ARTICLES

TECHNOLOGY, THE INTERNET AND THE EVOLUTION OF WEBCASTERS... AMAZON REVISITED

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BEHIND THE MUSIC: MUSIC PRODUCERS & THEIR STRUGGLE FOR AUTHORSHIP RIGHTS

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FICTITIOUS FLATTERY: FAIR USE, FANFICTION, AND THE BUSINESS OF IMITATION

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FICTITIOUS FLATTERY: FAIR USE, FANFICTION, AND THE BUSINESS OF IMITATION
Mynda Rae Krato

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INTRODUCTION

Fanfiction is what literature might look like if it were reinvented from scratch after a nuclear apocalypse by a band of brilliant pop-culture junkies trapped in a sealed bunker.

Lev Grossman, author of The Magicians.¹

Fanfiction is defined as “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.’”² This definition, provided by a scholar on the matter of fanfiction and fair use, falls short as there are many types of fan-created mediums beyond “written creativity.” These mediums include art,³ films,⁴ and video games.⁵ Fifty Shades of Grey, a New York Times-bestselling book trilogy by author E.L. James, started out as a fanfiction based on Stephanie Meyer’s hugely popular Twilight series.⁶ In February 2015, Focus Features released the first of three Fifty Shades of Grey films.⁷ A month prior, Asylum released Bound, a “mockbuster” of the Fifty Shades of Grey film.⁸ Finally, in January 2015, comedian filmmaker Marlon Wayans

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³ See e.g. DEVIANT ART, http://www.deviantart.com/ (last visited Apr. 27, 2016) (a website allowing users to publish original and fan-based graphic art).
released *Fifty Shades of Black*, a parody of the *Fifty Shades of Grey* film. This capitalization on original works through derivative works is not a new phenomenon in publishing and film, and brings about a variety of legal issues. Namely, issues concerning infringement and fair use. Fanfiction is growing as a creative medium, and governing law must shift in order to accommodate the changes in creative landscape.

Judge Leval accurately surmised the two competing issues concerning fair use in *Authors Guild*, stating:

> The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption . . . [however,] in certain circumstances, giving authors absolute control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge.

In terms of fanfiction, the two prevailing viewpoints suggest that (1) Copyright law needs to be strengthened to ensure original copyright owners enjoy the rights and financial incentives to creation or; (2) Copyright law must be relaxed to promote creativity and the expansion of creative works. This Article advocates for a more liberal use of the fair use doctrine in relation to works derived from fanfiction. Such a stance is necessary to promote progress and expansion in creative realms under the Copyright Act and in turn, allow for the commercialization of innovative works to benefit creators. Additionally, this Article presents a statutory licensing system as a potential solution to the tension between original authors and fanfiction authors.

Section II of this Article will provide a brief background of relevant statutory and case law surrounding derivative works, fair use and fanfiction. Section III of this Article will analyze the recent outgrowth of fanfiction that has been met with commercial success, suggesting that the fair use defense be construed broadly to promote the protection of such works, as well as the resulting expansion of creativity and innovation through these works. Section III will also

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11 *Id.* at 212.
discuss the possibility of a licensing system under which original authors might seek royalties. Section IV will provide a brief conclusion.

I. BACKGROUND

A. Foundational Statutory and Case Law

Copyright law is rooted in the Progress Clause of the United States Constitution: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .” Copyright law is codified through the Copyright Act. The Copyright Act grants exclusive rights to copyright holders in protected works and aspects of works, and these rights include the right to reproduction, derivative works, distribution, performance, display, and transmission.

A plaintiff establishes infringement by illustrating (1) Ownership of a valid copyright and (2) Copying of the constituent elements of the work that are original. Courts determine the extent of infringement by first establishing which elements of a work are original to that work. Courts then analyze whether there is a substantial similarity between those elements which are original to the plaintiff’s work and those within the defendant’s work. The test for substantial similarity is based upon the judgment of an “ordinary observer” and whether he, unless he set out specifically to look for the disparities, “would be disposed to overlook [the disparities] and regard [the] aesthetic appeal [of the two works] as the same.” Additionally, courts look at the total concept and feel of the two works at issue.

The Copyright Act defines derivative works as a work based on “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

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12 U.S. Const. art. 1, § 8, cl. 8.
14 Id. § 106.
15 Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (citing Harper & Row, Publrs. v. National Enter., 471 U.S. 539, 548 (1985)). See also Copyright Act § 501 (“The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).
16 See Feist Publ’ns, Inc., 499 U.S. at 348, 350.
18 Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
19 See Cavalier v. Random House, 297 F.3d 815, 822 (9th Cir. 2002) (citing Kauf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)); Sid & Marty Krofft TV Prods. v. McDonalds Corp., 562 F.2d 1157, 1167 (9th Cir. 1977)).
a work may be recast, transformed, or adopted.”20 The definition of derivate works includes works that could be considered editorial revisions, annotations, elaborations, or other modifications that together, represent an “original work of authorship.”21 Therefore, the derivative works definition encompasses “prequels, sequels, and the retellings of existing works,” encapsulating much of what is considered to be fanfiction works.22 There is no statutory definition of fanfiction, but works within the genre are considered to be the “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.”23 This Article will explore this definition and the issues that emerge when participation in the creation and dissemination of fanfiction crosses the line of free enjoyment to commercialized success.

Fair use is another concept that is closely linked to fanfiction. Fair use is a limitation on the exclusive rights outlined in the Copyright Act. The fair use defense can be traced back to the 1841 case, Folsom v. Marsh.24 Folsom introduced the four-factor test discussed below and codified by § 107 of the Copyright Act.25 Courts examine four factors when analyzing whether a work is protected by the fair use defense:

(1) The purpose and character of use; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.26

The fair use defense allows the use of a copyrighted work for purposes of criticism, comment, news reporting, educational teaching, scholarship, and research.27 Fair use is established on a case-by-case basis and therefore, case outcomes are difficult to predict.28

20 Copyright Act §101.
21 Id.
23 Id.
25 See id.
26 Copyright Act §107.
27 Id.
Within the statutory language of the fair use defense is the exception for works of parody. The Supreme Court tailored the fair use inquiry for parody cases in *Campbell v. Acuff-Rose Inc.*, establishing that there is no presumption that all parody is fair use, transformative elements of parody reduce the significance of commercialism, the use of parody to advertise a product is less likely to fall within the fair use defense, and that the effect on the market does not include harm due to ridicule. When considering works such as *Fifty Shades of Black* and the *Scary Movie* franchise, parody remains a steadfast defense for lampoon-like works borne out of original copyrighted material. However, parody within fair use cannot represent the only pathway to protection for fanfiction, as fanfiction often embodies multiple genres beyond parody.

**B. Fanfiction Case Law**

Although fanfiction has existed since the Victorian Era, the medium has only become prevalent recently through bestselling works such as *Fifty Shades of Grey*, which began as a *Twilight* fanfiction, and *The Mortal Instruments* series, which was written by a popular *Harry Potter* fanfiction author. While there have been no cases that directly concern infringement in the context of works that are defined as pure fanfiction, this section analyzes works that follow the vein of fanfiction, or have been created by fans of original works, and have faced conflict under the current copyright law regime.

*i. Literature*

The most recent jurisprudence surrounding fair use and derivative works is *Authors Guild, Inc. v. Google, Inc.* (the “Google case”). The case considered whether Google’s act of creating digital copies of roughly 20 million books, and making such copies available to the

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29 *Campbell*, 510 U.S. at 569.
30 *Id.* at 584-86.
31 *Id.* at 579.
32 *Id.* at 585.
33 *Id.* at 583.
36 *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).
public via a search function, constituted fair use.37 The court examined the traditional four-factor fair use test, ultimately determining that Google’s digitalization of the contested works, creation of the search function, and display of text snippets through that search function did not equate to infringement and were protected under the fair use defense.38 The court held as such because it deemed the search function to be highly transformative, providing users copies of original books that “served a different function from the original.”39 The court found the fact that Google utilized its digitalization system for profit to be inconsequential, as “[m]any of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.”40 The Google case, though not directly aligned with fanfiction, illustrates the reach of the transformative element of the fair use test.

Similarly, the court in SunTrust Bank v. Houghton Mifflin Co.41 examined the fair use test in the context of what could be considered a fanfiction work. Alice Randall authored The Wind Done Gone, a retelling of Margaret Mitchell’s Gone With the Wind told from the viewpoint of an original character named Cynara.42 The court conducted a comparison of the two works, noting that The Wind Done Gone featured many of the same, copyright-protected characters as Gone With the Wind.43 However, these characters were renamed and viewed from a distinct viewpoint.44 The court continued on to conclude that although The Wind Done Gone was created for commercial purposes and achieved commercial success, this attribute was “overshadowed and outweighed in view of its highly transformative use of [Gone With the Wind’s] copyrighted elements.”45 This led the Court of Appeals to hold that The Wind Done Gone constituted fair use under the first factor as The Wind Done Gone commented and criticized Gone With the Wind.46 The Wind Done Gone took characters and scenes from Gone With the Wind and altered characteristics, storylines, and events.47 These alterations brought the work as a whole to an

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37 See id. at 207-208.
38 Id. at 229.
39 Id. at 217 (citing Authors Guild, Inc. v. HaithiTrust, 755 F.3d 87, 97 (2d Cir. 2014)).
40 Id. at 219.
42 See id. at 1259, 1267.
43 See id. at 1267.
44 See id.
45 Id. at 1269.
46 See id. at 1271-774.
47 See id.
ample level of transformation to warrant protection under the fair use doctrine.\textsuperscript{48} Additionally, the court established that *The Wind Done Gone* did not supplant the marketplace for *Gone With the Wind*\textsuperscript{49}.

Alternatively, the court in *Salinger v. Colting*\textsuperscript{50} established that a story set 60 years after *Catcher in the Rye*, entitled *60 Years Later: Coming Through the Rye*, was not sufficiently transformative and therefore did not warrant the protection of the fair use defense.\textsuperscript{51} The *Salinger* case is closely aligned to fanfiction, as the defendant’s novel took a “recognizable character and re-imagin[ed] them at a different stage of life.”\textsuperscript{52}

\textsuperscript{48} See id.
\textsuperscript{49} See id. at 1274-77
\textsuperscript{50} *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).
\textsuperscript{51} See id. at 83.
The court in *Salinger* stated that altering a setting and aging a character was not sufficient to establish transformative fair use.\(^5\)\(^3\) Contrary to the *Google* case,\(^5\)\(^4\) the court in *Salinger* agreed with a lower court, stating that the commercial nature of the defendant’s work weighed against a finding of fair use under the purpose and character of use element.\(^5\)\(^5\) The *Salinger* case introduces the issues that fanfiction authors face upon attempting to commercialize their works. Fair use and fanfiction scholar Stacey Lantagne describes the *Salinger* case as “not an ideal fanfiction precedent” as “most fanfiction is not-for-profit.”\(^5\)\(^6\) However, this case represents the emergence of fanfiction as a prevalent medium for commercialization in the literature industry.

In line with the court in *Salinger*, the court in *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*,\(^5\)\(^7\) held that a parody of Dr. Seuss’ *The Cat in the Hat*, entitled *The Cat NOT in the Hat! A Parody by Dr. Juice*, was not transformative enough to constitute fair use.\(^5\)\(^8\) The court determined that the defendant’s work did not ridicule or appropriately parody Dr. Seuss’ work and additionally, did not put forth enough “effort to create a transformative work” through new expression, meaning, or message.\(^5\)\(^9\) This holding is particularly relevant for fanfiction artists who seek to defend their works based on parody and transformative nature—courts have not created a bright line rule concerning how transformative a literary work must be in order to be protected under fair use.

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\(^{53}\) *Salinger*, 607 F.3d at 73-74.

\(^{54}\) See supra, note 39 and accompanying text.

\(^{55}\) *Salinger*, 607 F.3d at 73-74.

\(^{56}\) See Lantagne, *supra* note 52 at 170.

\(^{57}\) *Dr. Seuss Enters., L.P v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

\(^{58}\) See id. at 1401.

\(^{59}\) *Id.*
**ii. Films, Stage Productions, and Photography**

Fair use analysis in films and art is applied on a case-by-case basis and the courts have yet to hold uniformly.\(^{60}\) Recently, the Second Circuit Court of Appeals held that a parody stage adaptation of the 1991 film *Point Break*, called *Point Break Live!* was protectable under the fair use defense as the work stayed “within the bounds of fair use” and was sufficiently original.\(^{61}\) In terms of sufficient originality, the author of *Point Break Live* added jokes, props, theatrical staging, and other “humorous theatrical devices” to transform his work and distinguish it from *Point Break*.\(^{62}\) Furthermore, the court established that the author of an unauthorized work, protectable under fair use and “exhibiting sufficient originality,” is entitled to claim independent copyright protection.\(^{63}\) This holding seems to light the way for fanfiction works to establish independent copyright protection.

Photography and art are often at the center of the fair use debate. The court in *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*\(^{64}\) held that a reimagined *Men in Black* promotional poster and trailer did not rise to the level of fair use because the poster and trailer “merely incorporate[d] several elements” of *Men in Black*.\(^{65}\) The court established that the defendant sought attention for their work and avoided “the drudgery in working up something fresh.”\(^{66}\) Alternatively, the court in *Leibovitz v. Paramount Pictures Corporation.*\(^{67}\) held that an advertisement for *Naked Gun 33 1/3: The Final Insult*, which featured an image that parodied an Annie Leibovitz photograph of Demi Moore, was fair use as the advertisement could noticeably be perceived as “commenting on the seriousness, even the pretentiousness, of the original.”\(^{68}\) The issue with holding fanfiction to a standard such as this is that not all fanfiction directly comments on the work from which it is derived. Fanfiction often is a continuation of a story, or an alternate

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\(^{60}\) See Lantagne, *supra* note 28 at 286-87.

\(^{61}\) Keeling *v. Hars*, 809 F.3d 43, 45 (2d Cir. 2015).

\(^{62}\) See id.

\(^{63}\) Id. at 54.


\(^{65}\) Id. at 1188 (listing similar elements such as carrying large weapons, the New York skyline, and a similar layout).

\(^{66}\) See id. at 1188.


\(^{68}\) *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2nd Cir. 1998).
storyline all together. Holding fanfiction to the standard of parody is unrealistic, and further places fanfiction in fair use purgatory.

iii. Sound Recordings

Briefly discussed above, Campbell v. Acuff-Rose Music, Inc. solidified the place of parody within the meaning of section 107 of the Copyright Act. The case examined “Pretty Woman,” by 2 Live Crew, which was a parody of “Oh, Pretty Woman,” originally by Roy Orbison. The Supreme Court held that 2 Live Crew’s “Pretty Woman” was protected by fair use, as the song provided comment or criticism, was a parody song in nature, did not present market harm to the original, and because 2 Live Crew did not copy excessively from the original. Beyond parody, music has a dense history in terms of derivative works in the form of sampling. Sampling can be considered a type of fanfiction, as it combines original, often copyrighted material, with an artist’s new material. Historically, sampling was automatically considered infringement. The opinion in Grand Upright Music Ltd. v. Warner Bros. Records begins with “[t]hou shalt not steal,” which is acutely reflective of the sentiments expressed by the court. The defendant utilized lyrics from “Alone Again (Naturally),” written by Raymond “Gilbert” O’Sullivan. The court determined that because the defendant failed to secure rights to the composition, the defendant knowingly committed infringement. As such, a preliminary injunction was granted to halt the production and selling of the defendant’s albums with the infringing song. The opinion was short and to the point—if an artist does not secure the rights to a song, he is infringing.

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69 See generally supra notes 28-32 and accompanying text.
70 See Campbell, 510 U.S. at 572-75.
71 See id. at 593-94.
73 Id.
74 Id. at 183.
75 Id.
76 Id. at 185.
77 See id.
78 See id.
The court’s holding in *Bridgeport Music, Inc. v. Dimension Films*\textsuperscript{79} represented the turning point for sampling as infringement. The plaintiff claimed infringement upon “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics by N.W.A.\textsuperscript{80} Notably in this case, the court considered *de minimis* copying, ruling that N.W.A.’s brief use of “Get Off Your Ass and Jam” was infringement.\textsuperscript{81} In the simplest of terms, the court stated, “Get a license or do not sample. We do not see this as stifling creativity in any significant way.”\textsuperscript{82} This holding represented judicial bodies’ foray into enforcing the compulsory licensing schema under section 115 of the Copyright Act.\textsuperscript{83} Section 115 establishes a compulsory license for nondramatic musical compositions to ensure copyright owners receive royalties when their works are utilized.\textsuperscript{84} Despite the amount of what could be considered “sampling” in literature and film, no such statutory system exists for these mediums. Furthermore, in a world that is technologically evolving at a rapid pace, it is questionable whether section 115 remains useful, or is toothless.

*C. Popular Culture and the Power of Fandoms*

\textsuperscript{79} *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).
\textsuperscript{80} *Id.* at 796.
\textsuperscript{81} *See id.* at 798.
\textsuperscript{82} *Id.* at 801.
\textsuperscript{83} Copyright Act § 115.
\textsuperscript{84} *Id.*
Fanfiction is popular, the monetization of fanfiction is mainstream, and fandoms are powerful. Take *Veronica Mars*, for example. *Veronica Mars* was a television show about a teenage detective that ended in 2007. However, fans continued to write fanfiction, upload fan videos to YouTube, and speak about the show online. The show’s creator, Rob Thomas, announced he would make a *Veronica Mars* film if fans could raise $2 million in thirty days through Kickstarter. Fans raised $5.7 million in that time. Similarly, a fanfiction-like, video blog series centered on Elizabeth Bennet of *Pride and Prejudice*, managed to raise $60 thousand in less than six hours and $462,405 by the end of the fundraiser. The internet makes connecting fans around the world easy, providing fandoms the tools to consume and fiscally support unconventional mediums such as fanfiction. With the advent of such a force, fanfiction can no longer occupy the purgatorial space it has nested in under the current copyright system. The following section analyzes where fanfiction fits in under current copyright law, and how copyright law must change to allow for this fit.

Fanfiction has only risen in popularity in recent years. Fanfiction.net, for example, is a popular website wherein users can publish their fanfiction. Fanfiction.net does not provide statistics of how many users utilize the site or how many stories have been published. For illustrative purposes however, there are 739,000 *Harry Potter* stories uploaded to date. The world of fanfiction is no longer limited to a few select groups of online nerds and fan girls. Fanfiction is part of a rising tide of creative fiction that will soon require legal guidance under copyright law. As such, this Article analyzes three specific issues, providing recommendations

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86 Lantagne, supra note 28 at 279.
87 Id. at 282.
88 Id.
89 Id. at 283.
concerning each: (1) Fanfiction merits protection under the Copyright Act; (2) The fair use defense should be applicable to fanfiction; and (3) The Copyright Office should implement a compulsory licensing system similar to that used within the music industry for commercialized fanfiction works. Each recommendation presents distinct advantages and disadvantages. However, it is undeniable that lawmakers must find a place for fanfiction, grounded within the Copyright Act, as the collective appetite of consumers for such works grows.

II. ANALYSIS AND RECOMMENDATION

A. Copyright Protection of Fanfiction

Fanfiction merits protection under the Copyright Act and relevant case law. One scholar outlines several compelling arguments against the protection of fanfiction under the Copyright Act.92 Most notably, she suggests that opponents of fanfiction argue that fanfiction is not aesthetically pleasing and fanfiction is not real writing.93 However, aesthetic pleasure and the determination of what is “real writing” is entirely subjective. Furthermore, transformative use is objective. Stacey Lantagne looks to the court’s opinion in Warner Bros. Entm’t Inc. v. RDR Books, which recalls SunTrust and states: “Whether Mitchell’s heirs must tolerate The Wind Done Gone did not turn on [sic] wither either they or even the public liked the retelling.”94 It follows that if a work of fanfiction is transformative under the fair use doctrine, as The Wind Done Gone was, that work should merit individual copyright protection and should not be considered an unauthorized, infringing work. Furthermore, if a work of fanfiction fulfills the basic tenements of copyrightable material under the Copyright Act—“[an] original work of authorship fixed in any tangible medium of expression”—that work merits protection.95

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93 See id.
94 Id. at footnote 96 (citing Anupam Chander & Madhavi Sunder, Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use, 95 CAL. L. REV. 597, 615 (2007)).
95 Copyright Act, § 102.
Fanfiction could be considered a derivative work, as it falls nicely under the definition of derivative work under the statute.\textsuperscript{96} However, creating a bright line rule to categorize fanfiction as a derivate work would make all fanfiction unauthorized derivative works. Such a rule would stifle the creative output that fanfiction provides, directly contradicting the fundamental purpose of the Progress Clause of the Constitution. Therefore, the fair use defense must be broadly construed to allow for the protection of fanfiction.

\textit{B. Fanfiction and the Fair Use Defense}

As fanfiction cannot always be categorized as a derivative work, the fair use analysis test is necessary to provide some modicum of protection for fanfiction works. Genuinely transformative fanfiction warrants protection under the fair use defense. The key factor becomes the first factor of the fair use doctrine, “the purpose and character of use,”\textsuperscript{97} which was the focus of the background cases surveyed and analyzed in this Article. Some scholars argue that this factor weighs in favor of copyright holders, as “fanfiction is almost always based on copyrighted works that go to the core of copyright law, such as novels, television shows, and movies.”\textsuperscript{98} Others scholars, like Rebecca Tushnet, find that the transformative factor is nearly inconsequential as “fanfiction focuses on fictional, never factual, events” and warrants protection as such.\textsuperscript{99} Furthermore, parody continually represents an easy fallback for fanfiction-like works, as demonstrated by \textit{Point Break Live!} in \textit{Keeling}\textsuperscript{100} and the \textit{Naked Gun} advertisement in \textit{Leibovitz}.\textsuperscript{101} However, fanfiction does not always present itself as parody. Expansion of the fair use doctrine to encompass fanfiction presents its own set of problems.

\textsuperscript{96} \textit{Supra} notes 20-22 and accompanying text.
\textsuperscript{97} Lipton, \textit{supra} note 22 at 961-62 (citing William F. Paltry, 4 \textit{PALTRY ON COPYRIGHT} § 10.13 (2010)).
\textsuperscript{99} See id. at 1571 (citing Rebecca Tushnet, Symposium: \textit{Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law}, 17 \textit{LOY. L.A. ENT. L.J.} 651, 664 (1997)).
\textsuperscript{100} \textit{Keeling v. Hars}, 809 F.3d 43, 45 (2d Cir. 2015).
\textsuperscript{101} \textit{Leibovitz v. Paramount Pictures Corp.}, 948 F. Supp. 1214 (S.D.N.Y. 1996); see also Stendell, \textit{supra} note 96 at 1567 (“With respect to purpose, at least, fanfiction parodies are better positioned to claim fair use protection than other works.”).
The fair use doctrine, as it stands is, is applied on a case-by-case basis, lacking bright line rules and gradients to determine what amount of change is enough to warrant considering a work transformative. Granting protection to “minimally transformative” works would undercut authors of original works. On the other hand, refusing protection to works that are transformative enough would hinder creative expression. The analysis utilized by the courts in the Google and SunTrust cases finds a comfortable median between overprotection and underprotection. These cases remain demonstrative of a liberally-construed fair use doctrine. The central solution would be this type of application across all circuits. Fair use analysis is integral to the defense of fanfiction, but the survival of fanfiction as a genre depends on more rigorous demarcation under copyright law. Fanfiction currently occupies a space of hit-or-miss protection. Beyond a broadly construed fair use defense, the future of fanfiction depends on a new statutory framework, as discussed in the following section.

C. Commercialization of Fanfiction and a Compulsory Licensing System

An adage states, “You cannot squeeze blood from a turnip.” In terms of the law and damages, one can only win money as the result of a suit if the defendant has money to give. The most compelling issue for authors of original works who seek protective orders or damages from authors of fanfiction is whether the fanfiction author has achieved a high enough level of success to warrant the suit. Under current law, copyright holders are entirely within their right to file suit against fanfiction creators and are likely to be successful. However, the commercialization of fanfiction not only brings the matter to the attention of the author, but also makes filing suit more appealing: “[T]he only cases that have advanced to litigation, so far, have involved fan works intended to be sold.” The greater concern for authors is unauthorized profit from their work rather than pure recognition that a fanfiction stems from their work.

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102 See generally Stendell, supra note 96 at 1577.
103 See Authors Guild, 804 F.3d at 217; see generally SunTrust Bank, 268 F.3d 1257.
104 See Victor Mayer-Schönberger & Lena Wong, Fan or Foe? Fan Fiction, Authorship, and the Fight for Control, 54 IDEA 1, 21 (2013) (“If and when a work of fanfiction turns commercial or otherwise morphs into a significant threat, authors can advance conventional copyright claims against fan fiction authors, and will likely be relatively successful.”).
105 Lantagne, supra note 28.
106 Lipton, supra note 22 at 993.
Copyright law does not allow for copyright infringement upon an idea or stock characters. As such, plaintiffs in copyright suits must also consider the idea-expression dichotomy in relation to commercial impact when filing suit. This idea was explored by the court in SunTrust: “[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work.” Artists are entitled to profit from ideas, if they can. However, fanfiction often rides the line between ideas and expression, which is protectable under copyright law.

A way to protect this unique expression would be through a compulsory licensing system that mirrors that which was created for sound recordings under Section 115. The sound recording licensing system allows for a royalty to be paid to an original copyright owner. If such a system were created for other mediums of art, fanfiction authors could pay a statutorily-set rate through an agency to ensure attribution and remuneration to lawful copyright owners. The compulsory system for sound recordings is at the center of copyright debates.

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109 See Copyright Act, § 115(c).

110 See, e.g. Eriq Gardner, Why Taylor Swift May Soon Be Able to Stop Cover Songs on Spotify Too, HOLLYWOOD REP. (Feb. 5, 2015), http://www.hollywoodreporter.com/thr-esq/why-taylor-swift-may-soon-770698 (examining a Copyright Office publication suggesting a way for music publishers to opt out of the Section 115 compulsory license).
This does not exclude the idea of a similar system, with more favorable rates set by the Copyright Royalty Board for original copyright holders, to be created and set in place for literature, film, and other creative mediums. The *Bridgeport* court’s notion, “Get a license or do not sample,” could be directly applicable to the creation and dissemination of fanfiction. While fanfiction has traditionally been published online for free, negating the need for such a system, fanfiction authors have expanded past free to monetization. The Copyright Act will need to adjust to allow for the emergence and staying power of this creative medium.

**D. A Final Note on Fandoms and the Law**

The attitude toward fanfiction is changing due to the undeniable power of fandoms. To illustrate, Lucasfilm, historically embraced fan-made content. In 2014, a website compiled and counted user-submitted content to various fan-art sites, estimating that the *Star Wars* fandom extended to six million individuals. When the Walt Disney Company purchased Lucasfilm, critics of the merger worried that Lucasfilm would retract its support for its widespread fandom. However, Lucasfilm has continued to embrace the work of its fans, even continuing to hold a contest called “The Star Wars Fan Film Awards.” The contest, existing since 2002, asks fans to submit videos based on the *Star Wars* universe. Lucasfilm’s support of its fan base is a testament to the evolving attitude toward fanfiction and fandoms.

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112 See *Lantagne*, supra note 28 at 301-302.
113 See generally, supra note 83-87 and accompanying text.
115 See *GEEK TWINS*, *Internet Fandom By the Numbers* (last visited Apr. 27, 2016), http://www.thegeektwins.com/2014/03/internet-fandom-by-numbers-infographic.html#VyONRN-rTEY.
116 See Mullin, supra note 112.
118 Mullin, supra note 112.
119 See *STAR WARS FAN FILM AWARDS*, supra note 115.
Fandoms are unlikely to retreat in terms of protection of their fan-made art. Fanfiction represents a medium through which fans can not only imitate, but add something to art they enjoy.¹²⁰ Fans desire a way expand their experience of a work by manipulate characters and storylines and engaging in creative exercise over a work.¹²¹ Once fanfiction transforms a work, and consumers see value in that work, the work takes on an entirely different form from the original. This is the point at which fanfiction authors enter the business of imitation. Fandoms desire more fanfiction, and there must be legal restraints and protections on this medium to ensure just compensation for both the original copyright owner and the fanfiction creator. The Organization for Transformative Works (“OTW”) seeks to educate the public on the legal issues surrounding fandoms, fanfiction, and copyright protection.¹²² It is organizations like this that will pave the way for fanfiction as copyright law faces the inevitability of reform.

CONCLUSION

Fanfiction is a growing medium for creative works. While fanfiction is often published for free, commercialized forms of fanfiction are also growing in popularity. Copyright law will need to evolve to accommodate these works and as such, the fair use defense must be construed broadly to ensure further innovation and protection of unique, artistic, fanfiction in all mediums. Additionally, the Copyright Office should consider a statutory framework similar to the compulsory licensing system for music, as it would allow for royalties to be paid to original authors. The desire for more fanfiction-based media ultimately necessitates copyright reform to ensure the fair protection of the rights of both original authors and fanfiction authors.

¹²⁰ See Lantagne, supra note 28 at 301-302.
¹²¹ See id.
TECHNOLOGY, THE INTERNET AND THE EVOLUTION OF WEBCASTERS... 
AMAZON REVISITED

Jessica Michelle Ciminero, Esq.*

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I. INTRODUCTION

With advances in technology, Internet music distribution services are in a constant state of change with new services being introduced to the market, and current services either striving to maintain their dominance or attempting to catch up. This article will discuss the various methods of digital music distribution, as well as the intellectual property issues that result from this shifting landscape. This article will revisit Amazon’s position post launch of Amazon Music Unlimited in 2016 and analyze how this may impact the (r)evolution of webcasters.

II. INTELLECTUAL PROPERTY ISSUES THAT RESULT FROM A SHIFTING LANDSCAPE OF MUSIC DISTRIBUTION

It is increasingly evident that more and more obstacles will surface “when anything based on precedent and tradition, as well as [resistance] to change, comes face to face with technology.”\(^2\) Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRA)\(^3\) and the Digital Millennium Copyright Act of 1998 (DMCA)\(^4\) in an attempt to align copyright laws with the increasing trend toward online music services as “part of a general strategy of control over access to digital content.”\(^5\) The DMCA “created a new species of legal rights, sometimes called ‘paracopyright,’”\(^6\) which provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”\(^7\) Nonetheless, despite efforts to bring the law up to speed with a technological world, the reality is such that “technology advances faster than the law,”\(^8\) and because of this there exists an inherent “lack of understanding and clarity as to how the law should be, or is, applied to new sets of facts.”\(^9\)

\(^{6}\) Id.
\(^{9}\) Id. at 47.
The more that copyright law looks like an old man unable to keep up, the further those opposing viewpoints become entrenched. As notions of copyright become demonized, myths proliferate; including that copying music for any reason is bad. These gross misunderstandings of the law are harmful. . . . We are the consumers and creators of content, and they are supposed to be the law – the essential purpose of which, ironically, is to support the creation and development of that content.10

A. BACKGROUND: LEGAL DEFINITIONS – THE DPRA & DMCA

The DPRA provides definitions pertinent to music streamed via the Internet. First, a digital transmission is defined as one that is “in a digital or other non-analog format,”11 and a digital audio transmission is one “that embodies the transmission of a sound recording.”12 The DPRA also defines a digital phonorecord delivery as “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.”13

Classifying the distribution method of digital audio transmissions as streaming or downloading is material for purposes of copyright law and determines various legal implications, such as its licensing requirements, which will be discussed below. A download is “a complete transfer of audio content from the [Internet] onto a computer hard drive” granting the user the capability of listening on demand.14 Streaming, on the other hand, is a “continuous transmission of music over the Internet in real time so that listeners hear the music as it is transmitted to them from a website or other source.”15

Streaming then gets broken down further into interactive versus non-interactive classifications. The DMCA defines an interactive service as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is

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10 Id.
11 § 5, 109 Stat. at 348; see also § 101 (defining transmit: “to communicate . . by any device or process whereby images or sounds are received beyond the place from which they are sent.”).
12 § 3, 109 Stat. at 343.
13 § 4, 109 Stat. at 348 (specifying that it “does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission receipt in order to make the sound recording audible.”).
selected by or on behalf of the recipient.”16 By contrast, with a non-interactive service, “the user experience mimics a radio broadcast . . . [and users] are provided a pre-programmed or semi-random combination of tracks, the specific selection and order of which remain unknown to the listener.”17 Next, there is a breakdown of subscription versus non-subscription based music services. The DMCA’s definition of a subscription service is one “that performs sound recordings by means of noninteractive audio-only subscription digital audio transmission”18 and a non-subscription transmission as:

made as part of a service that provides audio programming consisting . . . of performances of sound recordings . . . if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.19

Webcasters exist in various shapes and forms falling within the above-mentioned defined categories. Traditional Internet webcasters play music “solely to an Internet audience and . . . [are] not interactive or on-demand.”20 However, most noteworthy are personalized Internet webcasters, which are on-demand, interactive or subscription-based.21 This type has been coined the ‘celestial jukebox’ – “a technology-packed satellite orbiting thousands of miles above Earth, awaiting subscriber's order – like a nickel in the old jukebox, and the punch of a button – to connect him to any number of selections from a vast storehouse via a home or officer receiver.”22

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16 § 405, 112 Stat. at 2898; see also § 405, 112 Stat. at 2899 (defining a transmission: “either an initial transmission or a retransmission.”).
18 § 405, 112 Stat. at 2899 (offering “a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis” for promotional purposes is permitted).
19 § 405, 112 Stat. at 2898 (emphasis added).
20 Raffi Zerounian, Bonneville Int’l v. Peters, 17 Berkeley Tech. L.J. 47, 53-54 (2002) (explaining some webcasters have a “predetermined format,” while others “have skip forward functions and playlists.”).
21 See id. at 54; see also Carpenter, supra note 8, at 50 (noting additional features, such as playlists that can be made and shared “through iTunes or other websites such as Mixcloud, tracks.com, Playlist, Opentape . . . and MixTape.me.”).
22 Paul Goldstein, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 199 (Hill & Wang 1994).
Significantly, no permanent copy of the media is stored on a user’s computer with these streaming jukeboxes, but rather they produce ephemeral copies – “temporary, buffer copies” – stored on the computer’s RAM (random access memory).

1. MUSIC COPYRIGHT LAW: LICENSING REQUIREMENTS

“In a society where cultural revolutionaries often rail against ‘the Man,’ copyright law itself is portrayed as ‘the Man.’” In order for webcasters to operate legally, they must assess which licenses are required to be secured for two copyrights under 17 U.S.C. § 102(a) – for the underlying musical composition as well as for the sound recording. Because the musical composition is a copy under the Copyright Act, the exclusive rights that attach include the rights of reproduction and public distribution. Sound recordings, however, are treated differently and are afforded the right of public performance “by means of a digital audio transmission.”

As mentioned above, the type of transmission an Internet music service offers – downloading or streaming – will determine which type of license(s) must be acquired. § 115 sets forth guidelines to obtaining reproduction and distribution rights to the underlying musical composition (the nondramatic musical works) via a compulsory mechanical license in exchange for royalty rates set by the Copyright Royalty Board. Per the statutory language, this license is not available for sound recordings. To reproduce the sound recording, a master use license is required. As such, while a copyright owner’s public performance right is not triggered by a download, services that offer downloading of digital music files are nonetheless required to secure licenses for both the composition as well as for the sound recording.

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24 Carpenter, supra note 8.
25 § 106(1), (3).
26 § 106(6); see also § 114 (noting the limitations on the § 106(1)-(3) exclusive rights in sound recordings: clause (1) “is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording” and clause (2) “to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” These rights “do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds” nor do they “apply to sound recordings included in educational . . . [public broadcasting entities] radio programs” so long as copies of the programs are not publicly commercially distributed).
27 See Moser & Slay, supra note 15, at 76-83; see also 17 U.S.C. § 115(a)(1) (stating the “primary purpose in making phonorecords [must be] to distribute them to the public for private use”).
29 Moser & Slay, supra note 15, at 255.
30 See Wagman, supra note 14 (noting iTunes as an example: because it functions as a retailer, it “does not pay mechanical licenses directly . . . the record label pays the mechanical royalties instead.”).
Alternatively, streaming music does trigger the public performance right.\textsuperscript{31} Certain streaming services are subject to compulsory licenses and others are subject to negotiated performance licenses, often managed by performing rights organizations\textsuperscript{32} – licenses for musical compositions managed by ASCAP, BMI, and SESAC and licenses for the sound recordings by SoundExchange.\textsuperscript{33} The distinction in licenses is based upon the characterization and nature of the streaming service, primarily whether or not it is interactive.\textsuperscript{34} A non-interactive webcaster must obtain a sound recording license and a public performance song license.\textsuperscript{35} Interactive webcasters, on the other hand, are not able to obtain a compulsory license; rather the DMCA sets forth “a statutory right for webcasters to be eligible for a license for copyrighted sound recordings.”\textsuperscript{36} This distinction was due to Congress’s conclusion that “interactive services were more likely than noninteractive services to cause harm to conventional record sales.”\textsuperscript{37} The rationale was that consumers’ varied interaction capabilities would lead to the likelihood that they “[would] not buy a recording of the song, whether on a CD or through a digital download.”\textsuperscript{38} However, this fear might be misplaced, as individuals may also use webcasters as a means to sample music in order to decide whether or not to purchase it.

\textsuperscript{31} Moser & Slay, supra note 15, at 255.
\textsuperscript{32} See id., at 108-13.
\textsuperscript{33} See generally ASCAP Payment System, \url{https://www.ascap.com/help/royalties-and-payment/payment/whocollect} (last visited Apr. 29, 2017); see generally BMI and Performing Rights, \url{http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights} (last visited Apr. 29, 2017); see generally SESAC, Licensing FAQs, \url{https://www.sesac.com/Licensing/FAQs.aspx} (last visited Apr. 29, 2017); see generally SOUNDEXCHANGE, \url{https://www.soundexchange.com} (last visited Apr. 29, 2017).
\textsuperscript{34} See Moser & Slay, supra note 15, at 126-27.
\textsuperscript{35} Sugo Music Grp., supra note 17; see also Moser & Slay, supra note 15, at 76.
\textsuperscript{36} Webcaster Alliance, Inc. v. Recording Indus. Ass’n of Am., Inc., 2004 U.S. Dist. LEXIS 11993, at *2 (N.D. Cal. Apr. 1, 2004) (citing § 114(d)(2)) (noting further that the “license is ‘compulsory’ as to the copyright holders but ‘voluntary’ as to the webcasters.”).
\textsuperscript{38} Conley, supra note 23, at 432.
III. ANALYSIS: THE (R)EVOLUTION OF DIGITAL MUSIC DISTRIBUTION: WEBCASTERS VERSUS TRADITIONAL RADIO

With the Internet and new media sources, of which “[t]he past thirty years has seen an explosion,” has come momentous changes in how we purchase, share and listen to music. Although Congress expressed a fear of displacement of conventional record sales, in this Digital Age where digital music may become the new ‘conventional,’ the concern becomes whether the music industry would suffer even if there were a complete shift of sales methods.

The IFPI Global Music Report showed that by 2015 digital music revenues accounted for 45% of global revenues, whereas physical sales only accounted for 39%. In fact, this 10.2% increase of digital revenues to $6.7 billion marked “the industry’s first measurable year-on-year growth in [twenty] years” with global revenues rising 3.2% to $15 billion.

Music Watch had projected that in 2016 “the average music customer in the United States [would] pay about $67 . . . on recorded music,” which is an increase from the $55 in 2015, working its way back up to the $80 seen “around the peak of the CD market” in 1999. Moreover, according to Nielsen’s 2016 U.S. Year-End Report, on-demand audio and video music streams have increased 39.2% from 310.1 billion streams in 2015 to 431.7 billion in 2016, and with this increase in streaming activity total digital consumption has increased by 8.9%. Lastly, as an additional example of the path to this new norm, “2016 saw the first album to chart based solely on streaming activity.”

41 Id. at 4, 8.
Today’s brave new technological world, with its increasingly widespread use of webcasters, offers many advantages to users. With traditional radio, the audience capable of listening is limited, for example by their location to access a particular radio station.45 Then came the Internet. “The Internet is not a thing; it is the interconnection of many things – the (potential) interconnection between any of millions of computers located around the world”46 and by early 2017 there were over three billion Internet users worldwide.47 These billions of Internet users have the option to listen at any time to a vast number of stations being broadcast across the globe.48 1994 marked the beginning of this trend to online streaming of terrestrial radio stations and today there now exist over 400 legal online music distribution services worldwide.49 Webcasters provide additional benefits not achievable by traditional radio such as increased access for users and increased exposure for musicians.50 As a result of the opportunities revealed by the Internet, “p2p [(‘peer-to-peer’) users have assembled the ‘greatest library of recorded music ever,’ including many uncopyrighted, unavailable, and out-of-print titles.”51 Since the infamous Napster litigation, peer-to-peer file sharing networks have been trying to persevere and avoid the same downfall. However, even after Napster was shut down, “its roughly forty million users did not sign off – they simply migrated to other file-sharing services.”52 At a practical level, when one peer-to-peer file sharing service, like Napster or LimeWire, is shut down, another service will soon emerge – and they have, in masses.53

48 See Hardman, supra note 37, at 292; see also Jon Pareles, With Streaming, Musicians and Fans Find Room to Experiment and Explore, N.Y. TIMES (Dec. 22, 2016), http://www.nytimes.com/2016/12/22/arts/music/streaming-album-bon-iver-kanye-west-frank-ocean.html (citing reports from the International Federation of the Phonographic Industry that 68 million people paid for music streaming subscriptions by the end of 2015 and projecting by 2017 the number would rise to 100 million subscribers worldwide).
49 Find Music Services, http://pro-music.org/legal-music-services.php (last visited Apr. 25, 2017); see also Hardman, supra note 37, at 303.
52 Spektor, supra note 50, at P6.
A. AMAZON MUSIC UNLIMITED – ALEXA, WILL AMAZON WIN THE BATTLE OVER DIGITAL MUSIC DISTRIBUTION?

Although an initial response to the question ‘which webcaster will you choose to fulfill your music fix?’ might be Spotify or Pandora (or now Apple Music, perhaps), Amazon Music is the subtle beast that may be inching its way toward the top of this digital music distribution battle. Amazon Music’s driving competitive factor has been its prices since its first launch in 2014 when it bundled its music services Amazon MP3 and Amazon Cloud Player/Cloud Drive into, simply, Amazon Music – which now includes Prime Music. While Prime Music’s catalog started at around one million, not only has it doubled to “a growing selection of [two] million songs,” but now Amazon has also introduced its more premium streaming service Amazon Music Unlimited to the market where users can “unlock tens of millions of songs” and new releases every week.

Amazon Prime members can log into their account to purchase nearly anything. With Amazon’s bundled service users can shop, stream television shows, watch movies, and now listen to music. Amazon, with all of these services and features in one convenient location, has itself perfectly situated to out-shine its competitors, especially when taking into consideration its enormous user base – 183 million unique visitors as of March 2017.

54 See Sisario, supra note 53.
If users are already paying the minimal $10.99 per month (or $99 per year) for the benefits of Prime membership, it begs the question why they would then also pay an additional $9.99 per month for Spotify Premium, for example, or pay an additional $4.99 per month for Pandora Plus or $9.99 for Pandora Premium, when Prime Music offers a very comparable experience at no additional cost.\(^5^8\) Prime Music, like the paid subscription version of Spotify or Pandora, offers ad-free, on-demand music with “unlimited skips and offline payback” as well as “playlists curated by [their] music experts, [and] personalized stations to fit every moment.”\(^5^9\)

If Prime users want to spend an additional monthly expense, they can conveniently remain with the one service and pay only an additional $7.99 per month (or $79 per year) to upgrade to Amazon Music Unlimited – where again, its features and benefits are strikingly similar to Spotify, and even Apple Music.\(^6^0\) Like Spotify, Amazon Music Unlimited offers users the ability to create playlists, download for offline streaming availability and use an unlimited number of skips.\(^6^1\) Furthermore, similarly to Apple Music, Amazon Music Unlimited users’ previously purchased music from Amazon will be displayed and stored together with new music from the streaming service in the users’ personal online library. Lastly, in keeping current with our ever-evolving technological world, each of these services have apps for mobile devices, and now where Apple has Siri, Amazon has Alexa and Prime users can listen to music with Amazon Echo, Echo Dot or Amazon Tap.\(^6^2\)

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59 Prime Music, [supra note 55].


61 Amazon Music Unlimited, [supra note 56].

For Echo users, Amazon again has an edge on competitors in terms of price—Amazon’s rate of $3.99 per month “is far lower than has ever been charged for what is essentially a complete catalog of music online.”63 While a new entrant to this market should strive for a distinguishing feature to set itself apart from the competition (along with ensuring complete compliance with all applicable copyright laws), Amazon is in a position of power in this battle over the digital music market and can instead offer a service that is up to par with its competitors and capitalize on its own pre-established advantages.

IV. CONCLUSION: EVOLUTION

With the advent of music via the Internet, “[t]he more music people are exposed to . . . the greater chance they will find something they like. The more people discover music they like, the more likely they are to purchase that music.”64 From cassette tapes to online playlists, not everything has changed—it is still just as:

the olden days, [when] boys and girls used to spend hours using double cassette decks to carefully craft mix tapes to share in order to express their innermost longings in an artsy way. It sometimes led to love and inadvertently increased record sales by sharing a little taste of previously undiscovered bands.65

What has changed is that in today’s Digital Age we can find webcasters nearly everywhere—competition is thriving, as it should, because after all, "how much do we love this thing called music?"66

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63 Sisario, Amazon Speakers, supra note 54 (adding “one of the most popular commands on the service is simply, ‘Alexa, play music,’ which generates a Pandora-like playlist based on a customer’s past listening.”).
64 Carpenter, supra note 8, at 72.