

# Copyright, Plagiarism, and Emerging Norms in Digital Publishing

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## ABSTRACT

*Today's copyright law derives from the needs of the publishing industry in centuries past. The digital world creates even more significant concerns for authors and publishers than those that arose with the advent of the printing press. Digital technology enables easy, fast, and inexpensive global copying and distribution of digital texts. Other digitized industries—such as the music, movie, and video-game industries—have faced these challenges with a higher apparent success rate, at least in the courts, than the publishing industry. This Article considers why publishing has been less successful in protecting its online copyrights and examines the extent to which copyright law might work more effectively within the industry. Drawing on evidence of emerging norms in the self-publishing community, the Author suggests that the answers for e-publishing may lie outside formal legal regulation; rather, the answers reside in market-based solutions, social norms, and grassroots antipiracy campaigns, augmented by currently available digital technologies such as encryption and plagiarism-detection software.*

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## INTRODUCTION

In April of 2013, academic-text publisher John Wiley lost its copyright infringement battle in the US Supreme Court for the unauthorized importation of copies of its textbooks originally sold overseas.<sup>1</sup> This loss came soon after the industry's failure to stop libraries from digitizing copyrighted works without express permission,<sup>2</sup> which itself followed the industry's settlement of litigation against the Google Books project that also dealt with digitizing literary texts.<sup>3</sup> These losses stand in stark contrast to copyright wins by content owners in other digital industries, including the music and motion picture industries. For example, the music industry by and large has been successful in shutting down illegal file-sharing services,<sup>4</sup> including convincing the Supreme Court in 2005 to create a new form of contributory liability to combat the impact of the then-popular Grokster and Streamcast file-sharing services.<sup>5</sup> The music industry has also been successful in pursuing individual consumers for illegal file sharing.<sup>6</sup>

This Article considers why the digital publishing industry has been less successful in protecting its copyrights than other digitized industries. Digital literary works are arguably more at risk than

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1. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1357 (2013).

2. *See* *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445, 464 (S.D.N.Y. 2012).

3. *See* Claire Cain Miller, *Google Deal Gives Publishers a Choice: Digitize or Not*, N.Y. TIMES, Oct. 4, 2012, <http://www.nytimes.com/2012/10/05/technology/google-and-publishers-settle-over-digital-books.html> (noting the terms of the settlement agreement as well as the fact that the Authors' Guild elected to continue its litigation against the Google Books project).

4. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 660 (S.D.N.Y. 2013); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

5. *See* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005).

6. *See, e.g.*, *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005).

works produced in other online industries in terms of disruption to existing market models. Digital books are cheaper and easier to copy and distribute than other digital works because they tend to be smaller and less sophisticated files than, say, games, movies, or music. Additionally, customers tend to read books only once, unlike other digital works. Thus, if a book is pirated, there is little chance that the user who enjoyed the pirated version will later decide to purchase a legal version or some form of upgrade—again, in sharp contrast to movies, music, and video games that may appeal to their customers in multiple enhanced versions. For example, consumers of theatrical releases of films may purchase DVDs that include additional bonus materials, and new versions of existing games may attract customers who enjoyed the original game. Further, while other industries can take advantage of tie-in markets—like concerts for music and merchandising for movies—the publishing industry tends to be a “one-shot deal.” Copyright owners make money from the original work with little chance of attracting customers to related merchandise.

Given the obvious threats digital technology poses to publishing, it is remarkable that most of the successful digital-copyright litigation in the last twenty years has involved other content industries.<sup>7</sup> This Article identifies possible explanations for the divergence between those other industries and the publishing industry in terms of copyright litigation success. It suggests that the challenges currently faced by the publishing industry may be more effectively addressed by nonlegal means, including emerging social norms and market practices, which are augmented by available encryption technologies and plagiarism-detection software. A useful avenue of investigation of these alternative approaches can be found within the digital self-publishing sector, which is fast developing and enforcing its own norms of acceptable conduct for both readers and authors.<sup>8</sup>

Part I outlines current models of digital publishing, including moves by traditional publishers into new digital markets, the rise of small independent e-presses, and the concomitant rise of self-publishing, including new opportunities to create and distribute

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7. See, e.g., *Grokster*, 545 U.S. at 913 (digital music file-sharing service); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 978 (9th Cir. 2011) (digital photography); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008) (television and movies); *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 793 (9th Cir. 2007) (digital photography); *BMG Music*, 430 F.3d at 889 (digital music); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003) (digital photography); *Napster*, 239 F.3d at 1011 (9th Cir. 2001) (digital music file-sharing service); *UMG Recordings*, 92 F. Supp. 2d at 350 (digital music).

8. See *infra* Part III.B.

digital fan fiction cheaply and easily.<sup>9</sup> It examines ways in which these models raise the specter of copyright piracy to an extent significantly greater than existed in the paper-based publishing world, with particular reference to threats to the reproduction and distribution rights.<sup>10</sup> It also discusses some concerns about derivative works<sup>11</sup> and plagiarism.<sup>12</sup> Understanding how the industry has developed over the last decade is an essential step in better identifying the major threats to digital copyright holders as well as the most appropriate and effective responses to those challenges. For example, participants in online fiction-writing communities have been extremely vocal in recent years about the boundaries of acceptable conduct within those industries in terms of copying and borrowing from the work of others.<sup>13</sup> These industries can teach important lessons both about emerging norms involving copyright infringement and plagiarism and effective means for combatting these perceived harms.

Part II analyzes the copyright cases litigated in recent years by the traditional publishing industry in an attempt to determine why this industry has been less successful than other digitized industries in terms of protecting copyrights. The failure of the publishing industry to obtain judicial support in copyright cases may say something about judicial and societal attitudes toward the proprietization and dissemination of literary works, as opposed to other categories of works; it may also give some clues as to ways in

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9. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997) (“‘Fan fiction,’ broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing. Fan authors borrow characters and settings, such as Princess Leia and Luke Skywalker or the Starship Enterprise, for use in their own writings. Fan fiction spans genres including comedy, drama, melodrama, adventure, and mystery.”).

10. See 17 U.S.C. § 106(1) (2012) (reproduction and distribution rights).

11. See 17 U.S.C. § 106(2) (2012) (derivative works right).

12. See RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 11–12 (1st ed. 2007).

Judge Posner observes:

“[P]lagiarism” turns out to be difficult to define. A typical dictionary definition is “literary theft.” The definition is incomplete because there can be plagiarism of music, pictures, or ideas, as well as of verbal matter . . . . The definition is also inaccurate . . . there can be plagiarism without theft. And it is imprecise, because it is unclear what should count as ‘theft’ when one is not taking anything away from someone but simply making a copy. . . . [N]ot all copying is plagiarism—not even all unlawful copying, that is, copyright infringement. There is considerable overlap between plagiarism and copyright infringement, but not all plagiarism is copyright infringement and not all copyright infringement is plagiarism.

*Id.*

13. See *infra* Part III.

which the protection of literary works should vary from the protection of works in other digital industries.<sup>14</sup>

Part III examines some of the concerns arising in the digital publishing industry that never see the inside of a courtroom. In particular, it focuses on online fan-fiction communities and online commercial self-publishing. Participants in these communities have raised significant concerns about digital-copyright infringement and plagiarism.<sup>15</sup> They are also the content holders with the fewest resources and wherewithal to combat those problems. They have engaged in sustained and often heated debates about the boundaries of acceptable versus unacceptable conduct in terms of the unauthorized use of others' work.<sup>16</sup> These discussions could prove very helpful in reconceptualizing copyright law and practice in the digital-publishing era.

Drawing from the discussions in the earlier sections, Part IV suggests ways to reform copyright law to better meet the needs of the various sectors of the digital publishing industry. It concludes by suggesting that the most effective way forward for digital publishers will be a nuanced combination of copyright rules and plagiarism-norm enforcement, supported by currently available encryption and plagiarism-detection software. The broader adoption of such strategies by those who provide the most popular platforms for the distribution of literary works online—such as Amazon, Barnes & Noble, and Google—might take the pressure from authors and publishers in terms of protecting content at a point where the works are effectively beyond their physical control. Any strategies for protecting digital content more effectively must be implemented in a way that does not place undue burdens on these online intermediaries and protects free expression. Discussions in the self-publishing community are very useful guidelines on both of these points. This Article suggests that the voices of those in the self-publishing community should be examined more closely in terms of the contributions they make to debates about protecting copyright in digital literary works.

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14. See Jacqueline D. Lipton, *A Taxonomy of Borrowing*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* (forthcoming 2014) (arguing for a sector-specific approach to copyright and plagiarism in the digital literary works context).

15. See *infra* Part III.B.

16. See *infra* Part III.B.

## I. THE DIGITAL PUBLISHING INDUSTRY

A. *Structure of the Industry*

The publishing industry was relatively slow to move into the digital arena, at least when compared with, say, the motion picture and music industries.<sup>17</sup> A number of potential explanations exist for the lag. It may be that the publishing market tends overall to cater to an older audience than other industries, and the older demographic was more resistant to change than the younger participants in other markets. It may also be that the shift to digital publishing necessitated the development and distribution of devices (e-readers such as Kindles and iPads) within an industry that had not previously required consumers to purchase devices to enjoy content.

The music and home-movie industries have always required consumers to purchase in-home devices to enjoy content—iPods and DVD players, cassette decks and Walkmans, and even phonographs and player pianos.<sup>18</sup> Prior to the digital age, those industries had already gone through the teething pain of formulating agreements with manufacturers and distributors of consumer devices that enable enjoyment of their works. Having organized their consumer platforms through agreements with manufacturers and distributors of home devices—and sometimes through litigation<sup>19</sup>—they were perhaps able to focus more effectively on regulating content online than the publishing industry, which was struggling in the early years of digital content distribution to negotiate market-effective models with e-readers manufacturers.

Content distributors in the music and movie industries may also have a better sense of how best to spend litigation dollars to control online distribution of their works than the publishing industry, which has only relatively recently faced a market in which it needs to balance control of content via digital devices. Prior to Apple's entry into the e-book market in 2009–2010, the publishing industry had really only dealt with one major digital distributor—Amazon.com.<sup>20</sup>

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17. For example, Amazon.com didn't market the Kindle e-reader (arguably the leading e-reader) until 2007. See Nilay Patel, *Kindle Sells Out in 5.5 Hours*, ENGADGET, <http://www.engadget.com/2007/11/21/kindle-sells-out-in-two-days> (last visited Feb. 10, 2014).

18. See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (concluding that player piano rolls were not infringing copies of musical works under existing copyright law).

19. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (rejecting a motion picture industry's suit against Sony for manufacture and distribution of the Betamax video recorder).

20. See *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 647–49 (S.D.N.Y. 2013) (describing the history of the e-book industry prior to Apple's entry into the market).

It is possible that there has been less threat of digital piracy in the nascent digital-book industry because for the first part of the new millennium, market models forced publishers to sell their works at a loss, keeping consumers relatively happy and less inclined to pursue cheap or free pirated versions of digital works.<sup>21</sup> The recent decision by the District Court of the Southern District of New York to hold Apple liable for colluding with the major publishing houses to artificially inflate e-book prices emphasizes the fact that prior market models for digital books, dominated by Amazon, were working to keep e-books at relatively manageable prices for most consumers, thus potentially dissuading piracy.<sup>22</sup> However, as the Apple case makes clear, those models were not sustainable in the long term for the publishing industry.<sup>23</sup>

An even newer development in the digital publishing industry has been the rise of Kindle Direct publishing, which has been a huge boon to self-published authors and to the development of predominantly digital independent presses.<sup>24</sup> Kindle Direct provides authors with the opportunity to self-publish works directly for Kindle and thus cut out the middlemen of the traditional publishers.<sup>25</sup> It has also created a market space for smaller independent e-presses that utilize the Kindle Direct service to publish collections of books by a stable of newer authors who might otherwise self-publish.<sup>26</sup> These smaller independent e-presses provide editing, cover design, and some marketing services in return for a cut of what a self-published author would otherwise receive in royalties from Amazon.<sup>27</sup> Other online distribution services followed Amazon's lead, and Amazon is no longer

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21. See *id.* at 702 (expressing concern that newer market models that upset consumers by delaying digital releases of books might lead to an increased threat of piracy).

22. *Id.* at 709.

23. See *id.* at 650–54 (describing the major publishing houses' dissatisfaction with existing market models for e-books).

24. See *Welcome to Amazon's Kindle Direct Publishing*, AMAZON, <https://kdp.amazon.com/self-publishing/signin> (last visited Aug. 13, 2013); *Publishing FAQ*, KINDLE DIRECT PUB., <https://kdp.amazon.com/help?topicId=A36BYK5S7AJ2NQ> (last visited Aug. 13, 2013) ("Kindle Direct Publishing is a fast, easy self-publishing tool that lets you publish your digital text content for the Amazon Kindle wireless reading device. Simply upload your content, enter sales copy and pricing information, and publish in minutes.").

25. See *Publishing FAQ*, *supra* note 24.

26. See, e.g., BOOKS TO GO NOW, <http://bookstogonow.com> (last visited Aug. 13, 2013); MUSA PUBLISHING <http://www.musapublishing.com> (last visited Aug. 13, 2013); MUSEITUP PUBLISHING <http://museituppublishing.com> (last visited Aug. 13, 2013); WILD ROSE PRESS [http://www.wildrosepublishing.com/maincatalog\\_v151](http://www.wildrosepublishing.com/maincatalog_v151) (last visited Aug. 13, 2013); BLACK OPAL BOOKS <http://blackopalbooks.com/blackopalstore/home> (last visited Aug. 13, 2013).

27. See, e.g., *Submissions*, BOOKS TO GO NOW, <http://bookstogonow.com/submissions> (last visited Aug. 13, 2013) ("Books to Go Now offers professional editing, cover design, multiple book format file creation, and most important publicity. Our staff works one-on-one with our authors to help make our author books a success one book at a time.").

the only digital service that enables direct online publishing.<sup>28</sup> However, it is still the most popular.

Amazon's initial motivation for Kindle Direct may have been to compete with the major publishing houses so it would not be at their collective mercy with respect to content availability and pricing. However, self-publishing and publishing with small independent presses have become more popular phenomena in recent years.<sup>29</sup> Traditional publishers have even started purchasing the rights to books that have proved successful initially as self-published works.<sup>30</sup> These new market practices raise challenges for online copyright law. Traditional publishing houses have strategies and litigation dollars set aside for combating copyright infringement. They also have the wherewithal to pressure their online distributors to ensure that infringing works are expeditiously removed from sale. However, smaller presses and self-published authors often do not have such wherewithal.<sup>31</sup> From reading online writers' blogs, it appears that digital copyright piracy and plagiarism are growing problems in this sector of the industry.<sup>32</sup>

Digital technology has also enabled an explosion in the publication and distribution of fan fiction, although many fan-fiction communities may not appropriately be referred to as "markets" to the extent that market terminology connotes commercial profit motives.<sup>33</sup>

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28. Other entities like Barnes & Noble, Smashwords, and Kobo now offer similar services online. See, for example, *How to Create, Publish, and Distribute Ebooks with Smashwords*, SMASHWORDS, [https://www.smashwords.com/about/how\\_to\\_publish\\_on\\_smashwords](https://www.smashwords.com/about/how_to_publish_on_smashwords) (last visited on Aug. 13, 2013).

29. For example, *The New York Times* now includes an "e-book" bestseller list that includes many self-published authors. See Stephanie Chandler, *How Books by Self-Published Authors Can Land on the New York Times Bestsellers List*, AUTHORITY PUBLISHING, <http://authoritypublishing.com/book-marketing/how-books-by-self-published-authors-can-land-on-the-new-york-times-bestsellers-list> (last visited Feb. 10, 2014).

30. For example, Hugh Howey's "Wool" series was originally self-published and later acquired by Simon and Schuster, *Simon & Schuster Acquires Print Rights to Self-Published Ebook Hit Series Wool*, DIGITAL BOOK WORLD (Dec. 12, 2012), <http://www.digitalbookworld.com/2012/simon-schuster-acquires-print-rights-to-self-published-ebook-hit-series-wool>, Tammara Webber's "Easy" was originally self-published and later acquired by Berkly (an imprint of Penguin), Rachel Deahl, *Penguin Divisions Team Up to Buy Self-Pubbed Bestseller 'Easy.'* PUBLISHERS WEEKLY (Oct. 4, 2012), <http://www.publishersweekly.com/pw/by-topic/authors/pw-select/article/54223-penguin-divisions-team-up-to-buy-self-pubbed-bestseller-easy.html>, and Jamie McGuire's "Beautiful Disaster" was originally self-published and later acquired by Atria Books, *Atria Books Signs New Deal with #1 Bestselling Author Jamie McGuire*, PR NEWSWIRE (June 27, 2013), <http://www.prnewswire.com/news-releases/atria-books-signs-new-deal-with-1-bestselling-author-jamie-mcguire-213305951.html>.

31. See *infra* notes 68–70 and accompanying text.

32. See *infra* Part III.

33. See, e.g., Tushnet, *supra* note 9, at 686 (noting that copyright law should protect copyright holders against commercial harms but not against noncommercial expressive fan-fiction activities).

Much fan fiction is written and distributed purely for fun or expressive, rather than commercial, purposes.<sup>34</sup> But the rise of self-publishing has coincided with a blurring of the lines between noncommercial fan fiction and commercial self-published work.<sup>35</sup> Many prominent self-published authors (and some authors who have contracts with traditional publishing houses) gain experience by first writing fan fiction. Obvious examples include Cassandra Clare,<sup>36</sup> E.L. James,<sup>37</sup> and Sarah Rees Brennan.<sup>38</sup>

With all of these new market sectors in development, the modern publishing industry looks very different from the publishing industry fifteen years ago. It is still working through the most effective models for digital distribution in terms of cost and availability of content. It is also faced with the development of new market sectors like self-publishing, augmented by the efforts of small independent e-presses, and the exploding online fan-fiction community. These activities all pose challenges for the application of copyright law in terms of identifying the needs of newer market sectors and making the legal system accessible to smaller market players. In particular, many players in the more independent sectors of the market—self-published authors and independent presses—are not sufficiently well versed in copyright law to know how and when to protect themselves from infringement. Many independent authors do not register their copyrights and often do not have the ability to know when their copyright has been infringed or what avenues of legal recourse are open to them.<sup>39</sup>

On top of this is the fact that the major publishing houses are facing a somewhat unsympathetic judiciary when they pursue claims

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34. *Id.* at 664.

35. *See infra* notes 128–132 and accompanying text.

36. Author of the *Mortal Instruments* young adult books, and a number of spin-off series, started her career writing Harry Potter Fan Fiction. *See* Alexandra Alter, *The New Queen of Fantasy: Cassandra Clare's Breakout*, WALL ST. J. (June, 15, 2012, 12:11 PM), <http://online.wsj.com/news/articles/SB10001424052702303734204577464593388416630?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702303734204577464593388416630.html>.

37. Author of the best-selling *Fifty Shades of Grey* trilogy started her career writing Twilight fan fiction. *See Fifty Shades Makes EL James Top-Earning Author*, BBC (Aug. 13, 2013, 6:45 PM), <http://www.bbc.co.uk/news/entertainment-arts-23681220>.

38. Author of the *Demon's Lexicon* young-adult fantasy trilogy originally wrote *Harry Potter* fan fiction. *See* Colleen Lindsay, *How Harry Potter Fanfic May Have Created the Next Harry Potter: A Closer Look at Sarah Rees Brennan*, SWIVET (Sept. 4, 2007), <http://theswivet.blogspot.com/2007/09/how-harry-potter-fanfic-may-have.html>. One self-published urban-fantasy novelist has stated that she is thinking of discontinuing a popular series because she can no longer support herself on her royalties due to the threat of copyright piracy.

39. *See infra* Part III.C; *see also* Lipton, *Taxonomy of Borrowing*, *supra* note 14 (discussing the attitudes of self-published authors to unauthorized copying of their works).

of copyright infringement.<sup>40</sup> While other digital industries have been largely successful in winning copyright cases against alleged primary and secondary infringers,<sup>41</sup> the publishing industry has tended to lose or settle its major cases.<sup>42</sup> There are a number of reasons for the lack of judicial sympathy toward copyright claims raised by the publishing industry. These are discussed in more detail in Part II.

The volume of copyright litigation in the digital publishing industry, at least at the present time, is relatively small compared to other digitized industries.<sup>43</sup> This is perhaps unsurprising when one considers the lack of resources and knowledge of copyright law in various sectors of the industry and the relative newness of the digital publishing industry as a whole, at least as compared with other digitized industries. Concerns about copyright infringement are a factor with which the industry as a whole is obviously concerned.<sup>44</sup> Traditional publishers have struggled with the balance of encouraging digital dissemination of their works while maintaining price models that are reasonable enough to discourage piracy.<sup>45</sup> They have also litigated against organizations like Google and university libraries in an attempt to strike an acceptable balance between paid and freely available digital literary works.<sup>46</sup>

### *B. Nature of Digital Literary Works*

Literary works reside at the focus of copyright law. The initial impetus for copyright legislation in the United Kingdom—the Statute of Anne—was to protect the needs of the then-nascent publishing industry.<sup>47</sup> Literary works are the heart and soul of many creative human endeavors, and our literary traditions as a species go back

40. See *infra* Part I.B.

41. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888, 893 (7th Cir. 2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 659 (S.D.N.Y. 2013); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000). The main exceptions to the content-owner-wins trend have been cases involving consumer in-home time-shifting of television programs and generally holding this conduct to be excused under the fair use defense to copyright infringement. *E.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008).

42. See *infra* discussion in Part II, for a detailed examination of these cases.

43. See cases cited *supra* note 7.

44. See *infra* Parts II, III.

45. See *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 657 (S.D.N.Y. 2013).

46. See, e.g., *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013); *Authors Guild, Inc. v. Hathitrust*, No. 11 CV 6351(HB), 2013 WL 603193 (S.D.N.Y. Feb. 15, 2013).

47. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

hundreds, if not thousands, of years.<sup>48</sup> While predigital literary works could only be copied either laboriously by hand or with the assistance of often unwieldy machinery—a printing press, or large-scale copy shop—digital works are much cheaper and easier to copy and distribute globally at the push of a button. This creates much more opportunity for dissemination of information, and correspondingly larger threats for those attempting to commercialize their works online.

The threats to digital publishing from unbridled copying and distribution are arguably greater than the threats to other digitized industries. Unlike, say, the motion picture and music industries, e-publishers do not have many additional revenue streams outside selling the basic work.<sup>49</sup> In the music industry, revenue streams associated with musical compositions can be generated from concert tours and promotional merchandising associated with public performances. In the motion picture industry, revenue can be generated from tie-in markets subsequent to an initial theatrical release of a movie. Often studios release multiple versions of movies for the home-video market and through various distribution channels—cable television, Netflix, Hulu, and other streaming and distribution services. Additionally, blockbuster movies generate revenue through merchandising.

The publishing industry does not generally benefit from these kinds of tie-in revenue streams. While markets for a particular book may be split geographically or split between those who would purchase a book in various different formats—hardcover, softcover, mass-market paperback, digital text, or audiobook—a typical consumer will only purchase one copy of the book and will likely only read it once. In contrast, a moviegoer may enjoy a motion picture at the cinema and then purchase one or more digital versions: for example, a standard DVD, a Blu-ray version, a special director's cut, or an anniversary edition. A music-lover may purchase a single song before purchasing the entire album and may still attend a concert and purchase associated merchandise.

Because of the significance of the threats to the publishing industry posed by digital technology, and the fact that digital piracy is likely to have a more significant impact on the development of the

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48. See, e.g., *The History of Writing*, HISTORIAN.NET, <http://www.historian.net/newindex.html> (last visited Feb. 4, 2014) (providing a description of the history of literature, from the invention of writing in Bronze Age Mesopotamia and Ancient Egypt, which developed out of proto-literate sign systems).

49. While some literary texts are made into movies and many are made into audiobooks, there is generally not as much “merchandising” in the form of action figures, posters, music etc. derived from books as from, e.g., films and television series.

industry because of lack of alternate revenue streams, it is timely to evaluate both the copyright challenges facing the modern publishing industry and the potential solutions to those problems. In so doing, it is useful to consider instances where the industry has been unsuccessful in effectively asserting control over valuable content. Recent case law such as *Authors Guild, Inc. v. Google*,<sup>50</sup> *Authors Guild, Inc. v. Hathitrust*,<sup>51</sup> and *United States v. Apple*<sup>52</sup> are good examples of situations in which courts have been largely unsympathetic to the publishing industry's attempts to protect its content.<sup>53</sup>

### C. E-Book Piracy Litigation

#### 1. Traditional Publishers

The recent slew of digital copyright cases have seen the larger players in the publishing industry pitted against each other. Large traditional publishing houses have pursued claims against large entities such as Google and university libraries to protect their copyrights.<sup>54</sup> Unlike some other digitized industries—notably the music industry<sup>55</sup>—there are few claims of direct copyright infringement against individuals who pirate literary works online. This may be because the threat of digital piracy of copyrighted books is relatively new compared to digital piracy in other industries. It may be because the publishing industry has a different relationship with its customers than other industries. Alternatively, it may be because the issue can more effectively be dealt with in other ways in the digital publishing industry. As literary works are basic text files, it is relatively easy to locate unauthorized copies online and send

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50. *Authors Guild, Inc.*, 2013 WL 603193, at \*11.

51. *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445, 464 (S.D.N.Y. 2012).

52. *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 702 (S.D.N.Y. 2013). This is not a copyright case, but rather an antitrust case. Yet it is another example of ways in which the government has lacked sympathy to the concerns of the traditional publishing industry in the digital age.

53. The latter decision involved antitrust law rather than copyright law, but it is instructive on judicial attitudes to digital market strategies in the publishing industry and is included here for that reason.

54. See, e.g., *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 288 (S.D.N.Y. 2013); *Authors Guild, Inc.*, 2013 WL 603193, at \*1.

55. *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), <https://www.eff.org/files/eff-riaa-whitepaper.pdf> (criticizing the recording industry for taking legal proceedings against its consumers).

cease and desist notices or DMCA takedown notices.<sup>56</sup> In academic publishing, several software programs have been developed to detect plagiarism,<sup>57</sup> and these can also be utilized—and are in fact being utilized by some digital-book distributors<sup>58</sup>—to monitor instances of digital copyright piracy.<sup>59</sup>

It is also possible that traditional individual piracy is not, or not yet, seen as a major threat to the industry's profit margins. The volume of direct infringement in terms of nontransformative pirate copying is currently unclear in the digital publishing industry, although there is anecdotal evidence that it is occurring.<sup>60</sup> It may also be an increasing problem, notably in the self-publishing sector where

56. See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 450–52 (5th ed. 2010) (detailing the operation of the “notice and takedown” procedure set out in the Digital Millennium Copyright Act).

57. One popular program is Turnitin. TURNITIN, [www.turnitin.com](http://www.turnitin.com) (last visited Aug. 13, 2013); see also GRAMMARLY, [www.grammarly.com](http://www.grammarly.com) (last visited Jan. 2, 2014) (another plagiarism-detection website).

58. See David Rothschild, *Self-Publishing Plagiarism: Amazon Kindle Pirated Books*, PLAGIARISM BLOG (Jan. 26, 2012, 3:00 AM), <http://www.ithenticate.com/plagiarism-detection-blog/bid/77929/Self-Publishing-Plagiarism-Amazon-Kindle-Pirated-Books> (noting that Amazon does utilize plagiarism-detection software but has been close-mouthed about the details).

59. The relationship between copyright and plagiarism is taken up in more detail in Part III *infra*. See also the discussion on plagiarism and copyright infringement in POSNER, *supra* note 12, at 11–39.

60. Urban fantasy author J.A. Saare raised significant concerns about copyright piracy relating to a recent novel, J.A. SAARE, *THE RIPPLE EFFECT* (2012):

As hard as it is to confess, the Rhiannon's Law series is my most heavily pirated work (and most abundantly shared). For the most part, readers seem to enjoy the books -- so long as they're free. At first I accepted this, knowing I needed to make as much cash (no matter how small) as I could. Then I started writing under Aline Hunter and discovered a whole new world existed, one in which people would purchase my work and appreciate me far more. . . .

Unlike New York authors, small press ones don't get money up front. Our income is totally reliant on each and every book sold. It's important for people to realize what is at stake here. Do I want to nag? No, of course not. However, the abundance of those who've contacted me . . . have to understand where I'm coming from . . . If you don't buy my books, I won't be able to keep writing them. It's not rocket science; it's simple math.

J.A. SAARE, *Future Works & What's at Stake*, RANDOM MUSINGS (Mar. 19, 2012), <http://jasaare.blogspot.com/2012/03/future-works-whats-at-stake.html?zx=1b23070daea321ab>.

Other authors have voiced similar complaints. See Jennifer Miller, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 1:16 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“As a writer, this infuriates me. I woke up to find out that more copies of my books were pirated, and now this. Just awful.”); Jessica Meigs, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 2:45 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“I had one of my works illegally uploaded to Amazon by a third party, and though Amazon took the illegal copy down, they said they wouldn't prevent money earned from dispersing to the copyright violator's account and that it was up to me to somehow magically collect the money from the violator. Yeah, I haven't seen a penny from that, but some dude out there got a decent chunk of change from my work.”).

authors have less wherewithal to monitor and take action against infringement.<sup>61</sup> Perhaps the major publishers do not want to draw consumer attention to the piracy problem for fear of encouraging piracy. Traditional publishers are still struggling economically and strategically with the shift to the digital industry and may want to be very selective about the court battles they fight.

If it is currently the case that consumers of digital books do not engage in copyright infringement to the same extent as those in other industries, there must be reasons for this aside from the effectiveness of technological protection measures attached to those works. It is possible that book purchasers find the availability of books under currently available market prices and practices more acceptable than consumers in other industries and are thus less inclined to go to the trouble of hacking encryption measures to obtain unauthorized versions.

Digital books are plentiful and are available free of charge through various lending schemes, including the Amazon digital library, which makes temporary copies of digital books available for a limited time to customers.<sup>62</sup> Thus, while books per se are more expensive than, say, buying a single song from iTunes in the music industry, they are readily available in so many formats and at so many price points that customers may be less inclined to seek illegal options. It would be difficult to test this assertion empirically but, if true, it may explain the lack of direct digital piracy in the e-publishing industry—if indeed there is a lack of piracy rather than a simple lack of awareness of piracy or a lack of enforcement of digital copyrights.

While it is possible that digital piracy is simply not seen as a major threat to the e-publishing industry, it is difficult to see how that could be the case. Comments made in the *Apple* decision suggest that traditional publishers are at least sensitive to the threat of digital piracy and are concerned about changing their marketing strategies

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61. See *infra* Part III.

62. Amazon's website states:

If you are an Amazon Prime member, you can borrow books from the Kindle Owners' Lending Library and read them on your Kindle device. The Kindle Owners' Lending Library is available to Amazon Prime members—paid Amazon Prime, paid Amazon Student, 30-day free trial, and customers receiving a free month of Prime benefits with a Kindle Fire device—who own a Kindle device. The Lending Library features over 350,000 titles, including many New York Times bestsellers. Books borrowed from the Lending Library have no due date and can be delivered to other Kindle devices registered to your Amazon account.

*Borrow Books from the Kindle Owners' Lending Library*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200757120> (last visited Aug. 13, 2013).

for fear that new retail approaches that impose greater costs on consumers might exacerbate the threat.<sup>63</sup>

## 2. Self-Published Authors

It may be the case that traditional book publishers tolerate a certain level of piracy and price their wares accordingly in the marketplace to recoup any potential losses. Book publishers accepted losses when they contracted with digital platforms such as Amazon to distribute their works online.<sup>64</sup> Of course, this would not explain the market for self-published books and books published by smaller independent e-presses where there is very little leeway to recoup losses from piracy. Because the market for small presses and self-published authors has low barriers to entry that flood it with participants, the players in those sectors do not have much flexibility to price their books to take account of the threat of digital piracy.<sup>65</sup> But maybe those books are priced so low in the first place—averaging between \$0.99 and \$2.99 each—that the threat is insignificant.

It is equally possible that the threat of piracy is lower in the self-published and independently published sector of the electronic-book industry if one accepts that the quality of books published in those sectors is more variable than those published by traditional publishers. Where the market is flooded by participants who are likely exerting less quality control than traditional publishers, the demand for the works is likely to be lower and the threat of piracy may be concomitantly lower. While some self-published and independently published books become bestsellers,<sup>66</sup> most of them do not sell many copies, and copies sell at low prices.<sup>67</sup>

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63. United States v. Apple Inc., 952 F. Supp. 2d 638, 702 (S.D.N.Y. 2013) (expressing concern that newer market models that upset consumers by delaying digital releases of books might lead to an increased threat of piracy).

64. *Id.* at 648–54 (describing publishing houses’ concerns over Amazon.com’s retail pricing policies for e-books).

65. A survey of pricing of self-published titles on Amazon indicates that most of them sell between \$0.99 and \$2.99. Presumably they would not be able to compete effectively at higher prices.

66. For example, Tammara Webber’s “Easy” (2012), Jamie McGuire’s “Beautiful Disaster” (2012), Hugh Howey’s “Wool” (2011), and Tracey Garvis Graves “On the Island” (2012), not to mention a series of young adult novels Amanda Hocking published early in her career. *See Best-Sellers: E-Book Fiction*, N.Y. TIMES (June 3, 2012), <http://www.nytimes.com/best-sellers-books/2012-06-03/e-book-fiction/list.html> (listing “Beautiful Disaster,” “Wool,” and “On the Island.”); *Best-Sellers: E-Book Fiction*, N.Y. TIMES (July 29, 2012), <http://www.nytimes.com/best-sellers-books/2012-07-29/e-book-fiction/list.html> (listing “Easy”); *Best Sellers: Children’s Series*, N.Y. TIMES (May 13, 2012), <http://www.nytimes.com/best-sellers-books/2012-05-13/series-books/list.html> (listing “Trylle Trilogy,” the Amanda Hocking novel).

67. *See supra* note 65 and accompanying text.

Thus, most of the books are likely not particularly attractive targets for infringement.

Assuming some level of piracy in the self-publishing industry, additional reasons for lack of effective enforcement may relate to the fact that individual authors—even if those with sufficient knowledge of the copyright system—do not have the time or energy to proceed through the courts.<sup>68</sup> For example, a successful self-published author, supporting herself through fiction writing, claims that if she worried too much about copyright infringement, she would spend most of her time sending DMCA takedown notices<sup>69</sup> and would not have time to write her books.<sup>70</sup> Furthermore, focusing on the legal aspects of the business interferes with her creative process.<sup>71</sup> For her, the response to potential copyright infringement is working with an independent publisher who can send takedown notices on her behalf so she can focus on her writing.<sup>72</sup>

This would seem like an appropriate solution except for the fact that independent publishers, like traditional publishers, are selective about the authors they take on and tend to prioritize certain markets—those that are most lucrative for them. Thus, one of the unforeseen consequences of failing to protect self-published authors from the threat of copyright infringement could be a skewing of the substance of the works available to the general public.<sup>73</sup> If authors are forced to rely on publishers to protect their legal rights, and those publishers prioritize certain commercial genres, then the public may be deprived of work in other areas that are less commercially attractive to publishers.

68. See *infra* Part III.C.

69. See LEAFFER, *supra* note 56, at 450–52.

70. J.A. Saare, an urban-fantasy novelist, wrote:

Unfortunately I've seen my books release (aka The Ripple Effect) only to be uploaded onto forums for free download by users on the same day. Compounding matters is the length of time it takes to send DMCA notices to have work taken down. I used to spend hours per day doing so but discovered I had little time to write and in sending out the notices my muse suffered. . . . I'm sad to say that my J.A. Saare pen (Rhiannon's Law series books and Crimson series book) brought in 17% of my income last year. The rest came from my erotic romance sales penned under Aline Hunter (Ellora's Cave has a piracy department who handles situations if/when I discover them -- all I have to do is contact them with links which they have taken down). It's an enormous difference and can't be ignored if, like me, an author is a mother and has a family to support.

See Email from J.A. Saare, urban-fantasy novelist, to author (June 8, 2013) (on file with the author).

71. See *id.*

72. See *id.*

73. The author described above has had to sacrifice work on her relatively successful paranormal adventure/romance series to focus on writing erotica for which there is a larger market and for which she can obtain the services of an independent publisher. See *supra* note 70 and accompanying text.

As a result, there may be a general decline in the variety of work created despite the availability of cheap and effective digital methods for creation and dissemination of work. If copyright law is too expensive or difficult for creators of works, it will not do much more than protect the interests of established industry participants. It will do little to encourage new forms of innovation even where the technical resources are available to make creation and dissemination cheaper and easier than ever before for the individual author. It would be useful to know whether, and to what extent, the inability of independent authors to effectively enforce copyright rights skews or lessens innovation in the publishing industry.

## II. TRADITIONAL PUBLISHERS IN THE COURTS

### A. *Digital Library Litigation*

As noted in the previous section, the publishing industry differs from other industries both in terms of the battles it has chosen to pursue in the courts and in its litigation success rates. These two issues may be linked. In other words, the publishing industry may have fought battles that were harder to win because of the nature of the factual scenarios under consideration. Much of the litigation in the digital music and movie industries has revolved around purely consumptive copying of digital works—such as unauthorized peer-to-peer file-sharing networks over which users simply consume large volumes of protected work without any innovative or transformative use.<sup>74</sup> The publishing industry, on the other hand, has tended to fight battles where the relevant uses of the protected works might be regarded as more transformative.<sup>75</sup> In other words, the defendant's use of the plaintiff's work adds some new insights or functionalities that may benefit society as a whole.<sup>76</sup>

Thus, while other industries have pursued those who provide platforms for accessing and sharing works to meet the demand of users who do not want to pay for them, the publishing industry has focused on litigating against services that provide significant social benefits. The two obvious examples involving the publishing industry

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74. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 645–46 (S.D.N.Y. 2013); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

75. See LEAFFER, *supra* note 56, at 490 (noting that transformative or “productive” uses in copyright law are uses that “build on the works of others by adding their own socially valuable creative element”).

76. See *id.*

in recent years are the Google Books litigation<sup>77</sup> and the Hathitrust litigation.<sup>78</sup> Each case involved the creation of large-scale digital libraries to make books more broadly accessible to the public.<sup>79</sup> While some copyright infringement was undeniably involved, the benefits—at least according to the respective courts that found fair use—outweighed these concerns.<sup>80</sup>

The Google Books Library Project revolved around a plan by the search-engine giant to digitize as many books as possible for free and easy search by users.<sup>81</sup> Later iterations of the program also included a more commercial prospect for Google under which it sells e-books to consumers under its Google Play program.<sup>82</sup> The digitization process involves the creation of copies of large volumes of copyrighted material as well as public domain material and orphan works—works that are under copyright but for which the author cannot be located.<sup>83</sup>

A 2012 settlement agreement with the Association of American Publishers balanced the significant social benefits of this program with the concerns of copyright holders.<sup>84</sup> The settlement includes provisions that allow works to be removed from the program on request.<sup>85</sup> The Authors Guild, representing individual authors, lost its battle against Google in 2013 when the court held that Google's digitization of even entire verbatim copyrighted texts was transformative under the first fair use factor and did not encroach on the copyright holders' markets for the works under the fourth fair use factor.<sup>86</sup> Similarly, *Hathitrust* involved a scheme that would benefit

77. *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 286 (S.D.N.Y. 2013).

78. *Authors Guild, Inc. v. Hathitrust*, No. 11 CV 6351(HB), 2013 WL 603193, at \*1 (S.D.N.Y. Feb. 15, 2013).

79. *See Authors Guild, Inc.*, 954 F. Supp. 2d at 286; *Authors Guild, Inc.*, 2013 WL 603193, at \*1.

80. *See Authors Guild, Inc.*, 954 F. Supp. 2d at 287–88, 291–94; *Authors Guild, Inc.*, 2013 WL 603193, at \*2.

81. *See Google Books Library Project*, GOOGLE BOOKS, <http://books.google.com/googlebooks/library> (last visited Feb. 4, 2014).

82. *See Books*, GOOGLE PLAY, <https://play.google.com/store/books> (last visited July 11, 2013).

83. *See* LEAFFER, *supra* note 56, at 231–32.

84. *See* Andi Sporkin, *Publishers and Google Reach Settlement*, ASS'N AM. PUBLISHERS (Oct. 4, 2012), <http://www.publishers.org/press/85>.

85. *See* Jennifer Howard, *Publishers Settle Long-Running Lawsuit over Google's Book-Scanning Project*, CHRON. HIGHER EDUC. (Oct. 4, 2012), <http://chronicle.com/article/Publishers-Settle-Long-Running/134854>.

86. *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 291–92 (S.D.N.Y. 2013) (“Google’s use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books.”); *id.* at 292–93 (“Google does not sell its scans, and the scans do not replace the books.”).

the public in a number of ways. A consortium of university libraries contracted with Google to digitize millions of books for the purposes of: “(a) full text searches; (b) preservation; and (c) access by people with certified print disabilities.”<sup>87</sup> In October of 2012, the District Court in New York held that this project constituted a fair use.<sup>88</sup> Like the Google Books project, the court allowed the project because of the clear benefits it provided to the public. This decision followed on the heels of another loss for the publishing industry regarding digitization of print materials, in which a group of academic publishers sued Georgia State University over electronic course packs.<sup>89</sup> As with *Hathitrust*, the court in *Cambridge University Press v. Becker* held that the copying was excused by the fair use defense.<sup>90</sup> Decisive factors included the nonprofit educational motives of the university and the informational nature of the works copied.<sup>91</sup>

While these cases may be criticized as not sufficiently protecting the interests of the copyright holders, they are significantly different in terms of their factual scenarios than the litigation typically engaged in by other digitized industries, such as the music and motion picture industries. These other industries tend to sue direct consumers as well as those who enable purely consumptive copying of protected works.<sup>92</sup> The publishing industry, on the other hand, involves itself in more complicated litigation because the uses of its works arguably provide significant social benefits.<sup>93</sup> This may explain why publishers have tended to suffer major losses in court in recent years while other digital industries have predominantly succeeded.

While it is true that Google Books has commercial aspects, including an e-book retail outlet, Google also digitizes works in the

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87. *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012) (“For works with known authors, Defendants use the works within the HDL in three ways: (1) full-text searches; (2) preservation; and (3) access for people with certified print disabilities.”).

88. *See id.*

89. *See Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1197 (N.D. Ga. 2012).

90. *See id.* at 1224–39 (applying the fair use factors and finding that factor one strongly favors Defendants, factor two favors Defendants, factor three favors Plaintiffs, and factor four strongly favors Plaintiffs); *Copyright: Recent Court Cases Involving Textbooks and E-Reserve*, WILLIAM & ANITA NEWMAN LIBR., <http://guides.newman.baruch.cuny.edu/content.php?pid=159878&sid=1369795> (last updated July 23, 2013) (“[S]ome, but not all, of professors' uses of excerpts and/or chapters of copyrighted works were subject to ‘fair use’ defense to infringement claims [under Copyright Act].”).

91. *See id.* at 1256.

92. *See BMG Music v. Gonzalez*, 430 F.3d 888, 889, 893 (7th Cir. 2005) (affirming an injunction against a downloader of recordings through a Internet file-sharing network in a copyright infringement action brought by owners of copyright in musical recordings).

93. *See Authors Guild, Inc.*, 954 F. Supp. 2d at 287–88; *Authors Guild, Inc.*, 2013 WL 603193, at \*1.

public domain, difficult-to-find works that are out of print, and orphan works.<sup>94</sup> In that vein, it furthers the availability of information for the advancement of learning. The tendency of judges to favor public access to literary works<sup>95</sup> over protections of copyright might also explain the only Supreme Court case involving the publishing industry in recent decades.<sup>96</sup>

### *B. First Sale and International Exhaustion Litigation*

Unsurprisingly—or perhaps surprising that it took so long for a case to get to the Supreme Court—outside of concerns about digitization and fair use, the other area of litigation in the publishing industry in recent years involves the first sale of hard copies of copyrighted works.<sup>97</sup> First sale is also known as exhaustion of copyright.<sup>98</sup> Exhaustion has been the subject of ongoing debate in domestic and international copyright law, largely because it is unclear as to whether a first foreign sale should exhaust the copyright holder's rights in the work.<sup>99</sup>

The first sale doctrine helps to balance rights and interests in a protected work by allowing downstream markets for used works.<sup>100</sup> The defense provides that once a copy of a work has been legitimately sold, that particular copy may be resold without any consent or permission from, or payment to, the copyright holder.<sup>101</sup> Without the

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94. See *Authors Guild, Inc.*, 954 F. Supp. 2d at 288 (describing operation and purpose of Google Book digitization project).

95. See *supra* Part II.A.

96. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

97. See 17 U.S.C. § 109(a) (2012) (“[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).

98. See Christopher Baxter, *Exhaustion of Rights: Copyright and the First Sale Doctrine*, U. N.H. RES. BLOG (Mar. 20, 2013), <http://unh.edu/research/blog/2013/03/exhaustion-rights-copyright-and-first-sale-doctrine> (“The first sale doctrine, in a general sense, stands for the proposition that once a physical copy of a copyrighted article is sold, the copyright holder cannot prevent the subsequent owner of the physical article from lending, reselling, or otherwise distributing the article, rights not granted by the Copyright Act. Although the subsequent holder is allowed the just mentioned rights, the first sale doctrine does not allow the subsequent owner to perform any of the rights granted to the copyright holder by the Copyright Act.”).

99. See *infra* Part II.B.

100. See LEAFFER, *supra* note 56, at 329 (“The rationale of the first sale doctrine is to prevent the copyright owner from restraining the free alienability of goods. Without a first sale doctrine, a possessor of a copy or phonorecord of a copyrighted work would have to negotiate with the copyright owner every time he wished to dispose of his copy or phonorecord.”).

101. *Id.* at 328 (“To elaborate on these elements of the first sale doctrine, once the work is lawfully sold or even transferred gratuitously, the copyright owner’s interest in the material object, the copy or phonorecord, is exhausted; the owner of that copy can then dispose of it as he sees fit.”).

first sale doctrine, secondhand markets in books, CDs, and DVDs would not be possible.<sup>102</sup> In the United States, the copyright act is unclear—and arguably contradictory—on its face as to whether the sale of a copyrighted work outside the country counts as a sale for the purposes of exhaustion.<sup>103</sup>

*Kirtsaeng* involved a Thai student, studying in the United States, who made a small business out of purchasing cheap versions of textbooks overseas and importing them into the United States for resale, thus undercutting the publisher’s regional pricing strategies.<sup>104</sup> The Court held that copies of books sold outside the United States and then imported into the country for resale could amount to a first sale, thus settling decades of uncertainty about the application of the doctrine to foreign sales.<sup>105</sup>

While the question of foreign exhaustion of rights has been a major area of contention in international copyright law, the controversy does not appear immediately relevant to concerns about piracy in the digital industry because of its focus on hard-copy works.<sup>106</sup> Paper books are sold, while digital books are typically licensed.<sup>107</sup> Thus, purchasers of digital books are really “licensees” of the works and legally and technically unable to on-sell them to third parties, making the first sale doctrine moot.<sup>108</sup> The terms of the licenses typically prohibit resale, and digital encryption technology makes sharing difficult to achieve in practice.<sup>109</sup> While I can give someone else my password for my Kindle so they can read a book I have downloaded, I cannot transfer that book to their account unless I know how to hack the relevant encryption code and, even if I did, it would likely be a violation of the anticircumvention provisions of the DMCA.<sup>110</sup>

The lack of a “first sale” is not limited to digital publishing; it applies to all digital-content industries. While many consumers of digital works—including books, music, games, and movies—consider themselves to be owners of their copies, they technically only hold

102. *See id.* at 328–29.

103. *See infra* Part II.B.

104. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct 1351, 1352 (2013).

105. *Id.* at 1358.

106. *See* LEAFFER, *supra* note 56, at 331–32.

107. *See id.* at 332–33.

108. *See Digital Books and Your Rights: A Checklist for Readers*, ELECTRONIC FRONTIER FOUND., [https://www.eff.org/files/eff-digital-books\\_0.pdf](https://www.eff.org/files/eff-digital-books_0.pdf) (“However, electronic books have often been treated as ‘licensed’ content, subject to legal and technical restrictions . . . that block readers’ ability to resell, lend, or gift an e-book.”).

109. *See id.*

110. *See* 17 U.S.C. § 1201(a)–(b) (2012).

licenses to enjoy the work under the terms set out when they either purchased the work or signed up to use the service through which works are accessed (such as iTunes for music, Netflix for streaming video, or Amazon for books).<sup>111</sup> Actor Bruce Willis garnered significant media attention late in 2012 when he realized that he did not technically “own” his digital music library on iTunes and, as such, could not transfer it by testamentary disposition to his children.<sup>112</sup> While it is possible to give someone else a password to access your digital reading device, your iTunes library, or your Netflix account, you cannot actually transfer any copies of digital works to another person on those services. You are merely licensed to use them. You have not purchased them, and cannot on-sell them to third parties.

After *Kirstaeng*, John Wiley’s best bet to protect its pricing model is to focus on licensing digital versions of the books, which cannot be resold under the first sale doctrine or relicensed without its permission. It can disallow books licensed to foreign customers from being relicensed to customers in the United States. This business model would not infringe the first sale defense because no first sale would be involved, and the publishers’ rights would never be effectively exhausted.

Thus, the resolution of the question of foreign exhaustion of copyrights may spur more publishers and distributors to move to digital distribution models. The move away from paper-based publishing to digital publishing in the academic sector would simply place more pressure on the questions under consideration in this Article—identifying the extent of the copyright infringement problem in the digital publishing industry and establishing whether the industry requires more effective copyright protection than is currently available.

There have been attempts in other industries that deal with digitized works to create a “first sale” equivalent for digital content.<sup>113</sup> The idea is to allow a consumer who has legitimately obtained a

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111. Cf. Baxter, *supra* note 98 (“The only time [rights granted to copyright holder by the Copyright Act] transfer to the subsequent owner is when the copyright holder expressly grants such rights to the subsequent holder via a license or other such agreement. To illustrate, the purchase of a book or DVD, protected by copyright, does not convey the rights granted by the Copyright Act to the author of the book or DVD. In contrast, the purchase of a license from the author (or copyright holder) of the book or DVD transfers one or more of the rights granted under the Copyright Act to the license purchaser. The rights granted to the license purchaser can be limited in time, geography, or may only convey some of the rights under the Copyright Act . . .”).

112. See Tim Worstall, *Bruce Willis Might Sue Apple over iTunes*, FORBES (Sept. 3, 2012, 10:13 AM), <http://www.forbes.com/sites/timworstall/2012/09/03/bruce-willis-to-sue-apple-over-itunes>.

113. See, e.g., *Capitol Records, L.L.C. v. ReDigi Inc.*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

license over a work to transfer the license to a third party in return for giving up her own access to the work.<sup>114</sup> Several other schemes have been developed that utilize technological means to achieve a digital licensing analog to first sale. These schemes allow secondhand markets in licensed digital content to develop consistent with copyright law.<sup>115</sup> For example, the original version of the ReDigi system in the United States purported to wipe all traces of specific digital content from a user's hard drive when the user attempted to "re-sell" or "re-license" the work through the ReDigi service.<sup>116</sup> When the music industry complained of copyright infringement, the Southern District of New York in *Capitol Records, L.L.C. v. ReDigi, Inc.* held that the first sale defense did not apply to ReDigi's activities because the defense is limited to physical copies of works that have been sold to a consumer, not to digital reproductions.<sup>117</sup> Likewise, the fair use defense was unavailable to ReDigi because its use of the copyrighted works was not transformative under the first fair use factor and the other fair use factors weighed in favor of the plaintiff.<sup>118</sup>

In contrast to the ReDigi experience, attempts to create digital versions of "first sale" have succeeded in the European Union.<sup>119</sup> The first sale doctrine of European Union Software Directive was found to uphold a system to "re-sell" or "re-license" digitally licensed database software.<sup>120</sup> The system under consideration in *UsedSoft GmbH v. Oracle International Corp*<sup>121</sup> mimicked first sale by ensuring that the original licensee could no longer access the licensed software after transferring it to a third party.<sup>122</sup> The Court of Justice for the European Union (CJEU) limited its decision to the first sale of computer programs under the Software Directive and made no pronouncement on first sale of other forms of digitized copyrighted works, not covered under that directive.<sup>123</sup> It is unclear to what extent

114. *See id.*

115. *See id.* at 645.

116. *See id.* at 645–47 (describing operation of ReDigi service).

117. *See id.* at 654–56.

118. *Id.* at 653 ("The first factor requires the Court to determine whether ReDigi's use 'transforms' the copyrighted work and whether it is commercial. Both inquiries disfavor ReDigi's claim. Plainly, the upload, sale, and download of digital music files on ReDigi's website does nothing to 'add [] something new, with a further purpose or different character' to the copyrighted works.") (internal citations omitted).

119. Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R. I-0000, at ¶¶ 8, 11.

120. Directive 2009/24, art. 4(2) and 5(1), of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L. 111) 18 (EC).

121. Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R. I-0000, at ¶ 24–25.

122. *Id.* ¶ 30.

123. *See id.* ¶ 48.

the reasoning in the case would apply to other copyright works such as books, music, and movies. It is also unclear whether digital books, music, and movies might be characterized as “software” in their own right and thus able to take advantage of the CJEU’s reasoning in *Oracle*, at least within the European Union.

### III. COPYRIGHT CHALLENGES FOR SELF-PUBLISHED AUTHORS

#### *A. Categories of Digital Borrowing*

While the traditional publishing industry has faced significant copyright challenges, the self-publishing industry faces even more serious threats. While the digital age enables self-publishing on a scope and scale never before possible, it likewise threatens the emerging industry. For the purposes of this Article, self-publishing includes the small, independent e-publishers that basically consolidate a group of new authors and publish their works through services like Amazon Direct, sharing royalties with the authors.<sup>124</sup> These publishers tend to contribute cover design, as well as marketing and editorial services, but do not operate at the level of traditional publishers.<sup>125</sup>

Self-published authors and small independent presses simply do not have the wherewithal of the larger publishing houses to battle copyright piracy. They can send DMCA takedown notices to online retailers such as Amazon when they become aware of pirated material being sold through their services.<sup>126</sup> However, this can also be time consuming in fields like romance publishing where the amount of unauthorized copying is quite high.<sup>127</sup>

Self-published authors also do not have the wherewithal of the larger publishing houses to determine when a competing work actually infringes copyright, or rather borrows ideas and situations from their work without technically infringing. The blogosphere is replete with discussions about the borrowing of successful work, including commentary on what kind of borrowing conduct should be tolerated in the self-publishing industry.<sup>128</sup>

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124. See *Welcome to Amazon’s Kindle Direct Publishing*, *supra* note 24.

125. See *Submissions*, *supra* note 27.

126. See 17 U.S.C. § 512 (2012) (notice and takedown regime under US copyright law).

127. See Adam L. Penenberg, *Amazon’s Plagiarism Problem*, FAST COMPANY (Jan. 16, 2012), <http://www.fastcompany.com/1807211/amazons-plagiarism-problem> (describing piracy problem in erotic and romance publishing).

128. See *infra* Part III.B.

Unauthorized borrowing seems to break down into at least four categories:

- (a) direct literal copying of text which may be described as traditional “piracy;”<sup>129</sup>
- (b) copying of snippets of text from one or more works to create a new work;<sup>130</sup>
- (c) creating a derivative work based on the characters or situations in an existing text without literally copying text;<sup>131</sup> and
- (d) writing noncommercial fan fiction.<sup>132</sup>

The lines between these categories may be blurred. For example, the final category (fan fiction) is likely a subset of the previous category (derivative works, borrowing characters, and situations), but is a distinct iteration of that conduct in that it that occurs within specific communities with relatively well-developed sets of norms about what is appropriate conduct in terms of borrowing and attribution.<sup>133</sup> Fan-fiction communities also tend not to have commercial motives, which may be another distinction from the previous category of derivative works.<sup>134</sup>

It may also be difficult to draw clear lines between the first and second categories. They both involve direct copying of portions of a text. However, the first category contemplates traditional piracy—selling someone else’s work per se for profit without authorization. The second category is a little more complex because it involves taking snippets from others’ work and repackaging them with a new title and under a new author’s name for profit. While there is probably direct copyright infringement going on in these situations, authors may be more concerned about allegations of plagiarism—taking their work without attribution.<sup>135</sup>

The most obvious distinction among the four categories of borrowing in terms of potential copyright infringement is that the first two squarely raise the possibility of infringement of the reproduction

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129. See *infra* notes 193–198 and accompanying text.

130. See *infra* notes 168–170 and accompanying text.

131. See *infra* notes 168–170 and accompanying text.

132. See *infra* notes 171–175 and accompanying text.

133. See Tushnet, *supra* note 9, at 680 (“One factor not explicitly included in the [copyright] statute, but relevant to real-world practice, is that of proper attribution. Through disclaimers, fan authors express their sense that credit must be given where it is due, to the creators of the characters borrowed. This ritual demonstrates a concern for avoiding plagiarism or self-aggrandizement while preserving space for creativity.”).

134. See *id.* at 664 (“Fan fiction is mostly nonprofit, and on the Web no one has to pay to read it.”).

135. See Lipton, *Taxonomy of Borrowing*, *supra* note 14.

or distribution rights,<sup>136</sup> while the latter categories raise the possibility of infringement of the derivative works right.<sup>137</sup> All of these rights are exclusive rights of the copyright holder found in section 106 of the Copyright Act.<sup>138</sup> However, it is easier to identify a situation where someone has literally reproduced another's text in violation of the reproduction right than to ascertain whether a derivative work has been created in a given case.

The Copyright Act defines "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."<sup>139</sup> This definition clearly applies to both the second and third categories of borrowing. Both contemplate a recasting or transformation of the original work. However, to the extent that text is literally borrowed from the original it is much easier for a copyright holder—although it is never particularly easy for a self-published author for time and cost reasons—to establish infringement.

The third and fourth categories of borrowing—whether taken together or separately—at least facially constitute derivative works. The use of another's characters or settings to create something new could be described as an adaptation or transformation of the original work.<sup>140</sup> It is possible to argue that fan fiction, in particular, is not necessarily—or is not always—a derivative work,<sup>141</sup> or that, if it is, it should be excused under the fair use doctrine when undertaken for noncommercial purposes.<sup>142</sup> As noted above, many new authors cut their teeth on fan fiction before branching out into their own commercial creations.<sup>143</sup> A number of today's commercially successful authors—even authors whose work has given rise to fan fiction—do not appear to object to the practice, provided that any resulting work

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136. 17 U.S.C. § 106(1), (3) (2012) (reproduction and distribution rights, respectively).

137. *Id.* § 106(2) (derivative works right).

138. *Id.* § 106.

139. *Id.* § 101.

140. *Id.* (definition of "derivative work").

141. See Tushnet, *supra* note 9, at 660 (noting that some fan fiction has been judicially regarded as a derivative work, but criticizing the holding).

142. See *id.* at 684–86 (noting that noncommercial fan fiction should be regarded as fair use).

143. See Stephanie Doyle, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 4:36 PM) ("[I]m not opposed to fanfic authors transitioning into published ones. I was there – it's a great tool in the growth of an author. But when you see that you can attract fans, and you decide you want to be paid for your talent, that's when it's time to let that other person's world go and create your own.").

that is sold commercially is not obviously a rip-off of their own original creations.<sup>144</sup>

Stephenie Meyer, author of the *Twilight* series, has said that she does not necessarily object to fan fiction, provided that when a new author is ready to publish commercially, she publishes her own original work and not fan fiction obviously based on Meyer's or another author's work.<sup>145</sup> Interestingly, Meyer does not seem to object to certain recent commercially successful books that were unapologetically derived from *Twilight* fan fiction, including E.L. James's phenomenally successful *Fifty Shades of Grey* trilogy and Sylvain Reynard's *Gabriel's Inferno* trilogy.<sup>146</sup>

These examples of commercially successful work based on noncommercial fan fiction also illustrate the blurring of the line between the categories of commercial publishing and self-publishing. Someone who is initially a successful noncommercial fan-fiction author can become a successful commercial author as a result of her fan-fiction work. E.L. James allegedly did not change much between her fan fiction and her commercially successful trilogy other than the characters' names.<sup>147</sup> Some commercially established authors actually encourage fan-fiction communities and even participate in them.<sup>148</sup> For some time, fantasy author Marion Zimmer Bradley, for example, was an active participant in encouraging and editing fan

144. See Tushnet, *supra* note 9, at 672–74 (giving examples of copyright owners who allow and even encourage noncommercial fan fiction as long as it falls short of direct copying).

145. See Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 537, 554–56 (2011) (describing author Stephenie Meyer's stance on fan fiction).

146. See Jason Boog, *The Lost History of Fifty Shades of Grey*, GALLEYCAT (Nov. 21, 2012, 8:23 PM), [http://www.mediabistro.com/galleycat/fifty-shades-of-grey-wayback-machine\\_b49124](http://www.mediabistro.com/galleycat/fifty-shades-of-grey-wayback-machine_b49124) (“This erotica bestseller [*Fifty Shades of Grey*] began as a work of Twilight fan fiction called Master of the Universe, earning a massive fan fiction following years before the book deal. Most traces of this fan fiction history have been removed from the Internet.”); Jason Boog, *Twilight Fan Fiction History of Gabriel's Inferno*, GALLEYCAT (Aug. 1, 2012, 3:07 PM), [http://www.mediabistro.com/galleycat/sylvain-reynard-fan-fiction\\_b55297](http://www.mediabistro.com/galleycat/sylvain-reynard-fan-fiction_b55297) (“Indie romance novelist Sylvain Reynard has landed a ‘substantial seven-figure deal’ with Penguin Group’s Berkley imprint for Gabriel’s Inferno and Gabriel’s Rapture, a series that began as Twilight fan fiction.”).

147. See Robin/Janet, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 5:04 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“No decisive case has been made against 50 Shades being sufficiently transformative, even though the characters were originally named after the original inspiration.”).

148. Alexandra Alter, *The Weird World of Fan Fiction*, WALL ST. J. (June 14, 2012), <http://online.wsj.com/news/articles/SB10001424052702303734204577464411825970488> (“Fan fiction can still be a touchy and controversial subject for writers and publishers. While some see it as free marketing, others regard it as derivative dreck at best and copyright infringement at worst. Some authors, including J.K. Rowling and [Stephenie] Meyer, have heartily endorsed fan fiction.”).

fiction based on her work.<sup>149</sup> However, she ceased promoting fan fiction when a fan claimed that Bradley had plagiarized her work.<sup>150</sup>

Considering the interrelationship between fan fiction, commercial self-publishing, and traditional publishing, it is clear that the four kinds of borrowing identified in this section potentially affect all sectors of the publishing industry. However, it is the self-published authors and small independent presses that have the least knowledge and wherewithal to combat true piracy. These groups also have developed norms of publishing that may differ from the traditional publishing industry and that may provide useful lessons for more effective approaches to combating digital piracy in the future.

### *B. Norms Relating to Digital Borrowing*

Self-published authors are an active and articulate group, particularly when it comes to navigating the ins and outs of new digital market spaces and protecting the fruits of their labors.<sup>151</sup> Occasionally, one will strike it big, become a bestseller, and thus become a target for “borrowing” of the various kinds identified in the previous section.<sup>152</sup> This growing self-publishing community utilizes online resources such as blogs and book-review websites to monitor and police undesirable conduct and, in some cases, has been instrumental in bringing digital-book pirates to justice.<sup>153</sup>

From online discussions within the self-publishing community, it seems clear that violating certain basic norms of behavior leads to corrective action—such as damning reviews and complaints to Amazon, including requests for refunds on infringing material sold by

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149. See Catherine Coker, *The Contraband Incident: The Strange Case of Marion Zimmer Bradley*, 6 TRANSFORMATIVE WORKS & CULTURE (2011), available at <http://journal.transformativeworks.org/index.php/twc/article/view/236/191> (“From the 1970s through the early 1990s, Bradley Actively engaged with her fans by editing their stores and publishing them in fanzines, holding contests for fan works created in her universe, and finally publishing, with DAW books, 12 anthologies of fan-written stories.”).

150. *Id.*

151. See *infra* Part III.C.

152. See Jane Litte, *The Plagiarizing of Tammara Webber’s Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (describing plagiarism of significant portions of originally self-published books, “Easy” by Tammara Webber and “Beautiful Disaster” by Jamie McGuire).

153. See *Swift Action After Blogger Calls Out Plagiarism*, AUTHORS’ GUILD BLOG (June 28, 2013), <http://www.authorsguild.org/e-books/swift-action-after-blogger-calls-out-plagiarism> (describing way in which swift action from the blogger community caused Amazon.com to remove a plagiarized book from sale).

them.<sup>154</sup> For the most part, the emerging norms reflect copyright rules,<sup>155</sup> which may not be surprising considering that authors probably have a general idea about copyright law, even if they do not understand the specifics. Where the online writing community's norms perhaps diverge the most starkly from traditional copyright law is that online norms seem to be more tolerant—and even encouraging—of borrowing, provided that it is creative or entertaining, provides attribution, and is not for profit.<sup>156</sup>

Norms of attribution and noncommercial expression form the basis of many fan-fiction communities. Fans want to express their creative reinterpretations of existing works in ways that differ from the authors' original conception.<sup>157</sup> Participants in those communities generally think this is fine as long as there is no unauthorized profit at the expense of the original author.<sup>158</sup> Once there is a profit motive, fan-fiction communities expect the writer to contribute something new and wholly original to the market.<sup>159</sup> There are two apparent reasons why fan-fiction communities prefer that commercially published work be something entirely new. The first is the obvious notion that it would be unfair to make money based on the author's original work without permission.<sup>160</sup> Interestingly, the second reason—the one that seems to garner even more discussion in the blogosphere—is that fans of the original fan fiction feel cheated if the work they used to be able to access for free now comes with a price tag attached.<sup>161</sup>

A glaring example of this second concern relates to Cassandra Clare's phenomenally successful series of young adult urban-fantasy books, *Mortal Instruments*,<sup>162</sup> which went on to generate spin-off

154. See, e.g., Melissa Hardy & Ashley Smith, *Book News: The Plagiarizing of Tammara Webber's Easy* by Jordin B. Williams, SMARDY PANTS BOOK BLOG (June 27, 2013), <http://smardy-pants.blogspot.com/2013/06/book-news-plagiarizing-of-tammara.html> (describing Amazon and Barnes & Noble booksellers' offer to refund customers the purchase price of Jordin Williams novel that plagiarized earlier work from novelists Tammara Webber and Jamie McGuire).

155. See *infra* Part III.C.

156. See *infra* Part III.C.

157. See Tushnet, *supra* note 9, at 654 ("Fan fiction deserves protection because it gives authors and readers meaning and enjoyment, allowing them to participate in the production of culture without hurting the legitimate interests of the copyright holder.").

158. Of course, that is not to say that all authors are sanguine about fan fiction. See Lipton, *Moral Rights and Supernatural Fiction*, *supra* note 145, at 551–55 (noting the anti-fan-fiction stances taken by best-selling authors Anne Rice and Charlaine Harris).

159. See *infra* Part III.B.

160. See *infra* Part III.B.

161. See *infra* Part III.B.

162. *The Mortal Instruments Series*, CASSANDRA CLARE, <http://www.cassandraclare.com/my-writing/novels/the-mortal-instruments> (last visited Feb. 5, 2014) (noting the books in her *Mortal Instruments Series*: CITY OF BONES (2007), CITY OF ASHES (2008), CITY OF GLASS (2009), CITY OF FALLEN ANGELS (2011), CITY OF LOST SOULS (2012), CITY OF HEAVENLY FIRE (forthcoming, 2014)).

series, including a steam-punk prequel trilogy set in Victorian London<sup>163</sup> and a forthcoming urban-fantasy trilogy set in contemporary Los Angeles.<sup>164</sup> The books are also being made into movies, the first installment of which was released in August of 2013.<sup>165</sup> Clare also cowrote a companion series of e-novellas based on one of the characters introduced in the first book who appears throughout the series.<sup>166</sup>

Clare's career in fiction writing started when she wrote *Harry Potter* fan fiction.<sup>167</sup> The tremendous commercial success of authors such as Clare is perhaps a testament to the way in which fan fiction can spur new popular writing. It is also a great example of emerging norms in the fan-fiction community about the need for work to be original once it is commercially published.

While a nonprofit fan-fiction author, Clare became embroiled in a plagiarism scandal within the *Harry Potter* fan-fiction community for her fan-fiction opus, the *Draco Trilogy*.<sup>168</sup> Clare borrowed Rowling's characters with attribution to Rowling for the *Draco Trilogy*, a noncommercial parody with Harry Potter's arch-rival, Draco Malfoy, as the main character. However, the alleged plagiarism was unrelated to the material borrowed from J.K. Rowling.<sup>169</sup> Clare was alleged to have reused lines of dialogue from popular television shows such as *Buffy the Vampire Slayer* and *Babylon 5* with no, or insufficient, attribution.<sup>170</sup>

163. See *The Infernal Devices*, CASSANDRA CLARE, <http://www.cassandraclare.com/my-writing/novels/the-infernal-devices> (last visited Feb. 5, 2014) (describing the trilogy of CLOCKWORK ANGEL (2010), CLOCKWORK PRINCE (2011), and CLOCKWORK PRINCESS (2013)).

164. See *The Dark Artifices: A Companion Trilogy to the Mortal Instruments*, CASSANDRA CLARE, <http://www.cassandraclare.com/my-writing/novels/the-dark-artifices> (last visited Feb. 5, 2014) (describing her upcoming trilogy with the books: LADY MIDNIGHT (forthcoming, 2015); THE PRINCE OF SHADOWS (forthcoming, release date TBA); THE QUEEN OF AIR AND DARKNESS (forthcoming, release date TBA)).

165. *The Movie: Information*, CASSANDRA CLARE, <http://www.cassandraclare.com/movie/info> (last visited Feb. 5, 2014) (noting that the first movie was THE MORTAL INSTRUMENTS: CITY OF BONES (Constantin Film 2013)).

166. See CASSANDRA CLARE ET AL., THE BANE CHRONICLES (2013); *The Bane Chronicles*, CASSANDRA CLARE, <http://www.cassandraclare.com/my-writing/novels/the-bane-chronicles> (last visited Feb. 5, 2014) (describing the book that she cowrote with Maureen Johnson and Sarah Rees Brennan).

167. See *The Draco Trilogy*, FANLORE, [http://fanlore.org/wiki/The\\_Draco\\_Triology](http://fanlore.org/wiki/The_Draco_Triology) (last visited Aug. 13, 2013).

168. See *id.*

169. See *id.*

170. *Id.* ("The series also incorporates an intricate web of dialogue pieces and text passages from popular genre television shows and books. Two characters might have a lengthy conversation which Buffy the Vampire Slayer fans will recognize as dialogue from the show, or Harry might answer a question with the words of a character from Babylon 5."); see also *Why I Have a Problem with Cassandra Clare & Why You Should Too*, LIFE & WHAT-HAVE-YOU BLOG (Mar. 14, 2012), <http://bellumina.wordpress.com/2012/03/14/049-why-i-have-a-problem-with->

Clare's fan fiction brought her to the attention of a successful young adult fantasy author who introduced Clare to her own agent, which ultimately led to a contract for the *Mortal Instruments* series.<sup>171</sup> At that point, Clare stopped writing fan fiction and focused on her own original work.<sup>172</sup> However, Clare ran into trouble after publication of her commercial work, which "borrowed" significant passages and concepts from her own *Draco Malfoy Trilogy*.<sup>173</sup> This time, she was not alleged to have borrowed material from J.K. Rowling nor from television programs such as *Buffy*; rather, she allegedly copied her own original work—characters and storylines she had created as an original part of her fan fiction.<sup>174</sup>

Thus, to the extent the fan-fiction community complained about her unjustly profiting from previous work, the work in question was her own original work. It was simply work that had been made available free of charge when she was a fan-fiction author. Her original fans expected to see something completely new when she became a commercial success.<sup>175</sup>

Clare's fans railed against the lead characters from her new commercial fiction because they allegedly shared too much in common with the lead characters from her fan fiction, even though the conceptions of those characters were completely her own.<sup>176</sup> In particular, fans noted a passage from the fan fiction in which Clare's version of Draco Malfoy tells a story about his father killing his pet falcon.<sup>177</sup> This passage was reproduced as a story her lead male character (Jace) tells the heroine (Clary) in the *Mortal Instruments* trilogy about his own past.<sup>178</sup>

The complaint about profiting from others' work here, to the extent it has any legal merit, is not about taking others' work without attribution or recompense. It is rather about cheating readers by

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cassandra-clare-why-you-should-too (raising concerns about Cassandra Clare's plagiarism of earlier works in her Harry Potter fan fiction).

171. See *Why I Have a Problem with Cassandra Clare & Why You Should Too*, *supra* note 170.

172. See *id.* (describing Clare's success as an author of independent, original commercial fiction).

173. See *id.*

174. *Id.*

175. See *id.*

176. See *id.*

177. See *id.* ("Jace is so Draco, in fact, that it's impossible to see him as his own character. The way Clare characterizes Jace is the exact same way she characterized her Draco. They share lines (the ones she didn't steal from *Buffy*, of course), they share nervous tics, they share appearances, *and* they even share memories. The second I read the scene in which Jace tells Clary the story about the boy and the falcon, I felt an unpleasant jolt of recognition: that story is one Draco tells in one of the Draco Trilogy installments.").

178. See *id.*

proportizing something that was originally available free of charge, or perhaps about being lazy in one's own authorial work and failing to create something sufficiently new to justify a commercial profit.

Some representative comments by members of the fan-fiction community underline the point that fan-fiction authors who "go pro" have a higher obligation to be original than those writing for purely expressive nonprofit purposes:

You want to fanfic [sic] in your world for free – have at it. But when you sell intellectual property to a consumer, I truly believe you should be the one intellectually creating it from beginning to end.<sup>179</sup>

I think fanfiction [sic] and fandoms are great, but once you try to make a buck off of it you've crossed the line.<sup>180</sup>

[I]'m not opposed to fanfic [sic] authors transitioning into published ones. I was there – it's a great tool in the growth of an author. But when you see that you can attract fans, and you decide you want to be paid for your talent, that's when it's time to let that other person's world go and create your own.<sup>181</sup>

I think fanfiction [sic] definitely has a place, but it's important for fanfic [sic] writers to still be original and not plagiarize, and it's equally as important that fanfiction [sic] doesn't make money, because it's not a wholly original creation.<sup>182</sup>

Fanfiction [sic] exists in a legal gray area. It's not done for profit, but out of love for the source material and a desire to interact with other fans. If a piece of work has a fandom, then it's good for the source material, and is generally tolerated.<sup>183</sup>

These comments illuminate emerging norms in the fan-fiction community: the practice of noncommercial borrowing with attribution is tolerated and encouraged, but once an author plans to monetarily profit from her work, she is expected to write something new. This norm is not on all fours with the aims of copyright law. While it is a fundamental goal of copyright law to promote innovation by protecting the rights of authors for the fruits of their labors, the law is silent about requiring authors to independently create each of their own

179. Stephanie Doyle, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 3:42 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

180. Ava Lore, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 4:07 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

181. Stephanie Doyle, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 4:36 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

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

183. Ava Lore, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 12:55 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

works. In other words, copyright law will protect a work as long as it is original to the author, but the author is free to riff on existing motifs that the author herself has previously created, or indeed that others have created to a certain extent.<sup>184</sup>

When it comes to commercialization, the fan-fiction community is also aware of the problem of drawing lines between something wholly original and something derived from another work—even if they are not well versed in the finer details of copyright law:

One of the main issues in the Constitutional grant of copyright oversight to Congress is the creation of a balance between the \*limited\* rights of the creator and the rights of the public. Because if you lock everything up too tight, you end up with NO artistic products past a certain point, since so much of what is produced creatively is inspired by or even riffed on by another creator. And in many cases, the creator may not even be fully aware of those inspirational origins, until someone else points them out.<sup>185</sup>

[I] have always been taught that reusing work and taking things from the work before you is how you write. Sure, you must write your own original work but thats [sic] only what a good author does. A great author would look to the work before hers and use it to her advantage . . . .<sup>186</sup>

E.L. James may have a lot to answer for, at least in the fan-fiction community, given that her commercially successful *Fifty Shades of Grey* trilogy seems to blur the lines between acceptable borrowing in the noncommercial fan-fiction community versus the commercial publishing industry.<sup>187</sup> *Fifty Shades* was unapologetically based on Stephenie Meyer's *Twilight* books and was commercially successful, making it more difficult for participants in online writing communities to understand where to draw the appropriate legal and ethical lines about acceptable versus unacceptable borrowing.<sup>188</sup> Some see the success of *Fifty Shades* as a slippery slope that will encourage more direct copyright infringement and plagiarism:

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184. See Tushnet, *supra* note 9, at 655 (“‘Fan fiction,’ broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”); see also *What is Fanfiction?*, WISEGEEK, <http://www.wisegeek.org/what-is-fanfiction.htm> (last visited Feb. 17, 2014) (“Fanfiction, also called fanfic, is fiction that has been written by people who are fans of a particular television series, movie or book. . . . This material might violate copyright laws but, but copyright claims are rarely pursued by the original authors or creators unless the fanfic writer is attempting to profit from the material. Fans who choose to create their own works based on copyrighted material do so at their own risk.”).

185. Robin/Janet, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 4:08 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

186. Percy, Comment to *Why I Have a Problem with Cassandra Clare & Why You Should Too*, LIFE & WHAT-HAVE-YOU BLOG (Dec. 5, 2012, 2:10 AM), <http://bellumina.wordpress.com/2012/03/14/049-why-i-have-a-problem-with-cassandra-clare-why-you-should-too>.

187. See *supra* notes 179–183 and accompanying text.

188. See *supra* notes 179–183 and accompanying text.

[S]adly I think [Fifty Shades of Grey] opened a very large and ugly door. I understand fanfiction [sic] isn't plagiarism. But when people see that you can make MILLIONS by riffing off someone else who made MILLIONS doesn't it lend itself to first stealing their characters, then their plots, then finally their words?<sup>189</sup>

I think Fifty Shades totally crossed the line, but apparently filing the serial numbers off your fanfic is a-okay! This case is total plagiarism, though.<sup>190</sup>

Others have suggested that if *Fifty Shades* is ethically and legally acceptable, then other kinds of borrowing, like Clare's self-plagiarism, must be acceptable.

[E].L. James took her EXACT fanfiction [sic] and had it published, so for Clare to have just used similar ideas/characterization from her old fanfiction [sic] doesn't seem like a big deal to me. She had something that worked, and that people enjoyed online, and used those successful ideas on a larger scale.<sup>191</sup>

The likely truth is that E.L. James's work and Cassandra Clare's work are both legally acceptable in terms of not actually infringing copyright.<sup>192</sup> However, it is interesting to see where the fan-fiction community is trying to draw lines between acceptable and unacceptable borrowing of source works and to note that the fan-fiction community is arguably less permissible in terms of what is acceptable borrowing than the copyright law. Fan-fiction community participants tolerate far less riffing on one's own creations than the copyright law permits, at least when money becomes an issue.

Where the online writing community is probably more aligned with copyright law is with respect to borrowing that involves literal copying of an original work.<sup>193</sup> In June of 2013, Jane Litte, author of the "Dear Author" blog,<sup>194</sup> brought to light an example of an author who had taken chunks of text from two best-selling romance novels and incorporated them into her new work.<sup>195</sup> Litte accused author

189. Stephanie Doyle, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 3:42 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

190. Ava Lore, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 12:55 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

191. Paige, Comment to *Why I Have a Problem with Cassandra Clare & Why You Should Too*, LIFE & WHAT-HAVE-YOU BLOG (Dec. 12, 2012, 2:22 AM), <http://bellumina.wordpress.com/2012/03/14/049-why-i-have-a-problem-with-cassandra-clare-why-you-should-too>.

192. If it were not for the fact that the authors were known fan-fiction writers, it would be unlikely that readers would pick up the similarities between the works. Regardless, the works are probably sufficiently "transformative" under the first fair use factor and likely do not serve as market substitutes for the original works under the fourth fair use factor in copyright law. 17 U.S.C. § 107 (2012).

193. See *infra* notes 194–199 and accompanying text.

194. Jane Litte, *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, *supra* note 152.

195. *Id.*

Jordan Williams of plagiarizing from two best-selling self-published e-books: *Easy* by Tammara Webber and *Beautiful Disaster* by Jamie McGuire. Webber and McGuire both made their names as self-published e-book authors before their books were picked up by major publishing houses.<sup>196</sup> Litte published screenshots on her blog showing how much literal text Williams had borrowed and used in her own book.<sup>197</sup> This led to a successful online grassroots campaign to have the book removed from Amazon and Barnes & Noble.<sup>198</sup>

The amount of literal copying by Williams was indeed substantial and would likely have been regarded as copyright infringement if the matter had been litigated.<sup>199</sup> However, as a result of the grassroots action by bloggers, individual readers of the infringing work contacted Amazon and Barnes & Noble, asking for refunds on their purchases.<sup>200</sup> The entire episode spurred much online debate about the nature of plagiarism and copyright infringement.<sup>201</sup> While Williams's work was likely an example of both plagiarism and copyright infringement, only the latter is legally actionable in court.

At the end of the day, the differences between plagiarism and copyright law in terms of judicial enforceability may be moot if social norms, market forces, and grassroots action can remedy the problems of unethical borrowing. Plagiarism and copyright infringement are often confused in practice.<sup>202</sup> While plagiarism involves borrowing without attribution—and not necessarily borrowing literal text—copyright infringement generally involves literal copying (although paraphrasing will sometimes amount to infringement

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196. See Tammara Webber, *The One About the Plagiarism, A ROOM OF MY OWN* (Nov. 15, 2013), <http://tammarawebber.blogspot.com/2013/11/the-one-about-plagiarism.html>.

197. See Jane Litte, *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, *supra* note 152.

198. See *id.* ("Edit x2: The book has been removed from sale on Amazon and BN. Good job for reporting this everyone!").

199. See *id.*

200. See *id.*

201. See *infra* notes 205–207 and accompanying text.

202. See POSNER, *supra* note 12, at 9–39 (noting confusion and overlap between plagiarism and copyright infringement).

depending on the level of abstraction).<sup>203</sup> Attribution is irrelevant to copyright infringement.<sup>204</sup>

The online writing community does not seem to have a good grasp of the difference between plagiarism and copyright infringement. The community often conflates the two, or at least describes plagiarism in terms of literal copying:

[P]lagiarism involves stealing actual text . . . .<sup>205</sup>

Plagiarism is taking full passages of text and inserting into your own, without attribution. You are not rewording or writing down your interpretation, you are fully copying the text.<sup>206</sup>

[I]n most fanfic [sic] communities, plagiarism (directly lifting words from someone else's work) results in a huge backlash against the author.<sup>207</sup>

It may be that the new generation of writers considers plagiarism to involve literal copying because of the prevalence of plagiarism-detection software that looks for literal correspondence between a student's assignments and preexisting works.<sup>208</sup> The increased reliance by schools and colleges on this software and the increased awareness of this software by students and graduates may create the impression that plagiarism, by definition, involves literal copying, rather than simply taking another's ideas without proper attribution.

As with concerns about the commercialization of fan fiction, the online community seems to have two major objections to unauthorized literal borrowing of another author's work: (1) the harm to the author of the unauthorized taking and (2) the deception promulgated on the

203. See LEAFFER, *supra* note 56, at 426 ("What justification is there for the proscription against pattern copying? If infringement were limited to exact copying, a clever plagiarist could avoid a copyright violation by carefully paraphrasing the work. Moreover, absent a concept of infringement by pattern similarity, works could be freely copied in a different medium, such as novel to film, without copying any specific language or dialogue. In sum, without the proscription against pattern copying, the incentive to create works of authorship would be greatly undermined.")

204. *Id.* at 389 (noting that attribution is relevant to the concept of moral rights, rather than copyright infringement).

205. Ros, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 12:37 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

206. Azteclady, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 12:40 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

207. Meljean, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 12:57 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

208. See POSNER, *supra* note 12, at 81–85 (describing the internal process of plagiarism-detection software like Turnitin.com); *id.* at 86–87 (discussing the difference between plagiarism by a student and creative imitation by a popular historian); *supra* notes 57–58 and accompanying text (noting the existence of plagiarism-detection software).

reader. As one commenter on Litte's blog pointed out with respect to Williams's literal copying of Webber's and McGuire's works: "When I buy a book I expect it to be original work (even if the tropes used are as old as time)."<sup>209</sup>

This reasoning would presumably also apply to a writer who copied ideas from another's work without literally copying the words. Such was the case in the brick-and-mortar publishing world in 2006 when new author Kaavya Viswanathan, then a Harvard student, published a debut novel entitled *How Opal Mehta Got Kissed, Got Wild, and Got a Life*.<sup>210</sup> She was accused of plagiarizing from other sources including the work of Megan McCafferty, Meg Cabot, Sophie Kinsella, and Salman Rushdie.<sup>211</sup> Her publisher recalled the book and cancelled her contract on a second book.<sup>212</sup>

Viswanathan's work did not involve literal copying but rather reworking original sources in new—or at least paraphrased—words.<sup>213</sup> While this conduct may be an example of plagiarism, it may not have amounted to copyright infringement, depending on whether the new work was "substantially similar" to the original sources for copyright purposes.<sup>214</sup> Despite the differences between this situation and the Williams plagiarism situation, antiplagiarism norms and market forces seem to have been the answer in both cases. If enough consumers are upset that some kind of fraud has been perpetrated on them<sup>215</sup> or that they are paying for something that is not sufficiently "original," the availability of copyright litigation may be irrelevant. Public outcry can be enough to cause an unethically written book to be removed from circulation, and emerging norms seem to be crystallizing in terms of the ability to identify with sufficient specificity works that are unethically written.

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209. Mireya, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 11:41 AM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

210. POSNER, *supra* note 12, at 1.

211. *See id.* at 3–6; LIZ SONNEBORN, FREQUENTLY ASKED QUESTIONS ABOUT PLAGIARISM 5 (1st ed. 2011).

212. *See* POSNER, *supra* note 12, at 5; *Scandal-Makers: How Opal Mehta Lost a Book Deal*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1868982\\_1868981\\_1868955,00.html](http://content.time.com/time/specials/packages/article/0,28804,1868982_1868981_1868955,00.html) (last visited Feb. 10, 2014).

213. POSNER, *supra* note 12, at 3–6.

214. *See* LEAFFER, *supra* note 56, at 424 ("In an action for copyright infringement, plaintiff must prove that defendant copied plaintiff's copyrighted work and that defendant's copying amounted to an unlawful or improper appropriation. To prove improper appropriation, plaintiff must show that defendant copied a sufficient amount of the protectable elements of the plaintiff's copyrighted work as to render the two works substantially similar.")

215. *See* POSNER, *supra* note 12, at 19 (describing plagiarism in terms of deceitful reliance on a work's attribution).

*C. Lessons from the Online Writing Community*

Returning to the four categories of unauthorized borrowing, it seems clear that the first two categories—direct literal copying of entire works and direct copying of significant portions of works—are not tolerated under existing norms. Those norms comport with copyright law, amounting to infringements of the reproduction and distribution—and in some case derivative works—rights. The latter two categories of unauthorized borrowing are more difficult to pin down in terms of acceptable use of another’s work. While it is possible to draw a line between “commercial” and “noncommercial” unauthorized uses, this is not what the Copyright Act currently does, although commercial purposes are relevant to the fair use defense under the first and fourth fair use factors.<sup>216</sup> The online community seems to accept a significant amount of unauthorized borrowing provided that the borrower gives attribution to the original work, and does not profit from it.

It also appears that the online community has developed some very effective methods—even more effective than the threat of copyright litigation—to address instances of unauthorized borrowing. The campaign to have Williams’s plagiarized romance book removed from the e-book shelves is one example of this. To some extent, the ability and willingness of participants in online communities to address unauthorized borrowing helps to counterbalance the problems self-published authors face in terms of the resources to combat copyright infringement in the courts. However, there are limits to these approaches: They depend on people being able and willing to locate instances of unauthorized borrowing and to take action against them. They also depend on the willingness of the community to mobilize behind the cause to have an unauthorized work removed from sale.

Many self-published authors face the specter of voluminous online copyists who crack digital encryptions attached to their works and resell them without recompense. The volume of such copying is often too great for anyone to do anything about. One self-published urban-fantasy novelist has stated that she is thinking of discontinuing a popular series because she can no longer support herself on her royalties due to the threat of copyright piracy.<sup>217</sup> She has also noted

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216. Cf. 17 U.S.C. § 107(1) (2012) (relating to the purpose and character of the defendant’s use of the plaintiff’s work including whether the use is of a commercial nature); *id.* § 107(4) (relating to the effect of the defendant’s use on the potential market for, or value of, the copyrighted work).

217. See Email from J.A. Saare to author, *supra* note 70.

that in order to combat the threat of piracy she would need to spend entire days sending out DMCA takedown notices, which may or may not be effective in practice.<sup>218</sup> Another self-published author notes that she cannot stand waking up each day to find more pirated copies of her work available online.<sup>219</sup> These authors do not appear to be satisfied that the law is taking care of them effectively, and market solutions also have not proven sufficient to assist them.

Self-published authors have complained that online book sellers like Amazon are nowhere near as responsive to their concerns about specific pirated works than those raised by the major publishing houses,<sup>220</sup> and they are not forthcoming about explaining the software and monitoring techniques they utilize to detect and deter digital piracy.<sup>221</sup> There have also been complaints that while Amazon may remove a book from sale, it will not always refund purchases of infringing books, unless they fall within the seven-day grace period of the initial sale.<sup>222</sup> Thus, if a consumer learns of a copyright infringement or plagiarism problem more than seven days after purchasing the infringing work, Amazon may not refund the purchase price. This approach perpetuates the ability of pirates to profit from the work of legitimate authors.

Bloggers have suggested that Amazon and other online retailers could combat the problem of digital piracy by putting all

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218. See *id.*

219. See Jennifer Miller, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 1:16 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“As a writer, this infuriates me. I woke up to find out that more copies of my books were pirated, and now this. Just awful.”).

220. See Jessica Meigs, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 2:45 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“Unfortunately, Amazon won't do jack about the money portion. I had one of my works illegally uploaded to Amazon by a third party, and though Amazon took the illegal copy down, they said they wouldn't prevent money earned from dispersing to the copyright violator's account and that it was up to me to somehow magically collect the money from the violator.”).

221. See Jeff John Roberts, *Why Amazon's Plagiarism Problem is More Than a Public Relations Issue*, PAIDCONTENT BLOG (Jan. 18, 2012, 11:14 AM), <http://paidcontent.org/2012/01/18/419-why-amazons-plagiarism-problem-is-more-than-a-public-relations-issue> (criticizing Amazon.com for being less than forthcoming about their use of plagiarism screening software).

222. See Loosheesh, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 12:16 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“Easy is one of my favorite books and I'm very disgusted by this. For persons who've had the book more than seven days, you can still try to contact Amazon about returning it. I bought a book in error one time and the 7-day return period had passed but they still refunded me after I explained. You won't be able to do this through the MYK page; I can't remember now but think I either called them or used their Kindle Support page.”).

self-published books through plagiarism detection software before posting them for sale.<sup>223</sup> This could be a cost-effective method that would go some way toward addressing the problems of literal copying, although there is evidence that Amazon at least currently utilizes plagiarism-detection software in some situations.<sup>224</sup> Additionally, such software is only as effective as the latest pirating techniques. If pirates move to paraphrasing existing works without doing anything more transformative to them, the software may not catch the unauthorized borrowing. This kind of paraphrasing conduct also blurs the line between the second and third categories of unauthorized borrowing described above. Once the copying is not literal, it is more difficult to draw lines between a copyright infringement and a noninfringing work.

#### IV. CONCLUSIONS: THE FUTURE OF COPYRIGHT IN THE E-BOOK INDUSTRY

The discussions in Parts II and III illustrate that in many ways, the different sectors of the digital publishing industry are facing a number of challenges in the digital age relating to the ability to identify and control unethical or inappropriate use of their copyrighted work. The mainstream publishing industry has struggled for the most part—in the courts at least—with identifying whether digitizing projects involving their works are infringements of their rights.<sup>225</sup> It has also struggled, as evidenced by the *Apple* litigation, with creating effective online market models that promote innovation while remaining commercially viable. The self-publishing sector, on the other hand, has focused more on issues of acceptable versus unacceptable borrowing of specific work in creating new work.

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223. See Misty H, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 1:31 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“This is the third time I’ve seen an instance of plagiarism in a week. In college we have to turn all of our papers into turnitin.com. I’m starting to think self published books should go through the same process.”); see also Robin/Janet, Comment to *The Plagiarizing of Tammara Webber's Easy* by @JordinBWilliams, DEAR AUTHOR BLOG (June 26, 2013, 3:07 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams> (“I seem to remember an RWA session years ago on plagiarism that featured one of the founders of turnitin, who was talking about adapting the program for commercially published fiction. Did that turn out to be a bust? I assume if such a program/partnership happened, the [Amazon terms of service] would be modified, but maybe that was a sticking point? Periodically I think about that presentation and wonder if anything’s going to come of it.”).

224. See Roberts, *supra* note 221.

225. See *supra* Part II.A.

Fan-fiction authors also write to express their devotion to the works that are the subject of the fan fiction.<sup>226</sup>

Current copyright law fails to give the traditional publishing or the self-publishing sector certainty about the appropriate boundaries for use and control of copyrighted works. The online writing community cannot pin down with any certainty what is appropriate use of another's work with reference to copyright law, although they have developed relatively clear norms, which often reflect copyright law, although framed in terms of "plagiarism" rather than copyright infringement.<sup>227</sup> The traditional publishing industry is fighting to control many downstream uses, even those that are transformative. The question is whether it is possible to reform, or at least streamline, copyright law to better meet the needs of the digital publishing industry as a whole and, in so doing, whether it is necessary to create and promulgate new rules for self-publishing in particular.

If legal reform is possible, relevant reforms would likely fall into two possible categories: (a) more clearly defining the rights of copyright holders and the nature of infringing conduct in the e-book sphere and (b) enforcement challenges in an increasingly anonymous and global online world. Taking the latter point first, the enforcement of copyrights in the digital age, like the enforcement of any other legal interests online, largely implicates online intermediaries who facilitate illegal activities.<sup>228</sup> In the case of e-books, these are the online booksellers like Amazon and Barnes & Noble; they are the institutions that receive and respond to DMCA takedown notices and they are the ones pressured to implement policies that prevent the dissemination of infringing works, including the use of plagiarism-detection software.

One solution to some of the problems inherent in the digital piracy area is to put more pressure—legal or otherwise—on the leading online distribution platforms for digital books to ensure that they have transparent and accessible practices in place to combat digital piracy. These online intermediaries should also attempt to be as responsive to the concerns of self-published authors, from whom they are making a commercial profit, as those of traditional publishers. As suggested by at least one member of the online writing

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226. See Tushnet, *supra* note 9, at 657–58 ("Fans . . . see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit. They believe that their emotional and financial investment in the characters gives them moral rights to create with these characters.").

227. See *supra* Part III.B.

228. See Jacqueline D. Lipton, *Law of the Intermediated Information Exchange*, 64 FLA. L. REV. 1337, 1338 (2012) (discussing the importance of the role of online intermediaries generally in the regulation of all online conduct).

community, these platforms may be encouraged to institute a policy of checking all self-published works through plagiarism software before posting them for sale.<sup>229</sup>

While it is important that online distribution platforms for e-books not be unrealistically burdened with legal obligations for fear of chilling innovation, those who commercially profit from the work of small authors and independent presses should perhaps be held to a higher standard than nonprofit distribution platforms. These platforms should also work proactively with institutions like the Authors' Guild to ensure that concerns of all authors are being met in terms of combatting online piracy.

With respect to the first issue—that of ensuring better understanding of what is acceptable borrowing of a literary text in the online world—it may be useful for the Copyright Office in its proposed copyright law review,<sup>230</sup> or representatives of author communities, or both, to attempt to formulate clearer guidelines about appropriate uses of existing works. There is now enough data both from judicial determinations on book-digitizing projects and from the writers' community to begin to set out some basic “best practices” for downstream uses of literary works with an emphasis on attribution, fraud prevention, and balancing commercial against expressive interests. While these issues are complex and will vary from context to context, there seem to be some basic themes emerging in online discussions about the kinds of borrowing that should be tolerated or encouraged and kinds of borrowing that should be prohibited or discouraged. These themes revolve around balancing public access against property rights, ensuring appropriate attribution, and creating flexibility for noncommercial transformative uses of prior works.

The creation of new specific legal rules—outside those that already exist in the Copyright Act—may be problematic both on First Amendment grounds and because these principles would be difficult to reduce to formal rules, as opposed to best practices or guidelines. However, a set of guidelines promulgated by online book distribution platforms, author organizations, and possibly endorsed by the Copyright Office, would be a useful step in at least identifying and

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229. See, e.g., Misty H, Comment to *The Plagiarizing of Tammara Webber's Easy by @JordinBWilliams*, DEAR AUTHOR BLOG (June 26, 2013, 1:31 PM), <http://dearauthor.com/book-reviews/the-plagiarizing-of-tammara-webbers-easy-by-jordin-williams>.

230. See *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights, US Copyright Office).

delineating ways in which literary texts might most appropriately be used by new authors.

This Article has demonstrated that, while the needs of the modern digital publishing industry are many and varied, there is enough information that can be gleaned from market practices, technological solutions, recent judicial decisions, and online discussions to begin to draw together the basic contours of what copyright law and best practices should look like in the digital publishing industry. Those community norms, properly considered, can inform productive discussion about how best to promote and balance the needs of traditional publishers, small presses, self-published authors, and new aspiring authors in the future.