
> *persons.'" They'll link to the original post. "This is*
> *stolen."* – Eve

However, one participant did point out the importance of not condoning harassment. This can be a delicate line to walk. Journalist Jon Ronson's book on public

shaming explores a number of case studies in which the punishment may not have fit the crime—lives and careers ruined over arguably minor offenses (Ronson, 2015). Victoria worries that this may happen in fan communities as well:

> *Sometimes I worry that people might go too far. I mean,*
> *I'm all for calling out people for being jerks, but let's not*
> *send out the pitchforks for what might be an honest*
> *mistake. Thankfully I haven't seen fans get too crazy about*
> *that. It's rare anyway.* - Victoria

Shunning can also be seen as a method of maintaining community boundaries. Though fan creators want to encourage newcomers who legitimately want to engage with the community, they can also be wary of outsiders. Hellekson's description of the "swift punishment" of the website FanLib is essentially a story of outsiders being run out of the community (Hellekson, 2009). She quotes an open letter from a fan explaining why the "intense backlash" against the site occurred:

> You do not understand us and our communities, nor do you
> respect us. . . . If you want us to participate in your
> endeavor then make it something in which we would want
> to participate. . . . You do not come to us as equals and that
> is your fundamental failing in this endeavor. You cannot
> build a new community at your site all nicely regimented
> and controlled because the community already exists and
> we will not be controlled by the likes of you. (Hellekson,
> 2009)

6.4.2 Internalization of Norms

With respect to shaming sanctions, it may not be the formal punishment that matters so much as informal moralizing features—for example, studies have shown that education about moral reasons for compliance can be more effective than education about the penalties for non-compliance (Braithwaite, 1989). Punishment is not the only enforcement mechanism. Burnett points out that newsgroup enforcement that was helpful and welcoming as opposed to ostracizing actually strengthened community ties by

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encouraging newcomers to ask for help (Burnett & Bonnici, 2003). Similarly, Nancy

Baym's early study of an online community of soap opera fans revealed that social norms

were enforced through "gentle reminders" about appropriate behaviors. She speculated

that the fact that most participants were women may have influenced the ethic of

friendliness in the group (Baym, 2000), which could certainly be true of current

predominantly female fan communities as well.

Whereas many of the previous examples that my interview participants gave were

on the more negative/sanctioning side of norm enforcement, there is also a great deal of

enforcement more along the lines of Baym's "gentle reminders."

> *Fandoms are really aware of [copyright rules] in general.*
> *So, it's not necessarily something you, in particular, have*
> *to be seeking out. At least in my experience, people will tell*
> *you. Then you can say, "Ah, I'll stay away from that."*
> - Maria
>
> *I would probably be annoyed that they didn't actually ask*
> *for permission [to write a sequel to my fan fiction]. But I*
> *would probably just message them and ask, "Why didn't*
> *you ask for permission? But thank you."* – Lily

This brand of sanctioning encourages internalizing belief rather than changing

behavior through fear of reprisal. Though some research has shown it to not be as

effective as negative shaming (Panagopoulos, 2010), there are advantages to the "gentler"

approach to community norm policing. Braithwaite frames this difference as

"reintegrative" as opposed to "disintegrative" shaming: "here's how to do better next

time" over "you've been bad" (Braithwaite, 1989). Reintegrative shaming internalizes

belief, but this also means that its effectiveness is reliant on a bond to the community.

When this bond exists, however, Braithwaite argues that reintegrative shaming is more

powerful than the law in shaping behavior. Similarly, Hogg posits that, based on social

identity theory, the prescriptive force of norms comes not from perceived social sanctions from their violation, but instead from an internalized self-definitional function—a knowledge of how we ought to behave as members of a group (Hogg & Reid, 2006). Therefore, for all of the same reasons that norms may form easily in close-knit fan communities based heavily on community identification, reintegrative sanctions may also be the most effective. Education rather than punishment also works towards alleviating fears like Victoria's that a community might "send out the pitchforks for what might be an honest mistake."

6.5 Music Remixers

As noted in the methods section of this chapter, in addition to the fan creators whose experiences shaped these primary findings, I also interviewed five musicians recruited from a videogame music remix community. I predicted that their experiences and norms would be somewhat different than the fan creators due to lacking the shared history of that community. However, there are also similarities. For example, they emphasized that they value attribution and the contributions of the artists whose work they build upon.

> *Everyone in the video game remixing community has a*
> *great respect for the original composers and are more than*
> *willing to give them the credit they deserve and then some.*
> *This attitude has pretty much been intact for as long as I've*
> *been around the community.* – Drake

One of the tensions that does exist in this community relates to what constitutes remix—at what point you have taken so little or changed so much the work should simply be considered your own. The musicians seemed to have individual rules of thumb for their own judgments:

If you use the harmonic context, rhythmic tendencies, and countermelody in conjunction with the melody, for example, you're no longer using the original composer's ideas for your own work. That could be used for a 20 second chunk of a 5 minute song but I believe it would still be inappropriate use of the material without legal permission. - Drake

They also have specific, formalized guidelines about what constitutes too much copying (one of the important aspects of music remix), which decreases the amount of ambiguity that creators have to navigate in making decisions.

I really like that their evaluations of songs is not made public. I like that they have a dedicated judge's panel to evaluate what does and does not go up on the site. - Ben

Relatedly, they also rely more heavily on rules as enacted by the maintainers and moderators of the community. The responsibility for enforcing rules stays with the site rather than being distributed in the community.

The community even on OC Remix, as great as they are, won't necessarily stop something. They may report it to the moderator, I suppose. But even then, it's the moderator's responsibility to step in and say, "Hey, knock it off."
- Kevin

One of the major reasons for normative and attitudinal differences is that the musicians I spoke overall showed more concern for their *own* copyrights than the fan creators—likely because nearly all of them in addition to remixing created original works as well. Therefore, when asked about copyright they often focused on this aspect rather than the ambiguities around remixing.

I think about copyright the way I think about pickpocketers: it affects me more after the fact, when someone takes action against me. So it might linger in the back of my head when I'm working on a remix, the way a recent mugging might, but I don't think it influences the creative output itself.
– Jeremy

Accordingly, their ideas about how copyright should be handled in their particular

community was colored just as much if not more so by how *their* work should be

protected than by how they could safely remix others' work, despite the community's

focus on remix.

> *As much as I don't want them to steal my work and I don't*
> *want them to allow improper use of original content from*
> *others, whether it's music or other arts, I don't want to see*
> *it improperly used, whether it's my own or somebody*
> *else's.* – Kevin

In general, these participants spoke less about a sense of community than did fan

creators. They also seemed overall less worried about copyright consequences. My

impression is that this is in part because the rules around music are more in the public eye

and therefore they take less risks. For example, commercialization of remix without

licenses rarely came up at all because they simply know not to try it.

6.6 Conclusion

In Elinor Ostrom's discussion of how social norms evolve in response to

collective action problems, she posits that norms often have more staying power than

cooperation enforced by externally imposed rules (Ostrom, 2000). Moreover, externally

imposed rules tend to "crowd out" cooperative behavior; in other words, it is more

difficult for norms to evolve efficiently when they compete with formal rules. This

mirrors Ellickson's collective action argument that social norms are most efficient at

filling in gaps where law is absent (Ellickson, 1986). Ostrom further suggests that the

"worst of all worlds" when it comes to the relationship between law and norms is when

external authorities impose rules with weak monitoring or sanctioning (Ostrom, 2000):

"In a world of strong external monitoring and sanctioning, cooperation is enforced without any need for internal norms to develop. In a world of no external rules or monitoring, norms can evolve to support cooperation. But in an in-between case, the mild degree of external monitoring discourages the formation of social norms, while also making it attractive for some players to deceive and defect and take the relatively low risk of being caught" (Ostrom, 2000).

This hypothetical worst case scenario is easily what the environment around intellectual property reuse, despite not being a traditional collective action problem, could become. Unlike IP's "negative spaces" where relevant laws are entirely absent (Rosenblatt, 2011), fanworks and other remix do exist within the purview of fair use. Therefore, the situation is not (as in Ellickson's cattle farmers) that social norms fill in the gaps when law is absent (Ellickson, 1986), but instead that they clarify rules for gray areas where law is confusing. In other words, fan creators are operating in a space in which there are externally imposed legal rules that are poorly defined and inconsistently applied. In Ostrom's view, this could lead to both difficulty in norm formation and an increase in deviant behavior (Ostrom, 2000). However, I have shown that within fan creation communities, this does not seem to be the case. Instead, there exists a specific set of social norms related to copyright that are effectively enforced by the community.

I would argue that the successful formation and enforcement of norms, leading to largely cooperative ownership behavior in these communities, is due to the strong ties and sense of community identity. Group membership is essential to successful formation of norms (Hogg & Reid, 2006), and contributes to the more successful methods of enforcement as well. Braithwaite posits a number of reasons why reintegrative shaming is the more efficient than instilling a fear of punishment (Braithwaite, 1989), but in sum,

instilling internalized beliefs contribute to an increased sense of community identity, which in turn helps form and reinforce norms.

Ostrom concludes that a solution to tensions between norms and formal rules is to increase the authority of individuals to devise their *own* rules (Ostrom, 2000). The fact that fan communities have been doing this informally could explain their relative success in self-regulating ownership norms. I would therefore suggest that a potential solution to dealing with legal gray areas is to encourage *community*-based formation of rules, and further, to encourage enforcement of these rules through reintegrative practices. Of course, this recommendation should be tempered by the acknowledgment that not all norms will be positive ones, and that there may still be tensions between competing norms. For example, the permission culture around re-use of fanworks is at odds with OTW's mission towards validating all transformative work as fair use regardless of the source. As discussed in the next chapter, design recommendations to support norm formation should be sensitive to these tensions.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

Throughout the four studies described thus far, I examined the role of copyright in online creative communities, focusing on behavior and decision-making as shaped by sources of rules: law, site policy, and norms. In this last chapter, I will recap my findings as related to my first three research questions, detail design and policy recommendations, and discuss limitations and potential future work that could build upon my research.

7.1 Sources of Rules

R1: In online creative spaces, what is the relationship between copyright law as written, policy as enacted by online communities, and social norms?

One major finding from this work is that understanding and engaging with copyright is hard, but also important. I have shown that the ambiguities of copyright law cause problems for content creators in online communities, and that a large part of this is due to conflicting sources of rules. I have discussed in detail throughout examples of conflict and confusion about rules in these creative spaces. In sum, the relationship between law as written, policy as enacted by websites, and social norms emerging within a community is that though often overlapping they also diverge, each influences the formation of the others, and conflicts between them is a major contributing factor to misconceptions about legal concepts.

To further break down some of these relationships, in Chapter 2 I suggested that Activity Theory would be a useful framework for considering the complexity of rules in the context of remix. Under this framework, the unit of analysis is an activity within a community of people with a shared goal—here, remixing (Kuutti, 1995). In looking back

at the entirety of my research findings, I examined the relationship between "rules" as a concept and the other pieces of the activity system (see Figure 5).
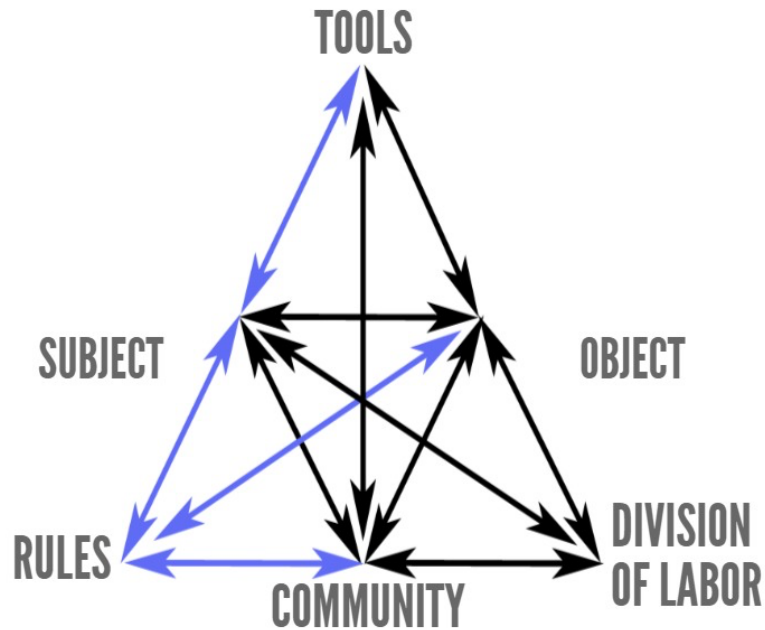

Figure 5 Activity Theory triangle with rules emphasized

We can actually consider each of these connections (directionally) as representing a different piece of the socio-technical system described in this dissertation.

- **Rules → Subject:** Enforcement of law or other rules, such as the threat of lawsuits or community norm sanctions.

- **Subject → Rules:** Perception of law, or how the subject's own experiences contribute to their understanding of what the rules are. This could also be seen as the potential for a subject to *change* law, though this was not something that came up in my research, likely due to the practical limitations of impacting policymaking at an individual level.

- **Rules → Tools:** Technological solutions or constraints. YouTube's content ID system is the seminal example of the law influencing technological infrastructure.

- **Tools → Rules:** Creation of website/technology policies. Here, a technology contributes to the development of new or different rules.

- **Rules → Community and Community → Rules**: Social construction of law and formation of community norms. Norm formation is a bidirectional process, in that existing rules (e.g., law) influence social norms while the same time social norms create *new* rules.

- **Rules → Object:** Chilling effects on practice. When rules change a subject's behavior away from the original goal, that activity has been chilled. This could be seen as a negative when it comes to the primary activity here—remixing—but may not be so for secondary goals such as plagiarism.

- **Object → Rules:** Policy changes to support practice. Though changes in the law are difficult to enact at the individual level, it is true that changes in practice can have an effect on rules. This can be seen with DMCA rulemaking, for example, or when communities' codes of best practices are formalized into policy.

A final note about rules in the activity system is that of the three major sources of rules I identified—law, policy, and norms—two of these are formed within the system. Policies arise from the technology/tools and norms arise from the community. Only law is entirely externally imposed. As I argued in the previous chapter, backed up by ideas from Ostrom (Ostrom, 2000), the closer the rules are to the community itself, the more efficiently they will be enforced. Therefore, community norms as a source of rules in this

activity system are particularly desirable, but policy could be as well, particularly if it pulls from both the tools *and* community segments of the system.

7.2 Copyright Behavior and Decision-Making

R2: How does the law (and perceptions of the law) impact technology use, creativity, and online interactions?

R3: How do content creators make decisions about what they can and can't do when faced with unclear rules?

These two research questions have been at the core of my findings throughout the four studies I have described. To summarize the big picture themes related to these:

1. Copyright law causes problems for creators in online communities as they navigate ambiguity in law and conflicts in rules.

2. The negative outcome of these problems is less creativity (whether measured by creation itself or visibility). Chilling effects result in creators choosing not to create or not to share their work in certain ways.

3. The copyright policies and practices of websites have an effect on how creators use those sites for sharing, including choosing *not* to use certain sites due to the way they handle copyright.

4. In making decisions about what they can and cannot due regarding copyright, creators consider more than just the letter of the law, but also their interpretation of the law and policies, ethical heuristics, and social norms.

The most striking pattern across my findings is the frequency with which I observed chilling effects. This story told by a participant in my initial exploratory interview study, first quoted in Chapter 3, was one of the driving motivations behind the rest of my work. It demonstrates chilling effects on creativity and a concrete effect of copyright law on technology use:

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

As I continued my work, I verified that stories like this are fairly common. Every one of my interview participants from Chapter 6 who had posted remix videos on YouTube had at some point had a video flagged or removed for copyright infringement, and not one of them fought the claim. This story from Sara in my second interview study echoes the struggle of the participant from my first study:

> *I think it was my third or fourth video that I had made that*
> *got taken down. It was deleted by YouTube seconds after*
> *uploading and I got this big copyright email from them. At*
> *first I was angry because I put in a lot of time and wanted*
> *my friends to see the new video. And then I got scared*
> *because I thought, what if they're going to sue me? … It*
> *took me a couple of months to get back on the vidding*
> *horse, so to speak. But I got more and more copyright*
> *notices and I grew tired of it and just tried to share my*
> *work anyway [outside of YouTube], if only with a few*
> *friends. I want to share videos with my YouTube*
> *subscribers. It was a fun little community that we had. I*
> *had over 500 subscribers. That was a lot to me and it was*
> *always fun to interact with them on the videos. I miss that.*
> – Sara

These kinds of issues are also not limited to YouTube. As Sara told me, "It's always saddened me to see talented fanfic writers or fanvidders delete their accounts, whether on Livejournal or on YouTube, because they got scared of copyright issues." This dampening effect on creativity is a problem that matters and is worthy of our attention as technology designers.

7.3 Recommendations for Online Community Designers

R4: What changes to policies or design/technical features of online communities might better support current practices among online content creators?

In thinking about potential solutions from the point of view of online community designers and maintainers, my findings point to three specific recommendations: (1) monitoring and supporting user concerns and questions about copyright; (2) creating copyright policies that are readable and take into account the needs of the community; and (3) designing with norms in mind and scaffolding copyright knowledge into design.

7.3.1 Supporting Copyright Conversations

None of the communities I studied have a dedicated space for questions or conversations about copyright. Though we do see knowledgeable community members appearing frequently in forums to answer questions, they might do so even more frequently if the relevant posts were easily accessible. When I asked interview participants how they found information about copyright, most mentioned Google or Wikipedia if they had a specific question. And as we know from results of the forum analysis described in Chapter 4, when creators do go to the community for answers to copyright questions, there is a good chance they might get bad information. Even in the communities where norm enforcement is working effectively to regulate behavior, misunderstandings still have the potential to be harmful, especially in cases where norms are so strong that there is a false sense of security that they know legal rules when they don't. For example, some of my interview participants thought that disclaimers ("For entertainment purposes only," "I don't own these characters," etc.) were necessary in order to claim fair use. Others had very specific ideas about what made a work legal— ideas that might affect how they decided to create something, despite these not actually

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tracking to the law. Both of the participants below expressed knowledge of specific rules about fair use that were incorrect.[40]

> *If it's video or music, the amount of time from it that you're using, like how many minutes of video you're taking from an episode or whatever, there's a ratio, then I believe a cap. I think it's a 10% ratio, but it maxes out for television at like 3 minutes. Even if it's a 45-minute show, you can only take 3 minutes from it instead of 4½. -* Carrie

> *Fair use is normally described as usage to… Well, for video, it's between 2-3 seconds or enough to provide an example or a judgment, I believe, is the term that it used in the latest set of copyright legislation. Fair use was deemed to be an appropriate quantity to provide an example for a judgment or a situation that cannot be construed out of context. I think that was the actual wording. -* Harry

As noted in Chapter 4, it is also possible to think of this as a social Q&A problem. In addition to providing dedicated spaces for copyright discussions, another design opportunity would be for these spaces to provide signals of expertise. For example, in some Reddit communities, users have "flair" next to their usernames that indicate their position in the community. In Chapter 4 I provided an example of a YouTube poster telling someone that there is no such thing as fair use. If that poster had some visible signal that they had no legal training, would it make a difference in how their answer was responded to?

Monitoring conversations about copyright or providing guidance or explanations about the actual law could be helpful in these communities. However, even with the potential for bad information, I would argue that supporting conversation at all is still positive. Encouraging critical thinking about copyright among community members

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[40] There are generally no bright line rules for the "amount taken" aspect of fair use. A recent Court of Appeals case actually struck down a 10% rule for library electronic reserves (see Cambridge v. Patton, 11th Circuit, 2014). I found that it is common for creators to have rules of thumb like these—10%, 3 minutes, 2-3 seconds—but these are not actually legal rules.

could even have positive policy outcomes. Aufderheide and Jaszi argue in their book

Reclaiming Fair Use that it would be in the best interest of creative communities to

articulate their own understandings of fair use, because judges sometimes consult patterns

of use when making fair use determinations (Aufderheide & Jaszi, 2011). They provide

an example of the documentary film community benefiting from a document of best

practices.

Another example of community organization around copyright is the

Organization for Transformative Works (OTW). This non-profit dedicated to preserving

and defending fanworks as legitimate cultural objects has actually had an influential seat

at the table in U.S. copyright policymaking (Tushnet, 2014b). The organization formed

following online discussions about disillusionment in the fan community about the

policies of existing online communities and a desire to create a space of their own

(Coppa, 2013; Jamison, 2013). Additionally, OTW is responsible for Archive Of Our

Own, which I noted in Chapter 6 has both copyright policies and design features derived

from the existing social norms of the community. In this position, OTW has the ability to

influence both law and norms. Though the law is slow to change, websites have more

control over their own policies and can take into account the norms of their user base.

7.3.2 Creating Usable Policies

It is also important to consider the clarity, readability, and comprehensiveness of

copyright-related site policies. As shown by the study described in Chapter 5, these

policies are currently in poor condition when it comes to readability. HCI researchers

who have put forth the complexity of privacy policies as an important usability problem

(Bohme & Kopsell, 2010; Earp et al., 2005; Jensen & Potts, 2004; Kelley et al., 2010; Lin

et al., 2012; Luger et al., 2013) have also been considering technological solutions to help

(Kelley et al., 2010; Lin et al., 2012). For example, researchers have had some success in automatic parsing of privacy policy text in order to present information to the user in a more readable way (Kelley et al., 2010; Reidenberg et al., 2015). Licensing terms would be even easier to parse, since they tend to user very similar language and structure.

Of course, Terms of Service more broadly are more complex, as are the overarching copyright policies of websites. The simplest recommendation that I can make to online community designers is simply to provide plain language explanations of policies. Though websites are often constrained by legal departments and required language for terms and conditions, in *explaining* those terms, it is important to be mindful of terms that users would find most alarming. Consider the example from Chapter 5, the right to modify or transform in a copyright license. This licensing term could mean anything from changing the font size to editing content to creating that blockbuster film. A study of data use requirements on mobile apps found that simply knowing *why* the app needed that information did much to alleviate privacy concerns (Lin et al., 2012). An understanding of not only what the term *means* but what the site actually *means to do* would be an important step towards alleviating user concerns about uses of their content. For example, Archive of Our Own's TOS has a line after their license (including in part "modifying or adapting") that reads: "Modifying and adapting here refer strictly to how your work is displayed—not how it is written, drawn, or otherwise created."[41] Even this amount of plain language explanation is rare.

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[41] https://archiveofourown.org/tos (as of September 18, 2014)

However, beyond the readability problem, the policies themselves should be considered as well. In particular, this should involve policy drafters thinking more carefully about the needs of a particular community of users. Consider the amount of user research that often goes into design decisions like where to place a button on a website or exactly how the flow of a pay transaction should be designed. How often, in contrast, do websites do user studies about what their copyright policies—or any part of their Terms of Service—should be?

YouTube and DeviantArt, the largest of the sites we studied by far, both have pages dedicated to copyright policies, which include some plain language explanations of copyright law—including YouTube's "Copyright School" video where the explanations are provided by cheerful cartoon characters. Though both sites should be commended for plain language copyright policies, and in fact for mentioning fair use in them at all (rare among these types of sites), their explanations present fair use as something confusing and scary that should only be attempted with the help of an attorney. To quote DeviantArt's section on fair use:

> *[Fair use is] very limited, complex to analyze under the law and require[s] the help of expert advice from a lawyer. We recommend you talk to your own lawyer if you want to know more about fair use as it applies to the work you are doing. If it turns out that it isn't fair use, you may be liable for very serious money damages.*[42]

In other words, as stated in YouTube's Copyright School: "You could get in a lot of trouble. That's how the law works." Presenting fair use in this manner could arguably contribute to chilling effects. Similar to if advice is "ask for permission," if advice is

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[42] http://about.deviantart.com/policy/copyright/

"hire a lawyer," then the better-safe-than-sorry response would likely just be to not post the work. Policies like these could contribute to the "climate of fear" that exists among remixers, the cloud of legal uncertainty formed due to a lack of legal precedent (Tushnet, 2014b).

My interviews also verified that individual sites' copyright policies do have an effect on whether they choose to share work there. Sara, quoted earlier in this chapter, was one of many participants who no longer uses YouTube because of their copyright practices. Echoing findings from my forum analysis at DeviantArt, some participants also mentioned not using DeviartArt due to any idea that their work was not *protected* enough.

> *I feel like between Deviantart and Tumblr, I've heard a lot*
> *more stories of art being stolen, or reposted, or drawn over*
> *from Deviantart than Tumblr. I guess it's made me a little*
> *more wary on posting things on Deviantart.* – Eve

On the other side, participants also mentioned being pleased with copyright policies that they felt supported their community. Tumblr as noted above, came up a number of times as being supportive of protecting creators from plagiarism. Archive of Our Own was also mentioned frequently with respect to supporting transformative works.

> *Tumblr in particular, I've known people who have had*
> *their fan art reposted, stolen as it were, and put in a DCMA*
> *claim to Tumblr, and had the repost taken down. So, I think*
> *it does make a difference, especially as somebody who's in*
> *fandom.* – Eve

> *AO3 is very involved in championing fanworks and that's*
> *something I really admire. I'd never go somewhere like*
> *fanfiction.net, where they're notorious for just taking down*
> *fics, for various reasons.* – Andrea

I do like Archive Of Our Own. I like how active they are in trying to create and uphold policies that treat fan fiction as something meaningful. They've built this whole organization of… I think it's called The Organization of Transformative Works that kind of protect fan fiction against liability and things like that. So, that's something I really appreciate. - Ellie

Part of the problem here is that though ideally we might like to suggest that these sites rewrite their policies to be friendlier to fair use, there are competing interests at stake. In terms of lowering both cost and legal risk, it is likely not in the sites' best interest to adjudicate fair use themselves. The flexibility of fair use as a doctrine means that there are examples of fair use being construed strictly, which also accounts for risk averse behavior. Meanwhile, the sites also have to consider the interests of both users who are appropriating and users who are in fear of others appropriating their work. This is a difficult balance to strike, but simply providing copyright policies in readable language helps with the user information deficit.

Additionally, even if policy or Terms of Service re-writes are an impractical solution, these websites have a valuable resource at hand. It is the same one that I had for my research: information about what users do and do not understand about copyright law and policy. Something as simple as the construction of an FAQ that covers recurring questions in these communities would be a step in the right direction.

7.3.3 Designing for Knowledge and Norms

In terms of potential technological solutions to deal with copyright, unfortunately automated copyright infringement detection is imperfect (Sawyer, 2009), and the flexibility of fair use exacerbates the problem even further (Felten, 2003). However, there may be simpler solutions for small positive changes. Consider this idea put forth by a poster in the DeviantArt forums:

> *[M]y suggestion would be: make a big fat explanation in*
> *the poems-upload-centre under the "submit preview*
> *picture" upload, that only pictures may be uploaded, that*
> *were created by the artist himself. And that neither pictures*
> *found in the internet, e.g. by google, nor pictures that you*
> *own (e.g. that hangs on your wall) may be submitted as*
> *long as you are not the artist and owner of the copyright.*

The idea here is essentially a copyright reminder at the time of upload. Of course, this specific poster's solution does not account for fair use. However, one example of an existing solution is the process for uploading an image onto Wikipedia, which functions as something of a fair use wizard (Fiesler, 2013). Wikipedia requires information about the origin of the image, and if the user chooses "I believe this is fair use," there are options for common fair use rationale to choose from, such as "the object of discussion in an article" or "excerpt from a copyrighted work." This essentially scaffolds an understanding of fair use for the user. If YouTube, for example, had a similar wizard that prompted for fair use rationale if they indicate that the video contains third-party content, then this would not only similarly scaffold knowledge, but the information could be passed on to copyright holders before they can issue a takedown notice. Decreasing the knowledge gap here would also shift some balance of power to the content creator.

In addition to the potential for scaffolding copyright knowledge into design, designers should also consider ways to support successful social norms. In HCI, value-sensitive design is the process by which moral values are translated into processes and designs—such as ways to supporting autonomy or discouraging bias (Friedman, 1996). Similarly, there may even be ways to build social norms *into* a design. One example of this came up in my interviews, regarding Archive of Our Own, which as noted previously was built specifically to support the needs of a community of fan fiction writers that already existed. In relating the history of the archive, Coppa provides the original list of

"necessary features" that were considered in designing the site. These included items like allowing complete poster control over stories, giving explicit credit to creators while disclaiming official status, and making provisions for trigger warnings (Coppa, 2013).

Emergent practices had also already formed in the community regarding conventions for things like attribution in the spaces they already used, such as Livejournal. Maria described how she had seen this in practice, regarding using another creator's work as inspiration, and Lily mentioned a design feature at Archive of Our Own that integrated this existing practice.

> *You would contact the creator and be like, "Hey, I have this great idea for a fic based on your art. Would it be okay?" You would put a link back to it. That happens fairly frequently, fic based off of a drawing, or a drawing based off a fic. You always have the link back to it.* – Maria

> *[If I wanted to write a sequel to a fanfic], if they said, "Yeah. Go for it. Knock yourself out," then I would go ahead and write it and probably credit them at the beginning and/or end in author's note to say, "This work was inspired by," which actually, on Archive of Our Own is something we can actually do. When you're posting something, it's gives you a field all ready to say this work was inspired by this.* – Lily

Another example of building in support for positive copyright practices would be providing mechanisms for licensing. Arguably YouTube has made a positive step in allowing copyright owners to monetize videos that contain their content rather than their only option being to take them down, though unfortunately this process also has the potential to be abused, such as when Lionsgate attempted to monetize the fair use *Buffy vs Edward* (Collins, 2014). A better example might be Flickr's hugely successful integration of Creative Commons licenses (Caroll, 2006). DeviantArt has recently done this as well, which one of my participants mentioned as an advantage over Tumblr:

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I will say that what Deviantart doesn't have that Tumblr
does is that on Deviantart you can put a creative commons
license on your content sort of explicitly stating what
people can and cannot do with your artwork, where Tumblr
doesn't have that option. – Eve

The key to all of these suggestions (and to value-sensitive design in general) is to understand the needs of your community of users. It is important to remember as well that these needs relate not just to copyright as written, but to copyright as *understood*, as well as to social norms as an additional source of rules.

7.4 Limitations and Future Work

In the course of this dissertation work, I have used a suite of different qualitative methods to examine this problem space—interviews, content analysis, and survey work. I paired in-depth interviews with a smaller number of participants with large-scale analysis of trace data and quantitative analysis of survey data. Though I purposefully use complementary methods in order to get a broader picture, it is important to note the strengths and weaknesses of these methods in considering the limitations of the current work and potential for further study.

The bulk of the work described here is qualitative in nature, which means that rather than the goals of causal determination, prediction, and generalization sought by quantitative researchers, my goals were "illumination, understandings, and extrapolation to similar situations" (Golafshani, 2003). Strengths of qualitative work include the ability to examine a space in great detail and depth, the adaptability of the research framework, collection of data with subtleties and complexities not available in quantitative data, and the situating of data in the context of experience and community. However, there are limitations of this type of work as well. There is less volume of data, data is collected from a smaller group so may not generalize, rigor is more difficult to assess and

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demonstrate, and research quality is dependent on the individual skill of the researcher and more susceptible to bias.

This last point is particular important, but it is also not appropriate to attempt to claim perfect objectivity; rather, qualitative researchers can embrace their involvement and role within their research. By its nature, qualitative research is shaped by those who conduct it. As Charmaz puts it, we are not passive receptacles into which data are poured (Charmaz, 2006). People construct data: both researchers and participants introduce bias by bringing in underlying values and making assumptions about what is real, a state which requires our reflection as researchers.

Golafshani notes that whereas quantitative researchers determine credibility in terms of validity and reliability, the credibility of qualitative research depends more on the effort and ability of the researcher—the researcher is the instrument (Golafshani, 2003). Though my methods for each study have been described in detail, I want to emphasize the particular techniques used to maintain credibility in this work:

- For content analysis, I employed inter-rater reliability measures with multiple coders (Lombard et al., 2002), in order to ensure consistency of coding as well as to reduce the likelihood of individual coder bias.

- For interview data analysis, codes were created and discussed with an additional researcher, with initial theme identification occurring independently.

- I used multiple data sources to examine the same problem space (interviews multiple years apart, as well as analyzing trace data). Triangulation is considered an effective strategy in increasing the validity and generalizability of qualitative work (Golafshani, 2003).

It is also important to note generalizability limitations of my findings. I examined a specific set of online communities, focusing on remixers. As noted in Chapter 6, my interviews with music remixers suggests that many of my more specific findings about social norms are likely limited to the communities in which they originate. However, I feel that particularly based on the larger data set used for content analysis, that my big picture findings about copyright misconceptions and chilling effects could be applicable to many kinds of online content creation. Moreover, a major contribution of this work is support for the recommendation that online community designers should be more carefully considering their specific community of users in making decisions about copyright policy. I hope that this recommendation will encourage further user research into communities different from those I discuss in this dissertation.

In fact, the boundaries and limitations of my work so far suggest a number of courses towards more research in this space. For the purposes of scope and shared context, my work has been largely confined to communities with a purposeful skew towards amateur remix and appropriation. There are a number of other contexts in which discussions of intellectual property are prevalent online, including file sharing communities, Wikimedia Commons, and commercial sites. In fact, I have already seen evidence for striking normative differences between amateur remix communities such as those that I studied, and commercial communities where appropriation is common (such as Etsy and Ravelry, or even professional, original artists versus fan artists on DeviantArt). Arguably, the copyright issues around commercial artists are even more complex, since fair use analyses can be more difficult, and trademark is relevant as well as copyright.

There is also opportunity to look more closely at cultural or demographic differences in norms. For example, attitudes about copyright as well as remix in particular can be strikingly different outside of the United States. One possibility would be to examine the fan practices around Japanese manga, which bring to bear complicated intellectual property issues around both wholesale copying (e.g., scanning) and transformative works (e.g., fansubbing) (Condry, 2010; Lee, 2009). Additionally, I have brought up gender several times throughout this dissertation due to the fact that the fan creation communities I focused on in my interviews are predominantly female. It would be worth examining whether differences in attitudes do have any basis in gender or other demographics or are driven entirely by community involvement.

Other data sources as well could provide more insight into this subject. One observation from my data is the prevalence of copyright disclaimers. Though they carry no legal weight, they are commonplace in fanworks (Busse & Farley, 2013; Tushnet, 1996), and also appear frequently accompanying YouTube videos (e.g., "no copyright infringement intended"). This is an example of information about copyright that could be gleaned from the artifacts themselves rather than explicit conversations among users. Moreover, the Wikipedia upload wizard described above essentially provides thousand and thousands of examples of fair use rationale given by Wikipedia users. Though these "big data" sources of copyright information may not alone provide enough context, paired with my current findings or further qualitative work, they could contribute to a broader picture of this space.

In my recommendations to online community designers in this chapter, I have also discussed implications for design. Some of the suggestions I have made include:

- Scaffolding copyright knowledge with content upload tools

- Considering community norms about copyright in design features of online communities (e.g., providing methods for attribution)

- Building signals of expertise into copyright Q&A spaces

- Better presentation of copyright policy information, including the potential for technological solutions driven by automated TOS parsing

I hope that this body of research will contribute to design work in this space.

7.5 Conclusion

In the course of this dissertation research, I set out to better understand the role of law and rules in socio-technical systems by focusing on one complex domain, copyright in online creative communities. Unfortunately, copyright will continue to be a hard problem in these spaces. There are many stakeholders with competing interests— lawmakers, copyright holders, online content creators, content consumers. However, technologies and websites that facilitate creation and sharing are also part of this environment and should be considering these issues in terms of both usability and design. It is important, then, for designers and researchers to have some understanding of copyright law as well. As Jackson et al. point on in their discussion of the role of policy in CSCW systems, it should not be the case that consideration of policy comes only *after* design and practice (Jackson et al., 2014). Copyright policy is deeply intertwined with any kind of creative activity, especially in the context of sharing and collaboration. My work has revealed that it is an important aspect of interactions between creators in these online communities, and therefore should be an important part of the user model in design decisions. We should not only be thinking of ways to help creators better

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understand copyright, but also considering the implications of the ways they currently understand it as well.

YouTube's Copyright School video informs users: "You could get in a lot of trouble. That's how the law works." It should not be in an online community's best interest to discourage creativity by making their users afraid of being in trouble with the law. It is my hope that this work has provided a better understanding of how content creators engage with copyright and how norms organically form within communities of creators, and that this knowledge will help online community designers decide how to best educate users and police their copyright decisions, while avoiding potential chilling effects.

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