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LEAD ARTICLES

COPYRIGHT FAIR USE AND PRIVATE ORDERING: ARE COPYRIGHT HOLDERS AND THE COPYRIGHT LAW FANATICAL FOR FANSITES? 1

Jessica Elliott*

I. INTRODUCTION

The "fan website" or "fansite" raises several potential copyright infringement issues. Fansites typically provide copyrighted content for downloading without authorization. 3 Such content may include portions of copyrighted musical compositions, audiovisual works, and literary works. 4 Fansite operators who infringe copyrighted works may assert the fair use defense, under the Copyright Act of 1976. 5 This paper will discuss the probable outcome of a fair use defense for the use of these types of works on a fansite. Even though the analysis generally favors the copyright holders for each of these works, they are also using further legal tactics and private ordering schemes to secure gratuitous protection for their works.

These efforts actually run counter to the purpose for establishing

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4 Id. at 100-101.
the fair use doctrine as a means for the public to use copyrighted works. The Supreme Court has even stated that the fair use doctrine is "necessary to fulfill copyright's very purpose" as set forth under the United States Constitution, Article I, Section 8, Clause 8.\footnote{Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).} Although the fair use defense does not frequently permit fansite operators to escape copyright infringement liability, the use of these additional protectional measures by copyright holders prevents some fansite operators from having the opportunity to assert the defense. This outcome reflects a tension between copyright holders who desire compensation for the unauthorized use of their works and Internet users, such as fansite operators, who believe that they have a right to use the works for free if their use positively promotes or publicizes the incorporated work.\footnote{See Yamamoto, supra note 3, at 99.} This article proposes a compulsory licensing scheme for Internet uses of copyrighted works as a resolution to this tension and to discourage private ordering schemes and other legal maneuvering.

II. THE EVOLUTION OF FAN WEBSITES

The Internet continues to evolve and grow as a world wide network. The procurement of an Internet domain name is inexpensive, and easily obtained through an online domain name registry.\footnote{See, e.g., Network Solutions at http://www.nsi.com; Register.com at http://www.register.com. At Network Solutions, an individual or business can obtain a domain name with the "con" top level domain for $35.00 per annum. Other top level domain rates range from $25.00 to $50.00 per annum at Network Solutions. This registrar also offers registrants increasing discounts if they register for more than one year. Registrants save 10% if they register for two years, 20% if they register for five years, and 40% if they register for ten years. The prices are similar at Register.com, although savings are not available unless the registrant registers for five years or more, and these savings are not as substantial as those offered by Network Solutions.} In addition, it is no longer necessary to own a personal computer to obtain access to the Internet. Public libraries, schools, and even cybercafes offer Internet access for free or minimal
chances. Further, several Internet Service Providers ("ISPs") are able to provide free Internet access by requiring users to read advertisements, delivered electronically to mail accounts or as pop-up and banner advertising. All of these circumstances enable individuals to obtain and create personal websites with minimal financial expense. Ultimately, this new "Information Age" has spawned a new format for public laudatory speech through the evolution of the personal website.

One variety of personal website is the "fan website." In many instances, the personal website started as an autobiography of sorts, enabling the site operator to publicly display his or her life history, including personal hobbies and interests. Often, the fansite takes form as one aspect of this personal web page,

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9 Cybercafes.com at http://cybercafes.com (last visited April 13, 2001). Currently, there are at least 475 cybercafes or similar businesses offering Internet access within the fifty United States. There is at least one cybercafe in each of the fifty states and the District of Columbia, with the exception of Vermont and North Dakota. The rates offered in major cities are reasonable. For example, the Cyberstop Café in Washington, DC charges $5.99 per half hour and $7.99 per hour. Cyber Java in Los Angeles, California charges $2.50 for every fifteen minutes or $9.00 per hour. The rates at After-words Bookstore in Chicago, Illinois are identical to those offered by Cyber Java, although After-words charges $8.95 per hour. Café Monet Cyber Café in Houston, Texas offers the bargain rate of $6.95 per hour.

10 See, e.g., Juno at http://www.juno.com (last visited April 13, 2001); Net Zero at http://www.netzero.com (last visited April 13, 2001); Blue Light at http://www.bluelight.com (last visited April 13, 2001). These sites offer varying degrees of basic free service, ranging from 12 hours per month to unlimited time. In exchange, users will encounter numerous banner advertisements and pop-up ads. As an alternative, individuals can obtain inexpensive Internet services by paying a $25.00 household annual fee and by reading e-mail advertisements and completing surveys thereafter. See Blue Frog at http://www.bluefrog.net (last visited April 13, 2001).


12 See, e.g., Oasis Central at http://www.oasiscentral.com (last visited April 23, 2001). The creator of this website states that his Oasis fansite started as one part of a Star Wars fansite. As he continued to develop the Oasis material, he realized that his interest in the band required its own fansite.
sometimes requiring a separate domain name address and corresponding website.\textsuperscript{13} Alternatively, some fan website operators initially set out to create a shrine to a specific music group, movie, television show, or personality.\textsuperscript{14}

There are roughly four types of fan websites. These include the official fansites, unofficial but permissible fansites, unofficial but non-confusing fansites, and unofficial and confusing fansites.\textsuperscript{15} The confusion arises when the fansite deliberately mimics the official fansite. First, there are official websites for a television series, film, band or celebrity.\textsuperscript{16} Often, these websites are not true fansites because a corporate entity, such as the production studio, controls the website. On occasion, an actual fan-operated website will become the official website.\textsuperscript{17}

In comparison, the true fansites have limited corporate authorization or no authorization. The former category includes those fansites that achieve limited approval from the corporate entity or production group responsible for creating or promoting the television series, film or band that is the subject of the unofficial fansite. These entities often delineate procedures that fansite operators must follow in order to secure this limited approval.\textsuperscript{18} For example, the Official Oasis website,

\textsuperscript{13} Id.
\textsuperscript{14} See, e.g., Harry Potter Guide at http://www.harrypotterguide.co.uk; Harry Potter Network at http://www.hpnetwork.f2s.com/.
\textsuperscript{15} The author created this categorization of fan websites, official and unofficial.
\textsuperscript{16} See, e.g., The Official Buffy the Vampire Slayer Site at http://www.buffy.com (last visited April 13, 2001). Since the writing of this article, UPN now controls the broadcast rights to the Buffy the Vampire Slayer television series. Accordingly, Warner Brothers no longer hosts the Official Buffy the Vampire Slayer site referenced throughout this article. UPN created a new website at the same address that is currently under on-going construction.
\textsuperscript{17} See, e.g., Official Star Wars site at http://www.starwars.com (last visited April 23, 2001). George Lucas was so impressed by one unofficial fansite that he offered the operator of that site the opportunity to create the official Star Wars site prior to the 1997 re-release of the motion pictures.
Oasisnet.com, permits fansites to "borrow" copyrighted materials for inclusion in the unofficial fansite. In order to do this, fansite operators must host a banner notice for Oasisnet.com on their unofficial fansite. Similarly, the Official Buffy the Vampire Slayer website implicitly permits the operation of unofficial websites and permits these sites to copy and reproduce images from the Official website, buffy.com. Fansites who copy and reproduce these images must also reproduce specified HTML code on each page of their unofficial website that displays one of these "borrowed" images.

The remaining categories of unofficial fansites comprise those sites without any authorization from the Official website or otherwise. These unofficial fansites include those sites that try to render confusion unlikely between their own site and the official sites. They attempt to comply with their understanding of copyright law by providing or posting disclaimers concerning the sponsorship of their unofficial site throughout their website.

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20 Id.
21 The Official Buffy the Vampire Slayer Site at http://www.buffy.com (last visited April 13, 2001). This website informs website operators that they can link to the official website and they can take images if they include the copyright notice on their unofficial fansite. The UPN Buffy the Vampire Slayer website (at http://www.buffy.com) is more explicit regarding the use of copyrighted material. The new terms of use agreement states that visitors may download materials from the site for personal, non-commercial use only provided all copyright and other proprietary notices remain intact. This new agreement also states that modification of the materials or use of the materials for any other purpose is a violation of UPN's or such other sources' copyright, trademark and other proprietary rights.
22 Id. The html code is: Pictures are copyright © 1998 The WB Television Network and are from the Official Buffy the Vampire Slayer Site. This html code provision no longer exists on the UPN Buffy the Vampire Slayer website (at http://www.buffy.com).
23 See, e.g., Harry Potter Guide at http://www.harrypotterguide.co.uk.
24 Id. The Harry Potter Guide posts, at the top of its home page, the following disclaimer: “This site is an unofficial Harry Potter site, and therefore should only be entered by people who fully understand that the site holds no connection to J.K. Rowling, Bloomsbury, Scholastics or Warner Bros. It is however meant
other unofficial fansite is the type operating with reckless disregard of the copyright law. These “rogue” fansites fail to provide disclaimers and, in some cases, attempt to mimic the official websites.

III. POTENTIAL COPYRIGHT INFRINGEMENT ISSUES COMMON TO FAN WEBSITES AND THE APPLICATION OF TRADITIONAL FAIR USE CONCEPTS

Irrespective of how the fan website evolves and the authorization or approval it receives, the website content frequently poses several copyright infringement issues. Such copyright infringement issues can include digital audio samples, such as excerpted dialog from television programs or movies, or even music samples. The inclusion of streaming video samples, such as television, movie, music video or live performance video clips, and even movie trailers, also raise copyright infringement as an educational experience for all ages, and is non-profit. If you fully understand this criteria, then please feel free to click on the banner below and enter.” See also The Harry Potter Network at http://thehpn.rupture.net/ (last visited November 28, 2001). This fansite provides a less informed disclaimer and states that “All images and multimedia copyright of their respective owners. No infringement intended.”

See e.g., Where the Site Has No Name at http://www.wherethesitehasnoname.com (last visited November 28, 2001). This fansite posts music downloads, lyrics and album sleeve artwork without attribution and without any identifiable disclaimers regarding the use of copyrightable materials.

It is difficult to determine whether the Official U2 Website set out to copy an award winning fansite, or vice versa. The Official U2 website operates under several domain names, including @U2.com, and an award winning fansite uses the logo @U2 throughout its site but the domain name address http://www.atU2.com. See The Official U2 Website at http://www.U2.com (last visited April 13, 2001); The Official U2 Website at http://www.@U2.com (last visited April 13, 2001); and @U2 at http://www.atU2.com (last visited April 13, 2001).

See generally Yamamoto, supra note 3.

Oasis Central at http://www.oasiscentral.com. This fansite has music files (mp3 files) available for download. The website states that it specializes in covers and remixes of Oasis songs.
concerns. Finally, the fan website may infringe copyrighted literary works by including as content, excerpts from scripts or screenplays, plot synopses, and song lyrics.

For example, the various aspects of the unofficial Buffy the Vampire Slayer fansite, The Buffy Cross and Stake, potentially infringe several copyrighted works. This fansite provides synopses to each episode. There is also a gallery of nearly one thousand photographs, some of which are reproduced without any copyright management information. In addition, the fansite provides lists of character quotations derived from the dialogue for each episode. Finally, this fansite also reproduces and displays fan fiction, namely stories and scripts involving the series’ characters, that are arguably derivative works of the television series. The unofficial U2 fansite, atU2.com, also posts photographs of the band, with and without copyright management information. This fansite, which uses a logo "@U2" that is identical to one of the domain addresses used by the Official fansite, also provides lyrics for each of the band’s album releases. Further, this fansite provides music for downloading, including unreleased songs, “b-sides,” and other recorded singles.

31 Id.
32 Id.
33 The author notes that as a visitor to this website, it is not readily apparent whether the website operator removed copyright management information in violation of copyright law.
34 The Buffy Cross and Stake at http://www.angelicslayer.com (last visited April 13, 2001). Although the fansite states that the quote lists are not scripts from the episodes, one selection comprised six pages of quotes from a single episode.
35 Id.
36 @U2 at http://www.atU2.com.
37 Id.
38 Id.
A. Traditional Interpretation of the Fair Use Defense Under Copyright Law

Even if fansites infringe the copyright law, fansite operators can assert a fair use defense. The Copyright Act of 1976 codified the judicially developed fair use doctrine. The applicable section, 17 U.S.C. § 107, represents an actual codification of the judicial doctrine. The legislature did not want this codification to introduce new elements into the doctrine. The doctrine summarized, by example, the categories of fair uses already supported by the judiciary. In addition, the legislature set forth a balancing test comprising four factors for the fair use. These factors are:

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.⁴⁴

Although these factors are illustrative, they are almost exclusively relied upon by judicial districts in applying the balancing test.⁴⁵ Further, the Supreme Court has recognized that the fair use doctrine "calls for case-by-case analysis."⁴⁶ The courts are fairly consistent in their interpretation of fair use for each of these delineated factors. For example, the courts generally interpret the first factor, "the purpose and character of the use," by considering whether "the new work is "transformative" and "commercial."⁴⁷ Typically, the greater the transformative nature of the new work, the less significant the commercial success of the work.⁴⁸ Further, courts interpret the second factor, "the nature of the copyrighted work" in light of the "value of the materials used."⁴⁹ The third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," considers whether the material used "was reasonable in relation to the purpose of the copying."⁵⁰ This generally turns on whether the copier used "the heart" of the

⁴⁵Notably, the Second Circuit has repeatedly acknowledged that other factors may be relevant in the fair use defense analysis, and the Circuit has evaluated public interest and First Amendment considerations in the past. See, e.g., Twin Peaks Prod., Inc. v. Pub. Int'l, Ltd., 996 F.2d 1366, 1377-1378 (2d Cir. 1993) (explaining that "while the four statutory factors are non-exclusive, we do not believe that the various other factors discussed by the parties merit discussion . . . [as] all of the statutory factors favor [the Copyright owner]."); Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 146 (2d Cir. 1998) (dismissing the relevance of "free speech and public interest considerations" for the facts of this case).
⁴⁷Campbell, 510 U.S. at 579.
⁴⁸Id.
⁴⁹Id. (quoting Folsom, 9 F. Cas. at 348).
⁵⁰Id. at 586.
copyrighted work.\textsuperscript{51} Finally, the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," necessitates an evaluation of the impact the second work made upon the current commercial market for the original work and for future markets for the work and derivative works.\textsuperscript{52}

\subsection*{B. Digital Audio Samples}

In light of the recent Napster decision, fansites will not have a successful fair use defense if they make digital audio "mp3" music files available for downloading on their fansites.\textsuperscript{53} This should also prevent fansite operators from asserting a successful fair use defense if they provide digital audio "mp3" \textit{bootleg} music files available for download. The remaining questions are whether the Napster decision should apply with equal force against those infringers who provide digital audio samples from television shows or movies on their fansites or who provide digital audio "mp3" music files that are only a portion of an entire musical composition and sound recording.

Under the fair use factors, the first and second factors would favor the plaintiff in analyzing this type of case. The Napster decisions by the district court and the Ninth Circuit reject the argument that a conversion of the digital music to a "mp3" file amount to a transformative use of the original copyrighted work.\textsuperscript{54} Although fansites are frequently non-commercial websites, arguably, the sale of advertising space on the website amounts to a commercial use of the work. In addition, the musical composition excerpts and audio "quotes" from the television series and movies are fictional works, thereby favoring the plaintiff.\textsuperscript{55}

Ultimately, the success of the fair use defense would depend on

\textsuperscript{51}Id. at 587.
\textsuperscript{52}Id. at 590 (quoting Harper & Row, Pub., Inc., 471 U.S. at 568).
\textsuperscript{53}A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding the website Napster.com did not have a fair use defense for facilitating the infringement by others of copyrighted musical works and sound recordings).
\textsuperscript{54}Id. at 1015.
\textsuperscript{55}See Yamamoto, supra note 3, at 110.
the interpretation of the third and fourth factors. In analyzing the third factor, the available mp3 or audio/video sample download would comprise a portion of the original work. The audio "quotes" would likely comprise a very minimal amount of the work, perhaps just a few seconds or minutes. Most prime-time television series are approximately twenty-two minutes or forty-five minutes in duration. Most films range from ninety minutes to upward of one hundred eighty minutes. Such a small excerpt from the original work would likely tilt this factor in favor of the defendant. In contrast, the audio music excerpt would likely comprise a greater percentage of the original work. An excerpt of a few seconds to a minute in length would be a greater portion of a popular song, as most popular musical compositions are approximately three to four minutes in length. This third factor, particularly if the song excerpt comprised the refrain of the song - likely the heart of the original work - would probably favor the plaintiff.

Finally, the fourth factor may favor the defendant, as most people will not want to substitute an audio "quote" or song excerpt

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56 Today there is an average of fifteen minutes of commercial advertising broadcast during each hour of prime-time television. An inversion of this statistic indicates that there is an average of forty-five minutes of prime-time television per hour. Class Notes for Thursday, February 3, 2000 at http://www.washington.edu/baldasty/Feb 3.htm (last visited April 23, 2001).
57 Moviefone.com at http://www.moviefone.com (last visited April 23, 2001). This website provides the performance duration for recent film releases. Among current releases, "Bridget Jones' Diary" is ninety-two minutes in duration; "Along Came a Spider" is one hundred three minutes in duration; "Memento" is one hundred thirteen minutes in duration; and "Blow" is one hundred twenty-four minutes in duration.
58 Princeton Univ. Press v. Michigan Document Serv., Inc., 99 F.3d 1381, 1389 (6th Cir. 1996) (noting that a taking of even 5% of a work was not "insubstantial," although the value of the portion taken is also relevant).
59 As indicated by the compact disc tracking information for the following releases, the recent hit "Yellow" by Coldplay is four minutes and twenty-nine seconds in duration; Blink 182's hit "All the Small Things" is two minutes and forty-eight seconds in duration; and Dido's hit "Thank You" is three minutes and thirty-eight seconds in duration.
for the original work. In addition, there likely is not a significant market for these types of audio “quotes” or songs. Arguably, this factor would favor the plaintiff, if there is a potential or foreseeable market in a compilation release of such audio “quotes” or song excerpts.

C. Streaming Video Clips and Trailers

Until very recently, the technology for transmitting video over the Internet prevented the transmission of video at adequate speeds and without distortion. The newest technology, streaming video, facilitates improved transmission of video over the Internet in real time. With this innovation, it is possible to download film trailers and television, movie, or music video clips from Internet websites with reduced distortion. Accordingly, fansite operators can now provide their site visitors with downloadable real-time copies of audiovisual works.

Under the fair use factors, the first and second factors clearly favor the copyright holder in the audiovisual works. The performance and reproduction of a trailer or streaming video clip on a fansite are nontransformative uses. Although some fansite operators may argue that converting the original trailer or audiovisual work technology into streaming video is transformative, the end viewer result is essentially the same. The fansite visitor still views the identical content. Second, the fansite is arguably a commercial operation if it receives financial support for the operation of the website through the sale of advertising space on the website. The second factor similarly favors the

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60 See Twin Peaks Prod., Inc., 996 F.2d at 1366 (considering whether fans of the Twin Peaks television series would substitute a book summarizing individual episodes for videotapes of those episodes).

61 Mark S. Torpoco, Article: Mickey and the Mouse: The Motion Picture and Television Industry’s Copyright Concerns on the Internet, 5 UCLA ENT. L. REV. 1, 18-19 (1997).


63 Id.
plaintiff, if the copyrighted work is fictional. If it is a documentary, and therefore factual, it may still favor the plaintiff, depending on the film style and direction of the work.

The outcome of the third factor depends on the quality and quantity of the original work available on the fansite. With respect to movie trailers and music video clips, most fansites will offer the complete trailer or video to site visitors. If the trailer or video itself is copyrighted, the copying and performance of the entire work on a fansite would weigh against a finding of fair use. This would result even though film trailers are marketing ploys meant to pique the interest of potential filmgoers. Although a trailer is most effective when designed to reveal as little as possible about the film, a display of the entire trailer represents a complete taking of a copyrightable work even if the trailer does not expose the heart of the original work.

These arguments similarly apply to the reproduction and performance of movie and television clips on a fansite. Due to the amount of time that it takes to download streaming video technology, these clips are frequently short in duration. Where the clip is only one scene of the series or the film, it is unlikely that the clip would comprise the heart of the original work. However, in Castle Rock, the plaintiffs successfully argued that the author of a quiz-book about the “Seinfeld” television series did not have a fair use defense because the book played upon the heart of the Seinfeld show, without actually providing commentary about the underlying copyrighted work. In this case, the heart of the show was the “nothingness” of daily life. Similarly, a copyright holder could argue that fansites providing certain movie or television clips are also taking the heart of the original work, particularly if the portion taken represents a “surprise” ending or a favorite moment in the series.

Finally, in analyzing video clips and streaming video, the fourth factor could favor the fansite operator or the copyright holder, depending on the circumstances. The design of the movie trailer is

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64 See Yamamoto, supra note 3, at 110.
65 Castle Rock Entertainment, Inc., 150 F.3d at 143-144.
66 Id.
such that it is not meant to serve as a substitute for the actual copyrighted film. Accordingly, the reproduction and performance of a movie trailer on a fansite would not interfere with the market for the actual film that is the subject of the trailer. It is likely that many film production studios purposefully coordinate the release of a trailer with the release of a different film, in order to expand the potential consumer base for the film that is actually being released. Most recently, the first “Harry Potter” movie trailer was released with the movie “See Spot Run.”

Warner Brothers, the studio behind both pictures, may have recognized that the Harry Potter trailer would appeal to children, potentially expanding the audience for See Spot Run.

Although it is unclear how many people attended See Spot Run in order to see the Harry Potter trailer, it is likely that more than a few people went to the film to see the trailer. Consequently, the availability of a trailer on a fansite would interfere with this marketing tactic to expand the consumer base for a different film release. This interference is arguably to the detriment of a potential market, as some fans are willing to pay the ticket price for a movie in order to see a trailer.

In contrast, the reproduction and performance of a film or series

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68 This seems particularly possible since See Spot Run received several negative critical reviews. See Critical Mass, ENTERTAINMENT WEEKLY, April 6, 2001, at 88.
69 Real.com has several movie trailers available for download, including the trailer for the Harry Potter film and the remake of “Planet of the Apes.” The website also has music and film clips available for download. Real.com at http://www.real.com (last visited April 23, 2001).
70 Tim Lammers, Harry Potter Movie Trailer Debuts, Channel 2000 at http://www.channel2000.com (last visited May 1, 2001). Lammers states that this “is the latest example of how the release of a movie trailer can become an event in itself long before a film hits theaters -- a trend that began in 1999 with advanced footage of ‘Star Wars: Episode One -- The Phantom Menace.’ Not only did people turn out in droves to see the first ‘Star Wars’ teaser trailer; many left the theater before the film it was playing with started.” Notably, a trailer-viewer pays the same price as any other film patron, irrespective of whether the trailer-viewer stays to watch the following film.
clip are less likely to impact a current or potential market for the original copyrighted work. The successful syndication effort of several television series is evidence that consumers enjoy watching their favorite episodes repeatedly. The availability of favorite clips on the Internet is unlikely to hurt syndication sales. However, it is possible that online availability of favorite clips, particularly those not yet publicly available, could affect the future market for consumer sales of videotapes and DVDs for television series and movies, as consumers can download these clips for free.

Finally, the reproduction and performance of a music video on an Internet fansite would likely favor the copyright holder. The music video is an entire work. There is no substitute for the work. However, it is arguable that the music video is just a commercial or advertisement for the music and band that are the subject of the work. Consequently, it may be the actual music recording release that is being marketed for consumer purchase, and additional performances of the video would arguably further the promotion and sales of that music release.

D. Script or Screenplay Excerpts and Television Episode Synopses

The fan website may also infringe copyrighted works through the inclusion on the website of excerpts from scripts or screenplays, and episode plot synopses. Some fan websites for television shows provide summaries for every episode, organized by season. Other websites provide quotes and dialogue from

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71 What Price Friendship? Canoe.ca at http://www.canoe.ca/televisionfriends/paydispute.html (last visited May 1, 2001). This brief article notes that the syndication price for “Friends” is approximately four million dollars per episode. This is one of the most profitable sitcoms ever.

72 See Yamamoto, supra note 3, at 99 (explaining that there is a tension between copyright law and the positive publicity that fansites provide for movies, television, music groups, and celebrities).

their favorite television series or movies.\textsuperscript{74}

Again, the question of whether or not these materials infringe copyrighted works would traditionally turn on an analysis of the uses under the fair use doctrine. Although there are no cases that presently analyze the fair use of these materials by a fan website, one case in particular informs the fair use analysis.\textsuperscript{75} The Second Circuit addressed a similar situation when it analyzed whether a book that discussed and summarized the television series, "Twin Peaks," actually infringed the audiovisual and literary copyrights held by the creators of the series.\textsuperscript{76}

In \textit{Twin Peaks}, the alleged infringers' book included detailed plot summaries of each first season episode.\textsuperscript{77} The book also quoted from the scripts of the television series.\textsuperscript{78} Although the Second Circuit recognized that a "work of [research, comment, criticism, or news reporting] of and about pop culture" is still "entitled to the defense of fair use,"\textsuperscript{79} the defendants did not successfully assert the defense.\textsuperscript{80} The court found that each of the four factors favored the plaintiff.\textsuperscript{81} First, the court found that the plot summaries did not constitute a transformative use for the "purposes of comment or criticism."\textsuperscript{82} Rather, the defendants went beyond any permissible uses by creating a book that was essentially an "abridgment" of the television series.\textsuperscript{83} In addition, the court stated that the second factor favored the television show, because it was a "creative and fictional work."\textsuperscript{84} The third factor also favored the plaintiff because of the synopses included in the book and evidence of "verbatim [copying] from the script."\textsuperscript{85}

\textsuperscript{74}\textit{Id}.
\textsuperscript{75}See, e.g., \textit{Twin Peaks Prod., Inc.}, 996 F.2d at 1366.
\textsuperscript{76}\textit{Id}.
\textsuperscript{77}\textit{Id.} at 1370.
\textsuperscript{78}\textit{Id.} at 1376.
\textsuperscript{79}\textit{Id.} at 1374.
\textsuperscript{80}\textit{Twin Peaks Prod., Inc.}, 996 F.2d at 1374.
\textsuperscript{81}\textit{Id.} at 1377-1378.
\textsuperscript{82}\textit{Id.} at 1375.
\textsuperscript{83}\textit{Id.} at 1376.
\textsuperscript{84}\textit{Id}.
\textsuperscript{85}\textit{Twin Peaks Prod., Inc.}, 996 F.2d at 1366-1367.
Finally, the fourth factor, although close, still tilted toward the plaintiff because the book competed in markets that the plaintiff had legitimate rights in, even if the book provided additional positive "publicity" for the television show. The court found it most significant that a fan of the television series could read the book to catch up on a missed episode instead of renting the videotape of that episode.

Similarly, a fan website may provide such plot summaries for television episodes. Under the *Twin Peaks* analysis, it appears that at least three of the fair use factors would favor the copyright holder. First, the plot summaries would similarly be non-transformative even if they were produced on a website. A fansite operator would actually have to inject a significant amount of commentary or criticism into each plot summary to legitimately argue that his or her use was transformative. Without such commentary or criticism, the fan website would also be an abridgment of the television series.

The second factor, the nature of the copyrighted work, would also favor the plaintiff under this analysis because most fan websites pay homage to creative and fictional television shows. It is arguable that a reality-based show, such as the tremendously popular "Survivor," would be non-fiction and this factor would be neutral as against a fansite devoted to this show.

The third factor, the amount and substantiality of the work used,

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86 *Id.* at 1377.
87 *Id.*
89 *Id.*
90 *See, e.g., Survivor Sucks* at http://www.survivorsucks.com (last visited April 23, 2001). Notably, the creators of "Survivor" would likely argue that the editing of the weekly programs injects the necessary creativity to make the work protectable under copyright law and that this second factor should weigh in favor of the copyright holder. Although the Survivor fansites do not pose as many potential copyright infringement problems, this fansite does post summaries for each episode. As the Survivor program relies upon the premise of "who is kicked off" to provide the drama for each show, these episodic summaries may actually take the "heart" of the program by informing site visitors about these results.
would also likely favor the plaintiff under *Twin Peaks*. However, the Second Circuit has since followed the *Campbell* decision by recognizing that the third factor “must focus upon whether ‘the extent of . . . copying’ is consistent with or more than necessary to further ‘the purpose and character of the use.’”⁹¹ Accordingly, the outcome of this factor now depends upon the content of the plot summaries provided on the fansite and whether the fansite directly quoted from the series’ screenplays, and whether the amount of the work used was reasonable in light of the infringer’s purpose.⁹²

The only factor that might favor a fansite operator under the *Twin Peaks* analysis is the final, and at one time viewed the most significant, fourth factor.⁹³ The Second Circuit noted that the fourth factor may favor a defendant where the defendant’s infringing activity satisfies a market demand expected to remain unfulfilled by the plaintiff.⁹⁴ In the early age of the Internet, television and movie producers recognized the advertising and marketing power of promoting their show or film on the Internet.⁹⁵ It is now customary for producers to release a website devoted to their show or film before the film is released.⁹⁶ Despite this prominent practice, producers likely view their websites as a promotional tool and therefore the fan websites may still occupy a market niche that the producers are not interested in occupying. For example, many fan websites provide different content than the “Official” websites, content that is perhaps purposefully omitted from the “Official” websites because it will not help in the

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⁹¹ *Castle Rock Entertainment, Inc.*, 150 F.3d at 144.
⁹² *Twin Peaks Prod., Inc.*, 996 F.2d at 1376-1377.
⁹³ *Harper & Row, Pub., Inc.*, 471 U.S. at 563. *But see Campbell*, 510 U.S. at 578 (stating that “all [factors] are to be explored, and the results weighed together”).
⁹⁴ *Twin Peaks Prod., Inc.*, 996 F.2d at 1377.
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promotion of the television show or movie.\textsuperscript{97} As these fansites may provide different content from the Official site, it is possible that they do not serve as a substitute for the original.\textsuperscript{98}

\textbf{E. Song Lyrics}

In addition to other types of media, several district courts have also had the opportunity to review alleged fair uses of song lyrics.\textsuperscript{99} In these cases, which precede the codification of the fair use doctrine in the 1976 Copyright Act, the defendant printed the lyrics to the chorus of a copyrighted song in a magazine article.\textsuperscript{100} The courts held that the use was fair because the publication of the song lyrics did not negatively impact the value of the song.\textsuperscript{101} Further, the Eastern District of Wisconsin noted in \textit{KarlI} that the article did not compete with the copyrighted musical composition, a Green Bay Packers fan “fight” song.\textsuperscript{102} Rather, the article incorporated the song lyrics to illustrate fan loyalty to the Green Bay Packers.\textsuperscript{103} Although these cases indicate that the partial publication of a copyrighted song’s lyrics may constitute a fair use, both of these cases involved a news article that incorporated the lyrics for an illustrative purpose.\textsuperscript{104}

\textsuperscript{97}See, e.g., The Official Buffy the Vampire Slayer Site at http://www.buffy.com (last visited April 13, 2001); and The Buffy Cross and Stake at http://www.angelicslayer.com (last visited April 13, 2001). The Official site states in response to a “frequently asked question” that it cannot accept outside idea submissions for legal reasons. In contrast, the unofficial fansite, The Buffy Cross and Stake, encourages fans to submit fan fiction based upon “Buffy the Vampire Slayer,” even though this fiction may infringe copyrights held by the creator of the television series, Joss Whedon, and Warner Brothers.\textsuperscript{98}

\textsuperscript{99}Castle Rock Entertainment, Inc., 150 F.3d at 145.

\textsuperscript{100}See \textit{KarlI}, 39 F. Supp. at 836; \textit{Broadway Music Corp.}, 31 F. Supp. at 817-818.

\textsuperscript{101}See \textit{KarlI}, 39 F. Supp. at 836; \textit{Broadway Music Corp.}, 31 F. Supp. at 817-818.

\textsuperscript{102}See \textit{KarlI}, 39 F. Supp. at 837.

\textsuperscript{103}Id.

\textsuperscript{104}See \textit{KarlI}, 39 F. Supp. at 836; \textit{Broadway Music Corp.}, 31 F. Supp. at 817-818.
In contrast, fan websites devoted to music groups frequently publish complete song lyrics in order to provide their site visitors with a printable copy of the words to their favorite songs. This very different purpose, in conjunction with the verbatim publication of the complete lyrics to copyrighted songs, would alter the fair use analysis for fan websites. The third factor, the purpose and character of the use, would now likely favor the copyright holder. Despite this change in the analysis, the aggregate of the factors may still tilt this fair use factor in favor of the fansite operator. Specifically, the publication of lyrics on a fansite would not directly compete with the distribution of the recorded song. Still, it remains a possibility that the availability of free music over the Internet, in conjunction with free copies of song lyrics, would eliminate a consumer’s desire to purchase the original release by the musical artist.

IV. LEGAL MANEUVERING AND PRIVATE ORDERING SCHEMES EFFECTING FAN WEBSITES

Even though the analysis of the fair use doctrine for the various fan website copyright infringement issues favors the copyright holders, those with legitimate copyright interests are also using private ordering schemes and other legal tactics to expand the protection for their legitimate rights on the Internet. These legal maneuvers include using contractual measures to expand

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105 See, e.g., @U2 at http://www.atU2.com (last visited April 13, 2001); Oasis Central at http://www.oasiscentral.com (visited February 23, 2001).

106 For example, the website Oasiscentral.com makes the lyrics to many Oasis songs available to its website visitors. All of the Oasis releases in the United States include the lyrics to their songs in the packaging. Previously, fans who were interested in obtaining these lyrics had to purchase the release. Now, they can “burn” a digitalized copy of a borrowed compact disc and print the lyrics off of an Internet fansite. This eliminates the need to purchase the original release and ultimately reduces the royalties earned by the band.

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protection and limit possible fair uses. Other copyright owners use the ICANN domain name arbitration system, designed for settling domain name disputes, to expand the protection for their copyright.

A. Contractual Measures

Those copyright holders who use contractual measures, such as agreements that stipulate the terms of use for the copyrighted material, attempt to expand the copyright protection for their interests. The Official X-Files website has such an agreement. It stipulates as terms of use under this agreement that Internet users have the right to use the material on the Official website for “personal, noncommercial use only.” The Official X-Files website includes script excerpts and photographs from current season episodes as part of its content.

Similarly, the Official Star Wars website also has a terms of use agreement. This agreement is even more detailed than the
agreement posted on the Official X-Files website.\textsuperscript{115} First, the Official Star Wars website agreement states that use of the website "signifies" assent to the terms of use.\textsuperscript{116} It also prohibits all uses of its materials, including "text, graphics, photographs, audio and/or video material or stills from audiovisual material" without "prior written consent" from Lucasfilm.\textsuperscript{117} The website does permit users to download "one copy of the materials on any single computer for . . . personal, noncommercial home use" if "all copyright and other proprietary notices" are retained.\textsuperscript{118}

Although the operators of the Official X-Files and Starwars websites can attempt to make such a contract with its website visitors, these agreements expand the copyright holder's potential rights in the material on the Official website. First, both of these Official website agreements limit visitor use of material to "personal, noncommercial use."\textsuperscript{119} This language, where "personal" modifies "noncommercial" actually extends the copyright holder's rights beyond the fair use doctrine. Under the fair use doctrine, noncommercial uses of material would favor the infringer, even if those uses were not personal. Accordingly, this term of use agreement language expressly prohibits a fansite operator from including copyrighted material on his or her website, since such website is likely not a "personal" use, even if it is noncommercial. Second, the agreement also protects material that is without copyright by restricting the potential use of such material by another to "personal, noncommercial use."

The Official Star Wars website further expands its rights in copyrightable works by prohibiting any personal use other than

\textsuperscript{115}Id.
\textsuperscript{116}Id.
\textsuperscript{117}Id.
\textsuperscript{118}Id.
permitting a user to download a single copy per computer.\textsuperscript{120} The starwars.com terms of use agreement also contractually prevents a fansite operator from asserting a fair use defense, without providing the fansite operator the opportunity to first read the agreement before assenting, since use of the website to read the agreement constitute assent.\textsuperscript{121}

B. The Uniform Dispute Resolution Policy as a Legal Maneuver

Other copyright holders are enforcing their interests against fan websites by alleging that fansite operators are cybersquatters in cease and desist letters and by pursuing recourse under the Uniform Dispute Resolution Policy (UDRP) for the regulation of Internet domain names.\textsuperscript{122} This system allows those with legitimate trademark rights in domain names to order the transfer of the domain name by an arbitration panel.\textsuperscript{123} Often, copyright holders have concurrent trademark rights. Pursuing arbitration under the UDRP enables these copyright holders to obtain domain names from fansite operators for less expense than filing costly copyright litigation. In some instances, a fansite operator will cease operating his or her website upon receiving legal threats related to the domain name, even if he or she had a fair use right to reproduce, display, or perform the copyrighted material present on the fansite.

Although the UDRP is limited in application to the arbitration of domain name conflicts, an arbitration order compelling the transfer of a fansite domain name causes a fansite operator to temporarily shut down his or her fansite until he or she procures a new domain

\textsuperscript{120} The Official Star Wars Website at http://www.starwars.com (last visited April 23, 2001).

\textsuperscript{121} Id. Interestingly, the Official Star Wars Website actively promotes the creation of fansites, even while it expressly limits the fair use defense for those fansite operators. The Official Star Wars Website offers suggestions for how to better promote fansites and also publishes a list of the top one hundred Star Wars fansites.

\textsuperscript{122} The Internet Corporation for Assigned Names and Numbers at http://www.icann.com.

\textsuperscript{123} Id.
name. In some instances, a UDRP order can scare a fansite operator into permanently shutting down his or her fansite.\textsuperscript{124} In order to attract potential website visitors, fansite operators frequently register domain names that are variations upon the name of the television series, movie, music group or celebrity that is the subject of the fansite.\textsuperscript{125} Accordingly, the fansite domain name likely infringes trademark rights in the names of the television series, movies, music groups or celebrities. As a result, those with corresponding copyrights in these works can interfere with legitimate fair uses of copyrighted material on fansites by filing UDRP actions to obtain the transfer of the domain name from the fansite operator to the party with trademark and/or copyright interests.

\textbf{C. Recent UDRP Celebrity Name Decisions}

Although the UDRP decisions have no precedential value for future arbitration decisions, the panelists seem willing to award the transfer of disputed domain names to celebrities, when the registrant of the disputed domain name fails to have a legitimate interest in that domain. In one such case, the Estate of Jimi Hendrix filed a UDRP complaint against “The Jimi Hendrix Fan Club” and Denny Hammerton, the registrant and operator of a fansite at jimihendrix.com.\textsuperscript{126} The Estate owns the domain names


\textsuperscript{125} See e.g., Oasis Central at http://www.oasiscentral.com; @U2 at http://www.atU2.com; The Buffy Cross and Stake at http://www.angelicslayer.com; Harry Potter Guide at http://www.harrypotterguide.co.uk; Harry Potter Network at http://www.harrypottnetwork.net. These domain names are variations on the entertainment property or groups, including Oasis, U2, Buffy the Vampire Slayer, and Harry Potter.

In the arbitration decision and the addendum, the panelist determined that Mr. Hammerton registered the domain name jimihendrix.com in bad faith, particularly since the only website activated at that domain was a page offering domain names for sale. In addition, the Estate offered evidence showing that “The Jimi Hendrix Fan Club,” allegedly organized by Mr. Hammerton, did not exist. Ultimately, the panelist awarded this transfer because it was clear that Mr. Hammerton was a cybersquatter.

In contrast, the majority of the panelists deciding the dispute over brucespringsteen.com allowed the registrant to retain ownership of the domain name. The representatives for Mr. Springsteen asserted similar arguments to those made by the Hendrix Estate, namely that the registrant was operating under the fictitious name, “Bruce Springsteen Club.” The majority of the panelists awarded the domain name to the registrant, Burgar, even though he operates two hundred “mini sites” as part of his website www.celebrity1000.com. Even though this conduct may indicate that Burgar is a cybersquatter, the panelist majority made the surprising conclusion that this did not amount to bad faith and confusion was unlikely, as Internet users would not expect brucespringsteen.com to host the official Bruce Springsteen website. This decision seems to conflict with the Hendrix decision, since neither registrant operated a legitimate fansite for an actual fan club.

Fortunately, a separate arbitration decision under ICANN recognized the interests of a fansite operator and permitted this
operator to retain the domain names tupac.com and tupac.net. In this case, the registrant only registered domain names that contained one portion of the celebrity's name. Further, the registrant actually operated a "Tupae" fansite at the domain name tupac.com, and attempted to decrease confusion by notifying visitors that the site is unofficial and by providing a link to the official site. The panelists acknowledged that awarding the domains in this arbitration to the Tupac Estate would likely prohibit the operation of fan clubs or fansites at domain name addresses that incorporated part or all of the relevant trademark.

D. An Example of Extending Copyright Protection Through Threats of UDRP Action

Warner Brothers, an entertainment industry conglomerate, has trademark and copyright interests in the four "Harry Potter" novels written by J. K. Rowling. Recently, Warner Brothers sent cease and desist letters to the operators of Harry Potter fansites at the following domain names, harrypotternetwork.net, harrypotterfaq.com, harrypotter-world.com and hogwartsonline.net. These letters requested that the registrants of the domain names "clarify the intent" of their website and to transfer the domain name to Warner Brothers. In some cases

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136 Id.
137 Id., slip op. at 6, 9. The domain name tupac.net linked to the tupac.com fansite.
138 Id., slip op. at 9.
this initial contact has caused fansite operators to transfer the
domain name and subsequently close their website.\textsuperscript{142} As one
fansite operator noted, the financial cost to defend against such
legal intimidation is often too costly for the independent operator
of a fansite.\textsuperscript{143}

The operator of the fansite at harrypotterguide.co.uk, fifteen-
year-old Claire Field, also received such a cease and desist letter
on December 1, 2000.\textsuperscript{144} The letter stated that J.K. Rowling and
Warner Brothers owned “the intellectual property rights in the
“Harry Potter” books” and Miss Field’s domain name registration
likely infringed those rights.\textsuperscript{145} The letter notably failed to outline
the specific intellectual property rights and it failed to explain why
the domain name registration would infringe any copyrights held
by Warner Brothers.\textsuperscript{146} Rather, the letter merely stated that the
registration would likely “cause consumer confusion or dilution of
the intellectual property rights described herein.”\textsuperscript{147} As this
language traditionally belongs to trademark law and doctrine, the
Warner Brothers’ legal counsel attempted to use trademark law to
prevent potentially fair uses of its copyrighted works, likely one of
the unspecified “intellectual property rights.”\textsuperscript{148}

Although the sending of cease and desist letters and the filing of
UDRP actions do not constitute per se private ordering, this
conduct enables copyright holders to interfere with and restrict fan
website operations. Even though Warner Brothers claims that it
has no desire to shut down “genuine fansites,” it is clear from the

\begin{footnotes}
\footnotetext[143]{Id.}
\footnotetext[145]{Id.}
\footnotetext[146]{Id.}
\footnotetext[147]{Id.}
\end{footnotes}
letters exchanged between Warner Brothers and Miss Fields that Warner Brothers is attempting to use trademark laws to obtain control over the content of unofficial fan websites. Specifically, "Warner Brothers has considered licensing the domain name to Field for free," in exchange for the right to final approval of content appearing on the fansite. This arrangement could lead to censorship and perhaps could chill expression over the Internet. Although fansites often present similar content to official sites for the same subject matter, fansites may provide additional commentary and even criticism about the subject matter. Such criticism and commentary are illustrative categories appropriate for consideration under the fair use exception.

Ultimately, this arrangement proposed by Warner Brothers would result in chilling fan expression through a private ordering scheme of copyrights via a contractual agreement between Warner Brothers and Miss Field. One possible solution is to modify the UDRP to reflect that legitimate fansite operators have rights to the domain name and are not operating in bad faith. This could prevent the types of legal threats and maneuvering practiced by copyright holders against fansite operators who may have legitimate interests in their domain names, and possibly a fair use defense under federal copyright law.

V. A PROPOSAL FOR A COMPULSORY LICENSING SCHEME FOR FAN WEBSITE OPERATORS

Although the aggregate of the fair use factors will generally favor copyright holders as opposed to the operators of fan

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websites, various legal tactics are presently favored by copyright holders to prevent the unauthorized use on the Internet of their copyrighted works. This article does not propose to answer whether these tactics and private ordering schemes are constitutionally permissible. Rather, this article suggests a potential legislative solution that would protect truly fair uses of copyrighted materials on the Internet while additionally protecting the rights of copyright holders. The legislative solution is a compulsory licensing scheme.

Compulsory licensing provisions are currently found within the Copyright Act of 1976. These provisions delineate the various steps for obtaining a compulsory license. They also provide for the payment of royalties or fees to the copyright owner. Under 17 U.S.C. § 114(f), a copyright holder can negotiate a fee for licensing the right “to publicly perform a sound recording by means of a digital audio transmission.” This fee can be negotiated through a copyright arbitration royalty panel. Potential licensees can also obtain licenses through independent agencies. Likewise, it is feasible to obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work. This license requires either the voluntary negotiation of a royalty payment or the arbitration of a royalty payment schedule by a copyright arbitration royalty panel.

Although a legislative provision providing for the compulsory licensing of copyrighted works for use on the Internet would encompass a greater variety of copyrighted works, it would provide a means for compensating copyright owners without erasing the existence of fan websites. First, the scheme could establish a notice provision, similar to the notice provisions in the other compulsory licensing schemes present under the Act.

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152See, e.g., 17 U.S.C. § 114(f); § 115(a), (c) (1994).
153Id.
154Id.
156Id.
Specifically, the Internet compulsory license should incorporate a requirement for “notice of intention to obtain a compulsory license” similar to the notice requirement found within 17 U.S.C. § 115(b). Under such a requirement, the operator of a fansite or a website would have to provide the copyright owner with notice of an intent to obtain a compulsory license.

Second, the scheme could establish a voluntary rate negotiation policy supported by an arbitration system. Due to the potential diversity of copyrightable works that may be reproduced, displayed, or performed on a website, the Internet compulsory licensing legislation could incorporate a standardized rate usage system in lieu of voluntary negotiations or arbitrations. Such a system should reflect current average negotiated rates for the digital audio transmission of sound recordings, and the average industry rates for the use of audiovisual works and literary works. For example, the rates could be calculated per word number excerpted and used from the literary work or pursuant to the length of the audiovisual segment or audio segment excerpted from the original copyrighted works. Although this compulsory scheme would be complex, it would balance the tension between the legitimate rights of the copyright holders and the public’s interest in using the copyrighted works.

VI. CONCLUSION

Notably, this Internet compulsory licensing scheme would erase the need for Internet copyright infringers to assert the fair use defense. Although some Internet infringers, likely a rare few, may have a present fair use to use copyrighted material, the proposed compulsory licensing system would enable those without fair use privileges to continue their infringing activity for a small fee. Certainly, the rates proposed in this scheme must be reasonable, in order to permit continued public use. This system will encourage independent website operators to seek financial support for their websites, without a penalty, in order to pay for the rates negotiated under the compulsory license. Accordingly, the sale of advertising space on a fansite will no longer hurt the fansite operator by
impinging upon the success of their fair use defense.