Remixers' Understandings of Fair Use Online

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ABSTRACT

How do online content creators make decisions about copyright law? In the course of day-to-day online activities, Internet users are forced to make subtle judgments about one of the most confusing and nuanced areas of law, copyright and fair use. In this study, we conducted semi-structured interviews with eleven content creators who participate in remix and fan creation activities online, to try to probe their legal understandings and attitudes. We found that social norms that emerge among these content creators do not always track to what the law actually says, but are often guided more by ethical concerns. Our participants showed surprisingly similar patterns of understandings and confusions, impacting technology use and interaction online.

Author Keywords

copyright; creativity; fair use; fandom; intellectual property; internet; law; remix; social norms; user-generated content

ACM Classification Keywords

K.4.1 **[Computers and Society]:** Public Policy Issues --- *Intellectual property rights*

INTRODUCTION

In online spaces, a number of aspects such as technical limitations or cultural norms influence what users can and cannot do. In understanding group dynamics, CSCW research often focuses on the entire socio-technical system. However, a part of this system infrequently examined is the role of law. One striking example of the law (or perceptions of the law) impacting online behavior is in the realm of copyright and content creation. From the massive popularity of peer-to-peer networks to the rise of remix culture and user-generated content sites like YouTube, the notion of what sorts of uses someone can make of copyrighted work is touching amateur content creators in a way that it simply didn't a decade ago. As a result, the answer to "Can I do this?" in an online creative space may have a legal rather than a technical answer.

In the United States, *fair use* is the legal mechanism that allows for uses of copyrighted content under certain conditions. Without it, we would not be able to quote from books in book reviews, or parody film and music on comedy television shows like *Saturday Night Live*. However, since determinations of what constitutes fair use are made on a case-by-case basis, the concept is deliberately vague and notoriously ambiguous [2,13]. Content re-use has long been considered one of the most complex areas of copyright law. In 1841, Justice Story referred to the problem as the "metaphysics" of law (*Folsom v. Marsh*), and in 1992 the United States Supreme Court agreed that fair use remains the "most troublesome" aspect of all of copyright law (*Campbell v. Acuff Rose*). This is a problem that has only grown along with technology, and if lawmakers, judges, and legal scholars can have reasonable debates about what may or may not be a fair use, then it is not surprising that ordinary Internet users have trouble drawing these lines as well. Yet, "Can I do this?" is a question that many online content creators have to ask themselves in the context of using pieces of copyrighted works.

Traditionally, copyright was not an area of the law that held much relevance for the majority of people. However, the amount of agency that people have with technology has changed drastically, and so has the way that consumers interact with copyrighted material. We have seen a significant cultural shift toward using previously existing content in new ways [24]. Consumers are not only producers but remixers—that is, not just creating from scratch but also making use of existing content—thanks to the digitization of nearly all media which makes manipulating it possible for anyone with common computer software, and to the wide dissemination of amateur content made possible by the Internet. However, just because the law is more relevant to more people does not mean it is more easily understandable. Technological advances have only exacerbated the same confusions that have always existed in applications of copyright law.

Understanding and knowledge of applicable legal doctrines can change in this environment as well. In situations in which the law is unclear or largely unenforced, it is not uncommon for community constructions to become social norms that can carry more weight than written law [10].

Though the term "remix" originally applied to music, the concept has become much broader in recent years. As

Lawrence Lessig describes in his book on the subject, remix is an act of read-write creativity—not just consuming content but using it to make something new [24]. By "remixer" we mean anyone who makes use of content created by someone else in new, creative ways. We wanted to better understand how remixers might think about copyright law and its relationship to their online creative activities. In the absence of bright line legal rules, how do they make decisions about what they can or can't do when it comes to creative appropriation?

Though we wanted to study "remixers," we did not want to focus on a specific online site or media type. Our subjects responded to an ad asking for "online content creators," and specifically those who create "remixes" and "fanworks" in a variety of media (see Methods section below). Because all of our participants self-identified as being creators of fanworks, we consider this our population, a subset of remix.

Therefore, we conducted interviews with online content creators who specialize in fanworks—art, writing, music, video, or other media based on media properties such as television shows, books, or videogames. The "fandom" community forms a set of subcultures focused on shared significant interests in these media. These practices date back to the days of Sherlock Holmes and Jane Austen, but have flourished since the 1970s when fans congregated around science fiction television shows such as *Star Trek* [8]. The first author has experience as a fan writer.

Like the issue of fair use itself, copyright complications with fanworks do not begin and end with the Internet. Fan creators have been remixing works since long before digital technology was prevalent [8,20]. However, as in many other contexts, changing technology has exacerbated already-existing tensions [11,33]. Fan creators provide us with an example of social norms that derive from the creative community itself rather than being dependent on a specific online site or technology. The current study therefore does not focus on a specific online site but rather on the shared activity of creating fanworks.

RELATED WORK

Research in the field of creativity and technology emphasizes that creativity does not exist in a vacuum, and indeed, it is inevitably influenced by context, including the connection between artist and broader cultural and technological factors [6]. We see these common themes appearing again and again in studies of amateur content creators—such as the importance of attribution, and tension over commercialization. This is true both for creators of original content, such as digital musicians [6,30] or knitters [18], and for remixers, such as fan fiction authors [11,16] or video mash-up artists [9]. Sometimes the online spaces they frequent might have technical support for these kinds of norms, though very often not [29], which suggests that online community designers may not always be aware of them.

One example is the Scratch online community, made up of young people sharing user-generated content they create through programming, in which norms about reuse and attribution have evolved within their remix practices [27]. Researchers found that whereas there are both positive and negative reactions to work being remixed within the community, the idea of attribution and credit was of near-universal importance. Even with (presumably) little knowledge of copyright law, norms emerged in the community about when remixing was okay based on whether appropriate credit was given to the creator. Remixing in this context will only become more important—Lange and Ito note that many of the activities in which youth are developing creative identities and competencies involve appropriation, such as music remixing and anime video creation [22]. Hill and Monroy-Hernandez have also discussed ways to promote remixing and originality among their young Scratch users, [17] a goal that has been posited by other researchers as well [5,20,22].

In the interest of advocating remix within the combative copyright environment, Aufderheide and Jaszi studied different communities of creators to reveal practices and attitudes about using copyrighted material, and then published a book as a guide to fair use for online content creators [2]. In one of their studies, of college students who upload online video, nearly half of the participants said that they never incorporated copyrighted material in their work [1]. Some were simply confused about what is copyrighted, but for others, they purposefully did not incorporate material for fear of getting into trouble—possibly a chilling effect of the law. Though traditionally referring to when free expression is "chilled," this effect comes into play when any conduct is suppressed for fear of penalty.

Another major finding of Aufderheide's study was that participants did not understand even elementary facts about copyright; with respect to fair use, three fourths of participants believed that it permitted them use of copyrighted materials but none were able to describe the doctrine accurately. Other studies have revealed similar misunderstandings of copyright law, such as among documentary filmmakers [23] and librarians [14]. Legal scholarship on the subject of social norms and content production has suggested that people may have intricate intuitions about the law without actual knowledge to back it up—and that this phenomenon is particularly pronounced in communities of online content creation such as fan creators [11,16,33].

Fan culture is particularly interesting with respect to issues of copyright and appropriation. The community of fan creators does not fit within the bounds of a particular online site. Instead migrating to some degree with changing technologies [8], the group has established highly ingrained social norms that are not tied to a particular technology [11]. Researchers have examined how fandom communities make use of different technologies, such as Livejournal [31]

or Twitter [26], as well as the norms that form. Communities of fan creators are notoriously tight-knit [20], and Ito notes from her interviews with members of the anime music video community that standards for behavior and creativity derive from this closeness [22]. They have specialized practices that rely on deep knowledge of the subject matter and the community, an environment that makes it easy for norms to proliferate. Fans have also been struggling with legal issues for decades, much longer than most remix communities, but chilling effects have become more common in recent years [7].

METHODS

In the current study, we interviewed eleven online content creators—two in-person interviews for local participants, and nine conducted by phone. Our criteria for inclusion was that each participant dealt with issues of appropriation in their creative work, and identified fanworks as a major part of their online creative activities. Participants were recruited through postings in online remix communities. We also attempted to use fliers on a college campus, but were unsuccessful in gaining any participants this way. Though we posted to websites that catered to fiction and music as well, the participants that contacted us came from communities that focused on art (DeviantArt) and video (a Livejournal fan video community), though also participated in a wider range of activities (see Table 1) and a large number of different online content creation websites.

Recruitment materials sought "online content creators," specifying a particular interest in those who created remix works or fanworks. Because we asked our participants to recommend others who might be interested in participating, word of mouth was also a recruitment tool; therefore, we had in part a "snowball sample" of participants [3]. Five of our participants came to us directly from seeing our recruitment materials, and six heard about the study from other participants. Though this technique does produce a more homogeneous sample, it also has the benefit of allowing the interviewer to explore shared meanings among the community being studied [30]. Additionally, though our sample size is only eleven participants, research has shown that data saturation can occur quickly in thematic analysis of qualitative interview data, and that most codes/themes can be present in as few as six interviews [15].

Participants were 10 women and 1 man, ranging in age from 19 to 36. This gender breakdown is not unusual for the community of fan creators, which is traditionally predominantly female [7,19]; though the Internet has shifted demographics of fan communities, this is largely with respect to age (younger) and nationality (more global) while maintaining the gender gap [21]. All participants lived in the U.S. and participated in primarily U.S.-based online communities. As detailed in Table 1, our participants covered a range of different media types in their remixing activities, including fan art, fan video, and fan fiction and roleplaying (both types of writing), as well as music and

graphics remix. We also captured non-remix content creation that might be relevant to the discussion (blogging, and original art and fiction); for example, some of the participants with blogs brought up copyright issues with respect to using images in their blog posts.

Interviews were semi-structured, and included questions about online activities, including types of content creation and sharing, as well as online communities participated in; scenarios related to copyright and content creation, asking for their judgments about how the law applied and how they thought it should apply; and knowledge about U.S. copyright law. The purpose of these questions was to tease out their attitudes about different aspects of the law, how they felt it applied to their work, and the ways in which different technologies as well as their knowledge of the law affect their online creative activities. The semi-structured interview protocol gave us the flexibility to dynamically adjust questioning based on the participants' responses. The idea behind this technique is to consider not just a behavior itself as stated, but the meaning behind it [28].

After transcribing the interviews, we conducted a thematic analysis of the data. This method of identifying, analyzing, and reporting emergent patterns (or themes) within a set of data is a type of open qualitative coding that maintains some theoretical freedom [4]. Our analysis relied in part on the first author's expertise in copyright as a law school graduate. Though a number of themes emerged from our interviews, one concept that came up consistently was that of fair use. After having coded all of the data, we considered just the data that had been coded for fair use concepts, and examined it more closely.

RESULTS

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

Judging from previous research, including studies of documentary filmmakers and remix video creators, we expected to see misunderstandings of the law; however, a more surprising finding was just how similar the misconceptions were among our participants. Even across different types of creators—writers, visual artists, filmmakers—intuitions about what makes a use "fair" were by and large the same. What follows is a discussion of these common understandings (and misunderstandings) of fair use, as well as patterns of heuristics and judgments used in thinking about the law. In order to emphasize the relationship between these understandings and the actual law, we organize our findings based on the four fair use factors. Though a judge determines whether something is fair use on a case-by-case basis, the Copyright Act of 1976

	Fan Fiction	Fan Art	Fan Video	Fan Roleplaying	Music Remix	Graphics Remix	Original Fiction	Original Art	Blogging
1	■			■					■
2		■				■		■	
3	■			■					■
4				■	■				■
5			■		■				■
6		■		■					
7	■			■					
8	■								■
9	■		■			■			■
10		■				■			■
11	■	■						■	■

Table 1: Types of Content Creation by Participant

codified these four factors that must be weighed in making this determination:

> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

> 2. the nature of the copyrighted work;

> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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

The Purpose and Character of the Use

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

Noncommercial Use

Whether a use is commercial or noncommercial is only one part of the first factor weighed in fair use determinations. Generally, noncommercial use weighs more toward a finding of fair use. This factor is usually a point in favor of remixers who typically do not profit from their work. However, the definition of "noncommercial" is not clearly defined in case law [33].

Most participants (eight out of eleven) implied that this was the single most important factor in determining whether a use is fair. This backs up previous legal scholarship that has pointed out the deeply ingrained norm of noncommercial use within fan communities [11,16].

Some participants (P4, P5, P7, P8) also expressed frustration that, like the doctrine itself, a judgment of commerciality is in a gray area. When pushed to define the boundaries of noncommercial use, they disagreed over where this line should be. Some thought that having ads on a website that displays remixed work was a deal breaker, whereas others stated that the remixer has to be explicitly selling something.

On my website, it has Amazon ads that help pay for the bandwidth or whatever for it. But I don't know that I would consider that as a profit-making enterprise that would be a big deal since I think I've made like 13 dollars in two years, which isn't enough to cover even the space. – P5

I don't think they should be making money from it. It's like a hobby, right? I mean, if you were making money, like if you were selling a DVD of your vids that had such and such song and clips from such and such show then the owners of that stuff should get some of the proceeds. If you profit from ads, same thing. – P8

In fact, many participants (five out of eleven) when discussing commercial use spoke in terms of "profiting." The issue was not whether any money exchanged hands at all, but whether the person making use of the copyrighted work was personally benefiting from the use. For example, charity auctions in fan communities are not uncommon. One participant (P11) spoke of the "Help Haiti" initiative on Livejournal (a blogging community) in which fan fiction writers and artists offered their services (to write or draw to specifications) to the highest bidder, with the proceeds going to the Red Cross. She noted that the noncommercial norm within the community doesn't seem to apply to this

situation because the artists are not personally profiting from the original works.

Another community norm that several participants articulated but had difficulty explaining is the significance of media with respect to noncommercial norms—specifically, the fact that within fan communities there is more tolerance for selling fan art than fan fiction. With the exception of charity auctions, there have been documented instances of fan fiction writers being ostracized for attempting to sell their work [11,16]; however, the same does not seem to be true for art. One fan fiction writer (P9) expressed envy that artists can sell their work at conventions, noting that "you could never get away with that" as a writer. Another participant (P11) was an artist who regularly takes commissions to draw characters from books or movies such as *Harry Potter* or *Pirates of the Caribbean,* for as much as $50 a piece. She stated that she "sometimes feel[s] guilty" that she can make money from her art when writers can't.

Neither this artist, nor the others who brought up this inconsistency, could explain exactly why it exists. However, there seems to be a related norm of more tolerance for selling art from books over art from television shows, though some participants had a vague idea of publicity rights of actors factoring into this as well. Some (P4, P11) did note that for books, it is more difficult to "prove" that the image is of a particular character—is that Harry Potter or just a boy with glasses? This could explain both why the noncommerciality norm within fandom seems to be less enforced for art, and why legal scrutiny (cease-and-desist letters, etc.) have more often been seen with fiction than with art.

Despite the ambiguity regarding boundaries and differences in media, commercial use does play an important role within understandings of fair use: it is consistently judged as being more legally important than it likely is. Since the landmark case *Campbell v. Acuff-Rose*, courts have recognized that commercial uses can still be fair. However, it is also true that noncommercial uses are less frequently litigated, and since fair use is determined on a case-by-case basis, there is no bright line rule as to the weight of the factor [16]. Though our participants made statements like "I think that… would be okay, like legal, though because they're not making money" (P3), a more technically correct interpretation would be to pragmatically say that it (a noncommercial use of a copyrighted work) would be "okay" because it would be much less likely to be challenged in court.

In sum, the noncommercial part of the first prong of fair use is seen as an important factor. This in itself is not a misconception, but there is a misconception when it is seen as the sole deciding factor. However, perhaps more interestingly, this norm seems to be largely a moral judgment rather than a legal or market-based one. Judgments extend to the fairness of profiting from someone else's work. As one creator of fan videos (P5) stated, "It's just tacky. Completely aside from fair use issues of commercial/non-commercial, you just don't do it because fandom's a gift economy."

Educational Use

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

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

Transformativeness

Transformativeness—part of the "purpose and character of the use" stated in the first prong of the fair use test—covers how much a new work is "transformed" from the original, extending to the purpose and function of the new work. Two significant examples of this from case law are the 2 Live Crew "Pretty Woman" rap as defended in *Campbell v. Acuff Rose* and Google's use of thumbnail images in their search engine in *Perfect 10 v. Google*.[1] The more transformative a use is, the more likely it is to be judged fair use. Though currently considered to be a very important aspect of fair use analysis [2], like fair use itself, the definition of what constitutes transformativeness has been ambiguous.

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

The Nature of the Work

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

The second fair use factor concerns the nature of the original copyrighted work—specifically whether it is fiction or nonfiction, or published or unpublished. If the original

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

work is fiction or unpublished, this weighs slightly in favor of the new work being a fair use.

None of our participants had any concept of this factor, with the exception of the common misconception that some process is required to receive a copyright in something (such as registering). When pushed on this issue, several participants (P2, P6, P10) reconsidered or expressed confusion—for example, stating that their work isn't copyrighted unless they have applied for it like a patent, but then also saying that their work posted online cannot be used without permission.

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

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

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

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

There really is an art to making a good icon, to choosing the right shot, to cropping it right, to tweaking the color in whatever way it has to happen, and obviously not everyone does that; there are icons that are less transformative just like there are vids that are less transformative. – P5

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

remixes are far more likely to be fair use than wholesale copying.

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

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

A number of themes involving market harm emerged from our interviews, reflecting in large part a utilitarian stance from our participants. For example, though they conceded that this concept likely does not have legal weight, some participants (P1, P3, P5, P7) expressed that some people should be more entitled to copyright protection than others—i.e., the "little guy." They were less likely to obtain illegally and more likely to correctly attribute a source when that source is a smaller artist as opposed to a large corporation. When pressed, they admitted that this was a moral judgment rather than a legal one.

Another theme that emerged is that of the potential for remix to do a market *good* rather than harm. The basic idea is that if a work is included in a remix (such as a song, or clips from a television show), then that work reaches a larger audience, thus increasing exposure rather than discouraging sales. One participant put it thus:

What's better advertisement for a TV show than a [fan video]? Oh and I can't tell you the number of times I've bought a song because I heard it on a vid. I'm pretty sure that Regina Spektor owes a ton of sales to Lim [a popular creator of fan videos]. I mean not only are the fans not making money from this but they're putting money in the pockets of the owners. At least I think so. I don't think the law should mess with creative works that aren't hurting anybody. – P7

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

I don't download music from the Internet, I use iTunes or I'll get it from Amazon. Unless I can't. I am so annoyed that neither iTunes or Amazon has [recording artist] ACDC. There's no mp3s, you can't buy it. And I want Thunderstuck and I want it now! – P4

With Doctor Who, I'm not going to wait a whole year to watch it just because I'm in the wrong country and with the Internet it's like a forced pop culture divide. My

[Livejournal] friends list doesn't care who's in the UK and who's in the US and if I read it the day after [UK television show] Doctor Who airs I'm going to get spoiled at worst or at least not be able to participate in the conversation. –P10

The participants that discussed this did, however, acknowledge that this was an ethical judgment and not a legal one. Additionally, those who do not pirate noted that they choose not to do so because of fear of viruses or legal ramifications rather than believing that it is wrong to do so in all cases (P5, P7, P10). Those who do pirate also do not always abide by their own ethical heuristics—the same participant who spoke of her unwillingness to download music unless absolutely necessary (P4) has no qualms about pirating software "if it's too expensive." In fact, all participants who mentioned software seem to have fewer reservations about pirating it than other types of media, suggesting further utilitarian calculations relating to cost.

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

However, the idea of "credit where credit is due" is an important norm within communities of fan creators in particular. Fandom has even been described as an "attribution economy" [32]. This idea extends beyond reuse and into sharing and copying as well. To a large degree, this is a "good faith" norm. Some participants said that though they don't necessarily credit every image they use in a blog post, for example, they would remove something without question if they were asked to do so.

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

If you're writing a post about Sherlock Holmes, like a movie review, then yeah, put up a picture of the movie poster. No need to say where it's from, it's obvious. But if you have some picture you got from Flickr then you should give the photographer credit. – P8

Another participant (P3) noted that for some types of content (such as music by indie recording artists), she will include links to purchase CDs or ask people to buy them, but that this isn't necessary for well-known works—that everyone knows she "didn't make up" Harry Potter, as well as where to buy the product if they want to do so.

Along with how well-known the source is, with respect to value judgments (as opposed to a consideration for what the law actually says), the importance of attribution seems to be related to how public the forum is—i.e., the bigger an audience the remixer has, the more important it is to correctly attribute sources. Again, to some of our participants this was a show of good faith, and is true of fan works also. Though most of the participants (seven out of eleven) cited a preference for disclaimers ("I don't own this"), they also thought that though they were not necessary, they were polite. In fact, disclaimers typically carry no legal weight when it comes to copyright infringement [33].

Though attribution is not a factor in fair use determinations, except perhaps relating to good faith, our participants consistently brought up the issue with respect to fair use or broader judgments of what is fair. This "hidden factor" represents a common misconception that correct attribution carries more legal weight than it actually does. However, it also represents a clear norm among original content creators to be properly credited; in early studies of the use of Creative Commons licenses, it was found that 97-98% of users were selecting attribution as a characteristic for their licenses, to the point where the organization made it a requirement of *all* licenses [25].

DISCUSSION
Of the themes that emerged from the analysis of our interview data, the commonality of ideas related to fair use among our participants was the most striking. The common thread among our participants is that they all create and share fanworks online. Many of the heuristics described therefore likely stem from the social norms of that larger community. What is also interesting, however, is that our participants also represent a number of different media types: fiction, art, video, graphics, and music. Though their understandings of fair use were similar across these different types of creators, we also saw that treatment of different media types are not always the same when it comes to accepted norms—for example, the different standards for noncommerciality for art.

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

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

2. Blanket exception for educational use

3. Addition of attribution as an explicit fair use factor

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

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

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

3. Potential for "market good"

4. Implicit attribution

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

With respect to fair use, or even more granular down to individual factors, we see that the following five dimensions of copyright decisions can be completely different: (1) what the law says; (2) what people think the law says; (3) what is ethical; (4) what people think is ethical; and (5) what people actually do. The following table illustrates one example of this from our results:

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

Table 2: Five Dimensions of Copyright Decision-Making

Additionally, though we did not discuss with participants at length specific online community policies, it is sometimes the case that those policies may not track exactly to the law or to ethical judgments. Some participants did express that they have more comfort in distributing their work via some online communities than others. YouTube in particular seems to have a poor reputation when it comes to protecting creators' rights; several of our participants (P4, P5, P9) reported not using the site due to the fear of being served DMCA takedown notices (though none had a clear understanding of the Digital Millennium Copyright Act). For example:

For vidding [creating fan videos], I [post to] my personal journal just because of the hassles of the copyright violations associated with vidding… because YouTube and sites like that have all those things where they can take down your video. Once YouTube took down one of my vids because of copyright violations. Just because I know that I'm not violating the law doesn't mean that they know that… I really wish I could share with more people. – P5

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

activities; some of our participants did seem to be the victims of chilling effects of the law, particularly the DMCA, and those who were generally had the least knowledge.

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

I wish they would just come out and say that fan fiction is legal and be done with it. It's not hurting anyone, and we shouldn't have to be scared of doing our art. –P1

CONCLUSION

The socio-technical system of the Internet is shaped by both the law as written and the law as understood by software designers and end users. The professionals who contribute to shaping this space are strangely disconnected in their knowledge and methods. Legal scholars rarely use an empirical approach to understanding human behavior. Designers of social computing systems rarely have legal training. Policy makers often know little about software design. Where does this leave users? In this study, we have taken an empirical approach to gain insight into how online content creators understand ethical and legal questions that impact their daily practice. One goal of this research was to begin to help bridge these professional gaps, and foster more dialog about the role of law within the field of CSCW.

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

There are more questions to ask in this space, for a more detailed picture. The patterns we saw from this small sample of fan creators suggest further threads of inquiry, particularly in terms of looking at different types of content creation communities. It is unclear how much of these findings might be generalizable to other types of content creation or other groups of creators. For example, might we see different norms or ethical intuitions in a community of creators that does not skew so heavily female, such as music remix? In our ongoing work, we are studying how intellectual property rules and norms differ across Internet sites, and are using both qualitative and quantitative methods to understand to what extent users understand those differences.

With respect to a legal doctrine that is infamously ambiguous, a better understanding of those who are forced to engage with fair use could benefit both policy makers and online community designers. Legal problems might be bad business for user-generated content sites, but so are chilling effects that might drive users away. One legal scholar has suggested that the risk inherent in the ambiguity of fair use has led to unnecessary licensing—better to pay for use of something than take the risk of being sued [13]. However, for amateur content creators who would not know how to go through traditional media licensing channels, this same risk aversion might simply chill creative expression instead.

YouTube's "copyright school," a video that copyright violators are required to watch, tells them how to file a counter-notice if they think their video was wrongfully flagged as a copyright violation. However, it also notes that taking action could be risky: "You could get in a lot of trouble. That's how the law works." A more positive example might be Wikipedia, which scaffolds fair use knowledge with their image upload wizard [12], asking uploaders for the appropriate information that would signal fair use of an image. This not only helps with the legal ambiguity, but it shifts some of the balance of power to the content creator since they are able to explain their decision-making pre-emptively to copyright holders.

As user-generated content continues to be a huge part of online communities, designers should be thoughtful about how their users deal with these ubiquitous and ambiguous copyright issues. Aufderheide and Jaszi argue in *Reclaiming Fair Use* that because judges often consult patterns of use in surrounding communities of practice when making fair use determinations, it would be in the best interest of communities to articulate their own understandings of fair use in order to strengthen these norms as well as the ability of judges to make reasonable decisions [2]. This is a strategy that has worked well within the documentary filmmaking community, for example. What the community typically believes and does can actually affect what is judged legal. However, what about creative communities that do not have the cohesion or motivation to craft codes of best practice?

Community designers are able to observe, and indeed help mold, patterns of use in an online community. In this role, designers can help develop an understanding of social norms and practices that could be used as a model for policymaking and legal interpretation. Ideally there should be a congruence between what people believe is legal, what is legal, and what fairly balances the interests of diverse stakeholders. More dialog about legal issues and evidence of user understandings of the law can help the CSCW community to create systems that help protect the rights of both copyright holders and content creators.

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