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## A Taxonomy of Borrowing

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# A Taxonomy of Borrowing

Jacqueline D. Lipton, Ph.D.\*

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*While copyright infringement is a legal wrong, plagiarism is a breach of academic and market practices. However, few authors of literary works truly understand the difference between the two. Copyright law seeks to protect economic interests in an underlying work, while plagiarism—and in countries where moral rights are robust, associated legal rights—protect the integrity of the work and the author’s claim to the work. The digital age has refocused*

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*attention on the kinds of claims an author or copyright holder might make with respect to unauthorized uses of a literary work. The ease with which a digital work may be cut and pasted, or generally repurposed, creates a need to reconsider the types of legal and market wrongs that arise with respect to digitally distributed literary works. Drawing on observations from the digital publishing industry, this Article proposes a taxonomy of borrowing from existing works that serves to clarify the kinds of borrowing that should be legally and economically tolerated as contrasted with conduct that may be regarded as wrongful. It is the hope that this taxonomy assists in the development of both digital copyright law and market approaches to acceptable versus unacceptable borrowing in the digital publishing sphere.*

“Plagiarism’s bad enough,” Goss said. “But from a girl? I can’t believe you’d plagiarize from a girl.”<sup>1</sup>

## INTRODUCTION

Today’s Copyright law derives from the needs of the nascent publishing industry centuries ago in Europe following the advent of the printing press.<sup>2</sup> Moral rights law—in countries where such laws are robust—derives from the needs of creators of artistic and literary works to be protected with respect to the authorial integrity of their works.<sup>3</sup> Plagiarism, while not a legal wrong, is a concept that also protects a creator’s right to be identified as the author of a work, and to prevent unattributed misappropriation of the work by others.<sup>4</sup> All of these regimes relate to authors’ rights in their original creations. They all facilitate and protect creators of original works from unauthorized misappropriation, but they do so

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<sup>1</sup> TOBIAS WOLFF, OLD SCHOOL, 144 (2003).

<sup>2</sup> See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 3–5 (5th ed. 2010) (detailing the invention of the printing press and the enactment of the first copyright statute in the United Kingdom, the Statute of Anne of 1710).

<sup>3</sup> See Jacqueline Lipton, *Moral Rights and Supernatural Fiction*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 537, 543–45 (2011) (describing the bases of European moral rights law).

<sup>4</sup> See *infra* Part I.D.

in different ways, and in different contexts. The interplay between them is often complicated, and is poorly understood by most creators of artistic and literary works.

The advent of the digital age creates greater pressures than ever on those involved in the creation and dissemination of literary works to ensure that they understand the contours of what are acceptable versus unacceptable uses of existing material. While no writer is an island and all new works rely to some extent on borrowing from works that have predated them, there must be some boundaries provided by the law and market norms with respect to when borrowing is appropriate and when it should be characterized as wrongful. These boundaries may be in different places depending on the field of endeavor. For example, borrowing from scientific works to further fields of research and scholarship may be more acceptable than borrowing from purely fictional works whose main value is entertainment. It is also likely that the nature and type of borrowing sanctioned in the literary field generally will differ in many ways from what is permissible in other fields of creative endeavor such as movies, music, games, and the like.

This Article attempts to formulate a taxonomy of digital borrowing in the field of literary works. The idea is to draw from current conduct in the digital publishing industry in order to ascertain what might be regarded as acceptable borrowing and how it might contrast with conduct that is either a legal or a moral wrong, or both. In particular, it teases out the elements of copyright and plagiarism that have the most impact on the determination of wrongfulness in different contexts. While the Article suggests no major law reforms, it advocates a more nuanced approach to applying existing regulatory principles.

Part I briefly considers the differences (and similarities) between copyright infringement, moral rights infringement (in jurisdictions where available), and plagiarism. Part II articulates the proposed taxonomy of borrowing that might assist the development of rules, norms, and market practices that better address the concerns of those involved in digital publishing markets. Part III draws from the taxonomy to outline ways in which laws and market practices could better address the concerns

of authors and copyright holders. Part IV concludes with suggestions about useful future directions in the regulation of digital publishing.

## I. LEGAL AND OTHER RULES RELATING TO UNAUTHORIZED BORROWING

### A. *Copyright, Moral Rights, and Plagiarism*

As noted in the Introduction, there are three main sets of rules that regulate unauthorized borrowing: copyright, moral rights, and plagiarism. The former two categories are legal rules while the latter derives from market norms and institutional honor codes. While these regimes apply to all kinds of creative works—including musical works, artistic works, sculptural works, movies, and games—this Article focuses on their application to literary works, predominantly commercial and literary fiction. However, unauthorized borrowing of academic and scientific works is considered to the extent that imperatives about digital borrowing of these works differ from those relating to fictional works. It should also be noted that in the context of this discussion “unauthorized” borrowing does not necessarily equate to “wrongful” conduct. “Unauthorized” simply means not authorized by the creator of the work or the copyright holder, or both. “Wrongful” suggests a legal or moral wrong. “Unauthorized” conduct is not always wrongful as the following discussion demonstrates.

The robustness and availability of each of the three sets of rules depends to a significant extent on context and, particularly in the case of moral rights, jurisdiction. While moral rights are very robust in most countries of the European Union, they are much weaker in the United States; some would argue, however, that other aspects of American law—such as the laws relating to trademarks and unfair competition—fill in gaps left by the failure to adopt broader-based moral rights legislation.<sup>5</sup>

The interconnections between copyright, moral rights, and plagiarism may also be a little context- or jurisdiction-specific,

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<sup>5</sup> See LEAFFER, *supra* note 2, at 390–91 (detailing areas of existing American law said to encompass the equivalent protections to moral rights law).

although generally Copyright law concerns itself predominantly with economic rewards, while moral rights and plagiarism have more to do with the integrity of the work and the author's right to be identified with the work. The following discussion briefly explains how each of the three sets of rules operates, and the relationship between them. Then the discussion turns to the proposed taxonomy of borrowing and how each of the rules may or may not be implicated in different aspects of digital borrowing conduct.

### *B. Copyright*

The law does not excuse copyright infringement, no matter how fulsome the infringer's acknowledgment of his copying; but the acknowledgment will exonerate him of any charge of plagiarism. Or at least should—because judges will sometimes call copyright infringers “plagiarists” though there is no concealment. This loose usage erases what is distinctive about plagiarism, though it illustrates how the right of copyright has made copying a suspicious activity.<sup>6</sup>

#### 1. Exclusive Rights

While a detailed discussion of the operation of Copyright law is beyond the scope of this Article, it is necessary for the reader to understand the basics to contrast copyright infringement with other sanctions related to unauthorized borrowing. Though copyright infringement will often overlap with a moral rights violation and/or plagiarism, each set of rules has a distinct basis and they do not always coincide in practice. Copyright is largely concerned with unauthorized borrowing of the fixed literal expression of an existing work.<sup>7</sup> Thus, technically it should only apply to taking the

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<sup>6</sup> RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 17 (2007).

<sup>7</sup> See LEAFFER, *supra* note 2, at 78 (“The Copyright Act has codified the longstanding, judicially evolved rule that copyright protects the expression of an idea but not the idea itself.”).

exact words of the original author without permission, rather than the underlying ideas. However, because the test for infringement utilizes a conception of “substantial similarity” between the defendant’s work and that of the plaintiff, courts will take into account some degree of abstraction.<sup>8</sup> It is sometimes difficult for courts to establish when a copyist has taken the original author’s idea versus her original expression for copyright infringement purposes.<sup>9</sup> Thus, the creation of a work that does not literally copy the exact expression of the original, but reproduces its noteworthy concepts (characters, setting, plot points) may also amount to copyright infringement.<sup>10</sup>

The copyright statutes in most countries give exclusive rights to the creator of a work.<sup>11</sup> These are property rights—or at least property-like—that can be transferred to others.<sup>12</sup> Thus, the creator of the work is not necessarily the copyright holder. Copyright protection generally subsists for the term of the author’s life plus seventy years thereafter.<sup>13</sup> The exclusive rights provided by copyright include the right to prevent unauthorized copying/reproduction, public dissemination, and public distribution of a work.<sup>14</sup> In the United States, Copyright law also preserves to the copyright holder the right to make and control the production and dissemination of “derivative works.”<sup>15</sup>

“Derivative work” has been defined by Congress as:

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<sup>8</sup> *Id.* at 426–27 (describing the “abstractions” test in applying the concept of “substantial similarity”).

<sup>9</sup> *See* POSNER, *supra* note 6, at 13 (“The line between idea and expression is often indistinct. How loose must a paragraph be to escape infringing?”).

<sup>10</sup> *Id.* (“Copying a generic plot or a stock character from a novelist, or historical facts from a historian, is not copyright infringement. But copying details of plot . . . and of character could well be.”).

<sup>11</sup> *See* LEAFFER, *supra* note 2, at 293–94 (describing the exclusive rights given to copyright holders in the United States under 17 U.S.C. § 106).

<sup>12</sup> 17 U.S.C. § 204(2) (2012) (formalities required for transfers of copyright interests); *see also* LEAFFER, *supra* note 2, at 216–18.

<sup>13</sup> *See* LEAFFER, *supra* note 2, at 226 (“For most works created after January 1, 1978, the copyright term is measured by the life of the author plus 70 years.”); *see also id.* at 239 (providing a detailed table of copyright terms for all works under the Copyright Act).

<sup>14</sup> 17 U.S.C. § 106 (exclusive rights of copyright holders in the United States).

<sup>15</sup> *Id.* § 106(2) (rights in derivative works).

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”<sup>16</sup>

Derivative works include prequels, sequels, and retellings of existing works. Thus, they are highly implicated in the fanfiction<sup>17</sup> community. “Fanfiction” has exploded since the advent of the Internet, even though it existed prior to the digital age.<sup>18</sup> It involves creating unauthorized sequels, prequels and retellings of existing works by fans, generally not for any monetary reward but purely for the enjoyment of participating in the fandom.<sup>19</sup> Most fanfiction might be described as derivative works.<sup>20</sup> However,

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<sup>16</sup> *Id.* § 101 (definition of “derivative work”).

<sup>17</sup> See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997) (“‘Fan fiction,’ broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”); see also *Fan Fiction*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Fan\\_fiction](http://en.wikipedia.org/wiki/Fan_fiction) (last visited Dec. 23, 2013) (“Fan fiction, or fanfiction (often abbreviated to fanfic, or simply fic), is a broadly defined fan labor term for stories about characters or settings written by fans of the original work, rather than by the original creator. Works of fan fiction are rarely commissioned or authorized by the original work’s owner, creator, or publisher; also, they are almost never professionally published. Due to these works not being published, stories often contain a disclaimer stating that the creator of the work owns none of the original characters. Fan fiction is defined by being both related to its subject’s canonical fictional universe and simultaneously existing outside the canon of that universe. Most fan fiction writers assume that their work is read primarily by other fans, and therefore tend to presume that their readers have knowledge of the canon universe (created by a professional writer) in which their works are based.”).

<sup>18</sup> See Tushnet, *supra* note 17, at 655 (“Fan fiction and organized media fandom have been traced to the second season of *Star Trek* in 1967.”).

<sup>19</sup> See *id.* at 657 (“The ethos of fandom is one of community, of shared journeys to understanding and enjoyment.”); *id.* at 664 (“Fan fiction is mostly nonprofit, and on the Web no one has to pay to read it.”).

<sup>20</sup> Some of it may also amount to a reproduction or copy of an original work under broad conceptions of “copying” utilized by judges applying the “substantial similarity” test with respect to distinctive characters and settings. See, e.g., Tushnet, *supra* note 17,



much of it is probably excusable under the fair use doctrine of Copyright law. The role of fanfiction as an unauthorized, but potentially socially valuable, form of digital borrowing is considered in more detail in Part II *infra*. Interestingly, many authors of works that give rise to active fanfiction communities do not appear to understand the legal definition of a derivative work, nor the application of Copyright law to derivative works.

For example, bestselling young adult fantasy author Maggie Stiefvater makes the following comments about fanfiction on her website:

I consider [fanfiction] a pretty steep compliment. So long as I'm acknowledged as the creator of the original characters and no money is being made on the derivative fiction, fanfic away! I am not, however, a fan of derivative works—i.e., fanfic where my writing is taken word for word with only the characters or minor details changed. Please don't plagiarize!<sup>21</sup>

Ms. Stiefvater's description of a "derivative work" as a story where her writing is taken word for word with only minor details changed is a far cry from the legal definition of derivative work found in the copyright legislation. The legal definition is much broader than Ms. Stiefvater's conception. Additionally, her final sentence conflates the creation of unauthorized derivative works with plagiarism, which is also incorrect. While a derivative work may or may not identify the author as the creator of the original work, a plagiarized work generally will not identify the author of the original work. As Judge Posner has written, "Concealment is at the heart of plagiarism."<sup>22</sup> The plagiarist conceals the identity of the author while the copyright infringer may or may not do so.

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at 658–59 ("Fan fiction does not involve pure copying. It might infringe on a creator's copyright in characters—the unique personalities created to express a concept . . . Copyright law . . . expanded its reach beyond duplication to looser forms of borrowing, including the use of well-established characters.").

<sup>21</sup> *FAQ*, MAGGIE STIEFVATER BLOG, <http://maggiestiefvater.com/faq> (last visited June 13, 2014).

<sup>22</sup> POSNER, *supra* note 6, at 17.

## 2. Fair Use

Some common misconceptions about copyright infringement generally include: (a) if a copyist did not intend to infringe, her infringement may be excused; (b) if a copyist made no money, or did not intend to profit, from an infringement, the infringement will be excused; (c) if the copyist identifies the author of the original work, there is no infringement; and (d) remixing, repurposing, sampling, and fanfiction do not constitute copyright infringement.

As blanket statements of the law, these assertions are all incorrect, although each may be correct in specific cases depending on the circumstances. Taking the assertions in order, copying is a strict-liability wrong.<sup>23</sup> Thus, a defendant's intentions are immaterial to infringement, although they may be taken into account in the determination of damages.<sup>24</sup> Financial gain is not an element of the infringement action *per se*, although it is an element of the fair use defense.<sup>25</sup> Thus, some noncommercial infringement may be excused under the fair use doctrine, but a blanket statement that noncommercial copying is not an infringement is incorrect.

The identification of the original author, while socially responsible, is not an excuse for infringement. Infringement involves copying and not attribution or lack thereof. Those issues are more relevant to claims involving moral rights infringement (in jurisdictions where a right of attribution action is available).<sup>26</sup> They are also relevant to allegations of plagiarism. Finally, conduct like remixing, repurposing, sampling and fanfiction may or may not be infringing activities, and may or may not be excused under the fair use doctrine depending on the context. A blanket assertion that these activities are always non-infringing or are always excused by fair use is incorrect.

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<sup>23</sup> See LEAFFER, *supra* note 2, at 539.

<sup>24</sup> See *id.* (“In general, infringement with innocent intent is *not* a defense to a finding of liability. Outside of one narrowly drawn provision in the Act, infringement of copyright is a strict liability rule, where intent of the copier is not relevant in determining the fact of liability.”).

<sup>25</sup> See 17 U.S.C. § 107(1) (2012) (Commercial motives of the defendant are part of the first fair use factor).

<sup>26</sup> See *infra* Part I.C.

As is evident from the above discussion of common misconceptions of copyright infringement, many arguments relating to non-infringing conduct assume a broad application of the fair use defense. This defense is set out in § 107 of the Copyright Act and is problematic in the sense that its application in any given case is intended to be flexible. The advantage of flexibility is, of course, that courts are able to adapt the doctrine to new contexts such as those arising with new digital technologies enabling remixing, sampling and repurposing. However, the downside of flexibility is the uncertainty of a result, which may be contrasted with the law in some countries that have a more clearly proscribed “fair dealing” doctrine.<sup>27</sup>

The American copyright legislation provides that:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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

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<sup>27</sup> See Rebecca Tushnet, *Q&A with Professor Rebecca Tushnet*, DEAR AUTHOR BLOG (Mar. 21, 2012), <http://dearauthor.com/features/essays/qa-with-professor-rebecca-tushnet> (“U.S. fair use is definitely unusual, though it’s been adopted in Israel and several other countries are at least thinking about adopting it. Outside the U.S., the closest concept is generally known as ‘fair dealing.’ Fair dealing varies by country; it generally covers quotation and criticism, and some people have argued that at least highly transformative fictional works could fall within those categories. Though I’m not an expert in the area, I’ve read some very interesting analysis of recent German case law, for example, suggesting that freedom of expression principles justify a broad interpretation of fair dealing in the case of critical reuses.”).

(4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>28</sup>

While the preamble sets out the kinds of situations typically regarded as fair use in the United States, it is not a blanket statement that uses of existing works for purposes of criticism, comment, news reporting and the like will *necessarily* be found to be a fair use in any given case. Additionally, there is nothing in the preamble that contemplates the kinds of uses that have become popular in the digital age including sampling, remixing, repurposing, and fanfiction.

The four fair use factors are the key to determining whether or not a defendant's use of a work is excusable under the doctrine. Factors one and four are often given paramount weight by modern courts.<sup>29</sup> Each of these factors relies to a significant extent on the economics of the defendant's use, and the impact of that use on existing or potential markets for the work. This is probably where a lot of the confusion about noncommercial works comes into the equation. Because economic elements are contemplated in fair use factors one and four, many borrowers of works assume that noncommercial uses are necessarily excused and acceptable under Copyright law. However, as noted above, the fair use factors are applied flexibly and even a noncommercial use may amount to a copyright infringement.

While not stated in the statute itself, the first fair use factor has come to incorporate a concept of "transformative use."<sup>30</sup> Courts have held that where a defendant's use "transforms" the plaintiff's work by adding new insights or ways of looking at the work, it is more likely to be considered a fair use.<sup>31</sup> In recent years, cases

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<sup>28</sup> 17 U.S.C. § 107.

<sup>29</sup> See LEAFFER, *supra* note 2, at 481 ("The case law frequently states that [the fourth fair use] factor is the single most important element of fair use . . . . The fourth factor is related in one way or another to the other three factors, but perhaps most closely to the first factor where presumption of harm arises from commercial use of the copyrighted work.").

<sup>30</sup> See WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 10.13 (2010) (explaining the concept of transformative use and its application under the first fair use factor).

<sup>31</sup> See, e.g., Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 540–41 (S.D.N.Y. 2008) ("Most critical to the inquiry under the first fair use factor is 'whether and to what extent the new work is transformative.' Specifically, the court asks 'whether the new work merely supersede[s] the objects of the original creation, or instead adds

involving digital technology have extended the notion of transformative use of the work itself to what might be termed transformative functionality of the work, even in cases where the defendant may be a profit-making enterprise like the Google search engine.<sup>32</sup> In a number of cases involving search engines, for example, courts have held that even verbatim reproductions of entire works in search results may be excused by fair use largely because of the ability of search engines to allow easier access to works and, in the case of literary works, data mining of those works.<sup>33</sup>

The application of the notion of transformative use in the context of the first fair use factor, along with the application of the other fair use factors to various types of digital borrowing are considered in more detail in Parts II and III *infra*. For the purposes of distinguishing the basic elements of copyright infringement from those of moral rights infringement and plagiarism within the context of this discussion, it is simply necessary to understand that Copyright law is a strict liability tort that prevents unauthorized reproductions, disseminations, displays and derivative works based on preexisting works where the defendant's conduct is not excusable under the fair use defense.<sup>34</sup>

### C. Moral Rights

The word create . . . derives from the Latin verb *creo*, which means “to give birth to” . . . . The concept that an author “gives birth” to her artistic

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something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’ The fair use doctrine seeks to protect a secondary work if it ‘adds value to the original if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings,’ because such a work contributes to the enrichment of society.” (citations omitted).

<sup>32</sup> See *id.* at 541 (“Courts have found a transformative purpose both where the defendant combines copyrighted expression with original expression to produce a new creative work, . . . and where the defendant uses a copyrighted work in a different context to serve a different function than the original.”).

<sup>33</sup> See *Authors Guild Inc. v. Google*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>34</sup> Other copyright defenses, such as first-sale/exhaustion are not relevant to this discussion.

creations provides the foundation of the insurmountable connection between an author and her work.<sup>35</sup>

Moral rights have not become a large part of American law, even though the United States is technically required to implement moral rights as a condition of becoming a signatory to the Berne Convention. Some commentators argue that the United States is not in compliance with its Berne obligations to implement moral rights legislation.<sup>36</sup> The United States government's failure to implement additional moral rights legislation outside of the Visual Artists Rights Act of 1990 suggests that it is relying on the current pastiche of copyright, trademark, and unfair competition principles to provide compliance with the country's Berne obligations.<sup>37</sup>

Because moral rights are not a mainstay of American law, and because the author has addressed them in detail in a previous Article,<sup>38</sup> they are only briefly canvassed here for the purposes of distinguishing them from copyright infringement and plagiarism. The discussion in Parts II and III refers to areas in which moral rights legislation might fill some of the gaps currently existing in the American regulatory matrix for protecting authors' rights. The author of this Article has previously concluded that moral rights legislation is not likely to be a particularly effective avenue for

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<sup>35</sup> ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 13–14 (2010).

<sup>36</sup> See LEAFFER, *supra* note 2, at 399 (“[W]hatever one thinks of the [Visual Artists Rights Act], it is doubtful that it complies with our obligations under Berne.”).

<sup>37</sup> *Id.* at 389 (“Although American Copyright law has never adopted an integrated version of the moral right, the concept has made its way incrementally into the law in three ways. First, an author’s integrity and attribution rights have been protected piecemeal by various bodies of state and federal law. Second, about a dozen states have passed statutes explicitly recognizing the moral rights of visual artists. Third, in the Visual Artists Rights Act of 1990, federal law has followed the lead of state law by protecting the integrity and attribution rights of visual artists.”).

<sup>38</sup> See generally Lipton, *supra* note 3 (drawing substantively on the work of Professor Roberta Rosenthal Kwall and Professor Neil Netanel in considering the possibility of developing moral rights legislation for the United States).

protecting authors' rights in their original creations in the United States.<sup>39</sup>

While the law in many European Union countries contemplates the existence of a wide variety of moral rights,<sup>40</sup> only two rights are required to be enacted into domestic law by signatories to the Berne Convention. They are the right of attribution (or paternity) and the right of integrity.<sup>41</sup> The former relates to the creator's right to claim authorship of the work, while the latter relates to the author's right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to" the work.<sup>42</sup> The Berne Convention also provides that any such distortion or mutilation must be "prejudicial to the [author's] honor or reputation."<sup>43</sup> However, there is little guidance as to what would be considered prejudicial to the author's honor or reputation in this context.

The right of attribution is closely related to plagiarism in the sense that each of these wrongs involves either failing to attribute a source or falsely attributing a source. Obviously, in countries where the right of attribution is available as a cause of action, authors can pursue legal recourse in the courts. In jurisdictions where such a right is not available to authors, however, such creators must rely on academic and market conceptions of plagiarism, or honor codes in academic and other settings where they might be enforced institutionally. Where plagiarism is asserted in the commercial marketplace, market forces (such as consumer outcry) may give an easier and more effective remedy than legal action because a publisher may be pressured or shamed

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<sup>39</sup> *Id.* at 580 (concluding that even if the United States adopted a broader conception of moral rights, such laws would be unlikely to assist many contemporary fiction authors address the kinds of unauthorized borrowing with which they have expressed concerns in recent years in the digital context).

<sup>40</sup> *Id.* at 544 (including the right to refuse to create, the right to create and publish in any form desired, the right to withdraw or destroy a work, the prohibition against excessive criticism, and the prohibition against other injuries to the creator's personality).

<sup>41</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*(1), Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

into withdrawing a plagiarized work from sale relatively promptly.<sup>44</sup>

Where a failure to properly attribute work occurs in the context of unauthorized copying, as is often the case, a copyright action may also be available. For example, in a highly publicized case several years ago, popular author Dan Brown was accused of copyright infringement with respect to material in his bestseller *The Da Vinci Code*, which had allegedly been borrowed without attribution from a previous work.<sup>45</sup>

The right of integrity is in many ways the moral rights correspondent to the derivative works right in Copyright law. Both have to do with altering an original work. However, the central thrust and underlying doctrine of the two actions is different. The derivative works right is based on protecting the right to control economic markets for a work and is the exclusive right of the copyright holder, whether or not that entity is the author of the work.<sup>46</sup> In the case of many commercial literary works—as well as academic texts—the copyright holder is the publisher, rather than the author.

In contrast, the moral right of integrity is essentially a right of the author, regardless of whether the author has assigned the copyright to another entity.<sup>47</sup> It is a right personal to the author to prevent mutilations of a work, or representations of the work that do not meet with the author's approval.<sup>48</sup> In this sense, the right of integrity can actually interfere with a copyright holder's ability to commercially exploit the work.<sup>49</sup> If the author objects to the

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<sup>44</sup> See *infra* Part I.D.

<sup>45</sup> See POSNER, *supra* note 6, at 13 (“[D]an Brown, the author of *The Da Vinci Code*, who was sued for copyright infringement by the authors of an earlier book on the grounds that he’d stolen their idea of Jesus Christ having married Mary Magdalene and fathered children by her, won the suit.”).

<sup>46</sup> See 4 PATRY, *supra* note 30, § 12:1 (explanation of rights in derivative works).

<sup>47</sup> See *id.* § 23:23 (explaining moral rights of integrity and attribution, and their waivability as a matter of international Copyright law).

<sup>48</sup> See *id.*

<sup>49</sup> See LEAFFER, *supra* note 2, at 400 (“Moral rights protection will inherently clash with the way many works are created in cultural and entertainment industries such as moviemaking, publishing, and broadcasting. These intensely collaborative endeavors are exploited through subsidiary markets. For example, motion pictures are abridged for television, textbooks are revised and translated, and music is synchronized, adapted, and



copyright holder's plans for use of the work and the right of integrity is implicated, the author can—absent a contractual provision preventing such a course of action—bring an action to prevent the publisher's activities.

For example, if a copyright holder wanted to authorize a ghost writer to write a sequel or a prequel to an existing work and the original author objected to the new work on moral rights grounds, that author may have an action available to prevent the new work in a country where the right was available and where it had not been modified or excluded by contract. In most cases, the rights are modified or excluded by contract in these kinds of situations although some countries' laws do not allow for waiver of a moral right by an original creator.<sup>50</sup>

Even though it appears that moral rights could have a significant impact on downstream works like prequels, sequels and retellings or remixes of existing works, the reality is that moral rights protection tends to be weak in practice. Authors often do not have the financial wherewithal or legal knowledge to exercise such rights in countries where they are available. The rights are only available in limited jurisdictions, and even within those jurisdictions authors are often contractually required to waive the rights when they contract with commercial publishers.

#### *D. Plagiarism*

Plagiarism is attracting increasing attention, though whether this is because it is becoming more

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broadcast in a multiplicity of forms. These lucrative derivative markets, which attract significant investment into the entertainment and cultural industries, are regulated by contractual agreement. But an expansive moral rights concept, presenting a constant threat of legal challenge brought about by any one or more collaborators, would tend to undermine the economic expectations and the delicate allocation of rights achieved through private negotiation between authors, users, and labor unions. The result may be less financial support for such collaborate artistic endeavors, ultimately harming the public interest.”).

<sup>50</sup> See, e.g., Mrinalini Kochupillai, *Moral Rights Under Copyright Laws: A Peep into Policy—Part 1*, SPICY IP BLOG (Dec. 4, 2007), <http://spicyip.com/2007/12/moral-rights-under-copyright-laws-peep.html> (discussing the waivability of moral rights under Indian intellectual property statutes and comparing this issue with legislation in other jurisdictions).

common, or because its boundaries are becoming vague and contested, or because it is being detected more often (digitization has made it at once easier to commit and easier to detect) are among the many questions about it that call for investigation.<sup>51</sup>

While not giving rise to a legal action, plagiarism is garnering much attention in the digital world. This may be because, as Judge Posner posits, plagiarism is both easier to commit and easier to detect since the advent of digital technologies.<sup>52</sup> It may also be because more and more people are creating literary and artistic works online and creation often involves borrowing which is, in many instances, uncredited. Thus, the incidence of plagiarism in society overall is likely increasing exponentially.

A brief survey of attitudes to unauthorized digital borrowing suggests that those involved in creative remixing activities online often confuse copyright infringement and plagiarism.<sup>53</sup> This may also explain the increased focus on the concept of plagiarism in the digital world. Even successful professional authors often conflate copyright infringement with plagiarism. Recall, for example, Maggie Stiefvater's comments equating a derivative work with plagiarism.<sup>54</sup>

Because plagiarism is not, strictly speaking, a legal wrong, there is no statutory definition of the term. It appears in a number of institutional honor codes, and is clearly a matter of concern in the commercial publishing world.<sup>55</sup> However, its contours are vague.<sup>56</sup> In describing the concept, Judge Posner notes that while typical dictionary definitions contemplate that plagiarism is akin to "literary theft,"<sup>57</sup> this description is incomplete in several respects, including: (a) it is possible to plagiarize works other than literary

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<sup>51</sup> POSNER, *supra* note 6, at 9.

<sup>52</sup> *Id.*

<sup>53</sup> See Jacqueline Lipton, *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VAND. J. ENT. & TECH. L. (forthcoming 2014).

<sup>54</sup> See *supra* note 21 and accompanying text.

<sup>55</sup> See *infra* Part II.C.

<sup>56</sup> See POSNER, *supra* note 6, at 11 ("'[P]lagiarism' turns out to be difficult to define.").

<sup>57</sup> *Id.*

works;<sup>58</sup> (b) plagiarism can occur without *theft* because “stealing” a work does not deprive the author or her readers of the work;<sup>59</sup> but, (c) plagiarism is more than *borrowing* because the “borrowed” matter is not returned.<sup>60</sup>

Posner acknowledges that an important aspect of plagiarism, at least with respect to literary works, is that it tends to occur in cases where the plagiarist copies either expression or ideas without acknowledgment of the original source “so that readers of the new work are invited to think that [the copied] features are the invention or discovery of the plagiarist.”<sup>61</sup> Plagiarism thus differs from copyright in the sense that it involves either expression or ideas, or both. In other words, plagiarism extends to non-copyrightable features of a work such as the underlying ideas when they are presented in a new work without attribution as to source.

Posner’s conception of plagiarism, and indeed that which is embodied in many honor codes, invokes the concept of fraud on the reader—the idea that the reader is being misled as to the provenance of particular expressions or ideas.<sup>62</sup> Thus, he suggests that plagiarism does not necessarily occur in contexts where there is no acknowledgment of the original source, but the readers of the new work are “indifferent.”<sup>63</sup> In other words, “they may be deceived, but the deception has no consequences.”<sup>64</sup> He gives the example of textbook authors. Many textbooks, notably high school texts, do not cite all their sources because “there is no pretense of originality—rather the contrary: the most reliable textbook is one that confines itself to ideas already well accepted by experts in the field.”<sup>65</sup>

Posner also suggests that plagiarism rightfully involves a “reliance” interest in the sense that the plagiarist’s activities, along

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 11–12.

<sup>61</sup> *Id.* at 14.

<sup>62</sup> *Id.* at 19 (describing plagiarism as conduct that is “deceitful in the sense of misleading the intended readers”).

<sup>63</sup> *Id.* at 18.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 18–19 (noting that “since students have little or no interest in the origins of the ideas they are studying, source references would merely clutter the exposition”).

with being deceitful as to source, induce some kind of reliance in a consumer, such as purchasing a book she would not otherwise have purchased if she knew it was really the work of another writer.<sup>66</sup> He suggests that:

The reader has to *care* about being deceived about authorial identity in order for the deceit to cross the line to fraud and thus constitute plagiarism. More precisely, he has to care enough that had he known he would have acted differently. There are innumerable intellectual deceits that do little or no harm because they engender little or no reliance. They arouse not even tepid moral indignation, and so they escape the plagiarism label.<sup>67</sup>

He gives the example of judges who sign opinions that are actually written predominantly or completely by their law clerks without attribution.<sup>68</sup> Generally, this conduct is not regarded as plagiarism. Likewise, Posner suggests that celebrities and politicians who employ the services of ghost writers for their memoirs are not engaging in plagiarism as the public does not expect the celebrities to be the “real” authors, but merely expects them to endorse the contents of the books.<sup>69</sup>

These situations may be contrasted with some of the conduct considered in Part II that involves remixing fictional works by cutting and pasting passages from existing texts into a new text and changing character names before selling the work as a completely new work without attribution of the original sources. This may amount to copyright infringement, but it would also likely satisfy Posner’s definition of plagiarism because it is deceitful in its failure to provide attribution. At the same time, the plagiarist intends that the consumer *rely* on the deceit and buy her book rather than, or alongside, the original works. The plagiarist seeks to have the consumer act differently in reliance on her deceit by purchasing a book she would not otherwise have purchased had she known the truth.

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<sup>66</sup> *Id.* at 19–20.

<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.* at 20–21.

<sup>69</sup> *Id.* at 24–26.

While most participants in online publishing communities probably do not think through the concept of plagiarism in as much detail as Judge Posner, his insights are instructive as to the essential differences between plagiarism and copyright infringement. Plagiarism is not unimportant in digital publishing marketplaces simply because it does not ground a legal cause of action. In fact, some claims of plagiarism can have a more immediate and greater impact in redressing a perceived wrong than a copyright claim. Claims of plagiarism may cause the market to respond quickly and often decisively, while claims of copyright infringement may take significant time and expense to work their way through the courts before an outcome is reached. Even if the case ultimately settles, the focus on the legal cause of action can lead parties to wait to see how the judicial winds are blowing before engaging in attempts to negotiate a settlement.

## II. TAXONOMY OF DIGITAL BORROWING

### *A. Anecdotal Evidence of Online Borrowing*

One thing missing from much of the previous discussion of Copyright law, plagiarism, and moral rights law (in jurisdictions where moral rights apply to literary endeavors) is an unpacking of the different categories of borrowing with which authors and copyright holders may be concerned in the digital age. In a previous Article, the author proposed a new “taxonomy” of borrowing drawn from practices currently occurring in the world of digital publishing.<sup>70</sup> This discussion extends the taxonomy and examines in more detail the appropriate regulatory approaches to each category of borrowing with a view to determining whether a more nuanced approach to unauthorized digital borrowing may be developed in the future. The taxonomy is drawn from anecdotal evidence of conduct currently taking place in the digital publishing world.

From a survey of online blogs and email discussions with writers and publishers, the author has ascertained that there are at least five different classes of unauthorized (but not necessarily

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<sup>70</sup> See Lipton, *supra* note 53.

“wrongful”) online borrowing about which writers and copyright holders may express concerns. It is important to note that these categories are based on practical usages of works in the digital publishing industry rather than on legal distinctions. Thus, the applications of regulatory principles to the categories will overlap while the categories themselves may be practically distinct with respect to the concerns they raise for authors and copyright holders.

The categories comprise:

- (a) Direct literal copying of an entire text which basically equates to traditional “piracy.” The resulting works are likely perfect or near-perfect market substitutes for the original works.
- (b) Direct literal copying of an entire text for functionally transformative purposes in circumstances where the copies do not displace the original works in the market.
- (c) Copying of snippets of text usually from multiple sources in the process of creating a new work.
- (d) Creating a derivative work based on the characters, settings, or plot points of an existing work without literally copying text, and with the intention of commercially profiting from the new work.
- (e) Creating a derivative work—as in (d) above—*with no intention to commercially profit* from the new. This category largely refers to the creation of fanfiction.

These classes of conduct obviously overlap to a significant extent, particularly in terms of the legal analysis that might be applied, although the results of the legal analysis may differ from class to class. Categories (d) and (e) are arguably two sides of the same coin—commercial versus noncommercial derivative works. They have been separated for the purposes of this discussion because of the notable online norms that have developed in relation to noncommercial fanfiction as opposed to, say, the writing of

unauthorized commercially-viable prequels or sequels to an existing work.<sup>71</sup>

The distinction between the two classes of conduct may be illustrated by comparing the copyright litigation and large sums of money involved in the dispute over whether Alice Randall's retelling of *Gone with the Wind* (entitled *The Wind Done Gone*) amounted to copyright infringement<sup>72</sup> with the voluminous amount of non-contentious *Gone with the Wind* fanfiction freely available online.<sup>73</sup> It should be noted here that the actual *Gone with the Wind* litigation was framed in terms of an infringement of the *reproduction* right, rather than the *derivative works* right. However, the court focused on the notion of markets for derivative works in its analysis of the fourth fair use factor—examining the extent to which the defendant's work might encroach into markets that the original copyright holder may want to reserve for authorized sequels and retellings of the original story.<sup>74</sup>

Categories (a) and (c) in the taxonomy may also be difficult to distinguish in practice as both involve direct and literal copying from an existing original work. Thus, each sounds like a *per se* copyright infringement. While both classes of conduct likely do amount to copyright infringement depending on the circumstances—and in category (c), for example, the amount of the original work taken by the copyist—they raise different concerns in different contexts. Though there is little doubt that a direct literal copy of an entire text, particularly when distributed online, is problematic for the copyright holder as it is a perfect market substitute for the original work, there may be more doubt with regard to the borrowing of snippets to create a new work. One might argue that a new work constructed from snippets of multiple existing works actually does contribute something new to the marketplace of ideas and might be protected as a transformative use under the fair use doctrine. However, there will be cases where the remixing of existing works to create a new

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<sup>71</sup> *See id.*

<sup>72</sup> *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>73</sup> *See, e.g., Archive of Gone with the Wind*, FANFICTION, <https://www.fanfiction.net/book/Gone-with-the-Wind> (last visited June 13, 2014).

<sup>74</sup> *See Suntrust Bank*, 268 F.3d at 1274–76.

work will be very similar to traditional piracy,<sup>75</sup> particularly if intended to substitute for, or potentially detract sales from the original works.

Of course, as noted above,<sup>76</sup> sometimes direct literal copying of an entire work will be excused by the fair use doctrine in circumstances where the resulting copy is not a market substitute for the original work. The search engine cases are obvious examples of this,<sup>77</sup> and this is the purpose of category (b). This category differentiates full text literal copying that threatens the market for the original work with full text literal copying that does not create such a threat because of the lack of actual or potential market displacement. While the copyist's purposes in category (b) cases may be commercial, the products of the copying do not threaten actual or potential markets for the original work.<sup>78</sup>

The most effective way to demonstrate the contribution a taxonomy of borrowing might make to the development of legal and market regulations is to provide concrete examples of each different class of conduct. Such examples evidence the different dynamics that arise between original creators, copyright holders, and copyists in different situations, and support the author's contention that the taxonomy might give rise to a more nuanced approach to the regulation of unauthorized digital borrowing.

#### *B. Verbatim Copying of Entire Text*

Categories (a) and (b) in the proposed taxonomy each deal with verbatim copying of an entire text. The categories might therefore be condensed into one single category. However, this may be doing a disservice to ways in which Copyright law, in particular, has developed in recent years in light of the recognition of the “functional transformativeness” test that has crept into the factor one analysis of the fair use doctrine. While verbatim copying of an entire text could never amount to a derivative work—because it involves copying the actual text, not deriving something new from

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<sup>75</sup> See *infra* Part II.C.

<sup>76</sup> See *supra* Part I.B.2.

<sup>77</sup> See POSNER, *supra* note 6, at 24–26.

<sup>78</sup> See *Authors Guild v. Google*, 954 F. Supp. 2d 282, 292–93 (S.D.N.Y. 2013) (“Google does not sell its scans, and the scans do not replace the books.”).



it—it may nevertheless allow consumers to see the work in a new way or in a new context.

The purpose of the distinction between categories (a) and (b) is to differentiate what might be regarded as good old-fashioned piracy (category (a)) from more socially beneficial uses of a work (category (b)). Little need be said about category (a). The law would typically deal with it as a copyright infringement both in terms of the actual copying of the original work and in terms of any subsequent dissemination of the work. The resulting copies would likely, or potentially, serve as market substitutes for the original, particularly in the age of near-perfect digital copies of a text file.

On the other hand, category (b) conduct—while involving verbatim copies of entire works—does not create market substitutes for these works. Category (b) contemplates activities such as the Google book project and the Hathitrust digitization project for library materials.<sup>79</sup> While digitization in the search engine or library context does involve verbatim copying of entire works, there is no (or very little) market substitution effect. In fact, the activities of the copyists may assist consumers to locate and utilize legally disseminated copies of the original works in new and socially beneficial ways. The aim of the copying is to assist individuals to locate and use original works more easily and effectively. This conduct has been regarded by courts as excused under Copyright law by the application of the fair use doctrine. In the Google books situation, for example, the court made much of the first fair use factor to hold that Google's digitization of the plaintiff's members' books is transformative in the sense that it promotes research and expands public access to books.<sup>80</sup>

While this result under Copyright law is laudable, the problem for future developments involving digitized literary texts is that it

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<sup>79</sup> See *Authors Guild Inc. v. Hathitrust*, No. 11 CV 6351 HB, 2013 WL 603193 (S.D.N.Y. Feb. 15, 2013).

<sup>80</sup> *Google*, 954 F. Supp. 2d at 291 (“Google’s use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books has become an important tool for libraries and librarians as cite-checkers as it helps to identify and find books. The use of book text to facilitate search through the display of snippets is transformative.”).

relies on a court's finding that the defendant's use of the plaintiff's work is a fair use. Such a finding can only be made after the fact in the context of copyright litigation. There is no *ex ante* guidance available as to whether a particular verbatim copy is fair use in any given context. Even the Google books litigation took years to make its way through the courts and cost the parties plenty of money and time.<sup>81</sup> The litigation raised by the Association of American Publishers against Google ultimately settled, thus providing no explicit legal precedent as to the kinds of uses Google was making of the literary texts in question.<sup>82</sup> It was not until the action raised by the Authors Guild against Google was decided in 2013 that any legal precedent was forthcoming.<sup>83</sup>

One of the aims of proposing the taxonomy advocated in this Article is to focus on the classes of conduct that have recently taken place in the digital world in an attempt to propose more *ex ante* guidance as to conduct that should be deemed acceptable. While it is difficult to formulate a legal rule that would differentiate acceptable versus unacceptable instances of verbatim copying of an entire work, some *ex ante* guidance may be gleaned from drawing the line between market substitution cases and cases of copying that are more socially beneficial.

Interestingly, and perhaps somewhat counter-intuitively, commercial motivations *per se* become extremely important in the context of categories (c), (d) and (e) of the taxonomy, while they are arguably less important in distinguishing between category (a) and (b). Where verbatim copying of an entire work is for a noncommercial purpose, the resultant copies can still serve as market substitutes for an original work under category (a) and thus be considered wrongful. Even if the copying is undertaken for commercial benefit, it can nevertheless be socially beneficial or functionally transformative under category (b), and thus be excusable. Thus, while commercial motives may be a key factor in

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<sup>81</sup> The lawsuit commenced in 2005. See Elinor Mills, *Authors Guild Sues Google Over Library Project*, CNET NEWS (Sept. 21, 2005), [http://news.cnet.com/Authors-Guild-sues-Google-over-library-project/2100-1030\\_3-5875384.html](http://news.cnet.com/Authors-Guild-sues-Google-over-library-project/2100-1030_3-5875384.html).

<sup>82</sup> See Claire Cain Miller, *Google Deal Gives Publishers a Choice: Digitize or Not*, N.Y. TIMES, Oct. 4, 2012, [http://www.nytimes.com/2012/10/05/technology/google-and-publishers-settle-over-digital-books.html?\\_r=0](http://www.nytimes.com/2012/10/05/technology/google-and-publishers-settle-over-digital-books.html?_r=0).

<sup>83</sup> See generally *Google*, 954 F. Supp. 2d 282.

other areas of the taxonomy to distinguish good conduct from bad, they are perhaps less decisive and should be given less weight in cases of verbatim copying of entire works. The key to these cases appears to be market substitution (or lack thereof) as well as the potential for transformative *functionality* of the work.

### C. *Literal Copying of Snippets*

I love *Easy* by Tammara Webber and so do hundreds of thousands of other readers. Unfortunately, one Jordan Williams recognized this and thought, hmmm, I'll just incorporate whole swaths of text from Webber's famous and much beloved book. Worse, Jordan William's book is selling like mad. It's 58 in the US Kindle store, as of this writing.<sup>84</sup>

It is possible that describing category (c) of the taxonomy as borrowing of "snippets" is a misnomer in that it creates an impression of minimal taking from another's work. In fact, borrowing of multiple snippets, often from various different sources, to create a new work can be—and has, in the past, been—highly problematic for the creators of original works and consumers alike. Because of the inherent consumer deception in taking snippets from pre-existing works and repackaging them as a new work, this conduct tends to be described as plagiarism, although in many cases it also amounts to copyright infringement. Taking snippets from existing works and repurposing them in a new work can obviously infringe the reproduction, public dissemination, and derivative works rights that are exclusively reserved to the author under § 106 of the Copyright Act.<sup>85</sup>

One very high-profile example of this class of conduct in the "bricks and mortar" publishing world occurred in 2006 when then-

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<sup>84</sup> Jane Litte, *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

<sup>85</sup> See 17 U.S.C. § 106 (2012) (listing the exclusive rights of copyright owners in their works).

Harvard student Kaavya Viswanathan published a book entitled *How Opal Mehta Got Kissed, Got Wild, and Got a Life*.<sup>86</sup> It was published by major publishing house under a two-book deal.<sup>87</sup> Viswanathan was given an advance of \$500,000, and sold the movie rights to Dreamworks.<sup>88</sup> The book was later withdrawn from the shelves after claims were made that Viswanathan had copied passages verbatim from existing authors including Meg Cabot, Megan McCafferty, and Salman Rushdie.<sup>89</sup> Her publishing contract was cancelled and existing copies of the book were recalled and destroyed.<sup>90</sup>

This situation is a good example of the way in which an assertion of plagiarism may be a more powerful incentive for a publisher to act than a threat of copyright infringement. Where plagiarism is asserted, there is the implication that the publisher has been involved in something “dishonorable,” thereby interfering with its credibility in the market. Copyright, on the other hand, may be regarded more as a legal matter, rather than a matter of honor. Where a copyright infringement claim is made against an author or publisher, the participants in the action may leave the matter to their lawyers and the courts, rather than be concerned about their reputation or honor in the field. As copyright is a strict-liability wrong,<sup>91</sup> it arguably does not carry the same dishonorable connotations as an allegation of plagiarism.

In many ways, the Viswanathan case is an easy example because the author as well as the publisher obviously acted with commercial motivations. Clearly, given the size of the advance paid to the author, the publisher had high commercial hopes for the book and was obviously the subject of major embarrassment when the claims of plagiarism were publicly made.<sup>92</sup> Other cases may not be so simple. For example, cases where a self-published

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<sup>86</sup> See POSNER, *supra* note 6, at 3.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*; see also *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, WIKIPEDIA, [http://en.wikipedia.org/wiki/How\\_Opal\\_Mehta\\_Got\\_Kissed,\\_Got\\_Wild,\\_and\\_Got\\_a\\_Life](http://en.wikipedia.org/wiki/How_Opal_Mehta_Got_Kissed,_Got_Wild,_and_Got_a_Life) (last visited June 13, 2014).

<sup>90</sup> See POSNER, *supra* note 6, at 3.

<sup>91</sup> See LEAFFER, *supra* note 2, at 539.

<sup>92</sup> Embarrassment is inferred here from the fact that the book was removed from sale.

author borrows smaller snippets from less well known works. Such conduct is not necessarily any less “wrongful” than Viswanathan’s activities. However, it may not be as high profile and a self-published author may be less equipped to act to remedy the situation than a major publishing house.

Of course, even a self-published author may rely on a digital distributor such as Amazon, Barnes and Noble, or Kobo to disseminate her works. Thus, in the digital world, the service providers that enable self-publishing may take on the role of monitoring unauthorized borrowing that was previously the task of traditional publishers.<sup>93</sup> There is some anecdotal evidence that the self-publishing author community and its readers rely on companies like Amazon to take on such a role, raising concerns about the extent to which these service providers are sufficiently active in detecting and preventing plagiarism and copyright infringement, or at least responding to allegations of such conduct.<sup>94</sup>

For example, in 2013 a similar situation arose in the digital self-publishing world as the 2006 “real world” example of Viswanathan’s book. A self-published romance author working under the pseudonym “Jordin Williams” released a book that included large snippets taken verbatim from two previous self-published bestsellers: *Easy* by Tammara Webber, and *Beautiful Disaster* by Jamie McGuire.<sup>95</sup> The two latter books were ultimately picked up by commercial publishers and marketed through traditional channels.<sup>96</sup>

As soon as the online community detected the copying an outcry arose in the blogosphere.<sup>97</sup> A grassroots campaign ensued advocating that those who purchased Williams’ book demand refunds from Amazon and that the book be withdrawn from sale.<sup>98</sup> The campaign resulted in the refunds being made and the book

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<sup>93</sup> See Lipton, *supra* note 53.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> JAMIE MCGUIRE, *BEAUTIFUL DISASTER* (2012); TAMMARA WEBBER, *EASY* (2012).

<sup>97</sup> See Lipton, *supra* note 53.

<sup>98</sup> See *id.*

being withdrawn by the distributor, Amazon.<sup>99</sup> The online discussions evidenced confusion about whether the concern was truly copyright infringement or plagiarism, but the bottom line was that most agreed that taking another's work for commercial gain without attribution was wrongful.<sup>100</sup> Thus, even though the players and dynamics were a little different in the online situation to the Viswanathan situation, the results were similar. The digital book was ultimately removed from sale and purchase prices were refunded to consumers, as they had acted in reliance on the deception that this was an original work by Williams.

Category (c) conduct obviously differs from category (a) conduct in that the resulting copy here is not a perfect market substitute for the original work. It is rather a remix of several original works that may or may not appeal to those who would otherwise have purchased the original works. Category (c) also differs from categories (a) and (b) in that commercial motivations seem to be more significant in category (c) than in the previous categories. Authors and consumers expressed concern that a copyist should not be allowed to profit commercially from stealing snippets of others' work and repurposing them.<sup>101</sup>

In contrast, we saw in comparing categories (a) and (b) that commercial motives were less significant. Noncommercial copies of entire works could be perfect market substitutes for originals and thus wrongful, while commercial copies of entire works could be socially beneficial—as in the search engine context—and thus not wrongful even if done for commercial purposes. Another important distinction between category (c) conduct and the previous categories in the taxonomy is that category (c) conduct tends by default to include lack of attribution to the borrowed works. Thus, it is more likely to amount to plagiarism—and to an infringement of the moral right of attribution in jurisdictions where such a right is available to authors of literary works.

#### *D. Derivative Works*

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<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

“It’s not illegal.” All the arguments came easily to Cath; they were the justification for all fanfiction. “I don’t own the characters, but I’m not trying to sell them, either.”<sup>102</sup>

As noted previously, the statutory definition of “derivative work” refers to: “[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>103</sup> In the context of literary works, derivative works tend to be prequels, sequels, and retellings of a story from another perspective. Alice Randall’s *The Wind Done Gone*,<sup>104</sup> for example, retells aspects of Margaret Mitchell’s classic *Gone with the Wind*<sup>105</sup> from a new perspective. When Mitchell’s estate brought a copyright infringement action against Randall, it was interestingly under the reproduction right rather than the derivative works right.<sup>106</sup> Thus, the court struggled with applying the “substantial similarity” doctrine to a work that did not literally reproduce verbatim text from the original.<sup>107</sup> Randall’s work could more easily have been characterized as a “derivative work” which might have made the infringement analysis somewhat easier.

Generally, unauthorized derivative works may raise the specter of all three of the regulatory regimes applying to unauthorized borrowing discussed in Part I: copyright infringement; moral rights infringement (where available for literary works); and plagiarism. Under American copyright legislation, the right to create derivative works is an exclusive right of the copyright holder.<sup>108</sup> In jurisdictions in which moral rights are available to authors of literary works, a derivative work may infringe the right of integrity

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<sup>102</sup> RAINBOW ROWELL, *FANGIRL* 107–08 (2013).

<sup>103</sup> 17 U.S.C. § 101 (2012).

<sup>104</sup> ALICE RANDALL, *THE WIND DONE GONE* (2002).

<sup>105</sup> MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

<sup>106</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1256 (11th Cir. 2001).

<sup>107</sup> *See id.* at 1266–68 (discussing copyrightability of characters and scenes in the absence of verbatim copying).

<sup>108</sup> 17 U.S.C. § 106(2).

(where the author is attributed, but the story is retold in an unacceptable manner).<sup>109</sup> If the copyist does not attribute the original author, the right of attribution may be implicated,<sup>110</sup> although derivative works generally are associated with the original work, unlike category (c) conduct where the source works may well be concealed.

Plagiarism is a more complicated issue with respect to derivative works than with respect to category (c) conduct. As derivative works usually expressly or implicitly identify the underlying source work, plagiarism in the sense of deceit against the consumer is unlikely to be an issue. Plagiarism tends to give the impression that the copyist's work is original to the copyist. Derivative works inherently bring the original work to the reader's mind.

The key distinction between categories (d) and (e) in the above taxonomy in many ways relates to the commercial motivation—or lack thereof—behind the creation of a particular derivative work. Where the work is intended to be commercialized, and thus may impinge on the copyright holder's control of markets expressly reserved to it in the Copyright Act, the conduct is more likely to be problematic than when the work is noncommercial. In the commercially-focused cases, the next factor to focus on (after commercial motive) will likely be transformativeness of the kind traditionally associated with the first fair use factor in copyright law: transformative of the substance of the work to provide new meanings or insights. If the new work is commercially motivated, the next question will be whether it is a sufficiently new contribution to literature in this sense.

Of course, if the copyright holder does not object to commercialization of a derivative work, no litigation will ensue and the courts will not have cause to consider any of these issues. Recent examples are the best-selling *Fifty Shades of Grey* trilogy,<sup>111</sup> and the popular *Gabriel's Inferno* trilogy,<sup>112</sup> both of

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<sup>109</sup> See 7 PATRY, *supra* note 30, §23:23.

<sup>110</sup> See *id.*

<sup>111</sup> E.L. JAMES, *FIFTY SHADES OF GREY* (2012); E.L. JAMES, *FIFTY SHADES DARKER* (2012); E.L. JAMES, *FIFTY SHADES FREED* (2012).



which were originally based on noncommercial *Twilight* fanfiction.<sup>113</sup> In neither case did the copyright holders raise concerns about copyright infringement. If they had, much would have turned on the legal analysis of the traditional transformativeness test applied under the first fair use factor.

These exceptions aside, noncommercial derivative works in the literary sphere tend to arise in the context of fanfiction authors who do not attempt to commercialize their work. These derivative works are typically noncommercial retellings of existing works engaged in by members of the work's fandom.<sup>114</sup> The rise of Internet communications led to an explosion of fanfiction communities.<sup>115</sup>

A recent (traditionally published) young adult romance novel, *Fangirl* by Rainbow Rowell, actually revolves around a protagonist—Cath—who is a noted fanfiction author and who has trouble, when she enrolls in a fiction-writing class at college, creating her own characters and situations.<sup>116</sup> At one point in the narrative, Cath explains to her bemused fiction writing professor her comfort level with writing fanfiction as opposed to her own original work:

[“]But I don’t want to write my own fiction,” Cath said, as emphatically as she could. “I don’t want to write my own characters or my own worlds—I don’t care about them.” She clenched her fists in her lap. “I care about Simon Snow. And I know he’s not mine, but that doesn’t matter to me. I’d rather pour myself into a world I love and understand than try to make something up out of nothing.[”]<sup>117</sup>

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<sup>112</sup> SYLVAIN REYNARD, *GABRIEL’S INFERNO* (2012); SYLVAIN REYNARD, *GABRIEL’S RAPTURE* (2012); SYLVAIN REYNARD, *GABRIEL’S REDEMPTION* (2013).

<sup>113</sup> See Tushnet, *supra* note 27 (discussing the derivation of “Masters of the Universe”—precursor story to the *Gabriel’s Inferno* trilogy—and “Fifty Shades of Grey” from *Twilight* fanfiction).

<sup>114</sup> See *supra* note 17 and accompanying text.

<sup>115</sup> See Tushnet, *supra* note 17, 651–52 (noting the broad accessibility of user-generated fanfiction content since the advent of the Internet).

<sup>116</sup> ROWELL, *supra* note 102.

<sup>117</sup> *Id.*

During the story, Cath comes to terms with the place of fanfiction in her development as a creative artist and learns the difference between, and importance of, being able to create her own original characters and stories if she seeks a career as a legitimate fiction writer.<sup>118</sup> Cath's story mirrors the true-life stories of many modern-day authors who initially cut their teeth on fanfiction before graduating to original fiction. Some examples are Meg Cabot, author of the bestselling *Princess Diaries* series, Cassandra Clare, author of the popular *Mortal Instruments* series, and best-selling fantasy author Naomi Novik.<sup>119</sup> Of course, E.L. James and Sylvain Reynard, authors of the *Fifty Shades* and *Gabriel's Inferno* books are also obviously examples of authors who transformed a fanfiction interest into a professional writing career even though their works might technically be derivative works encroaching on markets arguably reserved to the original copyright holders under the copyright act. In any event, the ability to write fanfiction is arguably an important aspect of the development of new creative artists and should be tolerated, or arguably encouraged.

In jurisdictions where moral rights protection is available for authors of literary works, fanfiction may be more problematic, particularly in terms of the right of integrity. Moral rights do not generally depend on commercializing a work in competition with the author, but rather with presenting a work in a light of which the author does not approve. As noted above, the Berne Convention additionally contemplates that the new work must damage the author's reputation in some way, although this concept is not defined in the Berne Convention.<sup>120</sup> In the absence of specific moral rights protection for authors of literary works, the legal position on fanfiction in the United States is arguably easier to deal with than potentially in countries that have a strong moral rights jurisprudence.

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<sup>118</sup> *Id.*

<sup>119</sup> See Alexander Alter, *The Weird World of Fan Fiction*, WALL ST. J., June 14, 2012, <http://online.wsj.com/news/articles/SB10001424052702303734204577464411825970488>.

<sup>120</sup> Berne Convention, *supra* note 41, art. 6*bis*(1).

While the law relating to fanfiction even in the United States is not well settled, the weight of opinion seems to be that fanfiction would qualify as a fair use under copyright law, provided that it is noncommercial.<sup>121</sup> Existing authors differ in their personal attitudes to fan fiction.<sup>122</sup> A number of established traditionally published authors have acknowledged that writing fanfiction is a useful way for aspiring authors to become comfortable with the process of writing, and many do not object to fanfiction based on their own work provided that it is noncommercial.<sup>123</sup> Some authors—even those who were originally opposed to fanfiction—now embrace these activities of fans as free advertising and expressions of the fans’ affection for, and deep connection to, the underlying works.<sup>124</sup>

However, other authors have publicly taken a stance against fan fiction. Best-selling urban fantasy author Anne Rice has been an outspoken critic of fanfiction and states on her website that she does not “allow” fanfiction relating to her works.<sup>125</sup> Interestingly, Anne Rice has licensed derivative works including movies and a Broadway musical based on her books.<sup>126</sup> Thus, it may be that her real concern is with commercially-oriented derivative works and not fanfiction *per se*. This is one reason for the distinction between commercially motivated derivative works and noncommercial derivative works in the above taxonomy. It seems that the commercial motivation is a key to distinguishing works that are on balance considered socially acceptable from those that are not.

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<sup>121</sup> See Alter, *supra* note 119 (“Most experts agree that fan fiction qualifies as fair use under Copyright law, provided that it differs substantially from the original and its creators don’t attempt to profit from it.”).

<sup>122</sup> See Jacqueline D. Lipton, *Copyright’s Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1 (2010).

<sup>123</sup> See Alter, *supra* note 119.

<sup>124</sup> See *id.*

<sup>125</sup> See Lipton, *supra* note 3, at 551–53 (on Anne Rice’s stance on fanfiction).

<sup>126</sup> See *Lestat (musical)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Lestat\\_\(musical\)](http://en.wikipedia.org/wiki/Lestat_(musical)) (last visited Apr. 11, 2014) (discussing the musical *Lestat*, based on Rice’s novel *The Vampire Chronicles*).

Compare noncommercial fanfiction with, say, Alice Randall's commercially published retelling of *Gone with the Wind*,<sup>127</sup> or the retelling of J.D. Salinger's famous *Catcher in the Rye* by a Swedish author who attempted to commercially publish a sequel to the novel starring a geriatric version of the book's iconic protagonist, Holden Caulfield.<sup>128</sup> While Copyright law may encourage retellings of literary works for purely expressive noncommercial purposes, even where the retellings garner their own large audiences within the fandom, the line becomes more difficult to cross with respect to conduct that trespasses on markets reserved by Congress to copyright holders. This approach is reflected in comments on the blogosphere by participants in the self-publishing community (writers and readers alike):

You want to fanfic in your world for free—have at it. But when you sell intellectual property to a consumer, I truly believe you should be the one intellectually creating it from beginning to end.<sup>129</sup> I think fanfiction and fandoms are great, but once you try to make a buck off of it you've crossed the line.<sup>130</sup>

I'm not opposed to fanfic authors transitioning into published ones. I was there—it's a great tool in the growth of an author. But when you see that you can attract fans, and you decide you want to be paid for your talent, that's when it's time to let that other person's world go and create your own.<sup>131</sup>

I think fanfiction definitely has a place, but it's important for fanfic writers to still be original and not plagiarize, and it's equally as important that

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<sup>127</sup> As noted above, the case was not actually litigated under the derivative works right, but many would consider an unauthorized retelling of an existing work to be a derivative work.

<sup>128</sup> See BBC News, *Sequel to Catcher in the Rye 'Banned in US,'* BBC NEWS (Jan. 13, 2011, 12:09 PM), <http://www.bbc.co.uk/news/entertainment-arts-12181223>. The Salinger litigation was settled, with banning the sale of the book in the U.S. and Canada as a condition to the settlement.

<sup>129</sup> Stephanie Doyle, Comment No. 177 to Litte, *supra* note 84 (June 26, 2013).

<sup>130</sup> Ava Lore, Comment No. 185 to Litte, *supra* note 84 (June 26, 2013).

<sup>131</sup> Stephanie Doyle, Comment No. 192 to Litte, *supra* note 84 (June 26, 2013).

fanfiction doesn't make money, because it's not a wholly original creation.<sup>132</sup>

Obviously, quoting comments from the blogosphere is not tantamount to engaging in a detailed statistical or doctrinal analysis as to how copyright law does, or should, work. Nevertheless, if the underlying philosophy of Copyright law in the United States is to promote creativity,<sup>133</sup> there is a strong argument for drawing a line between commercial and noncommercial derivative literary works in terms of what is permitted under the law. Noncommercial works appear to encourage creativity within the fandom for an existing work while additionally serving as free advertising that draws attention to the original author's work and may enhance sales. Commercial work, on the other hand, while it may encourage creativity in the fandom, potentially detracts from the existing author's market by encroaching on a market that is expressly reserved to the author in the Copyright Act.

A counterargument would be that there should be room in the market for even commercially motivated derivative works and that even a commercially published derivative work will increase interest in the original work and provide free advertising for it. It is possible, even likely, that readers of, say, Alice Randall's *The Wind Done Gone*, who had never read *Gone with the Wind*, would purchase a copy of the original book out of a renewed interest in the story.<sup>134</sup> The derivative work—even if commercially motivated—will focus more attention on the original work and may increase the market for the original work or revive the market for an original work.

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<sup>132</sup> Kendra, Comment to *Why I Have a Problem with Cassandra Clare & Why You Should Too*, LIFE & WHAT-HAVE-YOU BLOG (Mar. 14, 2012, 11:49 AM), <http://bellumina.wordpress.com/2012/03/14/049-why-i-have-a-problem-with-cassandra-clare-why-you-should-too>.

<sup>133</sup> See Tushnet, *supra* note 17, at 684 (“Copyright’s purpose . . . is to encourage creativity for the public interest, not only to ensure monopoly profits.”).

<sup>134</sup> Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1281–82 (11th Cir. 2001) (Marcus, J., concurring) (“It is . . . possible that *The Wind Done Gone* will act as a complement to, rather than a substitute for, *Gone with the Wind* and its potential derivatives. Readers of Randall’s book may want to refresh their recollections of the original. It is not far-fetched to predict that sales of *Gone with the Wind* have grown since *The Wind Done Gone*’s publication.”).

Nevertheless, the commercial derivative work is more problematic for Copyright law than a noncommercial derivative work when applying the fair use doctrine. While both commercial and noncommercial derivative works are *prima facie* infringements of the derivative works right in § 106 of the Copyright Act, the first fair use factor invites a court to consider the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. As noted above,<sup>135</sup> courts applying this factor also consider the “transformativeness” of the defendant’s use in the sense of whether or not the use adds new insights to the existing works.

While both commercial and noncommercial derivative literary works likely add new insights, noncommercial uses will be given greater deference as fair uses under the factor that requires courts to consider the commercial nature of the use. Commercial uses will, if litigated, put more pressure on the first fair use factor in considering the concept of transformativeness of the content of the work. This was a major consideration in the litigation involving Alice Randall’s derivative work based on *Gone with the Wind*.<sup>136</sup> While the case was litigated under the reproduction right rather than the derivative works right, the analysis of transformativeness is equally applicable to either claim.

Transformativeness was also a significant criterion in an attempt to commercially publish the *Harry Potter Lexicon*, an unauthorized work based on a noncommercial website, that described the characters, places, artifacts, spells, potions and the like appearing in J.K. Rowling’s bestselling *Harry Potter* series.<sup>137</sup> J.K. Rowling and Warner Bros., the producer of the *Harry Potter*

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<sup>135</sup> See *supra* Part I.B.2.

<sup>136</sup> *Suntrust Bank*, 268 F.3d at 1269 (“The fact that *TWDG* [*The Wind Done Gone*] was published for profit is the first factor weighing against a finding of fair use. However, *TWDG*’s for-profit status is strongly overshadowed and outweighed in view of its highly transformative use of *GWTW* [*Gone with the Wind*]’s copyrighted elements.”).

<sup>137</sup> *Warner Bros Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 542 (S.D.N.Y. 2008) (“The utility of the Lexicon, as a reference guide to a multi-volume work of fantasy literature, demonstrates a productive use for a different purpose than the original works. The Lexicon makes the elaborate imaginary world of Harry Potter searchable, item by item, and gives readers a complete picture of each item that cannot be gleaned by reading the voluminous series, since the material related to each item is scattered over thousands of pages of complex narrative and plot.”).

movies, sued the publishers of the Lexicon for copyright infringement.<sup>138</sup> While the plaintiffs argued infringement of both the reproduction right and the derivative works right, interestingly the court held there was no infringement of the derivative works right.<sup>139</sup> The plaintiffs succeeded only with respect to the reproduction right.<sup>140</sup>

Nevertheless, the fair use analysis in the decision is instructive for the present discussion of commercialized derivative works. Ultimately, the court held that the defendant could not avail itself of the fair use doctrine, and, in so doing, focused much of the inquiry on the transformative nature of the defendant's use, noting that the Lexicon was transformative, but not sufficiently and consistently transformative to support a fair use defense.<sup>141</sup> The other fair use factors also weighed in the balance against the defendant, but the transformative use factor was discussed the most extensively because of the need under copyright law not to stifle creativity in relation even to pre-existing original works still protected by copyright.<sup>142</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 538 (“A work is not derivative . . . simply because it is “based upon” the preexisting works.”); *id.* at 539 (“By condensing, synthesizing, and reorganizing the preexisting material in an A-to-Z reference guide, the Lexicon does not recast the material in another medium to retell the story of Harry Potter, but instead gives the copyrighted material another purpose. That purpose is to give the reader a ready understanding of individual elements in the elaborate world of Harry Potter that appear in voluminous and diverse sources. As a result, the Lexicon no longer ‘represents [the] original work[s] of authorship . . . .’ Under these circumstances, and because the Lexicon does not fall under any example of derivative works listed in the Statute, Plaintiffs have failed to show that the Lexicon is a derivative work.”).

<sup>140</sup> The court held that there was no infringement of the derivative works right by taking a relatively narrow interpretation of the § 101 definition of “derivative work” from the Copyright Act. The court held that the Act “seeks to protect works that are ‘recast, transformed, or adapted’ into another medium, mode, language, or revised version, while still representing the ‘original work of authorship.’” *Id.* at 538. Under this interpretation an unauthorized Lexicon, encyclopedia or guide to an existing work does not meet the statutory definition of “derivative work.”

<sup>141</sup> *Id.* at 540–46 (detailed analysis of the transformativeness of the *Harry Potter Lexicon*).

<sup>142</sup> *Id.* at 540 (“The ultimate test of fair use . . . is whether the Copyright law’s goal of ‘promoting the Progress of Science and useful Arts,’ U.S. CONST., art. I, § 8, cl. 8, ‘would be better served by allowing the use than by preventing it.’”).

Factor four of the fair use test also invites courts to consider “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>143</sup> While both commercial and noncommercial works may positively impact the market for the copyrighted work by drawing attention to the original work and serving as free advertising, a commercial work is more likely to be regarded as infringing on a market reserved to the copyright holder.<sup>144</sup> This factor was also significant in the *Harry Potter* litigation.<sup>145</sup> The Lexicon was ultimately published in a revised shorter form that apparently did not infringe copyright.<sup>146</sup>

### III. LESSONS FROM THE TAXONOMY

#### A. *Transformativeness*

Several issues emerge from the above discussion about the different classes of borrowing identified in the taxonomy. As we might expect, copyright/fair use considerations involving the transformativeness of the defendant’s use of the plaintiff’s work and commercial use made by the defendant are central concerns of authors and copyright holders. The ability to be attributed as the author of a given work is also important. However, what is perhaps less obvious is that not all of these considerations arise

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<sup>143</sup> 17 U.S.C. § 107 (2012).

<sup>144</sup> *Warner Bros.*, 575 F. Supp. 2d at 545 (discussing the significance of commercial purpose to a finding for or against fair use in a copyright infringement suit).

<sup>145</sup> *Id.* at 550–51 (“[P]ublication of the Lexicon could harm sales of Rowling’s two companion books. Unless they sought to enjoy the companion books for their entertainment value alone, consumers who purchased the Lexicon would have scant incentive to purchase either of Rowling’s companion books, as the information contained in these short works has been incorporated into the Lexicon almost wholesale. Because the Lexicon’s use of the companion books is only marginally transformative, the Lexicon is likely to supplant the market for the companion books . . . . Additionally, the fourth factor favors Plaintiffs if publication of the Lexicon would impair the market for derivative works that Rowling is entitled or likely to license. Although there is no supporting testimony, one potential derivative market that would reasonably be developed or licensed by Plaintiffs is use of the songs and poems in the *Harry Potter* novels. Because Plaintiffs would reasonably license the musical production or print publication of those songs and poems, Defendant unfairly harms this derivative market by reproducing verbatim the songs and poems without a license.”).

<sup>146</sup> See STEVE VANDER ARK, *THE LEXICON: AN UNAUTHORIZED GUIDE TO HARRY POTTER FICTION AND RELATED MATERIALS* (2009).



equally across the board in all cases of borrowing. The taxonomy allows us to separate out classes of borrowing that raise predominantly commercial considerations from those that raise questions of attribution or social benefit. While all of these concerns overlap to some extent, the taxonomy demonstrates that different issues are paramount in different kinds of borrowing situations.

Starting with the issue of “transformativeness,” it appears that courts in the copyright context are in fact bifurcating this concept (in the context of the first fair use factor) into two distinct limbs.<sup>147</sup> The first is traditional transformativeness of the defendant’s use of the plaintiff’s work, which we typically see in the case of a derivative work.<sup>148</sup> This is the type of transformativeness that involves the defendant adding new insights to the work itself. In the case of the taxonomy, we typically see this type of transformativeness in categories (d) and (e) which involve creating unauthorized prequels, sequels, retellings, etc. of a given work. Interestingly, in these cases, creators of original works tend mainly to become concerned about transformativeness in cases where another person is attempting to commercialize a new version of the work.<sup>149</sup> Once we are in the territory of commercialization, more pressure is put on the notion of traditional transformativeness (or transformation of content) under the first fair use factor if the case is litigated.<sup>150</sup> Thus, there appears to be a clear relationship between commercialization and traditional transformativeness in the world of unauthorized reworkings of existing original literary texts.

The second type of transformativeness that has arisen with respect to literary works is where the transformation refers to the function to which the work is put, rather than the content of the work. These are the cases like the Google book-digitization project where the works are copied verbatim, and the

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<sup>147</sup> See *Warner Bros.*, 575 F. Supp. 2d at 541 (“Courts have found a transformative purpose both where the defendant combines copyrighted expression with original expression to produce a new creative work . . . , and where the defendant uses a copyrighted work in a different context to serve a different function than the original.”).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

transformation arises in terms of enhanced searchability and easier access to the work by potential consumers. Like the more traditional concept of transformativeness, this new concept is based on a policy of enhancing social benefit, but it operates differently in that it focuses on function rather than form of the copies. In cases of transformative functionality, the creator of an original work may be less concerned about commercial purposes of the defendant and more concerned about potential market displacement. Thus, there is perhaps a clear relationship between transformative functionality and market displacement, regardless of whether or not the defendant's purposes revolve around making a commercial profit. In other words, maybe notions of traditional/substantive transformativeness go hand in hand with concerns about unauthorized commercialization of the new work, while functional transformativeness is more clearly connected with market displacement questions.

#### *B. Unauthorized Commercialization*

Unauthorized commercial benefit is obviously a key concern of those involved in any creative endeavor and the publishing industry is no exception. As we saw in Part II, in the context of fanfiction, one of the main concerns expressed by readers and authors is that a fanfiction author should not commercially benefit from characters and situations created by others if not authorized to do so. Copyright law also heavily weighs in favor of preventing unauthorized commercial appropriations of the plaintiff's work by the defendant.<sup>151</sup> Two of the four fair use factors—factors one and four—take into account the defendant's potential commercial purposes (factor one) and the damage the defendant may have done or may yet do to the plaintiff's market (factor four).<sup>152</sup> However, commercial motives on the copyist's part are less relevant in cases of transformative functionality, such as the Google book digitization project, even where an entire work is copied verbatim.

One contribution the taxonomy of borrowing makes is to assist in unpacking the concept of commercialization for copyright

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<sup>151</sup> See *id.* at 545 (on significance of commercial use mitigating against fair use generally).

<sup>152</sup> See 17 U.S.C. § 107 (2012).

purposes, and perhaps also to give a stronger sense of current market norms with respect to unauthorized borrowing. Inherent in the taxonomy is the idea that commercialization is not a “one size fits all” concept, but contains degrees of seriousness. Commercial motives on a defendant’s part may be acceptable provided that the defendant is engaging in activities that are significantly socially beneficial and do not create market substitutes for the original works, such as in the case of large-scale digital libraries. This is the point of the distinction between categories (a) and (b) in the taxonomy. The traditional commercial piracy cases involving market displacement of the original work are wrongful while cases where there is no such displacement are likely to be acceptable where there is a significant social benefit inherent in the verbatim copying.

Commercial motives are also regarded as unacceptable (or at least less acceptable) when the copyist is disseminating a work derived from the original work without attribution whether or not the resulting copy is a perfect substitute for the original work. In cases of “snippet copying” involving unauthorized commercial remixing of existing works (category (c)), the profit motives of the copyists appear to be significant to the question whether the activities should be prohibited.

The snippet copying cases are problematic because they may be “like” traditional piracy but rather than involving a verbatim copy of the whole work they are derived from snippets of multiple works. In other words, they may or may not perfectly substitute for the original work and are less likely than category (a) cases to contain appropriate attribution to original authors. High profile examples of snippet copying cases are Kaavya Viswanathan’s novel *How Opal Mehta Got Kissed, Got Wild, and Got a Life* in the brick-and-mortar publishing world and Jordin Williams repurposing snippets of Tammara Webber’s and Jamie McGuire’s best-selling self-published romance titles.<sup>153</sup> If not for the commercialization of these works, there may not have been such an outcry against them. While the repurposed works would have involved a lack of attribution to original sources, the lack of

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<sup>153</sup> See discussion *supra* Part II.C.

attribution may not have seemed as egregious or noteworthy if the copyist had not been attempting to profit from the resulting work.

To the extent that the central concern of these cases is about unauthorized commercialization, they are similar to the derivative works cases that involve unauthorized commercial profit—category (d) in the above taxonomy. While it is possible that questions of attribution could arise in a derivative works case, in many derivative works cases, attribution is express or implied from context. In cases of sequels, prequels, and retellings of an original story, the identity of the author of the original work will be obvious from the context. Readers would be less likely to be attracted to the new work if not for the existence of, and the readers' familiarity with, the original.

So, again, as with the category (c) cases, it is the idea of making an unauthorized profit from another's work that may be the key concern in many category (d) cases, rather than a concern with attribution. In countries with a robust moral rights jurisprudence, these kinds of situations—both categories (c) and (d)—could also raise authorial concerns about the right of integrity.

### *C. Attribution and Plagiarism*

There is less to say legally, at least in the context of American law, about attribution and plagiarism than about transformativeness and commercialization. This is because moral rights are not a part of the copyright legislation that applies to literary works,<sup>154</sup> and plagiarism is not a legal wrong. However, it is worth briefly discussing the relevance of concepts of attribution and plagiarism in the literary borrowing context because of their importance with respect to the existence of market norms and practices.

As noted above, allegations of failure to attribute sources and plagiarism may be more effective market deterrents to unattributed borrowing than a threat of copyright infringement.<sup>155</sup> Kaavya Viswanathan's book was quickly recalled, and her publishing deal and movie option promptly cancelled, following allegations of

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<sup>154</sup> The protections of the Visual Artists Rights Act of 1990 do not apply to literary works. See 17 U.S.C. § 106(A).

<sup>155</sup> See discussion *supra* Part I.D.

plagiarism.<sup>156</sup> The threat of copyright infringement, on the other hand, may take a much longer time to resolve itself, as it may rely on lawyers and litigation rather than on the publisher's concerns about its reputation in the marketplace. While publishers will not be cavalier about a claim of copyright infringement, it does not raise the same implications about a commercial party's honor and reputation than an allegation of plagiarism. Copyright infringements are strict-liability wrongs and illegal copying can be unconscious on the part of an author, while plagiarism contains unambiguous connotations of disreputable practices.<sup>157</sup>

The taxonomy illustrates that the situations where concerns about attribution and plagiarism come to the fore are typically the category (c) "snippet copying" cases like the Viswanathan novel and the Jordin Williams e-book.<sup>158</sup> These are clear-cut cases in which a copyist has drawn from the works of others without attribution, but has typically also done so for her own commercial benefit—to profit from deceiving the consumer about the true provenance of the work. As noted in the previous sub-part, unauthorized commercial benefit seems to be a large part of the concern about this kind of borrowing. There are few situations where there has been such an outcry about unattributed borrowing in cases where the copyist is not attempting to make a commercial profit.

#### CONCLUSION

What conclusions might we draw from the above taxonomy of borrowing in the context of literary works? Hopefully, the taxonomy, drawn as it is from actual market practices and legal cases, illustrates the most common current concerns of those involved in the digital publishing industry. In so doing, it enables us to tease out the key factors that concern authors, copyright holders, readers, and others involved with literary texts in the digital age. Copyright law can be rather a blunt instrument because of its strict-liability approach to infringing conduct.

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<sup>156</sup> See discussion *supra* Part II.C.

<sup>157</sup> See *supra* Part I.D.

<sup>158</sup> *Id.*

Paradoxically, it can also be somewhat vague in terms of the application of the flexible fair use doctrine, giving little *ex ante* guidance as to what classes of borrowing conduct are acceptable. Plagiarism, on the other hand, is a matter of honor and reputation and does not in and of itself give rise to a legal cause of action or an award of damages by way of compensation to the wronged party.

The point of the taxonomy is to draw together key threads from Copyright law and plagiarism (with some reference to moral rights doctrines in other jurisdictions) to ascertain whether laws, policies, and practices related to borrowing from literary texts in the digital age can be better streamlined or at least better understood in the future. The aim has not been to suggest dramatic law reform for the publishing sector in particular, or for Copyright law in general. To the extent that the discussion impacts on future legal applications, the idea is to guide participants in the industry and judges applying Copyright law to literary works on the key considerations that may arise in different situations. In other words, this Article is intended to focus future thinking on the most effective ways to apply copyright doctrines, with an emphasis on fair use factors one and four, to meet the needs of the digital publishing industry. As conceived in this Article, the publishing industry includes both traditional publishers and self-published authors.

A second goal of the discussion has been to help those within all segments of the industry to better understand acceptable social and market norms with respect to unauthorized borrowing from literary texts. Concepts of plagiarism and attribution are more likely to implicate publishers, authors, and consumers, than judges and legislators. Yet, they are of importance to those within the industry, and should not be ignored simply because they do not give rise to a legal claim.

From the above discussion, it seems that those involved in the various segments of the industry need to better understand when, and to what extent, concepts like transformativeness, commercialization, and attribution—or lack thereof—will be relevant in a given situation, and the interplay between them. Of course, the taxonomy is not exhaustive and there may be conduct

that does not neatly fit into the categories set out above or that may overlap categories. The taxonomy may require further explication as literary text borrowing practices continue to evolve online.

It is also important to understand that while copyright laws and moral imperatives like plagiarism are relevant and may be applied to various sectors of creative endeavors (art, literature, games, music, movies, etc.), there are significant benefits to occasionally engaging in a sector-specific examination of their application. Each field of creative endeavor involves sector-specific concerns as well as common concerns. Interestingly, copyright concerns relating to the digitization and self-publishing of literary works are relatively new in comparison to those involving other sectors of creative endeavor. The last few years have seen a rash of court cases involving the publishing industry, whereas previous decades showed comparatively little litigation involving the industry as compared with, say, music and movies.<sup>159</sup> In light of this fact, the time is ripe for a sector-specific examination of the needs of the digital publishing industry in the hopes of streamlining and clarifying the commercial and moral imperatives underpinning the modern industry.

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<sup>159</sup> See Lipton, *supra* note 53.