Fan Works and the Environmental Law of Copyright

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I. INTRODUCTION

Creativity is a natural resource and copyright law should take that into account more fully than it currently does. More specifically, ideas and expression of those ideas are resources and it might be useful to apply resource management law concepts from resources in the physical world to their noöspheric equivalents. The connection between property in the physical environment and property in the noöspheric environment has been explored as metaphor, but rarely as an underlying legal reality. Examples exist: the increasingly outdated concept of the "tragedy of the commons" has been used to provide a theoretical underpinning for the economic approach to international environmental law while at the same time providing a useful rhetorical device "the closing of the information commons" in intellectual property law, and especially in copyright law.[1]

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1. *See, e.g.*, JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008).

However, more could be done to develop and explore linkages between these two areas, among others.

The physical environment falls into the realm of, or is at least apportioned by humans as, real and personal property, while the noösphere falls into the realm of intellectual property. The allocation of property interests in the products of human creativity involves, as with other forms of property, a bundle of rights. Historically, this allocation has been structured in ways that undervalue the creative efforts of women and people of color, a characteristic it unfortunately shares with other areas of property law.[2, 3, 4]

This Article examines copyright law as a problem in natural resource allocation by focusing on the preparation of derivative works, and in particular, outsider works such as fan works. Everyone has the potential to create original works and nearly everyone has access to an online platform on which to publish those works. The potential for injustice comes from the raw material with which we have to work. The ownership of the original works on which derivative works are based is increasingly concentrated, while the public domain, much like the high seas, has been diminished by the legal allocation of greater rights to formerly unowned property.

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2. *See, e.g.*, Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551 (2006); Dan L. Burk, *Bridging the Gender Gap in Intellectual Property*, WIPO MAG. (Apr. 2018), http://www.wipo.int/wipo_magazine/en/2018/0s2/article_0001.html; Margaret Chon, *Intellectual Property Equality*, 9 SEATTLE J. SOC. JUST. 259 (2010); Carys J. Craig, *Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self,* Osgoode Legal Studies Research Paper Series 31, http://digitalcommons.osgoode.yorku.ca/olsrps/31; Carys J. Craig et al., *What's Feminist About Open Access? A Relational Approach to Copyright in the Academy*, 1 FEMINISTS@LAW 1 (2011), http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/7/54; Terra L. Gearhart-Serna, *Women's Work, Women's Knowing: Intellectual Property and the Recognition of Women's Traditional Knowledge*, 21 YALE J.L. & FEMINISM 372 (2010).

3. andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. LOUISVILLE L. REV. 499 (2010); K.J. Greene, *What the Treatment of Black Artists Can Teach About Copyright Law*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH ISSUES AND PRACTICES IN THE DIGITAL AGE 385 (Peter K. Yu ed. 2007); K.J. Greene, *Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 344 (1998); Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 464 (2005); Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591 (2019); Anjali Vats, *Created Differences: Rhetorics of Race and Resistance in Intellectual Property Law* (July 13, 2013), http://digital.lib.washington.edu/researchworks/bitstream/handle/1773/23464/Vats_washington_0250E_11939.pdf?sequence=1&isAllowed=y.

4. *See, e.g.*, JANIS SARRA & CHERYL L. WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN-AMERICAN DREAM (2020).

Part II of this Article explores some theoretical approaches to natural resource allocation problems and considers how they might apply to copyright and derivative works. Rejecting the idea of a single sharp boundary between the rights of the author and the public domain and seeing instead a penumbra of uncertain extent, Part III looks at the balance between the right to exploit one's resources—that is, the right of the author to profit—and the environmental law concept of a duty to do no harm by such exploitation. Part IV looks at the value of fan works as creative works in their own right, while Part V looks at some current resource management issues in the penumbra or commons. Part VI takes an optimistic look at the contribution of fan works to the overall resource management problem—the management of the work and its penumbra for the benefit of author and audience alike.

II. THEORETICAL APPROACHES: THE COMEDY OF THE COMMONS

The one existing widespread use of resource management concepts in intellectual property law is the concept of the commons, with frequent reference to Garrett Hardin's "tragedy of the commons."[5] It may be necessary, however, to call the idea of the "tragedy of the information commons" into question—not only because of its inevitable, even if indirect, connection to Hardin's horrifyingly racist and xenophobic political writings, but also because, as Elinor Ostrom and other economists have shown, Hardin seems to have been wrong about the ways in which natural resource commons are actually used in the real world.[6] By

5. Garrett Hardin coined the phrase "the tragedy of the commons" to refer to a situation in which, if costs are not internalized, there is no economic incentive to avoid doing environmental harm; in fact, there is an incentive to engage in environmentally destructive behavior. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). Hardin's famous example is: "a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons." He asks what the utility is to "add[] one more animal to [his] herd?" This utility has one negative and one positive component. The positive component benefits the herdsman alone, while the negative component is shared equally by all of the herdsmen. Thus, as long as there is more than one herdsman, it will always be to his individual benefit to over-exploit the commons. *See also*, *supra* Part I.

6. *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); *see also, e.g.*, Catherine Brinkley, *Hardin's Imagined Tragedy is Pig Shit: A Call for Planning to Recenter the Commons*, 19 PLANNING THEORY 127 (2019); Susan Jane Buck Cox, *No Tragedy on the Commons*, 7 ENV'T ETHICS 49 (1985); Klarizze Puzon & Marc Willinger, *Can Common Ownership Prevent the Tragedy of the Commons? An Experimental Investigation* 7 REV. BEHAV. ECON. 271 (2020); CRAIG FORTIER, UNSETTLING THE COMMONS: SOCIAL MOVEMENTS WITHIN, AGAINST, AND BEYOND SETTLER COLONIALISM (2017).

extension, his reasoning may be equally inapplicable to information resources.

The idea of an ineluctable tragedy of the commons sounds reasonable, given a cynical view of human motivations and social functioning. Its inherent simplicity and ease of applications leads to its being cited in all sorts of contexts.[7] It is also wrong. Most of the time, human beings do not actually mismanage common resources as Hardin predicted. Instead, they create shared resource management structures even in the absence of an overarching legal regime.

I will admit to not thinking critically about the consequences of Hardin's commons-unfriendly view until, rather belatedly, I discovered his unsavory white supremacist beliefs.[8] This is not to fall into the *ad hominem* association fallacy; rather, the inevitable hostility to the idea of a commons is the natural and logically consistent result of white supremacist beliefs within a system that allocates the largest share of non-commonly held property rights to white persons, and especially to white men. (I will acknowledge that this latter argument comes close to the somewhat related fallacy C.S. Lewis termed Bulverism—in this case, starting from the assumption that Hardin is wrong about the commons because he is wrong about so many other things).[9]

The unavoidable conclusion from Garrett's thought experiment was that common property would inevitably result in less efficient resource management than a regime of privately owned property, state owned property, or some mixture thereof. Realizing that Hardin was wrong is liberating, not only for environmental law, but also for intellectual property law as well, and fan work creators should rejoice: If intellectual commons are not bad, they can become a safe space for fan works.

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7. *See, e.g.*, Aaron Schwabach, *Diverting the Danube: The Gabcikovo-Nagymaros Dispute and International Freshwater Law*, 14 BERKELEY J. INT'L L. 290, 316 n.180 (1996); Aaron Schwabach, *International Environmental Law*, UNESCO ENCYCLOPEDIA LIFE SUPPORT SYS. § 1.36.2 (2002), http://www.eolss.net/sample-chapters/C14/E1-36-02.pdf.

8. I am not going to link to or cite hate speech, other than the unavoidable cite to the article at issue: Hardin, *supra* note 5; for a discussion, *see* Matto Mildenberger, *The Tragedy of the Tragedy of the Commons*, DISCARD STUDIES (July 15, 2019), http://discardstudies.com/2019/07/15/the-tragedy-of-the-tragedy-of-the-commons/; Matto Mildenberger, *The Tragedy of the Tragedy of the Commons*, SCI. AM. (Apr. 23, 2019), http://blogs.scientificamerican.com/voices/the-tragedy-of-the-tragedy-of-the-commons/; Southern Poverty Law Center, *Garrett Hardin*, S. POVERTY L. CTR., http://www.splcenter.org/fighting-hate/extremist-files/individual/garrett-hardin (last visited Mar. 9, 2021).

9. *See* C.S. Lewis, *"Bulverism," in* 2 SOCRATIC DIGEST 16 (1944), *reprinted in* C.S. LEWIS, GOD IN THE DOCK (1970).

We need not stop there, however. Unfettered use is not a bad thing. Port Meadow in Oxford, a traditional grazing commons of the type Hardin used as his example, has been grazed as a commons for at least 4,000 years. It is recorded, along with neighboring Wolvercote Common, as common grazing land in Domesday Book, and is still used for that purpose today.[10] Some resources not only are unharmed by additional use but are enhanced by it. Picture two dance floors: one empty, one with many dancers already dancing. Which is more attractive to most potential dancers? The presence of other users of the resource renders the resource more valuable.

This is the comedy of the commons.[11] As one commentator has observed, "[t]he Internet is a 21st century example: the more people who use it, the greater the benefit to all."[12] This is true for many sectors of the Internet, from social media to Wikipedia. It is especially true for online fan communities. Although the fandom is based on a copyrighted work, it might be more beneficial to both the content creator and the fans to treat much of fan activity as occurring within a commons. The original work, illuminated in the fierce glow of copyright, can be thought of as having both a fully shaded umbra, covering activities reserved for the copyright holder, and a less-shaded penumbra, which I am proposing as the fandom commons: an area in which works may be created and shared without violating copyright, to the benefit of fans and original creator alike. The original creator benefits from a larger, more involved audience; the fans benefit from a greater opportunity to share their enjoyment of the original work, without fear of a lawsuit.

III. RESOURCE MANAGEMENT: THE BALANCE BETWEEN THE RIGHT TO EXPLOIT ONE'S OWN RESOURCES AND THE DUTY TO DO NO HARM TO OTHERS BY DOING SO

Delineating the boundaries of the umbra and penumbra is, of course, the hard part. Doing so is beyond the scope of this Article and will be the work of years or decades for the global copyright system. For the present, we need be concerned only with exploring the consequences of treating fandom as a problem in resource management.

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10. GREAT DOMESDAY BOOK, National Archives, Wolvercote, Oxfordshire, Folio 159r, Ref. E 31/2/1/6107, http://discovery.nationalarchives.gov.uk/details/r/D7305402; *Port Meadow*, OXFORD CITY COUNCIL, http://www.oxford.gov.uk/info/20003/parks_and_open_spaces/823/port_meadow (last visited Mar. 8, 2022).

11. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

12. Garrett Richards, *Comedy of the Commons: Cheerful Options for Shared Resources in an Era of Climate Change*, 41 ALTERNATIVES J. 50 (2015).

Copyright law in the modern era is necessarily international, and so in treating creativity as a natural resource it may be helpful to begin with a statement of this balance from international environmental law. Perhaps customary international law's most widely accepted statement of the balance between environmental protection and development is that found in Principle 21 of the Stockholm Declaration on the Human Environment:

> States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[13]

The right to profit from one's resources (a liberty right) is thus balanced against the right of others to be free from harm to their own resources—that is, of interference with the use and enjoyment of their own resources (a claim right).[14]

This is not to suggest that content creators and consumers are like sovereign states. With regard to copyright, however, they begin—like sovereign states—as equal possessors of an interest in the work; that balance is altered only by the rights created in one party by copyright law, which necessarily requires a limitation on the rights of the other or others.

The problem is that copyright law has allocated those rights inefficiently, to the ultimate detriment of both fans and original content creators. The lines between derivative and transformative works, and of fair use, were originally drawn in the pre-Internet era and reflect a different, now vanished relationship between creators and fans.[15] As applied today, they may have a chilling effect on fandom.

Because fan works are largely created by economically unempowered individuals—often teenagers and students—and are often based on content owned by large corporate interests, and because a majority of the creators of fan works are female or nonbinary, and intellectual property law has historically been hostile to women's creative expression, fan fiction stands at the intersection of property rights and gender discrimination, with the potential for analogies to intellectual

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13. U.N. Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, U.N. Doc.A/CONF.48/14/Rev.1, Pr. 21 (June 16, 1972).

14. *See, e.g.*, Nikolai Lazarev, *Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights*, 12 MURDOCH U. ELEC. J. L. (2005), http://classic.austlii.edu.au/au/journals/MurUEJL/2005/.

15. Both date, in their current form, from the Copyright Act of 1976, 17 U.S.C. § 101 *et seq*.

property law's equally great historical disregard for the rights of excluded groups.[16]

Over the long term, such an imbalance will create instability in the system; what we should strive for is a sustainable system of copyright law, taking into account the concerns and interests of all affected groups.[17] Returning to the umbra and penumbra analogy, this system should recognize that the umbra is the region in which the copyright holder's exercise of rights does not injure the rights of others, while the penumbra is the region in which it may. (The area beyond the penumbra—the area in which a successful exercise of rights would certainly injure the legitimate interests of others—is the area of frivolous copyright claims.)

IV. THE RIGHTS OF FAN WORK CREATORS AND THEIR PARTICIPATORY VALUE TO THE CREATIVE PROCESS

Creative works incorporate the environments in which they are incorporated. Tolkien's Shire is unmistakably drawn from the English countryside; luckily for Tolkien, that countryside was, at the time, composed of non-copyrighted elements. Today's environments are increasingly owned; works drawing upon them are at constant risk of trespass on the intellectual property rights of another.

But just as copyright is everywhere, fan works are everywhere. A TV commercial for Folgers coffee has sparked years of fanfiction, otherwise known as fanfic.[18] A Japanese farming village creates living artworks in its rice fields each year, often based on copyrighted works from *Gone with the Wind* to *Star Wars*.[19] In these cases there seems to be no economic harm to the creators of the works; if anything, the works bring Folgers, *Star Wars*, and *Gone with the Wind* more publicity.

Derivative works, within the meaning of 17 U.S.C. § 106, are private property; they lie within the umbra of the original work. Transformative works are in an artistic sense, though not legal sense, still derivative, but

16. *See generally, e.g.*, Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 112, 116 (2011) ("We need a new way of framing issues that can bring to center stage the rights and legitimate interests of ordinary people—what we used to call 'the common man' — and woman."). *See also supra* notes 2, 3.

17. *See generally, e.g.*, Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 U. KAN. L. REV. 91 (2009).

18. Gabriella Paiella, *"You're My Present This Year": An Oral History of the Folgers Incest Ad*, GQ (Dec. 16, 2019), http://www.gq.com/story/folgers-incest-ad-oral-history.

19. Selena Takigawa Hoy, *The Epic Landscape Art of Tiny Inakadate, Japan*, ATLAS OBSCURA (Aug. 27, 2021), http://www.atlasobscura.com/articles/rice-art-japan-inakadate.

they should more properly be thought of as lying within the penumbra. The difference is between milking another farmer's cow as it grazes on the common and taking a picture of that same cow. In the case of the coffee commercial, the purpose of the work was to get people talking about Folgers. It worked, although perhaps not exactly as intended.

Copyright in U.S. law protects economic rights.[20] Folgers would of course have a right to prevent another coffee company from using its ad to sell coffee. The underlying idea is not copyrightable, though; if other companies want to film their own similarly questionable ads, with different dialog but the same underlying idea, there's no violation.[21]

The Folgers fanfic stories are clearly transformative. They're different stories, in different media, not created to sell coffee. A penumbra is quite literally a grey area, and this falls within it. The fan stories and the original ad involve the same characters. But even if those characters are sufficiently delineated to be the subject of copyright (which seems unlikely; it's just a coffee ad, although a possible sequel to Folgers' classic "Peter Comes Home for Christmas" ad), the use made of them in these stories is transformative. The fans are not trying to create their own commercials to sell coffee or any other product for Folgers or anyone else; the medium of expression and the purpose of the work is different.

In a possible inversion of this power dynamic, after a widely publicized, slightly surreal incident in Germany, a company that makes plastic scale model kits for model railway enthusiasts released a kit of a naked man chasing a wild pig that had stolen his laptop.[22] The world would be a poorer place without such whimsy. But the photographer who captured the chase scene, Adele Landauer, feels poorer for the lack of compensation for her work: "I had a huge amount of work due to that picture, but financially I got nothing from it. I don't like the fact that others are now earning money from it without asking me."[23] While Landauer

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20. The sole exception in U.S. copyright law is the Visual Artists Rights Act, 17 U.S.C. § 106A, which is not relevant here. The law of most European Union countries allows for considerably more extensive moral rights protections, which are nonetheless still unlikely to apply to a television commercial.

21. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

22. Kate Connolly, *Hey, That's Mine: Naked Man's Wild Boar Chase Immortalised in Plastic*, GUARDIAN (July 28, 2021, 10:52 AM), http://www.theguardian.com/world/2021/jul/28/hey-thats-mine-naked-mans-wild-boar-chase-immortalised-in-plastic (noting the "[p]hotographer [is] unhappy about [the] model railway version of [the] viral picture she took at Berlin lakeside.").

23. *Id.*

may have gained recognition as a photographer, the usual power dynamic of original-work creator and fan work creator is reversed. Landauer is an individual with relatively little power in the marketplace; the model maker, Busch GmbH & Co. KG, is a small company, but may have a bigger marketplace presence than Landauer. The comparison here is not to taking a picture of another farmer's cow on the common, but to taking that picture and then selling the picture for a profit. Landauer's original photograph is still on her Instagram, clearly identified with her name and picture.[24] It would be a simple matter to contact her to ask for permission to use the work, as (one hopes) the many news agencies that circulated the photograph did.

The man-chasing-pig picture is a picture with genuine value, both monetary and intangible, as it provided entertainment to the world during an especially bleak part of the pandemic; it is distinct from photos uploaded as bait for the purpose of trolling for infringers.[25] The model railway kit also has both monetary and intangible value; it was released commercially, to make money, though the amount was probably small. But these are not the only persons who had a part in the creative process leading up to the creation of the model kit. All the retweeters and meme-makers and other internet fans who collectively worked to make this image part of our collective memory of the pandemic played a role. Moreover, the most indispensable party of all is the man who sparked the entire creative process—who might have preferred that his fifteen minutes of fame not be for chasing a pig through a park while nude.

Copyright law chooses to reward some of these creators and not others. The photographer, rather than the subject, owns the copyright in the image.[26] In the U.S., the subject might have publicity or other rights that would limit commercial use of the photograph, though not editorial, while the European Court of Human Rights has found even broader protections for the subject of photographs[27]:

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24. Adele Landauer (@adelelandauer_lifecoach), INSTAGRAM (Aug. 7, 2020), http://www.instagram.com/p/CDlM18_lANd/?hl=en.

25. On the latter problem, *see, e.g.*, Daxton R. Stewart, *Rise of the Copyleft Trolls: When Photographers Sue After Creative Commons Licenses Go Awry* (May 11, 2021), http://ssrn.com/abstract=3844180.

26. 17 U.S.C. § 102; Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, §§ 2(1), 72(2) (Ger.) (covering photographic works and other photographs); *see also* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339 (2012).

27. Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 1; Von Hannover v. Germany (No. 2) 2012-I Eur. Ct. H.R. 351, paras. 95-99, http://hudoc.echr.coe.int/eng?i=001-109029. Note that

> Regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.[28]

None of these works—the scale model, the rice field art, the Folgers fanfic—would have been created at all if not for the underlying original work. From a standpoint of fairness, it seems Landauer should be compensated for her picture, while Folgers and the movie studios need not be. The umbra of Landauer's photo includes commercial uses but does not include using the image as a template from which to dash off an image macro meme.[29] (The latter would, under the standard set out in Von Hannover (No. 2), fall within the pig-chaser's umbra, but he does not appear to have stepped forward to suppress the use of the photo. At least he got his laptop back.) In contrast, the umbra of the Folgers advertisement is limited to other uses involving the sale of coffee; the somewhat dubious fanfic lies in the penumbra. The umbra of *Star Wars* and *Gone with the Wind* is greater in extent than that of the first two; it covers not only the movies themselves but the use of characters and other story elements in other works of entertainment.[30] The rice field patterns, to the extent they are works of entertainment, are within the penumbra rather than the umbra of the films to which they are homages; while they are clearly connected to the original work, their use in no way harms the interest of the copyright owners.

A more complex problem, of intersecting umbras and penumbras, occurs with mashups, a popular form of fan work. Anything can be fodder for a mashup; the more unexpected the better.[31] The HBO Max show *FBoy*

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the first Von Hannover decision found German law, which at the time provided less broad protection, to be out of compliance with European human rights law; by the time of Von Hannover (No. 2), that deficiency had apparently been at least somewhat corrected.

28. *Von Hannover* (No. 2), 2021-I Eur. Ct. H.R. at para. 96.

29. *See* u/EC18742069lol, *Naked Man Chasing Wild Boar*, REDDIT (Aug. 13, 2020, 3:14 PM), http://www.reddit.com/r/MemeTemplatesOfficial/comments/i97cxg/naked_man_chasing_wild_boar/.

30. *See generally, e.g.*, Aaron Schwabach, *Legal Issues in Online Fan Fiction*, *in* THE ROUTLEDGE COMPANION TO MEDIA EDUCATION, COPYRIGHT, AND FAIR USE 81 (Renee Hobbs ed., Routledge 2018); Aaron Schwabach, *Fan Works and the Law*, *in* NEW DIRECTIONS IN POPULAR FICTION 405 (Ken Gelder ed., Palgrave Macmillan 2016).

31. *See, e.g.*, ThereIRuinedIt, *I Mixed Slipknot's Psychosocial with Baby Shark to Terrify My Son for Halloween*, YOUTUBE (Oct. 13, 2021), http://www.youtube.com/watch?v=1B6_4mHBCD8.

Island, for example, has spawned mashups with the classic castaway novel *Robinson Crusoe* and the Yogi Bear cartoon series *Jellystone*.[32] In the former case, *Robinson Crusoe* casts neither umbra nor penumbra; the novel long ago passed into the public domain.[33] In regards to the latter, in order for the fan work to be a permissible transformative work, it must lie outside the umbra of both *FBoy Island* and *Jellystone*.[34] *FBoy Island* casts a small umbra; it is only minimally creative, being a formulaic dating show whose chief distinction from the majority of such shows is gender-flipping the roles of the characters. However, *Jellystone* casts a much larger umbra, or more precisely, its cast does. Yogi Bear has been part of the cultural landscape for over six decades; he first appeared on the *The Huckleberry Hound Show* in 1958 and got his own show in 1961.[35] He has remained part of the Hanna-Barbera universe ever since. *Jellystone*'s cast of characters includes not only Yogi and his perennial sidekick Boo-Boo, but also the aforementioned Huckleberry Hound and numerous other Hanna-Barbera characters, including Magilla Gorilla, Top Cat, Grape Ape, Atom Ant, and many other characters protected both as graphically depicted characters—graphic works in their own right—and as characters sufficiently delineated to be the subject of copyright in their own right, independent of the works in which they appear.[36]

In a tweet on the day of both shows' release, *Jellystone* director Careen Ingle posted a number of pictures of the *Jellystone* cartoon characters at the beach with the live-action *FBoy Island* cast, in screenshots taken from the latter show.[37] This may not be a true fan work;

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32. *Jellystone!* (HBO Max television broadcast 2021); Cartuneslover16, *Jellystone / FBOY Island 1*, DEVIANTART (Aug. 22, 2021), http://www.deviantart.com/cartuneslover16/art/Jellystone-FBOY-Island-1-889544983; Careen Ingle (@CareenIngle), *TODAY'S THE DAY!*, TWITTER (July 29, 2021, 5:02 PM), http://twitter.com/CareenIngle/status/1420867428918042626?s=20. Careen Ingle is the director of *Jellystone!*, so she's making a mashup of her own work—not an uncommon practice.

33. *Robinson Crusoe* was published just nine years after Parliament enacted the Statute of Anne and would initially have been protected for fourteen years. Had the author been alive when the first term expired in 1733, he could have renewed it for one additional fourteen-year term; however, Defoe died in 1731, coincidentally the final year of the twenty-one-year period of protection for works published before the Statute of Anne. *See* Statute of Anne, 8 Ann. c. 21 (1710).

34. The name of the show is actually "Jellystone!" with an exclamation mark; I'm leaving the exclamation mark out of the body of the text because it's distracting and makes it sounds as if I think what I'm saying about the show is a lot more exciting than it actually is.

35. *Yogi Bear*, BRITANNICA, http://www.britannica.com/topic/Yogi-Bear (last visited Feb. 10, 2022).

36. *See* Walt Disney Prod. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972) (graphically depicted characters); Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 631 (2d Cir. 1982); Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004).

37. Ingle, *supra* note 32.

both shows are on the same network, and Ingle is one of the creators of *Jellystone* (though not of *FBoy Island*). A true outsider work, posted on DeviantArt under the name Cartuneslover16, shows a muscular Yogi Bear on a beach, embracing an *FBoy Island* actor.[38]

This latter picture falls within the penumbra of both shows. It uses a copyrighted image from *FBoy Island* and original artwork based on a copyrighted character from *Jellystone* and many earlier shows; the humor of the image derives from the unlikely juxtaposition of the two. While this use of material from both sources is almost certainly fair use under 17 U.S.C. Section 107, traditional fair use analysis is not the goal of this Article.[39] Rather, it is to examine to what extent it makes sense to treat the use in the same way as we treat other private property placed in a public place, or other natural resources. To continue our cow analogy, Ingle saw two cows grazing on the common, one of them her own cow, and thought they would look good in a picture together; she led them close to each other and photographed them. Cartuneslover16 has done the same, except that they owned neither of the cows.

In neither case has the owner of the cow suffered either a monetary cost or an opportunity cost. In the case of the Busch GmbH model kit, there is an opportunity cost, as Ms. Landauer has now been deprived of the opportunity to be the first to market her own scale model of the scene. While this may sound perilously close to declaring this to be fair use simply by putting all of the emphasis on the fourth Section 107 fair use factor—"the effect of the use upon the potential market for or value of the copyrighted work"—that factor is merely a natural result of treating creativity as a natural resource and allocating its benefits accordingly.[40] The picture, like any creative work placed on the internet, has enhanced value because it is part of an ongoing global conversation in which the majority of the human race takes part; that is modern online experience. The Internet is the commons and allowing one's cow to graze upon it and to be nourished by likes, retweets, followers, and sometimes even paying

38. Cartuneslover16, *supra* note 32.

39. For a more thorough examination of fair use and fan works, *see, e.g.*, Aaron Schwabach, *Bringing the News from Ghent to Axanar: Fan Works and Copyright after Deckmyn and Subsequent Developments*, 22 TEX. REV. ENT. & SPORTS L. (2021); Aaron Schwabach, *Reclaiming Copyright from the Outside in: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFF. INTELL. PROP. L.J. 1 (2012). On fair use more generally, *see* Aaron Schwabach, *The Internet Archive's National Emergency Library: Is There an Emergency Fair Use Superpower?*, 18 NW. J. TECH. & INTELL. PROP. 187 (2021).

40. 17 U.S.C. § 107.

customers requires allowing certain liberties to other users of the common, such as the freedom to take a picture of one's cow.

V. THE CURRENT STATE OF THE MANAGEMENT OF THE COMMONS

The cow-and-commons analogy is a simple way to illustrate the resource management points made thus far. Others may be more serviceable when addressing issues arising from treating creativity as a resource: creativity may be more like water flowing in a stream, or fish swimming in the seas, or polymetallic nodules—valuable but difficult to bring to market, littering the deep ocean floor.[41]

Today's creative process takes part with the potential for constant communication with the audience. The future of copyright law will have to reflect the reality of nearly everyone having the opportunity to be online, potentially in dialog with the creator of the work as well as with each other. The legality of fan works, once a largely theoretical problem, is beginning to be not only written about, but litigated.[42]

The year 2021 saw two major fair use cases. *Google v. Oracle* and *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* deepened our understanding of fair use, although it did not deviate from the existing understanding of copyright as the product and property of a single author, rather than a collective creation resulting from a distributed collaborative cultural process.[43] Previously, we mentioned Defoe's work and the

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41. On the latter, *see* Aaron Schwabach, *A Hole in the Bottom of the Sea: Does the UNCLOS Part XI Regulatory Framework for Deep Seabed Mining Provide Adequate Protection Against Strip-Mining the Ocean Floor?*, 39 VA. ENV'T L.J. (2021).

42. *See generally, e.g.*, Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); DC Comics v. Towle, 989 F. Supp. 2d 948 (C.D. Cal. 2013); Paramount Pictures Corp. v. Axanar Productions, Inc., Case No. 2:15-cv-09938-RGK-E, 2016 WL 2967959, 2016 Copr.L.Dec. 30, 924 (C.D. Cal. 2016) (order re motion to dismiss); 2017 WL 83506 (C.D. Cal. 2017) (order re motions for summary judgment); Schwabach, *Bringing the News from Ghent to Axanar*, *supra* note 39; *see also* Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question: What do Copyright and Authorship Mean in the Crowdsourced Realm Known as the Omegaverse?* N.Y. TIMES (May 23, 2020), http://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html (the fanfic-copyright-adjacent issues in the Omegaverse litigation, discussed in more detail); Lindsay Ellis, *Into the Omegaverse: How a Fanfic Trope Landed in Federal Court*, YOUTUBE (Sept. 3, 2020), http://www.youtube.com/watch?v=zhWWcWtAUoY.

43. The meaning and likely consequences of these two cases for fan works are worthy of an article in their own right, but that article is not this article. Google LLC v. Oracle America, Inc., 141 S.Ct. 1183 (2021), on remand as Oracle America, Inc. v. Google LLC, 847 Fed. Appx. 931 (Memorandum decision); *see also, e.g.*, Andrew C. Michaels, *Functionality's Role in Oracle Copyright Ruling Isn't so Novel*, LAW360 (May 7, 2021), http://ssrn.com/abstract=3842052; Peter S. Menell, *Google v. Oracle and the Grateful (API) Dead: What a Long Strange Trip It's Been*, DAILY JOURNAL (Apr. 12, 2021), http://ssrn.com/abstract=3824442; Jasper L. Tran and Kristen

beginning of the era of the modern novel, both of which were inextricably embedded in the legal and cultural matrix of the Statute of Anne and the end of the Renaissance. The end of the proto-copyright regime, being the Stationers' Company monopoly, freed up new spaces for authorship, leading to the explosion of creativity in English narrative literature in the 1700s. In essence, the transition from the Stationers' Company regime to the Statute of Anne regime was a transition from information feudalism to entrepreneurial capitalism.[44] The latter model has served for over three centuries but is increasingly under strain. Eventually it will have to change, perhaps as drastically as the change from royal monopoly to the Statute of Anne. If the law recognizes that audiences play a role in the creative process—that the work is ultimately realized in the mind of the audience—and treats creativity according to resource management principles, overall creative output should be enhanced.

But if the current regime remains inflexible, we risk regression to intellectual property feudalism: large rights holders will control all copyrighted content, and thus all creative works based upon that content. This is already happening. The Disney Corporation is the most obvious example, with its ownership of properties as diverse as *Star Wars*, the Marvel Cinematic Universe, and its own cartoons, animations, and live-action feature films. This access to a vast library of source material makes possible wonderful synergies between these apparently unrelated fictional worlds. Disney can bring the *Avengers* and the *Star Wars* universe to *Phineas & Ferb* because it owns all three of these properties.[45] Disney's enormous market power means it can also bring in properties it does not own. For example, *WandaVision*, especially in the early episodes, openly

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Kido, *Google v. Oracle: Copying Declaring Code Is Fair Use*, GEO. WASH. L. REV. (Apr. 18, 2021), http://www.gwlr.org/google-v-oracle-copying-declaring-code-is-fair-use/; Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021); Maxime Jarquin, *Second Circuit: Warhol's "Prince Series" Derivative, Not Transformative*, FINNEGAN (Aug. 12, 2021), http://www.finnegan.com/en/insights/blogs/incontestable/second-circuit-warhols-prince-series-derivative-not-transformative.html.

44. *See* Statute of Anne, 8 Anne, c. 19 (1709). The Stationer's Company's royally granted monopoly on the printing of books in England lasted from 1557 until 1695. In the fifteen years after the termination of the monopoly alternative publishers flourished; the Stationer's Company lobbied for further legal protection, and in 1710 Parliament passed the Statute of Anne, leading to both modern copyright law and the demise of the Stationer's Company as a force in publishing. *See generally, e.g.*, MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW (5th ed. 2010).

45. PHINEAS & FERB: MISSION MARVEL (Disney Channel broadcast Aug. 16, 2013); PHINEAS & FERB EPISODE IVA: MAY THE FERB BE WITH YOU (Disney Channel broadcast July 26, 2014). The *Star Wars* crossover is especially odd, as it is also a stylistic parody of *Rosencrantz & Guildenstern are Dead*. *See* ROSENCRANTZ & GUILDENSTERN ARE DEAD (TOM STOPPARD 1966).

and proudly borrows many elements from *I Love Lucy* and *The Dick Van Dyke Show*, both of which are owned by ViacomCBS.[46]

The danger is that this sort of cross-pollination of creativity will be restricted to a few large players by the inevitable centralization of ownership in any late-stage capitalist system. Other creators will be restricted to the margins, such as minor passing references that fall unquestionably within the penumbra, or within fair use, as when history YouTuber OverSimplified has Abraham Lincoln launch into Joe Pesci's famous (and terrifying) rant from *Goodfellas*: "I'm funny how? I mean funny like I'm a clown, I amuse you?"[47] Others—and this is not a bad thing—will have to build their works in dialogue with century-old works that have passed out of copyright. (Sometimes the fan works themselves may be as old. The world of *Sherlock Holmes*, in particular, is an apparently inexhaustible source of copyright oddities.[48]) The derivative nature of some may be questionable. Is *Un Petit Trou dans une Pomme* a retelling of *The Very Hungry Caterpillar*?[49] Or is it a wholly original work? Maybe it occupies some middle ground like Dmitri Yemets' Tonya Grotter stories?[50]

The large content owners are tightening their grip, however. Like the latifundia of pre-agrarian-reform Latin America, they are suppressing competition. As a large and especially active fandom, *Star Trek* fan work creators have found themselves on the losing end of court battles twice in recent years; first, *Prelude to Axanar* was suppressed, and, more recently, Dr. Seuss Enterprises successfully blocked publication of *Oh, the Places*

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46. WANDAVISION (Marvel Studios 2021); *see* Daniel S. Levine, *'WandaVision' Pays Homage to Classic Sitcoms 'I Love Lucy,' 'Full House' and More*, POPCULTURE (Jan. 15, 2021, 11:47 PM), http://popculture.com/streaming/news/wandavision-homage-references-classic-sitcoms-i-love-lucy-full-house-more/.

47. OverSimplified, *The American Civil War—OverSimplified (Part 1)*, YOUTUBE (Jan. 31, 2020), http://www.youtube.com/watch?v=tsxmyL7TUJg; GOODFELLAS (Warner Bros. 1990).

48. *See* Matthew Dessem, *The Curious Case of "Ħerlock Sholmès": When the Creators of Lupin and Sherlock Got into a Copyright Dispute, the Solution Was as Inelegant as it Was Hilarious*, SLATE (June 11, 2021), http://slate.com/culture/2021/06/lupin-part-2-netflix-herlock-sholmes-not-sherlock.html.

49. *Cf.* GIORGIO VANETTI, UN PETIT TROU DANS UNE POMME (Paru en Janvier, 2002). The classic with which Anglophone readers may be more familiar is, in French translation, ERIC CARLE, LA CHENILLE QUI FAIT DES TROUS (Mijade, 3rd ed. 1999), *with* ERIC CARLE, THE VERY HUNGRY CATERPILLAR (World Publishing Company 1969).

50. *See* Дмитрий Емец [DMITRI YEMETS], Таня Гроттер и магический контрабас [TANYA GROTTER AND THE MAGICAL DOUBLE BASS] *et seq.* (Moscow: Eksmo, 2002) (in Russian).

You'll Boldly Go! (Boldly), a Dr. Seuss/*Star Trek* mashup.[51] There have been occasional victories, as when the heirs of *Tintin* creator Hergé, through their company Moulinsart, unsuccessfully sued to prevent the display and sale of *Tintin*/Edward Hopper mashups by French artist Xavier Marabout.[52] Not only did the French court decline to enjoin the display and sale of the paintings, holding them to be permissible parodies, it also awarded damages to Marabout because Moulinsart had contacted galleries and told them Marabout's work was copyright infringement.[53]

VI. WHY DOES IT MATTER? FAN OWNERSHIP AS REDEMPTION OF WORK BY FLAWED CREATORS

Another thing the global conversation of fans and creators has brought is the realization that many creators of great works of art and entertainment have done horrible things. For me, the moment of crisis came with J.K Rowling's transphobic hate speech.[54] After two decades in Harry Potter fandom, I had to question whether I could still like the underlying works if that was what their author believed. Naturally, this brought to mind the other flaws in the series. There's the tokenism: one Jewish person, who plays no part in the story.[55] One pair of South Asian twins, whose main role in the narrative is as fill-in dates to the Yule Ball for two White main characters, each of whom would rather date someone else.[56] One East Asian person, who has a nonsensical name and whose

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51. *See* Schwabach, *supra* note 39; Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 2803 (2021). The source work in question is DR. SEUSS, OH, THE PLACES YOU'LL GO! (1990), so the fan work is more than a stylistic parody. Interestingly, other parodies appear to have found their way into the marketplace unhindered, including NICOLLE HODGES & JILLIAN MUNDY, OH, THE PLACES YOU'LL GO OH OH! (GWSF Creative, 2020), a sex manual closely matching both the literary and the art style of the original, and OH, SH*T JUST GOT REAL!, a blank book with a cover matching the style of the original.

52. *See* Alison Flood, *Tintin Heirs Lose Legal Battle Over Artist's Edward Hopper Mashups*, GUARDIAN (May 12, 2021, 8:39 AM), http://www.theguardian.com/books/2021/may/12/tintin-heirs-lose-legal-battle-over-artists-edward-hopper-mashups?fbclid=IwAR01jHTkdBgvjAsKGPRoeu54WCIp06yzwcGaHym_qD7WTLwohPpluXeudk0. Hopper's heirs did not sue; Hopper's best-known work, Nighthawks, is also widely parodied and homaged.

53. *Id.* The copyright law of France is generally less friendly to fan creators than is that of the U.S., making Moulinsart's defeat all the more crushing.

54. I'm not going to include cites to JK Rowling's hate speech; it's easy enough to find on Twitter and elsewhere.

55. Anthony Goldstein, who appears once, in chapter ten of J.K. Rowling, Harry Potter and the Order of the Phoenix (2003). J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX ch. 10 (2003). He and Padma Patil (*see also infra* note 64) become Ravenclaw prefects.

56. Parvati and Padma Patil attend the Yule Ball with Harry and Ron, both of whom are surly and unpleasant throughout. J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE ch. 23 (2000).

narrative function is to date two White students—Harry Potter and Cedric Diggory—and to be treated atrociously by the author, and in the movie (though not in the book) to involuntarily rat out Dumbledore's Army.[57] Then, there's the outright racism: with the arguable exception of Ron, each character in the main trio—all three of them White and English—has a starter, practice relationship with a person of color or a foreigner.[58] (Lavender Brown, Ron's first girlfriend, is whited out in the films, played by Black actor Jennifer Smith in a non-speaking role in Harry Potter and the Prisoner of Azkaban and then by White actor Jessie Cave in the next three movies.).[59] The French and Bulgarian characters all speak with comical foreign accents. The only identifiably Irish character is often comically inept.[60] Then there's colonialism: in the wizarding world, Ireland is apparently not independent.[61] Fatphobia is also present: Dudley is "the size . . . of a young killer whale."[62] Classism. Internalized misogyny. White saviorism: SPEW—the Society for Promotion of Elfish Welfare—was set up by Hermione with no Elfish input.[63] Hermione contradicting her own principles: as other students gush over the centaur Firenze, she says "I've never really liked horses."[64] She already knows that centaurs find this comparison highly offensive; does she believe it is okay to slur centaurs because, unlike house-elves, they're not disempowered?[65] An inconsistent and often disturbing treatment of consent, especially when

57. Cho Chang, who along with Lavender Brown, seems to have gotten an especially raw deal from the author. *See, e.g.*, Jacob Sarkisian, *The Actress Who Played 'Cho Chang' in 'Harry Potter' Responded After JK Rowling Was Called out for the Character's Name*, INSIDER (June 8, 2020), http://www.insider.com/harry-potter-cho-chang-actress-katie-leung-jk-rowling-controversy-2020-6. Leung's response was brilliant: "So, you want my thoughts on Cho Chang? Okay, here goes . . . (thread)," followed by links to organizations supporting and advocating for the rights of Black trans women. Katie Leung (@Kt_Leung), TWITTER (June 7, 2020, 5:20 AM), http://twitter.com/Kt_Leung/status/1269574865733988356.

58. Harry's and Hermione's starter relationships are with East Asian Cho Chang and Bulgarian Viktor Krum. Ginny Weasley's is with Dean Thomas, who is Black. All four of these characters end up in two all-White, all-English couples—Harry and Ginny as one, Ron and Hermione as the other—by the end of the series. *See* ROWLING, *supra* note 56.

59. HARRY POTTER AND THE PRISONER OF AZKABAN (Warner Bros. 2004).

60. Seamus Finnegan.

61. *See* Aaron Schwabach, *Harry Potter and the Unforgivable Curses: Norm-formation, Inconsistency, and the Rule of Law in the Wizarding World*, 11 ROGER WILLIAMS U. L. REV. 309, nn.124-28 and accompanying text (2006).

62. ROWLING, *supra* note 56, at ch. 3 (2000).

63. *Id.* at. ch. 14.

64. ROWLING, *supra* note 55, at ch. 27 (2003).

65. This exact point is made in-universe by Hermione to Ron: When Ron asks why she's not similarly concerned about the welfare of goblins, Hermione replies that goblins are capable of defending themselves. ROWLING, *supra* note 56, at ch. 14.

love potions are involved.[66] Mockery of some people with disabilities: Filch the Squib and Trelawney the alcoholic are both treated unsympathetically by the characters and the narrative; in contrast, the one-eyed, one-legged Mad-Eye Moody is a powerful and respected character, and Peter Pettigrew is unimpaired by his loss of an arm until the very end.[67]

Some of these are flaws of the characters, rather than of the author. Hermione's moral blind spots, for example, may strengthen the overall work; a character without flaws is boring. Others are more troubling. But the rant in the preceding paragraph notwithstanding, I still want to be a Harry Potter fan. I was heartened to see other creators involved in the works—especially the cast of the films—speak out against transphobia.[68]

Ultimately, though, it was not the words of the cast that saved Harry Potter for me, but the words of a fan I have never met, on the other side of the world. Indian fan Shubhangi Misra wrote:

> J.K. Rowling's transphobic tweets don't make me question my love for *Harry Potter* one bit, like Harry Potter actor Daniel Radcliffe fears. Potterverse has been shaped as much by fan fiction as it has been by the books. So, in this case, I have no qualms separating the art from the artist. Rowling may have given us the boy who lived, but we were the ones who made him immortal."[69]

Shubanghi Misra perfectly sums up the role of the audience in creating the work, and the reason we don't have to allow the initial creator's flaws to poison the work for us: "we were the ones who made him immortal."[70] All the thousands of hours we Harry Potter fans spent creating fan works have saved the character, and his world, from his author. Ultimately, Harry Potter belongs not only to the author, but to the fans, and

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66. While the Imperius Curse, overriding free will, is almost always treated as bad (with the possible exception of when Harry uses it), love potions, which override the victim's consent or lack thereof, are often treated as comical, and are sold by good characters, Fred and George Weasley. *Id.*

67. Pettigrew dies when his magical prosthetic arm turns against him. J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS 470-71 (2007).

68. Sarkisian, *supra* note 57; Emma Nolan, *How the 'Harry Potter' Cast Has Reacted to J.K. Rowling's Trans Tweets*, NEWSWEEK (June 11, 2020, 11:57 AM), http://www.newsweek.com/harry-potter-stars-jk-rowling-transphobia-emma-watson-daniel-radcliffe-1510237; *see also* Leung, *supra* note 57.

69. Shubhangi Misra, *JK Rowling Has Always Been Tone-Deaf. Just Look at the Harry Potter Universe*, PRINT (July 20, 2021, 2:31 PM), http://theprint.in/opinion/pov/jk-rowling-has-always-been-tone-deaf-just-look-at-the-harry-potter-universe/439064/.

70. *Id.*

copyright law should reflect that.[71] The "trans female Harry Potter" category on AO3 already does.[72]

VII. CONCLUSION

The Harry Potter series is not the only discomforting work out there. Shakespeare can be uncomfortably racist at times; so too can Jane Austen. But those works have entered the public domain and cast neither umbra nor penumbra; we are free to create our own works reinterpreting Shylock and Aaron the Moor however we wish.[73] It is the works still in copyright—those still casting a shadow—that present the thornier problem. Some may be so deeply flawed that no reinterpretation can save them without venturing into the umbra. Others, like Harry Potter, become (partly) the property of the fans through the inhabiting and development of the penumbra.

We can treat the territory in the penumbra, now hazily defined by transformativeness and fair use, as a commons—a safe space for fan works and other non-commercial activity much as they might take a picture of cows grazing on the commons. We can treat it as the use of a watercourse, perhaps for boating or fishing, that in no way diminishes the rights of the senior riparian appropriator. Environmental and resource management law concepts may be useful in developing the emerging law of the online environment, giving rise to an environmental law of the noösphere. Once we acknowledge that human creativity is a resource like any other and that any work of fiction is a joint creation between the mind of the author and the mind of the audience, we can import such concepts from natural resource management law as may prove useful. And by doing so, we may save any number of works which, though otherwise having merit, may have flaws rendering them unpalatable to a wide audience. As

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71. For an analogous approach to property generally, *see, e.g.*, Singer (1988), *supra* note 16; Singer (2011), *supra* note 16, at 81 ("We need a new way of framing issues that can bring to center stage the rights and legitimate interests of ordinary people—what we used to call 'the common man'—and woman.").

72. *Trans Female Harry Potter*, ARCHIVE OUR OWN, http://archiveofourown.org/tags/Trans%20Female%20Harry%20Potter/works (last visited Oct. 11, 2021). And for more general reimagining of a less heteronormative Potterverse there is MsKingBean89's epic fanfic work *All the Young Dudes*, ARCHIVE OUR OWN, http://archiveofourown.org/works/10057010 (last visited Nov. 10, 2021); *see also* Rachelle Hampton, *The Best Harry Potter Novel Isn't Written by J.K. Rowling: It's Queer, It's Class-Conscious, and It's 500,000 Words Long*, SLATE (Nov. 27, 2021, 5:55 AM), http://slate.com/culture/2021/11/all-the-young-dudes-harry-potter-fanfic-wolfstar-tiktok.html.

73. *See, e.g.*, RACHEL HAWKINS, THE WIFE UPSTAIRS (2021), yet another reimagining of Jane Eyre, a work most famously reimagined by Jean Rhys in Wide Sargasso Sea (1966).

Shubanghi Misra says, it is the fans who make the works and characters immortal.[74]

Legally constructed "property" can be either a tool of oppression and exclusion or a fundamental component of social mobility and economic growth. We have a chance, in copyright law's current convulsion, to guide it toward becoming the latter.

74. *See* Misra, *supra* note 69.